Om Prakash Gautam, *Empathetic Amenability of the obligations in good faith under Law of Treaties: A Diamond in the Hay Stack*, NLUJ Law Review 6(2) 125 (2020)

EMPATHETIC AMENABILITY OF THE OBLIGATIONS IN GOOD FAITH UNDER LAW OF TREATIES: A DIAMOND IN THE HAY STACK

OM PRAKASH GAUTAM[+]

ABSTRACT

ICJ in Jadhav's Case held, that Pakistan was in breach of the obligations under Vienna Convention on Consular Relations, and relied on good faith to assess the nature of breach. Good faith plays a predominant role in treaty relations, thereby translating into general obligations: to abstain from acts, pending ratification of a treaty, that would prejudice the rights of the other party; having ratified the treaty, to perform it in good faith and not to frustrate its object and purpose; to negotiate and settle disputes in good faith; to interpret treaties in good faith; and to exercise rights in good faith. Under Art. 18 of Vienna Convention on the Law of Treaties, 1969 (VCLT)[299], states that have signed or ratified a treaty are supposed to refrain from acts which might defeat the object and purpose of the treaty prior to its entry into force. It gives concrete meaning to the principle of good faith by protecting legitimate expectations. The legitimate expectation means that fundamental

[+] The author is an Assistant Professor at National Law University, Jodhpur and may be contacted at **opg[dot]nlu[attherate]gmail[dot]com.**

fairness requires a State to refrain from undermining an agreement on which another State is relying. Pacta sunt servanda binds the State party to the provisions of the treaty and to perform them in good faith. ICJ in Nuclear Tests Case held that, 'one of the basic principles governing the creation and performance of legal obligations... is good faith'. Art. 31(1) VCLT states that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose. This rule of treaty interpretation highlights three sources: the treaty's terms, the context of those terms, and the treaty's object and purpose.

TABLE OF CONTENTS

I. INTRODUCTION

Mr. Kulbhushan Jadhav was arrested by Pakistani authorities for espionage and terrorism. Pakistan raised the issue of arrest with India and released a video in which Mr. Jadhav confessed for acts of espionage and terrorism in Pakistan. India made requests for consular access. Subsequently, Mr. Jadhav was tried and sentenced to death by Military Court. India raised the issue before ICJ for consular assistance with regard to the arrest, detention, trial and sentencing of Mr. Jadhav especially under Art. 36 of Vienna Convention on Consular Relations, 1963. The Court held[300] that, Pakistan is under obligation to inform Mr. Jadhav without further delay of his rights and to provide Indian officers access to him in accordance with Article 36 of the Vienna Convention on Consular Relations. It has committed breach of its obligations by not informing Mr. Jadhav without delay of his rights under Article 36, paragraph 1 (b) of Vienna Convention on Consular Relations; and deprived India of the right to communicate with and have access to Mr. Jadhav, to visit him in detention and to arrange for his legal representation under Article 36, paragraph 1 (a) and (c), of the Vienna Convention.

Making a reference to Art. 26 of the Vienna Convention on the Law of Treaties, Judge Robinson[301] held that, it requires a careful examination of all the relevant circumstances including the treaty in question and their conduct, to determine whether parties to a particular treaty have acted

[300] Jadhav (India v. Pak.), Judgement, 2019 I.C.J. General List No. 168 (July 17).
[301] Jadhav (India v. Pak.), Judgement, 2019 I.C.J. General List No. 168, at 6,7, ¶ 10 (July 17) (declaration by Robinson, J.).

consistently with their obligations under the treaty. He also relied on the decision of the court in Gabčíkovo-Nagymaros Project (Hungary/ Slovakia), that the good faith obligation requires parties to apply a treaty "in a reasonable way and in such a manner that its purpose can be realized."[302] The court[303] applied the customary rules of treaty interpretation reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties to interpret Vienna Convention on Consular Relations.[304] In his separate opinion, Judge Cancado Trindade[305] held that: no records were provided as to Mr. Jadhav's trial by a military court and there is lack of evidence of due process of law and observance of his fundamental human right to life. The prosecution, conviction and sentencing of Mr. Jadhav in such circumstances disclose a lack of bona fides.

In his dissenting opinion, Judge Jillani observed[306] that the question of the abuse of rights is closely intertwined with the fundamental principle of good faith. The rights and obligations stipulated in an international treaty are to be exercised and performed in accordance with the object and purpose for which those rights were created. He further held that, India has

---

[302] Gabčíkovo-Nagymaros Project (Hung./Slovk.), Judgment, 1997 I.C.J. Rep. 79, at 7, ¶ 142 (Sept. 25).
[303] Jadhav (India v. Pak.), Judgment, 2019 I.C.J. General List No. 168, at 20-21, ¶ 71 (July 17).
[304] Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, 2004 I.C.J. Rep. 12, at 48, ¶ 83 (March 31); Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment, 2008 I.C.J. Rep. 177, at 232, ¶ 153 (June 04).
[305] Jadhav (India v. Pak.), Judgement, 2019 I.C.J. General List No. 168, at 23, ¶ 91 (July 17) (separate opinion by Trindade, J.).
[306] Jadhav (India v. Pak.), Judgement, 2019 General List No. 168, at 2, ¶ 4 (July 17) (dissenting opinion Jillani, J.).

abused its right when claiming consular access to its national who had been instructed to commit serious crimes of terrorism and espionage in Pakistan.

The principle of good faith is an intrinsic part of the law of treaties, applicable to their formation, performance, interpretation and termination.[307] Cheng observed that, good faith plays an overarching role in treaty relations and "governs treaties from the time of their formation to the time of their extinction,"[308] thereby translating into general obligations such as: to abstain from acts pending ratification of a treaty that would prejudice the rights of the other party; having ratified the treaty, to perform it in good faith and not to frustrate its object and purpose; to negotiate and settle disputes in good faith; to interpret treaties in good faith; and to exercise rights in good faith.[309] The Vienna Convention on the Law of Treaties ("Convention") preamble notes that the principle of good faith has universal recognition.[310] The Convention mandates good faith in the performance of existing treaty obligations by explicitly adopting the

---

[307] BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 106-20 (Stevens, 1953) [*hereinafter* "**CHENG, GENERAL PRINCIPLES**"]; SCHWARZENBERGER, THE FUNDAMENTAL PRINCIPLES OF INTERNATIONAL LAW, 191, 295 (1955); A. MCNAIR, THE LAW OF TREATIES 465 (1961); C. WOLFF, JUS GENTIUM METHODO SCIENTIFICA PERTATATUM, 282-84 (J. Drake trans. 1764 ed., 1934); Tariq Hassan, *Good Faith in Treaty Formation*, 21 VA. J. INT'L L. 443, at 450 (1981) [*hereinafter* "**Hassan**"].

[308] CHENG, GENERAL PRINCIPLES, *supra* note 307, at 106; ANDREW D. MITCHELL, M. SORNARAJAH & TANIA VOON, GOOD FAITH AND INTERNATIONAL ECONOMIC LAW, 11 (OUP, 2015) [*hereinafter* "**MITCHELL, INTERNATIONAL ECONOMIC LAW**"].

[309] CHENG, GENERAL PRINCIPLES *supra* note 307; Andrew Mitchell, *Good Faith in WTO Dispute Settlement*, 7 MELB. J. INT'L L. 339, at 345 (2006).

[310] IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES (2nd ed.1984) [*hereinafter* "**SINCLAIR, VCLT**"]; Kearney & Dalton, *The Treaty on Treaties*, 64 AM. J. INT'L L. 495 (1970); Hassan, *supra* note 307.

principle of *pacta sunt servanda*:[311] "*Every treaty in force is binding upon the parties to it and must be performed by them in good faith*."[312] The Convention further provides that "*treaty shall be interpreted in good faith*",[313] and implicitly requires good faith in treaty termination.[314] The paper analyses the context of good faith in the Convention with respect to three dimensions: Art. 18: Obligation not to defeat Object and purpose of Treaty; Art. 26: Performing Treaty obligations; and Art. 31: Treaty Interpretations.

II. OBLIGATION NOT TO DEFEAT THE OBJECT AND PURPOSE OF A TREATY

Article 18 of the Convention[315] provides: "*A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.*" Article 18 which elaborates upon "interim obligations" as it governs the State conduct in the period between a State signalling its intention to join a treaty (i.e., signature) and the moment the State either becomes bound to the treaty (i.e., ratification) or makes clear its intention not to become a

311 Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331.
312 *Id.* at art. 26.
313 *Id.* at Art. 31(1).
314 A. DAVID, THE STRATEGY OF TREATY TERMINATION: LAWFUL BREACHES AND RETALIATIONS 169 (1975); Hassan, *supra* note 307, at 451.
315 Vienna Convention, *supra* note 311, at art. 18.

party to the treaty.[316] The time between signature and ratification allows governments to review a treaty before the State becomes bound by it.[317]

Generally, signature entails various implications, the most common being authentication of the text.[318] It can also entitle a State to ratify a treaty, whereas if it had not signed the treaty, it could only have become its party by accession. If a State does not sign a treaty, it cannot for example take part in certain post-signature activities, e.g. formation of treaty-established bodies. Signature can also enable a State to submit reservations at the time of signing or at the start of its provisional application.[319] In short, signatures do bring certain rights or benefits to the State, and it is therefore appropriate that the latter would assume certain obligations at that time.[320] When a State consents by the act of a signature alone to be bound by a treaty[321] and that treaty enters into force immediately after the signature, there is no interval between the signature and entry into force and thus all legal consequences of entry into force take effect instantly, i.e. the State is required to apply it in good faith (*pacta sunt servanda*).[322] By contrast, when a signature implies merely authentication of the text of a treaty subject to

---

316 David S. Jonas, *The Comprehensive Nuclear Test Ban Treaty: Current Legal Status in the United States and the Implications of a Nuclear Test Explosion*, 39 N.Y.U. J. INT'L L. & POL. 1007, 1042-44 (2007); Thomas N. Saunders, *The Object and Purpose of a Treaty: Three Interpretive Methods*, 43 VAND. J. TRANSNAT'L L. 565, 594 (2010) [*hereinafter* "**Saunders**"].

317 SINCLAIR, VCLT, *supra* note 310, at 29, 39-4; Saunders, *supra* note 316.

318 Vienna Convention, *supra* note 311, at art. 10.

319 *First Report on the Law of Treaties by SR Humphrey Waldock*, [1962] 2 Y.B. Int'l L. Comm'n 47 at 7, U.N. Doc. A/CN.4/144 [*hereinafter* "**Waldock, Law of Treaties**"].

320 *First Report of SR Hersch Lauterpacht*, [1962] 2 Y. B. Int'l L. Comm'n 109-110 ¶ 3, U.N. Doc. A/CN.4/63.

321 Vienna Convention, *supra* note 311, at art. 12; Council of Europe, TREATY MAKING - EXPRESSION OF CONSENT BY STATES TO BE BOUND BY A TREATY, 9-10 (2001).

322 Vienna Convention, *supra* note 311, at art. 26.

ratification, or when it implies consent to be bound and the treaty is to enter into force only after a certain period, a certain interval between the signature and entry into force arises, and that raises the question on the legal position of the State during that period.[323]

Ratification is not obligatory under international law and falls within the discretion of States, the interim period between signature and ratification being intended precisely for consideration on the ratification.[324] That does not mean, however, that the State is allowed to prejudice in that interim period with its actions the subsequent entry into force or application of the treaty. A State could be held responsible for such acts under international law simply because the principle of good faith alone requires that the State refrains from acts having such effect, the interim obligation being an emanation of that principle.[325]

Samuel B. Crandall wrote in 1916 that pending entry into force, "neither party may, without repudiating the proposed treaty, voluntarily place itself in a position where it cannot comply with the conditions as they existed at the time the treaty was signed."[326]

---

[323] Andrej Svetlicic, *Obligation of a State Not to Defeat the Object and Purpose of a Treaty between Its Signature and Entry into Force*, 70 PRAVNIK 361, 362-363 (2015).
[324] *Waldock, Law of Treaties, supra* note 319, at ¶ 5; Martin A. Rogoff, *The International Legal Obligations of Signatories to an Unratified Treaty*, 32 MAINE L. REV., 267 (1980); *Id.* at 364.
[325] Svetlicic, *supra* note 323, at 365.
[326] SAMUEL B. CRANDALL, TREATIES: THEIR MAKING AND ENFORCEMENT, 343-44 (2nd ed. 1916); Jan Klabbers, *How to Defeat a Treaty's Object and Purpose Pending Entry into Force: Toward Manifest Intent*, 34 VAND. J. TRANSNATL. L. 283, 295 (2001).

The Draft Convention on the Law of Treaties, prepared in 1935 under the auspices of Harvard Law School, contained a draft Article on the interim obligation, although it noted that it was concerned with a duty of good faith rather than of international law.[327] Draft Article 9 reads: "Unless otherwise provided in the treaty itself, a State on behalf of which a treaty has been signed is under no duty to perform the obligations stipulated, prior to the coming into force of the treaty with respect to that State; under some circumstances, however, good faith may require that pending the coming into force of the treaty the State shall, for a reasonable time after signature, refrain from taking action which would render performance by any party of the obligations stipulated impossible or more difficult."[328]

J. Mervyn Jones, in 1949, formulated the interim obligation as follows: "*Signature may, in conditions not yet defined by positive law, commit a State to the obligation not to exploit the signed text for its own purposes by abusing its discretion to ratify. Where a State has led other States to believe that its ratification will follow as a matter of course it ought not to do anything between signature and ratification which would frustrate the purpose of the treaty*."[329] Finally, Lord McNair, held that "*one party to a treaty must not, pending ratification, do anything which will hamper any action that may be taken by the other party if and when the treaty enters into force ....*"[330] Hence, there seems to be a general agreement among the writers that, in

---

[327] Harvard Law School, *Harvard Draft Convention on the Law of Treaties*, 29 AM. J. INT'L L. 657, 658 (1935); Klabbers, *supra* note 326.
[328] Harvard Law School, *Harvard Draft Convention on the Law of Treaties*, 29 AM. J. INT'L L. 657, 658 (1935); Klabbers, *supra* note 326.
[329] J. MERVYN JONES, FULL POWERS AND RATIFICATION: A STUDY IN THE DEVELOPMENT OF TREATY-MAKING PROCEDURE, 89 (1949); Klabbers, *supra* note 326.
[330] A.D. MCNAIR, THE LAW OF TREATIES 200 (1986); Klabbers, *supra* note 326.

one form or another, an obligation exists, not to impair the value of an undertaking pending ratification or entry into force.[331]

Many post-Vienna Convention writers advocate a legitimate expectations test.[332] Art. 18 VCLT, protects the legitimate expectations of other participants in the treaty-making process, and is based on good faith.[333] *Paul McDade* devoted to analysing the legality of unilateral attempts to explore the deep sea-bed by signatories of the UN Convention on the Law of the Sea, 1982 observes: "*The emphasis should be on conduct, a state can expect as a result of the obligation of good faith, rather than defining which actions constitute bad faith. Examining the legitimate expectations which each state is entitled to expect regarding the treaty which has been signed and the conduct of other states in relation thereto is likely to be more fruitful than focussing on bad faith or attempting to prove subjective intent to abuse a set of rights*."[334] Mark Villiger, concluded that '*clearly, Art. 18 gives concrete meaning to the principle of good faith by protecting legitimate expectations*.'[335] Robert Turner, advocated legitimate expectations test: "*the underlying principle behind article 18 is not that signed treaties are binding; it*

---

331 Klabbers, *supra* note 326, at 296.

332 SINCLAIR, VCLT *supra* note 310, at 42-44; Joni S. Charme, *The Interim Obligation of Article 18 of the Vienna Convention on the Law of Treaties: Making Sense of an Enigma*, 25 GEO. WASH. J. INT'L L. & ECON. 96 (1992); Klabbers, *supra* note 326, at 315.

333 OLIVER DORR AND KIRSTEN SCHMALENBACH (EDS), VIENNA CONVENTION ON THE LAW OF TREATIES - A COMMENTARY (Springer 2012).

334 Paul V. McDade, *The Interim Obligation Between Signature and Ratification of a Treaty*, 32 NETH. INT'L L. REV. 22 (1985); Klabbers, *supra* note 326, at 315.

335 MARK EUGEN VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES, 321 (1985); Klabbers, *supra* note 326, at 315.

is instead that fundamental fairness requires a State to refrain from undermining an agreement on which another State is relying ....".[336]

Yoram Dinstein, argued that signature creates legitimate expectations to the extent that the signatory State is bound to refrain from acts defeating the object and purpose of a treaty, and in the case of the Chemical Weapons Convention this means that a signatory State (or ratifying State) is not allowed to accelerate the production and stockpiling of chemical weapons, although it would not yet be under an obligation to stop producing and stockpiling altogether.[337]

In *S.E.B. v. State Secretary for Justice*,[338] case before the Judicial Division of the Dutch Council of State (the highest administrative court in the Netherlands), the Court refused to honour an appeal on the interim obligation when a Moroccan teenager whose father lived in the Netherlands and claimed a right to be reunited on grounds of the Rights of the Child Convention.[339] At the material time, the Convention had been signed by the Netherlands but not yet ratified, and accordingly it had not yet entered into force for the Netherlands. The Court argued that: "this obligation means that in the majority of cases, a State should refrain from acts which would make the future application of the treaty in question impossible once it has

---

[336] Robert F. Turner, *Legal Implications of Deferring Ratification of SALT*, 21 VA. J. INT'L L. 747, 777 (1981); Klabbers, *supra* note 326, at 315.
[337] YORAM DINSTEIN, THE CONVENTION OF THE PROHIBITION AND ELIMINATION OF CHEMICAL WEAPON: A BREAKTHROUGH IN MULTILATERAL DISARMAMENT 151, 154-55 (1995); Klabbers, *supra* note 326, at 315.
[338] S.E.B. v. State Secretary for Justice, 1992, 25 Neth. Y.B. Int'l L. 528 (1994); Klabbers, *supra* note 326, at 319.
[339] United Nations Convention on the Rights of the Child, Nov. 20, 1989, 28 I.L.M. 1448.

entered into force. Contrary to what the appellant evidently believes, it cannot be maintained that the refusal constitutes an act that makes the future application of the Child Rights Convention impossible."[340]

In *Opel Austria case*,[341] before EC's Court of First Instance, the issue was whether the EC Council had violated the interim obligation in imposing tariffs against gearboxes made by Opel Austria, as a retaliatory measure to countenance government subsidies, shortly before the Agreement establishing the European Economic Area (EEA) entered into force between Austria and the EC.[342] The prohibition contained in the EEA agreement would undoubtedly be self-executing in the legal orders of the territories covered by community law from the moment of entry into force onwards. The Court annulled the contested regulation, with reasoning that the regulation had 'infringed the applicant's legitimate expectations.'

In *Danisco Sugar case*,[343] before the European Court of Justice, a week and a half before January 1, 1995, when Sweden's membership of the European Union would take effect, Sweden's parliament adopted a new Sugar Law on December 20, 1994, which would take effect a day before

---

[340] S.E.B. v. State Secretary for Justice, 1992, 25 Neth. Y.B. Int'l L. 528 (1994).
[341] Case T-115/94, Opel Austria GmbH v. Council, 1997 E.C.R. II-39; Jan Klabbers, *Protection of Legitimate Expectations in EC Law Deriving from an International Agreement Prior to its Entry into Force: The Opel Austria Decision of the Court of First Instance,* 95 LAKIMES 732 (1997); P.J. Kuijper, *The Court and the Tribunal of the EC and the Vienna Convention on the Law of Treaties 1969*, 25 Legal Issues of Eur. Integration 1 (1998); Klabbers, *supra* note 326, at 321.
[342] Case T-115/94, Opel Austria GmbH v. Council, 1997 E.C.R. II-39, ¶ 39-44; Klabbers, *supra* note 28, at 321.
[343] Case C-27/96, Danisco Sugar AB v. Allmnna Ombudet, 1997 E.C.R. 1-6653; Klabbers, *supra* note 28, at 328.

Sweden's accession to the Union. Under the Sugar Law, anyone holding large amounts of sugar in stock at midnight, December 31, 1994, was to be subjected to a heavy tax. The purpose was to prevent speculation with sugar, because the regular EU sugar price differed markedly from the then current Swedish market price. As a result of the new law, Danisco Sugar AB was liable to pay, according to a determination of the Swedish agricultural board, close to half a billion Swedish crowns by way of sugar tax. Danisco brought proceedings for annulment of the Sugar Law, claiming among other things that the enactment of the Sugar Law just prior to entry into force of Sweden's membership of the EU amounted to a violation of the interim obligation. The Court did not address the point about the interim obligation, holding it to be "unnecessary." Between the contracting parties themselves, the EC and Sweden, no expectations were frustrated. Hence, on this "intergovernmental" level, since no problem relating to the interim obligation occurred or could possibly occur, no expectations of the treaty partners were frustrated, none was accused of acting in bad faith, and neither of the parties considered that the enactment of the contested Sugar Law defeated the object and purpose of Sweden's accession to the Union.

In the case *Certain German Interests in Polish Upper Silesia*,[344] before the Permanent Court of International Justice (PCIJ), in which Poland challenged the right of Germany to alienate certain assets after the signature and before entry into force of the Treaty of Versailles, the court ruled in

[344] Certain German Interests in Polish Upper Silesia (Ger. v. Pol.), Judgement 1926 P.C.I.J. (ser. A) No. 7 (May, 25); Svetlicic, *supra* note 323, at 365.

favour of Germany who in its view had the right to dispose of its property and only an abuse of this right could mean a violation of the treaty. One of the arguments of the Polish Government was that Germany abused its rights by alienating certain assets before ceding sovereignty over the relevant territory. The PCIJ inter alia confirmed indirectly that a signatory is not allowed to act contrary to the principle of good faith in certain circumstances and that its obligations under an unratified treaty could be violated as a consequence of the abuse of rights. It argued in this regard that since the treaty had not prevented Germany from alienating such assets after ratification, alienation between signature and ratification was not a violation of the good faith principle. On the basis of this argumentation of the PCIJ it could be concluded that if Germany had no such right under the treaty after ratification, there would be an abuse of this right if alienation took place in the interval between signature and ratification.

In *Megalidis v Turkey*,[345] the Greek claimant claimed restitution of items taken from him by Turkish authorities allegedly in violation of Article 65 of the Treaty of Lausanne, signed on 24 July 1923. The arbitral tribunal ruled that the Turkish authorities acted in violation of international law because parties have from the treaty signature and before its entry into force an obligation to refrain from acts with which they would prejudice the treaty by narrowing the scope of its provisions.

The above decisions duly affirm the principle under Art. 18, VCLT to protect the legitimate expectations of the signatory state to an unratified

[345] Svetlicic, *supra* note 323, at 366.

treaty, by not allowing the other signatory states, to act contrary to the obligations in good faith. Signature to a treaty, pending ratification creates legitimate expectations, that the signatory state is bound to refrain from acts defeating the object and purpose of a treaty.

III. PERFORMING TREATY OBLIGATIONS

The rule of *pacta sunt servanda*, with its origins in Roman law,[346] is today commonly considered a norm of both treaty and customary international law.[347] Whether it can also be considered a general principle of law seems unclear.[348] *Pacta Sunt Servanda* is Latin for "agreements must be kept." This maxim is one of the most ancient foundations of law itself.[349] Grotius recognized the importance of this rule to the stability of legal relations when he stated that 'to respect scrupulously the faith given is the foundation of States and of the grand community of nations.'[350]Art. 26 of

---

346 ROBERT KOLB, LA BONNE FOIEN DROIT INTERNATIONAL PUBLIC, 87-92 (Presses Universitaires de France 2000); MITCHELL, INTERNATIONAL ECONOMIC LAW *supra* note 308, at 18.

347 MARION PANIZZON, GOOD FAITH IN THE JURISPRUDENCE OF THE WTO: THE PROTECTION OF LEGITIMATE EXPECTATIONS, GOOD FAITH INTERPRETATION AND FAIR DISPUTE SETTLEMENT, 27 (Hart Publishing 2006); Mitchell, *supra* note 308, at 346.

348 Anthony Aust, *Pacta Sunt Servanda, in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 1, (Rudiger Wolfrum ed., 2014); JEAN SALMON, THE VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY,(Olivier Corten & Pierre Klein eds., 2011).

349 Black's Law Dictionary (10th ed. 2014); Hans Wehberg, *Pacta Sunt Servanda*, 53 AM. J. INT'L LAW 775, 780 (1959); ANTHONY AUST, PACTA SUNT SERVANDA: MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2007); Jonathan Granoff, *Pacta Sunt Servanda: Nuclear Weapons and Global Secure Sustainable Development*, 21 SW. J. INT'L L. 311, 330 (2015).

350 HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE (1625); ROBERT KOLB, GOOD FAITH IN PUBLIC INTERNATIONAL LAW 86 (2000); GOOD FAITH AND INTERNATIONAL ECONOMIC LAW 18 (Andrew D Mitchell, M Sornarajah and Tania Voon eds., 2015).

the VCLT provides:[351]"*Pacta Sunt Servanda*: Every treaty in force is binding upon the parties to it and must be performed by them in good faith." *Pacta sunt servanda* is found in all legal systems, in all periods of history, in all cultures, in the judicial orders of all sovereigns, and in all religions.[352]*C. Wilfred Jenks*[353]said "the principle of *pacta sunt servanda* is common to all major legal systems including, with certain qualifications, Soviet law."*Pacta sunt servanda* arises from Natural Law, and in light of the Greco-Roman-Christian tradition, to arise from the law of God.[354] Pursuant to a monist theory, a commitment, once given, must be carried out in good faith as a sacred obligation. Likewise, all major religions and their supporting legal systems arrive at a similar result. But, aside from moral obligations advanced by the natural law school, other theories of jurisprudence lead to the same conclusion, i.e., *pacta sunt servanda* is the most basic norm of customary international law,[355] simply because it is based on the expressed will and agreement of sovereign States.[356]

---

[351] *supra* note 311, at art. 26.
[352] W. Paul Gormley, *The Codification of Pacta Sunt Servanda by the International Law Commission: The Preservation of Classical Norms of Moral Force and Good Faith*, 14 ST. LOUIS U. L. J. 367, at 373 (1970) [*hereinafter* "**Gormley**"].
[353] C. WILFRED JENKS, PACTA SUNT SERVANDA - THE COMMON LAW OF MANKIND 143-45 (1958); Wehberg, *Pacta Sunt Servanda*, 53 AM. J. INT'L L. 775 (1959); *Id.* at 374.
[354] PHILLIPSON, THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME, 380-81 (1911); GERALD G. FITZMAURICE, SOME PROBLEMS REGARDING THE FORMAL SOURCES OF INTERNATIONAL LAW 161 (1958); Gormley, *supra* note 352, at 371.
[355] B. A. WORTLEY, JURISPRUDENCE 45-64 (1967); J. L. Kunz, *The Meaning and the Range of the Norm Pacta Sunt Servanda,* 39 AM. J. INT'L L. 180 (1945); Gormley, *supra* note 352, at 371.
[356] Gormley, *supra* note 352, at 371.

Bin Cheng held that *pacta sunt servanda* is merely one element in an even more fundamental notion of good faith.[357] The material duty to act in good faith during the performance of a treaty was stated by Waldock in the ILC's Report as "one of good faith and not *strictijuris*."[358] Beyond question, good faith is inherent in *pacta sunt servanda.* Good Faith would apply at all stages: negotiation, signature, ratification, and application. In addition, good faith and *pacta sunt servanda* must be applied even prior to the conclusion of a treaty.[359]

Lord McNair in his Law of Treaties stated: "No Government would decline to accept the principle *pacta sunt servanda*, and the very fact that Governments find it necessary to spend so much effort in explaining in a particular case that the pactum has ceased to exist, or that the act complained of is not a breach of it, either by reason of an implied term or for some other reason, is the best acknowledgement of that principle."[360] *Oppenheim* held,[361] "treaties are legally binding, because there exists a customary rule of International Law that treaties are binding. The binding effect of the rule rests in the last resort on the fundamental assumption,

---

[357] BIN CHENG, GENERAL PRINCIPLES, *supra* note 307, at 105-62; Gormley, *supra* note 352, at 383.

[358] ILC, Yearbook of the International Law Commission, Vol. II (1964) A/CN.4/SER. A/1964/ADD.17; Steven Reinhold, Good Faith in International Law, 2 UCLJLJ 40, 60 (2013) http://discovery.ucl.ac.uk/1470678/1/2UCLJLJ40%20-%20Good%20Faith.pdf [*hereinafter* "**Reinhold**"].

[359] Gormley, *supra* note 352, at 384.

[360] LORD MC NAIR, PACTA SUNT SERVANDA AND THE GENERAL PRESUMPTION AGAINST UNILATERAL TERMINATION, 493-505 (1961); Gormley, *supra* note 352, at 370.

[361] L.F.L. OPPENHEIM, INTERNATIONAL LAW 881 (6th ed. H. Lauterpacht ed. 1947); Gormley, *supra* note 352, at 376.

which is neither consensual nor necessarily legal, of the objectively binding force of International Law."

Professor Lissitzen[362] held that Article 38 of ICJ Statute includes the customary norm and stated, that *pacta sunt servanda* is incorporated into Article 38(1) (a) of the ICJ Statute, a provision requiring that the Court shall decide disputes in accordance with "international conventions, whether general or particular, establishing rules expressly recognized by the contesting States."[363] He argues: "*§1(a) of Article 38 means that states are bound by the norms of valid and existing treaties which they have expressly accepted. It is an expression of the principle of pacta sunt servanda and is relatively easy to apply*."

A treaty should be performed with the intentions of the parties in mind, rather than looking to a formalistic understanding of the wording.[364] ICJ in *Gabcikovo-Nagymaros* case noted,[365] *pacta sunt servanda* under Article 26 of the VCLT combines two elements: (1) The binding nature of treaty obligations themselves; and (2) the duty to perform these obligations in good faith. Good faith generally entails honesty and fair dealing between the parties, wherein it implies that the parties must truthfully represent their motives in a manner that it abstains from taking unfair advantage of the

---

[362]OLIVER LISSITZYN, INTERNATIONAL LAW TODAY AND TOMORROW 34 (1965); Gormley, *supra* note 352, at 376.

[363] Statute of the International Court of Justice, International Court of Justice, https://www.icj-cij.org/en/statute (last visited Mar 12, 2020).

[364] JEAN SALMON, THE VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY, 53 (Olivier Corten & Pierre Klein eds., 2011); Reinhold, *supra* note 358.

[365] Gabčíkovo-Nagymaros Project (Hung./Slovk.), Judgment, 1997 I.C.J. Rep. 79, at 7 (Sept. 25); Daniel Davison-Vecchione, *Beyond the Forms of Faith: Pacta Sunt Servanda and Loyalty,* 16 German L.J. 1163, 1166 (2015) [*hereinafter* "**Vecchione**"].

unintended interpretation of the agreement.[366] In both *Nicaragua v. Honduras*[367] and *Cameroon v. Nigeria*[368] (Preliminary Objections) the ICJ confirmed that good faith "is not in itself a source of obligation where none would otherwise exist."[369]

In proceedings brought by New Zealand and Australia against France (the *Nuclear Tests cases*) for atmospheric nuclear tests conducted by France in the South Pacific, the ICJ found statements made by France that it would no longer conduct nuclear tests of this kind after the 1974 tests to be legally binding, as France's undertaking was subject to the principle of good faith.[370] In the *Nuclear Tests Case*, the ICJ held that: "*One of the basic principles governing the creation and performance of legal obligations... is good faith. Trust and confidence are inherent in international cooperation, in particular in an age when this cooperation in many fields is becoming increasingly essential. Just as the very rule of pacta sunt servanda in the law of treaties is based on good faith, so also is the binding character of an international obligation. Thus, interested states may take cognisance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.*"[371] The Court's reasoning shows that good faith can

---

366 Anthony D'Amato, *Good Faith, in* 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, 599 (Rudolf Bernhardt ed., 1992) [*hereinafter* "**D'Amato**"].

367 Border and Transborder Armed Actions, Jurisdiction and Admissibility (Nicar. v. Hond.), Judgement, 1988 I.C.J. Rep. 69, at 105 (Dec. 20).

368 Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections 1998 I.C.J. Rep. 275 (June 11); Vecchione, *supra* note 365.

369 Border and Transborder Armed Actions, Jurisdiction and Admissibility (Nicar. v. Hond.), Judgement, 1988 I.C.J. Rep. 69, at 105, ¶ 94 (Dec. 20); Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections 1998 I.C.J. Rep. 275, ¶ 39 (June 11).

370 Nuclear Tests (Austl. v Fr.), Judgement, 1974 I.C.J. Rep 253, ¶ 46 (Dec. 20).

371 Nuclear Tests Case (Austl. v Fr.) (Merits) 1974 I.C.J. Rep 253, ¶46.

be a basis for legal obligations in the same way as the maxim *pacta sunt servanda* is for treaty obligations.[372] It must be noted that, ICJ in its judgments has inaccurately used "good faith" to refer to the creation of obligations by giving consent, rather than the duty to perform obligations fairly and honestly.[373]

IV. TREATY INTERPRETATION

The principle of good faith is a legitimate source for identifying tools, principles or even values that can be taken into account in interpreting treaties, despite the absence of any express reference to them in the VCLT. The principle of good faith is then both constitutive of principles of treaty interpretation under international law and complementary to the application of those principles, and it can be difficult to identify a stand-alone application of good faith in treaty interpretation.[374] Article 31(1) of the VCLT states,[375] that a "*treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose*." There are three sources of treaty interpretation namely: the treaty's terms, the context of those terms, and the treaty's object and purpose.[376] The Textualist School begins with the

---

372 VAUGHAN LOWE, INTERNATIONAL LAW 74 (2007); Reinhold, *supra* note 358, at 48.
373 Hugh Thirlway, *Law and Procedure of the International Court of Justice 1960-89, Part One*, 60 Brit. Y.B. Int'l L. 1, 10 (1989); Vecchione, *supra* note 365, at 1167.Hugh Thirlway.
374 Martin Dawidowicz, *The Effect of the Passage of Time on the Interpretation of Treaties: Some Reflections on Costa Rica v Nicaragua,* 24(1) LEIDEN J. INT'L L. 201, 212 (2011); RICHARD GARDINER, TREATY INTERPRETATION 148 (2008).
375 Vienna Convention, *supra* note 311, at art. 31(1).
376 IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 604-07 (6th ed. 2003); Sinclair, VCLT *supra* note 310, at 114-15; Saunders *supra* note 316, at 577-578.

presumption that the intention of the parties is reflected from the text of the treaty and therefore, the purpose of treaty interpretation is to ascertain the meaning of the text. The subjective school allows for the treaty interpretation beyond the text of the treaty to ascertain the intention of the parties. Lastly, the teleological school asserts that the treaty must be interpreted to give effect to the object and purpose of the treaty. The Vienna Convention combines all the three approaches, although textualism is dominant.[377]

A. PRINCIPLE OF EFFECTIVENESS

The principle of effectiveness is, as the ILC put it, implied in the general rule on interpretation.[378] Whilst that principle is not expressly stated in articles 31 to 33 of the VCLT, it is a specific articulation of the principle of good faith and the consideration that a treaty is to be interpreted in accordance with its object and purpose.[379] The principle of effectiveness is part of the general rule that a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in the context of that treaty and in the light of its object and purpose. The application of the general rule means that if "a treaty is open to two interpretations one

---

[377] *Report of the International Law Commission on the Work of the Second Part of Its Seventh Session,* [1966] 2 Y.B. Int'l L. Comm'n 169, 220, U.N. Doc. A/6309/Rev.1; Saunders, *supra* note 316, at 578.

[378] *Report of the International Law Commission on the Work of Its Sixteenth Session, 11 July 1964, Official Records of the General Assembly—Nineteenth Session,* [1964] 2 Y.B. Int'l L. 201 (1964); MITCHELL, INTERNATIONAL ECONOMIC LAW, *supra* note 308, at 44.

[379] *Third Report on the Law of Treaties by SR Humphrey Waldock*, [1962] 2 Y.B. Int'l L. Comm'n 47 at 5, U.N. Doc. A/CN.4/144; *Draft Articles on the Law of Treaties with Commentaries*, [1966] 2 Y.B. Int'l L. Comm'n at 6 (1966); MITCHELL, INTERNATIONAL ECONOMIC LAW, *supra* note 308, at 44.

of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted."[380]

B. HARMONIOUS INTERPRETATION

Another understanding of good faith interpretation is that a treaty can be interpreted in the light of relevant treaties, general principles of law and customary international law. Article 31(3)(c) of the VCLT explains that, in interpreting treaties, account should be given to the context and 'any relevant rules of international law applicable in the relations between the parties.' The principle according to which treaties are to be applied in good faith logically also embodies the principle of good faith interpretation because, application presupposes interpretation.[381] The interpretation of treaties in good faith is essential to the effect of the principle of *pacta sunt servanda*.[382] In *Gabčíkovo-Nagymaros*,[383] the ICJ explained Article 26 of the VCLT by stating that, the purpose of the treaty and intention of the parties should prevail over the literal application of the treaty.

---

[380] *Report of the International Law Commission on the Work of Its Eighteenth Session (4 May–19 July 1966),* [1966] II Yearbook ILC 219; MITCHELL, INTERNATIONAL ECONOMIC LAW, *supra* note 308, at 44.

[381] Int'l Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law—Report of the Study Group of the International Law Commission, UN Doc A/CN.4/L.682, at 423(2006); Int'l Law Commission, Second report on subsequent agreements and subsequent practice in relation to the interpretation of treaties, Georg Nolte (Special Rapporteur), UN Doc A/CN.4/671, at 4 (2014); MITCHELL, INTERNATIONAL ECONOMIC LAW, *supra* note 308, at 53; RICHARD GARDINER, TREATY INTERPRETATION 27–29 (OUP 2008).

[382] *Report of the International Law Commission on the Work of Its Eighteenth Session (4 May–19 July 1966),* [1966] II Yearbook ILC 219; MITCHELL, INTERNATIONAL ECONOMIC LAW, *supra* note 308, at 53.

[383] Gabčíkovo-Nagymaros Project (Hung./Slovk.), Judgment, 1997 I.C.J. Rep. 79, at 7, ¶ 142 (Sept. 97).

The principle of good faith can also be used in interpreting silences in treaties, wherein the principle can justify completing the treaties with content that is not expressly stated and possibly with norms of customary international law or general principles of law, including the principle of good faith itself. As *Lauterpacht* said, many examples of interpretation of silence are no more than interpretations 'by reference to common sense and the canons of good faith.'[384]

C. SUBJECTIVE FUNCTION OF GOOD FAITH: ASSESSING BEHAVIOUR OF INTERPRETERS

In performing its subjective function, the focus of good faith is on whether or not a treaty interpreter properly applied the relevant principles of interpretation and whether its interpretative reasoning is based on valid substantive arguments.[385]

Vice-President Schwebel wrote in his dissenting opinion in the case before the International Court of Justice (ICJ) on *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* that the ICJ's interpretation did 'not comport with a good faith interpretation of the treaty's terms' and that its failure to resort to preparatory work resulted 'if not in an unreasonable

---

[384] HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 167 (1958); MITCHELL, INTERNATIONAL ECONOMIC LAW, *supra* note 308, at 54.

[385] Arbitration on the Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau (Guinea-Bissau v. Senega), Decision, 1985 XIX UNRIAA 149, ¶ 46 (February 14).

interpretation of the treaty itself, in an interpretation of the preparatory work which is "manifestly…unreasonable.."[386]

V. CONCLUSION

In international dispute settlement, good faith has a firm place as both a facilitating and a restraining agent: it helps, on the one hand, to infuse predictability and reasonableness into state behaviour, furthers due process, and serves as an interpretative tool for international courts and tribunals, while on the other hand it restrains legal formalism and arbitrariness. The principle of Good faith has been construed as "Swiss Army Knife,"[387] because legal rules related to honesty, fairness and reasonableness are identified with the overarching principle of Good Faith.[388] International Court of Justice in *Nuclear Test Case* held "*One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this Co-operation in many fields is becoming increasingly essential.*"[389]

Under Art. 18, an obligation exists in good faith not to impair the value of an undertaking pending ratification or entry into force. It protects the legitimate expectations of other participants in the treaty-making process. The legitimate expectation is not that signed treaties are binding,

---

[386] Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain), Jurisdiction and Admissibility, 1995 I.C.J. Rep. 6, ¶ 36 (July 1) (Vice-President Schwebel).
[387] MITCHELL, INTERNATIONAL ECONOMIC LAW, *supra* note 308, at 9.
[388] JOHN O'CONNOR, GOOD FAITH IN INTERNATIONAL LAW 154 (1991); D'Amato, *supra* note 366.
[389] Nuclear Tests (Austl. v Fr.), Judgement, 1974 I.C.J. Rep 253, at 268 ¶ 46 (Dec. 20).

rather fundamental fairness requires a state to refrain from undermining an agreement on which another state is relying. The signature creates legitimate expectations to the extent that the signatory state is bound to refrain from acts defeating the object and purpose of a treaty. "Good faith" is generally taken to entail honesty and fair-dealing between the parties concerned, such as truthfully representing their motives and abstaining from taking unfair advantage of an unintended interpretation of any agreement they come to.[390] Hence, a treaty should be performed with the intentions of the parties in mind, rather than looking to a formalistic understanding of the wording. The principle of effectiveness as part of the general rule implied under Art. 31-33 of VCLT, means that a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in the context of that treaty and in the light of its object and purpose. Another understanding of good faith interpretation is that a treaty can be interpreted in the light of relevant treaties, general principles of law and customary international law.

[390] D'Amato, *supra* note 366.