

GOOD FAITH IN WTO DISPUTE SETTLEMENT

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[The definition of good faith in international law has been largely elusive, and its indefinite boundaries complicate its use in the World Trade Organization. Nevertheless, good faith is almost certainly a general principle of law and a principle of customary international law. It is also a principle of WTO law that is reflected in several provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes. WTO Tribunals may use the principle of good faith not merely to interpret WTO provisions, but also in the exercise of their inherent jurisdiction, such as when employing the doctrine of estoppel, which is one particularisation of good faith. However, the use of good faith in WTO dispute settlement entails three important considerations and qualifications. First, the principle should not be used to overwhelm WTO provisions that appear to be based on concepts similar to those underlying the principle of good faith, such as non-violation complaints, which are subject to detailed rules. Second, the principle should not be confused with other principles that may appear to be related, particularly due process. Third, in my view, WTO Tribunals have no legal basis for finding that a Member has violated a principle of good faith independent of a violation of a WTO provision. Some existing reports err in this regard.]

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Men must be able to assume that those with whom they deal in the general intercourse of society will act in good faith.¹

I INTRODUCTION

The principle of good faith has a great deal of normative appeal, and most commentators would acknowledge that it plays a role in all legal systems. The ordinary meaning of good faith is ‘honesty of purpose or sincerity of declaration’ or the ‘expectation of such qualities in others’.² ‘Good faith’ is often used interchangeably with ‘bona fides’, which is defined as ‘freedom from intent to deceive’.³ The touchstone of good faith is therefore honesty, a subjective state of mind, but the principle can also incorporate notions of fairness and reasonableness, both of which concern an objective state of affairs. Unfortunately, terms like honesty, fairness and reasonableness are almost as vague as good faith. This leads Rosenne to ask of good faith: ‘Is it a principle and a rule of law, having an identifiable and where necessary enforceable legal content, or is it nothing more than a throw-back to outmoded natural law concepts?’⁴ If good faith has no independent legal content, it may be of little use to World Trade Organization Tribunals in resolving disputes: ‘one may acknowledge the power and attraction of a general idea but the idea may be so general that it is of no practical utility to the merchant’.⁵

In this article, I attempt to clarify the meaning of good faith to the extent relevant to the WTO, by examining good faith as a general principle of law, a principle of customary international law, and a principle of WTO law. Below, I start by considering the existence and meaning of the principle of good faith in international law outside the WTO. Although I do not aim to establish definitively whether good faith is a general principle of law or a principle of customary international law, it is undoubtedly a well-accepted fundamental norm in many domestic and international contexts. It takes several more specific forms in relation to the interpretation and performance of treaties, as well as in the doctrines of abuse of rights and estoppel. Having considered good faith outside the WTO, I turn to the use of this principle in WTO disputes. I first determine the scope of good faith as a principle of WTO law, before assessing the procedural and substantive implications of good faith for WTO dispute settlement. I pay particular attention to the ways in which WTO Tribunals have used the principle of good faith so far.

¹ Roscoe Pound, *An Introduction to the Philosophy of Law* (1922) 188.

² Arthur Delbridge et al (eds), *The Macquarie Dictionary* (2nd ed, 1991) 754.

³ John Simpson and Edmund Weiner (eds), *The Oxford English Dictionary* (2nd ed, 1989) vol 2, 379.

⁴ Shabtai Rosenne, *Developments in the Law of Treaties 1945–1986* (1989) 135.

⁵ Royston Goode, ‘The Concept of Good Faith in English Law’ (Paper presented at the Centro di Studi e Ricerche di Diritto Comparato e Straniero, Rome, Italy, March 1992).

II GOOD FAITH IN INTERNATIONAL LAW OUTSIDE THE WTO

A A General Principle of Law

Unquestionably, the obligation to act in accordance with good faith, being a general principle of law, is also part of international law.⁶

Good faith was recognised as a general principle of law during the drafting of the *Statute of the Permanent Court of International Justice*.⁷ This principle is described as ‘the foundation of all law, or a fundamental principle of law’.⁸ O’Connor suggests that good faith derived from ‘the necessity for a minimum of human co-operation and tolerance if group living is to emerge and survive’.⁹ Although good faith has origins in the earliest human societies, O’Connor suggests that the Roman concept of *bona fides* (associated with trustworthiness, conscientiousness and honourable conduct) represents its most direct ancestor.¹⁰ By about 1450 it was applied in both civil and common law systems, and was ‘reflected in specific rules incorporating or referring to good conscience, fairness, equitable dealing and reasonableness’.¹¹

Today, the principle of good faith is recognised in most civil codes, in essence being ‘a principle of fair and open dealing’.¹² Most importantly, civil law regimes tend to require that contracts be formed and performed in good faith.¹³ One explanation for this may be economic. If parties act in bad faith, this leads to mistrust, making contracting more complex and expensive. A rule of good faith increases contracting parties’ confidence that contractual obligations will be performed.¹⁴

The principle of good faith is less established and less uniform in common law systems. At one extreme is the United Kingdom, which has no general doctrine of good faith.¹⁵ However, equity developed many doctrines to promote

⁶ *Certain Norwegian Loans (France v Norway) (Jurisdiction)* [1957] ICJ Rep 9, 53.

⁷ See comments of Lord Phillimore in Permanent Court of International Justice: Advisory Committee of Jurists, *Procès-verbaux of the Proceedings of the Committee, June 16th – July 24th, 1920, with Annexes* (1920) 335.

⁸ John O’Connor, *Good Faith in International Law* (1991) 2.

⁹ *Ibid* 6.

¹⁰ *Ibid* 18–19.

¹¹ *Ibid* 30.

¹² *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1988] 1 All ER 348, 352 (Bingham LJ). See, eg, *Code Civil du Québec* c 64; Charles Gonthier, ‘Liberty, Equality, Fraternity: The Forgotten Leg of the Trilogy, or Fraternity: The Unspoken Third Pillar of Democracy’ (2000) 45 *McGill Law Journal* 567, 584.

¹³ William Tetley, ‘Good Faith in Contract: Particularly in the Contracts of Arbitration and Chartering’ (2004) 35 *Journal of Maritime Law and Commerce* 561, 567; Disa Sim, ‘The Scope and Application of Good Faith in the Vienna Convention on Contracts for the International Sale of Goods’ in Pace International Law Review (ed), *Review of the Convention on Contracts for the International Sale of Goods (CISG) 2002–2003* (2004) 19, 31; *Bürgerliches Gesetzbuch* § 242; *Code Civil Suisse* art 3; *Code Civil de la France* arts 550, 1134.

¹⁴ Paul Powers, ‘Defining the Undefinable: Good Faith and the United Nations Convention on the Contracts for the International Sale of Goods’ (1998–99) 18 *Journal of Law and Commerce* 333, 351.

¹⁵ Royston Goode, *Commercial Law* (2nd ed, 1995) 117; *Allen v Flood* [1898] AC 1, 46 (Wills J).

specific notions of good faith, including the concepts of undue influence and promissory estoppel.¹⁶ Good faith is also recognised in relation to particular classes of contracts, for example, contracts of insurance. At the other extreme is the United States, where ‘every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement’.¹⁷ Farnsworth notes that US courts have used good faith in at least three different ways: to imply terms to fill gaps; to prevent a party from reclaiming opportunities it agreed to forgo when entering a contract; and to exclude bad faith.¹⁸ One disadvantage of using ‘bad faith’ to define or justify the principle of good faith

is that it seems tantamount to saying that the good faith duty is breached whenever a judge decides that it has been breached ... [which] hardly advances the cause of intellectual inquiry and ... provides absolutely no guide to the disposition of future cases, except to the extent that they may be on all fours with a decided case.¹⁹

Rosenne argues that while examples of good faith from domestic laws are of limited relevance for international law, they nevertheless ‘illustrate vividly that “good faith” is a recognized legal notion, and one that can be creative of significant legal institutions’.²⁰

B *A Principle of Customary International Law*

The principle of good faith in customary international law has a long history. Grotius recognised that ‘good faith should be preserved, not only for other reasons but also in order that the hope of peace may not be done away with’.²¹ Schwarzenberger and Brown list good faith as one of the seven fundamental principles of international law.²²

Good faith is ‘included in a long series of law-declaring instruments of major significance’,²³ some or all of which may be collectively regarded as codifying

¹⁶ Rosenne, above n 4, 164. See also Mary Hiscock, ‘The Keeper of the Flame: Good Faith and Fair Dealing in International Trade’ (1996) 29 *Loyola of Los Angeles Law Review* 1059, 1061.

¹⁷ *Restatement (Second) of Contracts* § 205 (1981). See also *Uniform Commercial Code* §§ 1–304.

¹⁸ E Allan Farnsworth, ‘Duties of Good Faith and Fair Dealing under the UNIDROIT Principles, Relevant International Conventions, and National Laws’ (1995) 3 *Tulane Journal of International and Comparative Law* 47, 59–60. See also David Stack, ‘The Two Standards of Good Faith in Canadian Contract Law’ (1999) 62 *Saskatchewan Law Review* 201.

¹⁹ Michael G Bridge, ‘Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith?’ (1984) 9 *Canadian Business Law Journal* 385, 398.

²⁰ Rosenne, above n 4, 165 (emphasis in original).

²¹ Hugo Grotius, *De Jure Belli ac Pacis Libri Tres* (1625), as quoted in O’Connor, above n 8, 56.

²² Georg Schwarzenberger and Edward D Brown, *A Manual of International Law* (6th ed, 1976) 7.

²³ Rosenne, above n 4, 135.

customary international law.²⁴ Many of these references to good faith are broadly analogous to domestic obligations to perform contracts in good faith. For example, art 2(2) of the *Charter of the United Nations* states that '[a]ll Members ... shall fulfil in good faith the obligations assumed by them in accordance with the present *Charter*'. This represents the first modern and universalised statement of the principle of good faith in treaty law,²⁵ and it 'constitutes ... an undertaking to comply with the whole of public international law, in so far as it is not amended by the *UN Charter*'.²⁶ Müller and Kolb explain in relation to this provision:

a set of treaties with such comprehensive objectives as those of the UN does not survive merely on the strength of the terms used and on its individual provisions, but only achieves its reality via the communal will of its members, for which there is ultimately no guarantee.²⁷

The *Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States* contains several references to good faith, including the following:

Every State has the duty to fulfil in good faith its obligations under the generally recognized principles and rules of international law.

Every State has the duty to fulfil in good faith its obligations under international agreements valid under the generally recognized principles and rules of international law.²⁸

A number of international tribunals have recognised the principle of good faith. According to the International Court of Justice, although good faith is '[o]ne of the basic principles governing the creation and performance of legal obligations',²⁹ it is 'not in itself a source of obligation where none would

²⁴ See, eg, *Charter of the Organization of American States* art 3(c); *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3, arts 105, 157, 300 (entered into force 16 November 1994); *Peaceful Settlement of Disputes between States*, GA Res 37/10, UN GAOR, 37th sess, 68th plen mtg, Annex, UN Doc A/RES/37/10 (15 November 1982) I(1), II(2) (*Manila Declaration on Peaceful Disputes*); *Report of the Secretary-General on the Work of the Organization*, GA Res 37/67, UN GAOR, 37th sess, 91st plen mtg, UN Doc A/RES/37/67 (3 December 1982) [2]; *Charter of Economic Rights and Duties of States*, GA Res 3281 (XXIX), UN GAOR, 29th sess, 2315th plen mtg, UN Doc A/RES/29/3281 (12 December 1974) ch 1(j); *Permanent Sovereignty over Natural Resources*, GA Res 1803 (XVII), UN GAOR, 17th sess, UN Doc A/RES/17/1803 (14 December 1962) [8]; *UNIDROIT Principles of International Commercial Contracts 2004*, art 1.7.

²⁵ Rosenne, above n 4, 156. But see Elisabeth Zoller, *La Bonne foi en droit international public* (1977) 5.

²⁶ Albrecht Randelzhofer, 'Article 2' in Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (2nd ed, 2002) vol 1, 63, 65.

²⁷ Jörg Müller and Robert Kolb, 'Article 2(2)' in Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (2nd ed, 2002) vol 1, 91, 96.

²⁸ *Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in accordance with the Charter of the United Nations*, GA Res 2625 (XXV), UN GAOR, 25th sess, 1883rd plen mtg, UN Doc A/RES/2625 (24 October 1970) 124.

²⁹ *Nuclear Tests (Australia v France) (Merits)* [1974] ICJ Rep 253, 268 ('*Nuclear Tests Case*').

otherwise exist'.³⁰ This could suggest that, in a treaty context, a violation of good faith cannot arise in the absence of a violation of a treaty provision (a possibility to which I return below). Conversely, the ICJ has rejected the contention that a violation of a treaty provision cannot arise in the absence of a violation of good faith.³¹ This distinction may reflect the gravity of a good faith violation, which also explains why international tribunals often presume that states act in good faith and why they do not lightly find bad faith.³²

In the *Nuclear Tests Case*, the ICJ used the principle of good faith to find that unilateral statements by the French Government indicating its intention to cease atmospheric nuclear testing in the South Pacific were legally binding.³³ In the *WHO/Egypt Agreement Case*, the ICJ recognised 'the mutual obligations incumbent upon Egypt and the [World Health] Organization to cooperate in good faith with respect to the implications and effects of the transfer of the Regional Office from Egypt'.³⁴ These included a duty upon the parties to 'consult together in good faith'³⁵ and to continue to fulfil in good faith their obligations during any transition between the decision to move the office and the completion of the move.³⁶ In the *North Sea Continental Shelf Case*, the ICJ relied on good faith to explain why certain states were required to enter into meaningful negotiations with the objective of reaching an agreement, 'which will not be the case when either of them insists upon its own position without contemplating any modification of it'.³⁷

C Towards a Definition of Good Faith

Unfortunately, of all the principles of international law, the principle of good faith is perhaps the hardest to define. Cheng considered the principle capable of illustration but not of definition, like other 'rudimentary terms applicable to human conduct' such as 'honesty' or 'malice'.³⁸ O'Connor, in his study on the principle, considered that good faith includes the general elements of 'honesty, fairness and reasonableness',³⁹ but then went on to propose the following more

³⁰ *Border and Transborder Armed Actions (Nicaragua v Honduras) (Jurisdiction and Admissibility)* [1988] ICJ Rep 69, 105.

³¹ See, eg, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1971] ICJ Rep 16, 56–7; Gillian White, 'The Principle of Good Faith' in Vaughan Lowe and Colin Warbrick (eds), *The United Nations and the Principles of International Law: Essays in Memory of Michael Akehurst* (1994) 230, 241.

³² See, eg, *Tacna-Arica (Chile v Peru)* (1925) 2 RIAA 921, 930; *Affaire du Lac Lanoux (France v Espagne)* (1957) 12 RIAA 281, 313.

[1974] ICJ Rep 253, 268–9.

³⁴ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt (Advisory Opinion)* [1980] ICJ Rep 73, 95 ('*WHO/Egypt Agreement Case*').

³⁵ *Ibid.*

³⁶ *Ibid* 96–7.

³⁷ *North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* [1969] ICJ Rep 3, 47 ('*North Sea Continental Shelf Case*').

³⁸ Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1987) 105 (citations omitted).

³⁹ O'Connor, above n 8, 118–19.

specific definition:

The principle of good faith in international law is a fundamental principle from which the rule *pacta sunt servanda* and other legal rules distinctively and directly related to honesty, fairness and reasonableness are derived, and the application of these rules is determined at any particular time by the compelling standards of honesty, fairness and reasonableness prevailing in the international community at that time.⁴⁰

This definition makes it clear that good faith is a general principle of law or a principle of customary international law that manifests itself in various other obligations, such as the following obligations on states:

(1) to settle disputes in good faith; (2) to negotiate in good faith; (3) having signed a treaty, not to frustrate the achievement of its object and purpose prior to ratification; (4) having ratified a treaty, to apply and perform it in good faith and not to frustrate the achievement of its object and purpose; (5) to interpret treaties in good faith, in accordance with their ordinary meaning considered in context and in the light of their object and purpose; (6) to fulfil in good faith any obligations arising from other sources of international law; and (7) to exercise rights in good faith.⁴¹

Obligations such as these may be more precise than the broader principle of good faith, and eventually they may develop sufficiently to be used without reference to the principle. Therefore, as legal systems develop and mature, resort to the principle of good faith may be less frequent.⁴² In this sense, the principle of good faith 'is both a first principle and one of last resort, finding practical relevance chiefly when a more definable rule cannot be found, when there is a collision of rights, or when seemingly contradictory concepts are at play'.⁴³ As regards the relationship between the general and particular notions of good faith, Sim writes:

there is nothing wrong with subscribing to the very general notion that 'good faith' is synonymous with anything that requires contracting parties to behave in a manner that ensures justice and fairness. The merit of this approach is that we do not omit anything that can assist us in circumscribing unethical behaviour. This idea, however, is not concrete enough to form the basis of a workable legal doctrine.⁴⁴

In the following section, I consider some expressions or particularisations of the principle of good faith in international law, namely: (i) good faith performance of treaties; (ii) good faith interpretation of treaties; (iii) estoppel; and (iv) abuse of rights. These expressions could themselves be regarded as rules, obligations, principles or doctrines. They may also exist in domestic law,

⁴⁰ Ibid 124. See also Anthony D'Amato, 'Good Faith' in Rudolf Bernhardt (ed), *Encyclopaedia of Public International Law* (2003) vol 2, 599, 599.

⁴¹ Guy Goodwin-Gill, 'State Responsibility and the "Good Faith" Obligation in International Law' in Malgosia Fitzmaurice and Dan Sarooshi (eds), *Issues of State Responsibility before International Judicial Institutions* (2004) 75, 88 (citations omitted).

⁴² O'Connor, above n 8, 123.

⁴³ Gabe Shawn Vargès, 'Book Reviews and Notes: *Good Faith in International Law*' (1992) 86 *American Journal of International Law* 841, 843.

⁴⁴ Sim, above n 13, 61.

treaty law, customary international law, and general principles of law. I am concerned here not with their precise categorisation, but with their meaning.

D Particularisations of Good Faith

1 Performance of Treaties: Pacta Sunt Servanda

Like good faith generally, *pacta sunt servanda* (agreements must be kept) originated in Roman law and was later incorporated into customary international law and treaty obligations.⁴⁵ In 1910, for example, the Permanent Court of Arbitration held that ‘every State has to exercise the obligation incurred by treaty bona fide and is urged thereto by the ordinary sanctions of international law’.⁴⁶ Also as regards treaties, art 26 of the *Vienna Convention on the Law of Treaties* (*VCLT*)⁴⁷ is entitled ‘*Pacta sunt servanda*’ and provides that ‘[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith’.

The ICJ has read the good faith requirement in art 26 as meaning that

the purpose of the Treaty, and the intentions of the Parties in concluding it, ... should prevail over its literal application. The principle of good faith obliges the Parties to apply it in a reasonable way and in such a manner that its purpose can be realized.⁴⁸

Similarly, in drafting the *VCLT*, the Special Rapporteur stated in relation to this provision:

the intended meaning was that a treaty must be applied and observed not merely according to its letter, but in good faith. It was the duty of the parties to the treaty not only to observe the letter of the law, but also to abstain from acts which would inevitably affect their ability to perform the treaty.⁴⁹

This suggests that a state may violate the obligation to perform treaties in good faith even if it does not violate the treaty itself (that is, the ‘letter’ of the treaty). For example, this could arise where the state ‘seeks to avoid or to “divert” the obligation which it has accepted, or to do indirectly what it is not permitted to do directly’.⁵⁰ Thus, McNair states:

A State may take certain action or be responsible for certain inaction, which, though not in form a breach of a treaty, is such that its effect will be equivalent to a breach of treaty; in such cases a tribunal demands good faith and seeks for the reality rather than the appearance.⁵¹

⁴⁵ O’Connor, above n 8, 37.

⁴⁶ *North Atlantic Coast Fisheries Arbitration (United States v Great Britain)* (1910) 11 RIAA 167, 186.

⁴⁷ Opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

⁴⁸ *Gabčíkovo-Nagymaros Project (Hungary v Slovakia) (Merits)* [1997] ICJ Rep 7, 79.

⁴⁹ International Law Commission, ‘Report of the International Law Commission Covering its 16th Session, 727th Meeting, 20 May 1964’ [1964] 1 *Yearbook of the International Law Commission* [70].

⁵⁰ Goodwin-Gill, above n 41, 93.

⁵¹ Arnold McNair, *The Law of Treaties* (1961) 540.

Accordingly, *pacta sunt servanda* may overlap with the doctrine of abuse of rights, as discussed below.⁵²

Article 26 of the *VCLT* applies to treaties ‘in force’. However, art 18 of the *VCLT*, which concerns treaties before they enter into force, may inform the meaning of good faith in art 26. Article 18 states:

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.

In relation to these ‘pre-conventional’ obligations to refrain from acts that would defeat the object and purpose of a treaty, the Special Rapporteur stated, ‘[a] *fortiori*, when the treaty is in force the parties are under an obligation of good faith to refrain from such acts’.⁵³ Thus, the obligation on states to perform in good faith treaties to which they are a party may include an obligation not to defeat the object and purpose of such treaties.

2 Interpretation of Treaties: *VCLT Article 31(1)*

Article 31(1) of the *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’. According to O’Connor, the requirement that the interpreter have regard to ‘the ordinary meaning to be given to the terms of the treaty’ may itself reflect the principle of *pacta sunt servanda*, in that it focuses on what the parties actually agreed.⁵⁴ Rosenne explains the relationship between good faith interpretation and good faith performance of treaties as follows:

whenever the expression ‘good faith’ is used, it is a pointer to the close link that exists between the obligation itself and its performance — for even interpretation as presented is not an exercise in abstraction but has an essential functional role in the decision-making process of a party or of a court or tribunal as regards the performance of the obligation.⁵⁵

Rosenne contends that the essential function of good faith in this context is ‘to give a broad interpretation of the scope of equitable principles, provided that in so doing the treaty is not revised; and in turn to emphasize the flexibility by appropriate language in the treaty’.⁵⁶ Accordingly, although the requirement of

⁵² See below Part II(D)(4).

⁵³ International Law Commission, ‘Third Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur’ [1964] 2 *Yearbook of the International Law Commission* 8.

⁵⁴ O’Connor, above n 8, 109.

⁵⁵ Rosenne, above n 4, 175.

⁵⁶ *Ibid* 178–9.

good faith in interpreting treaties may be related to the requirement of good faith in performing treaties, it appears to add little to the correct understanding of good faith as a substantive principle in international law.

3 Estoppel

Estoppel might be regarded as a principle of customary international law as well as a general principle of law:

a man shall not be allowed to blow hot and cold — to affirm at one time and deny at another ... Such a principle has its basis in common sense and common justice, and whether it is called ‘estoppel,’ or by any other name, it is one which courts of law have in modern times most usefully adopted.⁵⁷

Estoppel operates in different ways depending on the context of a given case,⁵⁸ but its common elements are to preclude Party X from denying a particular state of things against Party Y if: (1) X clearly and unambiguously represented to Y the existence of such a state; (2) Y altered its position in reliance on that representation in good faith; and (3) Y would suffer injury if the representation was groundless.⁵⁹ Estoppel is also related to the principle of ‘acquiescence’, which involves silence or inaction by X instead of a specific representation.⁶⁰ I leave this slightly different principle to one side.

In the *Land and Maritime Boundary Case*, the ICJ stated:

An estoppel would only arise if by its acts or declarations Cameroon had consistently made it fully clear that it had agreed to settle the boundary dispute submitted to the Court by bilateral avenues alone. It would further be necessary that, by relying on such an attitude, Nigeria had changed position to its own detriment or had suffered some prejudice.⁶¹

The ICJ also discussed the principle of estoppel in the *North Sea Continental Shelf Case*, where it found that a ‘very definite, very consistent course of conduct’⁶² would have to be established for a state to be bound by a treaty to which it had not formally acceded. The Court went on to declare that

only the existence of a situation of estoppel could suffice to lend substance to [the contention that the Federal Republic of Germany was bound by the *Geneva Convention on the Continental Shelf*] ... that is to say if the Federal Republic were now precluded from denying the applicability of the conventional régime, by reason of past conduct, declarations, etc., which not only clearly and consistently

⁵⁷ *Cave v Mills* (1862) 7 Hurlstone & Norman 913, 927, as quoted in Cheng, above n 38, 141–2. But see O’Connor, above n 8, 122–3.

⁵⁸ Jörg Müller and Thomas Cottier, ‘Estoppel’ in Rudolf Bernhardt (ed), *Encyclopaedia of Public International Law* (2003) vol 2, 116, 117.

⁵⁹ See *ibid* 116; Cheng, above n 38, 143. See also Ian Brownlie, *Principles of Public International Law* (6th ed, 2003) 616; Derek Bowett, ‘Estoppel before International Tribunals and Its Relation to Acquiescence’ (1957) 33 *British Yearbook of International Law* 176, 202.

⁶⁰ Bowett, above n 59, 200.

⁶¹ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria) (Preliminary Objections)* [1998] ICJ Rep 275, 303 (‘*Land and Maritime Boundary Case*’). See also *Aerial Incident of 10 August 1999 (Pakistan v India) (Jurisdiction)* [2000] ICJ Rep 12, 31–2.

⁶² [1969] ICJ Rep 3, 25.

evinced acceptance of that régime, but also had caused Denmark or the Netherlands, in reliance on such conduct, detrimentally to change position or suffer some prejudice.⁶³

In some descriptions of estoppel, the requirement of injury to Party Y is expanded to cover a benefit to Party X. In *Temple of Preah Vihear*, the ICJ rejected an attempt by Thailand to resile from a clear and unequivocal representation it had made to Cambodia concerning the boundary between them.⁶⁴ In this case, Judge Spender in his dissenting opinion gave the following description of the principle of estoppel:

the principle operates to prevent a State contesting before the Court a situation contrary to a clear and unequivocal representation previously made by it to another State, either expressly or impliedly, on which representation the other State was, in the circumstances, entitled to rely and in fact did rely, and as a result that other State has been prejudiced or the State making it has secured some benefit or advantage for itself.⁶⁵

Similarly, in *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras) (Application by Nicaragua for Permission to Intervene)*, the ICJ described the conditions for estoppel as ‘a statement or representation made by one party to another and reliance upon it by that other party to his detriment or to the advantage of the party making it’.⁶⁶

4 Abuse of Rights

In international law, the doctrine of abuse of rights (*abus de droit*) forbids a state from ‘exercising a right either in a way which impedes the enjoyment by other States of their own rights or for an end different from that for which the right was created, to the injury of another State’.⁶⁷ Abuse of rights is also reflected in civil law systems in particular.⁶⁸ In common law systems, although the phrase ‘abuse of rights’ is not commonly used, ‘[t]he law of torts as crystallized in various systems of law in judicial decisions or legislative enactment is to a large extent a list of wrongs arising out of what society considers to be an abuse of rights’.⁶⁹

Cheng conceives abuse of rights as an application of the principle of good faith.⁷⁰ Byers contends that this does not render abuse of rights redundant; rather,

⁶³ Ibid 26.

⁶⁴ *Temple of Preah Vihear (Cambodia v Thailand) (Merits)* [1962] ICJ Rep 6, 32–3 (*‘Temple of Preah Vihear’*).

⁶⁵ Ibid 143–4.

⁶⁶ [1990] ICJ Rep 92, 118.

⁶⁷ Alexandre Kiss, ‘Abuse of Rights’ in Rudolf Bernhardt (ed), *Encyclopaedia of Public International Law* (2003) vol 1, 4, 4. See also O’Connor, above n 8, 38; G D S Taylor, ‘The Content of the Rule against Abuse of Rights in International Law’ (1972–73) 46 *British Yearbook of International Law* 323, 333.

⁶⁸ Peter Nygh and Peter Butt (eds), *Butterworths Australian Legal Dictionary* (1997) 10; Irina Petrova, ‘“Stepping on the Shoulders of a Drowning Man” The Doctrine of Abuse of Right as a Tool for Reducing Damages for Lost Profits: Troubling Lessons from the Patuha and Himpurna Arbitrations’ (2004) 35 *Georgetown Journal of International Law* 455, 464–6.

⁶⁹ Sir Hersch Lauterpacht, *The Function of Law in the International Community* (1966) 297.

⁷⁰ Cheng, above n 38, 121.

abuse of rights should be viewed as ‘supplemental to the principle of good faith: [providing] the threshold at which a lack of good faith gives rise to a violation of international law, with all the attendant consequences’.⁷¹

International law can be seen as recognising three broad categories of abuse of rights.⁷² The first contemplates a state exercising a right in a manner other than the manner in which it was intended to be exercised (eg, against the spirit of the law conferring the right), including: (a) solely for a malicious purpose;⁷³ or (b) as a guise to evade the law.⁷⁴ An example of such an abuse would be a state using a right to establish a police cordon at a political border as a guise for a customs barrier, in breach of a treaty obligation to maintain certain zones free from customs barriers.⁷⁵

The second category involves a state exercising a right in a way that impinges on another state’s enjoyment of its rights when, ‘weighing the conflicting interests’, the exercise of the right is not fair and equitable between the parties.⁷⁶ An example of such an abuse would be a state exercising its right to regulate activities in its territorial waters in a way that unnecessarily interferes with a right granted under a treaty permitting the residents of another state to fish in those waters.⁷⁷

Third, a state could exercise a discretionary right unreasonably, dishonestly, or without due regard for the interests of others. An example of such an abuse is the arbitrary expulsion of an alien.⁷⁸ Cheng cautions that, as ‘discretion implies subjective judgment, it is often difficult to determine categorically that the discretion has been abused’.⁷⁹ He refers to the ICJ’s advisory opinion in *Conditions of Admission of a State to the United Nations (Advisory Opinion)*,⁸⁰ where the minority noted that although the discretion of Members to admit states to the UN is limited, it would be almost impossible to prove that the discretionary right had been exercised wrongly.⁸¹

In all three categories, the party alleging an abuse of rights must establish,⁸² through ‘clear and convincing evidence’,⁸³ that the abuse has caused injury ‘of serious consequence’.⁸⁴

⁷¹ Michael Byers, ‘Abuse of Rights: An Old Principle, A New Age’ (2002) 47 *McGill Law Journal* 389, 411.

⁷² Kiss, above n 67, 5.

⁷³ Cheng, above n 38, 122.

⁷⁴ *Ibid* 122–3.

⁷⁵ *Free Zones of Upper Savoy and the District of Gex (France v Switzerland) (Merits)* [1932] PCIJ (ser A/B) No 46.

⁷⁶ Cheng, above n 38, 125.

⁷⁷ *North Atlantic Coast Fisheries Arbitration (United States v Great Britain)* (1910) 11 RIAA 167.

⁷⁸ Cheng, above n 38, 133.

⁷⁹ *Ibid* 134.

⁸⁰ *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter) (Advisory Opinion)* [1948] ICJ Rep 57, 93 (Dissenting Opinion of Judges Basdevant, Winiarski, Sir Arnold McNair and Read).

⁸¹ See Cheng, above n 38, 134.

⁸² *Certain German Interests in Polish Upper Silesia (Germany v Polish Republic) (Merits)* [1926] PCIJ (ser A) No 7, 30; *Free Zones of Upper Savoy and the District of Gex (France v Switzerland) (Merits)* [1932] PCIJ (ser A/B) No 46, 167.

⁸³ *Trail Smelter Arbitration (United States v Canada)* (1938 and 1941) 3 RIAA 1905, 1965.

The potential breadth of abuse of rights is quite large, leading some to caution against its overuse. In Lauterpacht's words:

There is no legal right, however well established, which could not, in some circumstances, be refused recognition on the ground that it has been abused. The doctrine of abuse of rights is therefore an instrument which ... must be wielded with studied restraint.⁸⁵

The breadth of the doctrine of abuse of rights depends largely on the answers to two questions. First, what factors are relevant in determining whether a right has been abused? These may range from an injurious or deceitful motive to an unbalanced outcome. The doctrine broadens as one moves from subjective factors (such as the intention and purpose of the party exercising the right) to objective factors (such as the consequences of the exercise of the right).⁸⁶ On one view, objective factors are key,⁸⁷ particularly given the 'natural reluctance to ascribe bad faith to States, in the sense of a deliberate intention knowingly to circumvent an international obligation'.⁸⁸ The second question that must be answered in delineating the scope of abuse of rights is: to whom must the injury be caused? The answer could be the narrow class of those with whom the exerciser of the right has a specific contractual or treaty obligation, or the broader class of those with whom it has an obligation 'arising from the general rules and principles of the legal order' or from some more generalised notion of fairness or equity.⁸⁹

III USING GOOD FAITH IN WTO DISPUTES

A Good Faith as a Principle of WTO Law

According to McRae, the 'WTO agreements are themselves creatures of international law; they are treaties binding only because of the underlying norm of international law *pacta sunt servanda*'.⁹⁰ This suggests that good faith may underlie the WTO agreements as a whole. Perhaps this is what the Appellate Body had in mind when it referred to the 'general principle of *good faith* that

⁸⁴ Ibid.

⁸⁵ Sir Hersch Lauterpacht, *The Development of International Law by the International Court* (1958) 164. See also Petrova, above n 68, 464–5.

⁸⁶ Joseph Voyame, Bertil Cottier and Bolivar Rocha, 'Abuse of Rights in Comparative Law' in Council of Europe (ed), *Abuse of Rights and Equivalent Concepts: The Principle and Its Present Day Application* (1990) 23, 28–39; Georges Margue, 'Abuse of Rights and Luxembourg Law' in Council of Europe (ed), *Abuse of Rights and Equivalent Concepts: The Principle and Its Present Day Application* (1990) 56, 58; Petrova, above n 68, 470.

⁸⁷ *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)* (Advisory Opinion) [1948] ICJ Rep 57, 80.

⁸⁸ Gerald Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1954–9: General Principles and Sources of Law' (1959) 35 *British Yearbook of International Law* 183, 209.

⁸⁹ Cheng, above n 38, 130, as cited in Petrova, above n 68, 471.

⁹⁰ Donald McRae, 'Comments on Dr Claus-Dieter Ehlermann's Lecture' (2003) 97 *American Society of International Law Proceedings* 87, 89.

underlies all treaties'.⁹¹ In addition, the requirement in art 31(1) of the *VCLT* to interpret treaties in good faith — as incorporated in art 3.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ('*DSU*')⁹² — influences the interpretation of every WTO provision. Good faith might be described as a principle of WTO law on either of these bases. Finally, several WTO provisions refer specifically to 'good faith', without elaborating on its meaning. The absence of any definition of good faith in the WTO agreements supports the view that good faith is not a specific rule but a broader principle of WTO law, perhaps informed by good faith notions in international law.

The WTO provisions that refer to good faith include, most significantly for WTO disputes, arts 3.10 and 4.3 of the *DSU*. In art 3.10, the Members set out their understanding that, 'if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute'. Article 4.3 creates a more specific good faith obligation in relation to the consultation stage of disputes. The first sentence of this provision reads:

If a request for consultations is made pursuant to a covered agreement, the Member to which the request is made shall, unless otherwise mutually agreed, reply to the request within 10 days after the date of its receipt and shall enter into consultations in good faith within a period of no more than 30 days after the date of receipt of the request, with a view to reaching a mutually satisfactory solution.

Articles 3.10 and 4.3 of the *DSU* provide examples of how principles of good faith may underlie claims in WTO disputes. For instance, a complaining Member could claim in the course of a dispute that the respondent had failed to comply with the good faith requirement in art 4.3 by attending consultations without being willing to attempt to find a mutually satisfactory solution. A responding Member could claim that the complainant was using the dispute settlement mechanism as a mere strategy or tactic to achieve some unrelated result instead of in an effort to resolve the dispute as required by art 3.10.

Another reference to good faith is found in the *Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994*,⁹³ which relates in part to the requirement to provide for compensatory adjustment when increasing bound tariffs in the process of forming a customs union or free trade area. Members are to enter negotiations 'in good faith with a view to achieving mutually satisfactory compensatory adjustment'.⁹⁴ Thus, this good faith obligation is similar to the *DSU* requirement to engage in consultations and dispute settlement procedures in good faith.

⁹¹ *United States — Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WTO Doc WT/DS192/AB/R, AB-2001-3 (8 October 2002) [81] (Report of the Appellate Body) (emphasis in original).

⁹² *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), annex 2 (*Understanding on Rules and Procedures Governing the Settlement of Disputes*) 1869 UNTS 401.

⁹³ GATT Doc LT/UR/A-1A/1/GATT/U/4 (15 April 1994).

⁹⁴ *Ibid* [5].

Good faith is also mentioned in several provisions of the *Agreement on Trade-Related Aspects of Intellectual Property Rights* ('*TRIPS Agreement*').⁹⁵ Article 24, which relates to negotiations to increase the protection of individual geographical indications,⁹⁶ contains three references to good faith. These references relate to the 'good faith' of the nationals or domiciliaries of WTO Members in applying for or registering trademarks, and in using trademarks or geographical indications.⁹⁷ Articles 48.2 and 58(c) of the *TRIPS Agreement* refer to the 'good faith' of public authorities or officials in administering laws for the protection or enforcement of intellectual property rights. The references to good faith in the *TRIPS Agreement* are therefore less relevant to the principle of good faith examined in this article, because they concern the good faith of persons within WTO Members rather than the good faith of WTO Members themselves.

In the following sections, I consider some of the ways in which good faith as a principle of the WTO, a principle of customary international law, or a general principle of law could be used in WTO disputes. For the sake of clarity, I first consider certain aspects of good faith that might be regarded as procedural, in that they relate to the conduct of WTO disputes. I then turn to more substantive implications of good faith, which relate to obligations of WTO Members more generally.

B Procedural Implications of Good Faith

1 Engaging in Dispute Settlement Procedures (DSU Article 3.10)

One of the most significant reflections of good faith in the WTO agreements is in the general statement in art 3.10 of the *DSU* that Members will engage in the WTO dispute settlement procedures in good faith. The meaning of 'good faith' in this provision, whether regarded as an ordinary or special meaning, is clearly informed by good faith as a general principle of law and a principle of customary international law. Indeed, the Appellate Body has described art 3.10 as a 'specific manifestation of the principle of good faith which ... is at once a general principle of law and a principle of general international law'.⁹⁸ But it is necessary to examine WTO Tribunals' pronouncements on good faith in relation to art 3.10 more closely in order to determine whether they have properly interpreted this provision, taking into account this broader good faith principle.

The principle of due process obviously concerns issues of honesty, fairness and reasonableness, as does the principle of good faith. But the fact that these principles are related does not mean that they are interchangeable. Accordingly, the obligation in art 3.10 of the *DSU* to 'engage in these procedures in good faith in an effort to resolve the dispute' should be read as obliging Members to remain

⁹⁵ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), annex 1C (*Agreement on Trade-Related Aspects of Intellectual Property Rights*) 1867 UNTS 299.

⁹⁶ *Ibid* art 24.1.

⁹⁷ *Ibid* arts 24.4, 24.5.

⁹⁸ *United States — Tax Treatment for 'Foreign Sales Corporations'*, WTO Doc WT/DS108/AB/R, AB-1999-9 (24 February 2000) [166] (Report of the Appellate Body) ('*US — FSC*').

open to resolution of their dispute, whether through a mutually satisfactory solution or pursuant to recommendations of the Dispute Settlement Body ('DSB'). These obligations cannot be breached by due process failures of the parties such as filing a defence late. Rather, they might be breached by actions such as refusing to meet with a Member that has requested consultations or refusing to participate in proceedings.

In some submissions to and reports of WTO Tribunals, the principle of good faith or one of its specific rules has been muddled with the principle of due process.⁹⁹ For example, the Appellate Body appears to have confused the due process obligations imposed on Members in relation to the conduct of anti-dumping investigations with the principle of good faith.¹⁰⁰ In addition, WTO Tribunals have repeatedly but incorrectly read the reference to good faith in *DSU* art 3.10 as referring to due process.¹⁰¹ For example, in its report in *US — Gambling*, the Appellate Body noted that the 'the DSU is silent about a deadline or a method by which a responding party must state the legal basis for its defence'.¹⁰² Rather than simply relying on the principle of due process to resolve this issue, it pointed to *DSU* art 3.10 and suggested that this provision 'implies' that the respondent must state the legal basis for its defence 'at the earliest opportunity'.¹⁰³

Similarly, in *US — FSC*, the Appellate Body stated that art 3.10 contains a reference to the principle of good faith, requiring Members' 'good faith compliance' with *DSU* requirements.¹⁰⁴ The Appellate Body read 'good faith compliance' as requiring that 'complaining Members accord to the responding Members the full measure of protection and opportunity to defend, contemplated

⁹⁹ See, eg, *United States — Definitive Safeguard Measures on Imports of Certain Steel Products*, WTO Docs WT/DS248/R, WT/DS249/R, WT/DS251/R, WT/DS252/R, WT/DS253/R, WT/DS254/R, WT/DS258/R, WT/DS259/R (11 July 2003) [7.1987] (Report of the Panel); *United States — Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WTO Doc WT/DS184/R (28 February 2001) [A-76] (Report of the Panel) ('*US — Hot-Rolled Steel*'); *Mexico — Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States (Recourse to Article 21.5 of the DSU by the United States)*, WTO Doc WT/DS132/AB/RW, AB-2001-5 (22 October 2001) [73] (Report of the Appellate Body) ('*Mexico — Corn Syrup (Article 21.5 — US)*').

¹⁰⁰ See *US — Hot-Rolled Steel*, WTO Doc WT/DS184/AB/R, AB-2001-2 (24 July 2001) [101], [193] (Report of the Appellate Body).

¹⁰¹ See, eg, *Canada — Measures Affecting the Export of Civilian Aircraft*, WTO Doc WT/DS70/AB/R, AB-1999-2 (2 August 1999) [190] (Report of the Appellate Body); *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/R (18 September 2000) [7.2] (fn 3) (Report of the Panel); *United States — Safeguard Measures on Imports of Fresh Chilled or Frozen Lamb Meat from New Zealand and Australia*, WTO Docs WT/DS177/AB/R, WT/DS178/AB/R, AB-2001-1 (1 May 2001) [115] (Report of the Appellate Body). See also discussion of *European Communities — Trade Description of Sardines*, WTO Doc WT/DS231/AB/R, AB-2002-3 (26 September 2002) [139]–[141] (Report of the Appellate Body) in Arthur Appleton and Veijo Heiskanen, 'The Sardines Decision: Fish without Chips?' in Andrew Mitchell (ed), *Challenges and Prospects for the WTO* (2005) 165, 169–70.

¹⁰² *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/AB/R, AB-2005-1 (7 April 2005) [269] (Report of the Appellate Body) ('*US — Gambling*').

¹⁰³ *Ibid.*

¹⁰⁴ *US — FSC*, WTO Doc WT/DS108/AB/R, AB-1999-9 (24 February 2000) [166] (Report of the Appellate Body).

by the letter and spirit of the procedural rules' and that 'responding Members seasonably and promptly bring claimed procedural deficiencies to the attention of the complaining Member'.¹⁰⁵ In other words, the Appellate Body considered that 'good faith compliance' requires parties to act consistently with the objective of protecting due process in WTO proceedings. It is not clear why the Appellate Body felt compelled to refer to good faith in art 3.10 rather than some of the WTO provisions that do relate specifically to due process. For example, in relation to the due process interest of providing respondents with sufficient notice of the case they have to answer, these provisions include those concerning the request for consultations (*DSU* art 4.4), the request for the establishment of a Panel (art 6.2), and written submissions to the Panel (arts 12.6, 15.1).

In other international tribunals, due process is not generally invoked in connection with good faith. The WTO Tribunals' unusual approach to art 3.10 of the *DSU* may have arisen from a desire to point to specific WTO provisions to support particular propositions or interpretations, even if this involves straining the meaning of the provision in question. This may reflect a genuine concern not to impinge on the sovereignty of Members nor to add to or diminish the rights and obligations under the covered agreements contrary to arts 3.2 and 19.2 of the *DSU*. However, WTO Tribunals need not feel constrained by this part of arts 3.2 and 19.2, provided that they carefully follow the rules of treaty interpretation as they are mandated to do. It would be far better for WTO Tribunals to rely on the principle of due process (including in the exercise of inherent jurisdiction) than to read due process into the notion of good faith in art 3.10 without legal basis. Keeping good faith and due process distinct will promote legal certainty and predictability.

2 Resorting to Dispute Settlement (*DSU* Articles 3.7, 23)

WTO Tribunals have also referred to good faith in interpreting certain provisions of the *DSU* that do not include the words 'good faith'. These provisions relate to a Member's decision to resort to the WTO dispute settlement procedures.

Article 3.7 of the *DSU* states that, '[b]efore bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful'. The Appellate Body stated in *Mexico — Corn Syrup (Article 21.5 — US)* that 'this sentence reflects a basic principle that Members should have recourse to WTO dispute settlement in good faith, and not frivolously set in motion the procedures contemplated in the *DSU*'.¹⁰⁶ However, this requirement is 'largely self-regulating' and accordingly, WTO Tribunals 'must presume, whenever a Member submits a request for establishment of a panel, that such a Member does so in good faith, having duly exercised its judgement as to whether recourse to that panel would be "fruitful"'.¹⁰⁷ In that case, the Appellate Body held that the

¹⁰⁵ *Ibid.*

¹⁰⁶ WTO Doc WT/DS132/AB/RW, AB-2001-5 (22 October 2001) [73] (Report of the Appellate Body).

¹⁰⁷ *Ibid.* [74]. See also *European Communities — Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc WT/DS27/AB/R, AB-1997-3 (25 September 1997) [135] (Report of the Appellate Body) ('*EC — Bananas III*').

Panel was not obliged to consider, of its own initiative, whether the complainant had exercised its judgement as required by art 3.7.¹⁰⁸ Thus, the Appellate Body appeared to leave open the possibility that a Panel might find, upon request, that a Member had not exercised its judgement in accordance with art 3.7.¹⁰⁹ Bartels suggests that a WTO Member might not be acting in good faith if it requested the establishment of a Panel ‘for the *purpose* of nullifying the substantive rights of another WTO Member’.¹¹⁰

Given that art 3.7 does not refer expressly to WTO Members’ obligations to engage in dispute settlement in good faith, what basis did the Appellate Body have to infer a requirement of good faith in interpreting that provision? The most obvious answer is art 3.10 of the *DSU*, which provides relevant context for the interpretation of art 3.7 and can be read as encapsulating the ‘basic principle’¹¹¹ that Members must engage in dispute settlement in good faith. Against this background, it seems unnecessary to refer to good faith as a general principle of law or a principle of customary international law to justify the Appellate Body’s interpretation of art 3.10 of the *DSU*.

Another *DSU* provision in relation to which WTO Tribunals have referred to good faith is art 23, which one Panel described as ‘embed[ding]’ the ‘fundamental principle’ that ‘the dispute settlement system of the WTO [provides] ... the exclusive means to redress any violations of any provisions of the WTO Agreement’.¹¹² In *US — Section 301 Trade Act*, the Panel suggested that a ‘good faith’ interpretation of art 23 of the *DSU*, within the meaning of art 31(1) of the *VLCT*, suggests that Members should ‘refrain from adopting national laws which threaten prohibited conduct’, namely resolving disputes through unilateral action rather than in accordance with the *DSU*.¹¹³ However, the Panel was reluctant to impute ‘bad faith’ to either party in relation to its interpretation of this provision, preferring to seek the ‘better faith’ interpretation.¹¹⁴ This reasoning reflects the overlap between good faith interpretation and performance of treaties, as mentioned earlier.¹¹⁵ It also raises the question of the circumstances in which a WTO Tribunal might find that a Member had acted in bad faith (or had failed to act in good faith), in the absence of a specific provision imposing an obligation of good faith.¹¹⁶

¹⁰⁸ *Mexico — Corn Syrup (Article 21.5 — US)*, WTO Doc WT/DS132/AB/RW, AB-2001-5 (22 October 2001) [74] (Report of the Appellate Body).

¹⁰⁹ Were it otherwise, one might wonder whether the Appellate Body’s interpretation renders the first sentence of art 3.7 meaningless.

¹¹⁰ Lorand Bartels, ‘The Separation of Powers in the WTO: How to Avoid Judicial Activism’ (2004) 53 *International and Comparative Law Quarterly* 861, 890 (emphasis in original).

¹¹¹ *Mexico — Corn Syrup (Article 21.5 — US)*, WTO Doc WT/DS132/AB/RW, AB-2001-5 (22 October 2001) [73] (Report of the Appellate Body).

¹¹² *United States — Import Measures on Certain Products from the European Communities*, WTO Doc WT/DS165/R (17 July 2000) [6.13] (Report of the Panel).

¹¹³ *United States — Sections 301–310 of the Trade Act of 1974*, WTO Doc WT/DS152/R (22 December 1999) [7.68] (Report of the Panel) (*US — Section 301 Trade Act*).

¹¹⁴ *Ibid* [7.64].

¹¹⁵ See above Part II(D)(2).

¹¹⁶ See below Part III(C)(1).

3 Good Faith and Inherent Jurisdiction: Estoppel

Although several Members have pleaded estoppel before GATT Panels¹¹⁷ and WTO Tribunals, none has succeeded in such a claim. This series of cases provides one of the most illuminating illustrations of WTO Tribunals' understanding of the principle of good faith. It is not surprising that claims of estoppel are difficult to make out, but WTO Tribunals have responded to such claims with mixed degrees of legal accuracy. Some of the decisions reveal unnecessary hostility to this important expression of the principle of good faith, as well as a misunderstanding of the role of principles in WTO disputes.

In *US — FSC*, the Appellate Body prevented the US from objecting to an alleged failure by the European Community to include a 'statement of available evidence' with its request for consultations as required by art 4.2 of the *Agreement on Subsidies and Countervailing Measures* ('SCM Agreement'),¹¹⁸ on the basis that the US had forgone several earlier opportunities to raise this objection.¹¹⁹ Trachtman suggests that the Appellate Body applied a form of estoppel in this instance, even though estoppel was neither pleaded nor expressly mentioned.¹²⁰ However, as the Appellate Body made no mention of the EC relying to its detriment on the silence or inaction of the US in this regard, this dispute does not present a true example of estoppel.¹²¹

Two WTO Panels appear to have understood the notion of estoppel and dealt with Members' claims of estoppel accordingly. In *Guatemala — Cement II*,¹²² Guatemala argued that Mexico was estopped from alleging certain violations of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ('Anti-Dumping Agreement')¹²³ because Mexico had not made these allegations at the earliest opportunity.¹²⁴ In defining estoppel, the Panel stated that 'where one party has been induced to act in reliance on the assurances of another party, in such a way that it would be prejudiced were the other party later to change its position, such a change in position is 'estopped',

¹¹⁷ See James Cameron and Kevin Gray, 'Principles of International Law in the WTO Dispute Settlement Body' (2001) 50 *International and Comparative Law Quarterly* 248, 294; P J Kuyper, 'The Law of GATT as a Special Field of International Law: Ignorance, Further Refinement or Self-Contained System of International Law?' (1994) 25 *Netherlands International Law Review* 227, 231.

¹¹⁸ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1876 UNTS 3 (entered into force 1 January 1995), annex 1A (*Agreement on Subsidies and Countervailing Measures*) 1869 UNTS 14.

¹¹⁹ *US — FSC*, WTO Doc WT/DS108/AB/R, AB-1999-9 (24 February 2000) [165] (Report of the Appellate Body).

¹²⁰ Joel Trachtman, *European Journal of International Law, Decisions of the Appellate Body of the World Trade Organization: United States: Tax Treatment for 'Foreign Sales Corporations'* (2000) <<http://www.ejil.org/journal/curdevs/sr8.html>> at 15 September 2006.

¹²¹ Cf Michael Lennard, 'Navigating by the Stars: Interpreting the WTO Agreements' (2002) 5 *Journal of International Economic Law* 17, 78.

¹²² *Guatemala — Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WTO Doc WT/DS156/R (24 October 2000) (Report of the Panel) ('*Guatemala — Cement II*').

¹²³ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1876 UNTS 3 (entered into force 1 January 1995), annex 1A (*Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*) 1868 UNTS 201.

¹²⁴ *Guatemala — Cement II*, WTO Doc WT/DS156/R (24 October 2000) [8.23] (Report of the Panel).

that is precluded'.¹²⁵ The Panel rejected Guatemala's claim of estoppel because 'Mexico was under no obligation to object immediately to the violations' and raised the allegations 'at an appropriate moment under the dispute settlement procedure'.¹²⁶ Accordingly, the Panel did not consider that Guatemala could reasonably have relied on Mexico's delay in making these allegations, and it was also not persuaded that Guatemala would have acted any differently had Mexico made the allegations earlier.¹²⁷ This reasoning is in line with the principle of estoppel in international law as described earlier in this article.¹²⁸ Although the Panel did not explicitly consider the basis for making a claim of estoppel in a WTO dispute or the applicable law in dealing with such a claim, it can be regarded as having addressed this claim in the proper exercise of its inherent jurisdiction to resolve procedural matters.¹²⁹ This dispute was not appealed.

In *Argentina — Poultry Anti-Dumping Duties*,¹³⁰ Argentina argued that Brazil was estopped from pursuing its WTO claim because Brazil had already brought proceedings against the same measure before an Ad Hoc Arbitral Tribunal of the Mercado Común del Sur ('MERCOSUR').¹³¹ The Panel rejected Argentina's claim of estoppel. Mexico had made no clear and unambiguous statement that, 'having brought a case under the MERCOSUR dispute settlement framework, it would not subsequently resort to WTO dispute settlement proceedings'.¹³² In addition, the Panel found no evidence that Argentina had 'actively relied in good faith on any statement made by Brazil, either to the advantage of Brazil or to the disadvantage of Argentina'.¹³³ Like the earlier Panel in *Guatemala — Cement II*, this Panel's approach to estoppel accords generally with the requirements of estoppel in international law outside the WTO. Again, the Panel here did not explain its rationale for addressing the claim on its terms, but this can be seen as a valid exercise of the Panel's inherent jurisdiction. Neither party appealed the Panel report.

In two other WTO disputes, the Panels were far less adept at handling claims of estoppel. In *EC — Bed Linen (Article 21.5 — India)*, India claimed that the EC was estopped

¹²⁵ Ibid (citations omitted).

¹²⁶ Ibid [8.24].

¹²⁷ Ibid.

¹²⁸ See above Part II(D)(3).

¹²⁹ For an explanation of the inherent jurisdiction of WTO Tribunals, see Andrew D Mitchell, 'Due Process in WTO Disputes' in Rufus Yerxa and Bruce Wilson (eds), *Key Issues in WTO Dispute Settlement: The First Ten Years* (2005) 144; Andrew D Mitchell, 'Fair Crack of the Whip: Examining Procedural Fairness in WTO Disputes Using an Australian Administrative Law Framework' in Melissa Bray (managing ed), *Ten Years of WTO Dispute Settlement: Australian Perspectives* (2006) 43, 63–6.

¹³⁰ *Argentina — Definitive Anti-Dumping Duties on Poultry from Brazil*, WTO Doc WT/DS241/R (22 April 2003) (Report of the Panel) ('*Argentina — Poultry Anti-Dumping Duties*').

¹³¹ MERCOSUR is a South American customs union between Brazil, Argentina, Uruguay, Paraguay and Venezuela. Its associate members are currently Bolivia, Chile, Colombia, Ecuador and Peru.

¹³² *Argentina — Poultry Anti-Dumping Duties*, WTO Doc WT/DS241/R (22 April 2003) [7.38] (Report of the Panel).

¹³³ Ibid [7.39].

from advocating before us an interpretation of a provision of the [Anti-Dumping] Agreement which is different from the interpretation by the European Court of First Instance of a provision in the EC's municipal anti-dumping law which is identical to the AD Agreement provision.¹³⁴

¹³⁴ *European Communities — Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India (Recourse to Article 21.5 of the DSU by India)*, WTO Doc WT/DS141/RW (29 November 2002) [6.89] (Report of the Panel) ('*EC — Bed Linen (Article 21.5 — India)*').

Curiously, India attempted to buttress its estoppel argument by positing that ‘the principle of good faith, as enshrined in the *Vienna Convention*, ensures that such case law can serve as relevant context’.¹³⁵ This argument regarding good faith interpretation under art 31(1) of the *VCLT* has very little to do with estoppel.¹³⁶ Unfortunately, the Panel also provided a curious response to India’s claim. Perhaps baffled by India’s reference to good faith interpretation, the Panel stated that “estoppel” based on national court decisions interpreting municipal law does not limit the decisions of WTO panels interpreting a covered agreement’.¹³⁷ The Panel concluded that WTO Tribunals may not find that a Member has violated a WTO provision on the basis that the Member is applying the provision in bad faith,¹³⁸ adding:

We know of no basis in international law, and India has not cited any, that would require us to conclude that a measure which is consistent with a Member’s obligations under a provision of a covered agreement that we have interpreted in accordance with customary rules of interpretation of public international law could nonetheless be found to be in violation of that provision on the basis of alleged ‘bad faith’.¹³⁹

All in all, the Panel appears to have been thoroughly confused and anxious about India’s claim of estoppel. It may have wanted to assuage Members’ fears that Panels could find that a Member has acted in bad faith (an issue discussed further below). But India was not asking the Panel to find that the EC had acted in bad faith. It was simply arguing that the EC was precluded from submitting an interpretation of a WTO provision that was inconsistent with one of its court’s interpretations of the municipal law equivalent.

The Panel could have dismissed this claim quite easily in the exercise of its inherent jurisdiction, relying on the doctrine of estoppel as part of the principle of good faith in international law. The EC made no representation to India that could form the basis of an estoppel. The European Court of First Instance is a separate institution from the EC as a WTO Member. Statements by that court should not be regarded as being authorised by the EC, addressed to India, or likely to affect India’s conduct. Accordingly, such statements cannot found an estoppel.¹⁴⁰ Finally, the decision of the European Court of First Instance seems

¹³⁵ Ibid.

¹³⁶ This argument failed even as an interpretive context. The Panel held that the court decision ‘does not constitute “context”, as that term is used in Article 31 of the *Vienna Convention*’: ibid [6.90].

¹³⁷ Ibid [6.91].

¹³⁸ Ibid.

¹³⁹ Ibid.

¹⁴⁰ Bowett, above n 59, 185–6, 192.

to be an interpretation of a particular legal rule, rather than a representation of fact, which is required to make out an estoppel.¹⁴¹

More recently, in *EC — Export Subsidies on Sugar*¹⁴² the EC argued, ‘[o]n the basis of ... its good faith expectations’, that the complainants (Australia, Brazil and Thailand) were estopped from bringing certain claims because the violations alleged in those claims ‘would have been flagrant and immediately manifest upon the conclusion of the *WTO Agreement*’.¹⁴³ Yet the complainants had only raised these violations in bringing this dispute several years later.¹⁴⁴ The Panel considered the meaning of estoppel in law generally as well as its meaning as a ‘principle’ in public international law.¹⁴⁵ It suggested that estoppel might be a ‘general principle of law’,¹⁴⁶ a ‘customary rule of interpretation’,¹⁴⁷ or part of the ‘good faith principle reflected in Article 3.10 of the *DSU*’.¹⁴⁸ However, the Panel declared:

it is far from clear whether the principle of estoppel is applicable to disputes between WTO Members in relation to their WTO rights and obligations. The principle of estoppel has never been applied by any panel or the Appellate Body. Estoppel is not mentioned in the *DSU* or anywhere in the *WTO Agreement*.¹⁴⁹

Once it is accepted that the WTO agreements (like all legal texts) cannot possibly cover every conceivable issue that could arise in the WTO and do not purport to do so, the fact that the WTO agreements do not refer explicitly to estoppel means very little. More specifically, the WTO agreements leave many procedural issues up to the WTO Tribunals. Why, then, was the Panel so intent on rejecting the role of estoppel in WTO disputes? Looking more closely at the Panel’s reasoning, it becomes clear that the Panel had several unspoken concerns about the EC’s reference to good faith in conjunction with estoppel, as well as fundamental fears about the incorporation of international law in WTO law.

The Panel stressed that ‘both the European Communities and the Complainants have acted in good faith in the initiation and conduct of the present dispute proceedings’,¹⁵⁰ indicating its perception that accepting the EC’s estoppel argument might suggest that the complainants had acted in bad faith. The Panel also revealed its concern not to infringe the sovereignty of WTO Members by emphasising again the ‘largely self-regulating’ nature of art 3.7 of the *DSU*,¹⁵¹ even though the EC’s claim of estoppel was not grounded in that provision. The Panel also referred to the Appellate Body’s treatment of the precautionary principle in *European Communities — Measures concerning Meat*

¹⁴¹ Ibid 196.

¹⁴² *European Communities — Export Subsidies on Sugar*, WTO Docs WT/DS265/R, WT/DS266/R, WT/DS283/R (15 October 2004) (Report of the Panel) (*‘EC — Export Subsidies on Sugar’*).

¹⁴³ Ibid [7.55].

¹⁴⁴ Ibid [7.54].

¹⁴⁵ Ibid [7.61]–[7.62] (citations omitted).

¹⁴⁶ Ibid [7.64].

¹⁴⁷ Ibid [7.65].

¹⁴⁸ Ibid.

¹⁴⁹ Ibid [7.63] (emphasis in original).

¹⁵⁰ Ibid [7.74].

¹⁵¹ Ibid [7.67].

and Meat Products (*Hormones*),¹⁵² indicating a desire to avoid the suggestion that a principle of non-WTO law might impose an independent obligation on WTO Members or even override an explicit WTO provision.¹⁵³ It stated that if estoppel 'were applicable' in WTO disputes, Members 'would ... have to find a way to comply in good faith with both the provisions of the *DSU* and those of estoppel'.¹⁵⁴ Yet estoppel imposes no requirements on WTO Members, and it need not constitute applicable law in WTO disputes to be relevant. WTO Tribunals have inherent jurisdiction to resolve procedural matters and can rule on claims of estoppel on that basis.

Finally, the Panel stated that, even assuming that estoppel could be 'invoked' in WTO disputes, the elements of estoppel were not made out.¹⁵⁵ The complainants' silence did not create 'a clear and unambiguous representation upon which the European Communities could rely', especially given that the complainants had no legal duty to notify the EC of its alleged violations.¹⁵⁶ The Panel added that accepting the EC's estoppel argument would be contrary to the prohibition in arts 3.2 and 19.2 of the *DSU* on adding to or diminishing the rights and obligations in the covered agreements.¹⁵⁷ In my view, recognising a well-established general principle of law and principle of customary international law in the exercise of inherent jurisdiction would involve no infringement of arts 3.2 or 19.2. If anything, the Panel abdicated its judicial function in failing to do so.

On appeal, the Appellate Body rejected the EC's claim of estoppel.¹⁵⁸ It agreed with the Panel that 'it is far from clear that the estoppel principle applies in the context of WTO dispute settlement',¹⁵⁹ and went on to state:

The principle of estoppel has never been applied by the Appellate Body. Moreover, the notion of estoppel, as advanced by the European Communities, would appear to inhibit the ability of WTO Members to initiate a WTO dispute settlement proceeding. We see little in the *DSU* that explicitly limits the rights of WTO Members to bring an action; WTO Members must exercise their 'judgement as to whether action under these procedures would be fruitful', by virtue of Article 3.7 of the *DSU*, and they must engage in dispute settlement procedures in good faith, by virtue of Article 3.10 of the *DSU*. This latter obligation covers, in our view, the entire spectrum of dispute settlement, from the point of initiation of a case through implementation. Thus, even assuming *arguendo* that the principle of estoppel could apply in the WTO, its application would fall within these narrow parameters set out in the *DSU*.¹⁶⁰

¹⁵² WTO Docs WT/DS26/AB/R, WT/DS48/AB/R, AB-1997-4 (16 January 1998) (Report of the Appellate Body).

¹⁵³ *EC — Export Subsidies on Sugar*, WTO Doc WT/DS265/R (15 October 2004) [7.64] (Report of the Panel).

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid* [7.70].

¹⁵⁶ *Ibid* [7.73].

¹⁵⁷ *Ibid* [7.75].

¹⁵⁸ *EC — Export Subsidies on Sugar*, WTO Docs WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, AB-2005-2 (28 April 2005) [317] (Report of the Appellate Body).

¹⁵⁹ *Ibid* [310].

¹⁶⁰ *Ibid* [312].

This passage may reflect some of the Panel's concerns regarding estoppel, including a desire to focus on the text of the *DSU* and thus avoid criticism by Members for adding to or diminishing their rights and obligations. However, even if the Appellate Body did not wish to exercise its inherent jurisdiction to address the claim of estoppel, it could and should have acknowledged that the requirement of 'good faith' in art 3.10 of the *DSU* (which, incidentally, the EC had relied on as an adjunct to its estoppel claim)¹⁶¹ must be interpreted by reference to the principle of good faith in international law and, in turn, the doctrine of estoppel in international law. Properly understood, art 3.10 of the *DSU* does not narrow the concept of good faith or estoppel. It is the principle of good faith that informs and elaborates art 3.10 of the *DSU*.

Ultimately, the Appellate Body adopted the same strategy as the Panel, finding that estoppel was not made out even assuming that it applied.¹⁶² First, the complainants made no representations regarding the WTO-consistency of the EC measure.¹⁶³ Second, there was no 'shared understanding' between the parties as alleged by the EC.¹⁶⁴ It is not clear how the alleged 'shared understanding' was supposed to fit into the elements of estoppel. Had the Appellate Body shown more confidence in addressing this claim, it might have more carefully evaluated its meaning in international law, thereby providing clearer and better reasoning for its conclusion.

C Substantive Implications of Good Faith

1 Performance of WTO Obligations: Pacta Sunt Servanda

The Appellate Body has stated that WTO Tribunals should not presume that Members have acted in bad faith¹⁶⁵ and, conversely, that WTO Tribunals should presume that Members have acted in good faith in carrying out their WTO obligations 'as required by the principle of *pacta sunt servanda* articulated in Article 26 of the *Vienna Convention*'.¹⁶⁶ These statements suggest that Members are obliged to carry out their treaty obligations in good faith and that, in appropriate circumstances, the presumption that they have done so might be successfully rebutted. Nevertheless, WTO Tribunals typically refrain from calling Members to account or from questioning the accuracy of the presumption in light of the circumstances before them. To do so would involve

¹⁶¹ *Ibid* [307].

¹⁶² *Ibid* [313].

¹⁶³ *Ibid* [315].

¹⁶⁴ *Ibid* [316].

¹⁶⁵ *Chile — Taxes on Alcoholic Beverages*, WTO Docs WT/DS87/AB/R, WT/DS110/AB/R, AB-1999-6 (13 December 1999) [74] (Report of the Appellate Body).

¹⁶⁶ *European Communities — Trade Description of Sardines*, WTO Doc WT/DS231/AB/R, AB-2002-3 (26 September 2002) [278] (Report of the Appellate Body). See also *United States — Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WTO Doc WT/DS268/AB/R, AB-2004-4 (29 November 2004) [173] (Report of the Appellate Body); *United States — Import Prohibition of Certain Shrimp and Shrimp Products (Recourse to Article 21.5 by Malaysia)*, WTO Doc WT/DS58/RW (15 June 2001) [5.19] (Report of the Panel) ('*US — Shrimp (Article 21.5 — Malaysia)*').

acknowledging the principle of good faith as applicable law or as the basis for a valid claim in WTO disputes.

The significant exception was in *US — Offset Act (Byrd Amendment)*.¹⁶⁷ That case concerned the *Continued Dumping and Subsidy Offset Act of 2000* ('*CDSOA*'),¹⁶⁸ which provides for the distribution of anti-dumping or countervailing duties to affected domestic producers who supported the application for the initiation of the investigation that led to the imposition of those duties. The complainants (Australia, Brazil, Canada, Chile, the EC, India, Indonesia, Japan, Korea, Mexico and Thailand) challenged the *CDSOA* under art 5.4 of the *Anti-Dumping Agreement* and art 11.4 of the *SCM Agreement*, among other provisions. These provisions relate to the initiation of investigations into determine whether to impose anti-dumping or countervailing duties respectively. Essentially, they preclude domestic authorities from initiating investigations on the application of the domestic industry unless the application is supported by a sufficient proportion of domestic producers, determined according to certain statistical thresholds. The complainants argued:

when a treaty provision specifies that actions of private parties are necessary to establish a Member's right to take action, government provision of a financial incentive for those private parties to act one way rather than another is inconsistent with the requirement that Members perform their treaty obligations in good faith.¹⁶⁹

The Panel read the text of the relevant provisions as merely imposing 'statistical thresholds' rather than a 'requirement that the investigating authorities inquire into the motives or intent of a domestic producer in electing to support a petition'.¹⁷⁰ However, it went on to agree with the complainants, stating that the *CDSOA*

recreates the spectre of an investigation being pursued where only a few domestic producers have been affected by the alleged dumping, but industry support is forthcoming because of the prospect of offset payments being distributed if dumping is found in consequence of the investigation and antidumping duties imposed. In consequence the *CDSOA* may be regarded as having undermined the value of AD Article 5.4/ SCM Article 11.4 to the countries with whom the United States trades, and the United States may be regarded as not having acted in good faith in promoting this outcome.¹⁷¹

The Panel supported this conclusion by reference to 'the principle of good faith as a general rule of conduct in international relations', which 'requires a party to a treaty to refrain from acting in a manner which would defeat the object and purpose of the treaty as a whole or the treaty provision in question'.¹⁷² The Panel

¹⁶⁷ *United States — Continued Dumping and Subsidy Offset Act of 2000*, WTO Docs WT/DS217/R, WT/DS234/R (16 September 2002) (Report of the Panel) ('*US — Offset Act (Byrd Amendment)*').

¹⁶⁸ *Continued Dumping and Subsidy Offset Act of 2000*, HR 4461, 106th Cong (2000).

¹⁶⁹ *US — Offset Act (Byrd Amendment)*, WTO Docs WT/DS217/R, WT/DS234/R (16 September 2002) [7.54] (Report of the Panel).

¹⁷⁰ *Ibid* [7.63].

¹⁷¹ *Ibid*.

¹⁷² *Ibid* [7.64] (citations omitted).

characterised the object and purpose of art 5.4 of the *Anti-Dumping Agreement* and art 11.4 of the *SCM Agreement* as follows: ‘to require the authority to examine the degree of support which exists for an application and to determine whether the application was thus filed by or on behalf of the domestic industry’.¹⁷³ The Panel concluded that the *CDSOA* is inconsistent with those provisions because it effectively ‘mandates domestic producers to support the application and renders the threshold test ... completely meaningless’.¹⁷⁴

The Appellate Body reversed the Panel’s finding that the *CDSOA* is inconsistent with art 5.4 of the *Anti-Dumping Agreement* and art 11.4 of the *SCM Agreement*.¹⁷⁵ It considered that the Panel failed to apply correctly the ‘principles of interpretation codified in the *Vienna Convention*’.¹⁷⁶ In particular, the Appellate Body queried the Panel’s reference to the ‘object and purpose’ of the relevant provisions. The Appellate Body stated:

Clearly, the matter at issue before the Panel included whether the *CDSOA* is inconsistent with the *Anti-Dumping Agreement* and the *SCM Agreement* in the light of their object and purpose, since interpreting Articles 5.4 and 11.4 involves an inquiry into the object and purpose of those Agreements. In our view, however, the Panel dismissed all too quickly the textual analysis of those provisions as irrelevant.¹⁷⁷

Whether deliberately or not, the Appellate Body appears to have missed the point of the Panel’s analysis of object and purpose in this instance. The Panel was not relying on object and purpose in the course of interpreting the relevant provisions under art 31(1) of the *VCLT*. The Panel was relying on the substantive principle reflected in art 18 of the *VCLT*¹⁷⁸ (and, presumably, art 26 of the *VCLT*), which requires states to perform their treaty obligations in good faith. Thus, the Panel was using the principle of good faith (whether a general principle of law or as a principle of customary international law) as applicable law or the basis for a claim in a WTO dispute.

Strangely, although the Appellate Body appeared to misunderstand the Panel’s use of the substantive principle of good faith, it went on to accept the independent applicability of such a principle. The US argued that there ‘is no basis or justification in the WTO Agreement for a WTO dispute settlement panel to conclude that a Member has not acted in good faith, or to enforce a principle of good faith as a substantive obligation agreed to by WTO Members’.¹⁷⁹ In response, the Appellate Body referred to its previous recognition of ‘the

¹⁷³ Ibid.

¹⁷⁴ Ibid [7.66].

¹⁷⁵ *US — Offset Act (Byrd Amendment)*, WTO Doc WT/DS217/AB/R, WT/DS234/AB/R, AB-2002-7 (16 January 2003) [294] (Report of the Appellate Body).

¹⁷⁶ Ibid [281].

¹⁷⁷ Ibid [285].

¹⁷⁸ *US — Offset Act (Byrd Amendment)*, WTO Docs WT/DS217/R, WT/DS234/R (16 September 2002) [7.64] (fn 314) (Report of the Panel).

¹⁷⁹ *US — Offset Act (Byrd Amendment)*, WTO Docs WT/DS217/AB/R, WT/DS234/AB/R, AB-2002-7 (16 January 2003) [296] (Report of the Appellate Body).

relevance of the principle of good faith¹⁸⁰ and stated: ‘Clearly, therefore, there is a basis for a dispute settlement panel to determine, in an appropriate case, whether a Member has not acted in good faith’.¹⁸¹

The previous pronouncements that the Appellate Body referred to involved misapplications of the principle of good faith¹⁸² and, even if correct, would not demonstrate why WTO Tribunals may rule on whether a Member has acted in good faith, independent of any particular provision. Such a ruling would fall outside the procedural matters that WTO Tribunals may resolve in the exercise of inherent jurisdiction. It would also not be based on a valid claim or applicable law by virtue of the reflection of good faith in art 5.4 of the *Anti-Dumping Agreement* or art 11.4 of the *SCM Agreement* (in that these provisions do not specifically reflect the principle of good faith beyond the general requirement that they be interpreted in good faith). As suggested earlier,¹⁸³ good faith might be a principle of WTO law in the sense that it explains the binding nature of the WTO agreements, but this does not mean that WTO Tribunals may apply an independent, substantive principle of good faith in relation to every WTO provision.

In any case, the Appellate Body rejected the Panel’s conclusion that the US had not acted in good faith in enacting the *CDSOA*.¹⁸⁴ It added:

Nothing ... in the covered agreements supports the conclusion that simply because a WTO Member is found to have violated a substantive treaty provision, it has therefore not acted in good faith. In our view, it would be necessary to prove more than mere violation to support such a conclusion.¹⁸⁵

Of course, the source of any independent, substantive obligation of good faith is not the covered agreements but international law more generally. The Appellate Body’s conclusion implies that a violation is a necessary but not sufficient condition for a finding that a Member did not act in good faith. This is consistent with the ICJ’s statement in *Border and Transborder Armed Actions (Nicaragua v Honduras)* that good faith is ‘not in itself a source of obligation where none would otherwise exist’.¹⁸⁶ However, had the Appellate Body engaged in a more open and rigorous analysis of good faith in international law, it might have noted the possibility that good faith could be violated even in the absence of a breach of a treaty provision.¹⁸⁷

¹⁸⁰ Ibid [297], citing *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R, AB-1998-4 (12 October 1998) [158] (Report of the Appellate Body) (*US — Shrimp*) and *US — Hot-Rolled Steel*, WTO Doc WT/DS184/AB/R, AB-2001-2 (24 July 2001) [101] (Report of the Appellate Body). See also *US — FSC*, WTO Doc WT/DS108/AB/R, AB-1999-9 (24 February 2000) [166] (Report of the Appellate Body).

¹⁸¹ *US — Offset Act (Byrd Amendment)*, WTO Docs WT/DS217/AB/R, WT/DS234/AB/R, AB-2002-7 (16 January 2003) [297] (Report of the Appellate Body).

¹⁸² See above Part III(B)(1) and below Part III(C)(3).

¹⁸³ See above Part III(A).

¹⁸⁴ *US — Offset Act (Byrd Amendment)*, WTO Docs WT/DS217/AB/R, WT/DS234/AB/R, AB-2002-7 (16 January 2003) [299] (Report of the Appellate Body).

¹⁸⁵ Ibid [298].

¹⁸⁶ *Border and Transborder Armed Actions (Nicaragua v Honduras) (Jurisdiction and Admissibility)* [1988] ICJ Rep 69, 105.

¹⁸⁷ See above Part II(D)(1).

Upon adoption of the Panel and Appellate Body reports in *US — Offset Act (Byrd Amendment)*, the US referred to the Appellate Body's 'troubling' discussion of good faith,¹⁸⁸ and in particular its conclusion that WTO Tribunals

¹⁸⁸ DSB, *Minutes of Meeting Held on 27 January 2003*, WTO Doc WT/DSB/M/142 (6 March 2003) [57].

could find that a Member had not acted in good faith:

The US concern did not relate to whether Members were to implement their obligations in ‘good faith’ under international law. The United States agreed that they were. However, the WTO dispute settlement system had a limited mandate, which was to determine conformity with the ‘covered agreements,’ and not international law more generally. ... A finding that a Member had not acted in ‘good faith’ would clearly and unambiguously exceed the mandate of dispute settlement panels and the Appellate Body ...¹⁸⁹

Members’ statements to the DSB are generally self-serving, and this is no exception, but in this case the US was correct.

2 Non-Violation Complaints

In the previous section, I queried the Appellate Body’s suggestion that WTO Tribunals may apply the principle of good faith to find that a Member has not acted in good faith independently of any WTO provision. At least one aspect of WTO law does seem to reflect the principle of good faith: the possibility of bringing ‘non-violation’ complaints. The main non-violation provisions are in art XXIII:1(b) of the *General Agreement on Tariffs and Trade* (‘GATT 1994’),¹⁹⁰ art XXIII:3 of the *General Agreement on Trade in Services* (‘GATS’)¹⁹¹ and art 26.1 of the *DSU*. Essentially, a Member may claim that another Member has ‘nullified or impaired’ benefits accruing to the complainant under the WTO agreements by applying a measure even if the measure does not violate those agreements.¹⁹²

In *Korea — Measures Affecting Government Procurement*, the Panel stated that ‘the non-violation remedy as it has developed in GATT/WTO jurisprudence should not be viewed in isolation from general principles of customary international law’,¹⁹³ apparently merging the categories of ‘general principles of law’ and ‘customary international law’ as reflected in ss 38(1)(c) and 38(1)(b) of the *Statute of the International Court of Justice* respectively. The Panel

¹⁸⁹ Ibid.

¹⁹⁰ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), annex 1A (*General Agreement on Tariffs and Trade*) 1867 UNTS 190.

¹⁹¹ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), annex 1B (*General Agreement on Trade in Services*) 1869 UNTS 183.

¹⁹² See generally Frieder Roessler and Petina Gappah, ‘A Re-Appraisal of Non-Violation Complaints under the WTO Dispute Settlement Procedures’ in Patrick Macrory et al (eds), *The World Trade Organization: Legal, Economic and Political Analysis* (2005) vol I, 1371; Thomas Cottier and Krista Schefer, ‘Non-Violation Complaints in WTO/GATT Dispute Settlement: Past, Present and Future’ in Ernst-Ulrich Petersmann (ed), *International Trade Law and the GATT/WTO Dispute Settlement System* (1997) 145.

¹⁹³ *Korea — Measures Affecting Government Procurement*, WTO Doc WT/DS163/R (1 May 2000) [7.93] (Report of the Panel).

explained this ‘non-violation remedy’ as follows:

the basic premise is that Members should not take actions, even those consistent with the letter of the treaty, which might serve to undermine the reasonable expectations of negotiating partners. This has traditionally arisen in the context of actions which might undermine the value of negotiated tariff concessions. In our view, this is a further development of the principle of *pacta sunt servanda* ... [which] is expressed in Article 26 of the *Vienna Convention*.¹⁹⁴

The Panel was correct that the non-violation complaint seems analogous to the requirement in international law that states perform their treaty obligations in good faith, at least according to the view that a state may breach this requirement without necessarily breaching the treaty obligations themselves. However, this alone seems insufficient to conclude that WTO Tribunals, in addressing non-violation complaints, may determine more generally whether a Member has acted in good faith. The question of whether a state has violated a treaty obligation is separate from the question of whether the state has acted in good faith (thus, a treaty violation does not necessarily mean an absence of good faith). Similarly, asking whether a non-violation complaint is made out is not the same as asking whether a Member has acted in good faith. The fact that a Member may have nullified or impaired benefits of another Member (whether or not it has also violated a WTO provision) does not necessarily mean that it has not acted in good faith.

The Panel seemed to recognise this. It went on to explain its view that ‘the customary rules of international law apply to the WTO treaties’¹⁹⁵ and, implicitly, that WTO Tribunals may apply those rules in WTO disputes and determine whether they have been breached. I take a narrower view of the extent to which principles of customary international law and general principles of law can underlie claims or constitute applicable law in WTO disputes. The Panel added:

while the overall burden of proof is on the complainant, we do not mean to introduce here a new requirement that a complainant affirmatively prove actual bad faith on the part of another Member. ... Rather, the affirmative proof should be that measures have been taken that frustrate the object and purpose of the treaty and the reasonably expected benefits that flow therefrom.¹⁹⁶

The Panel took the relationship between WTO law and international law even further, using its conclusion that non-violation complaints are an extension of *pacta sunt servanda* to justify the application of the *VCLT* rules on errors in treaty formation.¹⁹⁷ Ultimately, the Panel found that the US had not made out its non-violation claim.¹⁹⁸

This dispute did not proceed to the Appellate Body. Had it been appealed, there is little doubt that the Appellate Body would have chastised the Panel for failing to interpret the relevant non-violation provisions in the WTO agreements

¹⁹⁴ Ibid.

¹⁹⁵ Ibid [7.96].

¹⁹⁶ Ibid [7.99].

¹⁹⁷ Ibid [7.100]–[7.102], [7.123].

¹⁹⁸ Ibid [7.126].

in accordance with arts 31 and 32 of the *VCLT*. The Panel did fail in this regard. Although the principle of good faith in international law may have been relevant in interpreting the non-violation provisions, the Panel skipped the usual steps of text, context, and object and purpose in interpreting these provisions, instead overlaying the non-violation remedy with its understanding of *pacta sunt servanda* in international law. Not surprisingly, upon the DSB's adoption of the Panel report, several Members (including Korea) expressed concern regarding the Panel's handling of the non-violation claim.¹⁹⁹

3 General Exceptions and Abuse of Rights

In several cases, WTO Tribunals have relied on the principle of good faith in interpreting the general exceptions in the *GATT 1994* (art XX) and *GATS* (art XIV). These cases can be traced to *US — Shrimp*,²⁰⁰ where the Appellate Body made a fairly lengthy statement regarding good faith, particularly in relation to the chapeau of *GATT 1994* art XX, which states that the general exceptions in that provision are '[s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade'. The Appellate Body stated:

The chapeau of Article XX is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right 'impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say reasonably.' An abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting. Having said this, our task here is to interpret the language of the chapeau, seeking additional interpretative guidance, as appropriate, from the general principles of international law.²⁰¹

Several questions arise from this paragraph. The Appellate Body's characterisation of good faith as 'a general principle of law and a general principle of international law' is not entirely clear. Perhaps it can be regarded as viewing good faith as a general principle of law and a principle of customary international law, as I do. I also agree with the Appellate Body that *abus de droit* could be described as an application of the principle of good faith. In the last sentence of this paragraph, the Appellate Body makes clear that it is not applying *abus de droit* independently; rather, it is interpreting art XX of the *GATT 1994* taking into account this application of the principle of good faith. In adopting this approach, the Appellate Body relies on art 31(3)(c) of the *VCLT*, without

¹⁹⁹ DSB, *Minutes of Meeting Held on 19 June 2000*, WTO Doc WT/DSB/M/84 (24 July 2000) [57]–[59], [64], [69].

²⁰⁰ *US — Shrimp*, WTO Doc WT/DS58/AB/R, AB-1998-4 (12 October 1998) (Report of the Appellate Body).

²⁰¹ *Ibid* [158] (citations omitted).

explaining its apparent assumption that general principles of law and principles of customary international law are the same as rules of international law under art 31(3)(c). I consider that such principles may fall within art 31(3)(c) only to the extent that they are encompassed in relevant rules of international law.

The Appellate Body appeared to rely on the doctrine of *abus de droit* to support its earlier conclusion that

a balance must be struck between the *right* of a Member to invoke an exception under Article XX and the *duty* of that same Member to respect the treaty rights of the other Members. To permit one Member to abuse or misuse its right to invoke an exception would be effectively to allow that Member to degrade its own treaty obligations as well as to devalue the treaty rights of other Members.²⁰²

This description may correspond with the second category of abuse of rights listed earlier in this article, but it also appears to flow simply from the Appellate Body's interpretation of art XX of the *GATT 1994* in accordance with art 31(1) of the *VCLT*.

The Appellate Body applied this balancing requirement to the case at hand in determining whether the challenged US measure conformed to the requirements of the chapeau of art XX. This measure was a prohibition on the import of shrimp caught using technology that might adversely affect sea turtles unless the imports came from countries that were certified by the US as having (i) a fishing environment that did not pose a threat of incidental turtle capture; or (ii) a regulatory programme for the prevention of such capture comparable to that of the US and with an average rate of such capture comparable to that of US vessels.²⁰³ The Appellate Body found that the import ban was not justified under art XX, in part because the US failed

to engage the appellees, as well as other Members exporting shrimp to the United States, in serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles, before enforcing the import prohibition against the shrimp exports of those other Members.²⁰⁴

In a subsequent case under art 21.5 of the *DSU* regarding the consistency of measures that the US took to comply with the ruling in *US — Shrimp*, the Panel appeared to read the Appellate Body's discussion of the absence of negotiations as arising from its recognition in the same case of the principle of good faith and *abus de droit*. Relying on that discussion,²⁰⁵ the Panel concluded that the US was obliged to make 'serious good faith efforts'²⁰⁶ to negotiate an 'international agreement'²⁰⁷ relating to the protection of sea turtles 'before resorting to the type of unilateral measure currently in place'.²⁰⁸ The Panel found that the revised US

²⁰² Ibid [156] (emphases in original). See also [159].

²⁰³ Ibid [3]–[4].

²⁰⁴ Ibid [166].

²⁰⁵ *US — Shrimp (Article 21.5 — Malaysia)*, WTO Doc WT/DS58/RW (15 June 2001) [5.60] (Report of the Panel).

²⁰⁶ Ibid [5.67].

²⁰⁷ See, eg, *ibid* [5.73], [5.75].

²⁰⁸ *Ibid* [5.67].

measure was justified by art XX as long as the US continued to make ‘serious good faith efforts to reach a multilateral agreement’.²⁰⁹ The Appellate Body upheld the Panel’s finding that the revised US measure complied with the chapeau of art XX ‘in view of the serious, good faith efforts made by the United States to negotiate an international agreement’.²¹⁰

Although ‘good faith’ efforts to negotiate may be required to satisfy the chapeau of art XX in some circumstances, this should not be confused with the broader principle of good faith or the doctrine of *abus de droit*. The Appellate Body decisions in *US — Shrimp* and *US — Shrimp (Article 21.5 — Malaysia)* are better understood as imposing this requirement regarding negotiations as a result of their interpretation of art XX. Giving the Appellate Body the benefit of the doubt, its reasoning rested neither on the application of a substantive principle of good faith in international law or the doctrine of *abus de droit*, nor on the influence of such notions pursuant to art 31(3)(c) of the *VCLT*.

Similar issues arose more recently in *US — Gambling* in connection with the general exception provision in *GATS* art XIV. Like the Panel in *US — Shrimp (Article 21.5 — Malaysia)*, the Panel in *US — Gambling* read the Appellate Body’s reference to the principle of good faith and *abus de droit* in *US — Shrimp* as leading to the conclusion that the US had not met the requirements of the chapeau of *GATT 1994* art XX because it had negotiated with only some Members.²¹¹ The Panel found that the US restrictions on internet gambling that Antigua and Barbuda had challenged were not provisionally justified under *GATS* art XIV(a),²¹² in part because

in rejecting Antigua’s invitation to engage in bilateral or multilateral consultations and/or negotiations, the United States failed to pursue in good faith a course of action that could have been used by it to explore the possibility of finding a reasonably available WTO-consistent alternative.²¹³

The Appellate Body reversed this finding,²¹⁴ stating:

Engaging in consultations with Antigua, with a view to arriving at a negotiated settlement that achieves the same objectives as the challenged United States’ measures, was not an appropriate alternative for the Panel to consider because consultations are by definition a process, the results of which are uncertain and therefore not capable of comparison with the measures at issue in this case.²¹⁵

Leaving to one side the correctness of the Appellate Body’s decision in this dispute, its response to the Panel’s discussion of the importance of negotiations confirms that any requirement to negotiate in these circumstances must arise

²⁰⁹ *Ibid* [6.1(b)].

²¹⁰ *United States — Import Prohibition of Certain Shrimp and Shrimp Products (Recourse to Article 21.5 by Malaysia)*, WTO Doc WT/DS58/AB/RW, AB-2001-4 (22 October 2001) [134] (Report of the Appellate Body).

²¹¹ *US — Gambling*, WTO Doc WT/DS285/R (10 November 2004) [6.576] (Report of the Panel).

²¹² *Ibid* [6.535].

²¹³ *Ibid* [6.531].

²¹⁴ *US — Gambling*, WTO Doc WT/DS285/AB/R, AB-2005-1 (7 April 2005) [321] (Report of the Appellate Body).

²¹⁵ *Ibid* [317].

from the relevant provision itself (*GATS* art XIV(a)), and not from the incorporation of any broader principle of good faith or *abus de droit* under international law.

IV CONCLUSION

The nebulous nature of good faith as a principle in international law outside the WTO intensifies the difficulties associated with relying on any principle which is by definition unlikely to be spelled out in any complete, precise manner. Thus, Virally concludes that, 'in practice, this general principle of law has only marginal value as an autonomous source of rights and duties'.²¹⁶ That is not to say that good faith is meaningless or that it has no role in WTO disputes. Good faith can properly be regarded as a principle of WTO law, in particular through its reflection in several *DSU* provisions and its inclusion in the inherent jurisdiction of WTO Tribunals, in the form of estoppel. However, WTO Tribunals should exercise caution in using this principle as if it carried more weight than specific WTO provisions that might be based on similar rationales, such as those governing non-violation complaints, general exceptions, or Members' resort to the dispute settlement system. Whenever WTO Tribunals rely on good faith, whether to interpret WTO provisions or as an independent substantive principle, they should ensure they have a valid legal basis for doing so, and should identify and explain this basis in their reports. They should also take care to use the principle precisely, consistent with its meaning in international law. In particular, good faith should not be confused with due process.

WTO Tribunals have shown some reluctance to find that a Member has failed to act in good faith. At the same time, WTO Tribunals have sometimes been keen to leave open the possibility that they could make such a finding in an appropriate case. If a WTO tribunal were ever to find a Member had failed to act in good faith independent of any WTO provision, it would need a solid legal basis for doing so within its mandate as a judicial body and taking into account the relevant provisions of the *DSU*. I see none.

²¹⁶ Michael Virally, 'Review Essay: Good Faith in Public International Law' (1983) 77 *American Journal of International Law* 130, 133.