

Reviewing the Good Faith Principle of in International Contracts and Treaties by Emphasizing on Judicial Procedure

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ABSTRACT

The principle of the necessity of observing Good faith and fair behavior has extensive legal implications in the legal systems of the world, especially the systems of the legal group. This principle is explicitly recognized as one of the most important principles of contract law in many important international deeds, including the international trade agreements principles, the principles of European contract law, and the domestic law of some countries, such as Germany, Italy, France, and the United States and the parties to the contract are obliged to observe it in their business relations. The effects of this rule are so wide and mandatory that they are stated in two international documents, that at the present time on the basis of which many international trade relations are regulated. Despite the principle of freedom of contract, the parties cannot agree against this rule or even restrict its application. In addition to contract law and commercial code, Good faith is a general principle of the structure of international law, which is different from the system and process of domestic legal law and commercial law. Good faith, as one of the fundamental and general principles of international law, indicates the need for fairness, honesty, and reasonableness in international relations; the principle to protect the legitimate and reasonable interests and expectations of the parties to these relations, and in particular as a necessity in resolving international disputes. Some of the rules of international law, including the need to adhere to the covenant, staple, silence, and abuse of rights and negotiation, are based on Good faith. This study, by examining the relationship between goodness and the mentioned rules, finally concludes that although Good faith is not the exclusive source of obligations, it can be considered as a modifier, complementary, restrictive, and corrective of legal rules; it means that the observance of this principle by governments regulates the implementation of their rights and obligations in the international arena.

Keywords: Good faith, International Law, Necessity of the fulfillment of the Covenant, Judicial Procedure.

Introduction

“Good faith “ is considered as a way of resolving commercial disputes in international contracts through international arbitration and a peaceful way of resolving binding international disputes by judges elected by the parties in accordance with pre-determined rules, which is based on voluntary referral and respect for the law. Voluntary referral without Good faith is meaningless. Arbitration and interpretation are one of the techniques of international litigation (or judicial settlement), although, in the absolute sense, it differs from the judicial settlement in that the parties to the dispute are usually free to choose the arbitrators, and they determine to some extent the procedure and the applicable law, but like judicial settlement, arbitration and interpretation include the constituent elements of a binding decision called a “judgment.” “Good faith“ is a factor in the unification of international trade law, which seeks to establish uniform rules on international trade law and international treaties.

Good faith, the principle governing contract law and international law that is rooted in ethics and adapted from ancient Roman law, and now in the legal systems of many countries, both in the written law group and the customary law group, it is widely used, depending on the scope of application. The principle of Good faith, although it has a moral essence. (Qasemi-Hamed, 2008: 104) But today, it has moved from a moral adornment to a legal necessity and has passed from the period of compliments and disputes to the period of objective and practical influence, in such a way that it leads to expansion of the contract and obligations of the parties. (Jafarzadeh and Simaei Saraf, 2005: 137)

Good faith is one of the basic rules in the implementation of international treaties; it means that no country or international treaty organization should do anything to undermine the subject matter and purpose of the treaty. Also, according to this treaty, Good faith is among the indisputable principles and rules of interpretation of international treaties that the interpreters of these documents must observe (Ziaee Bigdeli, 2007: 117-208). On the other hand, the most serious objection to international law is that the international community lacks a strong enforcement mechanism for international obligations and treaties to ensure compliance with international law through these mechanisms. This argument is based on the premise that the administrative mandate has only one form, and that is the coercive administrative mandate. At the same time, it seems that guaranteeing the moral implementation and recourse to the principle of Good faith in the implementation of international obligations is very effective. Accordingly, in the present study, the principle of Good faith in international contracts and treaties is examined analytically-descriptively with an emphasis on judicial procedure.

Theoretical Foundations of Research

The legal concept of Good faith

Good faith is the fair and just act that the parties to a transaction are expected to do in dealing with each other, even with third parties who may enter into the transaction implicitly or in the future. Good faith requires each party to be fair and honest in the initial negotiations and to fulfill their obligations honestly and fairly when the contract is concluded, and also to demand the other party's obligation to fulfill its obligations based on fairness and accordingly acquire their rights as well. (Ahmadpour, 2010: 40).

Good faith is exercised as a general legal principle in a variety of areas, including the obligations of governments; Obligations such as “resolving disputes in Good faith, negotiating in Good faith, signing the treaty without prejudice to its purpose and subject matter, prior to entry into force, having Good faith in the implementation and interpretation of the treaty, as well as in exercising its rights and fulfilling any obligations arising from other sources.” (Alhawi Nazari and Mohammadi, 2015: 126-99).

The principle of Good faith in contract law

Good faith in the stage of concluding a contract is: “Observing the fair and honest behavior of the parties in the preliminary stages of negotiations and concluding a contract and And the lack of knowledge of the

issues that bring to mind the malice.” As it follows from the above definition, observing Good faith at the stage of concluding a contract is equal to not having the intention of deception, and this feature prohibits acts contrary to conscience and fairness. Good faith plays a key role in the negotiation phase of contracts: On the one hand, Good faith restricts a person's freedom to negotiate; A person is free to start, continue and end the negotiation, but the exercise of liberty must be accompanied by consideration of the rights and interests of the other party; therefore, if the negotiator starts the negotiation without serious intention, it is considered as lack of Good faith.

Special aspects of the principle of Good faith in international treaties

1-Good faith in negotiating international treaties

Negotiation is the preliminary stage and the beginning of concluding a treaty. At this stage, the demands and positions of the countries will be discussed in the presence of their representatives. In the initial stage, heads of state usually participate due to the lesser extent of the issues. On the other hand, attending these negotiations requires legal and professional knowledge. Therefore, this step is done by the representatives with the competence of the countries. Negotiators must be fully qualified. This is achieved through authorization (a document containing this authority). A power of attorney is a document that proves the full authority and representation of a person to negotiate. Of course, in special cases, this is an exception, and there is no need for authorization. (Ziaee Bigdeli, 2011: 69).

Conducting negotiations in Good faith is an international rule and, in some cases, a prerequisite for concluding a treaty or reaching an agreement. Some believe that strengthening the benchmark and Good faith index can ensure that the negotiating parties take action that opens the door to dialogue and negotiation. Negotiating in Good faith can mean in a way that is likely to lead to an agreement. In other words, it can be said that each party must negotiate with a sincere and genuine willingness and make serious efforts to reach common ground and reach an agreement. In fact, negotiating in Good faith is a common task based on the use of logical and reasonable negotiation measures and the existence of mutual intention to reach an agreement and resolve disputes. Regarding the importance of Good faith in negotiations, it has been said that this principle is the main aspect of the set of obligations in negotiations in international law.

Another issue that must be considered in the negotiations in compliance with the terms and conditions of the regulations; means that governments should not unjustifiably delay negotiating or accepting an agreement. Another element of negotiation with Good faith is that the parties are flexible and, in order to succeed, temporarily agree to a temporary suspension of their rights during the negotiations. The Court of Arbitration in the case of Lake Lanux has referred to this issue. “In order to negotiate in favorable and suitable conditions, the parties to the dispute must agree to suspend the full exercise of their rights during the negotiation period (Arbitral Tribunal, Lake Lanoux Arbitration (France v. Spain), 1957, p. 28

2. Good intentions in interpreting international treaties

One of the main causes of international disputes is the differences between countries over the interpretation of treaties. The competent authorities of interpretation must base their argument on the minimum fixed rules, which are called the principles and rules of interpretation. These principles and rules are a useful and practical guide for interpreters. One of these principles is Good faith, which is one of the most important principles of international law. This principle governs all areas of international relations, especially in the interpretation of treaties (Vaseghi and Kozehgar, 2014: 1). Article 31 of the 1969 Vienna Convention (adopted on 23.05.1969) on the Law of Treaties recognizes the general rule of interpretation of treaties in Good faith: “A treaty will be interpreted in good faith and in accordance with the ordinary meaning of the terms to be given in the context of the terms and purpose of the treaty.”

3. Good faith in the Implementation of International Treaties

Any treaty is valid once it has entered into force and entered into the international legal system and must be enforced by its parties. Therefore, one of the characteristics of any legal rule, including international treaties, is that they are binding on the parties (Ziaee Bigdeli, 2011: 128). The basis of such a requirement is the same fundamental principle as the “principle of fidelity to the covenant” and the “principle of Good faith, “which has long been accepted in all legal systems. Failure to accept these principles will disrupt the international relations law of states and international law in general. For this reason, the principle of fidelity to the covenant and the “principle of Good faith, along with the obligation to implement treaties in international law, has advanced to the point that non-performance or violation of that treaty, may give rise to international liability of the country or relevant international organization. (Ziaee Bigdeli, 2011: 129)

Article 26 of the 1969 Vienna Convention (adopted on 23.05.1969) deals with the role of Good faith in the implementation of international treaties and provides that “Any binding treaty is binding on the parties and must be performed by them in Good faith.”

4- Good faith in fulfilling implicit obligations

Another aspect of good faith in international law is the reliance on “implied obligations” on the principle of “Good faith.” Principles of Commercial Contracts 1994, the product of the International Institute for the Unidroit¹, also in Article (2-5) considers implicit obligations as part of the provisions of the contract. This article provides: “Implicit obligations of the nature of the contract or its purpose; the procedures established between the parties and commercial customs; Good faith; they come from being reasonable and conventional.

The official interpretation of this article states that the non-specification of the contract to an implicit obligation may be due to the clarity and obviousness of that obligation according to the nature of the obligation or the purpose of the contract; alternatively, these obligations may be so clear in the ordinary practice between the parties or the prevailing business practice that they do not need to be specified in the contract.

The importance and place of the principle of Good faith in various branches of international law

1. The importance and application of Good faith in human rights

The government's withdrawal from human rights treaties certainly has serious consequences for victims of human rights abuses. By sacrificing victims' right to access international institutions, they lost the last chance to protect their rights. Indeed, systems of judicial control over human rights treaties play a central role in the international obligations of states. Of course, it is true that, as a rule, a state's withdrawal from a pillar treaty does not preclude it. However, treaties do not remain in a vacuum. Some general laws control the most important stages of the continuation of treaties, from negotiation to the termination. Such laws are not only anchored in the unilateral will of governments. Rather, there are specific public interests that affect the law of treaties by imposing additional obligations.

Some of these obligations arise from the rule of Good faith, which obliges the parties to consider the interests of the other parties to the contract. In fact, even the most difficult voluntary approach believes that there can be no international cooperation without maintaining the mutual trust of the parties to the law.

2. Good faith in accepting new governments in the United Nations and in the international law of succession of states

¹Unidroit

The principle of Good faith in fulfilling the obligations of the successor government is a very important issue that Iranian jurists have not yet addressed. Undoubtedly, it is a historical fact that some states will split, unite, disintegrate, and borders will move. In these changes, a vital issue that even Aristotle was concerned with in the fourth century BC is the stability of legal obligations following the change of political identities (Oscar Schachter, 1993, pp. 253-4). Usually, the identity of the state is recognized with the rights and obligations of a state in international law, and therefore the identity of states is of fundamental importance in international law. International law is based on the premise that the state continues despite some changes, such as changes in government, constitution, territory, and population (Crawford, 2006, p. 668). But the premise of the continuity of governments is that the identity of the state does not change. Today, the issue of continuity of obligations in the succession of states and the necessity of fulfilling the obligations of the previous government by the successor government has been identified by the International Law Commission in two conventions on the issue of succession of states. (Vienna in 1978 and 1983. Vienna Convention of 1978: article 2, point 1, letter b)

3. Good faith in International Environmental Law and Environmental Obligations

The importance of the principle of Good faith in international environmental law and environmental treaties becomes clear when we know that most environmental treaties are non-binding in nature, and if governments do not implement treaties in good faith, international environmental law will be a hollow law in practice. Fortunately, changes in governments' commitments to protect the environment in international law, which were initially outlined in the Declarations as a simple recommendation on the need to protect the environment. With the support of international judicial authorities, the principle of Good faith has been realized. Prohibition of harmful use of land is one of the principles of Good faith in international law.

4. The location and importance of Good faith in the law of war

The place and importance of Good faith in the law of war becomes clear when we recall the words of the famous jurist, Hersch Lattapack, in 1952: "If international law is the most unstable part of the law, war law is definitely the most unstable part of international law." (Cassese 2009:291)

According to customary international law, commanders can use any means of communication to establish non-hostile relations with the enemy, but such communication must be in Good faith. Therefore, we see that the procedures show that this communication may be mediated by individuals as *Parlementaires*² or other methods such as telephone and radio. The envoy belongs to the party to the conflict, which is allowed to communicate with the other party to the conflict and therefore has immunity. The traditional method of presenting oneself as a messenger by raising a white flag while advancing is still valid. In addition, the parties to the conflict rely on a third party to facilitate communication, such as the sponsoring government or a neutral and impartial humanitarian organization as its replacement; in particular, the International Committee of the Red Cross, as well as an international organization or peacekeepers is a well-known practice. Each of the warring parties may, during international armed conflict, designate a neutral country as a designated "supporting country" and introduce it to the other party. The role of the sponsoring country in the so-called treaty is stated in more detail than in the 1929 treaty (Articles 8, 10, 11, 23; paragraph 3, 60, paragraph 4, 62, paragraph 1, 63, 65, 66, paragraph 1, 69, 100, 126 and 129).

5. The location and importance of Good faith in the law of international responsibility

The application of the principle of Good faith in international law of responsibility arises from the opposite point of this principle, i.e., malice. Failure to comply with this principle, along with the principle of good neighborliness, will result in the international responsibility of governments. Governments have a duty to protect their people from threats beyond their competence, such as climate change, even if they are not directly responsible for climate change. The Oregon case in the Netherlands is an important case in

²*Parlementaires*

point because The Netherlands Court of Appeal and the Supreme Court, citing international human rights law, held the Dutch government responsible for fulfilling the obligations necessary to prevent dangerous climate change. However, the Netherlands' commitments did not yet include the Paris Agreement (United Nations Environment Programme, 2017, p.15). The principle of good neighborliness is strongly dependent on the principle of Good faith. And if the principle of Good faith is not at work, the principle of good neighborliness is nothing more than a hollow concept. Today, the principle of good neighborliness and the principle of Good faith and duty set forth in Article 7 of the Declaration of the Rights and Duties of States (to ensure that conditions prevail in their territory where nothing threatens international peace and security) Given the spread of extremism and the issue of terrorism, and unfortunately the irresponsible use of some territories by some governments to support, shelter, educate and train terrorists, the principle of Good faith must be more significant than ever.

6.The location and importance of Good faith in diplomatic law

Good faith is the basis for accepting diplomats and ambassadors in countries. And a diplomat or ambassador who does not have Good faith is recognized as a “Persona non grata”³and fired. An unfavorable element is a term in international law that may be used by a government against citizens of other governments, especially diplomats. A person who is considered an undesirable element does not have the right to enter or reside in the host country. The receiving State may expel an element deemed undesirable without the need for prosecution and trial.

7.The location and importance of Good faith in the law of settlement of international disputes

It is the most common, the easiest, the oldest, the most common, the most practical, the most useful, and the first step in resolving international disputes. (Ziaee Bigdeli, 2007: 504; Fangolan, 2010: 590; Omidi, 2009: 218) Negotiation means the convergence of positions through dialogue and compromise (Omidi, 2009: 218). Negotiation has played a crucial role in the peaceful settlement of major international disputes, including the reduction of the arms race between the (former) Soviet Union and the United States and the end of the Cold War. It is written that US Secretary of State George Schultz, during the Ronald Reagan era, asked Gorbachev what do you know as the turning point in the history of the beginning of the Cold War? He responds that there was no doubt that the Rikavik talks were in the Icelandic capital, where the two leaders reached a full understanding in good faith and confidence to reduce the arms race. (Ardalan, 2009: 8) UN agencies regularly call for Good faith negotiations to resolve specific disputes. On January 12, 2001, for example, the Security Council called on Yugoslavia and Croatia to negotiate in Good faith their dispute over the Prevlaka Island.

Conclusion

The observance of obligations by any country is inherently and in many respects dependent on the very general principle of extra-legal “Good faith”. The principle is to assess the conditions under which countries meet their obligations. According to Article 18 of the Convention on the Law of Treaties, the implementation of the principle of Good faith means that no Contracting State or international organization shall take any action that would detract from the object and purpose of the treaty. This concept may seem broad and vague because it does not sufficiently define its reciprocal status as “malice”. The implementation of the principle of Good faith should be considered as actions that prevent any fraud against the law or trickery and the need for loyalty and proper fulfillment of obligations. Today, the principle of Good faith has risen to the institutional level, which has governed the totality of international relations and has gained special prestige and prominence in the law of treaties. In fact, in the light of the principle of Good faith, countries have accepted that international law is a right, and in most cases, they follow it. However, there is the fact that international law is violated without being punished for violating it, the guarantee of the

³*Persona non grata.*

implementation of international law is getting stronger. Enforcement of the Statute of the International Criminal Court is, in fact, a sign of the maturity of the international legal system. It seems that in general, Good faith, as a general legal and fundamental principle, can be given a limiting role in international law, especially in the field of treaty law; In other words, the observance of this principle by governments regulates the implementation and enforcement of their rights and obligations in the international arena. Good faith overshadows the entire international legal order, and in particular in relation to States; apart from the treaties and other agreements of this actor and its international subject, it governs the general implementation of their obligations under international law. The principle of Good faith upholds the legitimate expectations that form the legal relationship between two or more law-abiding entities and plays this role through important international rules and principles such as the need to live up to one's promise, staple, silence, and abuse of rights. International jurisprudence, in particular the rulings of the International Court of Justice, has confirmed that each of these rules is based on Good faith. The role of the principle of Good faith in the two areas of international treaty law and negotiation is very prominent and decisive in resolving disputes. In treaty law, this principle covers a wide range of behaviors and issues, from the simple belief that one must be faithful to a covenant to the interpretation of a treaty. In the field of negotiation, the purpose of negotiations is to follow the agreed-upon procedure for conducting the negotiation process, temporarily suspending their rights during the negotiation period and the desire and effort to reach an agreement, the elements and pillars of goodness in negotiations. The final point is that so far in international jurisprudence, breach of Good faith has not been considered a cause for breach of the treaty.

References

- Ahmadpour, Ayub (2010), Civil Law 1, Textbook of Bahonar University Law School.
- Ardalan, Asad (2009), Methods of Resolving International Disputes, Textbook, Islamic Azad University, Maragheh Branch.
- Bahrami Ahmadi, Hamid (1998), Abuse of Right, Comparative Study, Tehran: Information.
- Bahrami, Bahram (2003), Applied Business Law, First Edition, Negah Bineh.
- Berridge, G. R. (2001), Machiavelli: human nature, good faith, and diplomacy, *Review of International Studies* (2001), 27, 539–556 Copyright © British International Studies Association.
- Cassese, Antonio (2009), International Law, translated by Hossein Sharifi Tarazkoochi, second edition, Tehran, Mizan Publishing.
- Crawford (2006), The Creation of States in International Law (2nd edn, Oxford University Press) 415.
- Ebrahimi, Yahya (2009), A Comparative Study of the Concept and Effects of Good faith in Concluding, Interpreting and Enforcing Contracts, *International Law Journal, Journal of the Center for International Legal Affairs, Presidential Issue 26, No. 26, No. 41: 90-61.*
- Elahivi, Nazari, Hamid (2013), the place of general legal principles in the rulings of the International Court of Justice, *Law Quarterly: Journal of the Faculty of Law and Political Science, Vol. 4: 55-37.*
- Fan Glan, Gerhard (2010), An Introduction to Public International Law, Volume 1, translated by Davood Aghaei, Tehran: Mizan, Ch4.
- Ghasemi, Ali (2013) International Responsibility of States for the Expulsion of Foreigners with Emphasis on an Iran-US Arbitration Tribunal, *Quarterly Journal of Judicial Perspectives, No. 207:68 to 240*
- Hajipour, Morteza (2016), The Limiting Role of Good faith in Negotiations, *Private Law Research, Article 4, Volume 4, Number 14: 81-108.*
- Jafarzadeh, Mir Ghasem, and Simai Sarraf, Hossein (2005); Good faith in International Contracts: A Comprehensive Rule or Exceptional Rule, *Legal Research, No. 13.*
- Kamyar (Karkan), Mohammad Reza (1997), Selection of Judgments of Legal Courts, First Edition, Tehran, Lawyer Publishing.
- Musazadeh, Reza (2008), Admission of New Members in the UN Procedure, *Law Quarterly, Faculty of Law and Political Science, Volume 38, Number 3: 295-271.*
- Omidi, Ali (2009), International Law from Theory to Practice, Mizan Publishing, Tehran, Mizan Publishing.
- Oscar Schachter, "State Succession: The Once and Future Law," (1993) 33 *Virginia Journal of International Law* 253, 253-4.
- Qasemi Hamed, Abbas (1995); Overview of the theory of the obligation to provide information in the contract from the perspective of French law, *Journal of the Bar Association, pp. 164 and 165 (p. 10 new period): 104.*
- Safaei, Seyed Hossein et al. (2008) , International Credit Law with Comparative Study, University of Tehran Press.
- Shahidi, Mehdi (2004), Principles of Contracts and Obligations, Volume II, Tehran, Majd.
- Skini, Rabia and Niazi Shahraki, Reza (2007), The Concept of the Principle of Good faith and Fair Behavior, *Witness Quarterly, No. 10: 3-21.*
- United Nations Environment Programme (2017), "The Status of Climate Change Litigation," A Global Review, ISBN No: 978-92-807-3656-4, Job No: DEL/2110/NA. Publishing Services Section, Nairobi, ISO 14001:2004-certified. D1 No: 17-02953/100.
- Vaseghi, Mohsen and Hassan Koozegar (2014), Good faith in the Interpretation of International Treaties, Tehran: Majd, Ch1.
- Ziaee Bigdeli, Mohammad Reza (2006), Law of International Treaties, Ganj-e-Danesh Library Publishing, Fourth Edition.
- Ziaei Bigdeli, Mohammad Reza (2007), Public International Law, Tehran, Ganj-e-Danesh, 29th edition..