GOOD FAITH

1. Notion

The principle of good faith requires parties to a transaction to deal honestly and fairly with each other, to represent their motives and purposes truthfully, and to refrain from taking unfair advantage that might result from a literal and unintended interpretation of the agreement between them (→ Interpretation in International Law). The concept figures prominently in the → Vienna Convention on the Law of Treaties, which by virtue of its careful draftsmanship and wide ratification has assumed an authoritative place in international law on questions relating to the interpretation and enforcement of → treaties. Art. 31(1) of that Convention provides: “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 the light of its object and purpose.” These references to context and purpose demonstrate that the substance of the principle of good faith is the negation of unintended and literal interpretations of words that might result in one of the parties gaining an unfair or unjust advantage over another party.

A secondary notion of good faith in the context of explicit agreements pertains to the duties of signatories to a treaty prior to ratification. The early rule of international law to the effect that States had an obligation to ratify treaties that their diplomatic agents had signed has been replaced since the 18th century by the concept of discretionary ratification (→ Treaties, Conclusion and Entry into Force). This change came about as a result of the growth of parliamentary institutions within States that adopted constitutional checks and balances against the acts of the executive branch or its diplomatic agents abroad (→ Diplomatic Agents and Missions). Yet the new concept of discretionary ratification carried over the old notion to the extent that the executive branch, having signed the treaty through its agents, now had an obligation to make every effort in good faith to obtain the consent of the sovereign, and not to act in the interim period in such a way as to prejudice the unperfected rights of the signatories to the treaty. Art. 18 of the Vienna Convention on the Law of Treaties, while not explicitly referring to the principle of good faith, summarizes its substance by providing that a signatory, prior to ratification, “is obliged to refrain from acts which would defeat the object and purpose” of the treaty.

Finally, the principle of good faith may be said to apply, apart from treaties or other agreements, to the general performance of a State’s obligations under international law. According to a significant
resolution of the → United Nations General Assembly passed in 1970, entitled “Declaration on Principles of International Law concerning Friendly Relations and Co-operation Among States”, the principle is proclaimed that “[e]very State has the duty to fulfil in good faith its obligations under the generally recognized principles and rules of international law” (→ Friendly Relations Resolution).

2. Historical Evolution of the Concept

In the early days of legal systems, including the international system, there was a strong tendency to interpret documents literally. The words of agreements, especially solemn international treaties or letters written on parchment and elaborately sealed, were invested with an almost magical literal power; this is illustrated by the historical fact that in the early days of contract, if the paper upon which a contract was written was itself lost or destroyed, the contract was regarded as dissolved. Thus if one party performed its obligation under a written contract and then lost (or was forcibly deprived of) the paper upon which the contract was written, the other party was entirely relieved of its reciprocal obligation.

Strict and literal construction of the earliest treaties often led to unintended and unjust consequences to one or more parties. As a result, the treaties began to include clauses designed to deal with questions of interpretation and performance. Early treaties concluded between kings of England and foreign monarchs contained separate clauses that the treaties were meant to be bonae fidei negotia – that they were to be kept in good faith. As time went on, these clauses gradually were reduced in size and prominence because the principle of good faith was increasingly understood to be implicit in the treaties. Today it is clear that there need be no explicit mention of the principle of good faith in a treaty because, unless that principle were specifically negated, it is an implicit provision of all treaties.

The principle of good faith is rooted in a → natural law conception of → customary international law. The earliest systematic writers on international law, including Grotius, Pufendorf, and Suarez, conceived of international law as founded in natural law, by which they meant the dictates of right reason (→ History of the Law of Nations: Ancient Times to 1648). Natural law thus conceived was a constraint upon a nation to act in a manner that takes into account the reasonable expectations and needs of other nations in the international community. Under this view, a treaty should be implemented in a way that fulfils the purposes of the joint undertaking, including the exchange of reciprocal obligations. Natural law would exclude the exploitation of an advantage deriving from a literal but mutually unintended reading of a treaty or other international agreement.

The principle of good faith thus owes its present authoritative status to the natural law foundations of general international law, to customary international law as derived from the articulation of that custom in numerous treaties, and to its explicit encapsulation in the aforementioned Art. 31(1) of the Vienna Convention on the Law of Treaties. Significantly, with respect to a member State’s specific obligations to the → United Nations, Art. 2(2) of the → United Nations Charter explicitly provides that those obligations shall be fulfilled in good faith.

3. Relation to Abuse of Rights

Good faith may be said to cover the somewhat narrower doctrine of → “abuse of rights”, which holds that a State may not exercise its international rights for the sole purpose of causing injury, nor fictitiously to mask an illegal act or to evade an obligation. While these specifications would indeed appear to follow from the principle of good faith, perhaps the better view is that there is no need for an independent, even if subsidiary, concept of abuse of rights. For if a State in the exercise of its rights were to cause injury to the entitlements of another State, then, upon analysis, the first State has not in fact exercised a “right” under international law. Rather, it has violated a rule of international law that obliged it not to cause a legally cognizable injury to another State.

4. Application

The → International Court of Justice, in two important recent cases, had occasion to consider the substantive impact of the principle of good faith. In the → North Sea Continental Shelf Case, the Court based its judgment on the general precepts of justice and good faith. However, good faith in those cases required the application of traditional claims to title over territory, and thus
the continental shelf was delimited according to the natural prolongation of its land territory. The Court did not elevate good faith to an overriding substantive principle which would supplant title-based claims in favour of more equitable approaches such as the use of the equidistance principle.

But in the Nuclear Tests Cases of 1974, the Court found that a series of unilateral declarations by France concerning the French intention to abstain from future atmospheric nuclear tests in the area of the South Pacific became legally binding upon France (Unilateral Acts in International Law). The Court based its conclusion in this regard solely upon the basic principle of good faith. However, it is not clear whether the international community regarded the French declarations as creating a binding obligation, nor whether France intended herself to be bound by them. Accordingly, the question of good faith would not apply, since a nation may retract a declaration that neither it nor other nations considered binding when it was made. Indeed, Australia and New Zealand, the other parties to the Nuclear Tests Cases, argued that the French unilateral declarations did not give them the same degree of security as would a judgment on the merits that the French nuclear atmospheric tests were illegal.

5. Significance

The judgment in the Nuclear Tests Cases indicates that the principle of good faith may be taking on new significance in international law. By utilizing that principle to give binding effect to a nation’s unilateral declaration, the ICJ has extended the concept of good faith to governmental statements which in the past were considered retractable and not giving rise to binding commitments (cf. Estoppel). In general, the uses to which the principle of good faith now seem to be applied include statements made publicly, or in negotiations, or in the course of a judicial proceeding. Nations must be more careful than ever before of what they say, because they may be held to it. This expanded role for the concept of good faith indeed appears to be consistent with its roots in a natural law conception of international law. Nations ought to be able to rely upon the pronouncement of other nations, as well as to have their own declarations taken seriously and with the expectation of legal enforceability.