THE SCHEME OF OPEN TEXTURE OF LEGAL LANGUAGE: TOWARDS FINDING A SOLUTION FOR AMBIGUOUS CASES?

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Certain legal terms are only capable of illustration and lack a precise definition. Definitions provide clarity but where the definition is not exhaustive there is uncertainty regarding its ambit. H.L.A Hart has attributed this indeterminacy to the 'open texture' of certain legal terminology. According to him, every term applies to a standard set of circumstances contemplated by the Legislator and in unforeseen situations giving rise to 'hard cases' the Court has to resolve this ambiguity. The first part of this paper analyses this aspect of Hart's theory of open texture of language and delves into the criticisms put forth by scholars such as Dworkin and Fuller. The term good faith is used as an illustration to demonstrate the application of open texture of language. Good faith is a general principle of public international law and its meaning in the context of international trade law is the focus of this paper. An attempt has been made to analyse cases involving interpretation of good faith arising before the Dispute Settlement Body of the WTO using Hart's interpretation of open texture of language to discern whether the theory finds application in the area of WTO law.

I. INTRODUCTION

The concept of open texture of language has ramifications for the interpretation of legal language beyond the confines of the apparently perceivable fact situations to which the given legal terminology applies. Towards this end, H.L.A. Hart's writings are pivotal for the understanding of this concept. Hart says that a general term in natural language has a central core of determinate meaning and a surrounding penumbra of indeterminate meaning. There is no ambiguity in

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determining the outcome of such cases where the standard meaning applies. In cases where the facts fall into the word's core meaning, the only task that remains is the identification of clear instances of the classificatory heads for the purposes of categorisation. On the other hand, there is vagueness surrounding the application of the rule to the borderline cases leading to a situation of indeterminacy. This, as per Hart, is attributable to the open texture of the language so used.[1] According to Hart, this indeterminacy enables application of rules to situations that the legislators did not foresee. He states that the judges act as surrogate legislators in such cases where the indeterminacy prevails. This is in contrast to the opinion of the Formalists and the Realists. The former argue that law always provides for adequate grounds for deciding any legal question, whereas the latter claim that law never provides any answers. In my opinion, Hart's position, juxtaposed between two contrasting opinions, appears to strike a middle ground.

The analysis of open texture has been criticised by Lon Fuller and Dworkin who have proposed alternate approaches for cases involving the 'penumbra'. Interestingly, the analysis of these eminent scholars is based on the understanding of the core and penumbra. Their arguments will be covered in substantial detail in the course of the paper. Hart anticipated that the problems of the open texture will arise in different spheres of legal interpretation because there are fact situations that are continually thrown up by the nature of human invention. In my opinion, the interpretation of good faith under specific provisions of WTO agreements provides ample opportunity to study interpretation of terms which are likely to give rise to difficult cases.

World Trade Law is a branch of Public International Law under which good faith is recognised as a general principle of law.[2] Good faith has not been defined exhaustively and in this respect remains open-ended.[3] Taking cognizance of the same, Kolb has classified good faith into two broad categories[4] - the intrinsic principle of good faith and the related concepts such as *equity*, *pacta sunt servanda* and prohibition *abus de droit*.[5] In order to understand the classificatory ambit of

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[1] Hart's conception of open texture of language can be traced back to Waismann's ideas relating to open texture of concepts. According to Waismann legal indeterminacy provides for linguistic developments of a language accommodating new discoveries. He cites the example of the development in the scope of number theory from positive integers to complex numbers.

[2] Article 38 of the Statute of the ICJ enumerates the sources of international law and recognises general principles of law as a recognised source of law. The good faith has been recognised as a general principle of law -under international law and was recognised even in context of the Permanent Court of International Justice, which was the predecessor of the ICJ.

[3] Attributes such as reasonableness, fairness have been associated with the interpretation of the phrase 'good faith'. The issue still remains whether these terms fully describe the phrase.

[4] MARION PANIZZON, GOOD FAITH IN THE JURISPRUDENCE OF THE WTO, 49 (2006).

[5] This paper will limit the discussion of the corollary principles of good faith to the principle of *abus de droit*.

good faith, I will start with the model proposed by Hart and apply it to two situations to discern its applicability while determining the so called 'hard cases'.[6] The two situations will be dealt with in the course of this paper.

II. OPEN TEXTURE OF LEGAL LANGUAGE- A SOLUTION FOR AMBIGUOUS CASES?

The open texture analysis is couched in the debate on the legal positivists' interpretation of law as indicated in the writings of H.L.A Hart.[7] Hart has highlighted some features of Legal Positivism (*hereinafter* LP), which need some recalling before dealing with the open texture theory and its criticisms. He has supported LP by and large, while providing his analysis on the existing theories. Austin, Bentham and Gray have all been concerned with the fundamental question of what law is, and in attempting to answer this, have drawn a separation between law and morality. For Austin, the existence of law is one thing and its merit or demerit is another. Bentham also suggests this separation of law from morality. Hart clarifies what the Utilitarians meant by separation of the law from morality.[8] He submits that there is an intersection between law and morality and through explicit legal provisions, moral principles can be brought into the legal system. However, it does not follow that merely because a rule violates moral standards, it is not a rule of law or vice versa. The distinction between 'is' and 'ought' has been a major ground for the debate between the Positivists and the advocates of Natural Law. The word 'ought' represents a standard of criticism and one among them is a moral one. All such standards of determination need not be moral.

The critics of this theory then raise questions as to what LP has to say regarding certain hard or penumbral cases. It is in response to such criticism that Hart elaborates his theory of open texture of language. Hart says that every term has a central core of determinate meaning that can be applied without any difficulty and a surrounding penumbra. Hart appears to mean that a general term is true of those items to which it clearly applies. It is, however, false of those items beyond the penumbra to which it clearly does not apply. Further, it is neither true nor false of penumbral items.[9] Hart explains the problem of these fringe cases using the example of a prohibition on the entry of vehicles in a park. The interpretation of the term vehicle is in question here. It is clear from the term vehicle that the ban does not apply to entry of food items such sandwiches into the park. Automobiles are also a part of the core meaning of the term vehicle. However, the use of bicycles within the park which are not run on motor engines,

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[6] Hard cases are those that involve interpretation of the indeterminacy in the term i.e. the cases dealing with the penumbra.

[7] H.L.A. HART, POSITIVISM AND THE SEPARATION OF LAW AND MORALS, 606-615 (1958).

[8] *Id.*, 598-599.

[9] Lyons, *Open Texture and the Possibility of Legal Interpretation* (Boston University School of Law Working Paper Series, Index, 2).

toy cars etc. will be problematic. These problematic cases arise because they don't fit into the core meaning of the term. In these penumbral cases, according to Hart the judge becomes the surrogate legislator. According to the Utilitarian tradition, the Judges in such cases apply new rules that are in effect the natural elaboration of existing rules. Hart defends his position by stating that the judge in such cases develop further rules and while doing so, he or she has to display judicial virtues. One of the important characteristics is the use of a generally acceptable principle as the reasoned basis of the decision.

Lon Fuller disagrees with Hart and responds to his arguments presenting counters to the application of the open texture theory. According to him, a natural extension of Hart's recognition of hard cases should have led to the acceptance of deploying moral norms to decide such cases. He further counters this with an elementary theory of interpretation. In case of legal language, meaning has to be assigned to a sentence, paragraph, a page or the whole text. According to Fuller, the judge must be placed in the position of those who drafted the rule to know what they ought to be. As per his argument, what the rule is has to be judged in light of this ought.[10] He also questions whether it is possible to interpret a word in a statute without knowing the overarching aim of the statute. He provides an interesting example citing that this cannot be the case. An incomplete statutory provision such as all the improvements must be reported promptly, will involve the interpretation of improvement as per Hart's theory. The open texture theory seems to suggest that even this fragment is sufficient since the word improvement in its ordinary sense applies to standard instances. To deal intelligently with the problems of the penumbra the rest of the statute will have to be known (to appreciate the context).[11] Further he points out that the problem of interpretation will not end with meaning of improvement, the other words such as reported and promptly will also have to be taken into account. These words form the string of thought that cannot be disregarded during the interpretation.

Lyons also criticises this theory: he pursues the same vehicle prohibition example and points out that according to Hart, the judge in the cases of the penumbra would have to first determine that the case at hand is neither prohibited nor permitted by the above mentioned rule and then step in to fill the gap acting as a surrogate legislator applying the new rule retrospectively.[12] This according to Lyons is not the approach followed by the judges in most cases. They may express their difficulty in applying the law to the given fact situations but they will never come to the conclusion that the rule neither permits nor prohibits the alleged action or inaction as the case may be. As Baker points out, Hart's theory of open texture of language which is based on other theories as mentioned in the

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[10] LON FULLER, POSITIVISM AND FIDELITY TO LAW- A REPLY TO PROFESSOR HART 663 (1958).

[11] The term improvement will assume different meaning depending on the context. For example the term would have a different connotation if it were required to be reported by a nurse in a hospital from that the scenario where the statute dealt with town planning.

[12] LYONS, *supra* note 9.

introductory part of this paper need not be applicable to legal language. This defect is described by Fuller as the 'common usage theory'. Dworkin has further generalised that LP has provided a theory of hard cases. According to him, parties have pre-determined rights even in cases involving vague terms which need further elucidation. These need to be applied to the fringe cases and the judges cannot make new rules retrospectively.

The theory of open texture of language will be used to analyse method of resolving hard cases arising before the Dispute Settlement Body (*hereinafter* DSB) within the World Trade Organisation (*hereinafter* WTO). The application of a vague concept such as good faith, in the context of law governing international economic relations between countries, will be the emphasis of the following part of the present paper.

III. GOOD FAITH IN WTO AGREEMENTS: REMEDY FOR INDETERMINACY

The WTO Treaty is essentially a treaty governing economic relations between member countries.[13] Since the theory of open texture has been presented by Hart, a positivist, the preliminary question might arise as to whether Public International Law is law at all. According to John Gardner, LP as a branch of legal philosophy only requires a source for the legal validity of a law.[14] Merits or demerits either of the norm or its source are irrelevant considerations for its validity. This proposition, though not shared by the all the positivists, suffices for the purposes of this paper.[15]

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[13] World Trade Law is a branch of Public International Law.

[14] John Gardner, *Legal Positivism: 5 1/2 Myths*, 46 Am. J. Juris. 199-201 (2001). The reader is reminded that the abbreviation LP, here is used in a different sense from that used by Gardner. Gardner uses the abbreviation to distinguish between two kinds of Legal Positivism. According to him, what he calls LP might consider the merits of the source of a norm while determining the legal validity of a norm. That is, LP, while not being concerned about the merits of the norm itself for the determination of legal validity, may concern itself with questions of merits of the source in determining legal validity. The other version of positivism, which he calls LP* does not concern itself with the merits of the norm including the merits of its source in determining legal validity. According to him LP may say that a norm is legally valid because it comes from Rex and Rex is a noble king. LP* would consider only the first of these facts – that is, the norm comes from Rex – and not the second – that is, Rex is a noble king, in determining the validity of the norm. In this paper, I am concerned with that version of legal positivism that Gardner calls LP*. Therefore, my use of the abbreviation LP denotes what Gardner calls LP* and not what he calls LP.

[15] However, my attempt to demonstrate that world trade law by implication is in fact of law according to LP should not be construed as a pre-requisite for applying the open texture of legal language to hard cases arising under this legal system.

I will attempt to demonstrate the role of good faith in international trade law by first highlighting its significance in international law as such. In Public International Law, the sources of law are laid down in Article 38 of the statute of the International Court of Justice (*hereinafter* ICJ). The ICJ has in fact acknowledged that good faith is one of the basic principles governing the creation and performance of legal obligations but it does not create any obligations where none exist.[16] This observation is important in the context of treaty obligations good faith can only be invoked alongside a substantive provision. The term has not been defined and scholars such as Cheng have considered it capable of illustration but not definition.[17] Good faith includes honesty, fairness and reasonableness. It is the vagueness of the term that makes it dependent on meaning imparted to it through courts.

A brief overview of the rules of dispute settlement mechanism under the WTO will be imperative in understanding the two cases involving the interpretation of good faith. Domestic legal systems in common law countries follow the principle of precedents whereby the law applied by the judiciary has to be applied in similar cases arising in the future as well. However the Panel or the Appellate Body (*hereinafter* AB) is not bound by its previous decisions. Adopted reports are considered by subsequent panels because they create legitimate expectations among Members when similar disputes arise and are considered.[18] Article 3.2 of the Dispute Settlement Understanding (*hereinafter* DSU) permits recourse to customary rules of interpretation. The primary rule in this regard is that treaties should be given their ordinary meaning in the context. As will be observed, this is not always possible because the terms themselves may be vague or ambiguous.[19] The supplementary rule of interpretation provides for recourse to preparatory work in such situations.

The term good faith has found its way into many provisions of the text of different WTO agreements. In this part, I will analyse only two references to good faith. The first one is an express mention in the provision which will help elucidate whether the term has a 'standard meaning'. Article 3.10 of the DSU imposes a duty on the parties to engage in dispute settlement procedures in good faith in an effort to resolve the dispute. Though the ordinary meaning of good faith is informed by good faith as a general principle of international law to mean fairness and reasonableness, in the specific context of Article 3.10, the phrase has been understood to mean procedural due process.[20] In *Canada-*

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[16] Nicaragua v. Honduras, [1988] ICJ Rep. 69, 105.

[17] Observations of Bin Cheng as cited in Andrew Mitchell, *Good Faith in WTO Dispute Settlement*, 7 MEL. J. INT'L LAW 344 (2006).

[18] David Palmeter & Petros Mavroidis, *The WTO Legal System: Sources of Law*, 92 AM. J. INT'L L. 401 (1998).

[19] *See generally*, Articles 31 and 32 of the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

[20] *See generally*, Panel Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products* (Brazil), WT/DS259 (July 11, 2003).

Aircraft, the Appellate Body held that the good faith requirement in Article 3.10 requires a fair exercise of members' due process rights, such as the right to consultations, right to object, right to withdraw notice of appeal and the right to request information.[21] It is interesting to note that in *US-Gambling*, the AB read this provision to imply that the defence should provide the legal basis for its argument at the earliest.[22] The trend that emerges from these decisions is that the interpretation of the phrase good faith is not only in tune with its meaning as a general principle but also facilitates procedural rights such as due process. These decisions reflect a certain meaning that has been assigned to the phrase. To that extent the theory of open texture seems to be tenable that words have a standard or core meaning. However the criticisms cannot be ignored. The specific meaning that the term assumes in the context of the treaty usage cannot be understood through its common usage. This hints at one of the defects that Fuller had pointed out to the open texture theory. This illustration, however, is a simple one where the term has been laid down in the agreement itself and the AB has merely applied it in context of dispute settlement between the parties. Its application in light of that provision, lends some degree of certainty to its meaning. The context, therefore, is extremely important for purposes of interpretation. Words by themselves can have more than one meaning.

The term good faith has various manifestations such as legitimate expectations and the principle of *abus de droit*. The AB resorted to the use of the latter principle to justify its interpretation of the general exceptions provision under Article XX of the GATT.[23] In order to meet the standards of Article XX, two tests are required to be met- the substantive provisions of Article XX and the requirements mentioned in the introductory clause of Article XX (also referred to as the *Chapeau*). The brief facts of *US-Shrimp Turtle case*[24] are as follows: United States had imposed a ban on import of Shrimp from those countries which were not in compliance with the requirements of section 609 of the US Public Laws Act.[25] The complaining countries (which were India, Malaysia, Pakistan and Thailand) were not provided with the same compliance period as was provided to the Caribbean countries. The US sought defence under Article XX of the GATT and the Panel went into the two-step requirement focussing on the *Chapeau* first, without looking at the substantive policy requirements. However, the interpretation

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[21] Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft* (Brazil), ¶ 190, WT/DS70/AB/R (August 2, 1999).

[22] *See generally,* Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (Antigua and Barbuda), WT/DS285/AB/R (April 7, 2005).

[23] Article XX provides justification for certain trade discriminatory objectives provided they are pursuing policy measures mentioned thereunder.

[24] Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (India, Malaysia, Pakistan, Thailand), WT/DS58/AB/R (October 12, 1998) [*hereinafter US-Shrimp*]. For a brief analysis of the case *see*, John Knox, *Judicial Resolution of Conflicts between Trade and the Environment*, 28 HARV. ENV. L.R. 36 (2004).

[25] The ban was imposed as an environmental measure to protect the sea turtles which were being harmed in the process.

of the provision is such that the substantive provisions have to be viewed first and then the application of measure has to be tested under the Chapeau. The *Chapeau* mandates that such protective measures should not result in unjustifiable, arbitrary or disguised restriction to trade. The Panel ruled in favour of the complainants and held that the United States had acted in a unilateral manner and had not conducted negotiations with the complainants before imposing its provisions on their imports.

The United States appealed this decision of the Panel and the AB in order to rectify the decision came up with the principle of *abus de droit*. The AB held that the United States measure was provisionally justified under Article XX(g) which dealt with conservation of exhaustible natural resource but was hit by the Chapeau. Though the decision might appear to be the same as that of the Panel, the AB corrected the sequence of analysis under Article XX.

In this regard the AB remarked that the *Chapeau* provision was in place in order to ensure that there should be no discrimination in the application of such a protective measure justified under the substantive provisions of Article XX. In interpreting the terms of discrimination of the *Chapeau* the AB went a step further and stated that the *Chapeau* was nothing but an expression of good faith and that the principle of *abus de droit* was an application of the same.[26] The prohibition of *abus de droit* imposes substantive limitations upon the domestic measures provisionally justified under a specific exemption.[27] Measure and its application must be flexible as to its aims. The AB found that the prohibition of *abus de droit* imposed the principle of due process and fairness on the United States which it was required to comply with. [28] The AB went on to detail that the principle seeks to further the delicate balance of rights and duties of member countries. This in essence is the basic objective of the *Chapeau,* which seeks to ensure that member countries do not use Article XX as a disguised means to circumvent from their general obligation of non-discrimination under the other provisions of the GATT. I find two interesting points here: first, that the principle of good faith which is not explicitly mentioned in Article XX was applied to the case and second, that it was fitted to the context. The hard case if it is to be so assumed was the question of interpretation of different forms of discrimination as referred to in the *Chapeau* to which the AB justified its opinion (since it varied from the Panel's) on the basis of the prohibition of *abus de droit.*

IV. CONCLUSION

The open texture of language as a theory of interpretation is laudable to the extent that it finds that words have a standard meaning which becomes hazy in difficult cases. I agree with the theory to the extent that the judges even in the

[26] *US-Shrimp, supra* note 24 ¶ 158.

[27] PANIZZON, *supra* note 22, 91.

[28] *US-Shrimp, supra* note 24 ¶ 181.

hard cases (in most of the legal systems), act as surrogate legislators only the extent of extension of existing legal rule to the new fact situation. This cannot have retrospective application in the world trade law because of the nature of dispute resolution system which does not incorporate the doctrine of precedent. However the theory is not always appropriate, as many of the critics of the theory have pointed out. The interpretation of open-ended terms such as good faith is context driven. Good faith, as a general principle of international law means fairness, reasonableness. These terms are also abstract concepts. Further, in the realm of world trade law it is not possible to look at the term in isolation and discern meaning as was found with the interpretation of good faith in Article 3.1, as discussed above in the context of *US-Gambling* case.

As I look at it, terms such as good faith as intrinsically value laden and require analysis into merit or demerit of the action or measure taken (i.e. analysis must be context based). In the second instance, the term was imported into a provision to provide a standard of evaluation of discrimination. This may be called a hard situation where the AB thought it necessary to apply good faith as a generally accepted principle to support its interpretation. Therefore, it is my opinion that the theory of open texture is not practically applicable in all legal systems as a means of interpretation.