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Equity and Equitable Principles in the World Trade Organization

Addressing conflicts and overlaps
between the WTO and other regimes

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Equity and Equitable Principles in the World Trade Organization

There has been little comprehensive treatment of the role of equity and equitable principles in WTO Dispute Settlement Body (DSB) proceedings. This lack is especially important in World Trade Organization (WTO) disputes where normative overlaps and conflicts occur between the multilateral trade regime and other specialized international regimes. This book analyses whether and how equity and equitable principles can be employed as juridical tools in the legal reasoning of judges and lawyers in WTO disputes. It especially focuses on challenges posed by fragmentation in international law, and asks how equity and equitable principles constitute a 'toolbox' capable of addressing these in WTO dispute settlement within this context.

Anastasios Gourgourinis provides a coherent methodology for addressing conflicts and overlaps between WTO and non-WTO norms in the context of DSB proceedings. As a work which explores both the potential role of equity and equitable principles in dispute settlement, and the effects of fragmentation in international law, this book will be of great interest and use to researchers and students in international trade and economic law, public international law, and international political economics.

Anastasios Gourgourinis is Lecturer in Public International Law, specializing in International Economic Law, at the Faculty of Law of the National and Kapodistrian University of Athens. He is also a research fellow at the Academy of Athens, and a practising advocate with the Athens Bar in Greece.

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Foreword

This ambitious work is a *tour de force* that explores the manner in which the WTO Dispute Settlement Body (DSB) utilises equity and equitable principles to bridge procedural and substantive normative conflict between WTO norms and other norms of international law. It originates from a PhD thesis which we had the pleasure of jointly supervising, and displays the scholarly depth and breadth evident there as well as Dr Gourgourinis's continued original thinking on fundamental questions regarding the role of equity and equitable principles in providing solutions to problems arising from normative fragmentation in international law. In particular, Dr Gourgourinis's analysis contributes to our greater understanding of WTO case law and the processes of judicial reasoning by the DSB in employing equity and equitable principles as judicial tools for the resolution of normative conflict between international law and WTO law. Moving beyond conventional WTO scholarship that focuses on the interpretative power of Articles 31-33 of the Vienna Convention on the Law of Treaties, this work highlights the continuing pertinence of fundamental questions such as the applicable law and the role of extraneous legal norms (including equity) in the WTO judicial process. It challenges the prevailing understanding in WTO scholarship when a conflict of norms exists, suggesting instead that the DSB has been much more creative in drawing on equity to create procedural rights of due process (together with good faith) and substantive rights of international responsibility for non-violation of WTO obligations under Article XXIII.1(b) GATT. The breadth of this work is impressive, ranging from the fragmentation ('diversity') of international law and the status, role and function of equity at international law to in-depth analysis of judicial reasoning across a wide range of diverse WTO panel and Appellate Body reports. This is a rich tapestry indeed, with much for the general international lawyer and the trade lawyer alike to appreciate.

Fiona Smith and Catherine Redgwell,
3 July 2015

Preface

This book is an updated version of the PhD thesis I defended at University College London in January 2010. It reflects the law as it stood, to the best of the author's knowledge, on 1 March 2015, unless otherwise indicated. Certain of the arguments have appeared in: 'Delineating the Normativity of Equity in International Law', 11 *ICLR* (2009), pp. 327–347; 'Equity in International Law Revisited (with Special Reference to the Fragmentation of International Law)', 103 *ASIL Proceedings* (2009), pp. 79–82; '*Lex Specialis* in WTO and Investment Protection Law', 53 *GYIL* (2010), pp. 579–622; 'General/Particular International Law and Primary/Secondary Rules: Unitary Terminology of a Fragmented System', 22 *EJIL* (2011), pp. 993–1026, and 'The Distinction between Interpretation and Application of Norms in International Adjudication', 2 *JIDS* (2011), pp. 31–57.

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I was fortunate to have had the opportunity of benefiting from the expertise of several academics and international lawyers, before and after my return to Greece in 2010, who assisted me, in various ways, to develop, test and improve my arguments during the various stages. I must make individual mention to Professor Emmanuel Roucounas, Professor Antonis Bredimas, Professor Angelos Yokaris, Judge Linos-Alexander Sicilianos, Professor Photeini Pazartzis, Professor Maria Gavouneli, Dr. Georges Kyriakopoulos, as well as Professor Haris Pamboukis, Professor Georges Abi-Saab, Professor Gabrielle Marceau, Professor Joanne Scott, Professor Joost Pauwelyn, Professor Stelios Perrakis, Professor Andrew Lang, Professor Federico Ortino, Professor Georgio Sacerdoti, Professor Lena Divani, Professor Ioannis Lianos, Professor Achilles Skordas, and Dr. Eleni Micha. I am particularly indebted to Professor Antonis Bredimas, who first taught me how and why international economic law is one of the fastest-growing fields of public international law, for his unwavering support and guidance, as well as to Professor Emmanuel Roucounas, for his open-hearted and steady support and for giving me the valuable opportunity to work under his supervision as a Researcher at the Academy of Athens since my return to Greece.

I also gratefully acknowledge the generous financial support I received from the Greek State Scholarship Foundation ('IKY') as a Scholar in International Economic Law, and I further express my gratitude to my scholarship supervisor, Professor Christos Gortsos. In addition, I am especially thankful to the UCL Faculty of Laws for funding my research trips to Washington D.C. and Geneva.

Moreover, I owe my deepest gratitude to all of my friends. They stood by me during this entire process, in various ways. *Inter alios*, and without wanting to exclude anyone, I would like to particularly mention Nikolaos Argyriou, Dimitra Boulougouri, Thomas Dimitriou, Leonidas Dimou, Nikolaos Floros, Konstantinos Hassiotis, Fotis Karkanis, Emmanouil Kasotakis, Georgios Krassas-Nikolaidis, Ioanna Messini, Kyriaki (Korina) Raptopoulou, Andreas Themelis, Vassiliki-Maria Tzatzaki and Aspasia Zirou.

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But above all, I am deeply grateful to my wife Eygnosia and our son Gerasimos, my source of inspiration and aspiration in life, to whom this book is dedicated; their love, support and patience guide me in good times and bad times, and always remind of the things that *do* matter. Had it not been for them, the completion of this book would certainly not have materialized.

Abbreviations

Abbreviation

Full title

AJCL	American Journal of Comparative Law
AJIL	American Journal of International Law
AIDI	Annuaire de l'Institut de Droit International
AFDI	Annuaire Français de Droit International
Alta. L. Rev	Alberta Law Review
Am. U. Int'l L. Rev	American University International Law Review
Am. U. L. Rev	American University Law Review
ASIL Proceedings	American Society of International Law Proceedings
Ann. A. A. A.	Annuaire de l'Association des auditeurs et anciens auditeurs de l'Académie de droit international de La Haye
AJLP	Australian Journal of Legal Philosophy
Austl. T. S.	Australian Treaty Series
Aust YBIL	Australian Yearbook of International Law
Berkeley J. Int'l L.	Berkeley Journal of International Law
BIT	Bilateral Investment Treaty
Brooklyn J. Int'l L.	Brooklyn Journal of International Law
BYBIL	British Yearbook of International Law
CJICL	Cambridge Journal of International and Comparative Law
Can. Y.B. Int. L.	Canadian Yearbook of International Law
Cardozo L.Rev	Cardozo Law Review
Chicago JIL	Chicago Journal of International Law
Chinese JIL	Chinese Journal of International Law
Colo. J. Int'l Env't'l. L. & Pol'y	Colorado Journal of International Environmental Law and Policy
Colum. J. Transnat'l L.	Columbia Journal of Transnational Law
Colum. L. Rev	Columbia Law Review
Cornell Int'l L. J.	Cornell International Law Journal
Cornell L. Q.	Cornell Law Quarterly
Denv. J. Int'l L. & Pol'y	Denver Journal of International Law and Policy

Duke J. Comp. & Int'l L.	Duke Journal of Comparative and International Law
DSR	World Trade Organization, <i>Dispute Settlement Reports</i> , Cambridge: Cambridge University Press
ECHR	European Court of Human Rights
ECJ	European Court of Justice
EJIL	European Journal of International Law
EJLS	European Journal of Legal Studies
Emory Int'l L. Rev.	Emory International Law Review
EPIL	R. Bernhardt (ed.), <i>Encyclopedia of Public International Law</i> , Amsterdam: North-Holland
Fordham Int'l L. J.	Fordham International Law Journal
FYBIL	Finnish Yearbook of International Law
Ga. J. Int'l & Comp. L.	Georgia Journal of International and Comparative Law
Geo. Int'l Env't'l L. Rev.	Georgetown International Environmental Law Review
Geo. J. Int'l L.	Georgetown Journal of International Law
Geo. Wash. J. Int'l L. & Econ.	George Washington Journal of International Law and Economics
Geo. Wash. Int'l L. Rev.	George Washington International Law Review
Grotius Society	Transactions of the Grotius Society
GYIL	German Yearbook of International Law
Hague Y.B. Int'l L.	Hague Yearbook of International Law
Harv. I. L. J.	Harvard International Law Journal
Harv. L. Rev.	Harvard Law Review
Hastings L. J.	Hastings Law Journal
H. R. L. Rev.	Human Rights Law Review
I/A Court H.R.	Inter-American Court of Human Rights
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICSID	International Centre for the Settlement of Investment Disputes
ICSID. Rev.- FILJ	ICSID Review: Foreign Investment Law Journal
IDI	Institut de Droit International
ILA	International Law Association
ILC	International Law Commission
ILM	International Legal Materials
Indian J. Int'l L.	Indian Journal of International Law
Indian Y.B. Int'l Aff.	Indian year book of international affairs
Ind. Int'l & Comp. L. Rev.	Indiana International & Comparative Law Review
ICLR (formerly: Int'l L.F. D. Int'l)	International Community Law Review (formerly: International Law Forum Du Droit International)
Int. Cr. L. R.	International Criminal Law Review

Int'l J. Marine & Coastal L.	International Journal of Marine and Coastal Law
Int'l Law.	International Lawyer
Int'l Org. L. Rev.	International Organizations Law Review
Iran-US CTR	Iran-United States Claims Tribunal Reports
Is. L. Rev.	Israel Law Review
IYIL	Italian Yearbook of International Law
JEL	Journal of Environmental Law
JIDS	Journal of International Dispute Settlement
J. Int'l Arb.	Journal of International Arbitration
J. Priv. Int. L.	Journal of Private International Law
J. Small & Emerging Bus. L.	Journal of Small and Emerging Business Law
JIEL	Journal of International Economic Law
J. Transnat'l L. & Pol'y	Journal of Transnational Law & Policy
JWIT	The Journal of World Investment & Trade (formerly: The Journal of World Investment)
KGZ	Kokusaiho gaiko zasshi (The Journal of International Law and Diplomacy)
Ky. L. J.	Kentucky Law Journal
Law & Soc'y Rev.	Law and Society Review
LCIA	London Court of International Arbitration
LCP	Law and Contemporary Problems
LJIL	Leiden Journal of International Law
L.I.E.I.	Legal Issues of Economic Integration
Loy. L. A. L. Rev.	Loyola of Los Angeles Law Review
L. Q. Rev.	Law Quarterly Review
L.P.I.C.T.	The Law & Practice of International Courts and Tribunals
Manchester J. Int'l Econ. L.	Manchester Journal of International Economic Law
Max Planck YUNL	Max Planck Yearbook of United Nations Law
McGill L. J.	McGill Law Journal
Mich. J. Int'l L.	Michigan Journal of International Law
MJIL	Melbourne Journal of International Law
MPEPIL online edition	R. Wolfrum (ed.), <i>Max Planck Encyclopedia of Public International Law (MPEPIL) online edition</i> . Available online at http://www.mpepil.com .
Nat. Res. J.	Natural Resources Journal
NILR	Netherlands International Law Review
Nord. J. Intl. L.	Nordic Journal of International Law (formerly: Nordisk Tidsskrift for International Ret)
Northwest U. L. Rev.	Northwestern University Law Review
NYIL	Netherlands Yearbook of International Law

N.Y.U. J. Int'l Law & Pol.	New York University Journal of International Law and Politics
N.Y.U. L. Q. Rev.	New York University Law Quarterly Review
Ocean Dev.v & Int'l L.	Ocean Development & International Law
Ohio St.J.Disp.Res.	Ohio State Journal on Dispute Resolution
ÖzöRV	Österreichische Zeitschrift für öffentliches Recht und Völkerrecht
Pace Int'l L. Rev.	Pace International Law Review
P.C.A.	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
O.J.	Official Journal of the European Union
QUTLJJ	Queensland University of Technology Law and Justice Journal
R.A.D.I.C.	Revue Africaine de Droit International et Comparé
R.B.D.I.	Revue Belge de Droit International
RCADI	Recueil de Cours de l'Académie de la Haye de Droit International
Rev. Int. St.	Revue of International Studies
Rev. Droit Int'l Sciences Dipl. & Politiques	Revue de droit international, de sciences diplomatiques et politiques
R.G.D.I.P.	Revue Générale de Droit International Public
Rev. Hellenique Droit Int'l	Revue Hellénique de Droit International
RIAA	Reports of International Arbitral Awards
SALJ	South African Law Journal
SCC	Stockholm Chamber of Commerce
Schweiz. Jahrbuch Int'les Recht	Schweizerisches Jahrbuch für internationales Recht
Stan. J. Int'l L.	Stanford Journal of International Law
Stan. L. Rev.	Stanford Law Review
Stat. L. R.	Statute Law Review
TDM	Transnational Dispute Management
Temp. Int'l & Comp. L. J.	Temple International and Comparative Law Journal
Tex. Int'l L. J.	Texas International Law Journal
TS	Treaty Series
Tul. J. Int'l & Comp. L.	Tulane Journal of International and Comparative Law
Tul. L. Rev.	Tulane Law Review
U. Toronto Fac. L. Rev.	University of Toronto Faculty of Law Review
UNTS	United Nations Treaty Series
U. Chi. L. Rev.	University of Chicago Law Review
U. Miami L Rev.	University of Miami Law Review

U.N.S.W. L. J.	University of New South Wales law journal
Va. J. Int'l L.	Virginia Journal of International Law
Vand. J. Transnat'l L.	Vanderbilt Journal of Transnational Law
Va. L. Rev.	Virginia Law Review
Victoria U. Wellington L. Rev.	Victoria University at Wellington Law Review
Widener L. Symp. J.	Widener Law Symposium Journal
WTR	World Trade Review
YbILC	Yearbook of the International Law Commission
Y.B.W.A.	The Yearbook of World Affairs
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

List of ICJ and PCIJ judgments, orders & advisory opinions cited, and their abbreviations

Short case title	Full case title and citation
<i>Aegean Sea Continental Shelf</i> case	<i>Aegean Sea Continental Shelf (Greece v Turkey)</i> , Judgment, ICJ Reports (1978)
<i>Ambatielos</i> case	<i>Ambatielos case (Jurisdiction) (Greece v United Kingdom)</i> , Preliminary Objection, Judgment, ICJ Reports (1952)
<i>Application of the Convention on Racial Discrimination</i> case	<i>Case Concerning the Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)</i> , Request for the Indication of Provisional Measures, Order, ICJ Reports (2009)
<i>Application of the Genocide Convention</i> case	<i>Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)</i> , Judgment, ICJ Reports (2007)
<i>Armed Activities</i> case (<i>Congo v Uganda</i>)	<i>Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)</i> , Judgment, 19 December 2005, ICJ Reports (2005)
<i>Arbitral Award</i> case	<i>Case Concerning the Arbitral Award made by the King of Spain on 23 December 1906 (Honduras v Nicaragua)</i> , Judgment, ICJ Reports (1960)
<i>Arbitral Award of 31 July 1989</i> case	<i>Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)</i> , Judgment, ICJ Reports (1991)
<i>Asylum</i> case	<i>Colombian-Peruvian asylum case (Colombia/Peru)</i> , Judgment, ICJ Reports (1950)
<i>Austro-German Customs Regime</i> Advisory Opinion	<i>Customs Regime Between Germany and Austria</i> , Advisory Opinion, PCIJ, Series A/B, No. 41 (1931)
<i>Avena</i> case	<i>Avena and Other Mexican Nationals (Mexico v United States of America)</i> , Judgment, ICJ Reports (2004)

<i>Barcelona Traction case</i> (Second Phase)	<i>Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)</i> , Judgment, ICJ Reports (1970)
<i>Barcelona Traction case</i> (Preliminary Objections)	<i>Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)</i> , Preliminary Objections, Judgment, ICJ Reports (1964)
<i>Borchgrave case</i>	<i>The Borchgrave case (Belgium v Spain)</i> , Preliminary Objections, Judgment, PCIJ, Series A/B., No. 72 (1937)
<i>Border and Transborder Armed Actions case</i>	<i>Case Concerning the Border and Transborder Armed Actions (Nicaragua/Honduras)</i> , Jurisdiction and Admissibility, Judgment, ICJ Reports (1988)
<i>Certain Phosphate Lands in Nauru</i>	<i>Certain Phosphate Lands in Nauru (Nauru v Australia)</i> , Preliminary Objections, Judgment, ICJ Reports (1992)
<i>Chorzow Factory case</i> (Jurisdiction)	<i>Case concerning the Factory at Chorzow</i> , Claim for indemnity – Jurisdiction, PCIJ, Series A., No. 9 (1927)
<i>Chorzow Factory case</i> (Merits)	<i>Case concerning the Factory at Chorzow</i> , Claim for Indemnity – Merits, PCIJ, Series A., No. 13 (1928)
<i>Continental Shelf case</i> (Tunisia/Libya)	<i>Continental Shelf (Tunisia/Libyan Arab Jamahiriya)</i> , Judgment, ICJ Reports (1982)
<i>Continental Shelf case</i> (Tunisia/Libya) (Application to Intervene)	<i>Continental Shelf (Tunisia/Libyan Arab Jamahiriya)</i> , Application to Intervene, Judgment, ICJ Reports (1981)
<i>Continental Shelf case</i> (Libya/Malta)	<i>Continental Shelf (Libyan Arab Jamahiriya/Malta)</i> , Judgment, ICJ Reports (1985)
<i>Continental Shelf case</i> (Libya/Malta) (Application to Intervene)	<i>Continental Shelf (Libyan Arab Jamahiriya/Malta)</i> , Application to Intervene, Judgment, ICJ Reports (1984)
<i>Corfu Channel case</i>	<i>Corfu Channel case (United Kingdom v Albania)</i> , Judgment, ICJ Reports (1949)
<i>Danzig Advisory Opinion</i>	<i>Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory</i> , Advisory Opinion, PCIJ, Ser. A./B., No. 44 (1933)
<i>Diplomatic and Consular Staff case</i>	<i>Case concerning the United States Diplomatic and Consular Staff in Tehran</i> , Judgment, ICJ Reports (1980)
<i>Effect of Awards of the U.N. Administrative Tribunal Advisory Opinion</i>	<i>Effect of Awards of Compensation Made by the United Nations Administrative Tribunal</i> , Advisory Opinion, ICJ Reports (1954)
<i>Eastern Greenland case</i>	<i>Legal Status of Eastern Greenland (Denmark v Norway)</i> , Judgment, PCIJ, Ser. A./B., No. 53 (1933)
<i>Electricity Company of Sofia and Bulgaria case</i>	<i>Electricity Company of Sofia and Bulgaria</i> , Judgment, PCIJ, Series A/B, No. 77 (1939)