**Equity and Equitable Principles in the World Trade Organization: Addressing conflicts and overlaps between the WTO and other regimes**. By Anastasios Gourgourinis. Abingdon: Routledge, 2016. £90.00 ISBN 9780415715485, 284pp.

The WTO and its law is a system of balance and contradictions. On the one hand, it matches a comparatively detailed set of legal obligations with startling gaps in the covered agreements – explicitly as in Art X General Agreement on Trade in Services which mandated further negotiations,[[1]](#footnote-1) implicitly as regards standard of review where it was understood that members would return to discuss the appropriate standard between the applicable Article 11 of the Dispute Settlement Understanding (‘DSU’) or the more deferential Art 17.6 Anti-Dumping Agreement,[[2]](#footnote-2) or accidentally such as in Art 2.1 Agreement on Safeguards where the text is ‘deficient’, mandating an economic test which cannot be fulfilled without further implying a number of assumptions into the economic analysis.[[3]](#footnote-3) On the other hand, WTO law is relatively self-contained in that it includes the legal apparatus for rule-creation, rule-elaboration, and rule-interpretation and has been (to date) almost exclusively focussed on regulating matters which fall under its trade mandate – and yet, the influence of trade and trade regulation is wide and deep, drawing the attention of interest groups from many other areas of international law, most notably environmental, human, investment, and labour rights.

It is in this context, between detailed legal texts and inevitable *lacunae*, regulatory isolation and interconnection, that Gourgourinis’s monograph is situated. In *Equity and Equitable Principles in the World Trade Organization* the author puts forward an approach for resolving conflicts or overlaps between legal regimes by reinvigorating the analysis of equity in international law and then demonstrating how it might be used within the WTO. As such, the focus of the book is centred squarely within the fragmentation debate in international law generally, and the ‘trade and’ debates in WTO law more specifically. Clearly, this is well-trodden ground. Worryingly for the reader, this is a debate where little progress has been made in spite of the abundant literature, and most importantly, a debate where the underlying existential challenge of fragmentation has not materialised; for all the questions about conflicts, in practice the *Kadi*, *Lauder, Micula* and *Southern Bluefin Tuna* sagas constitute rare exceptions to the norm.[[4]](#footnote-4) This is not to say that this topic needs no discussion, but that academe’s focus has been out of all proportion to its actual effect.[[5]](#footnote-5) What then can Gourgourinis’ contribution add to this debate?

A simplified version of Gourgourinis’ argument runs as follows: (1) equity serves a number of purposes, one of which is to avoid or resolve conflicts between norms; (2) equity is expressed through the traditional ‘sources’ (treaty, custom, general principles of law, judicial decisions, and scholarly teachings); and (3) nothing in WTO law precludes organs of the Dispute Settlement Body (that is, panels and the Appellate Body) from applying ‘non-WTO’ law - which includes equity and equitable principles – to resolve normative conflicts.

Each of these claims is made with careful consideration and close analysis of the jurisprudence of international tribunals across the board. For example, in Chapter 1 the author provides a comprehensive overview of equity’s origins and context in international law (pp 17-26) and then the different ways in which it functions and can be characterised, acting as an interpretative aid, to fill gaps, or as a trump (*infra, praeter,* and *contra legem* respectively) both *stricto sensu* and *lato sensu* (pp 26-39). In each instance, the author draws clear and reasoned distinctions within each, offering what is essentially a dissection of the normative framework of equity that borders on typology. Importantly, he identifies the ways in which equity is found in norms that meet the ‘positive law tests’, which is to say, not only as a general principle of international law, but also through treaty or custom. This process of tying principles to positive rules or principles says much of the author’s project. The author is relentlessly focussed on tying the application of equity and equitable principles to the sources of international law and thus implicitly (and at times explicitly) to give panels the legitimate (i.e. on the basis of positive law) grounds to apply equity in a wider way than might otherwise be customary (p 4).

In doing so, we are offered an account of equity that encompasses a great number of norms, including those within treaties that are ‘infused’ by equity (p 119ff). Thus equity is routed in specific and identifiable positive rules, swallowing a great number of norms by identifying their underlying equitable nature (these include a smörgåsbord of rules and principles, from *abus du droit* to proportionality).

In Chapter 3, for example, the author identifies a wide range of instances where equity and equitable principles are (in his view) already applied within the WTO by identifying a number of treaty-based examples where equitable principles have been applied by panels and the Appellate Body through the covered agreements (eg, pp 96-109), or used to fill gaps (eg, pp 109-113) within them (in particular, the DSU). Equity, in Gourgourinis’ view, is *already* used to amend the application of a provision, fill in gaps, or counter the otherwise application of a rule that would result in an unacceptable result (in both procedural and substantive areas). While acknowledging that other explanations could account for the identification of equity in WTO decisions (such as the acceptance of *amicus* briefs), in particular noting the possible use of inherent or implied powers, these are rejected in favour of equity. This is in part because it can be rooted within positive international law as understood here (eg, pp 108, 133-134), but also because (in the author’s view) equity provides a more intellectually consistent explanation of DSB practice in these areas.[[6]](#footnote-6) These two trends – a focus on justification through claiming identification of *lex lata*, and a desire for intellectual order within the legal system – run through the argumentation in the book. As we shall return to, this has great merit but also begs questions of the proposed solutions’ practical applicability within the WTO.

In making his argument, each step of Gourgourinis’ analysis is meticulously set out and rarely is the reader expected to take anything for granted. This is both a strength and weakness. There is no questioning Gourgourinis’ knowledge and technical skill (not only in WTO law but in international law generally) yet there are steps of the argument which are of questionable utility. That WTO law constitutes part of international law is almost entirely unquestioned by commentators, WTO bodies,[[7]](#footnote-7) or other international organizations.[[8]](#footnote-8) This claim does not require two pages and 12 footnotes (pp 8-9). That panels and the Appellate Body constitute international tribunals the author himself acknowledges ‘is largely accepted’ (p 11), yet we are treated to five heavily-footnoted pages making this point (pp 10-14). It may seem churlish to identify such examples when the author’s objective is to provide a watertight position and defend against fundamental critiques, yet it matters because space is not unlimited and the best of the author’s ideas are given less opportunity to be explored exactly because so much analysis is dedicated to answering questions that could be skipped.

And there is much innovation here: Chapter 4 provides an account of ‘normative parallelism’ and ‘normative conflict’ which is quite different to comparable accounts. Here the author distinguishes ‘genuine normative conflicts’ from ‘conflicting obligations of a given State’ and ‘inherent normative conflicts’ (pp 178-9). It is a conceptually dense method of identifying conflicts: we are told that a true normative conflict exists where ‘each [norm’s] final application would lead to a different, if not opposite, juridical result, so that, in effect, alternative application as the result of the resolution of the normative conflicts constitutes essentially an implicit choice among potential judicial outcomes of the dispute.’ (p 175) The structure of this definition is closely tied to processes of judicial decision-making, and of making claims within the judicial process: ‘genuinely conflicting claims are essentially expressive of the invocation of conflicting norms’ (p 176).

By framing the definition of conflicts in this way, the author is able to subsequently discuss the use of equity in conflict avoidance/resolution beyond strict legal conflicts hitherto understood. This is a bold move, seeking to support conceptions of legitimacy and fairness within the WTO legal order and international law more widely by allowing equity to play a role in more than narrow conflicts and moving away from the use of Article 31(3)(C) of the Vienna Convention of the Law of Treaties as a ‘panacea’.[[9]](#footnote-9) Hiding under the focus on positive law and doctrinal analysis as indicative of *lex lata* lies a bold argument that seeks to reshape the way in which WTO law can be applied. Somewhat sadly, its application in only one subsequent chapter, on equity’s role as a ‘negative catalyst’ permitting panels and the Appellate Body to respond to potential conflicts, feels brief by comparison to the earlier dissections in the book. This is felt more acutely as the consequences of the author’s positions are key.

For example, the author suggests that ‘[t]he overarching aim of this book is to demonstrate that equity and equitable principles constitute a judicial tool available to panels and the Appellate Body when they are confronted with problems posed by the normative fragmentation of international law.’[[10]](#footnote-10) Yet the difficulty here is that it is incumbent upon panels and the Appellate Body to consider that a conflict exists. Note, one of the challenges confronted by the author when discussing the possibility of using equity at the WTO is that of forum selection clauses in regional trade agreements and their interaction with the WTO.[[11]](#footnote-11) Where fork-in-the-road provisions or exclusivity is at play, there is a legitimate question about the desirability of one international tribunal examining a claim that (per the rules of another regime) should not be raised. The author’s analysis on this point is meticulous, suggesting an innovative use of estoppel to resolve this situation. This would require a panel or the Appellate Body to decide that estoppel was the appropriate tool and to refuse to hear a claim on such grounds. One can see why an objective international lawyer might wish such a thing, but there is little in a panel’s interest to do so, especially as the priority norm (in terms of quasi-constitutional legitimation) here is Article 3.2 DSU and the invocation not to ‘diminish the rights and obligations provided in the covered agreements.’[[12]](#footnote-12) The author makes an excellent argument for not understanding Article 3.2 DSU in narrow terms, but when expecting autonomous decision-makers to take decisions, we must appreciate the context within which such acts are taken. There is little benefit but great cost in acting to benefit international law as a system *in abstracto* over the legitimacy of an institution *in concreto*. This need not necessarily be the case, but discussion on these sorts of critiques would be welcome, especially as they form an important element of current literature on trade law’s role and influence.[[13]](#footnote-13)

*Equity and Equitable Principles in the World Trade Organization* can leave no doubt of the author’s impressive skill. The author commands not only the detail but also the breadth of trade law and general international law, matched by a precise analysis of the underlying logic of the legal reasoning found in a plethora of decisions. The fragmentation debate may have subsided, though for those unsettled by its failure to provide any convincing resolutions, Gourgourinis offers a provocative contribution worthy of careful consideration.

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1. ‘There shall be multilateral negotiations on the question of emergency safeguard measures based on the principle of non-discrimination. The results of such negotiations shall enter into effect on a date not later than three years from the date of entry into force of the WTO Agreement.’ [↑](#footnote-ref-1)
2. Though this never came to be. Decision on Review of article 17.6 of the Agreement on Implementation of article VI of the General Agreement on Tariffs and Trade 1994, adopted by the Trade Negotiations Committee, 15 December 1993, (1994) 33 ILM 1140. [↑](#footnote-ref-2)
3. Alan Sykes, ‘The Safeguards Mess: A Critique of WTO Jurisprudence’, (2003) 2(3) World Trade Review 261. [↑](#footnote-ref-3)
4. Case C-402/05 P *Kadi & Al Barakaat International Foundation v Council, Commission & United Kingdom* [2008] ECR I-6351; *CME v Czech Republic,* Partial Award, 13 September 2001, 9 ICSID Reports 121 & *Lauder v Czech Republic*, Award, 3 September 2001, 9 ICSID Reports 66; *Micula v Romania*, Decision on Jurisdiction and Admissibility, 24 September 2008, 48 *ILM* (2009) 51; *Southern Bluefin Tuna cases (New Zealand v Japan; Australia v Japan)* (Provisional Measures) , Order of 27 August 1999 (ITLOS cases No. 3 and 4), 38 *ILM* 1624 and their subsequent debates, respectively. [↑](#footnote-ref-4)
5. See similarly Yuval Shany, ‘Forum Shopping in International Adjudication: The Role of Preliminary Objections, *written by* Luiz Eduardo Salles’ (2016) 17 *JWIT* 159, 159-160. [↑](#footnote-ref-5)
6. An openly ‘ex post facto’ exercise: p 133. [↑](#footnote-ref-6)
7. Classically *United States—Standards of Reformulated and Conventional Gasoline*, Report of the Appellate Body (20 May 1996) WT/DS2/AB/R, DSR 1996:I, 16. [↑](#footnote-ref-7)
8. See, for example, comparative analysis at the ICJ: *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)* Judgment (20 April 2010), Joint Dissenting Opinion of Judges Al-Khasawneh and Simma, p6. [↑](#footnote-ref-8)
9. p 180. [↑](#footnote-ref-9)
10. p 39. [↑](#footnote-ref-10)
11. pp 192-203. [↑](#footnote-ref-11)
12. A challenge only made greater in light of the most recent developments with Appellate Body reappointments. See: ‘Farewell Speech of Seung Wha Chang at the DSB on 26 September 2016’ available at: <https://www.wto.org/english/news\_e/news16\_e/changfarwellspeech\_e.pdf> [↑](#footnote-ref-12)
13. Paradigmatically, A Lang, *World Trade Law After Neoliberalism: Reimaging the Global Economic Order*

    (OUP 2011). [↑](#footnote-ref-13)