Marion Panizzon. *Good Faith in the Jurisprudence of the WTO: The Protection of Legitimate Expectations, Good Faith Interpretation and Fair Dispute Settlement*. Portland: Hart Publishing Ltd, 2006. Pp. 396. £60.00
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The good faith principle is widely recognised and used in both commercial law and contract law. It has been incontestably established as a general principle of law and of customary law. Good faith has deeply marked international law and, more particularly, the evolution of international organisations. Despite its omnipresence in theory and practice, the content and various uses of the good faith principle have not been well identified.

The growing importance of the good faith principle within the World Trade Organization (hereinafter "WTO") has revealed the crucial need of identifying the role, value and content of the principle. The timely understanding of its impact on WTO jurisprudence, the behaviour of the member states and the harmonious development of WTO institutions is fundamental to the proper functioning of international trade law.

Marion Panizzon addresses the lack of academic work in this field. By dedicating her study to the identification of the different roles and values given to good faith in WTO jurisprudence, she makes an important contribution to our understanding of WTO law and its particularities as a specific area of international law. Her study focuses on the substantive, procedural and interpretational uses of the principle, as well as on its particular normative and jurisdictional role and its enforceability.

Panizzon uses Chapter 1 of her book to explore the nature and legal value of good faith in international law, before focusing in Chapter 2 on the inextricable links of good faith with what Panizzon calls the «corollaries», namely *pacta sunt servanda*, the duty to negotiate in good faith, *abus de droit*, protection of legitimate expectations (hereinafter "PLE"), equity and estoppel. Nevertheless, principles, which are in fact expressions of the good faith principle, should not be confused with good faith itself.[1] However, the interpretation is crucial to the understanding of the numerous manifestations of good faith in the WTO system. By analysing the intimate link with those corollaries, Panizzon draws the reader in with an original introduction, which helps to orient the study toward the various uses of good faith as a principle of international law, as a principle of customary law and as a standard of interpretation. The second chapter provides a useful basis for further understanding the particular place of good faith in the WTO system.

Chapter 3 focuses on the practical application of good faith and its corollaries by the Appellate Body and the Panels in the WTO system. Panizzon undertakes a complete and detailed study of the recognition of good faith within the WTO and guides the reader through different

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[1] This issue is fully explained by A.D. Mitchell, « Good Faith in the WTO Dispute Settlement », 7(2) *MJIL* (2006) 339-373.

applications on a case-by-case basis, demonstrating how the corollaries of good faith have greatly enriched the WTO system and are, for the most part, recognised as principles of WTO practice. She reveals however, that it remains unclear wether good faith and its corollaries are recognised as part of the GATT *acquis*.

Panizzon shows that good faith is predominantly used as a principle of international law. This is how she explains the inconsistencies and lack of rigour in the use of good faith by the Appellate Body and the Panels. The conclusion is clear: good faith currently receives a limited direct application by the Appellate Body and the Panels; firstly because of its various manifestations through the corollaries, and secondly because of its lack of specific legal value within WTO law, which prevents it from being an "established principle" of WTO law.

The value of good faith should not be underestimated. It certainly enriches WTO law. Panizzon contends, the legal value of the good faith principle is far more complex than the simple treatment it is given by the Appellate Body and the Panels. Indeed, apart from the direct mention by article 3.10 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (Hereinafter 'DSU') and article 4.3 DSU, the legal value of good faith and its various uses depends on its functions *praeter legem*, *infra legem* and *contra legem*. These different functions are presented in Chapter 4, which briefly, indeed too briefly, addresses the degrees of normativity of good faith in the WTO system. This chapter provides a sort of conclusion by emphasising more clearly than in Chapter 3 the different functions of good faith: the gap closing one, the corrective one and the balancing one.

Chapter 5, titled "Scholarly views and judicial arguments about the functions of the WTO good faith," provides a prompt review of two different schools of thoughts: voluntarist and integrationist, and the different theories that have emerged from the WTO's judicial application of good faith. Paradoxically, Panizzon does not give much on the theoretical and doctrinal aspects of good faith, despite all the foundational observations she made in the previous chapters. Panizzon simply presents the different points of view of the main schools of thought without providing any indication of her own standpoint vis-à-vis those doctrinal positions. This is disappointing given her considerable work in this field.

Moreover, despite having introduced the question of the value of good faith in Chapter 3, this is avoided in Chapters 4 and 5. Panizzon refrains from distinguishing good faith as a moral value, or norm of behaviour linked to "good conscience"[2] and human laws, from good faith as a general legal obligation. Whereas it would have been more interesting to deal with this key dichotomy more immediately, her consideration of this distinction is instead spread out over the next chapters. As underlined by O'Connor, 'Probably a majority in all legal orders accept that there is a relationship between good faith in legal contexts and morality and ethics, although the precise nature of that relationship is not often examined'.[3]

Following a quick introduction to the nature of the PLE principle in Chapter 3, Chapter 6 is dedicated to the foundation and extension of the PLE and considers the links between this principle and the performance of treaties in good faith. Thus, Panizzon demonstrates the limits

[2] J.F. O'Connor, *Good Faith in International Law*, Darmouth (eds) (1931) 23.
[3] J.F. O'Connor, *Supra* note 3 at 3.

given to this principle in the appellate practice. The author traces the history of this concept, defining its particular nature, firstly as a judicial concept created to prevent any kind of discriminatory treatment within international commerce, and second as a security net with broader application for competition. She clearly and consistently demonstrates how this creative PLE has been used to fill in the lacunae within the GATT and how the good faith principle has been used as a tool to enrich other WTO principles.

Chapter 6 provides rich insight and references to WTO case law, making it easy for the reader to understand the different extensions of the PLE (procedural and substantive) and the interesting relationship between the PLE and good faith. Furthermore, the logical steps taken by Panizzon in this chapter rightly lead her to correctly define the particular role of the PLE within the WTO. As one of the numerous aspects of the good faith principle in WTO law, one can rightly conclude from Panizzon's work that the PLE is undoubtedly an integrated and recognised substantive principle of the WTO, despite the nebulosity surrounding good faith.

From Chapter 7 to 10, Panizzon turns her attention to the obligations and rights that good faith provides under treaty law, analysing the interpretation of good faith and its corollaries by the Appellate Body, the Panels and the Members. In Chapter 7, the author establishes a two-prong study, starting by examining the interpretation of the good faith principle in WTO treaty law according to the rule of interpretation in article 31 of the Vienna Convention on the Law of Treaties (1969). Panizzon considers its substance, sequence of application, its function and its particular application in WTO case law.

Panizzon furthermore demonstrates how good faith and its corollaries have become an integral part of the interpretation of WTO agreements because of the advantages that such principles provide. For example, she explains how good faith allows for a certain flexibility in the interpretation of WTO agreements and introduces the "reasonable"[4] concept. She also grapples with the problem of subjectivity of good faith, but concludes that it is ultimately helpful as a way to correct the balance between the different WTO concepts and principles and as a way to fill the lacunae within agreements.

Panizzon also considers the role of good faith in the non-interpretation phase. In Chapter 8, she shows how the Appellate body has played an important and active role in the definition and identification of methods of interpretation of WTO agreements. Panizzon undertakes a meticulous study involving systematic critiques of case law to show that the Appellate Body usually follows a literal and textual method of interpretation, which allows little space for good faith. Before launching into this analysis, however, it would have been helpful for Panizzon to provide, first, a clear explanation of what is meant by "non-interpretation", and, second, a strong statement regarding the importance of such a question for the interpretative function of good faith. This would have made her analysis more understandable for non-WTO-experts.

Panizzon's review of the role of good faith in the interpretation and non-interpretation phases

[4] As developped by Zoller ' La bonne foi des clauses d'un traité conduit le plus souvent à une adaptation de l'obligation conventionnelle aux réalités. Elle s'extériorise dans ce que l'on peut appeler une obligation raisonnable de la règle de droit génératrice parfois d'obligations secondaires dérivées des premières.' E. Zoller, *La Bonne Foi en Droit International Public*, Publication de la Revue Générale de Droit International Public, A. Pédone (eds) (1977) 229-230.

leads her in Chapter 9 to consider the existence of a WTO specific principle of good faith interpretation. According to her, the organs of the WTO use good faith as a means to maximise the effectiveness of WTO agreements, rather than simply as a tool of interpretation.

The Appellate Body's search for effectiveness shapes its approach, as does its use of good faith in the interpretation phase. According to Panizzon, the Appellate Body is strategic: depending on the method of interpretation it chooses and on the value it gives to good faith, it can decide either to play a pioneer role by giving a large and flexible interpretation to WTO agreements, or to adopt a more conservative position through the use of textual interpretation. Panizzon believes that this choice is crucial for the future of the WTO and for the WTO's capacity to satisfy the needs of its members. The choice is even more critical to the position of the institution in the international sphere. Therefore, the author underlines the political value of good faith within the WTO system that was not addressed in Chapters 4 and 5. Nevertheless, Panizzon's position regarding the choice is ambiguous and it is difficult to pinpoint what would be, to her, the most preferable choice for the Appellate Body. In other words, the author poses questions regarding "interpretative good faith" without suggesting a way forward.

Panizzon recognises that procedural good faith also plays an important role within the WTO system. Indeed, she dedicates the last two chapters of her book to reviewing this particular issue and considers the different manifestations of procedural good faith by looking at the settlement of disputes, the relationship between members of the WTO and between WTO organs.

In Chapter 10, Panizzon focuses on the role of good faith within the WTO's dispute settlement procedures and tries to grapple with a fundamental question concerning the legal value of procedural good faith: is good faith recognised as a general principle of law or is it simply a standard to be taken into account in the settlement of disputes? In order to answer this question, Panizzon draws a distinction between two different constructs: the good faith standards developed by the Appellate Body and the Panels, and the good faith obligations of members during the settlement of disputes. By reviewing case law, Panizzon also highlights very clearly the role of good faith in protecting due process in the settlement of disputes and its role in guaranteeing fair settlement of disputes. It is, however, unfortunate that this chapter does not take a closer look at the particular relationship between good faith and due process, as this point is quite problematic in WTO case law[5].

Chapter 11 is dedicated to the particular and interesting role of good faith as a standard of review. Procedural good faith is used in this way to assess and control the panel's discretionary power as well as its duty to conduct factual review in good faith during the settlement of disputes. This particular use of good faith also allows the Appellate Body to correct and reverse the judgments of the panels within its mandate. In order to demonstrate more precisely the special nature of procedural good faith within WTO, Panizzon draws a very interesting parallel with the ICJ's standard of review. She also connects the standard of review of the Appellate Body to the more general question of good faith obligation, and analyses their dealing with one another in order to see how good faith obligations may be used as substitutes for panel examinations.

Panizzon's analysis highlights the remarkable modernism of WTO law, which has been achieved

[5] A.D. Mitchell, *supra* note 2.

through the Appellate Body's progressive standard of review since the *European Communities – Measures concerning Meat and Meat Products* (*Hormones*).[6] Her book further demonstrates the originality of the appellate practice, recognising its pioneer role in protecting, guaranteeing and preserving the integrity and efficiency of the settlement of disputes. Her work also acknowledges the impact of the appellate practice on the broader issue of WTO 'constitutionalism'. Finally, Chapter 11 successfully explains how the good faith standard of factual review regulates the power and role of the WTO organs.

Surprisingly, the last chapter of Panizzon's book returns to the PLE, and the question of whether it underpins the non-precedential value of the dispute settlements' reports. Although Chapter 12 also relates to procedural good faith, Panizzon's decision to go back to PLE at the end of her book is confusing. Nevertheless, this chapter provides a good opportunity for Panizzon to emphasize the importance of good faith within the "triangular" relationship of the Members, the Panels and the Appellate Body, in which each side of the triangle acts as a complementary check and balance to the others.

Panizzon's book does a good job of demonstrating the importance of good faith, its manifestations and its driving force within the WTO system. Good faith is right at the heart of of the WTO's operations and the recognition and application of this principle are directly linked to the inextricable tension within the organisation, namely between liberalisation and protection. As Panizzon shows, the presence and various uses of good faith reflect more generally the search for a well-balanced trade system, which is able to reconcile commercial and non-commercial goals. Above all, Panizzon's book clearly explains the complex nature of the good faith principle, the diversity of its use and value, and the important impact of the multiple manifestations of international law within the WTO. In particular, the author rightly highlights the crucial difference between the *practical* recognition of good faith as a general principle of law and its *legal* recognition within WTO law, i.e the distinction existing between the jurisdiction of the WTO and the applicable law[7].

Panizzon's work is logical in setting out the three main integrated and complementary functions of the good faith principle (substantive, procedural and interpretative), which underpin the significant capacity of the WTO to fully integrate such a complex international law principle. Nevertheless, because of Panizzon's very deep and detailed study of good faith, it would have been helpful for her to include regular conclusions to enable the reader to follow along. This would also have made the book much more accessible to non-experts. Furthermore, despite Panizzon's clear conclusion, it is quite frustrating that the author does not reveal her personal position, nor provide concrete suggestions regarding the future development of good faith in the WTO jurisprudence. The reader is left wondering if the turbulent application and uneasy recognition of good faith is weakening or reinforcing the WTO's jurisdiction. What strategic value does good faith have within the WTO? Why is the relationship between general international law and WTO law not already cohesive? Finally, a preliminary attempt to define good faith would have been welcome.

[6] WTO Docs WT/DS26/AB/R, WT/DS48/AB/R, AB-1997-4 (16 January 1998) (Report of the Appellate Body).
[7] This dictinction has been introduced by Pauwelyn, *Conflict of Norms in Public International Law : How WTO Law Relates to other Rules of International Law*, Cambridge, Cambridge University Press (2003).

The inaccessibility of this work is its core weakness. This issue is central, first because of the extreme complexity of the matter addressed in this book, second because of the interest that the topic raises in the WTO system and, more generally, in international law. Thus, an approach with less assumed knowledge and more explanations would have enhanced the value of Panizzon's work.

Panizzon demonstrates a tendency to delve straight into the details of WTO law without introducing, and taking time to situate, questions in their broader context. More importantly, she often touches upon core theoretical issues without fully engaging herself in the key debates. From a theoretical standpoint, the achievement of the book is therefore limited. It would have been interesting if Panizzon had used her tremendous work in considering the technical details of the overarching problematic issues concerning the evolution and challenges of the WTO. In particular, the question of the relationship between soft law and hard law, at the heart of the evolution and application of good faith in the WTO jurisprudence, could have been one direction for further development.

All in all, Panizzon's book could be seen as *the* work of reference on good faith. Her tremendous work, as well as her impressive analysis of case law, provide the reader a great focus on good faith in the WTO jurisprudence and solidly demonstrate the diverse manifestations of good faith. In this way, this book is a precious source of references for all practitioners and experts of WTO law. The meticulous and remarkable work of Panizzon should be acknowledged, as well as her clear understanding of the research needs in this particular field.