Contents

Acknowledgements	V
Abbreviations	xxi
Table of Cases	xxv
Table of Treaties, Statutes and Documents	xxxvii
1 Introduction	1
2 Concepts and Contents of Good Faith in International Law	11
Good Faith and its Sources in Public International Law	12
The Deficiencies of Article 38(1) of the Statute of the ICJ	12
Treaty Law and Practice	13
Codifications of the Duty to Settle Disputes in Good Faith and	
Prohibitions of Abuse of Procedure	14
WTO Dispute Settlement Understanding's Duty to Settle Disputes	
in Good Faith	16
General Principles of Law	17
Institutional Principle in International Organizations	18
Good Faith Protection and Corrolaries	20
Good Faith	20
Equity	21
Estoppel and Aquiescence	24
Pacta Sunt Servanda	27
Prohibition of Abus de Droit	30
The Legal Context of The Abus de Droit	30
Prohibition of Abuse of Rights	31
Good Faith Limits of the Abus de Droit Prohibition	34
Normativity of Good Faith Considerations	35
Good Faith as a General Principle of Law	35
Differences of Degree between Principles and Rules	37
Normative and Descriptive Theories of Principles	38
The Function of Normativity in Public International Law	39
Completeness of the International Legal System	39
Comprehensiveness of the WTO Agreements	41
The Standard of Good Faith Interpretation	42
From Subjective to Objective Standards	43
The Standard of Reasonableness	44

x Contents

Public Policy and The Moral Standard of Good Faith	46
Political Context	46
International Ethos	47
3 Good Faith and its Corrolaries in the Law of the WTO	
Agreements	49
Classifications of Good Faith and Corrolaries in WTO Law	49
Good Faith as General Principle of Law	51
US-Shrimp Appellate Body Report (1998): General Exceptions of Art XX GATT 94 Chapeau	51
EC-Hormones Appellate Body Report (1998): Good Faith in Risk	
Assessment of Art 5:2 ASPS	53
US-Cotton Yarn Appellate Body Report (2001): the Good Faith	
Obligation to Withdraw a Safeguard Measure	54
US-Japan Hot-rolled Steel Panel and Appellate Body Reports (2001) and	
Egypt-Steel Rebar AD Panel Report (2002): Good Faith in	
Anti-Dumping Investigations	56
US-Japan Hot-rolled Steel Panel Report (2001): the Reasonableness	
of Anti-Dumping Investigations	56
US-Japan Hot-rolled Steel Appellate Body Report (2001): Good	د
Faith in 'Using the Facts Available'	57
US-Japan Hot-rolled Steel Panel and Appellate Body Reports (2001):	59
Duty of Objective Examination by Investigating Authorities	37
Egypt-Steel Rebar AD Panel Report (2002): 'Level of Good Faith Cooperation' in Relation to Value of Information	60
US-Section 211 ('Havana Club') Panel and Appellate Body Report	00
(2002): Good Faith Implementation of the TRIPS Agreement	60
	61
Pacta Sunt Servanda Performing WTO Obligations in Good Faith	62
WTO Case Law	63
US-Offset Act ('Byrd Amendment') Panel Report (2003)	63
US-Offset Act ('Byrd Amendment') Appellate Body Report (2003)	64
Scholarly Discussion of the Decisions	67
Abus de Droit	68
Pacta Sunt Servanda Prohibiting the Abuse of WTO Rights	68
The WTO-specific Rule of Pacta Sunt Servanda	69
Reinforcing the Non-discrimination Obligation	70
Other Limitations on National Sovereignty	70
Treaty Interpretation and Rule Stability	7
Duty to Negotiate in Good Faith	7.
Foundation in International Law	73
Corrolary of Pacta Sunt Servanda and Other Applications	7

Content	s xi
WTO Case Law	75
US-Shrimp Panel Report (1998)	76
US-Shrimp (Art 21.5) Appellate Body Report (2001)	76
Korea-Government Procurement Panel Report (2000)	78
Scholarly Discussion of the Decisions	80
WTO-specific Doctrine of the Duty to Negotiate in Good Faith	81
Implementing WTO Obligations in Good Faith	84
US-Section 211 ('Havana Club') Appellate Body Report (2002)	84
Overview of International Legal Theory and Practice	87
Conclusions	88
Abus de Droit Doctrine	88
Specific Situations of Abus de Droit in WTO Practice	89
The Abus de Droit Prohibition as a Good Faith Obligation of the WTO	90
The Abus de Droit Prohibition as a Corrolary of Good Faith Obligations	91
'Balancing Test'	92
WTO Case Law: Sanctioning the Abuse of Public Policy Exceptions	
and Trade Defenses	93
The Prohibition against Abusing Article XX GATT Exception:	
US-Shrimp Appellate Report (1998)	94
The Prohibition against Abusing a Trade Remedy: US-Cotton	0.5
Yarn Appellate Body Report (2001)	95 96
Conclusions	
Protection of Legitimate Expectations	96
Foundations	96 97
GATT 47 Practice on the Protection of Legitimate Expectations	97 98
GATT 94 Panel Practice on the Protection of Legitimate Expectations	98
Evasive Appellate Body Reports Comparison to Protection of Legitimate Expectations in EU Case Law	99
Constitutive Elements	100
WTO Specificities	101
Future Developments	103
Protection of Concessions under Negotiation	103
Protection of Future Trade Opportunities	103
Equity	103
	106
Estoppel	
Conclusions	107
4 The Normativity of Good Faith in the WTO Legal System	109
Normative Functions: Praeter, Intra and Contra Legem Good Faith	110
Good Faith Praeter Legem	110
Good Faith Intra Legem	110
Good Faith Contra Legem	111

Varying Degrees of Normativity	111
	111
Standards of Good Faith in Dispute Resolution	112
Good Faith 'Implied' in, 'Inherent' to, and 'Underlying' WTO Treaty	
	113
'Good Faith Interpretation' of WTO Law	115
Direct Application by the Panels and the AB of the General Principle	116
5. 000 4 2	118
5 Scholarly Views and Judicial Arguments about the Functions	
	121
Scholarly Views of the Role of Good Faith in WTO Jurisprudence	121
The 'Volontarist' School of Good Faith Interpretation	121
The 'Integrationist' School of Good Faith Application	122
Judicial Views on the Limits of Good Faith in WTO Jurisdiction	124
Congruence	124
Divergence	125
6 Protection of Legitimate Expectations as GATT-specific Good	
	127
Economic Rationale and Legal Foundations	128
Consolidation of the Negotiated Level of Liberalization	
Commitments	128
The Judge-Made Principle	129
Function and Content of Protection of Legitimate Expectations	130
Conditions of Competition	130
The Substantive Element of GATT Article III	132
Italy-Agricultural Machinery GATT 47 Panel Report (1958):	
'Provide Equal Conditions of Competition'	132
'Expectations of the Equal Competitive Relationship:'	
Japan–Alcohol (1996)	133
The Substantive Element of GATS Article XVII Paragraph 3	135
EC-Bananas (US) Panel Report (1997): 'Creates Less Favourable	
Conditions of Competition for like Service Supplier'	135
Canada-Autos Panel Report (2000): 'Less Favourable as Formally	
Different or Formally Identical Treatment which Modifies the	
Conditions of Competition'	136
Differences between Protection of Legitimate Expectations under	4.5.5
GATT and GATS	138
The Procedural Element of Successful Non-violation Nullification and	141
Impaignant	141

'True' Non-violation Nullification and Impairment and Constitutive	
Elements	141
Benefit, Impairment, Non-forseeable Measures, Causality	141
Rendering Concessions 'Meaningless'	142
'Mutually Satisfactory Adjustment'	144
'True' Non-violation Nullification and Impairment Cases	144
Australia-Subsidy GATT 47 Panel Report (1950)	144
Germany-Sardines GATT 47 Panel Report (1953)	147
EEC-Oilseeds I GATT 47 Panel Report (1989)	147
US-Offset Act ('Byrd Amendment') Appellate Body Report (2003)	149
Conclusions	150
'Wrong', 'Overbroad' and 'Broad' Non-violation Nullification and	
Impairment Cases	152
Japan-Semi-Conductors GATT 47 Panel Report (1988): a	
'Wrong Case'	154
Japan-Film Panel Report (1998): an 'Overbroad Case'	155
Korea-Government Procurement Panel Report (2001): a	
'Broad Case'	155
The Notion of 'Extended' Protection of Legitimate Expectations in the	
Korea-Government Procurement Panel Report	157
Extending Protection of Legitimate Expectations and its Limits in a	
Rule-oriented WTO	157
Procedural Extensions: 'Broad' Non-violation Complaints and	
Violation Complaints	159
Protection of Legitimate Expectations under 'Broad' Non-violation	
Nullification and Impairment Complaints	159
Protection of Legitimate Expectations under Violation Complaints	160
India-Patents and EC-LAN Panel Reports (1998)	160
India-Patents and EC-LAN Appellate Body Reports (1998)	161
Korea-Government Procurement Panel Report (2000)	162
EC-Asbestos Appellate Body Report (2001)	162
Substantive Extensions: Articles I & II GATT 1994, Principle of	
WTO Law	163
EC-Citrus Products (1985): Article I GATT	163
EC-LAN Panel Report (1998): Article II:5 GATT	164
Substantive Extension Towards a Principle of WTO Law	166
India-Patents Panel Report (1997)	166
'Predictability Needed to Plan Future Trade'	168
Substantive Extensions under the Customary Rule of Pacta Sunt	
Servanda	169
Korea-Government Procurement Panel Report (2000)	170
'Good Faith Performance Has Been Agreed to Include Benefits	4 400 5
Reasonably Expected'	172

Limits on the Broad Principle of Legitimate Expectations in Appellate	
Practice	175
India-Patents Appellate Body Report (1997)	175
EC-LAN Appellate Body Report (1998)	176
Japan-Film Panel Report (1998)	178
Divided Adjudicators	178
Scholarly Critique of Expanded Protection	179
Fragmentation and 'Non-Discipline'	179
'Limit the Use of Flexibilities'	181
'Go Against Rule-Orientation'	181
An Imbalance between Rights and Obligations	182
Balancing Legitimate Expectations with Good Faith Treaty Performance	184
A 'Catalyst for Integration'	184
Authoritative Interpretation	185
Redefining the Rationale of Protecting Legitimate Expectations	186
A 'Complete' WTO Legal System	186
Formative Principle of Good Faith	186
Foundations for Gap-filling	187
Panel Reports on India-Patents and Korea-Government	
Procurement	188
A Re-emerging Comittment to International (Trade) Law	188
'Equity Law Jurisdiction' of Non-violation Complaints	191
WTO-specific Equity of Non-violation Complaints	191
The Principle of Pacta Sunt Servanda Primes Equity	193
Conclusions	195
Conclusions	
7 Good Faith Interpretation of the WTO Agreements	197
The 'General Rule of Interpretation' in the Vienna Convention on the	
Law of Treaties	200
Substance	202
'Objective Good Faith'	203
'Subjective Intent'?	204
Sequencing	206
Status	20€
Significance	208
Functions	209
Resolving Gaps in Interpretation	209
Correcting Restrictive Interpretation	210
'Balancing Conflicting Rights'	211
Early WTO Case Law References to 'General Rules of Interpretation'	21
GATT 47, GATT 94, and the WTO Agreements	212
CATT 47, GAT 1 24, and the wito Agreements	21

US-1 una II, GA I I 4/ Panel Report (1994): 'Good Faith Expresses	
the Basic Rules of Treaty Interpretation'	213
US-Lead and Bismuth Carbon Steel, GATT 47 Panel Report (1994):	
Reasonableness v Good Faith Interpretation	216
US-Gasoline, Appellate Body Report (1996): 'Directed to Apply the	
"General Rule of Interpretation"	218
Japan-Alcohol, Appellate Body Report (1996): 'Words of the	
Treaty Form the Foundation for the Interpretive Process'	220
'Good Faith Interpretation' in the Light of Legitimate Expectations' by	
the Panels	221
Protection of Legitimate Expectations Endemic to 'Good Faith	221
Interpretation'	222
India-Patents (1997): 'Lack of Legal Security System Cannot	222
Adequately Protect Legitimate Expectations'	222
	222
EC-LAN (1998): 'Security and Predictability Cannot be Maintain	
without Protection of such Legitimate Expectations'	223
EC-LAN (1998): 'Legitimate Expectations are a Vital Element in	22/
Interpretation'	226
'Maxims' of Good Faith Interpretation in Panel Practice	228
The WTO Panels' Substitution of Article 31(1) Vienna Convention	228
'Maxims' and the 'Good Faith Rule of Interpretation'	229
The Consistency of Interpretive Maxims with Vienna Rules	230
8 Good Faith Non-interpretation by the WTO Appellate Body	233
Legitimate Expectations, Good Faith Interpretation, and 'Subjective'	
Intentions	234
'Subjective and Unilaterally Determined Expectations'	234
'Common Intentions are the Purpose of Treaty Interpretation'	235
Rejection of the Panels' Objective Good Faith Interpretation	236
India-Patents Appellate Body Report (1998)	236
'The Panel Misunderstands the Concept of Legitimate Expectations'	236
Scholarly Discussion	237
Critique	238
EC-LAN, Appellate Body Report (1998)	239
'The Panel was Not Justified [in Finding] that the United States	
was Entitled to "Legitimate Expectations"	239
Scholarly Discussion	241
Critique	242
-	244
Classical WTO Appellate Practice	244
Japan-Alcohol (1996)	
US-Shrimp (1998)	244
US-Offset Act ('Byrd Amendment') (2003)	24 5

xvi Contents

Doctrinal Analysis: Key Elements of Classic Appellate Body	
Interpretative Practice	245
'Symbolic' Reference to the Vienna Convention	245
'Sequencing' versus a 'Holistic Approach'	246
The 'Text-First' and 'Text-Only' Methods	247
The Report of the International Law Commission of 1966	247
Critical WTO Doctrine	248
Good Faith as Subsidiary Means	248
Comparative Analysis: other International Tribunals' Interpretative Methods	251
The Progressive Interpretative Practice of the WTO Appellate	
Body	252
US-Shrimp, Appellate Body Report (1998)	254
'Relevant Rule of International Law Applicable Between the	
Parties'	254
'Marking Out a Line of Equilibrium'	256
US-Offset Act ('Byrd Amendment') Appellate Body Report (2003)	258
'Good Faith May be Said to Inform a Treaty Interpreter's Task'	258
'Performance of Treaties is also Governed by Good Faith'	259
9 Towards a WTO-specific Good Faith Interpretation?	261
The Meaning of Article 3.2 of the Dispute Settlement Understanding	
for WTO Interpretation	261
The Limitation of Judicial Power	262
WTO Expression of Pacta Sunt Servanda	264
The Principle of Effectiveness in WTO Treaty Interpretation Foundations	265 265
'[I]nherent in the Notion of Good Faith'	266
WTO-specific Principle of Effectiveness v Pacta Sunt Servanda	267
Effectiveness' Relation to Good Faith Interpretation	268
'Good Faith Interpretation' of Future Dispute Settlement Reports	269
A Prospective Member's Perspective	269
Developing Country Members	270
Full Acceptance of Vienna Rules on the Law of Treaties	271
WTO Institutional Limits	271
10 Good Faith Rules and Procedures of WTO Dispute Settlement	27 3
Rules and Procedures of Dispute Settlement	274
The Term 'Procedural' Good Faith	275
The Procedural Good Faith Standard of 'Fair, Prompt and Effective' Dispute Resolution	276

Contents	xvii
Fairness	278
Promptness	280
Effectiveness	282
Conclusions	284
	207
Procedural Good Faith Obligations of Dispute Settlement's Leges	
Generales	285
Article 3.10 DSU: 'Engage in these Procedures in Good Faith to	
Resolve the Dispute'	287
Canada-Aircraft Appellate Body Report (1999)	289
'Article 3.10 DSU "Gave Teeth" to the Member's Duty to Provide	
the Panel with the Information Sought'	290
Evaluation of Canada–Aircraft: Article 3.10 DSU Establishes the	
Duty of Collaboration with the Panel	291
Sanctions	292
US-FSC Appellate Body Report (2000)	294
'Good Faith Compliance' as 'Opportunity to Defend' and to 'Bring	
Claims of Procedural Deficiencies'	295
Good Faith in Disputes Fills Gap in Appellate Standard of Review	295
Evaluation of US-FSC, AB Report: Venire Contra Factum	
Proprium	296
Thailand-Steel Appellate Body Report (2001)	296
'Article 3.10 of the DSU, Enjoins Members of the WTO to	
Engage in Dispute Settlement Procedures in "Good Faith"	297
Evaluation of Thailand-Steel: Right to Due Process v Obligation	
of Good Faith in Dispute Resolution	298
US-Lamb Safeguards Appellate Body Report (2001)	299
'WTO Member States Cannot Improperly Withhold Arguments	
from Competent Authorities with a View to Raising those	
Arguments Later before a Panel'	299
Evaluation of US-Lamb Safeguards: Clean Hands Doctrine	300
Article 3.10 DSU as a Standard or an Actionable Right	301
Mexico-HFCS (Article 21.5) Appellate Body Report (2001)	302
'Good Faith, Due Process and Orderly Procedure Dictate that	
Objections Should be Explicitly Raised'	303
Evaluation of Mexico-HFCS (Article 21.5): Good Faith Standard	
of Due Process	304
EC-Sardines Appellate Body Report (2002)	304
'Appellate Review Proceedings do not Become an Arena for	
Unfortunate Litigation Techniques'	305
Evaluation of EC-Sardines: Prohibition of the Abuse of DSU	
Rules and Procedures	306
US-Offset Act ('Byrd Amendment') Appellate Body Report (2003):	
Good Faith as a Standard of Procedural Justice	308

xviii Contents

Conclusions	309
Article 4.3 DSU: 'Entering into Consultations in Good Faith'	310
US-Cement GATT 47 Panel Report (1992)	311
Mexico-HFCS (Article 21.5) Appellate Body Report (2001)	313
Good Faith in Article 4.3 DSU: Balancing the Respondant's Right to	
Consultations with the Complainant's Right to the	
Establishment of a Panel	314
Article 3.7 DSU: 'Whether Action Would Be Fruitful'	315
EC-Bananas Appellate Body Report (1997)	316
Mexico-HFCS (Article 21.5) Appellate Body Report (2001)	317
Fruitfulness as Prohibition of Frivolous Disputes	318
Presumed Fruitfulness	318
The Standard of Good Faith for Judgment on Bringing a	
Dispute	319
The Self-regulating Presumption of Good Faith Exempts Panels	
from Investigating on their own Motion	319
Common Features of Procedural Good Faith Obligations	320
Binding on the Complaining Member Only?	320
An Actionable 'Basic Principle'?	320
Conclusions	321
Procedural Good Faith Obligations of Dispute Settlement's Leges	
Speciales	323
-F	
11 The Good Faith Standard of Factual Review	325
An Egregious Error Calls into Question the Good Faith of a Panel'	325
EC-Hormones Appellate Body Report (1998)	326
Limited Factual Discretion of the Panels and the Duty of Members to	
Provide Information	328
The Judge-made Good Faith Standard of Factual Review	329
The Good Faith Standard for Appellate Review of Factual	
Conclusions	329
Factual Review Based upon a Panel's Good Faith Standard	331
Systemic Context	331
Functional Rationale	332
The Good Faith Standards of WTO Factual Review and ICJ Factual	
Review	333
Case Law of Appellate Decisions	335
EC-Hormones Appellate Body Report (1998)	335
EC-Poultry Appellate Body Report (1998)	335
Australia-Salmon Appellate Body Report (1998)	338
Korea-Alcohol Appellate Body Report (1999)	339
Doctrinal Division on the Good Faith Standard of Factual Review	341

Contents	xix
Deliberate Disregard (Intention) or Gross Negligence	
('Unreasonable Conduct') Science and the Facts: Narrow or Broad Appellate Standard of	343
Review	344
Members' Good Faith Obligations Replace Good Faith Standard of Factual Review	344
US-Cotton Yarn Appellate Body Report (2001)	348
Evaluation of US-Cotton Yarn Appellate Body Report (2001)	350
EC-Bed Linen (Article 21.5) Appellate Body Report (2003)	352
Evaluation of EC-Bed Linen (Article 21.5) Appellate Body	
Report (2003)	353
Conclusions	354
Summary	354
Appreciation	354
12 Legitimate Expectations as to the Precedential Value of Dispute	
Settlement Reports	357
The WTO-specific Basis of the Principle of Protection of Legitimate	
Expectations	357
'Subsequent Practice' of Article 31(3)(b) VCLT and Rule of Precedents	
in International Law	358
The Obligatory or Voluntary Nature of Legitimate Expectations as to	
Precedential Value of WTO Reports	359
The Binding Precedent or Discretionary Precedential Value of WTO	
Reports	361
The Triangle of Procedural Good Faith	361
13 Conclusions	365
The Rule of WTO Good Faith	366
Substantive Good Faith	366
Interpretative Good Faith	366
Procedural Good Faith	367
Good Faith's Role for the WTO Jurisdiction's Reach	368
The Jurisdictional Role of Good Faith	368
Pacta Sunt Servanda Limits to Normative Content	369
'Pro-trade' Limits to Substantive Content	371
The Enforceability of WTO Good Faith	371
Bibliography	375
Index	389