1 Introduction

Can we refer to a rule of general international law such as good faith? Can we have a legal system without the rule of good faith? ... Can there be any system of law that can work without a reasonable concept of proportionality?

Professor Georges Abi-Saab, Appellate Body member, World Trade Organization

1.1 Beyond the ostensible

Having passed its thirteenth anniversary, the World Trade Organization (WTO) has become one of the most important international organisations in existence. As the only global intergovernmental organisation concerned with the rules of trade between nations, it is the leading forum for trade negotiations and for the resolution of trade disputes. Its dispute settlement system has attracted enormous interest because of its binding, rule-oriented nature and its well-established appeals system, both a rarity at the international level. More than 360 disputes have been brought to the WTO since its creation in January 1995, and the recommendations of WTO Panels and the Appellate Body frequently generate intense controversy. These recommendations often require Members to change their measures to bring them into

2 WTO Secretariat, Update of WTO Dispute Settlement Cases, WT/DS/OV/31 (22 August 2007) ii.
compliance with WTO obligations, which may have significant economic consequences for companies, consumers and workers, as well as major political implications for governments. Panel and Appellate Body reports are therefore carefully scrutinised, and WTO Members and academics alike are quick to pounce on perceived failures in the resolution of disputes under the Dispute Settlement Understanding (DSU).

The Appellate Body has traditionally adopted a conservative approach to interpreting and applying the WTO agreements, perhaps in view of the vigorous debates surrounding its decisions and in order to maintain legitimacy of the organisation in the minds of the various WTO players. Several years ago, Weiler referred to the ‘almost obsessive attempts of the Appellate Body to characterize wherever possible... wide-ranging, sophisticated, multifaceted and eminently legitimate interpretations of the Agreement as “textual” resulting from the ordinary meaning of words’.4

However, no complex legal system can provide clear textual answers to every issue or dispute that falls within its scope as time goes by. Like any other such system, the WTO agreements contain some provisions that are ambiguous, contradictory, or silent on particular questions. This is becoming increasingly apparent. In early 2005, the first dissenting opinion of an Appellate Body member appeared in US – Upland Cotton, in relation to whether Article 10.2 of the Agreement on Agriculture exempts export credit guarantee programmes from export subsidy disciplines.5 The dissenting member stated: ‘I recognize that the language of this provision is not free from ambiguity. As noted by my colleagues on the Division, the drafters could have – dare I say, should have – made their intentions even more plain.’6 With the expiry of the peace clause,7 the number, scale and complexity of disputes about

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agricultural products of vital interest to developed and developing countries are set to grow. Other recent disputes also demonstrate the absence of textual answers to every issue, particularly in interpreting Members’ schedules (which do not necessarily adopt uniform language or concepts), or where the negotiating history is unclear.

In addition to explicit legal rules, broader principles regularly embody fundamental rights and obligations and provide critical guidance in understanding individual legal provisions, particularly where the text is silent or ambiguous. An understanding of legal principles that underlie or influence the WTO system is therefore essential to enable Panels and the Appellate Body to discharge their function. Furthermore, the consistency and ‘correctness’ of Panel and Appellate Body decisions can be better evaluated against a backdrop of principles, which should themselves be subject to critical scrutiny. In 2000, Howse suggested that the Appellate Body had increased coherence and integrity in the interpretation of WTO provisions by using the treaty text ‘as the necessary beginning point for an interpretative exercise that includes teleological dimensions’, taking into account the ‘diverse, and possible competing, values’ of the WTO agreements rather than assuming that the prevailing value is ‘free trade’, as some General Agreement on Tariffs and Trade (GATT) and WTO panels had a tendency to do. As discussed further in Chapter 3, the provisions of the DSU provide a legal basis for a teleological approach to interpretation, creating one path through which ‘principles’ may enter WTO dispute settlement. Specifically, principles may assist in identifying and balancing the various interests affected by international trade.

Frequently, the most relevant and valid principles in WTO disputes will be derived partly or wholly from sources of law beyond the WTO agreements themselves. For example, the Appellate Body was recently asked to address ‘the principle of good faith’, ‘the principle of estoppel’, and the ‘principle of judicial economy’ in EC – Export Subsidies on Sugar.

11 Ibid. 52–3.
12 Appellate Body Report, EC – Export Subsidies on Sugar, [304], [307], [321].
For Members such as the United States, the inclusion of non-WTO law in WTO disputes may raise longstanding fears of overreaching by Panels and the Appellate Body. In the Special Session of the Dispute Settlement Body (DSB), which is dedicated to improving the DSU, the United States has recently identified several issues on which it suggests Members could ‘provide[s] some form of additional guidance to WTO adjudicative bodies’. These issues include: the role of WTO Tribunals in interpreting the WTO agreements, particularly where the agreements are silent on an issue; whether WTO Tribunals can use ‘public international law other than customary rules of interpretation’; and the content of public international law that could be so used. As explained further below, the use of principles from various sources of law and the continued integration of the WTO dispute settlement system into the general framework of public international law will in fact increase the legitimacy of the system and provide greater consistency and transparency to decision-making.

Remarkably little has been written on the use of principles in WTO dispute settlement. An exploratory article by Hilf in 2001 is perhaps the most significant. In this article, Hilf describes a number of principles that could be used in WTO disputes, dividing the principles into three broad categories: principles internal to the WTO; principles of public international law that are external to the WTO; and ‘[p]rinciples common to the internal legal regimes of WTO Members’. This article provides a useful overview of a variety of principles and introduces some of the theoretical issues surrounding their use. However, it does not examine any of the principles in depth; nor does it offer a detailed analysis of the legal basis for WTO Tribunals to use principles in WTO disputes or the manner in which they could do so. In the same year, Cameron and Gray also wrote an article on principles in WTO disputes. This article is essentially a catalogue of previous dispute settlement decisions in which WTO Tribunals have used ‘principles of international law’. Certain other articles and other works have examined individual concepts that may be principles

14 Ibid. 2–3.
relevant to WTO dispute settlement, including good faith, proportionality, special and differential treatment, the


precautionary principle,\(^{21}\) and non-discrimination.\(^{22}\) Primarily, these focus on the principles within the WTO while paying little attention to their definition or their meaning under international law, and they are largely concerned with the operation of the principle in question rather than its implications for the use of principles in WTO dispute settlement more generally.

This book goes beyond the two previous studies of the use of principles in WTO disputes by defining and critically examining the categories of principles addressed. It also includes a thorough assessment of the legal basis for using different types of principles in WTO disputes, and the limitations on such use. Rather than merely describing the ways in which WTO Tribunals have used principles in their decisions to date, it evaluates these decisions in light of the principles used, the basis for using them, and the meaning of these principles outside the WTO. It also considers how principles could have been used in some decisions to confirm the result reached or to reach a better result. The four individual principles addressed in detail are assessed in terms of their meaning, validity, and scope. This analysis is conducted not only to understand these particular principles but also to provide a solid foundation for envisaging how WTO Tribunals could use principles more frequently, accurately, and legitimately in future.

I now turn to examine in more detail the nature of legal principles as distinct from rules.

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1.2 The nature of principles

1.2.1 Distinguishing principles from rules

The existence of principles of law as distinct from rules is widely recognised, both in jurisprudential thought and in the standard legal methodologies of academics, judges, and lawyers. Both principles and rules are species of norms (standards for how one ought to act). Typically, principles are seen as general, basic or underlying assumptions or precepts. They embody fundamental regulatory purposes or values and provide a broad guide for the development of legal rules, which are directed towards specific behaviour and can be used to resolve particular problems. Thus, principles are the ‘intellectual foundations of any legal order’, while rules are the precise laws that implement them and are explicit in the legal corpus. Put differently, a ‘rule answers the question “what”: a principle in effect answers the question “why”.’ This distinction seems more useful than one focusing simply on the breadth of the law in question. As Hart points out, the suggestion that principles are expressed in general or abstract terms is unhelpful, because all laws have a core of settled meaning and an uncertain penumbra. The content of principles may not be as

25 ‘5. a. A fundamental truth or proposition, on which many others depend; a primary truth comprehending, or forming the basis of, various subordinate truths; a general statement or tenet forming the (or a) ground of, or held to be essential to, a system of thought or belief; a fundamental assumption forming the basis of a chain of reasoning’: John Simpson and Edmund Weiner (eds.), The Oxford English Dictionary (2nd edn, 1989) vol. XII, 499.
27 Sujit Choudry, ‘Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation’ (1999) 74 Indiana Law Journal 819, 843. See also Antonio Cassese, International Law (2nd edn, 2005) 46: ‘Principles are the pinnacle of the legal system and are intended to serve as basic guidelines for the life of the whole community.’
30 H. L. A. Hart, The Concept of Law (1961) 120. The view that all law has a settled core and an uncertain penumbra has been taken further in Timothy A. O. Endicott, Vagueness in Law (2000). Endicott argues that all rules are radically indeterminate owing to the vagueness of legal language and concepts.
‘narrow’ as rules, but this does not mean that they are without a definable content.31

Dworkin suggests that rules generally operate in a binary manner.32 When the conditions for the application of a given rule have been satisfied, the rule operates to provide a determinative result to the legal problem; when the conditions for the application of the rule have not been satisfied, the rule has no operation.33 Principles do not have this kind of binary operation.34 A principle cannot lead to a determinative result or solution, because it must be applied together with other principles and taking account of the particular situation in dispute. In some circumstances, this may involve balancing and weighing different principles.35 In other circumstances, principles may represent values that are incommensurable and unable to be weighed against each other, for example liberty and equality.36 Thus, Eckhoff and Sundby state that rules either apply or do not apply, whereas principles are guidelines that are more or less relevant and persuasive in determining the preferable solution.37

However defined, it is clear that the categories of principles and rules overlap to some extent, and it is often difficult to determine where a principle ends and a rule begins. In many circumstances the line drawn between principles and rules may be somewhat subjective and dependent on the language used to describe the relevant laws. For example, one might contend that a principle of equality exists in

33 ‘A “rule” . . . “is essentially practical and, moreover, binding . . .; there are rules of art as there are rules of government” while principle “expresses a general truth, which guides our action, serves as a theoretical basis for the various acts of our life, and the application of which to reality produces a given consequence.”’: The Umpire in the Gentini Case of the Italian–Venezuelan Mixed Claims Commission (H Ralston and W Doyle, Venezuelan Arbitrations of 1903, etc (1904) 720, 725) quoted in Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals (1987) 376.
34 Ronald Dworkin takes a different view in Law’s Empire (1986), but this is not widely shared.
European Union law. This principle is reflected in certain rules of the Treaty of Rome such as Article 12, which prohibits discrimination on the basis of nationality, and Article 141, which requires equal pay for equal work by men and women. Based on this description, the difference between the underlying principle and the implementing rules seems fairly clear. However, is the notion in Anglo–American contract law that a binding contract requires consideration – that is, something of value flowing from the promisee to the promisor – better characterised as a principle or a rule? On one hand, it seems like a principle, in that it provides the context for more specific rules, such as the rule that past consideration (consideration that passed before the relevant promise was made) is inadequate. On the other hand, as it can be expressed not as a purpose but as a specific legal requirement, perhaps it could also be called a rule.

The distinction between principles and rules may be even harder to apply in international law. O’Connor states that a ‘principle is a common denominator for a number of related rules and a principle functions through the application of rules singly or in combination to relevant situations’.38 In national law, a given principle is often reflected in numerous detailed rules.39 But the customary international law principle of non-intervention, for example, is not reflected in any more detailed rules. As will be discussed, the International Court of Justice (ICJ) has often looked for principles only when it cannot find rules to resolve a particular case.40 However, the fact that the ICJ has used principles at all suggests that they may be useful in understanding or interpreting international law (including WTO law).41 For instance, the ICJ may be seen as balancing several principles to find an equitable solution to a continental shelf delimitation problem.42

For the purpose of this book, I need not offer any new way of distinguishing between principles and rules in the abstract. Instead, in Chapter 2 I identify three broad types of principles that may be particularly useful in WTO disputes. These three types, at least, are capable of fairly precise definition and justification. In the following section,

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I put the distinction between different types of principles to one side and explain certain generic ways in which principles may be used in understanding legal systems such as the WTO.

1.2.2 Normative and descriptive aspects of principles

Two different theories about principles can help explain their relevance and potential use in dispute settlement. The first is a normative theory, under which principles are norms or standards used to judge or direct human conduct. Principles are higher norms that influence the rest of the legal system, including other norms such as rules. Principles are distinguished from “ordinary” norms through some criteria, for example their general character, their binding nature or their position in a norm hierarchy. According to this theory, principles can justify rules, but rules cannot justify principles. Seen in this light, principles ‘guide State behaviour and...explain judicial decision-making’.

Under a normative theory, principles are determined through a process of deduction from a set of premises. The set of premises may be based on, for example, the nature of legal systems or natural law.

The second theory of principles is a descriptive theory, under which principles are simply inductive generalisations of rules (that is, inferences from particular to general). In other words, principles are descriptions of groups of rules. While principles in this sense may have useful systematic or didactic purposes and may help promote coherence, they do not possess any independent legal content. Thus, Schwarzenberger maintains that principles are only ‘abstractions and generalizations from legal rules or individual cases’. For him, at least in the context of international law, ‘rules...are the only legally binding norms’.

These two theories are not necessarily mutually exclusive. In the chapters that follow, I identify certain principles using both theories. For example, in Chapter 7, I address the principle of special and differential treatment in WTO law, which is reflected both in the express

44 Koskenniemi, General Principles, 128.
47 Koskenniemi, General Principles, 126.