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Legal Principles in WTO Disputes

ANDREW D. MITCHELL



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Andrew D. Mitchell



CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE UNIVERSITY PRESS

Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore,
São Paulo, Delhi

Cambridge University Press

The Edinburgh Building, Cambridge CB2 8RU, UK

Published in the United States of America by Cambridge University Press,
New York

www.cambridge.org

Information on this title: www.cambridge.org/9780521873260

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First published 2008

Printed in the United Kingdom at the University Press, Cambridge

A catalogue record for this publication is available from the British Library

Library of Congress Cataloguing in Publication data

Mitchell, Andrew D.

Legal principles in WTO disputes / Andrew D. Mitchell.

p. cm. – (Cambridge studies in international and comparative law ; [61])

Includes bibliographical references and index.

ISBN 978-0-521-87326-0 (hardback)

1. World Trade Organization. 2. Foreign trade regulation.

3. Tariff-Law and legislation. 4. Dispute resolution (Law) I. Title.

II. Series.

K4610.M58 2008

382'.92-dc22

2008028689

ISBN 978-0-521-87326-0 hardback

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Legal Principles in WTO Disputes

Principles play a crucial role in any dispute settlement system, and the World Trade Organization (WTO) is no exception. However, WTO Panels and the Appellate Body have been too timid in using principles, sometimes avoiding their use when appropriate and at other times using them without fully acknowledging that they are doing so. Perhaps more worryingly, these bodies often fail to delve deeply enough into principles. They tend to overlook key questions such as the legal basis for using a given principle, whether the principle is being used in an interpretative manner or as applicable law, and the meaning of the principle in public international law. This book establishes a framework for addressing these questions. The use of such a framework should allay fears and misconceptions about the use of principles and ensure that they are used in a justifiable manner, improving the quality of dispute settlement in the WTO.

ANDREW D. MITCHELL is a Senior Lecturer at Melbourne Law School. Previously he was a solicitor with Allens Arthur Robinson in Australia. He has also worked in the Trade Directorate of the Organisation for Economic Co-operation and Development (OECD), the intellectual Property Division of the World Trade Organization (WTO), and the Legal Department of the International Monetary Fund (IMF).

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To my wife and best friend, Tania
and to my son, Max

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Table of general abbreviations

Short title	Full citation
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the GATT 1994
ATC	Agreement on Textiles and Clothing
BISD	Basic Instruments and Selected Documents
CDSOA	<i>Continued Dumping and Subsidy Offset Act of 2000</i> , Pub L No 106-387, 114 Stat 1549, 1001-1003 (2001) (US)
covered agreements	The Agreements listed in Annex 1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes
Doha Declaration	WTO Ministerial Conference, <i>Ministerial Declaration</i> , WT/MIN(01)/DEC/1 (20 November 2001)
Doha Declaration on TRIPS and Public Health	WTO Ministerial Conference, <i>Declaration on the TRIPS Agreement and Public Health</i> , WT/MIN(01)/DEC/2 (20 November 2001)
Doha Implementation Decision	WTO Ministerial Conference, <i>Implementation-Related Issues and Concerns - Decision of 14 November 2001</i> , WT/MIN(01)/17 (20 November 2001)
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding)
EC	European Communities
ECJ	European Court of Justice
Enabling Clause	Decision on Differential and More Favourable Treatment, Reciprocity, and Fuller Participation

	of Developing Countries, GATT Document L/4903, 28 November 1979, BISD 26S/203
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GSP	Generalised System of Preferences
HS	Harmonized Commodity Description and Coding System (Harmonized System)
ICJ	International Court of Justice
ILC Articles	International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts: General Assembly, UN, <i>Report of the International Law Commission</i> , A/56/10 (SUPP) (1 October 2001)
IMF	International Monetary Fund
July Package	WTO General Council, <i>Decision Adopted by the General Council on 1 August 2004</i> , WT/L/579 (2 August 2004)
LDC	Least-developed country
Marrakesh Agreement	Marrakesh Agreement Establishing the World Trade Organization
MFN	Most Favoured Nation
Multilateral Trade Agreements	The Agreements and associated legal instruments included in Annexes 1, 2 and 3 to the Marrakesh Agreement Establishing the World Trade Organization
NAFTA	North American Free Trade Agreement
OECD	Organisation for Economic Co-operation and Development
PCIJ	Permanent Court of International Justice
Plurilateral Trade Agreements	The Agreements and associated legal instruments included in Annex 4 to the Marrakesh Agreement Establishing the World Trade Organization
Rules of Conduct	DSB, <i>Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes</i> , WT/DSB/RC/1 (11 December 1996)
S&D	Special and differential treatment
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures

SPS measure	Sanitary or phytosanitary measure
TBT Agreement	Agreement on Technical Barriers to Trade
TRIMS Agreement	Agreement on Trade-Related Investment Measures
TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights
UN	United Nations
UN Charter	Charter of the United Nations
UNCTAD	United Nations Conference on Trade and Development
VCLT	Vienna Convention on the Law of Treaties, opened for signature on 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980)
Working Procedures for Appellate Review	Appellate Body, <i>Working Procedures for Appellate Review</i> , WT/AB/WP/5 (4 January 2005)
WTO	World Trade Organization
WTO agreements	The Marrakesh Agreement and the documents contained in its four annexes
WTO Tribunals	WTO Arbitral Bodies, Panels, and the Appellate Body

Table of WTO award and report abbreviations

Short Title	Full citation
<i>Argentina – Ceramic Tiles</i>	Panel Report, <i>Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy</i> , WT/DS189/R, adopted 5 November 2001, DSR 2001:XII, 6241
<i>Argentina – Footwear (EC)</i>	Appellate Body Report, <i>Argentina – Safeguard Measures on Imports of Footwear</i> , WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, 515
<i>Argentina – Footwear (EC)</i>	Panel Report, <i>Argentina – Safeguard Measures on Imports of Footwear</i> , WT/DS121/R, adopted 12 January 2000, as modified by Appellate Body Report, WT/DS121/AB/R, DSR 2000:II, 575
<i>Argentina – Hides and Leather</i>	Panel Report, <i>Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather</i> , WT/DS155/R and Corr.1, adopted 16 February 2001, DSR 2001:V, 1779
<i>Argentina – Hides and Leather</i>	Award of the Arbitrator, <i>Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS155/10, 31 August 2001, DSR 2001:XII, 6013
<i>Argentina – Poultry Anti-Dumping Duties</i>	Panel Report, <i>Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil</i> , WT/DS241/R, adopted 19 May 2003
<i>Argentina – Preserved Peaches</i>	Panel Report, <i>Argentina – Definitive Safeguard Measure on Imports of Preserved Peaches</i> , WT/DS238/R, adopted 15 April 2003

<i>Argentina – Textiles and Apparel</i>	Appellate Body Report, <i>Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items</i> , WT/DS56/AB/R and Corr.1, adopted 22 April 1998, DSR 1998:III, 1003
<i>Argentina – Textiles and Apparel</i>	Panel Report, <i>Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items</i> , WT/DS56/R, adopted 22 April 1998, as modified by Appellate Body Report, WT/DS56/AB/R, DSR 1998:III, 1033
<i>Australia – Automotive Leather II</i>	Panel Report, <i>Australia – Subsidies Provided to Producers and Exporters of Automotive Leather</i> , WT/DS126/R, adopted 16 June 1999, DSR 1999:III, 951
<i>Australia – Automotive Leather II (Article 21.5 – US)</i>	Panel Report, <i>Australia – Subsidies Provided to Producers and Exporters of Automotive Leather – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS126/RW and Corr.1, adopted 11 February 2000, DSR 2000:III, 1189
<i>Australia – Salmon</i>	Appellate Body Report, <i>Australia – Measures Affecting Importation of Salmon</i> , WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327
<i>Australia – Salmon</i>	Panel Report, <i>Australia – Measures Affecting Importation of Salmon</i> , WT/DS18/R and Corr.1, adopted 6 November 1998, as modified by Appellate Body Report, WT/DS18/AB/R, DSR 1998:VIII, 3407
<i>Australia – Salmon</i>	Award of the Arbitrator, <i>Australia – Measures Affecting Importation of Salmon – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS18/9, 23 February 1999, DSR 1999:I, 267
<i>Australia – Salmon (Article 21.5 – Canada)</i>	Panel Report, <i>Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS18/RW, adopted 20 March 2000, DSR 2000:IV, 2031
<i>Brazil – Aircraft</i>	Appellate Body Report, <i>Brazil – Export Financing Programme for Aircraft</i> , WT/DS46/AB/R, adopted 20 August 1999, DSR 1999:III, 1161
<i>Brazil – Aircraft</i>	Panel Report, <i>Brazil – Export Financing Programme for Aircraft</i> , WT/DS46/R, adopted 20 August 1999,

	as modified by Appellate Body Report, WT/DS46/AB/R, DSR 1999:III, 1221
<i>Brazil – Aircraft (Article 21.5 – Canada)</i>	Appellate Body Report, <i>Brazil – Export Financing Programme for Aircraft – Recourse by Canada to Article 21.5 of the DSU</i> , WT/DS46/AB/RW, adopted 4 August 2000, DSR 2000:VIII, 4067
<i>Brazil – Aircraft (Article 21.5 – Canada)</i>	Panel Report, <i>Brazil – Export Financing Programme for Aircraft – Recourse by Canada to Article 21.5 of the DSU</i> , WT/DS46/RW, adopted 4 August 2000, as modified by Appellate Body Report, WT/DS46/AB/RW, DSR 2000:IX, 4093
<i>Brazil – Aircraft (Article 21.5 – Canada II)</i>	Panel Report, <i>Brazil – Export Financing Programme for Aircraft – Second Recourse by Canada to Article 21.5 of the DSU</i> , WT/DS46/RW/2, adopted 23 August 2001, DSR 2001:X, 5481
<i>Brazil – Aircraft (Article 22.6 – Brazil)</i>	Decision by the Arbitrators, <i>Brazil – Export Financing Programme for Aircraft – Recourse to Arbitration by Brazil under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement</i> , WT/DS46/ARB, 28 August 2000, DSR 2002:I, 19
<i>Brazil – Desiccated Coconut</i>	Appellate Body Report, <i>Brazil – Measures Affecting Desiccated Coconut</i> , WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:I, 167
<i>Brazil – Desiccated Coconut</i>	Panel Report, <i>Brazil – Measures Affecting Desiccated Coconut</i> , WT/DS22/R, adopted 20 March 1997, as upheld by Appellate Body Report, WT/DS22/AB/R, DSR 1997:I, 189
<i>Brazil – Retreaded Tyres</i>	Panel Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/R, 12 June 2007
<i>Brazil – Retreaded Tyres</i>	Appellate Body Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/AB/R, adopted 17 December 2007
<i>Canada – Aircraft</i>	Appellate Body Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft</i> , WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, 1377
<i>Canada – Aircraft</i>	Panel Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft</i> , WT/DS70/R, adopted 20 August 1999, as upheld by Appellate Body Report, WT/DS70/AB/R, DSR 1999:IV, 1443

<i>Canada – Aircraft (Article 21.5 – Brazil)</i>	<i>Appellate Body Report, Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU, WT/DS70/AB/RW, adopted 4 August 2000, DSR 2000:IX, 4299</i>
<i>Canada – Aircraft (Article 21.5 – Brazil)</i>	<i>Panel Report, Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU, WT/DS70/RW, adopted 4 August 2000, as modified by Appellate Body Report, WT/DS70/AB/RW, DSR 2000:IX, 4315</i>
<i>Canada – Aircraft Credits and Guarantees</i>	<i>Panel Report, Canada – Export Credits and Loan Guarantees for Regional Aircraft, WT/DS222/R and Corr.1, adopted 19 February 2002, DSR 2002:III, 849</i>
<i>Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)</i>	<i>Decision by the Arbitrator, Canada – Export Credits and Loan Guarantees for Regional Aircraft – Recourse to Arbitration by Canada under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement, WT/DS222/ARB, 17 February 2003</i>
<i>Canada – Autos</i>	<i>Appellate Body Report, Canada – Certain Measures Affecting the Automotive Industry, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, 2985</i>
<i>Canada – Autos</i>	<i>Panel Report, Canada – Certain Measures Affecting the Automotive Industry, WT/DS139/R, WT/DS142/R, adopted 19 June 2000, as modified by Appellate Body Report, WT/DS139/AB/R, WT/DS142/AB/R, DSR 2000:VII, 3043</i>
<i>Canada – Autos</i>	<i>Award of the Arbitrator, Canada – Certain Measures Affecting the Automotive Industry – Arbitration under Article 21.3(c) of the DSU, WT/DS139/12, WT/DS142/12, 4 October 2000, DSR 2000:X, 5079</i>
<i>Canada – Dairy</i>	<i>Appellate Body Report, Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products, WT/DS103/AB/R, WT/DS113/AB/R and Corr.1, adopted 27 October 1999, DSR 1999:V, 2057</i>
<i>Canada – Dairy</i>	<i>Panel Report, Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products, WT/DS103/R, WT/DS113/R, adopted 27 October 1999, as modified by Appellate Body</i>

	Report, WT/DS103/AB/R, WT/DS113/AB/R, DSR 1999:VI, 2097
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Canada – Dairy (Article 21.5 – New Zealand and US)	Panel Report, <i>Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Recourse to Article 21.5 of the DSU by New Zealand and the United States</i> , WT/DS103/RW, WT/DS113/RW, adopted 18 December 2001, as reversed by Appellate Body Report, WT/DS103/AB/RW, WT/DS113/AB/RW, DSR 2001:XIII, 6865
Canada – Dairy (Article 21.5 – New Zealand and US II)	Appellate Body Report, <i>Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Second Recourse to Article 21.5 of the DSU by New Zealand and the United States</i> , WT/DS103/AB/RW2, WT/DS113/AB/RW2, adopted 17 January 2003
Canada – Dairy (Article 21.5 – New Zealand and US II)	Panel Report, <i>Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Second Recourse to Article 21.5 of the DSU by New Zealand and the United States</i> , WT/DS103/RW2, WT/DS113/RW2, adopted 17 January 2003, as modified by Appellate Body Report, WT/DS103/AB/RW2, WT/DS113/AB/RW2
Canada – Patent Term	Appellate Body Report, <i>Canada – Term of Patent Protection</i> , WT/DS170/AB/R, adopted 12 October 2000, DSR 2000:X, 5093
Canada – Patent Term	Panel Report, <i>Canada – Term of Patent Protection</i> , WT/DS170/R, adopted 12 October 2000, as upheld by Appellate Body Report, WT/DS170/AB/R, DSR 2000:XI, 5121
Canada – Patent Term	Award of the Arbitrator, <i>Canada – Term of Patent Protection – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS170/10, 28 February 2001, DSR 2001:V, 2031