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Foreign Summary

Customary international law (CIL) has long served as the dispute settlement source of law for the International Court of Justice (ICJ) in the realm of public international law. The completeness and utility of CIL theory has evolved from its many analyses, interpretations, and applications by the ICJ and from scholarly scrutiny over the decades. On the other hand, scholars and WTO practice agree that WTO law is a special branch of public international law. By this logic, the sources of WTO law are covered agreements, general principle of law - as well as CIL.

However, CIL the function CIL serves in WTO cases can significantly differ from the function CIL serves in ICJ cases, due to the inherent complexity of CIL; the qualifications of the WTO's panelists and Appellate Body (AB) members; and key characteristics of the WTO legal system; and the hierarchy of WTO dispute settlement system. The aim of this thesis is to compare these two international dispute settlement legal systems and critique the function of CIL in WTO cases.

In chapter 2, I discuss the sources of international law and the legal theory of CIL, the essential elements of CIL in state practice and opinion juris, and the legal theory of CIL. In chapter 3, I present the classic cases in which the ICJ refers to CIL, and I examine the analysis, interpretation and application of CIL by the ICJ. In chapter 4, I analyze the sources of WTO law, its basis in covered agreements, CIL and general principles of law, and I demonstrate CIL as a basis for WTO law.

In chapter 5, I argue that the panel and the AB of the WTO differ from the ICJ, and that they do not apply the essential elements of CIL. Furthermore, the panel and the AB only consider non-debatable CIL rules, such as sovereign equality of states and pacta sunt servanda, and refuse to analyze and apply the rules still in debate, such as precautionary principle.

Finally, I conclude that understanding of the CIL theory by the panel and the AB is inconsistent with the legal theory of public international law, that the panel and the AB misunderstanding the range of effect of CIL has limit, base on branchs of international law, such as international environmental law and international trade law. This misunderstanding will have huge influence to WTO cases thereafter, and made WTO law disconnected from public international law. After all, the status of CIL in WTO cases is to interpret covered agreement, rather than the source of WTO law. Consequently, I recommend that the panel and the AB should clarify the range of effect of CIL and theory of public international law in future cases, and modify former cases in appropriate ways. Cases concerning CIL will increase in the future because of continued rises in trade-related topics in WTO cases. In order to clarify such legal relationships in WTO cases, the panel and the AB should analyze, interpret, and apply specific rules of CIL in the fullest. By amending these inconsistencies with the theories of international law, the panel and the AB can more clearly recognize the legal theory, essential elements, and range of effect of CIL and avoid unnecessary legal ambiguities in its international trade cases.

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