Use of Customary International Law in WTO Dispute Settlement

Dakshita Sangwan* and Abdullah Nasir**

1. Introduction

DEBATE SURROUNDING the relationship between two branches of public international law has attracted centre stage in the recent times. Proliferation of international treaties and its differing interpretations have not only led to conflict of norms but also fragmentation of international law.[1] This problem exists primarily because of the lack of a central law making and decision making body with compulsory jurisdiction. While International legal system does not have a central legislature unlike domestic legal system but it "does include an element with features of international legislation, namely general international law, composed of general customary international law (*hereinafter* CIL) and general principles of law which are binding on all states."[2] The aforesaid rules pegged-in the slits left by the treaties also protect 'key structural and substantive interests of the international community.'[3] As we shall see in this paper, there exists no hierarchy between different sources of international law, but by concluding a treaty, the states can contract out of or deviate from the customary rules of international law. Therefore, whether CIL applies in a given scenario depends on the text of the treaty and the extent to which that treaty has contracted out of general CIL.

The debate relating to the relationship of international law in dealing with WTO disputes is not new. Some commentators believe that WTO has followed a controlled regime in itself and therefore no norm of general international law applies to WTO legal system.[4] There basic argument is that in the absence of an express acknowledgment of the applicability of non-WTO law, it is not legitimate for the WTO adjudicating bodies to apply general principles of law in a given dispute. Therefore, they believe that WTO members have no obligation outside the WTO Agreements unless expressly agreed otherwise. Similarly, some commentators suggest treating WTO as a self-contained regime might lead to a situation where there would be no law on a particular issue and under such circumstances 'the course of action would be to declare a *non-liquet* and refer the matter to WTO General Council for clarification.'[5] There are other group of commentators who believe that WTO is a part of the international law and therefore principles of international law automatically apply to the WTO legal system unless the contrary is proved, i.e., to say that the WTO Agreement expressly contracts out of it.[6]

The paper aims to focus on two fundamental questions. First, whether WTO is a self-contained regime? If the answer to the first question is in the negative, then the second question would follow - how CIL rules have been used in a WTO dispute? However, here the main contention is not to make an empirical analysis of the WTO disputes but to present an overview of the use of CIL norms by Dispute Settlement Body (*hereinafter* DSB).

*** Assistant Professor, School of Law, G.D. Goenka University, Gurgaon.**

****Assistant Professor, Ram Manohar Lohia National Law University, Lucknow.**

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1 International Law Commission, 'Report on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', A/CN.4/L.682 (58th session Geneva, 13 April 2006) at 7-19.

2 Joost Pauwelyn, The Role of Public International Law in the WTO: How Far can We Go?, 95 *AJIL* 535, 536 (2001).

3 Anthea Roberts, 'Who Killed Article 38(1)(B)? A Reply to Bradley & Gulati' 21 *Duke J Comp & Int'l L* 173, 176 (2010). Also see, *Id*. at 536.

4 *See*, Judith Bello, The WTO Dispute Settlement Understanding: Less is More*,* 90 *AJIL* 416 (1996); Joel P. Trachtman, The Domain of WTO Dispute Resolution*,* 40 *Harvard Intl. L. J.* 333 (1999).

5 R Rajesh Babu, 'Understanding the Role of International Law in WTO Law'*,* 1(1) *Indian Yearbook of International Law and Policy* 287, 288, 300-303 (2009).

6 Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law relates to other Rules of International Law*, 25-147 (Cambridge University Press, New York, 2003); Joost Pauwelyn, 'The Role of Public International Law in the WTO: How Far can We Go?', 95 *AJIL* 535 (2001); John Jackson, *The World Trading System*, 25 (MIT Press: Cambridge 1997); Ernst-Ulrich Petersmann, *Dispute Settlement in International Economic Law: Lessons for Strengthening International Dispute Settlement in Non-Economic Areas,* 2 JIEL 189 (1999); Donald McRae, *The WTO in International Law: Tradition Continued or New Frontier?* 3 JIEL 27 (2000); Donald McRae, *The Contribution of International Trade Law to the Development of International Law,* 260 Recueil des Cours 111 (1996). Also see: Georg Schwarzenberger, *The Principles and Standards of International Economic Law,* 87 Recueil des Cours 1 (1966); Jiaxiang Hu, The Role of International Law in the Development of WTO Law*,* 7 *JIEL* 143 (2004); Andrew D. Mitchell, *The Legal Basis for Using Principles in WTO Disputes,* 10 JIEl 795 (2007); Lorand Bartels, Applicable Law in WTO Dispute Settlement*,* 35 *JIEL* 499 (2001).

This paper, in particular, studies the relationship between customary international and WTO dispute settlement.[7] Answer to these questions would help us to understand the applicable customary international law in a given dispute.

The present paper is divided into four parts. After a brief introduction to the paper, part II discusses the common understanding related to CIL and the way it operates. Part III analyses the question of WTO being/non-being a self contained regime. Depending on the findings made in the preceding section, Part IV analyses the applicable Customary International Law to the WTO dispute settlement. In the last part, a conclusion is arrived at by analyzing the arguments made in this paper.

2. Current Understanding of Customary International Law

Despite the increase in the number of treaties since World War II, CIL continues to play an important role in international law by regulating the actions of the non-parties to a treaty and by filling the gaps left by the treaties.[8] Therefore, one can say that CIL acts as safety net.[9] Moreover, those areas which are still un-regulated by a comprehensive treaty law, like immunity of heads of state, are still governed by CIL norms. It also helps to fill the gaps in law which arise due to emerging problems of international community [for example, treatment and trial of captured terrorists].[10]

Generally, it is understood that CIL develops from the practices of the states followed or understood as a legal obligation. Therefore, there are two elements of CIL: objective requirement of state practice and subjective requirement of *opinio juris*.[11] It is also agreed that state practice must be extensive and widespread, particularly that of '*specially affected states'*.[12] "Traditionally, formation of CIL was thought to be an inherently slow process; however 'technological changes in communication, the rise of international institutions, and other developments are thought to have condensed the time period such that CIL can arise very quickly in some circumstances.'[13] Therefore, ICJ on one occasion has held that -

> *"[p]assage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law [...] yet an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform [...] and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved".*[14]

Post-crystallization of a norm into CIL makes it binding on all the states except persistent objectors (i.e., those states that have been consistent and persistent in their objection to the rule before its crystallization into CIL and have continued to do so after it has crystallized). Nonetheless, there is no subsequent objector rule. In this

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[7] Another interesting area to be studied relates to the methodology used by the WTO Panel and Appellate Body to determine whether a particular norm has developed as customary international law [*i.e.*, identification of customary international law norm]. Although the methodology used by the International Court of Justice has recently been studied [Stefan Talmon, Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion, 26 *EJIL* 417 (2015); Peter Tomka, Custom and the International Court of Justice, 12 *The Law and Practice of International Courts and Tribunals* 195 (2013)], author has not come across any writing which has studied the practice of WTO Panel and Appellate Body. However, due to space and time constraint, this paper will also refrain from dealing with this area.

[8] International Law Commission, 'First Report on Formation and Evidence of Customary International Law', A/CN.4/664 (65th session, 2013) at 12.

[9] Roberts, *supra* note 3, at 176.

[10] Curtis A. Bradley and Mitu Gulati, Withdrawing from International Custom, 120 *Yale L.J*. 202, 210 (2010).

[11] Although, this is the conventional and generally accepted understanding regarding the formation of a CIL norm, there are some authors who have tried to deemphasize the subjective element. [*See*, ILA, 'Report on Formation of Customary (General) International Law' (London Conference, 2000) at 31-32] and also, there are others have tried to challenge the state-practice element. [*see*, Bruno Simma & Phillip Alston, The Sources of Human Rights Law: Custom, *Jus Cogens*, and General Principles, 12 *Austl. Y.B. Int'l. L*. 82, 89 (1989)].

[12] International Law Commission, 'Second Report in Identification of Customary International Law', A/CN.4/672 (66th session, 2014) at 35-44.

[13] Bradley, supra note 10, at 210. Also see, *Id*. at para 58. Therefore, some commentators argue that there can be "instant" CIL. Bin Cheng, *Studies in International Space Law*, 21-30 (Oxford University Press, 1997); Bin Cheng, United Nations Resolutions on Outer Space: "Instant" International Customary Law?, 5 *Indian J. Intl' L*. 23, 35-40 (1965).

[14] North Sea Continental Shelf (Federal Republic of Germany/Netherlands) (Judgment) 1969 I.C.J. Rep. 3, at p. 43.

regard, mere silence or adherence to contrary laws or practices is not enough for continual objection.[15] Contrary to the fact that CIL binds a new state which comes into existence after the formation of a CIL norm, doesn't *ipso facto* give an opportunity to object to the said new state.[16]

A CIL norm can be overridden by a treaty concluded after its crystallization but only between the parties to the treaty; meaning thereby, CIL rule will be binding between the non-state parties to the treaty as well as state parties in their relations with non-state parties. In this regard, one commentator argues that, *"the treaty-override option not only requires obtaining the agreement of other nations, but also that the CIL obligation be such that a nation can differentiate in its conduct between parties to the treaty and non-parties*."[17] Therefore, the only option available to the states to change a rule of CIL in true sense as opposed to overriding it by a later treaty or 'regional custom'[18] is by violating the CIL rule and expecting other nations to follow 'the new practice'.[19]

2.1 Hierarchy of International Law Sources

The priority of treaties [as appearing first in Article 38(1)] can be explained by the simple fact that it is a more specific source (*lex specialis*) of obligation.[20] However, this does not suggest that international law provides for a hierarchy of norms. Crawford emphatically argues that, "[t]reaty as a source relates to obligations; in some circumstances a treaty does not give rise to a corresponding obligation of a state party, notably when it is contrary to a peremptory norm of international law and in all cases the content of a treaty obligation depends on the interpretation of the treaty, a process governed by international law. A treaty may even be displaced by a subsequent rule of customary international law, at least where its effects are recognized in the subsequent conduct of the parties."[21]

To conclude, one can refer to the observation of ICJ in *Nicaragua* case where Court clearly emphasized that:

> *"[T]here are a number of reasons for considering that, even if two norms belonging to two sources of international law appear identical in content, and even if the States in question are bound by these rules both on the level of treaty-law and on that of customary international law, these norms retain a separate existence. This is so from the standpoint of their applicability. In a legal dispute affecting two States, one of them may argue that the applicability of a treaty rule to its own conduct depends on the other State's conduct in respect of the application of other rules, on other subjects, also included in the same treaty."*[22]

Based on the above discussion, one can easily conclude that there is no hierarchy between treaty and customary international law and treaty law overrides and applies to those areas to which it explicitly contracts out.

3. Whether WTO is an Integral Part of Public International Law?

With a few exceptions,[23] it is generally accepted that WTO rules are considered as important element of the

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[15] ILC, 'Third Report on Identification of Customary International Law', A/CN.4/682 (67th session, 2015) at 59-67.
[16] ILA Report, *supra* note 11 at 27-29.
[17] Bradley, *supra* note 10 at 211-212.
[18] *Right of Passage over Indian Territory (Portugal v. India)* (Judgment) 1960 I.C.J. Rep. 6, at 39-40.
[19] Bradley, *supra* note 10 at 212.
[20] James Crawford (ed.), *Brownlie's Principle of Public International Law*, 22 (Oxford University Press 2012); Also see, ILC Fragmentation Rep., *supra* note 1 at 8-11.
[21] *Id*. at 22-23.
[22] Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Judgment) 1986 I.C.J. Rep 14, para 178.
[23] *See*, Bello, *supra* note 4; Trachtman, *supra* note 4. Trachtman, for example, notes that, *"[t]he role of general law in completing contracts reminds us that no institution is an island: each exists in a broader institutional setting. [...] Thus, each particular institutional setting is really a complex of interacting institutional settings. However, the WTO generally isolates itself from much of the broader institutional setting of public international law. WTO dispute resolution panels and the Appellate Body are limited to the application of substantive WTO law and are not authorized to apply general substantive international law or other conventional international law. On the other hand, as noted above, the rules of interpretation of customary international law have been received into WTO law."* [at 347-348].

wider body of public international law.[24] There are a plethora of reasons for considering WTO rules as an important element of public international law. In this part of the paper, authors have attempted to highlight some of those reasons.

Joost Pauwelyn, in his seminal work on this issue, advances several arguments to establish that WTO is not a self-contained code. He presents an interesting example to discard the idea of WTO being a self- contained code. According to Pauwelyn, if WTO is accepted as a self-contained code then nothing will stop member states to bring slave trade within the ambit of WTO and if a dispute regarding slave trade comes before Appellate Body(*hereinafter* AB), then reading 'WTO legal system as an independent and self-contained legal system', Panel or AB 'will have to give its decision in favour of the states whose right to human trade has been violated under the WTO agreement.'[25] The argument is simple and proves the self-contained code argument to be completely 'absurd'[26] because if WTO is accepted to be an independent legal system then *jus cogens* as understood under Article 53 of the Vienna Convention on Law of the Treaties (VCLT)[27] [prohibition on slave trade in the above example] will have no application to the WTO legal system.

Another fundamental question which needs to be addressed here is- whether there can self contained regimes within international legal system. This question has been expressly addressed by the ILC report on the Fragmentation of International law. In the words of the special Rapporteur to this draft:

> "None of the treaty-regimes in existence today is self-contained in the sense that the application of general international law would be generally excluded. On the contrary, treaty bodies in human rights and trade law, for example, make constant use of general international law in the administration of their special regimes. Though States have the faculté to set aside much of the general law by special systems of responsibility or rule-administration, what conclusions should be drawn from this depends somewhat on the normative coverage or "thickness" of the regime. The scope of a special State responsibility regime is normally defined by the relevant treaty. No assumption is entailed that general law would not apply outside of the special provisions."[28]

It has also been argued by some commentators that the existence of several exceptions within WTO agreements (for ex. General exceptions under GATT) has 'linked WTO law with other international legal systems.'[29] These exceptions do not provide sufficient guidance or criteria to the Dispute settlement bodies to decide an issue falling under one of the exceptions. When faced with a dispute between two member countries, dispute settlement bodies have no choice 'than to look for information that will lead them to the reasonable and objective meaning of the terms of the treaty that they must ultimately interpret, apply and enforce.'[30] In this regard one commentator notes that, "[the] existence of Article XX, and exceptions elsewhere in the WTO agreements, implies that panels and the Appellate Body are charged with a duty to balance international trade and national interests, even in the presence of significant uncertainty about how the relevant WTO provisions apply.[31] In other words, issues relating to environment, health, war, etc. within WTO cannot be dealt solely by relying on the text of the GATT. This warrants the use of non-WTO law to achieve the clear meaning of the obligations referred in the WTO agreements.

Reference must also be made to the preamble of the WTO Agreement, which explicitly makes reference to

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[24] *See*, Joost Pauwelyn, *supra* note 6; James Cameron and Kevin R. Gray, Principles of International Law in the WTO Dispute Settlement Body, 50 *ICLQ* 248 (2001); Sharizal Mohd. Zin and Ashraf U. Sarah Kazi, *An Analysis of Customary International Law and the Importance of Dispute Settlement: A Study of Environmental Law Exceptions under Article XX,* 7 MqJICEL 39 (2011); Joost Pauwelyn, *supra* note 6; Jackson, *supra* note 6; Petersmann, *supra* note 6; Donald McRae- *The WTO in International Law*, *supra* note 6; Donald McRae- *The Contribution of International Trade Law to the Development of International Law*, *supra* note 6; Also see: Schwarzenberger, *supra* note 6; Jiaxiang Hu, *supra* note 6; Mitchell, *supra* note 6; Bartels, *supra* note 6.

[25] Joost Pauwelyn, The Role of Public International Law in the WTO: How Far can We Go?, 95 *AJIL* 535, 565 (2001).

[26] *Ibid.,* at p. 565.

[27] 1155 UNTS 331.

[28] ILC Fragmentation Rep., *supra* note 1, at para. 174.

[29] Jiaxiang Hu, *supra* note 6 at 144. For the list general exceptions and security exceptions under GATT, *see*, General Agreement on Tariffs and Trade 1994, 1867 U.N.T.S. 187 at Article XX- XXI [hereinafter GATT 1994].

[30] *Id.,* at 144-145.

[31] J. Bourgeois, "WTO Dispute Settlement in the Field of Anti-Dumping Law*," 1 Journal of Intl. Eco. L*. 259, 271 (1998).

'optimal use of world's resources in accordance with the objectives of sustainable development.'[32] Jiaxiang Hu notes that, *"in Marrakesh Decision on Trade and Environment WTO Members has taken note of the Rio Declaration on Environment and Development, Agenda 21, and its follow-up in GATT. Although all these international declarations and policy statements contained in the Marrakesh Decision are not legally binding, they have provided a widely-accepted parameter for the concept of sustainable development."*[33]

It is important here to briefly refer to Article 3(2) of the DSU. Article 3(2) of the Dispute Settlement Understanding[34] lay down that the WTO agreements should be interpreted in the light of "customary rules of interpretation". As we shall see subsequently in the paper, Article 3(2) also allows for the use of non-WTO law in the interpretation of WTO Agreements by the Dispute Settlement Body. Moreover, if DSU interprets WTO law in clinical isolation from rest of the international law, WTO law would risk conflicts with other international law rules and therefore will also lead to fragmentation of international law.[35]

Thus, one point which is clarified from the above distinction is that WTO is a part of the wide body of international law just like international human rights law, humanitarian law, environmental law, etc. Likewise, it is to be kept in mind that by accepting such a link, general international law may perhaps offer the WTO adjudicatory bodies not only a large body of well recognized principles helpful in clarifying ambiguities and strengthening remedies, but also in ensuring the comprehensiveness of the WTO legal system.

Thus, States, in their relations, can contract out of the rules of general international (other than the rules of *jus cogens*), but they cannot contract out of the system of general international law. In this observation, WTO rules can be termed as rules of international law (just like rules of international human rights law, international environmental law, etc.), nevertheless in certain regards, comprise *lex specialis* with reference to certain rules of general international law. [36]

This answers the first question we posed in the initial portion of this paper and it can be said with certainty that since WTO is a branch of public international law therefore CIL can be applied in a dispute under WTO unless it has been explicitly contracted out under the agreement.

4. Customary International Law in WTO Disputes

WTO jurisprudence seems to suggest that non-WTO law may play a significant role in WTO dispute settlement. On various occasions WTO Panels and Appellate Body have applied the rule of international custom while deciding a dispute.[37] Therefore for example, in *US-Wool Shirts and Blouses*,[38] when establishing the rule on burden of proof to be applied within WTO proceedings, the AB referred to the practice of other international courts.

In the *China Raw Materials case,*[39] the significant enquiry was that *whether export constraint forced on several raw materials was justified under Article XX (g) [conservation of exhaustible natural resources] of the GATT?* China invoked PSNR concept in this regard. Panel held that the principle is deemed as "relevant rules of international law applicable in the relations between the parties" that ought be taken into account together

[32] Marrakesh Agreement Establishing the World Trade Organization, 1867 U.N.T.S. 154.

[33] *Jiaxiang Hu , supra* note 6 at 148.

[34] Understanding on Rules and Procedures Governing the Settlement of Disputes, 1869 U.N.T.S. 401 [Hereinafter 'DSU'].

[35] ILC Fragmentation Rep., *supra* note 1, at para 19 & 494. Also see, Gabrielle Marceau, WTO Dispute Settlement and Human Rights*,* 13 *EJIL* 753 (2002).

[36] *Id.,* at p. 538-540.

[37] For instance, see, *Korea- Government Procurement*, WT/DS/163/R, (2000) (Panel Report) para 7.96; *US-Gasoline*, WT/DS2/AB/R, (1996) (Panel Report) 17; *EC- Measures Affecting the approval and marketing of Biotech product*s, WT/DS291-293/R (2006) (Panel Report), 7.53-7.54*; Canada-Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R (2000) (Appellate Body), para 202*; Indonesia-Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R (2 July 1998) (Panel Report), para 14.1; *US-Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R (10 May 2000) (Appellate Body); *China-Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R ; WT/DS395/AB/R ; WT/DS398/AB/R (2009) (Appellate Body) (China-Raw Materials) , and *China-Measures Related to the Exportation of Rare Earths, Tungsten and* Molybdenum, WT/DS431/R ; WT/DS432/R; WT/DS433/R (2012) (Panel Report) (China-Rare Earths).

[38] *United States — Measures Affecting Imports of Woven Wool Shirts and Blouses from India,* WT/DS2/9 (25 April 1997) (Appellate Body Report).

[39] *China-Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R; WT/DS395/AB/R; WT/DS398/AB/R (2009) (Panel Report) (China-Raw Materials).

with the circumstance in interpreting a treaty, which falls under Article 31 (3) (c) of the VCLT. Panel took this principle into account in interpreting the term "conservation".[40]

Panel's deliberation on this principle roughly incorporated three phases. *Firstly*, the panel stressed the basic nature of the international law principle of state sovereignty.[41] *Secondly*, at the same time as referring to different UNGA resolutions and international treaties, for instance Resolution 1803, Resolution 626 and the *Convention on Biological Diversity*, the panel moreover acknowledged that the principle of PSNR constitutes "an important element" of the principle of sovereignty.[42] *Thirdly*, the panel analyzed the link between state sovereignty and WTO obligation. The panel found as the capability to enter into WTO agreements is an instance of the exercise of sovereignty, and by joining the WTO, China not only obtained important commercial and institutional advantages, together with respect to its natural resources, nevertheless also committed to stand by the WTO rights and obligations. As a result, China must exercise its sovereignty over natural resources in a way consistent by its WTO obligations.[43]

Subsequent to *China Raw materials* decision, US and Japan initiated proceedings against China alleging that the export restrictions on various forms of rare earths, tungsten and molybdenum, as well as export duties, export quotas and trading rights restrictions, constituted violation of China's WTO obligations [*China Rare Earth case*].[44] Once again, to sustain its arguments on Article XX (g), China invoked the principle of PSNR.

Significant for our deliberation at this point is the issue relating to the PSNR. China argues that the policy goal of "conservation" under Article XX (g) is "not limited to preserving exhaustible natural resources in their current state, but also covers the use and management of those resources in line with a Member's sustainable economic development".[45] The panel initially laid down that this principle is important along with Article XX (g) in the sense that it may help the panel in interpret the Article XX (g).[46] After that, the panel confirmed that, pursuant to this principle, a state has sovereign rights to accept conservation measures at its own judgment, as well as those managing export of resources. Even while recognizing such sovereign rights, the panel subsequently stressed that such rights must not be understood to mean "a general right to regulate and control a natural resource market for any purpose" or "a right to control the international markets in which extracted products are bought and sold".[47] At last, the panel agreed with what has been laid down in *China-Raw Materials* that *"in becoming a WTO member, China has agreed to exercise its sovereign rights in conformity with WTO rules and to respect WTO provisions when developing and implementing policies to conserve exhaustible natural resources"*.[48] China appealed against the decision of the Panel. Appellate Body upheld the panel's finding that when interpreting the term "conservation" of Article XX (g), "appropriate balance should be struck between trade liberalization, sovereignty over natural resources and the right to sustainable development".[49]

It can very well be observed how DSB acknowledged the CIL rule of PSNR and balanced the principles of trade liberalization, sovereignty over natural resources and the right to sustainable development.

5. Explicit Reference to the Customary International Law Norms under WTO Agreement

One customary norm which clearly establishes its application in WTO dispute settlement system is the customary rule of interpretation.[50] This provides the Panel as well as the Appellate Body liberty in applying most international law principles into the WTO legal system on the pretext of clarification.

Rules of interpretation are codified, while not limited to, Articles 31 -33 of the Vienna Convention on the Law of the Treaties, 1969 (*hereinafter* VCLT) which sets out the general and supplementary rules adjudicatory bodies

[40] *Id* at para 7.122.
[41] *Id* at para 7.124.
[42] *Id* at para 7.158.
[43] *Ibid* at para 7.369.
[44] *China-Measures Related to the Exportation of Rare Earths, Tungsten and* Molybdenum, WT/DS431/R ; WT/DS432/R ; WT/DS433/R (2012) (Panel Report) (China-Rare Earths).
[45] *China-Rare Earths* (Panel Report), para. 7.53.
[46] *Ibid* at para 7.60 .
[47] *Ibid* at para 7.53-7.114.
[48] *Ibid* at para 7.270.
[49] *China-Rare Earths* (Appellate Body Report) at para 6.2. For an analysis of *China Rare Earth report* and *China- Raw Materials Report*, see, Manjiao Chi, 'Resource Sovereignty and WTO Dispute Settlement' Working Paper 2014/03 (Universität Siegen 2014).
[50] Article 3.2 of the DSU.

might use even while interpreting a treaty. The objective of the rules of interpretation under Articles 31 and 32 was to attain certainty to international law on treaties and give uniformity in treaty interpretation,[51] thereby reducing the possibility of fragmentation of international law.

The general rule of treaty interpretation under Article 31 of the VCLT[52] states that a Court shall interpret treaty in good faith in accordance with the ordinary meaning of the words in light of the context, object, and purpose of the agreement. At this point, particular importance is paid to the context of the treaty as a provision must not be interpreted in segregation but in its context, primary in that part of the agreement and after that in relation to the whole agreement. According to the said provision, considering the aforesaid reason, the court shall take into account (along with the context) not just the text, Preamble and Annexure, but as well as any such agreement which is relating to the treaty commenced between the concerned parties besides any instrument which was made by one or more parties and henceforth accepted by the other parties as an instrument related to such treaty. The Court must also take into consideration acknowledged agreements and practice or any relevant rules of international law applicable in the relations between the Parties that might shed light on its meaning.

Nevertheless, there might be a situation when Article 31 of the VCLT could not resolve a problem of interpretation, thereby leaving the meaning uncertain. In such a situation the court may resort to supplementary tools of interpretation, such as the negotiating history of the agreement, as well as the *travaux preparatoires* and the conditions of its conclusion.[53]

The thought behind the supplementary means of interpretation is to confirm the meaning resulting from the application of Article 31, or to decide the meaning when the interpretation according to Article 31 leaves the meaning unclear or ambiguous; or leads to a result which is patently absurd or unreasonable.[54]

The purpose of the dispute settlement system under WTO is to offer security and predictability to the multilateral trading system.[55] For this reason, members recognize that the clarification of the existing provisions of the covered agreements shall be in harmony with customary rules of interpretation of public international law. Article 3.2 of the DSU reads as: *"The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law."* The provision also lay down that *"the recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."*[56]

Moreover, WTO Panel and Appellate body on several occasions have used Rules of interpretation. Further, the Appellate Body in *US - Gasoline*[57] stated that the general rule of interpretation contained in Article 31 of the VCLT had attained the status of customary international law. Besides, the Appellate Body noted that the:

> "General rule of interpretation has been relied upon by all of the participants and third participants, although not always in relation to the same issue. That general rule of interpretation has attained the status of a rule of customary or general

[51] *R Rajesh Babu , Supra* note 5 at 298.

[52] Article 31 of the Vienna Convention on the Law of the Treaties, 1969 reads as:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between th parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

[53] VCLT Article 32.

[54] Anthony Aust, *Treaty Law and Practice*, 197-201 (Cambridge University Press, New York, 2000).

[55] *Joost Pauwelyn , supra* note 25 at 540.

[56] Article 3.2 of the DSU.

[57] *United States — Standards for Reformulated and Conventional Gasoline,* WT/DS2/R, (29 January 1996) (Appellate Body).

> international law. As such, it forms part of the 'customary rules of interpretation of public international law' which the Appellate Body has been directed, by Article 3(2) of the DSU, to apply in seeking to clarify the provisions of the General Agreement and the other 'covered agreements' of the Marrakesh Agreement Establishing the World Trade Organization (the 'WTO Agreement'). That direction reflects a measure of recognition that the General Agreement is not to be read in clinical isolation from public international law."[58]

The foregoing paragraph is the evidence of the fact that WTO jurisprudence has evidently established the applicability of rules of interpretation.

Nevertheless, it is to be noted that Panel and Appellate Body have acknowledged other customary rules of interpretation which are not codified under the VCLT. Some of these rules have also been used by the Panel and Appellate Body. These are: effectiveness,[59] *in dubio mitius,*[60] legitimate expectations,[61] etc.

6. Conclusion

This paper primarily discussed two questions: *first*, relationship between WTO legal system and general international law and *second*, applicability of customary international law by WTO DSB. We have seen in this paper that WTO is very important element of the public international law genre. Nevertheless, it is not being stated that States cannot opt out of the rules of general international law while entering into treaties.[62] As a result, States, in their relations, have the option to contract out of the rules of general international (except *jus cogens*), however they cannot contract out of the system of general international law. In this regard, WTO rules can be termed as rules of international law (just like rules of international human rights law, international environmental law, etc.), still in some regards, constitute *lex specialis vis-a-vis* certain rules of general international law.

The paper highlighted a number of cases where the adjudicatory bodies have applied the rules of customary international law other than the customary rules of interpretation. One might, of course, question the methodology applied by the adjudicating body while dealing with customary international law in a dispute under WTO but one cannot question the fact that adjudicating bodies under WTO have refrained from recognizing customary international law as applicable law in a dispute. As highlighted above, the methodology of recognizing and dealing with a norm of customary international law is an area which needs to be deliberated separately.

Application of customary international law by the WTO Panel and Appellate Body might offer the WTO adjudicating bodies not only a large pool of well recognized principles supportive in clarifying ambiguities and strengthening remedies. Also, it ensures the comprehensiveness of the WTO legal system. Likewise, if DSU interprets WTO law in clinical isolation from rest of the international law, WTO law would risk conflict with other international law rules and for that reason will also lead to fragmentation of international law. At the same time, WTO case law can also help in the growth and crystallization of customary international law. Its rulings consequently also develop international legal jurisprudence.

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[58] *US — Gasoline* (Appellate Body), 17.

[59] *Japan — Measures Affecting Agricultural Products*, (1988) 27 ILM 1539.

[60] *Brazil-Measures Affecting Desiccated Coconut*, WT/DS22/R (1996) (Panel); *Brazil-Measures Affecting Desiccated Coconut*, WT/DS22/AB/R (1996) (Appellate Body).

[61] *European Communities- Customs Classification of Certain Computer Equipment*, WT/DS62/R, WT/DS67/R, WT/DS68/R (1998) (Panel Report).

[62] In case of conflict between WTO Agreement and any other treaty, it has been suggested that common understanding of the State parties is to be identified or delicate balance between WTO obligations and members international obligations is to be made. See, *Joost Pauwelyn* , *supra* note 25 at 577; *Jiaxiang Hu* , *supra* note 6 at 1051.