摘 要

習慣國際法(customary international law)為國際法之法源，長久以來在國際法院的分析、解釋與適用以及學者之論述下，累積相當多的案件並且發展出一套完整的理論體系。而WTO 為今日相當重要的國際經濟組織，學者與WTO 實踐皆認為WTO 法為國際法的一部份。因此，學者歸納出WTO 法源除涵蓋協定外，尚包括習慣國際法與法律一般原則。

然而，因為證立習慣國際法本身具有困難性與複雜性、制度設計上小組及上訴機構成員不以具有法律背景為必要、WTO 兩審級之爭端解決體系並且具有強制管轄及執行效率，使得習慣國際法在WTO 爭端案件中之地位必然與國際法院不同，在分析、解釋與適用上必然有所差異。

在此研究動機下，本論文第二章首先探究國際法法源，論述習慣國際法之理論基礎與構成要件，並於第三章探討國際法院有關習慣國際法之案件，觀察國際法院如何分析、解釋與適用習慣國際法。第四章將焦點轉回WTO，介紹爭端解決程序之特色，並深入分析WTO 之主要法源及次要法源，以確認習慣國際法作為WTO 法源之理論依據。第五章則進入本論文之核心，探討小組與上訴機構關於習慣國際法之案件，深入分析會員於各爭端案件中如何主張習慣國際法、小組與上訴機構如何分析、解釋與適用習慣國際法，以觀察習慣國際法於WTO 爭端解決案件之地位。

第六章為本論文之結論。首先，本研究發現小組與上訴機構與國際法院不同，未於爭端案件中分析各習慣國際法規則之構成要件。再者，小組與上訴機構僅接受已無爭議之習慣國際法規則，迴避分析且拒絕適用具有爭議的習慣國際法規則。第三，小組與上訴機構對於習慣國際法之理解有與國際法理論不一致之處。而與國際法理論不一致之處在案件長期累積下，恐會造成與國際法理論脫節之結果。最後，本論文發現習慣國際法在爭端案件中之地位僅止於「解釋」涵蓋協定，小組與上訴機構並未視其為WTO 法源而直接分析、解釋與適用之。因此，本論文建議小組與上訴機構日後在處理有關習慣國際法之案件時，應正確釐清習慣國際法之效力範圍，並在適當時機導正前小組與上訴機構報告與國際法理論不一致之處。

在與貿易相關之議題日漸增加的今日，小組與上訴機構分析、解釋與適用涵蓋協定外之法源只會增加不會減少，習慣國際法既為WTO 的法源之一，小組與上訴機構應積極分析習慣國際法等涵蓋協定以外之法源，以充分釐清會員於爭端案件中的法律關係，亦應對於習慣國際法之理論、要件、效力深入理解，以避免作出與國際法理論不一致之認定。

關鍵詞：世界貿易組織、爭端解決機構、國際法法源、WTO 法法源、習慣國際法、法律一般原則、國家實踐、法之確信、預防原則、用盡當地救濟、國家不法責任、維也納條約法公約、歐體賀爾蒙案、歐體生技產品案

Abstract

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.

Keywords: WTO, DSB, sources of international law, sources of WTO law, customary international law, general principles of law, state practice, *opinio juris*, exhaustion of local remedies, state responsibility, the Vienna Convention on the Law of Treaties 1969, *EC – Hormones*, *EC - Biotech*