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*Review Article*

# Role of Public International Law in WTO Dispute Settlement Mechanism: An Analysis

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**Abstract**

International law is developed to bring all nations in the world under one umbrella due to medieval constraints of sovereignty of the Nations have been diluted and it has voluntarily surrendered their jurisdiction to international law governing organizations. Since the traditional theory to international law is governed State alone its subject. This concept now is diluted and covered individuals and all international organizations under it. Due to shrinking of the world in trade related sectors such as rendering services to all nations through trade and services, now it emerged as trade rules under public international law. The aim of the article is to analyze the role of public international law in World Trade Organizations disputes settlement mechanism in particular and in turn to discuss a creation of rules in public international law, rules of WTO, relationship between the rules of public international law and WTO rules, the nature of WTO dispute settlement mechanism and its jurisprudence and dispute settlement mechanism in general.

**Keywords:** WTO; Dispute; International Law; Settlement; DSU.

## Introduction

The Marrakesh Declaration has created the World Trade Organization (WTO) on 15th April 1994. The dispute settlement mechanism of the World Trade Organization (WTO) has come into existence as a result of the Uruguay Round of trade negotiations held on 1st January 1995 [1]. International Law has grown in all aspects of development in the World and it brings the world under one umbrella. Traditional concept of international law is governing and regulating rules relating to relationship between the civilized nations. Therefore international law is the body of rules and regulations which are binding between States in their intercourse with each other [2]. These traditional concept is covered not only States but also international organizations and individuals. Therefore these rules of public international law principles or rules are applicable to its organizations which are specifically created by under auspices of the U.N. Similarly WTO is one of the specialized organizations of the United Nations. Hence, World Trade Organization has central feature for its settlement mechanism in public international law. Its dispute settlement mechanism has had an enormous impact on the world trade system and trade diplomacy [3]. Therefore it has a unique system in international law both ramifications for its juridical and legislative system of dispute settlement mechanism. At this juncture this article examine the role of public international law in dispute settlement mechanism in particular and in turn to discuss a creation of rules in public international law, rules of WTO, relationship between rules of public

international law and WTO rules, the nature of WTO dispute settlement mechanism and WTO jurisprudence and dispute settlement mechanism in general.

*Creation of Rules in Public International Law*

International law is having a 'decentralized' legal system and it has no centralized legislator creating its rules. But in domestic legal system of the State is having centralized legal system [4]. Decentralized legal system means under international law is to certain extent, the international organizations can create rules of international law and it may call as acts of international organizations. The creators of international law are States. States are as subject of international law do not elect an international legislator like individual is subject in domestic law and they elect legislator to frame rules and on basis to govern government in States. Hence States are considered as creators of law and complete equal. International law is a law of cooperation and no subordination to national laws. Its creation of rules fully depends upon the consent of states either it's implicit or explicit. The lack of consent of a particular state generally means that it can not hold the rules would not apply to it. The rule of p*acta terties nec nocent nec prosunt* itself has exception in certain circumstances [5]. However, State is considered as gave consent even though without gave consent in a particular matter. Therefore international law is having lack of central legislators and it is essentially a compilation of varying bilateral and multilateral legal matters which are considered as an element with feature of international legislation. These feature of international law considered as general principle of law. The rules of general of international law are binding on all states [6]. The general international law fills the gap left by treaties. Hence, general of international law has largely composed of rules on the law of treaties; state responsibility, the interplay of norms, and the settlement of disputes are ensuring existence of international law as a legal system. The general law is not limited to secondary rules of law such as a toolbox for creation, operation, interplay and enforcement of other rules of law [7]. It also includes primary rules of law directly imposing rights and obligations on states and secondary rules impose only indirectly through other rules of law. The primary rules of law are customary law and general principles of law on the use of force, genocide and human rights [8]. For the analysis of this angle, general international law does resemble domestic legislation or even domestic constitutions [9].

The most of rules of international law has prominently developed with the rule of *jus cogens* or preemptory norms of general international law. The treaty or convention has been made between states are considered that State can contract of or deviate from general international law envisaged principles. But the treaties or convention was not in conflict with the preemptory norms of international law viz. *jus cogens*. Therefore any treaty or convention could not be permitted to derogation of preemptory norms of international law and it operates to invalidate a treaty or agreement between states to that extent of inconsistent [10]. However, the norm of *jus cogens* can be modified only by a subsequent norm of general international having the same character [11]. Similarly if any new preemptory norm of international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates. The generally acceptable norms of international has accepted as *jus cogens* such as prohibition of use of force or threat against any States [12], the principles of *pacta sunt servanda [13]*, principle of sovereign equality of states, and the principle of peaceful settlement of disputes. Therefore the rules of *jus cogens* include "the fundamental rules concerning the safeguarding of peace….. fundamental rules of a humanitarian nature (prohibition of genocide, slavery and racial discrimination, protection of essential rights of the human person in time of peace and war), the rules prohibiting any infringement of the independence and sovereign equality of States, the rules which ensure to all the members of international community the enjoyment of certain common resources (high seas, outer space, etc.)" [14].

This reflects the underlying object of *jus cogens* that the components norms are conditioned by the interest of international community. It is responsible for creation of binding principal rules of international law. Therefore all treaty norms are having same legal status if it do not derogate the preemptory norms of the international law i.e. United Nations Environment Programme (UNEP), the World Intellectual Property Organization (WIPO), the World Trade Organization (WTO) or a bilateral treaty. Hence no priority is having in WTO rules and other treaty rules. All treaties rules are having enforcement from surrendering their consent to those treaty norms. The rules of public international law give rise to rights and obligations *erga omnes*. In similarly the World Trade Organization (WTO) has a definitive organizational structure recognized under international law. It has derived force from massive treaty results of Uruguay Round of multilateral negotiations. Therefore rules of public international would be applicable in all cases in WTO disputed matters.

*Rules of World Trade Organization*

The WTO rules are considered as wider corpus of public international law likes in similar footing on international environmental law and human rights. WTO governing rules of law is considered as one of the branch of public international law. Therefore international lawyers called as WTO rules to be considered as creating international legal obligations that are part of the public international law [15]. Many negotiators of the WTO treaties are while creation of rules did not think of public international law because in numerous countries representatives of trade ministry desliked. The WTO rules are *lex specialis* as opposed to general international law. But contracting out of some rules of general international i.e. certain rules of general international law on state responsibility does not meant that a state contracted into WTO is out of all of them. It merely not considered as a fortiori that WTO rules were formulated completely outside the system of international law. Therefore the WTO rules are so-called as "Self-contained regimes rules". The WTO rules are constitutes *lex specialis Vis-à-vis* rules of general international law. Therefore WTO rules specifically regulate the trade relation between states as well as separate customs barriers [16]. Nonetheless today World in all countries are interdependent with one and another, the state regulations in one way or another affect trade flows between States. Therefore the essential aim of the WTO rules are to liberalize trade between custom barriers and it have a potential impact on almost all segment of Society and law in every country. For instances it may jeoparadise with respect to the environment or human rights. The certain countries in the World are restricts trade for non-trade objectives such as respect for human rights and protection of their environments in their territorial borders.

Such non-trade restriction measures create a huge potential for interaction between WTO rules and other rules of public international law. Indeed WTO rules forms a general and increasingly universal frame work for all of the trade relations between States. The WTO rules replaced the other bilateral or regional arrangements and it has serious of exceptions related to the environment and national security, among other things. In these aspects, the WTO rules of trade liberalization are general or *lex generalis* permitting to frame work of more focused and detailed rules of international law such as certain rules on the environment, human rights or the law of the sea, and custom unions and free trade areas. Hence, the WTO rules or law are not the alpha omega of all trade activities between states.

*Relation between Rules of Public International Law and WTO Rules*

The rule of public international law is governed to between states or among states by regulations, standards, and principles in matters pertinent to international relations including international trade [17]. The WTO rules includes the 1994 WTO treaty as well as subsequent WTO rules i.e. subsequent agreements between WTO members and also rules that are constituted by acts of the WTO as an international organization, unilateral acts of WTO members and customary principle of law specifically applies to WTO. The WTO rules are emerged from collectivities of states and it has a consistent character of treaty. The WTO rules derived from general principles of international law such as non-discrimination principle in trade in service; dispute settlement understanding measures. One of the WTO rule emphatically states that the WTO covered agreements should be interpreted in accordance with customary rules of interpretation of public international law [18]. It also confirms pre-existing treaty law i.e. GATT 1994 incorporated from GATT rules of 1947 similarly the TRIPS Agreements is incorporated from party of certain WIPO conventions. Non-WTO rules are applicable to and may have impact on WTO rules. These non-WTO rules are consist mainly with general international law in particular rules on law of treaties, state responsibility, settlement of disputes and other treaty rules which are particularly regulate to trade relations between states such as certain rules of environmental, human rights conventions and customs unions or free trade arrangements. Non-WTO rules that are specifically created after April 1994 relevant to WTO Rules. These rules are consistent with general international law and WTO rules. Nature of these rules are either to confirm existing WTO rules out of, deviate from, or replace the existing WTO rules. This kind of WTO rules has certain extent consistent or conflict with WTO treaty and general international law. Therefore any explicit confirmation of rules of general international law in the WTO treaty must be *made ex abundante cantela [19]*.

Hence, the members of WTO has confirmed their legal commitment to these rules and also extended this commitment to the automatic and compulsory dispute settlement system of WTO. Any of the WTO rules has not expressly omitted that must be regarded as a continuation or implicit acceptance of the rules in question [20]. But Permanent Court of Arbitration has pointed out in differently above stated principle as "every international convention must be deemed tacitly to refer to general principles of international law for all questions which it does not itself resolve

in express terms and in a different way" [21]. Mc Nair, Eminent author of in International Law has stated that "treaties must be applied and interpreted against the background of the general principles of international law" [22]. Another scholar in International Law Hersch Lanterpacht stated that "It is the treaty as a whole which is law. The treaty as a whole transcends any of its individual provisions or even the sum total of its provisions. For the treaty, once signed and ratified, is more than the expression of the intention of the parties. It is part of the international law and must be interpreted against the general background of its rules and principles" [23]. These principles also confirmed by the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ). The PCIJ in *Chorzow Factory* case has confirmed it in respect of the obligation of the state to make separation for breach of international law. It stated that "separation is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself" [24]. Indeed, in a general conception of law, that any breach of an engagement involves an obligation to make separation to aggrieved state. Similarly, the ICJ made a statement with respect to rules on termination of treaty for breach and exhaustion of local remedies is *South West Africa [25]* Advisory Opinion case and held that the right termination of a treaty for breach, the principle of separation to injured state should not applicable to the mandate system. The ICJ held that "it would be necessary to show that the mandates system ….. excluded the application of the general principle of law that a right of termination on account of breach must be presumed to exist in respect of all treaties ….. The silence of a treaty as to the existence of such a right cannot be interpreted as implying the exclusion of a right which has its source outside of the treaty, in general international law ….." [26].

The ICJ has categorically held that while interpretation of treaty, the principle of general international law should not be left out without application in such matters. Therefore the WTO rules are explicitly confirming the general international law. The DSU mechanism supports the WTO agreements must be clarified in accordance with customary rules of public international law [27]. The same principle was applied by the Appellate Body. Hence, the rules of WTO must be interpreted with in customary principle of international law. The international law principles are explicitly confirmed in the Vienna Convention on law of treaties [28]. As seen as the WTO treaty was created on the background of general international by its very nature applicable to all WTO member nations without any exception. The WTO rules emerged by the context of both bilateral and multilateral treaties which are binding between WTO member states.

*The Nature of WTO Dispute Settlement Mechanism*

One of the unique features of the WTO Disputes Settlement Mechanism is DSU. It is outcome of the Uruguay round of negotiations. It led to the establishment of the World Trade Organization's Disputes Settlement Body (DSB) and it was guaranteed to compulsory jurisdiction to settler trade disputes among WTO member nations. The question may arise whether the Dispute Settlement Understanding (DSU) of WTO provides for the judicial settlement of disputes. Because WTO panels are only an *ad hoc* tribunals created by Disputes Settlement Understanding (DSU) in pursuant to predetermined procedures and it is not standing bodies. The panels are established *ad hoc* basis for each case by the WTO Dispute Settlement Body. The panels' establishment is quasi-automatic by virtue of negative consensus rule in Article 6(1) [29] of DSU of WTO. The concept of dispute settlement is mainly concerned with the concept of applicable law [30]. The Applicable Law means the system of legal norms binding between WTO members and provides effective remedies on WTO members. The Article 6(1) has clearly provided negative consensus mode of establishment of panels thus panels have a mixture of both arbitration and judicial settlement. But it functions resembled consider as a judicial in nature. The legal bindings of the WTO panels and appellate body are culminated as recommendations to the defending parties to the disputes. These recommendations are considered as binding legal force between the disputed parties. If the DSB takes decision by negative consensus under Articles 16(4) [31] and 17(14) [32] i.e. quasi-automatically when DSB is notified to parties and aggrieved party can appeal to its decisions. These procedures denoted that WTO judiciary includes the WTO Dispute Settlement Body. In practice both panels and the Appellate Body are established and operated for reach their conclusions legally with independent and their law basis. Therefore these panels and Appellate Body are acted as judicial tribunals on WTO disputes in the public international law sense.

WTO judiciary has a compulsory jurisdiction *ex ante* on specific claims under WTO covered agreements only. But the WTO members not granted subject matter basis general jurisdiction to adjudicate all trade disputes between their members. The DSB did not recognize counter claims under WTO covered

agreements. If the defendant wishes to file a complaint against the plaintiff to initiate new proceedings but not to do claim counter claim in same proceedings [33].

*The WTO Jurisprudence and Dispute settlement Understanding Mechanism*

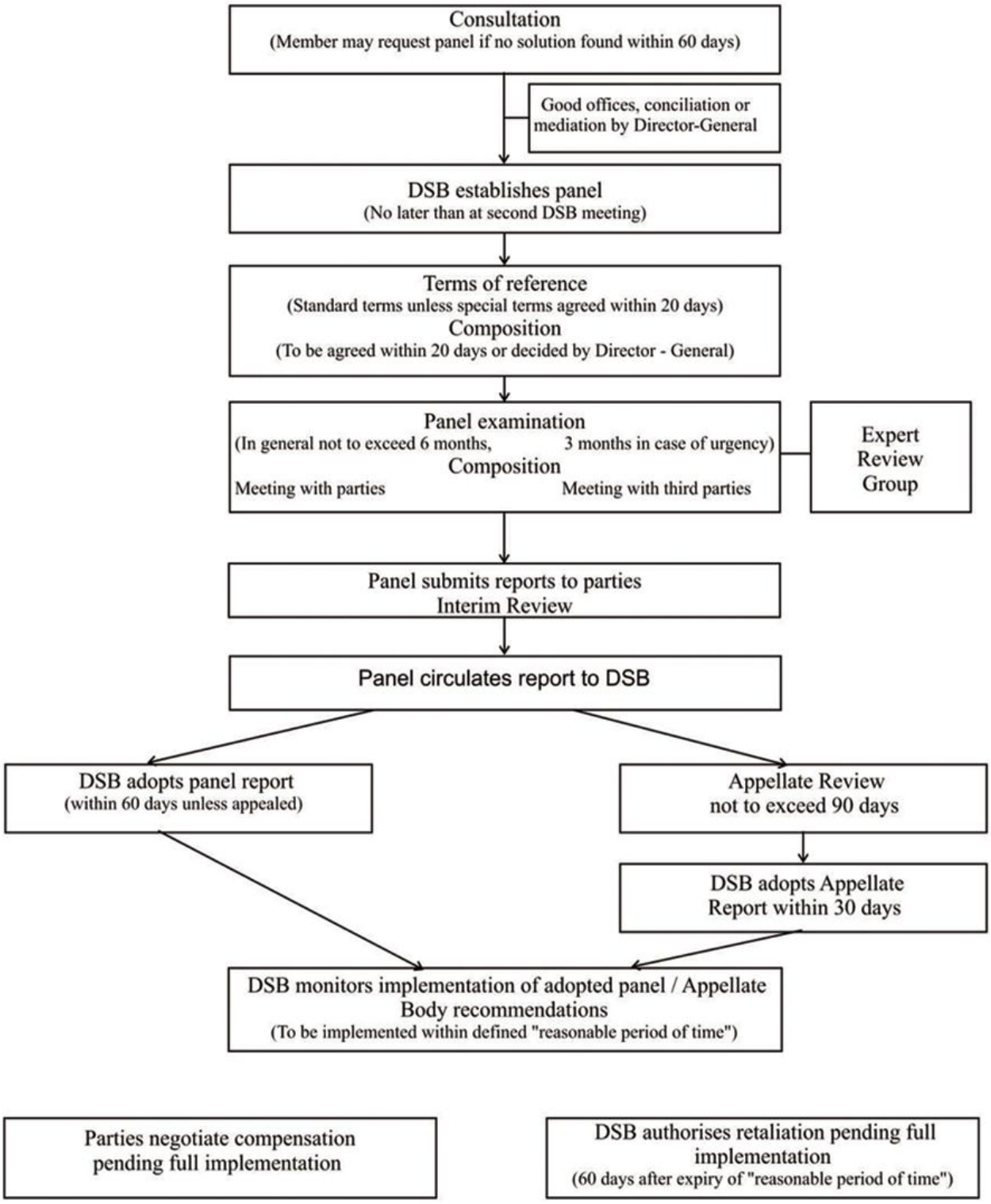
The WTO judiciary has an unparalleled responsibility for overseeing a treaty of more than thirty thousand pages including approximately one thousand complicated and ambiguous treaty texts [34]. The WTO's Disputes Settlement Understanding body is unique in International Law in its jurisdical and legalistic system for its disputes. The binding force of its decisions and panels reports shall be applicable to its members. The present WTO dispute settlement system build upon GATT disputes settlement mechanism and it inherently flowed in part because this mechanism was created by International Trade Organization (ITO) in GATT but unfortunately failed to come into force. The International Trade Organization's draft charter had contained the dispute settlement mechanism that contemplated the use of voluntary arbitration. While appeal to the International Court of Justice (ICJ) in certain circumstances [35]. The WTO Disputes Settlement Mechanism is an integrated legal system under which all disputes to be settled. The WTO Frame Work Agreement states that "the WTO shall provide a common institutional frame work for the conduct of trade relations amongst its members in matters related to the WTO agreements" [36].

Indeed the WTO has the best dispute settlement system of any other international organization. In 1997 the then Director General of the WTO categorically stated that the dispute settlement mechanism is the WTO's "most individual contribution to the stability of the global economy" [37]. For this purpose the WTO Dispute Settlement Mechanism is mainly established for removing weakness of the previous GATT system. This system is consists of three or five member panels and a Standing Appellate Body. The Panels issue reports with findings and recommendations on a dispute. Against this report appeal process followed if this is desired. In order to attain legal status these reports must be adopted by WTO Disputes Settlement Body (DSB). It is a political organ of all members based on the one-member-one vote principle. It has significant features of establishing panels by the complainant, obtain legally binding rules from the panel or Appellate Body and thereafter obtain authority from the Disputes Settlement Body to retaliate without requiring the prior consent of the dependent. It abolishes 'veto-power' system of GATT. Under the DSU, disputes resolution proceeds automatically but it subject to 'reverse consensus' mean consensus decision if not taken. If any of the WTO rules is found to be violated, the DSB recommends that member concerned "bring the measure into conformity" with the violated WTO rules [38]. Therefore the WTO disputes can be settled by applying legal rules of "covered agreements" and other than disputes are arising 'covered agreements' i.e. economic and political nature of disputes should be settled by non-legal means. The fellow mentioned flow chart explains WTO dispute settlement mechanism.

Applicable laws before DSU is determined by the panel after the dispute submitted before it. The panel must ascertain the law to be applied to resolve disputes in the WTO claims concerned. The panel has limited substantive jurisdiction to resolve disputes arising out of 'covered agreement'. The panels mandate covers only claims set out clarity in the panel's request [40]. The counter claims are not allowed in the same proceeding [41]. The WTO panel may invoke *ex officio* its own jurisdiction for examination of defenses submitted by defending party (*non ultra petita*). The WTO panel may apply the principles of *ratione materiae, ratione personae* and *ratione temporis* in the facts and circumstances of the case [42]. If any of the conflict has arisen for applying principles that should be interpreted on consonance with WTO Agreement [43]. Similarly the conflict between WTO rules and other rules of general public international law arises, the general public international law will prevail [44]. The sources of WTO Agreement has been emerged from Article 38(1)(a) of the statute of the International Court of justice (ICJ) [45]. But the DSU has failed to include "applicable law" for WTO dispute settlement mechanism. However the DSU has referred frequently to "providing security" and predictability to the multilateral trading system and preserving the rights and obligations of members under the 'covered agreement [46]' and also maintaining the "proper balance between the rights and obligations of members [47]." The panel has power to assessing the "applicability of and conformity with the covered agreements [48]." It relates to the substantive jurisdiction of WTO panels to judicially enforce WTO covered agreement.

Article 7 of the DSU states that applicable law. Art. 7(1) sets out the standard terms of reference of panels and instructs them to examine the disputed matter as referred by the parties by virtue of covered agreements and same should examine in the light of the relevant provisions of covered agreements.

**WTO Dispute Settlement Mechanism-Flow Chart**[1]




**Sourse : GATT Focus Newsletter (August 1994).**

Thomas J. Schoenbaum, WTO Dispute Settlement: Praise and Suggestions for Reform, 47 ICLQ 649 (1998).

Article 7(2) obliges panels to "address the relevant provisions is any covered agreement and agreement cited by the parties to the disputes". In the above analysis the DSU or any other WTO rules does not preclude panels for applying principles of public international law as to decide the WTO claims before panels. Therefore the WTO dispute settlement mechanism created and continues to exist in the context of the public international law. For instances the panel has applied principles of customary international law in *Korea- Government procurement* case. The panel emphatically stated that "we do not see any basis for arguing that the terms of article 7(1) of DSU are meant to exclude reference to the broader rules of customary international law in interpreting a claim properly before the panel [49]." Therefore the DSU does not explicitly confirm its creation and existence in international law but it has implicit confirmation about the panel may refer to and apply other rules of international law by virtue of Article 3(2),7(1) and 11 of DSU. Apparently WTO panels and Appellate Body have applied the rules of public international law while interpreting WTO covered agreements [50]. These general rules of public international laws are rules applied in judicial settlement such as standing before panel, representation by private counsel, to *competence de la competence,* burden of proof, application of municipal law, the acceptability of *amicus curiae* report, authority to draw adverse inferences, judiciary economy; the law of treaties such as the principle of non-retroactivity and error in treaty formation; state responsibility such as provisions on counter measures and attribution , referring ILC's reports on disputes. These are emphatically shows that the principle of public international law has played vital role for dispute settlement mechanism of WTO and applied by the panel while deciding cases.

## Conclusion

Since the binding nature of international law is widened by member States of the United Nation Organization (UNO). It means that rules and regulations are binding between civilized States. It fixes responsibility of states to fulfill international obligations in consonance with entered treaty rules. As in same manner WTO law is outcome of multilateral treaty regime which regulates world trade between member countries. Notwithstanding WTO law is one of the products of international law and its principles of general public international are applicable to the WTO disputes settlement mechanism. The main sources of the international law is envisage under Article 38(1) (a) of the Statute of International Court of Justice (ICJ). The same source is applicable to the Marrakesh Agreement establishing the World Trade Organizations' Agreements (WTO agreements). Article 38(1) (a) of the Statute of ICJ emphatically states that "international conventions, whether general or particular, establishing rules expressly recognized by the contesting States". By virtue of this article, the word used 'particular' under this, includes the 'WTO Agreements' and members in WTO can contest the disputes between them. The Vienna Convention on Law of Treaties aids to interpretation of WTO Agreements. Further Article 103 of the United Nation Charter has emphatically states that if any conflict between the obligations of the Members of the U.N. Charter and their obligations under any other international agreement, their obligations under the U.N. Charter shall prevail over such conflict. Therefore the fundamental source of the WTO Agreements is emerged from public international law. Hence fundamental sources of the WTO Agreements are relevant covered agreements. Therefore general public international law principles are applicable to WTO Dispute Settlement Mechanism without these principles WTO judiciary could not function and settled disputes properly. Therefore the WTO dispute Settlement Mechanism is not limited to 'WTO legal regime' only and it can apply to the entire body of public international law while deciding disputes.

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