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On the Feasibility of Self-Correction of the Appellate Body's Previous Decision: Lessons from *China-Rare Earths*

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Over its 20 years of practice, the Appellate Body gradually established a *de facto stare decisis* rule similar to that exists in common law system. Given the tight time constraint as provided in the DSU for an appeal process, the Appellate Body may face a situation where there is no sufficient time available for it to consider thoroughly all the elements for the interpretation of a provision, especially arguments or evidence of law that have not been raised even by the parties nor by the panel. If the issue whether Article XX of GATT 1994 can be invoked by China to justify a violation of paragraph 11.3 of its Accession Protocol had been decided in *China-Raw Materials*, can this issue be reopened and assessed again in *China-Rare Earths*? The author explored these two cases in light of the relevant WTO precedents as well as the common law thinking. This article concludes that it is both necessary and technically feasible to correct certain previous interpretation. Such a correction will contribute to further improvement in the clarification and interpretation of the covered agreements and accession protocols; hence give more confidence to Members that their rights and obligations under the treaty can be well preserved by a system with a built-in self-correction mechanism.

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I. A Historical Review: Establishment of the *De Facto Stare Decisis* Rule and the Cogent Reasons Theory at the WTO

The WTO dispute settlement mechanism has operated for 20 years. The system has had wide-spread respect and reputation from Members and academics. Article 3.2 of the DSU points out that: (1) it serves as "a central element in providing security and predictability to the multilateral trading system"; (2) it "preserves the rights and obligations of Members under the covered agreements"; and (3) it "clarifies the existing provisions of those agreements in accordance with customary rules of interpretation of public international law." Nevertheless, the drafters of the DSU also placed a Sword of Damocles on the disputes settlement system itself. This signifies that any good design of a system may face difficulties in practice. It is therefore necessary to manage such risk or difficulty with a clear border line. This border line in the DSU requires that: "recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."[1] It reminds all actors participating in the process that there is a safeguard on Members' rights and obligations under the covered agreement. However, there is no indication in the DSU on who must decide whether this border line is infringed or not, and in what manner this should be decided. The dispute settlement system is operated by panels and the Appellate Body, with professional supports of the WTO Secretariat and the Appellate Body Secretariat. Any supervision or checks and balance will end at a certain level. It is already remarkable that the WTO established an Appellate Body to check legal interpretation of the covered agreements and the consistent application of law to facts, which is exceptional among international tribunals. With the structure of a two-level litigation, it is more apt to establish a *de facto stare decisis* rule.

The issue to what extent previous decisions should be followed seems to be not only a complicated philosophical issue, but also a very practical one in reality. In *Japan-Alcoholic Beverages*, in 1996, the Appellate Body stated

explicitly that there is no *stare decis*is rule at the WTO.[2] Rather, the WTO inherited the international law tradition as set out under Article 59 of the Statue of International Court of Justice, that the rulings bind only the parties to the dispute. On the other hand, the Appellate Body recognized that the previous GATT panel decisions are GATT *aquis*, something acquired or achieved in the dispute settlement process and should, therefore, be considered in later disputes as follows:

> Adopted Panel reports are an important part of the GATT acquis. They are often considered by subsequent panels. They *create legitimate expectations* among WTO Members, and, therefore, should be taken into account, where they are relevant to any dispute. *However, they are not binding, except with respect to* resolving the particular dispute between the parties to that dispute.[3]

After over 10 years, in 2008, the Appellate Body stressed with much greater confidence the adherence to previous decisions in *US-Stainless Steel from Mexico* by indicating that the legal interpretation and the *ratio decidendi* contained in previous Appellate Body Report should not be disregarded. Rather, without cogent reasons, they should be strictly followed by the Panels and the Appellate Body in later disputes:

> It is well-settled that Appellate Body reports are not binding, except with respect to resolving the particular dispute between the parties. This however, does not mean that subsequent panels are free to disregard the legal interpretation and the *ratio decidendi* contained in previous Appellate Body reports that have been adopted by the DSB.[4]
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> In *US – Shrimp (Article 21.5 – Malaysia)*, the Appellate Body clarified that this reasoning applies to adopted Appellate Body reports as well. In *US – Oil Country Tubular Goods Sunset Reviews,* the Appellate Body held that "following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same."[5]
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> Dispute settlement practice demonstrates that WTO Members attach significance to reasoning provided in previous panel and Appellate Body reports. Adopted panel and Appellate Body reports are often cited by parties in support of legal arguments in dispute settlement proceedings, and are relied upon by panels

> and the Appellate Body in subsequent disputes. In addition, when enacting or modifying laws and national regulations pertaining to international trade matters, WTO Members take into account the legal interpretation of the covered agreements developed in adopted panel and Appellate Body reports. Thus, the legal interpretation embodied in adopted panel and Appellate Body reports becomes part and parcel of the acquis of the WTO dispute settlement system. Ensuring 'security and predictability' in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case. [6]

It is important that the Appellate Body set out the 'cogent reasons' theory as an exception to the principle that an interpretation made by the Appellate Body in a previous case, should be strictly followed by panels and the Appellate Body itself in a later case on the same legal issue.[7] This reveals a nuanced change of position of the Appellate Body from that in *Japan – Alcoholic Beverages* (they should be taken into account when relevant) toward a *de facto stare decisis* direction (where, without cogent reasons, they should always be followed). The threshold for deviating from previous decisions was set at a much higher level, closer to the level in common law system. Since then, the 'cogent reasons' theory has been referred to repeatedly, in *US-Continued Zeroing* (DS360, 2009), *US-Anti-dumping and Counter-veiling duties* (DS379, 2011), *US-Clove Cigarettes* (DS406, 2012), *US-CV/AD Measures* (DS449, 2014), and *China-Rare Earths* (DS431, 432 and 433, 2014). Interestingly, in the recent *US-CV/AD Measures* (DS449), the Panel set out specific conditions that constitute 'cogent reasons' as follows:

> In our view, bearing in mind the Appellate Body's particular function in the WTO dispute settlement system*, reasons that could support but would not compel a different interpretative result to the one ultimately adopted by the Appellate Body would not rise to the level of 'cogent reasons.'* [8]

It then announced four types of situations that in its view can justify a deviation from the previous Appellate Body interpretation and hence constitute 'cogent reasons':

> To our minds, 'cogent' reasons, i.e. reasons that could in appropriate cases justify a panel in adopting a different interpretation, would encompass, *inter alia*: (i) a multilateral interpretation of a provision of the covered agreements under Article IX:2 of the WTO Agreement that departs from a prior Appellate Body interpretation; (ii) a demonstration that a prior Appellate Body interpretation proved to be unworkable in a particular set of circumstances falling within the scope of the relevant obligation at issue; (iii) a demonstration that the Appellate Body's prior interpretation leads to a conflict with another provision of a covered agreement that was not raised before the Appellate Body; or (iv) a demonstration that the Appellate Body's interpretation was based on a factually incorrect premise.[9]

In *China-Rare Earths*, the question before the Panel was whether China had cogent reasons to ask the Panel to deviate from Appellate Body's previous decision in *China-Raw Materials* which says: "China cannot invoke Article XX of GATT 1994 to justify a violation of a commitment in its Accession Protocol, i.e., paragraph 11.3 on elimination of export duties for all products not included in Annex 6 to the accession Protocol."[10] China counter-argued that it had cogent reasons to demonstrate before the Panel and requested the Panel to rule differently from the previous decision.[11]

The primary purpose of this research is to analyze the 'cogent reason' in details. This paper is composed of six parts including a short Historical Review and Conclusion. Part two will introduce the definition of the *stare decisis* rule in common law system. Part three will discuss if China can justify the violation of export duty commitment with GATT Article XX. Part four will critically evaluate the Appellate Body's reasoning. Part five will address the reflections.

II. THE *STARE DECISIS* RULE IN COMMON LAW SYSTEM

Stare decisis may be defined as "to abide by, or adhere to, decided cases." Under the doctrine, when a point of law has been settled by decision, it forms a precedent which is not afterwards to be departed from, and while it should be strictly adhere to, there are occasions when departure is rendered necessary to vindicate plain, obvious principles of law and remedy continued injustice."[12]

The meaning of 'precedent' is "[a]n adjudged case or decision of a court, considered as furnishing an example or authority for an identical or similar case afterwards arising or a similar question of law."[13]

Some scholars summarized the advantages of the *stare decisis* rule as to: (1) ensure equality in treatment of different actors under the same situation; (2) restrict possible prejudice and arbitrariness; (3) provide predictability within a legal system; (4) facilitate the implementation of court judgments with convincing reasoning; (5) ensure judicial efficiency and reducing the number of unnecessary cases; and (6) promote prudential thinking by judges when considering various possibilities.[14]

The issue to what extent precedent should be followed in common law countries differ from one country to another. But the courts of last resort are more flexible than lower courts in both the US and the UK:

> In the history of the common law, two different versions of the principle of *stare decisis* have prevailed at different times and in different places.[15] … In the very strict version, which prevailed in England in the first half in the twentieth century all courts were regarded as bound to follow their own previous decisions, and lower courts were also bound to follow the decisions of the higher courts. … In the looser version which prevailed in England until the twentieth century, and which largely prevails in America today, courts of last resort are not bound to follow their own previous decisions, though they will in practice do so in most ordinary circumstances.[16]

In addition, although *stare decisis* is a general principle in common law countries, its role is not that critical in the constitutional courts, considering their important function in the rule of law of a country. The US Supreme Court, *e.g.*, has greater flexibility on its decision whether to adhere to its previous decisions or not for the reasons. Justice Brandeis, in his dissenting opinion, indicated:

> *Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. ... But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. ... This is strikingly true of cases under the due process clause.[17]

When the US Supreme Court found errors in previous decisions, and when such errors cannot be remedied by legislative actions, it will make self-corrections so that the error will not continue to affect the system. The Supreme Court decided:

> When convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment, and not upon legislative action, this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions.[18]

In the US legal system, State courts can also deviate from previous decisions under certain circumstances. One example is that the New Jersey State Supreme Court set a strict product liability rule in *Beshada v. Johns-Manville Products Corp*,[19] deviating from the "state of the art" consideration in determining whether a producer has the obligation to remind consumers of product risk as stated in *Suter v. San Angelo Foundry & Machine Company* case.[20] Two years later, in *Feldman v. Lederle Laboratories*,[21] the same court stated that the decision in *Beshada v. Johns-Manville Products Corp* applies only to the circumstance of that case. The New Jersey Supreme court adopted the "state of the art" consideration yet again in deciding the obligation of the producer and held that the obligation is limited to the known risk at the time of production of the product.[22]

These cases demonstrate that even in common law system, there are circumstances under which deviation from prior decisions are permitted for good reasons. They also indicate some of the specific reasons and conditions to justify departure from the previous decisions. In short, *stare decisis* is not an absolute rule without exception.

III. Can China Justify the Violation of Export Duty Commitment with GATT Article XX?

A. The findings of *China -Rare Earths* Panel

The majority of the Panel followed the guidance of the Appellate Body in *US-Stainless Steel* that absent cogent reasons, an adjudicatory body will resolve

the same legal question in the same way in a subsequent case so as to maintain security and predictability of the system. [Emphasis added] The Panel examined whether there are cogent reasons in *China-Rare Earths* allowing this Panel to deviate from the Appellate Body's conclusion in *China-Raw Materials*. The Panel examined: (i) the systemic relationship between accession protocol provisions and GATT 1994; (ii) whether "nothing in this agreement" in the Chapeau of GATT Article XX allowed its application to protocol provisions; (iii) whether a holistic interpretation considering the preamble of the Marrakesh Agreement gives China the right to invoke Article XX.[23]

In its specific analysis, the Panel considered that the accession protocol as a whole forms a part of the Marrakesh Agreement.[24] However, whether a provision of the protocol constitutes an integral part of certain covered agreement depends on whether the provision contains an explicit reference to that covered agreement.[25] The Panel also took the view that: "GATT 1994 is composed of a number of listed documents, not including accession protocols after the establishment of the WTO." Also, China's accession Protocol Part II paragraph 1 indicates that Schedules annexed to the protocol is an integral part of GATT 1994, whereas paragraph 11.3 of the Protocol does not have such indication in its text and, consequently, it does not constitutes an integral part of GATT 1994.[26] The Panel believed that the 'WTO Agreement' in paragraph 1.2 of the protocol, refers only to the Marrakesh Agreement in its narrow sense, excluding the annexed multilateral trade agreements[27] and that the protocol as a whole constitutes an integral part of the narrow sensed Marrakesh Agreement. Therefore, the provisions of the accession protocol do not automatically form integral parts of the multilateral trade agreements.[28]

Based on such an understanding of the relationship between the protocol and the multilateral trade agreements, the Panel found that paragraph 11.3 does not automatically become an integral part of GATT 1994 and, therefore, not necessary to examine whether there is an intrinsic link between Articles II and XI of GATT 1994 and Protocol paragraph 11.3.[29] The Panel also deemed it unnecessary to analyze China's argument that the silence of paragraph 11.3 means the availability of GATT Article XX for China to justify a violation of protocol paragraph 11.3 unless there is an explicit expression to the contrary.[30]

The Panel made a brief observation stating that: "GATT 1994 does not have

prohibition of export duties; hence paragraph 11.3 does not have an intrinsic relationship with Articles II and XI of GATT 1994."[31] The Panel stated that there are only two exceptions in Protocol paragraph 11.3: One is GATT Article VIII measure and the other is the renegotiation to increase the level of export duties to that exceeding those specified in Annex 6.[32] For these reasons, the Panel found that the relationship between protocol paragraph 11.3 and GATT 1994 does not constitute 'cogent reasons' to deviate previous decision of the panel and the Appellate Body in *China-Raw Materials* and that China cannot invoke GATT Article XX to justify violation of paragraph 11.3.

With respect to China's argument that the text of the Chapeau of Article XX does not exclude its application to protocol provisions, the Panel found that: "This Agreement in Article XX Chapeau refers only to GATT 1994, not to other covered agreements."[33] Given that China claimed the following: (1) paragraph 11.3 constitutes an integral part of GATT 1994; (2) Article XX exception is applicable to paragraph11.3;[34] and (3) as the Panel already found paragraph 11.3 does not constitute an integral part of GATT 1994, it thus refrained from further analyzing the text of Article XX Chapeau instead of declaring the issue is moot.[35]

China also raised the argument that the Appellate Body has not fully considered the different objectives provided in the preamble of the WTO Agreement in *China-Raw Materials*, in particular, the objective of environmental protection and sustainable development in examining whether GATT Article XX is available for China to justify violation of protocol paragraph 11.3.[36] As the Appellate Body did not find any guidance from this preamble in its interpretation of this issue in *China-Raw Materials*, China believed that this approach is not comprehensive.[37] China also argued that the objectives of the 'WTO Agreement' are not confined only to trade liberalization; they also include improving life standards and human welfare, optimal utilization of resources and the protection of the environment. In implementing the commitments in the accession protocol, it must also give up the fundamental right of invoking general exceptions under Article XX, such a reading of the protocol and the covered agreement is not in conformity with the preamble of the 'WTO Agreement,' in China's view.[38]

The Panel on the contrary maintained that the Appellate Body and the Panel in *China-Raw Materials* had considered the preamble of the WTO Agreement. The Appellate Body, however, did not think that the preamble provides any

guidance to the specific interpretation issue. In the Panel's mind, only when the Appellate Body's interpretation makes the protection of environment impossible, then such an interpretation is manifestly absurd or unreasonable.[39] Given the protection of environment and human health can be achieved in a manner consistent with China's WTO commitments, i.e., without imposing export duties, such interpretation does not prevent the attainment of protection of environment.[40] Consequently, the Panel found that China did not provide 'cogent reasons' in the present case for the Panel to deviate from the previous decision in *China-Raw Materials*, in that, Article XX of GATT is not available for China to justify a violation of paragraph 11.3 of the protocol.

B. The Appellate Body's Examination on the Relationship between the Accession Protocol and the WTO Agreement

In the appeal notice, China requested the Appellate Body to reverse the Panel's conclusions in Panel Report paragraphs 7.80, 7.89 and 7.93, which found that the term 'WTO Agreement' in paragraph 1.2 of the accession protocol refers to the Marrakesh Agreement in its narrow sense, with the effect that the entirety of the accession protocol is only an integral part of the Marrakesh Agreement, not including the annexed multilateral trade agreements.[41]

The Appellate Body interpreted the text of Article XII:1 of the Marrakesh Agreement - such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto - to mean that the legal act of becoming a WTO Member must be accomplished with respect to the Marrakesh Agreement and all Multilateral Trade Agreement.[42] Reading Articles II:2 and XII:1 together, the fundamental principles of the single undertaking applies to both existing and newly acceded Members of the WTO.[43] The Appellate Body believes that Article XII:1 does not create a substantive relationship - intrinsic or not- between protocol provisions such as paragraph 11.3 and provisions of the covered agreements such as Article II or XI of GATT 1994. Article XII does not address this question.[44]

Interpreting the phrase, "this Protocol … shall be an integral part of the WTO Agreement" in paragraph 1.2 of the accession protocol, the Appellate Body first analyzed the context of paragraph 1.2, i.e., the first sentence of paragraph 1.2. The Appellate Body stated that the 'WTO Agreement' in the first sentence refers

to the newest version of the 'WTO Agreement' up to the time of ratification of the accession protocol by the acceding Member, without saying whether it includes the annexed multilateral trade agreements or not.[45] It then concluded that:

> Thus, by acceding to the WTO, a new Member necessarily becomes bound by the Marrakesh Agreement and all Multilateral Trade Agreements, as rectified, amended, or modified at the time of such accession. *This analysis of the provision, in our view, does not compel a conclusion that 'the WTO Agreement' must be read to include or exclude references to the Multilateral Trade Agreements*.[46]

Unlike China, the Appellate Body believed that the reference to the 'WTO Agreement' in paragraph 1.1 of the Protocol refers to the Marrakesh Agreement alone,[47] and so does the same phrase in paragraph 1.3 of the Protocol.[48]

The Appellate Body stated that paragraph 1.2 of the accession protocol only serves to build a general bridge between package of protocol provisions and that of the WTO rights and obligations under the Marrakesh Agreement and the Multilateral Trade Agreements. It does not, however, answer how an individual protocol provision is related to an individual provision of the other WTO Agreements. Nevertheless, concerning the second sentence of paragraph 1.2 of the Protocol, the Appellate Body stated that:

> It appears the term 'WTO Agreement' in the second sentence of paragraph 1.2 *may* refer to the Marrakesh Agreement, that is, to the 'WTO Agreement' *excluding* the Multilateral Trade Agreements.[49]

The Appellate Body, in its reasoning, pointed out that the existence or the lack of textual references to a provision of a certain covered agreement is not dispositive in and of itself.[50] Instead, the question whether an exception can be invoked to justify a violation of a certain protocol provision must be answered through a thorough analysis of the relevant provisions using customary rules of interpretation, which starts with the text and goes to the context, including those in the protocol, the Working Party Report, and in the covered agreements, the single package architecture and other relevant interpretive tools.[51] The Appellate Body recalled

that in *China-Raw Materials*, it considered not only the lack of textual reference in paragraph 11.3 of the protocol to GATT 1994, but also the existence of the textual reference to GATT Article XIII and Annex 6 to the Protocol; it further held that the reference to GATT Article VIII does not mean Article XX can be invoked to justify export duties.[52] Pointing to the fact that no party has challenged the Appellate Body's ultimate conclusion in *China-Raw Materials* concerning whether Article XX can be invoked by China to justify the violation of export duty commitment under paragraph 11.3 of the Protocol, the Appellate Body stated it would not revisit this ruling.[53]

Considering that China did not appeal this ruling, the Appellate Body did not naturally reverse the conclusion in *China-Rare Earths*. Nevertheless, the Appellate Body kept a distance in this case from the overly textual analysis employed in *China−Raw Materials*. It paradoxically reveals that the Appellate Body reconsidered this interpretative issue from a broader perspective in *China-Rare Earths*.

The Appellate Body also addressed certain points raised by China. Firstly, China had argued, reading Articles XII and paragraph 1.2 of the Protocol together, the specific protocol provisions are to be treated as integral parts of either the Marrakesh Agreement or one of the Multilateral Trade Agreements, depending on the subject matter to which they are intrinsically related.[54] The Appellate Body's response to this point is that although China has identified GATT Articles XI and II as having an intrinsic relationship with paragraph 11.3 of the Protocol, in appeal, China has neither provided such specific identification in its written submission or at the oral hearing, nor defined the meaning of 'intrinsic relationship.'[55] Therefore, in the Appellate Body's opinion, the rights and obligations under GATT Article XX cannot be automatically transposed from one part of the WTO legal framework (GATT 1994) to another (Protocol paragraph 11.3).[56]

Secondly, China contended that its Protocol is not a "self-contained agreement." They serve to specify, including by the means of 'WTO-plus' provisions, how the covered agreements will apply in the relationship between the acceding Member and the incumbent WTO Members.[57] In China's view, the Accession Protocol is a subsequent agreement relating to the same subject matter in the sense of Article 30 of the Vienna Convention on the Law of Treaties

("VCLT"). Where a given protocol provision stands in conflict with one or more provisions of the annexed Multilateral Trade Agreements, such conflict should be resolved with the later-in-time rule provided under Article 30 of the Vienna Convention.[58]

However, the Appellate Body considered that China has neither further elaborated this point of Article 30 of Vienna Convention, nor addressed her position that Protocol is not a self–contained agreement.[59] The Appellate Body observed that the Protocol forms an integral part of the single package rights and obligations, but Article 30(c) of the Vienna Convention does not tell much on how different components of the single package relate to each other.[60]

There are also a few more points to keep in mind. The Appellate Body considered whether the 'WTO Agreement' in the second sentence of paragraph 1.2 of the Protocol refers to the narrow sense or broad sense of the Marrakesh Agreement (i.e., or excluding or including the Annexed Multilateral Trade Agreements) is not dispositive in determining the legal effect of paragraph 1.2.[61] Given that not dispositive issues are the relationship between the specific Protocol provision and provisions of the Marrakesh Agreement and the Multilateral Trade Agreements, the Appellate Body found it unnecessary to opine on the scope of the term 'WTO Agreement' in the second sentence of paragraph 1.2 of the Protocol.[62]

On the other hand, the Appellate Body considered that since Article II:2 of the Marrakesh Agreement has referred to all Multilateral Trade Agreements as integral parts of the Marrakesh Agreement, paragraph 1.2 of the Protocol made the entirety of the Protocol an integral part of the 'WTO Agreement.'[63] However, it refrained from making a definite finding whether here the 'WTO Agreement' refers to the single package agreement or not.

As seen from the above analysis, the Appellate Body stated the existence or absence of textual reference to a covered agreement in a Protocol provision, is not dispositive. Although paragraph 1.2 established a general bridge between the entirety of the Protocol and the Marrakesh Agreement as well as the annexed Multilateral trade Agreements, the relationship between a certain specific Protocol provisions with a certain Multilateral Trade Agreement still has to be interpreted thoroughly in a holistic manner. It is interesting to note that as the Appellate Body did not address the Panel's point that there should not be *de novo*

interpretation, only new arguments presented in the on-going dispute can be assessed by the Panel and the Appellate Body. The Appellate Body did not make such thorough analysis mainly because China did not appeal the Panel's specific finding that paragraph 11.3 of the Protocol is not an integral part of GATT 1994.

IV. Are the Appellate Body's Rulings Reasonable?

The Appellate Body concluded that it "finds that the Panel did not err in stating that *the legal effect of the second sentence of Paragraph 1.2* of China's Accession *Protocol is not* that 'the individual provisions thereof are, integral parts of Multilateral Trade Agreements annexed to the Marrakesh Agreement.'"[64]

While the entirety of the Protocol is an integral part of the Marrakesh Agreement together with the Multilateral Agreement, this does not mean specific provisions of Protocol are all integral parts of either the Marrakesh Agreement or the Multilateral Agreements. The Appellate Body's reasoning seems rather conservative or strict on the relationship between Protocol provisions and covered agreements. The bridge in paragraph 1.2 of the Protocol is rather an abstract one without providing any specific guidance as to the specific relationship between Protocol provisions and the covered agreements. On the contrary, the Appellate Body also refrained from making a finding on one point of appeal concerning the meaning and scope of the 'WTO Agreement' in paragraph 1.2 of the Protocol. The Appellate Body states:

> In our view, whether the term "the WTO Agreement," as used in Paragraph L2, second sentence, of China's Accession protocol, is referring to the narrow or broad connotation of the term is not dispositive of our understanding of the legal effect of Paragraph 1.2. Rather, the operative term of Paragraph 1.2 is "an integral part". Thus, just as Article II:2 of the Marrakesh Agreement makes the Multilateral Trade Agreements integral parts of the single package of WTO rights and obligations, paragraph 1.2 of China's Accession Protocol makes China's Accession Protocol, in its entirety, an integral part of the same package.[65]

A. Question 1

If the entirety of the Protocol is an integral part of the single package WTO

Agreement including Multilateral Trade Agreements, and the phrase 'integral part' in the second sentence of paragraph 1.2 is the interpretative focus, then the issue of an integral part of 'which agreement' is also significant. Is it an integral part of the Marrakesh Agreement, or of the single package WTO Agreement? That is exactly what China has asked the Appellate Body to interpret. Why is this issue not dispositive? The purpose is exactly to clarify the relationship between protocol provisions and the covered agreements. Unfortunately, the Appellate Body "find[s] it unnecessary to opine on the scope of the term 'WTO Agreement' in the second sentence of Paragraph 1.2 of China's Accession Protocol."[66]

B. Question 2

If the entirety of the Protocol is an integral part of the single package WTO Agreement including the Multilateral Trade Agreements, does this logically mean that the scope of the 'WTO Agreement' in the second sentence of paragraph 1.2 of the Protocol exceeds the scope of the Marrakesh Agreement alone, excluding the annexed Agreements? Or, does it also cover the scope of the Multilateral Trade Agreements? It is difficult to understand why the Appellate Body instead stated that:

> We decline to accept China's interpretation of paragraph 1.2 of China's Accession Protocol and Article XII:1 of the Marrakesh Agreement as meaning that a specific provision in China's Protocol of Accession is an integral part of the Marrakesh Agreement or one of the Multilateral trade Agreements to which it intrinsically relates.[67]

There is no explanation on why the entirety of the Protocol can be an integral part of the single package agreement, while each specific provision of the Protocol would not be an integral part of either Marrakesh Agreement or one of the Multilateral Trade Agreements. One would expect the Appellate Body to provide more elaboration on its reasoning.

C. Question 3

The Appellate Body Report did not address China's new argument concerning the relevance and the contribution of footnote 5 to Annex 7 of the Protocol to the interpretation of the phrase 'WTO Agreement' in the second sentence of

paragraph 1.2 of the Protocol. China argued in appeal that:

> "Another important contextual provision for interpreting the terms the 'WTO Agreement' as used in Paragraph 1.2, second sentence, of China's Accession Protocol is contained in Annex 7 of China's Accession Protocol." That Annex 7 is entitled "Reservations by WTO Members". According to that annex, Poland reserved its right to continue to apply certain anti-dumping measures after China's accession to the WTO but the annex specifies that "the bringing of these measures into conformity with the WTO Agreement will be effected by the end of 2002." The related footnote 5 clarifies that the term "the WTO Agreement" refers to "[t]he WTO Agreement as defined in the Protocol on the Accession of China, Section 1, para. 2.[68]
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> Given that the disciplines regarding anti-dumping measures are exclusively embodied in GATT 1994 and in the Anti-Dumping Agreement, this is an additional, very strong, indicator that the term "the WTO Agreement" as used in Paragraph 1.2 of China's Accession Protocol refers to the WTO Agreement as a whole, i.e. the Marrakesh Agreement including the multilateral trade agreements annexed thereto. Otherwise, if "the WTO Agreement" in Paragraph 1.2 of the Accession Protocol were to be read as a reference to the Marrakesh Agreement alone, the relevant part of Annex 7 of China's Accession Protocol would not convey any effective meaning."[69]

The Appellate Body did not provide an answer to this argument from China. The contribution of this context has therefore not been assessed and such omission may have brought defect in interpreting paragraph 1.2 of the Protocol, which would not result in systemic coherence in the whole single package of the WTO Agreement. From this perspective, it is understandable that the Appellate Body declined to make a definite interpretation. A new argument brought contextual element which could lead to the correction of one intermediate interpretation and which might eventually affect the final conclusion on the availability of Article XX to paragraph 11.3 of the Protocol. It seems the Appellate Body is not ready to correct its former decision. How a former decision can be corrected has not been thoroughly considered by the Appellate Body, at least in *China-Rare Earths*.

By declining to rule on the scope of the 'WTO Agreement' in paragraph 1.2 of the Protocol, the Appellate Body has not provided an answer to China's request for appeal as set out under point 4 of paragraph I.3 of China's notice of

appeal:

> The Panel unduly found that the word 'shall be an integral part of the WTO Agreement' in the second sentence of paragraph 1.2 of China's Accession Protocol leads to the conclusion that China's Accession Protocol is thereby made an integral part of the Marrakesh Agreement *excluding* the multilateral trade agreements annexed thereto.[70]

The core of this request is the meaning of the 'WTO Agreement' in the second sentence of paragraph 1.2 of China's Accession Protocol, i.e., its scope. This does not truly touch the relationship between specific Protocol provision and the specific covered agreement. However, it is also a building block for the next logical step to be analyzed. The Appellate Body should have given its accurate interpretation on the scope of this paragraph and reverse the Panel's conclusions in paragraphs 7.80, 7.89 and 7.93 of the Panel Report without touching other legal issues that China has not appealed. It is regrettable that the Appellate Body has not proceeded in such course, which raised an issue whether the DSU authorized the Appellate Body to refrain from making a finding on a legal issue raised in a party's notice of appeal.

V. Reflections

A. Is It Reasonable to Refrain from Deciding on the Scope of WTO Agreement in Paragraph 1.2?

The Panel found that the legal effect of the second sentence of paragraph 1.2 of the Protocol is to make the whole protocol an integral part of the Marrakesh Agreement, but it does not follow that provisions of the Protocol are integral parts of the Multilateral Trade Agreement.[71] The consequence of this conclusion is that the Panel, based on this conclusion, directly denied that paragraph 11.3 constitutes an integral part of GATT 1994. The Panel stated further that:

> Accordingly, it is not strictly necessary… to address the remaining elements of China's argument, which include the propositions that (i) the obligations in Paragraph 11.3 is 'intrinsically' related to Articles II and XI of GATT 1994; and

> (ii) assuming that Paragraph 11.3 is an 'integral part' of GATT 1994, Paragraph 11.3 is therefore subject to the general exceptions in Article XX of GATT 1994 'unless there is explicit treaty language' to the contrary.[72]

In the end, the Panel summarized:

> The systemic relationship between its Accession Protocol and GATT 1994 is not a 'cogent reason' for departing from the Appellate Body's finding that the obligation in Paragraph 11.3… is not subject to the general exceptions in Article XX of GATT 1994.[73]

China also raised a new argument in *China-Rare Earths* that: "'Nothing in this Agreement' in Article XX of GATT 1994 does not exclude the availability of Article XX to defend violation of paragraph 11.3 of China's Accession Protocol." Here, the Panel presumed that China's argument was based on the reason that the WTO-plus provisions contained in the Protocol regarding trade in goods are all integral parts of GATT 1994. However, the Panel opposed to such argument, because for the Panel - according to paragraph 1.2 of the Protocol - the entirety of the Protocol constitutes an integral part of the narrow sensed WTO Agreement, i.e., the Marrakesh Agreement alone[74] implies that the protocol provisions have no relationship with GATT 1994, and therefore, the issue itself is moot for the Panel.[75]

In essence, the Panel utilized the scope of the 'WTO Agreement' in paragraph 1.2 of the Protocol as the fundamental basis for its ruling that individual provisions of the Protocol are not to automatically become integral parts of the Multilateral Trade Agreements.[76] From this point, the Panel simply disagreed with China's arguments of existence of systemic relationship between GATT 1994 and the Protocol provision paragraph 11.3, by summarily rejecting the intrinsic link between the obligations under paragraph 11.3 and those under Articles XI and II of GATT 1994. The Panel even stated it is not strictly necessary to address China's arguments on the relationship between these provisions, it only offered some brief 'observations', and then concluded that the obligation in paragraph 11.3 is not related to those under GATT Articles XI and II.[77] Considering the obvious importance of defining the scope of the 'WTO Agreement' in paragraph 1.2 of the Protocol as a starting point of sorting out the

relationship between protocol paragraph 11.3 and GATT 1994, it seems unwise that the Appellate Body declined to make a specific finding on the accurate meaning of it. Article 17.6 of the DSU provides: "An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel." Article 17.12 of the DSU specifically addresses: "The Appellate Body shall address *each* of the issues raised in accordance with paragraph 6 during the appellate proceeding." [Emphasis added] Following these DSU provisions, it can be seen that the Appellate Body should have made a specific clarification as to the meaning of this term in Protocol paragraph 1.2.

In *Argentina – Footwear* (EC), the Appellate Body noted that pursuant to Article II:2 of the Marrakesh Agreement, GATT 1994, and the Agreement on Safeguards are all integral parts of the same treaty, the WTO Agreement. As a result, Article XIX of GATT 1994 and the provisions of the Safeguards Agreement are 'all provisions' of the WTO Agreement. Noting that the they "relate to the same thing," i.e., the application of safeguard measures, the Appellate Body endorsed that panel's view that Article XIX of GATT and the Agreement on Safeguards must *a fortiori* be read as representing an inseparable package of rights and disciplines which have to be considered in conjunction.[78] In addition, the Appellate Body stated that every word of a provision needs to be given a meaning:

> A treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously.[79] And, an appropriate reading of this "inseparable package of rights and disciplines" must, accordingly, be one that gives meaning to all the relevant provisions of these two equally binding agreements.[80]

This principle of interpretation is named as "effective rule of treaty interpretation," i.e., every word has a meaning to be interpreted. Applying this principle, it is natural that the 'WTO Agreement' in the second sentence of paragraph 1.2 of the Protocol should be given a meaning as to its specific scope. The methodology the Appellate Body employed in this case seems to differ from what it has stated in *Argentina- Footwear* (EC). The Appellate Body's exercise of judicial restraint on this legal issue seems contrary to the effectiveness rule of treaty interpretation. Although the author agrees that this rule is not an absolute one that should be

applied in each and every case, there is still a need for an explanation why it is not applicable in *China-Rare Earths*. It will be helpful to guide future panels and parties in differentiating situations in which the 'effectiveness rule' needs no application.

B. The Ruling of the Appellate Body

The Appellate Body ruled:

> 6.1d. questions concerning the specific relationship between an individual provision in China's Accession Protocol and provisions of the Marrakesh Agreement and the Multilateral Trade Agreements annexed thereto, including whether exceptions under those agreements may apply to a breach of the Protocol provision, must be answered through a thorough analysis of the relevant provisions on the basis of the customary rules of treaty interpretation and the circumstances of the dispute.[81]

In this legal proceeding, the Appellate Body also stated that the relationship between Protocols' provisions and a covered agreement should be examined in each case taking into account the relevant text and context, including other Protocol and Working Party Report provisions, provisions of relevant covered agreements, and circumstances of the case at issue.[82] Because China neither raised the legal issue of the relationship between paragraph 11.3 and GATT 1994 in its appeal notice, nor requested a re-examination and reversal of the previous conclusion on this issue in *China-Raw Materials*, it was not strictly necessary for the Appellate Body to reassess all the new arguments that China raised during the Panel stage. Rather, the Appellate Body simply recalled and summarized what it had ruled in *China – Raw Materials* in the meaning of paragraph 11.3 of the Protocol without considering all the related new arguments China argued in Panel stage and then easily reconfirmed its previous ruling.[83] Such an analysis without having to face China's new arguments to the contrary cannot be expected to be really comprehensive or holistic.

Should China raise the contention that the Panel's finding on paragraph 11.3 is not an integral part of GATT 1994, what would happen? China could provide the Appellate Body with more contextual provisions in the Protocol and in GATT 1994 itself, etc., to support an integral part argument, while the Appellate

Body facing with some contradictory evidence of law will have to reassess all the elements for interpretation and decide whether 'cogent reasons' exist to justify a deviation from the previous decision on this issue in *China-Raw Materials*. Recently, in *US-Countervailing and Anti-dumping Measures* (DS449), a question was raised whether there are 'cogent reasons' to depart from previous decision: could the panel establish a set of criteria on what constitute cogent reasons? The criteria included the following:

> (i) a multilateral interpretation of a provision of the covered agreements under Article IX:2 of the WTO Agreement that departs from a prior Appellate Body interpretation; (ii) a demonstration that a prior Appellate Body interpretation proved to be unworkable in a particular set of circumstances falling within the scope of the relevant obligation at issue; (iii) a demonstration that the Appellate Body's prior interpretation leads to a conflict with another provision of a covered agreement that was not raised before the Appellate Body; or (iv) a demonstration that the Appellate Body's interpretation was based on a factually incorrect premise.[84]

Applying such criteria, the author could provide an assessment on whether there are sufficient cogent reasons for the Appellate Body in *China-Rare Earths* to depart from its previous decisions.

1. Can China demonstrate that the previous decision in China – Raw materials is 'unworkable'?

The main reason the Panel and the Appellate Body found GATT Article XX unavailable for China to justify a violation of protocol paragraph 11.3 was that the text of paragraph 11.3 does not explicitly refer to GATT Article XX. The fact that both paragraphs 11.1 and 11.2 mention GATT 1994 whereas paragraph 11.3 does not lead the *China-Raw Materials'* panel and the Appellate Body to find Article XX of GATT 1994 to be inapplicable to justify a violation of paragraph 11.3. In *China-Rare Earths*, however, China, in its second written submission, raised paragraph 7.3 of the Protocol, which explicitly indicates that China will not have recourse to Article 5 of the TRIMs Agreement.[85] China argued that considering the context of paragraph 7.3, paragraph 11.3 would refer to GATT Article XX, and that Members had common intention for China to

give up her right to invoking GATT Article XX. Furthermore, it takes explicit indication to give up such right in respect of paragraph 11.3.[86] The Panel did not have any positive legal evidence to prove that China had given up its right of invoking GATT Article XX in relation to Protocol paragraph 11.3. If Paragraph 7.3 had not been raised in *China-Raw Materials*, it would have made the Panel's presumption on Members' common intention during China's accession negotiation 'unworkable.' Under such circumstance, the Appellate Body can well invoke its previous ruling in *Canada-Auto* that omission in text alone is not necessarily dispositive in interpreting a provision[87] and make a new holistic analysis on this issue to come out with an objective assessment of the law.

2. Whether China can demonstrate the reasoning of China-Raw Materials is conflicting with a provision of a WTO covered agreement?

The ruling of the Panel and the Appellate Body is in conflict with Article I:1 of GATT 1994. In *China-Rare Earths*, the Panel and the parties all agree that GATT Article I:1 applies to the commitment made in paragraph 11.3 (export duty rates), i.e., the export duties must be in conformity with Annex 6 levels as well as with MFN principle as set out in Article I:1, although paragraph 11.3 is silent on the applicability of Article I:1. Similarly, if paragraph 11.3 is also silent on the applicability of GATT Article XX, considering that they both are provisions in GATT 1994, why can Article XX not be applicable to this provision? The ruling in *China-Raw Materials* is therefore in conflict with Article I:1 of GATT 1994. Additionally, that ruling is also in conflict with the meaning of the Chapeau of GATT Article XX: "Nothing in this Agreement shall be construed to prevent the adoption… of measures." The wording, 'this Agreement' cannot be understood to be limited only to GATT 1994 because the Appellate Body had found in *China- Publications* that Article XX is applicable to Protocol paragraph 5.1, which is beyond GATT 1994. The *China-Rare Earths* Panel's statement that Article XX is only applicable to GATT 1994 is not consistent with the Appellate Body's ruling in *China- Publications*. What prevents the application of GATT Article XX to Protocol paragraph 11.3, comparing to its applicability to paragraph 5.1 of the Protocol? The text of paragraph 5.1 only refers to the WTO Agreement and it does not refer specifically to GATT 1994 *per se*. The Appellate Body nevertheless found in *China- Publications* that there is an "clearly

discernible, objective link" between a measure under paragraph 5.1 and GATT 1994 and that makes Article XX(a) available for China to justify a violation of Protocol paragraph 5.1.[88] Now, does paragraph 11.3 of the Protocol also have a clearly discernible and objective link with GATT 1994? If so, what can preclude the application of GATT Article XX to paragraph 11.3? In *China-Rare Earths*, China argued that there is such an intrinsic link between paragraph 11.3 and GATT 1994.[89] This in essence is the same as the relationship between paragraph 5.1 and GATT 1994.

3. Whether the Appellate Body's interpretation in China -Raw Materials was based on a factually incorrect premise?

During the hearing in appellate review stage, China referred to a historical document from a Tokyo Round negotiation to establish the existence of an intrinsic relationship between export duty and GATT 1994. This document is the Annex to Point 5 of the Note by the Acting Chairman of Group 'Framework' entitled, "Statement of Existing GATT Provisions Relating to Export Restrictions and Charges."[90] It shows contracting parties treated export duties as having close relationship with the various provisions of GATT 1947, although contracting parties was unable to conclude an agreement on the regulation of export duties in Tokyo Round. This Chairman Note listed Articles I:1, II.1(a), XI:1, XX, etc. as provisions having a bearing on export duties. Point 5 explained that: "The participants in the Multilateral Trade Negotiations have examined the various existing provisions of the General Agreement relating to export restrictions and charges. The Annex contains a statement of these provisions."

According to this document, the common intention of contracting parties during the Tokyo Round was that export duties are closely linked to a number of Articles in GATT 1947. It can help the Appellate Body to decide that the finding regarding Members' common intention was a factually incorrect premise, because the majority of Members back in the Tokyo Round agreed that export duties are closely related to the GATT provisions and paragraph 11.3 of the Protocol, and therefore, constitutes an integral part of the GATT 1947 for the applicability of GATT Article XX.[91]

The *China-Raw Materials* panel found that as long as there is no explicit reference to GATT Article XX in the text of paragraph 11.3 of the Protocol,

GATT Article XX is not available for China to defend a violation of paragraph 11.3.[92] However, Russia's Oral Statement during the Panel hearing testified that the WTO Members rejected Russia's proposal of including an explicit provision saying that Russia would not be prevented from invoking all exceptions provided in the covered agreements with the reason given by Members that it would be redundant.[93] Although this argument was denied by the US and the EU (without positive evidence) in their answers to the Panel's question, at the minimum, the statement by Russia revealed the fact that there was no common intention among Members that exceptions in covered agreements are unavailable for newly acceded Members to invoke unless explicitly referred to in a Protocol paragraph. Also, this finding in *China-Raw Materials* concerning the existence of such common intention constituted a factually incorrect premise and should therefore be set aside by *China-Rare Earths* Panel and its Appellate Body.[94]

As analyzed above, there are good cogent reasons in *China-Rare Earths* that conformed to the criteria as set by the Panel in *US-Countervailing and Anti-dumping Measures*. If China were to appeal the final conclusion of the Panel that Article XX of GATT 1994 is not available for China as a defense of violation of paragraph 11.3 in *China-Rare Earths,* the Appellate Body should have considered all these elements in deciding on the issue of whether GATT Article XX is available for China to justify measure inconsistent with paragraph 11.3 of the Protocol. In a holistic interpretation, such an analysis would have included the following elements:

1. Additional contextual provisions including Article XII:1 of the Marrakesh Agreement,[95] paragraph 1.2 and paragraph 7.3 of the Protocol,[96] Articles II:1(a)[97] and XI:1 of GATT 1994[98] as well as Article I:1[99] and the chapeau of GATT Article XX.[100]

2. The point on the principle of interpretation, i.e., GATT Article XX can be invoked to justify a violation of paragraphs 11.3 and 5.1 of the Protocol unless there is an explicit provision to the contrary.[101]

3. The preamble of the WTO Agreement as object and purpose of the treaty as it was also raised by China as supporting a balanced reading of the legal issue here.[102]

4. The relevance of the historical document in the Tokyo Round showing the close link between export duties and the provisions of GATT 1994.

Although the Panel recognized China's intrinsic relationship theory between protocol and the covered agreement was a new argument and raised complex legal issues,[103] China's arguments have not been thoroughly considered by the majority of the Panel.[104] The majority of the Panel considered Protocol paragraphs 11.1, 11.2, 11.3, 5.1 and some paragraphs of the Working Party Report, which had already been considered by the *China-Raw Materials* Panel.[105] The *China-Rare Earths* Panel only conducted limited analysis on Article XII:1 of the Marrakesh Agreement to identify the scope of the 'WTO Agreement' in paragraph 1.2 of the Protocol.[106] It did not objectively analyze the full meaning of Article XII:1 of the Marrakesh Agreement and its implication on the meaning of paragraph 1.2 of the Protocol. However, one panelist delivered separate opinion on this issue.[107] This panelist disagreed with the conclusion of the majority of the Panel and concluded otherwise, i.e., China has the right to invoke GATT Article XX as defense to justify violation of paragraph 11.3 of the Protocol.[108]

In contrast, the majority of the *China-Rare Earth* Panel did not consider all these relevant provisions and factors. Instead, by excluding the consideration of GATT Articles II:1(a), XI:1, I:1, and the Chapeau of Article XX as well as paragraph 7.3 of the Protocol, the Panel excluded some very critically relevant contextual provisions for the interpretation of the paragraph 11.3 of the Protocol.[109] In addition, China raised Annex 7 to the Accession Protocol as context for the interpretation of the scope of the 'WTO Agreement' in paragraph 1.2 of the Protocol as well as the Tokyo Round negotiation document on export subsidies during appeal, none of these has been considered or assessed as to their value as elements for the interpretation by the Appellate Body.

Were these factors all considered by the Panel and the Appellate Body in a truly holistic interpretation, the Panel and the Appellate Body might have come out with a different understanding and a different ruling from that found in *China-Raw Material.* It might be due to the separate opinion in *China-Rare Earths*. Keeping all these new elements raised during the proceedings in mind, the Appellate Body can find the disharmony of the reasoning in *China-Raw Materials.* Under the whole framework of the relevant factors, in particular,

Russia demonstrated the non-existence of the so-called Members' common intention; if a certain protocol provision does not refer to a covered agreement, the right to invoke the exception in that agreement is then forsaken by the newly acceded Member. Furthermore, considering the objective and purposes of the WTO, which include not only trade liberalization but also the preservation of the environment and sustainable development, the fundamental rights under an exception provision should not be interpreted lightly as having been forsaken by a Member without even explicit expression to that effect.

Lastly, should the *China-Rare Earths* Panel and the Appellate Body conduct a truly holistic analysis considering all the above-mentioned factors, the result may well be a departure from the Appellate Body's previous rulings in *China – Raw Materials*. The Appellate Body itself has expected such a situation to be possible so that it might already provide the "cogent reason theory" in previous cases as a threshold to decide whether there is a need to deviate from its previous interpretation.

VI. Conclusion

The question is how to apply the cogent reasons theory in real disputes. *China-Rare Earths* is one of these disputes in which the cogent reasons theory may apply. The Panel were divided on whether there were cogent reasons to justify a departure from the previous ruling. The Appellate Body explicitly rejected the overly textual approach of interpretation in appeal,[110] which in effect undermined the whole approach of reasoning in its previous decision in *China – Raw Materials* on the availability of GATT Article XX to paragraph 11.3 of the Protocol. As such, the Appellate Body's thinking changed fundamentally from that reflected in its previous ruling in *China-Raw Materials*. Should China have raised the full-fledged issue in its appeal, being the availability of GATT Article XX to paragraph 11.3 of the Protocol, the Appellate Body would have corrected its interpretation in *China-Raw Materials*. There is nothing to prevent the Appellate Body from making such self-correction on the critical question regarding the relationship between the accession protocols and the covered agreements. The Members of the WTO Appellate Body are accountable first to

the organization and to history. The Appellate Body is not bound by its previous rulings if that interpretation contains considerable disharmony with certain evidence of law within the interpretative framework. It is a pity that the issue of the applicability of GATT Article XX to paragraph 11.3 of the Protocol has not yet been fully decided in *China-Rare Earths*. Nevertheless, we have seen the necessity and feasibility of self-correction of the Appellate Body's previous findings in *China-Rare Earths*. The issue of the availability of GATT Article XX to paragraph 11.3 of China's Accession Protocol is still to be fixed in the future for good. We are looking forward to seeing a proper resolution of this issue soon, for the benefit of the newly acceded Members and for the organization as a whole.

References

1. DSU art. 3.2 (the last sentence).
2. Appellate Body Report*, Japan-Alcoholic Beverages*, WT/DS/8/AB/R, WT/DS/10/AB/R, WT/DS/11/AB/R (Oct. 4, 1996), at 1-2, *available at* https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(@Symbol=%20wt/ds8/ab/r*%20not%20rw*)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true# (last visited on July 23, 2015). This is the authors summary on the meaning of the cited paragraph from the Appellate Body Report (before footnote 3). In that paragraph, the Appellate Body says: "They are not binding, except with respect to resolving the particular dispute between the parties to the dispute." Such wording reveals that a previous decision does not bind parties to later disputes, *i.e.*, there is no *stare decisis* rule at the WTO.
3. *Id.* at 14. [Emphasis added]
4. Appellate Body Report, *US-Stainless Steel from Mexico,* WT/DS/344/AB/R, Apr. 30, 2008, ¶ 158, *available at* https://www.wto.org/english/tratop_e/dispu_e/ab_reports_e.htm (last visited on July 20, 2015). [Emphasis added]
5. *Id*. ¶ 159. [Emphasis added]
6. *Id*. ¶ 160. [Emphasis added]
7. Panel Report, *China-Rare Earths,* WT/DS/431/R WT/DS/432/R WT/DS/433/R, Mar. 26, 2014, ¶ 7.61, *available at* https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=123565,123566&CurrentCatalogueIdIndex=0&FullTextSearch= (last visited on July 20, 2015).
8. Panel Report, US-CV/AD Measures, WT/DS/R, adopted on Mar. 27, 2014, ¶ 7.317, *available at* http://www.academia.edu/7299033/Panel_Report_China_Anti-Dumping_

and_Countervailing_Duty_Measures_on_Broiler_Products_from_the_United_States_WT_DS401 (last visited on July 20, 2015) [Emphasis added]

9. *Id*. In this case, the panel interpreted 'appropriate amount' in Article 19.3 of SCM, with Articles 31 and 32 of VCLT, Article VI:5 of GATT, Article 15(b) of the Tokyo Round Subsidy Code, and drafting history of SCM.
10. Panel Report, *China-Rare Earths*, ¶¶ 7.53, 7.55 & 7.58.
11. *Id.* ¶ 7.61.
12. Black's Law Dictionary 1406 (6th ed. 1990).
13. *Id*. at 1176.
14. P. Atiyah & R. Summers, Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions 116 (1987).
15. *Id*. at 118.
16. *Id*.
17. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406–7 & 410 (1932) (Brandeis, J., dissenting).
18. Smith v. Allwright, 321 U.S. 649, 665 (1944).
19. In this case, plaintiff Frank Suter sought monetary damages for injuries sustained when his hand was caught in the cylinders of an industrial sheet metal rolling machine. Suter charged defendant San Angelo Foundry & Machine Company, the manufacturer of the machine, with negligence and with breach of an express and an implied warranty that the machine was safe and fit for its intended purposes and was of merchantable quality. In the judgment, the Supreme Court recognized the importance of "state of the art" in deciding the reasonableness of the manufacturer's conduct and found: "Depending upon the proofs, some factors which may be considered by the jury in deciding the reasonableness of the manufacturer's conduct include the technological feasibility of manufacturing a product whose design would have prevented or avoided the accident, given the known state of the art; and the likelihood that the product will cause injury and the probable seriousness of the injury. We observe in passing that the state of the art refers not only to the common practice and standards in the industry but also to other design alternatives within practical and technological limitations at the time of distribution." *See* Beshada v. Johns-Manville Products Corp., 90 N.J. at 204 (1982).
20. In this case, plaintiffs, workers with asbestos-related injuries or their survivors, filed personal injury and wrongful death actions, which were consolidated, against manufacturers of asbestos products for failing to warn the dangers of the product. Defendant raised a state-of-the-art defense, arguing that the danger was undiscovered and scientifically unknowable at the time of injury. The Supreme Court held in this case that a "state-of-the-art" defense should not be allowed in failure to warn cases, reasoning that "Essentially, state-of-the-art is a negligence defense. It seeks to explain why defendants are not culpable for failing to provide a warning. They assert, in effect, that because they

could not have known the product was dangerous, they acted reasonably in marketing it without a warning. But in strict liability cases, culpability is irrelevant. The product was unsafe. That it was unsafe because of the state of technology does not change the fact that it was unsafe. Strict liability focuses on the product, not the fault of the manufacturer. If the conduct is unreasonably dangerous, then there should be strict liability without reference to what excuse defendant might give for being unaware of the danger." *See* Suter v. San Angelo Foundry 81 N.J. at 171-2 (1979).

21. In this case, as a young child, plaintiff took an antibiotic produced and manufactured by the defendant. Thereafter, plaintiff's teeth were permanently discolored due to the usage of the drug. Plaintiff brought a lawsuit for strict liability against the defendant, arguing that it had a duty to warn against potential side effects, including the teeth discoloration. The judgment of the Supreme Court found that the "state of the art" is a relevant factor in finding the obligations and responsibilities of the manufacturer, reasoning that:

> Generally, the state of the art in design defect cases and available knowledge in defect warning situations are relevant factors in measuring reasonableness of conduct. Thus in *Suter,* we explained that other than assuming that the manufacturer knew of the harmful propensity of the product, the jury could consider the technological feasibility of manufacturing a product whose design would have prevented or avoided the accident, given the known state of the art. We observed that the state of the art refers not only to the common practice and standards in the industry but also to the other design alternatives within practical and technological limits at the time of distribution… In strict liability warning cases, unlike negligence cases, however, the defendant should properly bear the burden of proving that the information was not reasonably available or obtainable and that it therefore lacked actual or constructive knowledge of the defect.

See Feldman v. Lederle Laboratories, 97 N.J. at 451 & 456. (1984)

22. *Id.*
23. Panel Report, *China-Rare Earths*, ¶¶ 7.3.2.1.4 -7.3.2.1.6.
24. *Id*. ¶ 7.80.
25. *Id*.
26. *Id*. ¶¶ 7.81-7.84.
27. *Id*. ¶¶ 7.82 & 7.89.
28. *Id*. ¶ 7.93.
29. *Id*. ¶ 7.94.
30. *Id*.
31. *Id*. ¶ 7.95.
32. *Id*. ¶¶ 7.97-7.98.
33. *Id*. ¶ 7.101.
34. *Id*. ¶ 7.102.
35. *Id*. ¶ 7.104.

36. China's first written submission ¶¶ 447-448.
37. *Id*.
38. *Id*. ¶ 455-457.
39. Panel Report, *China-Rare Earth*, ¶ 7.111.
40. *Id*. ¶¶ 7.112-7.114.
41. *See* China's Notification of an Appeal, ¶¶ 3-4.
42. Appellate Body Report, *China-Rare Earths*, WT/DS/431/AB/R WT/DS/432/AB/R WT/DS/433/AB/R, ¶ 5.29, *available at* https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=123565,123566&CurrentCatalogueIdIndex=0&FullTextSearch= (last visited on July 20, 2015).
43. *Id.* ¶ 5.30.
44. *Id.* ¶ 5.34.
45. *Id.* ¶ 5.42.
46. *Id*. [Emphasis added]
47. *Id.* ¶ 5.43.
48. *Id.* ¶ 5.44.
49. *Id.* ¶¶ 5.46, 5.50.
49. *Id.* ¶ 5.46. [Emphasis added]
50. *Id.* ¶ 5.61.
51. Appellate Body Report, *China-Rare Earths*, ¶ 5.62. It is interesting to compare this statement with the Panel's theory that there shouldn't be a *de novo* review on the same issue that has been decided by the Appellate Body in previous case. *See* Panel Report, *China-Rare Earth*, ¶ 7.60.
52. *Id.* ¶¶ 5.63-5.64.
53. *Id.* ¶ 5.65.
54. *Id.* ¶ 5.66.
55. *Id.* ¶ 5.67.
56. *Id.* ¶ 5.68.
57. *See* China's Appellant Submission during Appeal, ¶ 6. It reads: "China takes the view that significance has to be attributed to the fact that post-1994 accession protocols, unlike the covered agreements…, are not self-contained agreements."
58. China argues, in its Opening Statement during the hearing in Appeal, that: "to the extent that a given accession commitment stands in conflict with one or more provisions in the Marrakesh Agreement or the multilateral trade agreements annexed thereto, such conflict is resolved according to the rule enshrined in Article 30.3 of the Vienna Convention. Under that rule, the accession commitment takes precedence to the extent of the conflict." *See* China's Opening Statement, ¶ 11.
59. China's Opening Statement during the hearing in Appeal, ¶ 12. In this paragraph, China argues: "Neither China, nor any other acceding WTO Member, could *ever* have agreed

to far-reaching 'WTO-plus' provisions had it expected that these commitments would *erroneously* be treated as forming a self-contained multilateral trade agreement, clinically isolated from the related rights and obligations in the WTO legal framework." [Emphasis added]

60. *Id.* ¶¶ 5.69-5.70. (paragraph number should be fully cited, not summarized as page numbers)
61. *Id.* ¶ 5.72.
62. *Id.* ¶ 5.73.
63. *Id.* ¶ 5.72.
64. Panel Report, *China-Rare Earths*, art. 6.1.b. [Emphasis added]
65. *Id.* ¶ 5.72.
66. *Id.* ¶ 5.73.
67. *Id.* ¶ 5.73.
68. China's Appellant Submission, ¶¶ 107-108. [Emphasis added]
69. *Id*. ¶ 108. [Emphasis added]
70. China's Notification of an Appeal in *China-Rare Earths*, ¶ 3.
71. Panel Report, *China-Rare Earths*, ¶¶ 7.92-7.93.
72. *Id.* ¶ 7.94. [Emphasis added]
73. *Id.* ¶ 7.99.
74. *Id.* ¶ 7.103.
75. *Id.* ¶ 7.104.
76. *Id.* ¶¶ 7.92-7.93
77. *Id.* ¶¶ 7.94-7.95.
78. Appellate Body Report, *China-Rare Earths*, ¶¶ 5.53-5.54.
79. We have recently confirmed this principle in our Report in *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, circulated Dec. 14, 1999, ¶ 81, *available at* https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=35265,38874&CurrentCatalogueIdIndex=1&FullTextSearch= *See also* Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, May 20, 1996, at 23, *available at* https://www.wto.org/english/tratop_e/dispu_e/2-9.pdf; Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, Nov. 1, 1996, at 12, *available at* https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=32900&CurrentCatalogueIdIndex=0&FullTextSearch=; Appellate Body Report, *India – Patents*, ¶ 45, *available at* https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=22367&CurrentCatalogueIdIndex=0&FullTextSearch= (all last visited on July 20, 2015).
80. Appellate Body Report, *Argentina- Footwear*, WT/DS/121/ AB/R, Dec. 14, 1999, ¶¶ 81 & 83-84, *available at* https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/

ds121sum_e.pdf (last visited on July 20, 2015).

81. Appellate Body Report, *China-Rare Earths,* ¶ 6.1d.
82. *Id.* ¶ 5.62.
83. *Id.* ¶¶ 5.63-5.64.
84. Panel Report, *US-Countervailing and Anti-dumping Measures* (DS449), ¶ 7.317, *available at* https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=123583,123584&CurrentCatalogueIdIndex=0&FullTextSearch= (last visited on July 20, 2015). [Emphasis added]
85. China's Second Written Submission in *China-Rare Earths*, ¶ 210.
86. *Id*.
87. Appellate Body Report, *Canada-Auto*, WT/DS139/AB/R, WT/DS142/AB/R, ¶¶ 137-138. It reads: "In examining this issue whether Article 3.1(b) extends to subsidies contingent 'in fact' upon the use of domestic over imported goods], the Panel appears to have taken the view that the terms of Article 3.1(b), on their own, do not answer the question, and, therefore, it turned to the context provided by Article 3.1(a). In this respect, the Panel relied on the fact that, in Article 3.1(a), there is explicit language applying to subsidies contingent "in law or in fact" while in Article 3.1(b) there is not. In the view of the Panel, the absence of such an explicit reference in the adjacent and closely-related provision of ++Article 3.1(b) indicates that the drafters intended Article 3.1(b) to apply only to those subsidies which are contingent "in law" upon the use of domestic over imported goods. In our view, the Panel's analysis was incomplete. As we have said, and as the Panel recalled, "omission must have some meaning." Yet omissions in different contexts may have different meanings, and omission, in and of itself, is not necessarily dispositive. Moreover, while the Panel rightly looked to Article 3.1(a) as relevant context in interpreting Article 3.1(b), the Panel failed to examine other contextual elements for Article 3.1(b) and to consider the object and purpose of the SCM Agreement."
88. Appellate Body Report, *China-Publications*, WT/DS362/ABR, ¶¶ 230 & 233.
89. China's Second Written Submission before the Panel, in *China- Rare Earths*, ¶ 214. *See also* China's First Written Submission before the Panel, ¶¶ 428, 429 & 433.
90. MTN/FR/W/20/Rev.2.
91. *Id*.
92. Panel Report, *China-Raw Materials*, WT/DS394/R, ¶¶ 7.138-7.140, *available at* https://www.wto.org/english/tratop_e/dispu_e/394_395_398abr_e.pdf (last visited on July 27, 2015).
93. *See* Russia's Oral Statement during the first Panel Substantive meeting.
94. Panel Report, *China-Raw Materials*, ¶ 7.129.
95. China's Second Written Submission, ¶¶ 207-210 & 213-215.
96. *Id.* ¶ 210.
97. *Id.* ¶ 209.

98. China's First Written Submission, ¶¶ 432-434; China's Second Written Submission, ¶ 209.
99. China's Response to Panel question 16, ¶ 85; China's response to Panel question 3, ¶¶ 8 & 11.
100. China's First Written Submission, ¶¶ 436-444.
101. China's First Written Submission, ¶¶ 422 & 444. China's Second Written Submission, ¶ 210; China's response to Panel question 5, ¶¶ 826-829.
102. China's First Written Submission, ¶¶ 445-458.
103. Panel Report, *China-Rare Earths*, ¶ 7.59.
104. *Id.* ¶ 7.94. The Panel stated: "It is not strictly necessary for the Panel to address the remaining elements of China's arguments." Instead, the Panel only offered "observations on some of them."
105. *Id.* ¶ 7.66.
106. *Id.* ¶¶ 7.90-7.93.
107. *Id.* ¶¶ 7.118-7.138.
108. *Id.*
109. *Id.* ¶ 7.94. The Panel deems unnecessary to analyze the relevance of Articles II, XI & XX of GATT 1994.
110. Appellate Body Report, *China-Rare Earths*, ¶ 5.61.