CONTEXTUALISM IN WTO CASE LAW ON MINERAL EXPORT RESTRICTIONS: PUZZLES AND IMPLICATIONS

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ABSTRACT

Against the dysfunctional crisis of the World Trade Organization (hereinafter “WTO”) Appellate Body, this article aims to reflect upon the puzzles arising from the techniques that the WTO Dispute Settlement Body (hereinafter “DSB”) has employed to interpret WTO law: contextual interpretation in particular and formalistic interpretative approach in general. We argue that the conventional notions of “contextual interpretation”, “objective analytic methodology” and “stability and predictability”, which frequently recur in the recent discourse on the interpretation of WTO agreements, are too much of an illusion. Several recent Panel Reports and Appellate Body Reports have demonstrated that contextualism, alongside many other formalistic interpretive techniques, is far less objective and predictable than assumed.

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Rather, context, like many other formal factors, is itself a notion of numerous versions, but it is difficult to establish a superior rule governing the very process of selecting and construing contextual references. WTO adjudicators need to apply its textually based approach in a new manner to deliver legitimate and satisfactory settlements for WTO members. Meanwhile, the legislative body needs to find a way to strike a more delicate power balance between adjudicative control and political management, and redefine the role that the DSB can play in facilitating the functioning of the WTO system.

**KEYWORDS:** contextualism, formalistic interpretation, WTO case law, mineral export restrictions
I. INTRODUCTION

The purpose of this article is to reflect on three interrelated notions that frequently appear in recent treaty interpretations by the World Trade Organization (hereinafter “WTO”) Dispute Settlement Body (hereinafter “DSB”), and its Appellate Body in particular. The first concept we examine is the notion of “objective analytical methodology”, a concept championed by the Appellate Body Report which states that “panels and the Appellate Body must adopt an analytical methodology or structure appropriate for resolution of the matters before them, and which enables them to make an objective assessment of the relevant matters . . . .”1 The second examined notion is “contextualized ordinary meaning”, better known as “contextualism”, where ordinary meanings of the terms of the treaty shall be determined in accordance with their relevant contexts.2 Third is the notion of “stability and predictability”, as outlined in a Panel Report: “Members recognized the importance of consistency and stability in the interpretation of their rights and obligations under the covered agreements. This is essential to promote ‘security and predictability’ in the dispute settlement system . . . .”3

The logical connection between the three notions is that contextualism, as one objective interpretive technique, serves to promote security and predictability in the WTO dispute settlement system. Since the outset of the

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2 We will elaborate the notion of contextualism in Part II. The Appellate Body has expounded, on many occasions, the crucial role of contextual examination in the Dispute Settlement Body (DSB)’s treaty interpretation. For instance:

Article 31(1) of the Vienna Convention provides that a “treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Therefore, we will begin our analysis with the text of Paragraph 11.3 . . . . Having examined the text of Paragraph 11.3, we turn to examine the context of that provision.

two-decade-long interpretive history of the WTO Appellate Body, this logic has become a widely accepted convention. Nevertheless, when it comes to the DSB’s interpretations, the purported property of contextualism is perhaps too much of an abstraction. When reading two Appellate Body Reports and one Panel Report on two recent, but separate cases that addressed the same interpretive issue, puzzles clearly arise. That is, the availability of General Agreement on Tariffs and Trade (hereinafter “GATT”) Article XX as a defense for China’s restrictive measures on mineral exports found to be inconsistent with China’s obligation under China’s Accession Protocol (the Protocol).

The three Reports are collectively puzzling because their purported analytical method of contextual interpretation is neither as objective, nor as predictable, as it at first appears. Instead, as we will demonstrate in this article, it is unlikely to establish any kind of superior rule that better guides adjudicators’ choice and understanding of various contextual elements. This inevitably provides adjudicators with the possibility of disguising other decisive factors in the name of objective, contextual inquiries (either consciously or unconsciously), or avoiding deliberating on other decisive factors, and consequently enables them to present two sets of competing contexts that lead to opposite interpretive results. This fact, along with other misapprehensions, questions the conventional wisdom of treaty interpretation by the WTO Appellate Body.

The three notions (and their relationships) are each quite complex. To this date, the complexity has neither been (and would unlikely be) explicitly acknowledged by the DSB, nor has it been sufficiently appreciated by academic commentators. Nonetheless, the disputes over China’s mineral export restrictions appear to be a never-ending story.

Indeed, China, a globally leading supplier of mineral resources in the global market, has implemented the two WTO decisions ruling against China’s restrictive measures on the export of certain types of minerals. Yet, as a recent case suggests, China is likely to continue placing export

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7 See Request for Consultations by the United States, China — Export Duties on Certain Raw Materials, WTO Doc. WT/DS508/1 (July 14, 2016); Request for consultations by the European
restraints on certain types of minerals, as long as WTO decisions only apply to the minerals at issue in the case without retrospective sanctions.\(^8\) and WTO adjudicators continue to be silent on “the more general issue of policy space available to developing country Members after the enforcement of a proliferating number of (uneven) WTO-plus commitments”.\(^9\) Similarly, other big players of the WTO, such as the United States, have resorted to their own mechanisms of diplomacy (and other non-legal strategies) as a means of negotiating with China.\(^10\) Thus, these disputes will keep questioning how WTO adjudicators interpret WTO law and challenging the authority of the WTO DSB. And the ongoing dysfunctional crisis facing the WTO Appellate Body adds to the necessity to rethink the way WTO adjudicators interpret WTO law and resolve cases brought before the WTO Appellate Body.

By investigating the puzzles arising from WTO adjudicators’ contextual inquiries of the law on China’s mineral export restrictions, this article provides an opportunity to elaborate the limits of WTO law and its interpretation further, and provide a new perspective that seeks to understand how the WTO Appellate Body has stepped into the dysfunctional crisis. Then, this article takes a step back by resetting the expectations of, and the way to pursue the ideal of “stability and predictability” through, WTO-Appellate-Body like institutions with more certainty.

This departure from conventional wisdom and discourse on contextualism may also shed light on other interpretive techniques used by the WTO Appellate Body, such as using dictionary definitions, deriving parties’ intentions from preparatory documents, according terms with effectiveness, and ascertaining the object and purpose of treaties, and so forth. The problems associated with contextualism apply to these equally, partly because there are no superior rules that guide the selecting and understanding processes of these interpretive elements.

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\(^8\) See Mark Wu, China’s Export Restrictions and the Limits of WTO Law, 16(4) WORLD TRADE REV. 673, 690 (2017).

\(^9\) Espe, supra note 6, at 59.

\(^10\) For example, President Trump of the United States signed an executive order directing U.S. executive agencies to investigate the causes of U.S. trade deficits with its major trading partners. President Trump expressly stated his dissatisfaction with the WTO in that order. Brian Picone, President Trump Signs Executive Order Calling for Omnibus Report on Significant Trade Deficits, WHITE & CASE (Apr. 12, 2017), https://www.whitecase.com/publications/alert/president-trump-signs-executive-order-calling-omnibus-report-significant-trade.
II. THE PROBLEM OF CONTEXTUAL INTERPRETATIONS

The WTO Appellate Body has, for two decades, tried to establish and present a doctrine of textualism for its interpretation of WTO covered agreements. Such a doctrine, however, has been nothing more than supplemental to the mantra of a member-driven organization. In this light, the WTO Appellate Body has attempted to solidify the security and predictability of the WTO system.\(^ \text{11} \)

Resultingly, the Appellate Body’s assumption of textualism presumes that any given text adequately reflects the common intention of all participants in a given treaty, and embodies the purpose of WTO Members.\(^ \text{12} \) However, textualism does not lend itself to an oversimplification such as purely literal or grammatical reading of treaty provisions. Nor does it merely equate ordinary meaning of treaty provisions. Rather, ordinary reading is only a useful starting point for a treaty’s interpretation (and occasionally conclusive) because the text of a particular provision may sometimes be incongruous with the purpose of WTO Members. Such purpose is reflected in various contextual cues.\(^ \text{13} \)

Subsequently, contextualism as an equally sanctified interpretive technique comes into play, emphasizing that the text must be read in accordance with its context. The Appellate Body has long grounded its application of contextualism on Article 3.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter “DSU”) and Article 31 of the Vienna Convention on the Law of Treaties (hereinafter “Vienna Convention” or “VCLT”). Article 3.2 of the DSU requires that panels and the Appellate Body should interpret WTO law in accordance with “customary rules of interpretation of public international law” when clarifying the provisions of WTO covered agreements, while Article 31 of the Vienna Convention, which expressly adopts a contextual interpretation of the treaty,\(^ \text{14} \) is recognized as one of the customary rules.\(^ \text{15} \)

\(^{11}\) See Georges Abi-Saab, The Appellate Body and Treaty Interpretation, in TREATY INTERPRETATION AND THE VIENNA CONVENTION ON THE LAW OF TREATIES: 30 YEARS ON 97, 100, 106-07 (Malgosia Fitzmaurice et al. eds., 2010). Especially in politically sensitive cases, WTO adjudicators appear to have textual fetishism and policy phobia. See Isabelle Van Damme, Treaty Interpretation by the WTO Appellate Body, 21(3) EUR. J. INT’L L. 605, 646 (2010).


\(^{14}\) Vienna Convention on the Law of Treaties [hereinafter Vienna Convention] art. 31(1), opened for signature May 23, 1969, 1155 U.N.T.S. 331 (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose (italics added).”)
For almost two decades, the Appellate Body’s interpretive practice has been firmly attached to Article 31 to Article 33 of the Vienna Convention, and presented an image of strict formalism. Contextualized ordinary meaning, in particular, has become the cornerstone for which WTO panels and the Appellate Body interpret treaties. By doing so, the Appellate Body aims to (and does indeed) “strengthen its decision to act as a court and exercise judicial function in the WTO.”

The Appellate Body’s firm attachment to contextualism, as justified by Article 31 of the Vienna Convention, is not without its quarrels. Article 31 of the Vienna Convention however, is not uncontroversial. Article 31 of the Vienna Convention has been, in and of itself, debatable ever since the very start of its codification. Current debates prioritize such issues as whether Article 31(2) has exhausted all “relevant context”, or whether the Appellate Body should adopt (or has adopted) a broad definition of context in Article 31(2) to include preparatory documents and other elements in its contextual appraisal.

Nonetheless, the contemporary academic discourse over the Appellate Body’s contextual interpretation is still assumes (whether explicit or implicit) that an objective method of practicing contextual interpretation does, indeed, exist. Few commentators have cast doubt on the very notions of “objectivity” and “stability and predictability” that stem from (and add to) the concept of contextualism. The absence of such a critique may be attributed to the disjuncture between the codification of the Vienna Convention and the interpretive practice of international courts and tribunals. Indeed, such an interpretive technique of contextualism was

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16 The Appellate Body was at one time so attached to the Vienna Convention that it explained its interpretation of the WTO covered agreements with each step referring to the Vienna Convention. See Pascal Lamy, The Place of the WTO and Its Law in the International Legal Order, 17(5) EUR. J. INT’L L. 969, 979 (2006).
17 See Van Damme, supra note 11, at 622-23.
18 Id. at 635.
19 As for a historical note on the codification of Article 31 to 33 of the Vienna Convention, see VAN DAMME, supra note 4, at 37-52.
20 The Vienna Convention Article 31(2) defines that:

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

Vienna Convention, supra note 14, art. 31(2).
21 See Van Damme, supra note 11, at 627.
22 Typically see Gu, supra note 4, at 1031.
codified during a time when treaties were, perhaps, not as often revisited and analyzed as they are today.\textsuperscript{23} Even if such a critique arose in early discussion, there were not empirical amounts of practical evidences and sources that could test said arguments, in turn lacking the public attention for such critique.\textsuperscript{24}

Two decades later, however, a growing number of disputes concerning the same legal issue have come before the DSB, and challenged its conventional wisdom of “objective analytical methodology”. Thus, we are presented with a unique opportunity to re-observe and critique contextualism (and the DSB’s interpretive method generally) from within the DSB’s interpretive practice. Such an internal critique of the DSB’s contextual interpretation, carried out immediately hereafter, would offer a departure from conventional understandings of the WTO dispute settlement system, and in turn provide an alternative perspective to think about contextualism.

III. THE PUZZLE OF TWO PAIRS OF COMPETING CONTEXTS

The puzzle that inspired this article arises from the DSB adjudicators’ contradictory use of the breadth and depth of contextual elements in their interpretations of the same provision in two separate cases. Complicating the issue is the fact that the two sets of competing contextual arguments seem, as a third-party submission remarked in the Panel procedure of China — Rare Earths, equally compelling.\textsuperscript{25} Both sets of contextual arguments have equal status as valid utterance in interpretive discourse. This makes it hard to judge the direction in which WTO Members are driving the World Trade Organization, and consequently derogates from the purported objectivity of contextual interpretation.

A. A Summary of China—Raw Materials and China—Rare Earths

The two disputes at hand are entitled China — Raw Materials and China — Rare Earths. Yet, both disputes concern China’s multiple measures, including export duties, which affect the export of certain types of raw materials. In China — Raw Materials, the complainants (the U.S.,

\textsuperscript{23} Van Damme, supra note 11, at 634.

\textsuperscript{24} For one example, see Julius Stone, Fictional Elements in Treaty Interpretation—A Study in the International Judicial Process, 1 SYDNEY L. REV. 344, 357-58 (1954). Stone was conscious about the importance of practice, and stated that “[t]he Writer must, therefore, leave open the practical import of the present analysis for the international judicial process in treaty interpretation.” Id. at 367.

\textsuperscript{25} See Colombia’s oral statement, ¶ 33, cited in China — Rare Earths Panel Report, supra note 3, ¶ 7.52. During the Panel procedure of China — Rare Earths, Colombia took no definite position on the interpretation of the disputed provision.
Mexico, and the EU) challenged China’s imposition of export duties, alongside other measures, on nine types of raw materials other than rare earths. The complainants claimed that China’s use of export duties violated its commitments made under Paragraph 11.3 of the Protocol. China responded that such measures, although inconsistent with the Protocol, are justified by the general exceptions in Article XX(g) of the GATT 1994. Paragraph 11.3 of the Protocol provides:

Paragraph 11. Taxes and Charges Levied on Imports and Exports 1 . . . 2 . . . 3. China shall eliminate all taxes and charges applied to exports unless specifically provided for in Annex 6 of this Protocol or applied in conformity with the provisions of Article VIII of the GATT 1994.

And Article XX of the GATT 1994 states:

Article XX: General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

. . .

(b) necessary to protect human, animal or plant life or health; . . .

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; . . . .

Unanimously, the Panel Report found that the wording of China’s Protocol of Accession did not allow China to use the general exceptions in Article XX of the GATT 1994 to justify its WTO-inconsistent export duties. Upon appeal, the Appellate Body upheld the Panel’s finding with no dissenting opinion.27

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26 They include various forms of bauxite, coke, fluorspar, magnesium, silicon carbide, silicon metal, yellow phosphorous, and zinc. See One-page Summary of Key Findings of This Dispute, DS395: China — Measures Related to the Exportation of Various Raw Materials, WTO, https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds395sum_e.pdf (last visited May 24, 2014).

China — Rare Earths is a case behind a case,\(^28\) in which the US, the EU and Japan raised an almost identical legal claim as the claim in China — Raw Materials. Namely, the unavailability of Article XX(b) of the GATT 1994 as a defense for Chinese export restrictions, including export duties, on rare earths, tungsten, and molybdenum.\(^29\)

In the Panel Reports circulated on 26 March 2014, the majority of the Panel followed (and arguably reinforced) the relevant finding in the Appellate Body Report of China — Raw Materials. According to the Panel’s majority, China could not invoke the exception in Article XX(b) to justify its export duties.\(^30\)

One panelist, however, disagreed with the majority’s findings. In a separate dissenting opinion, the panelist concluded that “the ‘General Exceptions’ in Article XX of the GATT 1994 are available to justify all WTO obligations related to trade in goods unless an obligation explicitly provides otherwise, and the relevant obligation in China’s Accession Protocol does not explicitly provide otherwise.”\(^31\)

In the appellate proceedings, China appealed only some of the Panel majority’s intermediate findings leading to the Panel’s conclusion that the general exceptions in Article XX of the GATT 1994 are not available to China as a defense to justify its imposition of export duties. China neither challenged the Panel’s final conclusion, nor any of the intermediate findings leading up to said conclusion. The appealed intermediate finding, in relevance to this article, is about the integral nature between the Protocol and the Marrakesh Agreement and the Multilateral Trade Agreements annexed thereto (in particular the GATT 1994). The Appellate Body upheld the intermediate finding by the majority of the Panel that the Protocol is “in its entirety, an ‘integral part’ of the Marrakesh Agreement, and not that, in addition, the individual provisions thereof are also integral parts of Multilateral Trade Agreements annexed to the Marrakesh Agreement”.\(^32\)

In reaching their findings, both the Appellate Body in China — Raw Materials, and the majority panelists and the Appellate Body in China — Rare Earths made painstaking efforts to examine the context of Paragraph 11.3.\(^33\) So, too, did the dissenting panelist in China — Rare Earths.\(^34\) They

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\(^{28}\) Alan Beattie et al., *Fight Against China on Rare Earths*, FIN. TIMES (Mar. 14, 2012), http://www.ft.com/intl/cms/s/0/4c3da294-6cc2-11e1-bd0c-00144feab49a.html#axzz1sefMgL4Z.

\(^{29}\) These are raw materials used in the production of various kinds of electronic goods.


\(^{31}\) *Id*.


all purported to interpret the context of Paragraph 11.3 holistically and objectively. Nevertheless, although the process of selecting and reading contextual elements generates arguments and counter-arguments, and leads to final interpretive results, in each step of the contextual examination, none of them explained why they chose one contextual element over another, or why they read a contextual element in one way in lieu of another.

**B. A Re-presentation of Four Opposing Pairs of Contextual Elements**

There are four major opposing pairs of contextual elements (and contextual arguments) that have already been used in the three Reports or are available for the extension of the Reports. All adjudicators in the two cases set their essential task of contextual examination to ascertain the common intention of the Protocol’s negotiating parties on whether China should have recourse to the general exceptions of Article XX of the GATT 1994 to defend violations of the export duty commitments it made in Paragraph 11.3 of the Protocol. More specifically, what is the common intention, if it exists, that WTO Members have established in light of the absence of a textual reference to the GATT 1994 in Paragraph 11.3?

1. **The Absence of Textual Reference** — The first contextualization comes in light of the lack of a cross-reference to the GATT 1994 in Paragraph 11.3. Both the Panel and the Appellate Body in *China — Raw Materials* followed the Appellate Body’s interpretive method that absence equates to waiver in a case prior to *China — Raw Materials, China — Publications and Audiovisual Products*. In *China — Publications and Audiovisual Products*, the Appellate Body ruled in favor of China’s claim to invoke Article XX of the GATT 1994 to justify a violation of an obligation previously made in Paragraph 5.1 of the Protocol, which states:

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34 *China — Rare Earths* Panel Report, supra note 3, ¶¶ 7.121-138.
35 *China — Raw Materials* Appellate Body Report, supra note 2, ¶ 307; *China — Rare Earths* Panel Report, supra note 3, ¶¶ 7.132, 7.135; *China — Rare Earths* Appellate Body Report, supra note 5, ¶¶ 5.62, 5.74.
36 Some academic comments that may overlap or reinforce adjudicators’ contextual arguments will be included in this re-presentation.
37 *China — Raw Materials* Appellate Body Report, supra note 2, ¶ 293; *China — Rare Earths* Panel Report, supra note 3, ¶¶ 7.136-137.
38 Cross-reference is not solely a type of contextualizing technique. It also serves to maintain consistency and coherence among different treaty provisions and promote mutually consistent interpretations. Van Damme, supra note 11, at 628. However, the Appellate Body takes cross-reference as a technique of ordinary meaning, instead of contextual interpretation. See *China — Raw Materials* Appellate Body Report, supra note 2, ¶¶ 291-92.
39 We borrowed the description of “absence equates to waiver” from Gu, supra note 4, at 1024.
Paragraph 5.1 Without prejudice to China’s right to regulate trade in a manner consistent with the WTO Agreement, China shall progressively liberalize the availability and scope of the right to trade, so that, within three years after accession, all enterprises in China shall have the right to trade in all goods throughout the customs territory of China, except for those goods listed in Annex 2A which continue to be subject to state trading in accordance with this Protocol (italics added) . . . .

The major ground on which the Appellate Body ruled in favor of China is the introductory clause of Paragraph 5.1—“Without prejudice to China’s right to regulate trade in a manner consistent with the WTO Agreement”. The textual reference—“in a manner consistent with the WTO Agreement”—bridges a connection between Article XX of the GATT 1994 and Paragraph 5.1 of the Protocol, and incorporated the former into the latter as a constituent part.40

In China — Raw Materials, the Panel noted that Paragraph 11.3 contains only a “specific set of exceptions: those covered by Annex 6 and those covered by GATT Article VIII”,41 yet “does not include any express reference to Article XX of the GATT 1994, or to provisions of the GATT 1994 more generally”.42 By such an observation, the Panel contrasted Paragraph 11.3 with Paragraph 5.1 of the Protocol. The textual reference in Paragraph 5.1 served as the key ground for the Appellate Body to rule in favor of China in China — Publications and Audiovisual Products.43

The Appellate Body in China — Raw Materials straightforwardly upheld this finding by the Panel. It stated that:

As noted by the Panel, “the language in Paragraph 11.3 expressly refers to Article VIII, but leaves out reference to other provisions of the GATT 1994, such as Article XX” (original quotation omitted) . . . .44 In the light of China’s explicit commitment contained in Paragraph 11.3 to eliminate export duties and the lack of any textual reference to Article XX of the GATT 1994 in that provision, we see no basis to find that

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40 See China — Publications and Audiovisual Products Appellate Body Report, supra note 1, ¶¶ 228-230, 233; for a comment on the rationale of the Appellate Body in this aspect, see Gu, supra note 4, at 1013-14.
42 Id. ¶ 7.124.
43 See id. ¶ 7.124; China — Raw Materials Appellate Body Report, supra note 2, ¶ 271.
Article XX of the GATT 1994 is applicable to export duties found to be inconsistent with Paragraph 11.3 (italics added).  

In stark contrast, the dissenting panelist in China — Rare Earths brought a different understanding of the omission of textual reference that the Appellate Body has clearly articulated in other WTO disputes. In previous disputes, the Appellate Body has stated that, “omissions in different contexts may have different meanings, and omission, in and of itself, is not necessarily dispositive.” In other words, the Appellate Body has affirmed that a reference may be inferred, even if such a reference is not expressly outlined. For instance, the parties and third parties’ responses and comments to the Panel’s questions suggest that “no party in this dispute has any doubt that China must comply with GATT Article I (MFN), even though there is no reference to Article I of the GATT 1994 in Paragraph 11.3 of China's Accession Protocol.”

More intriguingly, the Appellate Body in China — Rare Earths simply restated its previous position from China — Raw Materials without commenting on any methodological contradiction. The Appellate Body stated:

Notably, under the approach adopted by the Appellate Body, express textual references, or the lack thereof, to a covered agreement (such as the GATT 1994), a provision thereof (such as Article VIII or Article XX of the GATT 1994), or “the WTO Agreement" in general, are not dispositive in and of themselves (italics added, emphasis original).

2. The Existence of Textual Reference — The second pair of contextual elements are very similar. Namely, the interpretation of existing cross-references in other Protocol provisions and provisions of other WTO covered agreements.

In China-Raw Materials, both the Panel and Appellate Body did not make life easier on themselves. Both used the interpretive technique of effectiveness, one of the most controversial techniques of treaty

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45 Id. ¶ 306.
46 See China — Rare Earths Panel Report, supra note 3, ¶ 7.135.
49 China — Rare Earths Panel Report, supra note 3, ¶ 7.135.
50 China — Rare Earths Appellate Body Report, supra note 5, ¶ 5.61.
51 The canon of effectiveness is not codified into the Vienna Convention, but is a widely recognized interpretive technique. See VAN DAMME, supra note 4, ch.7. By the Appellate Body’s
interpretation. Here, cross-references were made to other Protocol provisions that included Paragraph 5.1 and the two paragraphs immediately preceding Paragraph 11.3 — Paragraphs 11.1 and 11.2. The latter of the two are outlined below:

Paragraph 11.1. China shall ensure that customs fees or charges applied or administered by national or sub-national authorities, shall be in conformity with the GATT 1994.
Paragraph 11.2. China shall ensure that internal taxes and charges, including value-added taxes, applied or administered by national or sub-national authorities shall be in conformity with the GATT 1994 (italics added).

The Panel argued that the wording difference between the three sequential sub-paragraphs provides contextual evidence of “a deliberate choice made by China and the WTO Members in setting out China’s rights and obligations and it must be given effect and respected”. The Appellate Body also considered it reasonable to assume from the wording difference between Paragraph 11.3 and Paragraphs 5.1, 11.1 and 11.2 that it is the common intention of WTO Members to negotiate away China’s access to Article XX of the GATT 1994 to defend its violation of Paragraph 11.3 of the Protocol. To the Appellate Body, the negotiating parties would have included a reference in Paragraph 11.3 if they were so intended. Otherwise, it would make the introductory clause in Paragraph 5.1 and the cross-references in Paragraphs 11.1 and 11.2 superfluous. The majority of the Panel in China — Rare Earths reiterated the above argument, and took it as a response to the counter-argument that silence, in and of itself, is not necessarily dispositive.

53 China — Raw Materials Appellate Body Reports, supra note 2, ¶¶ 291-93.
54 It is regarded as an “entry fee” that China paid to the WTO system in exchange for its acceding membership to the WTO. See id. ¶ 7.112; China — Raw Materials Appellate Body Report, supra note 2, ¶¶ 291-93, 303-07.
55 China — Raw Materials Appellate Body Reports, supra note 2, ¶¶ 291-93.
56 The U.S. and Mexico raised the argument of “superfluous”, which was implicitly accepted by the Appellate Body. See China — Raw Materials Appellate Body Report, supra note 2, ¶¶ 301-07.
57 The Appellate Body in China — Rare Earths, somehow, did not respond to China’s argument from US — Carbon Steel that silence does not necessarily mean dispositive. See China — Rare Earths Panel Report, supra note 3, ¶¶ 7.65-.72.
The dissenting opinion in China — Rare Earths also employed the technique of effectiveness, but in a different way. The dissenting panelist argued that there have been instances where acceding Members expressly waived their rights to invoke certain exceptions provisions contained in a specific WTO covered agreement.\textsuperscript{58} In fact, Paragraph 7.3, provides such an example:

Paragraph 7.3 China shall, upon accession, comply with the TRIMs Agreement, \textit{without recourse to the provisions of Article 5 of the TRIMs Agreement}. China shall eliminate and cease to enforce trade and foreign exchange balancing requirements, local content and export or performance requirements made effective through laws, regulations or other measures (italics added) . . . .

Had the Panel and Appellate Body’s findings been more grounded, then Paragraph 7.3 would indicate that WTO Members had no intentions of eliminating China’s right to invoke Article XX of the GATT 1994 to defend their violation of Paragraph 11.3. In other words, WTO negotiators would have expressly tried to eliminate China’s access to Article XX if such were the intention. Yet, such was not the intention.\textsuperscript{59} Otherwise, as a commentator says, it “wove meaning into a lack of terms and tried to brew something out of nothing”,\textsuperscript{60} and renders the reference language in Paragraph 7.3 superfluous.

Relying on the context of Paragraph 7.3 of the Protocol, the dissenting panelist concluded that the defenses provided in the GATT 1994, including its Articles XX, XXI, XXIII(c) and XXIV, are automatically available to justify any GATT-related obligations, unless explicitly stated otherwise in WTO covered agreements.\textsuperscript{61}


\textsuperscript{58} See id. ¶ 7.137.
\textsuperscript{59} This quotation is slightly adapted from a sentence in the Appellate Body Report, China — Raw Materials Appellate Body Reports, supra note 2, ¶ 293. \textit{NOT} is absent in the original sentence.
\textsuperscript{60} Gu, supra note 4, at 1016.
\textsuperscript{61} See China — Rare Earths Panel Report, supra note 3, ¶ 7.137. Moreover, Professor Matthew Kennedy argued that Paragraphs 11.1 and 11.2 and Paragraph 5.1 were not necessarily suitable analogues, because the term of “in conformity with the GATT 1994” in Paragraphs 11.1 and 11.2 only serves to “elaborate on existing obligations already found in GATT 1994; a commitment to eliminate export duties ‘in conformity with the provisions of GATT 1994’ might imply that those provisions already contained such an obligation, even for other Members.” Matthew Kennedy, \textit{The Integration of Accession Protocols into the WTO Agreement}, 47(1) J. WORLD TRADE 45, 57-58 (2013).
Although the use of preparatory work in legal interpretation is subject to its availability and the desirability of using it as contextual guidance, the Appellate Body has, on more than one occasion, used preparatory documents to both confirm and justify treaty interpretations by using other interpretive techniques.  

By the reference contained in Paragraph 342 of the Working Party Report, Paragraph 170 is incorporated into the Protocol as one of its integral parts. In *China — Raw Materials*, China argued that the wording of Paragraph 170 of the Working Party Report confirms that China, upon accession, assumed a “qualified” goods-related obligation to eliminate export duties, and retains the access to Article XX of the GATT 1994 to defend its violation of Paragraph 11.3 of the Protocol. In other words, China only has to eliminate export duties when otherwise specified, and there was no specific reference made to the minerals as being “qualified”.

Paragraph 170, and preceding Paragraph immediately elaborated upon hereafter, provides:

**D. INTERNAL POLICIES AFFECTING FOREIGN TRADE IN GOODS**

1. Taxes and Charges Levied on Imports and Exports

169. Some members of the Working Party expressed concern about the application of the VAT and additional charges levied by sub-national governments on imports. Non-discriminatory application of the VAT and other internal taxes was deemed essential.

170. The representative of China confirmed that upon accession, China would ensure that its laws and regulations relating to all fees, charges or taxes levied on imports and exports would be in full conformity with its WTO obligations, including Articles I, III:2 and 4, and XI:1 of the GATT 1994, and that it would also implement such laws and regulations in full conformity with these obligations. The Working Party took note of this commitment (italics added).

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62 *Van Damme, supra* note 4, at 317. The Appellate Body in *China — Rare Earths* reiterated the importance to examine the preparatory work when conducting contextual inquiries, see *China — Rare Earths Appellate Body Report, supra* note 5, ¶ 5.74.

63 Paragraph 342 of the Working Party Report provides that: “[T]he Working Party took note of the commitments given by China in relation to certain specific matters which are reproduced in paragraphs . . . 170 . . . 339 and 341 of this Report and noted that these commitments are incorporated in paragraph 1.2 of the Protocol.”

64 For China’s argument concerning Paragraph 170, see *China — Raw Materials Appellate Body Report, supra* note 2, ¶¶ 294-96.
From China’s perspective, the fact that both the subsection under which Paragraph 170 falls, and that of Paragraph 11.3 of the Protocol, are entitled as “Taxes and Charges Levied on Imports and Exports”, proves a very considerable overlap in the scope of goods-related measures (e.g., export duties) to which Paragraph 11.3 and Paragraph 170 apply. Placing weight on the language in other parts of China’s accession documents, the wording of “including” in Paragraph 170 suggests a non-exhaustive nature of its reference to the GATT 1994, which naturally includes Article XX of the GATT 1994.

By response, both the Panel and the Appellate Body ruled that Paragraph 170 is irrelevant to Paragraph 11.3 of the Protocol. Rather, Paragraph 155 of the Working Party Report exclusively addresses the issue of export duties. Paragraph 155, together with subsequent Paragraph, provides:

**C. EXPORT REGULATIONS**

1. Customs Tariffs, Fees and Charges for Services Rendered, Application of Internal Taxes to Exports

155. Some members of the Working Party raised concerns over taxes and charges applied exclusively to exports. In their view, such taxes and charges should be eliminated unless applied in conformity with GATT Article VIII or listed in Annex 6 to the Protocol.

156. The representative of China noted that the majority of products were free of export duty, although 84 items, including tungsten ore, ferrosilicon and some aluminum products, were subject to export duties. He noted that the customs value of exported goods was the F.O.B. price of the goods (italics added).

The Appellate Body’s reasonings for disregarding Paragraph 170 are rather practical and conventional. First, Paragraph 155 is titled as “C. EXPORT REGULATIONS”, indicating that Paragraph 155, rather than 170, has been formally established to enumerate China’s export duties. Moreover, Paragraph 155’s language is similar to the rhetoric found in Paragraph 11.3, providing that “taxes and charges applied exclusively to

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65 “At least one can say is that this was not the only possible interpretation of the words.” Marco Bronckers et al., *China Raw Materials: A Controversial Step Towards Evenhanded Exploitation of Natural Resources*, 13(2) *WORLD TRADE REV.* 393, 401 n.28 (2014).

66 For an argument in this regard by a commentator, see Gu, *supra* note 4, at 11-13.

67 See *China — Raw Materials* Panel Report, *supra* note 41, ¶¶ 7.141-142; See *China — Raw Materials* Appellate Body Report, *supra* note 2, ¶¶ 298-99. It is noteworthy that the Appellate Body acknowledged that Paragraph 170 has “limited relevance” in Paragraph 11.3, but it does not explain the context of “relevance” although “limited”.
exports ‘should be eliminated unless applied in conformity with GATT Article VIII or listed in Annex 6 to the Protocol.’” Second, the paragraphs adjacent to Paragraph 155 and Paragraph 170 provide additional context through which the Appellate Body made their final conclusions. Paragraph 156 explicitly refers to negotiating parties’ concern over China’s export duty, whereas the introductory paragraph to Paragraph 170—Paragraph 169—mentions the non-discriminatory application of VAT.

Nonetheless, preparatory work is also text that is subject to interpretation. The narratives of contextual elements in the Working Party Report do not stop here. As one commentator suggests, another contextual argument is available to the dissenting panelist. Namely, under subsection 2 of Section C. EXPORT REGULATIONS, Paragraphs 164 and 165 provides:

2. Export Licensing and Export Restrictions

164. Some members of the Working Party expressed concern about China’s restrictions on exports of silk. Certain other members expressed concern about export restrictions on other goods, in particular raw materials or intermediate products that could be subject to further processing, such as tungsten ore concentrates, rare earths and other metals. Members of the Working Party urged China to ensure that any such restrictions that were imposed or maintained complied with the terms of the WTO Agreement and the Protocol.

165. The representative of China confirmed that upon accession, remaining non-automatic restrictions on exports would be notified to the WTO annually and would be eliminated unless they could be justified under the WTO Agreement or the Protocol. The Working Party took note of this commitment (italics added).

Even if following the position established by the Appellate Body in China — Raw Materials (in saying that Section C. Export Regulations deals exclusively with the issue of export duties), the two paragraphs in Subsection 2 have bridged a connection between Paragraph 11.3 and the WTO Agreement (in particular Article XX of the GATT 1994).70

68 See Gu, supra note 4, at 13-14.
69 China raised the contextual argument of Paragraphs 164 and 165 in China — Raw Materials, which was responded to by the Panel. However, the Appellate Body somehow did not comment on this. It is also worth noting that, neither the majority of the Panel, nor the dissenting panelist in China — Rare Earths, revisited any contextual arguments in the Working Party Report which are addressed herein.
70 The Panel in China — Raw Materials reasoned that “Export Restrictions” in subsection 2 should be confined as “quantitative restrictions”. It is because the two paragraphs are under the title of
For this, there are two reasons for this. First, according to the early reasoning of the Appellate Body, because of the wording difference between the title of Section C. EXPORT REGULATIONS and that of Section D. INTERNAL POLICIES AFFECTING FOREIGN TRADE IN GOODS, it is Section C., rather than Section D, that addresses “export duty” in Paragraph 11.3 of the Protocol. By the same token, the wording difference between the titles of Subsection 2 and Subsection 1 suggests that the Members of the Working Party intended to address the export duty issue in Subsection 2, rather than Subsection 1. Here, the former title is meant to address various Export Restrictions (export duty included), whereas the latter points to Internal Taxes to Imports. Second, in the two Paragraphs in Subsection 2, the Members explicitly expressed their concerns about export restrictions imposed on raw materials or rare earths, and required that China conform its export restrictions to the terms of the WTO Agreement.

4. The Integral Nature the WTO Covered Agreements — The fourth pair of contextual arguments refers to the integral nature of the WTO covered agreements.

In China — Rare Earths, China raised a novel argument claiming the negotiating parties’ common intention to make Paragraph 11.3 (and the Protocol generally) an “integral part” of the GATT 1994. In coming to such a conclusion, China invoked, first, Paragraph 1.2 of the Protocol, which provides, “[t]his Protocol, which shall include the commitments referred to in paragraph 342 of the Working Party Report, shall be an integral part of the WTO Agreement” (italics added). Second, Article XII:1 of Marrakesh Agreement Establishing the World Trade Organization (hereinafter “Marrakesh Agreement”) provides, “[a]ny State or separate customs territory possessing full autonomy . . . may accede to this Agreement, on terms to be agreed between it and the WTO. Such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto (italics added).”

For China, the two provisions bridge an integral and intrinsic relationship between the Protocol and the GATT 1994, in turn legitimizing GATT Article XX as a justification of China’s violation of Paragraph 11.3.

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Section C (2) “Export Licensing and Export Restrictions”, independent from and in parallel with the title of Section C (1) “Application of Internal Taxes to Exports” in the Working Party Report, China — Raw Materials Panel Report, supra note 41, ¶ 7.146. However, the Panel’s reasoning is ill-constructed because “[a] typical form of quantitative restrictions, quotas are considered opaque, more of a waste form of allocation of resources than duties, and therefore, are generally prohibited under the WTO mechanism.” This would be absurd when the Appellate Body eventually interpreted Paragraph 11.3 of the Protocol to the effect that export duties are not qualified for recourse to GATT Article XX but export quotas are, while a more acceptable result may take place if the Appellate Body had chosen differently. Gu, supra note 4, at 1018-20.

71 See China — Rare Earths Appellate Body Report, supra note 5.
In response, the majority of the Panel stressed that “the WTO Agreement” as included in Paragraph 1.2, should not be defined to more than “the Marrakesh Agreement”, 72 and that “This Protocol” as used in Paragraph 1.2, by its ordinary meaning, refers to the entirety of the Protocol, rather than its individual provisions. 73 The Panel agreed that Paragraph 1.2 makes the Protocol in its entirety an integral part of the Marrakesh Agreement, and that Article XII:1 incorporates the Multilateral Trade Agreements annexed thereto; for example, the GATT 1994 and the Protocol as integral parts into the Marrakesh Agreement. However, this neither means that the Multilateral Trade Agreements annexed to the Marrakesh Agreement are integral parts of one another, nor does it mean that individual provisions of one Multilateral Trade Agreement are integral to other parts of the Multilateral Trade Agreement. 74 The Panel never directly denied the possibility that individual provisions of the Protocol are, perhaps, integral to other parts of the Multilateral Trade Agreements, for example, the GATT 1994. However, such a possibility will not arise until a literal reference is included in individual provisions. 75

By sharp contrast, the dissenting panelist gives superior weight to Article II:2 of the Marrakesh Agreement, 76 and takes it as the starting point for understanding the relationships among various WTO covered agreements. 77 The Appellate Body has established, by reference to Article II:2 of the Marrakesh Agreement, that various WTO covered agreements, including the Marrakesh Agreement itself and various Multilateral Trade Agreements, constitute a “Single Undertaking”. 78 In other words, altogether, WTO covered agreements form a single treaty unalterable by any single WTO member. 79 Each WTO covered agreement does not stand alone, but lives in harmony with other WTO covered agreements as its cousins. 80

72 China — Rare Earths Panel Report, supra note 3, ¶ 7.85.
73 Id. ¶ 7.82.
74 Id. ¶ 7.80.
75 Id.
76 The Marrakesh Agreement Article II:2 provides that: “[t]he agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as ‘Multilateral Trade Agreements’) are integral parts of this Agreement, binding on all Members.” Marrakesh Agreement Establishing the World Trade Organization art. II:2, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994).
77 China — Rare Earths Panel Report, supra note 3, ¶¶ 7.121, 7.124.
78 “The institutional character of the WTO is taken into account when interpreting the Agreement. The WTO is a ‘single undertaking’ composed of a series of interlocking agreements, as was explained in the Brazil — Measures Affecting Desiccated Coconut case (see above). The WTO is an integrated unit and all the agreements have to be interpreted together.” Fitzmaurice, supra note 52, at 93.
80 Gu, supra note 4, at 1022.
Moreover, the history of acceding negotiation suggests that all provisions of accession protocols came out of the common demands of WTO Members.\textsuperscript{81} In the absence of express exceptions, all WTO covered provisions, including the Marrakesh Agreement, the GATT 1994 and Accession Protocols, apply to all Members simultaneously and cumulatively.\textsuperscript{82} Thus, without explicit waivers, the general exceptions provided in GATT Articles XX, XXI, XXIII(c) and XXIV apply to all violations of goods-related WTO commitments.\textsuperscript{83}

As mentioned above, the Appellate Body in \textit{China — Rare Earths} was only requested to assess the above disagreement over the intermediate finding between the majority of the panel and the separate panelist, instead of the Panel’s conclusion. Although the Appellate Body agreed with the separate panelist regarding the integral nature and the “Single Undertaking” entity of all WTO covered agreements,\textsuperscript{84} it summarily dismissed the separate panelist’s position that all WTO covered provisions should be read simultaneously and cumulatively.\textsuperscript{85} According to the Appellate Body, the integral bridge built by Paragraph 1.2 of the Protocol is “only the starting point”, but does not provide specific guidance on how individual provisions in one agreement relate to those in another. Nor does it automatically avail itself of the general exceptions in GATT Article XX to China to justify its breach of the commitments it has made in Paragraph 11.3 of the Protocol.

Nonetheless, the Appellate Body’s summary dismissal of the separate panelist’s finding not only fails to resolve the conflicts between the majority of the Panel and the separate panelist, but also brings about a new question. That is, why provisions in a “Single Undertaking” should or should not be read simultaneously and cumulatively?

IV. THE LIMITS OF CONTEXTUAL AND FORMALISTIC INQUIRIES OF WTO LAW

A. The Limits of Contextual Inquiry of WTO Law

Indeed, “no one has ever made an acontextual statement. There is always some context to any utterance, however meager,”\textsuperscript{86} and there are

\textsuperscript{81}Julia Ya Qin, \textit{The Challenge of Interpreting ‘WTO-PLUS’ Provisions}, 44(1) \textit{J. World Trade} 127, 170 (2010).

\textsuperscript{82}Brazil — Desiccated Coconut Appellate Body Report, \textit{supra} note 79; see also \textit{China — Rare Earths} Panel Report, \textit{supra} note 3, ¶ 7.136.

\textsuperscript{83}\textit{China — Rare Earths} Panel Report, \textit{supra} note 3, ¶ 7.137.

\textsuperscript{84}“[A]ll the Multilateral Trade Agreements constitute integral parts of the Marrakesh Agreement. They together make up the same treaty, representing a single package of rights and obligations.” \textit{China — Rare Earths} Appellate Body Report, \textit{supra} note 5, ¶ 5.72; see also \textit{id.} ¶ 5.30.

\textsuperscript{85}Only in one footnote, the Appellate Body states, very briefly, that “[f]or these reasons, we also see no basis for the opinion of the dissenting panelist in these disputes that . . . .” \textit{Id.} n.504.

many provisions with contexts sufficiently unambiguous to determine their meanings (and the intents that lawmakers or negotiating parties have attached to them). For one example, no party in China — Rare Earth has any doubt that China must comply with GATT Article I (MFN), though no reference whatsoever has been made for such a requirement. The institution of MFN is so fundamental for the functionality of WTO that no active WTO Member has ever challenged its applicability to Accession Protocol provisions on the ground that such provisions have no textual reference to GATT Article I. No matter how powerful or weak trading partners may be, few parties can neither afford nor are willing accept the retaliations against one another.

Taking Paragraph 1.1 and Paragraph 1.2 of the Protocol as another example, they provide:

**Part I – General Provisions**

1. General

1. Upon accession, China accedes to the WTO Agreement pursuant to Article XII of that Agreement and thereby becomes a Member of the WTO.

2. The WTO Agreement to which China accedes shall be the WTO Agreement as rectified, amended or otherwise modified by such legal instruments as may have entered into force before the date of accession. This Protocol, which shall include the commitments referred to in paragraph 342 of the Working Party Report, shall be an integral part of the WTO Agreement (italics added).

Despite the disagreement on the specific inclusion of the term “the WTO Agreement” in these paragraphs, nobody would object that the syntax of Paragraph 1.1 confirms that “the WTO Agreement” and “that Agreement” in that paragraph necessarily refer to the same thing”, and that “the WTO Agreement” in Paragraph 1.1 and Paragraph 1.2 share the same meaning.87

In terms of its inclusion, China argued before the Panel and the Appellate Body in China — Rare Earths that the references to “the WTO Agreement” in Paragraphs 1.1 and 1.2 encompasses both the Marrakesh Agreement and the Multilateral Trade Agreements annexed thereto, whereas the complainants submitted that it only includes the Marrakesh Agreement.

The first sentence of the Preamble of China’s Accession Protocol serves clear insight, which stipulates, “[t]he World Trade Organization

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87 China — Rare Earths Appellate Body Report, *supra* note 5, ¶ 5.43.
(‘WTO’), pursuant to the approval of the Ministerial Conference of the WTO accorded under Article XII of the Marrakesh Agreement Establishing the World Trade Organization (‘WTO Agreement’), and the People’s Republic of China (‘China’) (italics added) . . .”

This sentence has clearly defined what content the term “WTO Agreement” is short for throughout the Protocol. Excluding prior knowledge or special instances, few could misconstrue this sentence’s meaning as to include anything more or less than solely the Marrakesh Agreement.88

Nonetheless, litigants before the DSB are arguably sophisticated, and are unlikely to principally ground their positions around arguments inconsistent with the clear contexts of the provisions at issue. Few would accord such arguments, even if raised, with merit.89 All in all, disputes brought before the DSB are unlikely to be as simple as defining the term of the “WTO Agreement”. Rather, in many cases, “the meaning of a particular provision, at times in light of other provisions in the WTO texts and other international law, may be highly contested as applied to different factual contexts.”90

After all, terms could be read in the context of the whole sentence, or the whole paragraph, or immediately adjacent paragraphs, or the whole subsection, or the whole section, or the whole agreement, or the “Single Undertaking” composed of multiple agreements and annexes. On many occasions, even a given context might be construed in entirely opposite ways because, as Karl Llewellyn demonstrated at length in the middle of the 20th century, almost every canon of interpretation has a counter-

88 Of course, this narrow interpretation of the term “the WTO Agreement” in Paragraphs 1.1, 1.2 (and in the Protocol generally) does not preclude China’s possibility of ascertaining other valid arguments for its position that the Protocol is an integral part of other Multilateral Trade Agreements annexed to the Marrakesh, such as the GATT 1994. For an argument of this kind grounded on Article XII:1 of the Marrakesh Agreement and Paragraphs 1.2 of the Protocol, see Kennedy, supra note 61, at 62-63.

89 In both procedures of China — Rare Earths, none of the third parties that take the same position of China on the applicability of GATT Article XX to the violation of WTO-plus commitments in accession protocols shares China’s broad reading of the term “the WTO Agreement” in Paragraph 1.2 of the Protocol.

90 Gregory Shaffer & Joel P. Trachtman, Interpretation and Institutional Choice at the WTO, 52(1) Va. J. Int’l L. 103, 122 (2011). This is in some aspects similar to the situation of domestic high courts, the Supreme Court in particular, but different from domestic lower court judges. This is not only because litigants before high courts are more sophisticated than those before lower courts. Also, many legal issues before the lower courts, probably the majority, have already been repeatedly decided with consensual opinions before. For comparisons of the complexity of legal issues between states courts and federal courts in the U.S., see generally Abbe R. Gluck, The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism, 119(8) Yale L.J. 1750 (2010); Richard A. Posner, How Judges Think ch.10 (2008).
These make the convention an illusion to regard contextualism as an objective analytic method for achieving the aim of promoting stability and predictability. This is true at least in practical situations as we have visited above.

**B. The Limits of Other Formalistic Interpretative Techniques**

In his farewell remarks, former Appellate Body Member Giorgio Sacerdoti stated, “[d]isputes are growing in complexity making it more challenging to adjudicate them within the prescribed timeframes both at the panel and at the Appellate Body level. Options to maintain the system’s efficiency should be continuously explored.”

Using other formalistic interpretative techniques for the clarification of contextual ambiguity is arguably one type of such exploration. It is argued that the codified methods in the Vienna Convention, including contextual interpretation, are principles, but not rules “in the ordinary sense of the terms, as relatively determinate directions to a given result.”

Referring to other interpretative techniques, such as dictionary meaning, negotiation history, and object and purpose may save the indeterminate process of contextual examination.

Indeed, context is not the only evidence for the common intention the negotiating parties have attached to treaty provisions. The vagueness of text may be clarified by dictionary definitions or by its contexts. The vagueness of one context may be saved by another, and referring to other relevant interpretative clues may also eliminate the contradiction among various contexts. However, these hopes are highly contingent on the availability and clarity of additional sources. Resources aside, one question still remains: are other interpretive techniques more objective than the conventional notion of contextualism? In this case, as other instances have shown, the answer appears rather dismal and unpromising.

The dictionary is one of the DSB’s key instruments to obtain ordinary meaning. But “dictionary meanings leave many interpretive questions open,” and different dictionaries can provide different definitions to the same term. This is because ordinary meaning and intent are not

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93 Van Damme, supra note 4, at 35.
94 Van Damme, supra note 11, at 618, 630.
96 See the dispute concerning the dictionary interpretation of “Sound Recording Distribution Services” in *China — Publications and Audiovisual Products Appellate Body Report*, supra note 1, ¶¶ 348-57.
preordained, but rather, established on various sources of evidence that are subject to the judges’ selection and reading.\textsuperscript{97}

The recourse to negotiation history is similarly problematic. South Korea, a third party in \textit{China — Rare Earths}, argues, “in answering the question of whether Article XX could be invoked as a defense to the breaches of Paragraph 11.3, recourse to preparatory work of the accession negotiations, pursuant to Article 32 of the Vienna Convention, may assist in finding the ‘correct intention between the negotiating parties’.” \textsuperscript{98} Apparently, such historical records are not available in the case of China.\textsuperscript{99} However, Russia, another third party in \textit{China — Rare Earths}, raised a relevant account on the negotiation history of its own accession protocol:

\begin{quote}
[D]uring its accession negotiations, upon assurance by the incumbent WTO Members that defenses under the WTO agreements are equally available to all WTO Members, Russia agreed to delete the following statement from its Accession Protocol: “nothing in these commitments shall be understood to derogate from the rights of the Russian Federation under the WTO Agreement as applied between the Members of the WTO by the date of accession of the Russian Federation to the WTO (footnote omitted).\textsuperscript{100}

From Russia’s point of view, this negotiating history suggests that “an acceding Member’s intention to waive its right to protect important values such as life and health must be clearly and unambiguously explained.”\textsuperscript{101} However, is this assurance officially recorded? If yes, whether such assurance to Russia applies to other acceding Members is still not uncontroversial. If no, the deletion of certain provision from a draft treaty, if shown by history, can be construed in both ways: “it can be understood to mean that the parties saw the language as unnecessary because no one would disagree with its content, or it can be interpreted as the parties’ ultimate rejection of the language.”\textsuperscript{102}

In terms of the interpretive method of object and purpose purely based on contexts, the real negotiating process of treaties resembles very much


\textsuperscript{98} \textit{China — Rare Earths} Appellate Body Report, supra note 5, ¶ 2.238.

\textsuperscript{99} In a broad sense, the Accession Working Party Report, as we have visited in the above \textit{Representation of four Opposing Pairs of Contextual Elements}, is part of the negotiation history.

\textsuperscript{100} \textit{China — Rare Earths} Appellate Body Report, supra note 5, ¶ 2.240.

\textsuperscript{101} Id.

that of contracts, in the sense that parties would knowingly leave some issues unanswered due to many considerations, for example, low probability of occurrence. In this case, judges are conjuring something out of nothing when they claim to have found parties’ common intention. Even if parties did place a certain object and purpose on negotiated provisions, the object and purpose of a paragraph might differ from those of a subsection, or section, or whole agreement.\footnote{\textit{[S]}ummary dismissal of the interpretive values of the WTO objectives betrays a profound misunderstanding of the role of ‘object and purpose’ in treaty interpretation.” Julia Ya Qin, \textit{Predicament of China’s WTO-Plus Obligation to Eliminate Export Duties: A Commentary on the China-Rare Earths Case}, 11 CHINESE J. INT’L L. 237, 243 (2012).}

In a word, when other interpretive clues are not available or unclear, the recourse to them is no more than to disguise an old fiction with a new one. It only intensifies the problem of every single interpretative method, and makes it more difficult to promote the objectivity of WTO adjudicators’ formalistic interpretation.

\textbf{C. The Weakness of the Holistic Interpretative Approach}

Besides turning to other formalistic interpretative techniques, the Panels and the Appellate Body of the DSB applied the approach of holistic interpretation or thorough analysis. It means neither contextual meaning, nor ordinary meaning, nor meaning obtained by other methods alone, but these methods together produce an interpretive conclusion.

Regarding the questions of whether there is an objective link between a provision in the Protocol and provisions in the Marrakesh Agreements and the Multilateral Trade Agreements, and whether China may rely on an exception provided for in those agreements to justify a breach of such Protocol provision, the Appellate Body in \textit{China-Rare Earths} provides,

\begin{quote}
Such questions must be answered through \textit{a thorough analysis} of the relevant provisions . . . . The analysis must start with \textit{the text} of the relevant provision in China’s Accession Protocol and take into account \textit{its context}, including that provided by the Protocol itself and by relevant provisions of the Accession Working Party Report, and by the agreements in the WTO legal framework. The analysis must also take into account the overall architecture of the WTO system as a single package of rights and obligations and any other relevant interpretative elements, and must be applied to the circumstances of each dispute, including the measure at issue and the nature of the alleged violation (italics added).\footnote{\textit{China — Rare Earths Appellate Body Report}, supra note 5, ¶ 5.74; see also id. ¶ 5.68.}
\end{quote}
This seemingly all-embracing method, in fact, embraces nothing. Such a method is so vague that it could never be wrong.\textsuperscript{105} After all, the purported holistic exercises of treaty interpretation by the Panels and the Appellate Body of the DSB have relied heavily on the analysis of various contexts and many other formalistic components of relevant treaties. However, both sets of contextual inquiries re-presented above have gone through the contexts of Paragraph 11.3 thoroughly, but point to opposite interpretive results. Mere satisfaction of such a formal requirement does not solve the conflict in the end. Rather, it is no more than an interpretative strategy to disguise the weakness of various types of formalistic interpretative techniques.

\section*{V. Concluding Thoughts}

Recognizing the limitations of various types of formalistic interpretative techniques, particularly contextual analysis, is vital if WTO adjudicators hope to deliver satisfactory dispute settlements for WTO members. As we have highlighted throughout this article, the contexts of certain disputed provisions may be of great complexity, enabling the adjudicators to produce two sets of competing contextual arguments. In \textit{China — Raw Materials} and \textit{China — Rare Earths}, the adjudicators have two clear sets of contextual arguments concerning the availability of the general exception contained in GATT Article XX as a defense to obligations contained in China’s accession protocol. Nonetheless, there is hardly any formalistic criterion for the selection of the two contextual narratives that point to opposite interpretive results. Confined in the toolbox of formalistic interpretive techniques, WTO adjudicators’ selection of either set of arguments is deemed to be puzzling and unsatisfactory in hard cases like \textit{China — Raw Materials} and \textit{China-Rare Earths}.

Subsequently, it becomes equally vital to ask if there is a solution for the puzzle. Although this question goes beyond the focus of this article, we would like to provide tentative thoughts on two types of efforts that can be made to save WTO adjudicators from puzzling contextual inquiries in hard cases. One type of effort can be made within the adjudicative body, by improving their formalistic interpretive techniques. Another comes from the legislative body of the WTO by striking a more delicate balance between political control and adjudicator independence and redefining the roles of the DSB.

The deep reason for the puzzle arising from contextual interpretation lies in the dissonance between WTO adjudicators’ commitment to ascertaining the common intentions of the parties with a purely textual method, particularly a contextual analysis, and the fact that “most international agreements, in particular multilateral agreements, are incomplete.”106 Disputed provisions are usually the results of incomplete negotiations or compromises, which barely contain either negotiating party’s true intention or all of the negotiating parties’ common intention.107 Had China and its negotiating parties been aware of the highly indeterminate contexts as to the availability of the general exception as a defense to obligations contained in China’s accession protocol, they were likely to record their common intention with clearer textual references. The existence of the two sets of contradictory contextual arguments at best suggests the failure of China and its negotiating parties to reach any common intention when contracting China’s accession protocol.108 Subsequently, WTO adjudicators’ dedication to ascertaining such common intention with textual references is no more than the efforts to find something that was not referred to at all.

Facing puzzling contexts (and hopeless, formalistic interpretative techniques generally), adjudicators in domestic courts may openly and confidently turn to fill in statutory (or contractual) gaps with what they think the legislature (or the contractors) would like them to provide, instead of sticking to hopeless, formalistic interpretative utterance. Theoretically, WTO adjudicators can also frankly acknowledge the limitation of contextual analysis in ascertaining negotiating parties’ common intentions, and turn to find a better tool within the “customary rules of interpretation of public international law”, as required by Article 3.2 of the DSU and set out in Articles 31 to 33 of the VCLT.


107 This is especially true for developing countries that acceded to WTO treaties without sufficient technical expertise to recognize the complexity of signed legal documents. Some acceding members eventually agreed to a “Grand Bargain” or “Burn Deal”. See generally Sylvia Ostry, The Uruguay Round North-South Grand Bargain: Implications for Future Negotiations, in THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW: ESSAYS IN HONOR OF ROBERT E. HUDEC 285 (Daniel L. M. Kennedy et al. eds., 2002); Sylvia Ostry, Trade, Development, and the Doha Development Agenda, in THE WTO AFTER HONG KONG: PROGRESS IN, AND PROSPECTS FOR, THE DOHA DEVELOPMENT AGENDA 26 (Donna Lee & Rorden Wilkinson eds., 2007).

108 Besides recording their common intention with clearer textual references, negotiating parties might circumvent politically sensitive issues (e.g., national security) during their negotiation and provide no textual references at all. See Robert McDougall, The Crisis in WTO Dispute Settlement: Fixing Birth Defects to Restore Balance, 52(6) J. WORLD TRADE 867, 888 (2018). Nonetheless, this circumvention still means the shortage of common intention.
As WTO adjudicators have attached importance to elsewhere,109 the “circumstances of the conclusion” of a given provision are provided by Article 32 of the VCLT as supplementary means to confirm the meaning resulting from contextual inquiries, or determine the meaning when the interpretation through contextual inquiries leaves it ambiguous, obscure, or manifestly absurd or unreasonable. Resorting to the circumstances to ascertain the common intention indeed departs from the Appellate Body’s established doctrine of textualism, but is still based on the textually based approach. It not only saves adjudicators from the hopeless puzzle of contextual inquiries, but also, more importantly, provides a new manner in which the textually based approach can be applied and the common intention ascertained.110

In China — Raw Materials and China — Rare Earths, an essential circumstance that is worthy of investigation by WTO adjudicators is whether there were common understandings of the substantive relationship between trade and non-trade concerns such as public morals and human health as contained in the general exception clause of GATT Article XX. “Exceptions embody important societal policy goals”, and “can be likened to built-in ‘connective tissues’” that sustain the continued functioning of the WTO.111 However, is the general exception clause as fundamental as the institution of MFN for the functionality of the WTO and therefore unable to be negotiated away?

Actually, it is widely observed that the Appellate Body in China — Publications and Audiovisual Products voiced out its position on non-trade concerns when stating that “[w]e note, in this respect, that we see the ‘right to regulate’, in the abstract, as an inherent power enjoyed by a Member’s government, rather than a right bestowed by international treaties such as the WTO Agreement.”112 Arguably, the introductory clause in Paragraph 5.1 of the Protocol has probably provided the Appellate Body with reason and confidence to clearly articulate its political stand for WTO Members’ “inherent power to regulate trade”. But would WTO members lose their inherent power to regulate if such introductory clause were absent? Compared to contradictory contextual arguments, the answers to these questions will materially enrich the circumstances of the conclusion of

110 See QURESHI, supra note 106, at 146-47.
111 Id. at 132, 135-36.
112 China — Publications and Audiovisual Products Appellate Body Report, supra note 1, ¶ 222. Observations on the Appellate Body’s political preference are evident in this Report, see Van Damme, supra note 11, at 646-47; Gu, supra note 4, at 1030; Qin, supra note 81, at 151.
China’s acceding protocol and bring the adjudicators closer to the common intentions of negotiating parties.

Nonetheless, the above methodological departure from the established textual approach cannot automatically take place within the Dispute Settlement Body in reality, although the cases of consensus vacuum and material wording failure are not unusual for WTO treaties. Adjudicators are expected to make a certain amount of law in any legal system as “resolving textual ambiguities will inevitably result in clarifications of obligations in a way that one party may not have originally expected.”\textsuperscript{113} However, the more gaps the adjudicators fill in materially, the higher the risks they incur in adding to or diminishing the rights and obligations to WTO parties who have not provided them in the covered agreements yet, and breaching their commitment to function as a member-driven organization. In some circumstances, the filled substances would be too big to afford by either party of these disputes.

Therefore, the question becomes to what extent the adjudicative body can play the lawmaking role. Although the DSB has been requested to clarify a growing number of disputed provisions in the absence of effective contextual references and exercise its judicial function, it cannot answer this question by itself. The current adjudicative system relies on the adjudicators’ methodological confinement to formalistic interpretive techniques and self-restraint in avoiding disputes over politically sensitive issues such as what constitutes “national security”.\textsuperscript{114} However, as the membership of the WTO expands both numerically and demographically, trade disputes reach deeper into domestic regulation and make decisions for the adjudicators more difficult.\textsuperscript{115} The DSB’s issue-avoidance strategy may eventually stretch thin and undermine the legitimacy of their settlements of trade disputes among WTO members. Recent strategies taken by the big players of the WTO, especially China and the United States, have provided strong evidence for this problem. As long as the DSB continues to avoid responding to the substantive concerns of the general policy space available to developing countries, China is likely to continue narrowly implementing WTO decisions and setting export restraints on mineral resources.\textsuperscript{116} In response, China’s big trading partners, such as the U.S., have chosen to resort to diplomatic and other extra-legal measures to address their trade concerns.

Since 11 December 2019, there has been only one active Appellate Body member serving the DSB of the WTO, which has weakened the

\textsuperscript{113} McDougall, supra note 108, at 878.
\textsuperscript{114} See Qin, supra note 81, at 140-42; Van Damme, supra note 11, at 646.
\textsuperscript{115} See McDougall, supra note 108, at 889; see also the farewell remarks delivered by former Appellate Body Member Giorgio Sacerdoti. Appellate Body, supra note 92.
\textsuperscript{116} See Wu, supra note 8 at 690; Espa, supra note 6, at 59.
future of the Appellate Body. However, the stalemate over the appointment of new Appellate Body members is just one more symptom of the defective relationship between the Dispute Settlement Body and the legislative body of the World Trade Organization. The system of dispute settlement is not a self-standing good.\textsuperscript{117} One key premise upon which the adjudicators can perform the commitment to a member-driven international economic order, is that WTO members have drawn clear destinations and routes. As former Appellate Body Member David Unterhalter remarked, “[a]djudication is robust when it lives in a dynamic relationship with legislative competence. If too much rests upon dispute settlement, the system gets out of kilter.”\textsuperscript{118} To save WTO adjudicators’ virtues of settling trade disputes and promoting stability and predictability from WTO members’ disaffection, the members themselves have to “agree as to how they wish to take the multilateral project forward.”\textsuperscript{119}

Instead of merely asking the adjudicators to resolve a growing number of disputes unsettled by themselves through treaty negotiations, the members need to find a way to strike a more delicate power balance between adjudicative control and political management,\textsuperscript{120} and redefine the role the DSB can play to facilitate the effective functioning of the WTO system. Even if WTO members cannot resolve the items remaining on the Doha Development Agenda in the short run,\textsuperscript{121} they can make efforts, for instance, to filter out significant or sensitive matters in which they hold considerably divergent views or the issues that they hope to trade-off during the continuous process of communication and collaboration among them in the shaping and sharing of demanded values.\textsuperscript{122} This is to make necessary amendments to the reverse consensus decision-making rule to ensure that WTO members can manage the risks and consequences of interpretations that move far away from what was anticipated,\textsuperscript{123} and improve the appointment process and extend the terms of Appellate Body members in order to secure their independence and impartiality,\textsuperscript{124} and so forth. Although these changes will inevitably reduce the DSB’s authorities

\textsuperscript{117} See Abi-Saab, supra note 11, at 107.
\textsuperscript{119} Id. at 47.
\textsuperscript{120} See McDougall, supra note 108, at 867, 887.
\textsuperscript{121} See generally Kent Jones, The Doha Blues: Institutional Crisis and Reform in the WTO (2010).
\textsuperscript{122} See McDougall, supra note 108, at 878; Jones, supra note 121, at 13; Qureshi, supra note 106, at 143.
\textsuperscript{123} See McDougall, supra note 108, at 876.
\textsuperscript{124} In her farewell remarks, former Appellate Body Member Jennifer Hillman also suggested that longer terms for Appellate Body Member help promote judges’ independence and impartiality. See Appellate Body, Appellate Body Annual Report for 2011, at 77, WTO Doc. WT/AB/17 (June 13, 2012).
in settling trade disputes, they are necessary steps to drive WTO adjudicators into a safe harbor where they can be saved from contextual fetishism and policy phobia and deliver legitimate and satisfactory settlements for WTO members.
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