

Holistic Approach of Treaty Interpretation: A Critique on *China-Rare Earths*

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Received 3 May 2015; accepted 10 July 2015

Published online 26 August 2015

Abstract

The holistic approach of treaty interpretation is an emerging manner in the last decade to apply international customary law of treaty interpretation in WTO practices of dispute settlement, in particular, the cases related to China. Currently, it is uncertain to apply this manner in WTO dispute settlement due to lack of expressed treaty provisions, which have drawn highly attentions of WTO Members and even resulted in controversies inside the Panel of China-Rare Earths. The analysis of this thesis demonstrates that the holistic approach involves in the customary rules of treaty interpretation. The separate opinion of one panelist in China-Rare Earths provides an example to apply the holistic approach, even though the Appellate Body gave no further explanation of this approach. China-Rare Earths indicates that the basic practices of dispute settlement since the establishment of the WTO remain unchanged, but, facing the new problems and challenges, the practitioners and the academics of the WTO Dispute Settlement must conduct more researches on holistic approach in order to develop the legal theory of treaty interpretation. It would be also benefited from relevant researches to improve Chinese capacity for responding to the WTO dispute settlement and other international dispute settlements by peaceful means.

Key words: China-rare earths; Treaty interpretation; WTO

Zhang, N. G. (2015). Holistic Approach of Treaty Interpretation: A Critique on *China-Rare Earths*. *Canadian Social Science*, 11(8), 16-26. Available from: <http://www.cscanada.net/index.php/css/article/view/7378>
DOI: <http://dx.doi.org/10.3968/7378>

INTRODUCTION

The interpretation of treaty is a process to clarify meanings of particular words or terms used in a treaty. The dispute arisen from different interpretations of a treaty in force by the contracting parties is classified as legal disputes under Article 36.2(a) of Statute of the International Court of Justice.¹ It is Article 3.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) that the Dispute Settlement Body (DSB) of the World Trade Organization (WTO) shall clarify the existing WTO agreements “in accordance with customary rules of interpretation of public international law.”² This thesis focuses on interpretation of treaty defined by the Vienna Convention on the Law of Treaties³ (VCLT) as the Section 3 of Part III, i.e., any interpretations made by the parties or the authorized tribunals after the treaty entered into force (Crawford, 2012, pp.378-379), which falls into the category of settlement of international dispute by peaceful means.

The International Court of Justice (ICJ) and the DSB, respectively in 1994 and 1996, explicitly confirmed for the first time that the general rule of interpretation reflected in Article 31 of the VCLT would be applied as “customary international law”,⁴ or “has attained the status of a rule of customary or general international law.”⁵ In the last two decades, the rules of treaty interpretation reflected in the VCLT have been applied widely in adjudications of the

¹ *Statute of the International Court of Justice*, 1 UNTS. XVI, T.S. 993. It is annexed to the U.N. Charter “and forms an integral part of the present Charter.” Art. 92, U.N. Charter.

² *Understanding on Rules and Procedures Governing the Settlement of Disputes* (1994)

³ *Vienna Convention on the Law of Treaties* (Vienna, 23 May 1969) 1155 UNTS 331.

⁴ *Territorial Dispute* (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports, 1994, 21-22, para.41.

⁵ WTO Report of Appellate Body, *United States-Standards for Reformulated and Conventional Gasoline*, adopted 29 April 1996, WT/DS2/AB/R.

ICJ, the DSB and other international tribunals.⁶ Now, the status is “not open to challenges” (Gardiner, 2012, p.476).

The dispute settlement by the DSB is different from the ICJ and other international tribunals in respect of matters for adjudication. The dispute settlement system of the WTO “serves to preserve the rights and obligations of the Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.”⁷ Virtually, all of disputes submitted to be settled by the DSB are related to treaty interpretation.⁸ The ICJ has jurisdiction over “all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.”⁹ The interpretation of a treaty is one of the legal disputes to be settled by the ICJ. The jurisdiction of the Tribunal for the Law of the Sea “comprises all disputes and all application submitted to it,”¹⁰ which may involve the issues of treaty interpretation. In comparison, it is mostly significant for the DSB to settle disputes through treaty interpretation. China accessed into the WTO on 11 December 2001. Since 2002, the disputes between China and other Members of the WTO have been increased,¹¹ including some cases with very complex interpretive issues on China’s Protocol of Accession to the WTO (Zhang, 2013, pp.230-250).

International community is facing challenges of treaty interpretation, in particular, how to apply the general rule of treaty interpretation for the WTO dispute settlement. The holistic approach of treaty interpretation was taken by Panels and the Appellate Body of the DSB in several cases. It was firstly appeared in the Panel report on *US – Section 301 Trade Act*:

The elements referred to in Article 31 [of the VCLT]—text, context and object-and-purpose as well as good faith—are to be viewed as one holistic rule of interpretation rather than a sequence of separate tests to be applied in a hierarchical order.¹²

⁶ Reference to systematic comments on applications of customary rules of treaty interpretation by different international tribunals, see Malgosia Fitzmaurice, etc. ed., *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (Leiden: Martnus Nijhoff Publishers 2010)

⁷ *Supra* note 2. Art. 3.2.

⁸ In the period of time from 1995 to 2014, 177 reports by the panels and Appellate Body were adopted. Only few did not address the treaty interpretation such as DS72 (1999), DS221 (2002). See *WTO Dispute Settlement: One-Page Case Summaries 1995-2014, 2015 edition* (Geneva: World Trade Organization 2015).

⁹ *Supra* note 1. Art. 36.1.

¹⁰ Art. 21. *Statute of the International Tribunal for the Law of Sea (Annex VI of the United Nations Convention on the Law of the Sea)*, 1833 U.N.T.S.3.

¹¹ The cases with China as the complaint or the respondent:

Year	2002-2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Cases	2	3	5	5	7	5	3	10	2	1	2

Source: http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm (visited 2 July 2015).

¹² WTO Report of the Penal, *United States-Sections 301-310 of the Trade Act of 1974*, adopted 22 December 1999, WT/DS152/R, para.722.

After that, the term “holistic” or similar usages were occasionally used in parties’ submissions or the Panel reports. The Appellate Body, in *China-Publications and Audiovisual Products*, emphasized that “interpretation pursuant to the customary rule codified in Article 31 of the *Vienna Convention* is ultimately a holistic exercise that should not be mechanically subdivided into rigid components.”¹³ However, it seems that the Appellate Body in *China- Rare Earths*¹⁴ took a cautionary way to avoid further explanation of holistic approach even though there were controversial interpretations in the Panel of this case. The questions are followed. What is the holistic approach of treaty interpretation? How should this approach be applied in practices of the WTO dispute settlement?¹⁵

This thesis will analyze the meaning of the holistic approach with examples of treaty interpretation in practices of the WTO dispute settlement, in particular, the separate opinion¹⁶ of one panelist of *China- Rare Earths* and the Appellate Body’s interpretation.¹⁷ It is also blended with analysis of commentaries by the International Law Commission (ILC) and the ICJ practices of treaty

¹³ WTO Report of Appellate Body, *China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, adopted 21 December 2009, WT/DS363/AB/R, para.348.

¹⁴ WTO Report of Appellate Body, *China -Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, adopted 7 August 2014 WT/DS431/AB/R, WT/DS432/AB/R, WT/DS433/AB/R.

¹⁵ The existing literatures on treaty interpretation include a few comments on holistic approach due to the possible reasons of either publication before 2010 or less attention for it. See Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body*, (Oxford: OUP 2009) 34. This book only mentions that “[I]nterpretation as a “holistic” approach means” and cites the words of Abi-Saab, G., “The Appellate Body and treaty interpretation” in G. Sacerdoti, A. Yanovich, and J. Bohanes (eds.), *The WTO at Ten—The Contribution of the Dispute Settlement System* (Cambridge: CUP, 2006) 459[... “holistic” approach means] “... one integrated operation which uses several tools simultaneously to shed light from different angles on the interpreted text; these tools should not be seen as watertight compartments or as a series of separate sub-operations but, rather, as connected (even overlapping) and mutually reinforcing parts of a whole, of a continuum or a continuous and multifaceted process that cannot be reduced to a mechanical operation and which partakes as much of art (the art of judgment) as of science (the science of law).”

¹⁶ WTO Report of the Penal, *China-Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, adopted 26 March 2014, WT/DS431/R, WT/ DS432/R, WT/DS433/R, paras.7.118-7.138. The separated opinion emphasizes that ‘I am of the view that the determination of whether Paragraph 11.3 of China’s Accession Protocol is an integral part of GATT 1994, and can therefore benefited from the GATT Article 20 exception, requires holistic interpretation of the concerned provisions.’ para.7.132.

¹⁷ *Ibid* para.5, pp.18-5.74. The Appellate Body analyzes the issues of treaty interpretation with 17 pages because that China insists in reversing the Panel’s ruling on measures of *Rare Earths* exportation with the limited issues of intrinsic relationship between China’s Accession Protocol and the WTO Agreement as well as the annexed Multilateral Agreement of Trade in Goods, and also that the 32 new Members of WTO should be taken into account.

interpretation for understanding the current application of customary rules of interpretation. The purpose is to promote theoretical study of international law on treaty interpretation and the capacities of China's response to the peaceful settlement of international disputes including the dispute settlement in the WTO.

1. THE HOLISTIC APPROACH OF TREATY INTERPRETATION TO BE DEFINED

1.1 The Treaty Interpretation by the ICJ: No Explicit Expression of the Holistic Approach

The ICJ has developed its practices of treaty interpretation since the case of *Territorial Dispute* in 1994 expressly referring to the rule of interpretation codified by the VCLT as the customary international law. But, since then the ICJ has not yet used the term of "holistic approach" or other similar usages.¹⁸ It is also true in most recent cases. For an example, the ICJ is required by the parties of *Maritime Dispute*¹⁹ to interpret the terms of the 1952 Santiago Declaration in accordance with Article 31 and 32 of the VCLT as customary international law of treaty interpretation. The ICJ points out that, under Article 31.1 of the VCLT, the ordinary meaning shall be given to the terms of the 1952 Santiago Declaration, and then, the object and purpose of the 1952 Santiago Declaration shall be considered. In regard of supplementary means of interpretation within the meaning of Article 32 of the VCLT, the ICJ takes the view that "the Minutes of the 1952 Conference summarize the discussions leading to the adoption of the 1952 Santiago Declaration, rather than record an agreement of the negotiating States. Thus they are more appropriately characterized as *travaux préparatoires*."²⁰ They constitute supplementary means of interpretation within the meaning of Article 32 of the VCLA. The ICJ emphasizes that, in principle, it is not necessary to resort to supplementary means of interpretation, such as *travaux préparatoires* of the 1952 Santiago Declaration and the circumstance of its conclusion, to determine the meaning of that Declaration. However, the ICJ "has considered the relevant material, which confirms the above interpretation of the 1952

Santiago Declaration [in accordance with Article 31 of the VCLT]."²¹

For another example, in the case of *Whaling in the Antarctic*,²² the ICJ makes it clear that the issues concerning the interpretation and application of Article 8 of the International Convention for the Regulation of Whaling "are central to the present case".²³ Concerning that the Article 8, in particular the paragraph 1, of the Convention is the clause of object and purpose, the ICJ believes that Article 8 is an integral part of the Convention. "It therefore has to be interpreted in light of the object and purpose of the Convention and taking into account other provisions of the Convention, including the Schedule."²⁴ The process of interpretation is firstly to focus on the relationship between Article 8 and the object and purpose of the Convention, and then to interpret the meaning of the phrase "for the purpose of scientific research" and other terms.

It appears that the ICJ does not take a mechanic approach of interpretive one by one of "meaning", "context" and "object and purpose" for application of Article 31 of the VCLT, instead of the flexible approach based on case by case of particular provisions of treaties to be interpreted.

It is necessary to go further to distinguish the holistic approach from the systemic integration of treaty interpretation adopted by the ICJ in the case of *Oil Platforms*.²⁵ The "systemic integration" means that, under the general rules of treaty interpretation of the VCLT, interpretation must take into account

any relevant rules of international law applicable in the relations between parties [Art. 31.3(c)] ... The application of the relevant rules of international law relating to this question thus forms an integral part of the task of interpretation entrusted to the Court by Article 21.2 of the 1955 Treaty.²⁶

The ILC gave the comments that Article 31.3 (c) of the VCLT "may be taken to express what may be called the principle of 'systemic integration', the process surveyed all along this report whereby international obligations are interpreted by reference to this normative environment ('system')."²⁷ "Without the principle of 'systemic integration' it would be impossible to give expression to and keep alive, any sense of the common good of humankind, not reducible to good of any particular

¹⁸ See Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece) Judgment, I. C. J. Reports, 2011, pp.667-668, paras.70-71; Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation) Preliminary Objections, Judgment, I. C. J. Reports, 2011, pp.125-130, para.133-147; Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal) Judgment, I.C.J. Reports 2012, 454, para.86.

¹⁹ *Maritime Dispute* (Peru v. Chile) I. C. J. Judgment, 27 February 2014.

²⁰ *Ibid.*, 28, para.65.

²¹ *Ibid.*, 28, para.66.

²² *Whaling in the Antarctic* (Australia v. Japan, New Zealand Intervening) I. C. J. Judgment, 31 March 2014.

²³ *Ibid.*, 25, para.50.

²⁴ *Ibid.*, 26, para.55.

²⁵ *Oil Platforms* (Islamic Republic of Iran v. United States of America), Judgment, I.C.J. Reports 2003.

²⁶ *Ibid.*, 182, para.41.

²⁷ *Fragmentation of international law: Difficulties Arising from Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, A/CN.41/L. 682 (13 April 2006), 208, para.413.

institution or 'regime'.²⁸ Under the principle of systemic integration, the norms of international law as a legal system should be interpreted against the background of other norms. "As a legal system, international law is not a random collection of such norms. There are meaningful relationships between them."²⁹ Regarding the relationship of interpretation, the ILC draws a conclusion that

this is the case where one norm assists in the interpretation of another. A norm may assist in the interpretation of another norm for example as an application, clarification, updating, or modification of the latter. In such situation, both norms are applied in conjunction.³⁰

Obviously, the principle of systemic integration which emphasizes the relevant rules of international law relating to the issues as an integral part of the task of interpretation is different from the holistic approach which concerns how to apply the rules of treaty interpretation under the VCLA in particular the general rule of treaty interpretation reflected in Article 31.1 so as to avoid mechanic or rigid process of interpretation.

1.2. The Treaty Interpretation by the WTO: The Basic Practices and the Holistic Approach

1.2.1 The Basic Practice and Problems

From very beginning of dispute settlement of the WTO, the Appellate Body of the DSB, under Article 3.2 of the DSU, explicitly referred to Article 31 and 32 of the VCLT as the customary international law of treaty interpretation,³¹ which has been followed by all of the Panels and DSB rulings. The basic practice established in WTO dispute settlement is that treaty interpreter shall base the texts to give the ordinary meaning of terms in relevant contexts with good faith while considering its object and purpose. The mechanic application of customary rules of treaty interpretation in particular Article 31 of the VCLT shall be avoided so as to have all of respects of interpretation together as an integral process. It may not resort to supplementary means of interpretation (Art. 32) or compare different texts (Art. 33). It may also not be necessary to cite the VCLT when the treaty is interpreted. The treaty interpretation cannot add to or reduce the words of text in order to clarify the existing provisions of the covered agreements with the goal to maintain the existing rights and obligations of WTO Members unchanged.

But, there are still some problems in practices of WTO dispute settlement. For instance, it is very difficult

²⁸ Ibid., 244, para. 480.

²⁹ Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, 2006, para. (1).

³⁰ Ibid., para. (2).

³¹ WTO Report of Appellate Body, *United States-Standards for Reformulated and Conventional Gasoline*, 29 adopted April 1996, WT/DS2/AB/R, 16-17; WTO Report of Appellate Body, *Japan -Taxes on Alcoholic Beverages*, adopted 4 October 1996, WT/DS8/AB/R,10, D.

to clarify the meaning of a Member's commitment in its schedule under the General Agreement on Trade in Service (GATS). After the Appellate Body in *US-Gambling*³² exhausted its applications of the general rule under Article 31.1 and all of rules of interpretation related to the contexts under Article 31.2 of the VCLT, it could not clarify the term of 'sporting'. It had to resort to Article 32 of the VCLT and reached the same conclusion that the Panel had for different reasons, "namely, that subsector 10.D of the United States' GATS Schedule includes a specific commitment with respect to gambling and betting services."³³ It was criticized that

although the Appellate Body appears to be trying to emancipate itself from a rigorous textual approach, it has not yet embraced a holistic approach to treaty interpretation, one in which the treaty interpreter looks thoroughly at all relevant elements of the general rule on treaty interpretation pursuant to Article 31(1) of the Vienna Convention. (Ortino, 2006)

1.2.2 Illustration of "Holistic Approach"

China-Publications and Audiovisual Products is similar with *US-Gambling* in respect to interpret the terms used in the GATS Schedule. China disputes the Panel's interpretation that the meaning of inscription 'Sound recording distribution services' in China's GATS Schedule encompasses the distribution through electronic means. The Appellate Body rejected China's allegation that the Panel failed to perform such a "holistic approach" to treaty interpretation when it interpreted the phrase "Sound recording distribution services", but, the holistic approach of treaty interpretation was illustrated as followed:

[T]he purpose of the interpretative exercise is to narrow the range of possible meanings of the treaty term to be interpreted, not to generate multiple meanings or to confirm the ambiguity and inclusiveness of treaty obligations. Rather, a treaty interpreter is required to have recourse to the context and object and purpose to elucidate the relevant meaning of the word or term. This logical progression provides a framework for proper interpretative analysis, bearing in mind that treaty interpretation is an integrated operation, where interpretative rules and principles must be understood and applied as connected and mutually reinforced components of a holistic exercise.³⁴

It was a little bit earlier that the Appellate Body in *US-Continue Zeroing* had given a like illustration of the "holistic approach":

The? principles of interpretation that are set out in Articles 31 and 32 are to be followed in holistic fashion. The interpretative exercise is engaged so as to yield an interpretation that is harmonious and coherent and fits comfortably in the treaty as a whole so as to render the treaty provision legally effective.... This logical progression provides a framework for proper interpretative analysis. At the same time, it should be kept in mind that treaty interpretation is an integrated operation, where

³² WTO Report of Appellate Body, *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, adopted 7 April 2005 WT/DS285/ AB/R..

³³ Ibid., para.212.

³⁴ *Supra* note 16, para.399

interpretative rules or principles must be understood and applied as connected and mutually reinforcing components of a holistic exercise.^{RT}

The last sentences of above two paragraphs are identified. It clearly denotes that the Appellate Body wants to provide a guideline somehow for treaty interpretation in accordance with Articles 31 and 32 of the VCLT, which emphasizes an approach of the holistic exercise or integrated operation. Although the Appellate Body in *China-Rare Earths* mentioned that it had conducted “a holistic analysis of all elements”³⁶ in *China-Raw Materials*,³⁷ but, it seems that slightly different expressions were taken such as “integrated assessment”, “integrated analysis” and “thorough analysis”.³⁸ The meanings of those phrases might be essentially same, i.e., the process to clarify meanings of particular words or terms used in a treaty should be a holistic exercise to integrate all elements of interpretation so as to avoid a mechanic or rigid analysis.

The expression of holistic approach has not yet been exclusively used to reiterate importance of the manner applying the customary international law of treaty interpretation. However, the Appellate Body did take this expression as the preferred interpretive process. Interestingly, excepted in a few citations of *China-Raw Materials* or the Panel report of *China-Rare Earths* which uses the ‘integrated assessment’ to interpret Article 20 (g) of the General Agreement on Tariff and Trade (GATT),³⁹ the Appellate Body in *China-Rare Earths* appears to delicately keep away from a further explanation of holistic approach even though the separated opinion of a panelist gave a quite different analysis. It did not mention its illustration of the holistic approach as a guideline of treaty interpretation in *China-Publications and Audiovisual*

Products at all. Does it mean that the holistic approach of treaty interpretation has been already defined and therefore no controversies? Taking the separated opinion of a panelist in the Panel report of *China-Rare Earths* into account, it should be reserved for further observation.

2. TREATY INTERPRETATION IN CHINA-RARE EARTH AND THE HOLISTIC APPROACH

2.1 The Separate Opinion: Application of the Holistic Approach

The report of *China-Rare Earth* disclosed a separate opinion by one panelist,⁴⁰ which is a good example of treaty interpretation with the “holistic approach”. It is the effort to explore different application of the holistic approach for treaty interpretation. It may need more sufficient legal reasoning in order to get supports from the majority of panel and the Appellate Body. However, it is valuable for us to consider what should be the holistic approach of treaty interpretation, and furthermore, what is the relation between the holistic approach and the rules of treaty interpretation under the VCLT.

2.1.1 Analyzes of the Holistic Approach in the Separate Opinion

The separate opinion believes that the holistic interpretation should be applied to interpretation of Paragraph 11.3 of China’s Accession Protocol, considering the structure of the WTO Agreements as a “Single Undertaking”. It stressed that “the determination of whether Paragraph 11.3 of China’s Accession Protocol is an integral part of GATT 1994, and can therefore benefit from the GATT Article 20 exception, requires a holistic interpretation of the concerned provisions.”⁴¹

Therefore, to address the availability of GATT Article 20 to justify violations of Paragraph 11.3, I am of the view that other contextual elements of Paragraph 11.3 should be examined, taking into account the object and purpose of the WTO Agreement. As I have said before, only a holistic interpretation of the relevant provisions can resolve such a fundamental issue.⁴²

Is the holistic interpretation taken by the separate opinion consistent with the Appellate Body’s illustration in *China-Publications and Audiovisual Product*, i.e., “a treaty interpreter is required to have recourse to context and object and purpose to elucidate the relevant meaning

³⁵ WTO Report of Appellate Body, *United States-Continued Existence and Application of Zeroing Methodology*, adopted 4 February 2009, WT/DS350/AB/R, para.268. Richard Gardiner cites another paragraph to demonstrate that the Appellate Body continues to stress the holistic approach of treaty interpretation: “... the enterprise of interpretation is intended to ascertain the proper meaning of a provision; one that fits harmoniously with the terms, context, and object and purpose of the treaty. ... The purpose of such an exercise is therefore to narrow the range of interpretations, nor to generate conflicting, competing interpretation. Interpretation tools cannot be applied selected or in isolation from one another. It would be a subversion of the interpretative discipline of the Vienna Convention if application of those disciplines yielded contradiction instead of coherence and harmony among, and effect to, all relevant treaty provisions.” (para.273). See Richard Gardiner, Preface to paperback edition of *Treaty Interpretation* (Oxford: Oxford University Press 2010), xxv-xxvi.

³⁶ *Supra* note 17, para.5.63.

³⁷ WTO Report of Appellate Body, *China-Measures Related to the Exportation of Various Raw Materials*, adopted 30 January 2012, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R..

³⁸ *Supra* note 17, paras.5.21, 5.39, 5.57. In particular, the Appellate Body took *China-Publications and Audiovisual Products* as an example to reiterate thorough analysis. para.5.60.

³⁹ *Ibid.*, paras.5.63, 5.77, 5.95, 5.101.

⁴⁰ Under Art.14.3 of DSU, “opinion expressed in the panel report by individual panelist shall be anonymous.” The separate opinion in *China-Rare Earth* is valuable in respect of treaty interpretation. See James Flett, “Collective Intelligence and Possibility of Dissent: Anonymous Individual Opinions in WTO Jurisprudence”, 13(2) *Journal of International Economic Law*, (2010) 287-320.

⁴¹ *Supra* note 17, para.7.132.

⁴² *Ibid.*, para.7.135.

of the word or term?”⁴³ It needs further analyzes.

2.1.2 The Relationship Between Holistic Approach of Treaty Interpretation and the Rules of the VCLT

It has been established by the practices of the ICJ and the WTO dispute settlement applying for Article 31 of the VCLT that the words or terms used in a treaty should be taken as the starting point of interpretive process. The interpreter should consider all of elements such as the context, object and purpose of the treaty as well as supplemental materials to clarify the meaning of the words or terms. The ILC made it clear in its comments on the Draft Articles of the VCLT that the single general rule of treaty interpretation

contains three separate principles. The first – interpretation in good faith – flows directly from the rule *pacta sunt servanda*. The second principle is the very essence of the textual approach: The parties are to be presumed to have that intention which appears from the ordinary meaning of the terms used by them. The third principle is one both of common sense and good faith; the ordinary meaning of a term is not to be determined in the abstract but in the context of the treaty and in the light of its object and purpose.⁴⁴

When the Draft Articles of the VCLT were reviewed in 1968, the United States proposed that the Article 31 and 32 (Draft Art. 27 and 28) would be combined as a single article to read as follows: A treaty shall be interpreted in good faith *in order to determine the meaning to be given to its terms in the light of all relevant factors, including in particular: (a) the context of the treaty; (b) its objects and purposes; (c) any agreement between the parties regarding the interpretation of the treaty; (d) any instrument made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty; (e) any subsequent practices in the application of the treaty which establishes the common understanding of the meaning of the terms as between the parties generally; (f) the preparatory work of the treaty; (g) the circumstances of its conclusion; (h) any relevant rules of international law applicable in the relations between the parties; (i) the special meaning to be given to a term if the parties intended such term to have a special meaning.*⁴⁵ But, the proposal was rejected.⁴⁶ The reason is that “the US amendment would restore a well-established process of interpretation, permitting recourse to factors extrinsic to the treaty text.” (Villiger, 2011, p.108) The extrinsic approach does not begin with the words or terms of the treaty to be interpreted as the starting point, instead of combination of relevant factors

⁴³ *Supra* note 16, para.399.

⁴⁴ Draft Articles on the Law of Treaties with commentaries, *Yearbook of the International Law Commission*, 1966, Vol. II, p.221, para. (12).

⁴⁵ *Official Records*, United Nations Conference on the Law of Treaties, First and second sessions, Vienna, 26 March– 24 May 1968 and 9 April 1969, Vol. I, p.149, para.269.

⁴⁶ 66 votes to 8, with 10 abstentions. *Ibid.*, p150, para.271 (a).

in good faith to interpret the words or terms, which would be resulted in dilution of interpretation of words or terms themselves.

The separate opinion does not start with the words used in Paragraph 11.3 of China’s Accession Protocol. Is it deviated from the customary rules of treaty interpretation? The Appellate Body did not answer this question directly, but expressed its conclusion that treaty interpretation ‘must start with the text of the relevant provision in China’s Accession Protocol.’⁴⁷ The Appellate Body followed its normal practices to interpret the words of the text as the first step of interpretation, which indicated that the approach of the separate opinion was rejected.

However, it should be noted that the separate opinion disagreed with the majority of panel on the fundamental issue – whether China is entitled to invoke Article 20 of the GATT to justify its violation of Paragraph 11.3 of China’s Accession Protocol – in considering China’s new arguments in comparison with the previous case *China-Raw Materials*. China’s new arguments include that (a) the textual silence of Paragraph 11.3 of China’s Accession Protocol and the GATT 1994 does not constitute a common intention of the WTO Members to exclude China’s rights to invoke Article 20 of the GATT 1994; (b) There is systemic relationship between China’s Accession Protocol and the GATT 1994; (c) The term “nothing in this Agreement” in the chapeau of Article 20 of the GATT 1994 does not exclude the availability of Article 20 to defend a violation of Paragraph 11.3 of China’s Accession Protocol; (d) An appropriate holistic interpretation, taking due account of the object and purpose of the WTO Agreement, confirms that China may justify export duties through recourse to Article 20 of the GATT 1994. The majority of panel rejected China’s arguments respectively, insisting on no “cogent reason” departing from the Appellate Body’s ruling and reasoning in *China-Raw Materials*.⁴⁸ But, in accordance with the separate opinion, China’s arguments should be reconsidered with a proper interpretation of Paragraph 11.3 of China’s Accession Protocol in the context of the WTO Agreement as a “Single Undertaking, that is, a single treaty for which there are no reservations and where all WTO provisions are generally simultaneously and cumulatively applicable.”⁴⁹

The separate opinion highlights that

[T]his dispute is concerned, *inter alia*, with the provisions of a WTO protocol of accession. In that context, I note that Article 12 of the Marrakesh Agreement [Establishing the WTO] provides that a Member’s accession shall apply to “this Agreement and the Multilateral Trade Agreements annexed thereto”. I also note that Paragraph 1.2 of China’s Accession Protocol provides that the Protocol “shall be an integral part” of the WTO Agreement. Therefore, in my discussion I will use the term the “WTO Agreement” to refer to the overall agreement that constitutes the

⁴⁷ *Supra* note 17, para.6.1.d.

⁴⁸ *Supra* note 19, para.7.115.

⁴⁹ *Ibid.*, para.7.124.

entirety of the WTO legal treaty provisions and which includes the Marrakesh Agreement, its four annexes, Members' schedules of commitments, and the commitments included in WTO accession protocol.⁵⁰

Apparently, it is the different approach of interpretation in comparison with the comments of the ILC on Draft Articles of the VCLT. It starts with the context of Paragraph 11.3 of China's Accession Protocol, i.e., Article 12 of the Marrakesh Agreement Establishing the WTO and Paragraph 1.2 of China's Accession Protocol, instead of the words used in Paragraph 11.3. Perhaps it is the holistic approach of the separate opinion to apply for interpretation of unique Paragraph 11.3 of China's Accession Protocol.

2.2 The "Integrated Assessment" of the Appellate Body: The Updated Version of Holistic Approach Or Not?

The Appellate Body referred to China's argument of "intrinsic relationship" test, providing with an integrated assessment on the relevant provisions of China's Accession Protocol and the WTO Agreements. Is it an updated version of the holistic approach of treaty interpretation?

2.2.1 The Basic Approach of Integrated Assessment

The Appellate Body pointed out that "[A]s a preliminary matter, we observe that it is uncontested that provisions of China's Accession Protocol should be interpreted in accordance with the customary rules of treaty interpretation as codified in Articles 31 and 32 of the Vienna Convention."⁵¹ Referring to China's request to review the Panel's interpretation of Article 12.2 of Marrakesh Agreement and the Paragraph 2.1 of China's Accession Protocol in framework of relationship between this Protocol and Marrakesh Agreement with the annexed agreements, the Appellate Body said that

the question of the relationship between provisions of China's Accession Protocol and provisions of the Marrakesh Agreement and Multilateral Trade Agreements cannot be answered without a more complete enquiry, we further proceed to an integrated assessment of the relevant provisions and general architecture of the relevant instruments as they bear on the issues raised on appeal.⁵²

Therefore, the integrated assessment is the "further" step of treaty interpretation, that is, the first step is to interpret the particular provisions at issue of dispute, and the second (further) step is to make an integrated assessment of more relevant provisions. This basic approach taken by the Appellate Body would be concluded as: (a) the first step of treaty interpretation shall be based on the customary rule reflected in Article 31.1 of the VCLT, that is, "[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 object and purpose"⁵³; (b) the second step shall be followed under the customary rules of Article 31.2, Article 31.3 and 31.4 (more contexts or special meaning given intentionally by the parties) and Article 32 (supplemental means). Apparently, the 'integrated assessment' is subject to the second step. This basic approach was affirmed in several paragraphs of the Appellate Body's report of *China-Rare Earth*. For an example, the Appellate Body stressed, after finishing its interpretation of Article 12.1 of the Marrakesh Agreement and Paragraph 2.1 of China's Accession Protocol as the first step, that

the questions of whether a particular protocol provision at issue has an objective link to specific obligations under the Marrakesh Agreement and the Multilateral Trade Agreement, and whether the exceptions under those agreements may be invoked to justify a breach of such protocol provision, must be answered on a case-by-case basis. They must be ascertained through analysis of the relevant provisions on the basis of the customary rules of treaty interpretation, as well as the circumstances of each dispute.⁵⁴

In accordance with the interpretation of the Appellate Body in *China-Rare Earth*, "the basis of the customary rules of treaty interpretation" primarily refers to Article 31.1 of the VCLT. In the first step of its interpretation of Article 12.1 of the Marrakesh Agreement and Paragraph 2.1 of China's Accession Protocol, the Appellate Body followed its normal practices to interpret the words or terms of provisions at issue firstly including reference of the *Shorter Oxford English Dictionary*, and secondly, turned to 'the immediate context' of the provisions and the relevant contexts so as to ascertain the meanings of words or terms of the provisions.⁵⁵

It is puzzled that the Appellate Body mentioned nothing about "object and purpose" while interpreting Article 12.1 of the Marrakesh Agreement and Paragraph 2.1 of China's Accession Protocol in accordance with Article 31.1 of the VCLT. It must be noted that "taking into account of the object and purpose of the WTO Agreement" is essential for the holistic approach of the separate opinion in *China-Rare Earth*.⁵⁶ It should be at least "in light of its object and purpose" of Marrakesh Agreement in particular its preamble expressing "the optional use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment."⁵⁷ Otherwise, its interpretation is not convinced by China and other Members of the developing country. As the third parties of appeal on *China-Rare Earth*, Brazil and Korea expressly concerned a Member's right to promote its legitimate

⁵³ *Supra* note 3, Art. 31.1.

⁵⁴ *Supra* note 17, para.5.58.

⁵⁵ *Ibid.*, paras.5.41-5.51.

⁵⁶ *Supra* note 19, para.7.135.

⁵⁷ Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, *The Legal Text: The Results of the Uruguay Round of Multilateral Trade Negotiation* 4 (1994), 1867 U.N.T.S. 154.

⁵⁰ *Ibid.*, para.7.123.

⁵¹ *Supra* note 17, para.5.19.

⁵² *Ibid.*, para.5.21.

objectives or goals such as sustainable development.⁵⁸ The Appellate Body repeated three times (paras.5.51, 5.62 and 5.74) as to the second step of integrated assessment, being virtually identified:

In our view, Paragraph 1.2 of China's Accession Protocol serves to build between the package of Protocol provisions and the package of existing rights and obligations under the WTO legal framework. Nonetheless, neither obligation nor rights may be automatically transposed from one part of this legal framework into another. The fact that Paragraph 1.2 builds such a bridge is only the starting point, and does not in itself answer the questions of whether there is an objective link between an individual provision in China's Accession Protocol and existing obligations under 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. Such questions 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. The analysis must start with the text of the relevant provision in China's Accession Protocol and take into account its context, including that provided by the Protocol itself and by relevant provisions of the Accession Working Party, 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 measures at issue and the nature of the alleged violation.⁵⁹

2.2.2 The Updated Version of Holistic Approach?

It seems nothing new added in comparison with the Appellate Body's previous illustration of the holistic approach which stresses that it is taken through the course of treaty interpretation, including that "a treaty interpreter is required to have recourse to context and object and purpose to elucidate the relevant meaning of the word or term", and "interpretative rules and principles must be understood and applied as connected and mutually reinforced components of a holistic exercise."⁶⁰ However, the previous illustration almost disappeared in the Appellate Body's "thorough analysis". Furthermore, the Appellate Body used four "must[s]" to emphasize its authority of treaty interpretation with "thorough analysis" as the basic approach.

But, the attitude of the Appellate Body with its unique position does not increase its persuasion, because that in addition to mentioning nothing about "object and purpose" in its "thorough analysis" as the second step of integrated assessment, the Appellate Body deliberately avoided to cite its illustration of the holistic approach in *China-Publications and Audiovisual Product*, even though its thorough analysis repeatedly used this case as an example in respect of interpreting the relationship between Article 12.1 of the Marrakesh Agreement and

Paragraph 2.1 of China's Accession Protocol.⁶¹ The Appellate Body said that Article 20 (a) of the GATT might be invoked to justify China's breach of Paragraph 5.1 of China's Accession Protocol in *China-Publications and Audiovisual Product*, but it did not mean that China would be entitled to invoke other general exceptions of Article 20 to justify its violation of Paragraph 11.3 of China's Accession Protocol in *China-Rare Earth*. It "must be answered on a case-by-case basis".⁶²

As a unique body with supreme authority of judicial interpretation over any covered WTO agreements, the Appellate Body is expected to provide necessary explanations on its previous illustration such as the holistic approach in similar cases, and at least to mention it with further elaboration so as to understand its consistent approach on certain issues. The holding that treaty interpretation must be based on customary rules of the VCLT does not mean that it needs not to give further elaboration on its previous expression of the holistic approach as a guideline somehow. In particular the new interpretative issues arose from different texts of the GATS schedules and the Members' accession protocols make it necessary to provide more persuadable interpretations with a consistent manner.

3. FURTHER ANALYZES OF CERTAIN ISSUES REGARDING THE HOLISTIC APPROACH OF TREATY INTERPRETATION

Some issues should be analyzed further concerning the Appellate Body's attitude in *China-Rare Earth* towards the holistic approach which might be the proper way to apply for customary rules of treaty interpretation.

3.1 Do the Customary Rules of Treaty Interpretation of the VCLT Involve the Holistic Approach?

As discussed above, there is now no doubt in the status of customary rules of treaty interpretation. The textual orientation of those customary rules has been already adopted by the ICJ and the DSB. Comparing with the ICJ's treaty interpretation as one of its exercises of optional compulsory jurisdiction,⁶³ the DSB had to settle disputes arisen from interpretations of the covered agreements, which are the legal issues for almost all cases in the WTO. In particular, the Appellate Body faces more interpretative issues, and sometimes very complex. Nowadays, it is the challenge not to the status

⁵⁸ *Supra* note 17, paras.2.222, 2.238.

⁵⁹ *Ibid.*, para.5.74.

⁶⁰ *Supra* note 16, para.399.

⁶¹ *Supra* note 17, para.5.46, 5.58, 5.61, 5.63, 5.64.

⁶² *Ibid.*, para.5.57

⁶³ *Supra* note 1, Art.36.2 (a). See Basis of the Court's Jurisdiction, available at <http://www.icj-cij.org/jurisdictio/index.php?p1=5&p2=1&p3=2>. (visited 2 July 2015).

of customary law of treaty interpretation, but how to apply those customary rules with flexible and proper manner. The holistic approach illustrated by the Appellate Body in *China-Publications and Audiovisual Product* was primarily to respond the questions of increasingly complex interpretation, which is not same with the integrated assessment or thorough analysis in *China-Rare Earth* for the reasons of not only apparently different expressions, but also possibly essential idea. Of cause, it is puzzled by different expressions, at least disappointed by the Appellate Body's avoidance to the holistic approach to *China-Rare Earth*. Assuming that the holistic approach should be a guideline for treaty interpretation, it needs a further discussion on whether the customary rules of treaty interpretation involve the idea of holistic approach.

3.1.1 The Commentary of the ILC to Article 31 [Draft Article 27] of the VCLT

The analysis above on the separate opinion in *China-Rare Earth* includes the ILC's commentary on a single general rule of treaty interpretation and reasons to reject the United States' proposal of amendment. The commentary makes it clear that Article 31 requires that "the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intention of the parties."⁶⁴ Does the commentary involve an idea of holistic approach? The answer should be 'yes' based on the commentary:

... Thus, article 27 is entitled "general rule of interpretation" in the singular, not "General rules" in the plural, because the Commission desired to emphasize that the process of interpretation is a unity and that the provisions of the article form a single, closely integrated rule. In the same way, the word "context" in the opening phrase of paragraph 2 is designed to link all the elements of interpretation mentioned in this paragraph to the word 'context' in the first paragraph and thereby incorporate them in the provision contained in that paragraph. Equally, the opening phrase of paragraph 3 "There shall be taken into account *together with the context*" is designed to incorporate in paragraph 1 the elements of interpretation set out in paragraph 3.⁶⁵

3.1.2 Comparative Analysis

Although the logical sequence of interpretation of a treaty shall be started at the words or terms of text in accordance with Article 31 of the VCLT, their ordinary meanings must be given to the context and in the light of its object and purpose. Only by the holistic approach, the ordinary meanings would be ascertained. It is "the holistic approach which the ILC intended to pervade their structure and use" (Gardiner, 2010, p.8). In comparison between above ILC's commentary and the Appellate Body's illustration of the holistic approach in *China-Publications and Audiovisual*

Product, some similar key phrases can be found such as "the process of interpretation" (ILC) and "the interpretative exercise" (the Appellate Body), "a unity/closely integrated rule" (ILC) and "an integrated operation" (the Appellate Body), both of which intend to explain the idea of holistic approach which shall be taken through the course of treaty interpretation so as to get all elements of Article 31 of the VCLT together for ascertaining the meanings of words or terms of the treaty. Therefore, the holistic approach is not the mechanical process as the second step of interpretation, but an integrated exercise or approach through the course of interpretation.

As analyzed above, the Appellate Body in *China-Rare Earth* divided the process of treaty interpretation into two steps, that is, first to interpret the particular provisions at issues, and secondly ("further"), to make an 'integrated assessment' on broader contexts of relevant provisions.⁶⁶ However, it seems different from the idea of holistic approach in the commentary of the ILC to Article 31 [Draft Article 27] of the VCL.

3.1.3 Examples Given by the ILC

In order to support its commentary to Article 31 [Draft Article 27] of the VCL, the ILC gave two cases (only two examples in this part of commentary).⁶⁷

The first case was the ICJ's Advisory Opinion on the *Competence of the General Assembly for the Admission of a State to the United Nations*, which expressed the idea to interpret the word of a treaty in context:

The Court considers it necessary to say that the first duty of a tribunal which is called to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter.⁶⁸

The second case was the PCIJ's Advisory Opinion on the *Competence of the ILO to Regulate Agricultural Labour*, which "stressed that context is not merely the article or section of the treaty in which the term occurs, but the treaty as a whole"⁶⁹:

In considering the question before the Court upon the language of the Treaty, it is obvious that the Treaty must be read as a whole, and that its meaning is not to be determined merely upon

⁶⁶ *Supra* note 17, paras. 5.19-5.21. Interestingly, it is echoed in academy on what is the holistic approach: "After the starting step of properly checking dictionary definitions, treaty interpreters would still have to rely on the holistic approach under Article 31 and 32 to decide treaty interpretation. In other words, the holistic approach is the second step of treaty interpretation, coming after the first step of clarifying the ordinary meaning and object-and-purpose of the treaty." Chang-Fa Lo, "A Clearer Rule for Dictionary Use Will not Affect Holistic Approach and Flexibility of treaty Interpretation — A Rejoinder to Dr Isabelle Van Damme", 3(1) *Journal of International Dispute Settlement*, (2012) 94.

⁶⁷ *Supra* note 49, para. (12).

⁶⁸ *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, ICJ Reports 1950, p.8

⁶⁹ *Supra* note 49, para. (12).

⁶⁴ *Supra* note 49, p.220, para.11.

⁶⁵ *Ibid.*, p.220, para.8.

particular phrases which, if detached from the context, may be interpreted in more than one sense.⁷⁰

Thus, the practices of international court insisted on the crucial function of varies contexts in the course of treaty interpretation. It is essentially the idea of the holistic approach to emphasize ‘the treaty as a whole’.

3.1.4 Further Analyses on the Separate Opinion of One Panelist and the Appellate Body’s Interpretation of Relevant Treaties in China-Rare Earth

From the viewpoint of analyses on the ILC’s commentary and practices of international court, it might be reconsidered to interpret the relation between Paragraph 11.3 of China’s Accession Protocol and Article 20 of the GATT 1994 in their contexts not primarily limited to the immediate one, i.e., “unless specifically provided for in Annex 6 of this Protocol or applied in conformity with the provisions of Article 8 of the GATT 1994,”⁷¹ but taking into account of China’s argument on understanding China’s Accession Protocol as whole, i.e., in accordance with the separate opinion, first in the context of Article 12.1 of the Marrakesh Agreement and Paragraph 2.1 of China’s Accession Protocol, to interpret Paragraph 11.3 of China’s Accession Protocol with the holistic approach. In fact, it was the primary focus of China’s appeal, and the Appellate Body did treat it as the primary issue of China’s appeal to interpret the relationship between Article 12.1 of the Marrakesh Agreement and Paragraph 2.1 of China’s Accession Protocol. Unfortunately, the Appellate Body’s interpretation is lack of the holistic approach.

It should be added that the Appellate Body’s previous illustration of the holistic approach requires interpreters “to have recourse to context and object and purpose to elucidate the relevant meaning of the word or term,”⁷² and to keep “in mind that treaty interpretation is an integrated operation, where interpretative rules or principles must be understood and applied as connected and mutually reinforcing components of a holistic exercise.”⁷³ But, the separate opinion goes forward to firstly take a treaty as whole as context for interpretation. It might be the first endeavour in practices of the WTO dispute settlement.

In principle, it is the basic practice of treaty interpretation in the WTO dispute settlement that the first is to seek “ordinary meaning” of the words of a treaty at issue from dictionary such as the *Shorter Oxford English Dictionary*, and then, to consider contexts from immediate one to more relevant ones for ascertaining the precise meaning of the words, finally, in light of object and purpose of the treaty to proceed interpretation in good

⁷⁰ *Competence of the ILO to Regulate Agricultural Labour*, PCIJ (1922), Series B, Nos. 2 and 3, p.23.

⁷¹ *Accession of the People’s Republic of China*, WT/L/432, para.11.3.

⁷² *Supra* note 16, para.399.

⁷³ WTO Report of Appellate Body, *United States-Continued Existence and Application of Zeroing Methodology*, adopted 4 February 2009, WT/DS350/AB/R, para.268.

faith. It has been the “precedent” because of its “powerful precedent effect on the jurisprudence of the WTO.” (Jackson, 2006, p.177) The separate opinion in *China-Rare Earth* did not follow this “precedent”, instead of first taking the context of a treaty as whole to find the true intention of parties. It is not contrary to the underlying principle of treaty interpretation of the VCLT, that is, the words of a treaty shall be interpreted “holistically” in contexts. The contexts may be either immediate or a treaty as a whole. The interpretation of Paragraph 11.3 of China’s Accession Protocol is inevitably related to the institutional issues and must be conducted in holistic approach. Although the Appellate Body in *China-Rare Earth* stressed again the extreme importance to follow the customary rules of treaty interpretation, it did not give a further elaboration of its previous illustration of the holistic approach, and even did not take the object and purpose of the WTO Agreements into its account of integrated assessment.

3.2 Do Some Interpretations of the WTO Agreements Have Specialties?

The Appellate Body is facing many new problems of treaty interpretation including that of the GATS Schedules and the Member’s Accession Protocols. The interpretation of the GATS Schedules involves many generic terms such as “sporting”, “sound recording”, “distribution” and “payment”. Those terms were given by Members themselves when they made commitments of market access with no expressions like sentence normally used in a treaty. The Member’s Accession Protocol is unique not only with some WTO-plus obligations, but also formed as paragraphs instead of sentences as usual in a treaty. The issue of the holistic approach arises mostly from the interpretation of those two kinds of instrument, which demonstrates that those specialties should not be ignored. The VCLT was drafted mainly with consideration of judicial practices of the ICJ and its predecessor. The rules of treaty interpretation are intended to primarily apply for bilateral treaty. It is impossible for the ILC to concern the specialty of treaty interpretation on either GATS Schedules or the WTO Member’s Accession Protocols. The new problems continue to come. The Appellate Body is expected to develop its holistic approach based on customary rules of treaty interpretation under the VCLT.

CONCLUSION

This thesis provides the comprehensive analyses of the holistic approach of treaty interpretation, including its origin and current status in the WTO dispute settlement, the separate opinion of one panelist in *China-Rare Earth* and the Appellate Body’s ruling and its reasons, and also combined with the judicial practices of the ICJ and the commentary of the ILC on the VCLT. The conclusions would be drawn as followed:

First, the ICJ has not yet explicitly adopted the expression of the holistic approach even though the ICJ case taken by the ILC to imply the idea of the holistic approach; the Appellate Body of the DSB has illustrated the holistic approach in a handful of disputes settlement of the WTO such as *China-Publications and Audiovisual Product* in order to prevent mechanical application of customary rules of treaty interpretation under the VCLT.

Secondly, the practices of the WTO dispute settlement, in particular the cases with China, demonstrate that the Appellate Body has not yet developed a consistent illustration of the holistic approach, and even avoided to give a further elaboration.

Thirdly, the separate opinion of one panelist in *China-Rare Earth* made efforts to apply the holistic approach for clarification of systematic relation between Paragraph 11.3 of China's Accession Protocol and the WTO agreements. However, it is still uncertain for application of the holistic approach in the WTO dispute settlement.

Fourthly, the idea of the holistic approach might be understood as a flexible way to apply for the customary rules of treaty interpretation in accordance with the ILC's commentary on the VCLT, which requires interpreters to prevent rigid sequence of interpretation and to ascertain the meaning of word of a treaty in context including a treaty as a whole.

Finally, in comparison with disputes on trade in goods, the GATS Schedules and the Member's Accession

Protocols have specialties in aspect of interpretation and need to apply for holistic approach particularly. Therefore, it is necessary to do more researches on approaches or manners of application of customary rules of treaty interpretation.

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