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How General Should the GATT General Exceptions Be?
A Critique of the Interpretation Approach in China – Raw Materials

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Table of Contents
Abstract........................................................................................................................................................................... i
1. Introduction................................................................................................................................................................... 1
2. Panel & Appellate Body’s Errors in Applying Article XX ......................................................... 2
   2.1 Panel & Appellate Body’s Analysis in China – Raw Materials.............................................. 2
   2.2 Accession Protocol as an Integral Part of the WTO Agreement................................. 6
   2.3 The All-embracing & Unforeseeable Nature of General Exceptions ........................ 9
   3.1 Vienna Convention as the Applicable Interpretative Rules ......................................... 12
      3.1.1 Vienna Convention as Codified “Customary Rules of Interpretation” .......... 12
      3.1.2 The Activist Tendency in Applying Vienna Convention .................................. 15
   3.2 The “Common Intentions” of All WTO Members.......................................................... 19
      3.2.1 The “Common Intention” Approach and Its Theoretical Base ......................... 19
      3.2.2 The Deficits of the “Common Intention” Approach .......................................... 21
   3.3 The Legitimacy Deficit of the “Common Intention” Approach .......................................... 24
4. Concluding Remarks................................................................................................................................................... 27

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Abstract

The paper offers a critical examination of the “common intention” approach of treaty interpretation in applying general exceptions to China’s commitments under its Accession Protocol in recent cases. The paper suggests that both the Panel and Appellate Body have misled due to confusion developed in previous discussions of China’s trading right commitment, and erred in their interpretation of the Accession Protocol as “an integral part of the WTO Agreement” and their understanding of the nature of contingency measures. Moreover, the judicial activist “common intention” approach further reveals an “origin-seeking retrospective” mechanism that locates “common intentions” statically at the founding moment of the treaty framework causing the failure of applying contingency measures that balance the rigidity of the regime. The approach’s failure in acknowledging differences and flexibility further undermines WTO legitimacy. The paper therefore calls for extreme caution to be applied to the “common intention” approach and its judicial activism tendency to allow a more dynamic understanding of evolving “common intentions” that ensures future growth of the WTO trading regime.
1. Introduction

A recent case on the application of general exceptions to China’s various export restraint measures has drawn much attention to the application of contingency measures to justify trade restraint practice in the World Trade Organization (WTO).1 In general, flexibility from the contingency measures in the WTO framework to balance the rigidity of trade policy commitments has made the rule-oriented regime a robust system.2 An appropriate balance between flexibility and commitments must be struck in order to maintain the effectiveness of the international trading system. General exception in GATT 1994 has been one of these well established safety valves allowing WTO members to balance other public policy goals with the free trade mandate of the WTO regime.

However, neither GATT panels nor WTO panels and the Appellate Body have developed a coherent set of jurisprudence in applying the general exceptions. Rather, the interpretations in applying general exceptions are sometimes misleading or even conflicting. GATT panels struggled with the application of GATT Article XX and developed a variety of inconsistent interpretations.3 Neither have WTO panels or the Appellate Body developed a coherent set of interpretations of general exceptions during their adjudication practices so far.4 A good example is found in the two most recent China related cases that involve issue of general exceptions, in which the Appellate Body dealt with similar situations differently. In China – Raw Materials, the Appellate Body rejects China’s reference to GATT’s general exception clause.5 However, in China – Publications and Audiovisual Products, the Appellate Body completes the Panel’s analysis and suggests that China may resort to justification of general exceptions in fulfillment of China’s trading rights commitments laid down in China’s Accession Protocol.6 This draws our attention to the Appellate Body’s jurisprudence regarding the general exception issue. How do the general exceptions mean to be in GATT 1994?

Building on the critical examination of the WTO Appellate Body’s interpretation of general exceptions in the above mentioned two China related cases, the paper offers a critical analysis of the jurisprudence of general exceptions in the WTO framework as well as the common intention oriented interpretation approach and its theoretical implications. In section II,

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the paper reveals that the failure of applying general exception measures in *China – Raw Materials* is mostly due to the confusion developed in the analysis of China’s trading right commitment in a previous case. Also, the Panel and Appellate Body’s errors in their interpretation of the accession protocol as an integral part of the *WTO Agreement* and in understanding the unforeseeable nature of contingency measures have misdirected the application of Article XX of GATT 1994 in the case. In section III, the paper offers a critical examination of the interpretation approach in the case that asserts “common intentions” of all WTO members using the 1969 *Vienna Convention* as the codified “customary rules of interpretation of public international law.” The paper reveals that the common intention approach deviates from general interpretative practice of public international law and contains an “origin-seeking retrospective” mechanism that finds legitimacy from the static common intentions at the founding moment of the trading regime. The common intention approach also reveals the Panel and Appellate Body’s problematic “juridical activism” tendency that challenges WTO legitimacy.

Building on the above critical examination, the paper calls for extreme caution in using the problematic “common intention” approach, and argues that the “common intentions” of all members should only be located in the evolving process to allow differences to enrich the evolution of the WTO framework. Flexibility of contingency measures can then balance the rigidity of the framework, which in combination makes the WTO framework an effective, robust, and evolving trading regime.

### 2. Panel & Appellate Body’s Errors in Applying Article XX

#### 2.1 Panel & Appellate Body’s Analysis in China – Raw Materials

The *China – Raw Materials* case concerns China’s various restraint measures, including export duties, export quota, export licensing, and minimum export price requirement on the exportation of certain raw materials. The U.S., EU, and Mexico brought the complaint to the WTO dispute settlement body claiming that China’s export restraint measures were inconsistent with China’s commitments under China’s Accession Protocol.\(^7\) According to the Accession Protocol, “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.”\(^8\)

By reference to *China – Publications and Audiovisual Products*, China claims that the inherent right to regulate trade allows China to resort to general exception clause for its WTO-inconsistent export restraint measures.\(^9\) In *China – Publications and Audiovisual Products*, the issue puts focus on Paragraph 5.1 of China’s Accession Protocol on China’s trading right commitment in which the Appellate Body confirms China’s right to resort to general exceptions for justification.\(^10\) In relation to granting all enterprises the right to trade, China’s Accession Protocol states:

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\(^7\)*China – Raw Materials*, Appellate Body report, paras. 1, 2.

\(^8\)Paragraph 11.3, *Protocol on the Accession of the People’s Republic of China (China’s Accession Protocol)*.


\(^10\)Ibid., para. 49.
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. Such right to trade shall be the right to import and export goods. … China shall complete all necessary legislative procedures to implement these provisions during the transition period.\footnote{Paragraph 5.1, \textit{China’s Accession Protocol}.}

In this case, the Appellate Body points out that the introductory clause of the Paragraph 5.1 of China’s Accession Protocol “is a reference to China’s power to subject international commerce to regulation,” and the wording of “consistent with the WTO Agreement” within the introductory clause indicates the exercise of this power “must be shown to conform to WTO discipline.”\footnote{\textit{China} – Publications and Audiovisual Products, Appellate Body report, paras. 220, 222.} The Appellate Body therefore concludes that “China may rely upon the introductory clause of paragraph 5.1 of its Accession Protocol and seek to justify these provisions as necessary to protect public morals in China, within the meaning of Article XX(a) of the GATT 1994.”\footnote{Ibid., para. 233.}

The Appellate Body’s analysis in this case misleads the Panel and Appellate Body’s analysis later on in \textit{China} – \textit{Raw Materials}. According to the Panel in \textit{China} – \textit{Raw Materials}, general exceptions apply only to violations of the GATT 1994, and China’s recourse to the justifications of Article XX was allowed by the Appellate Body in \textit{China} – \textit{Publications and Audiovisual Products} because Paragraph 5.1 successfully incorporates Article XX of the GATT 1994 into the Protocol “by way of reference.”\footnote{\textit{China} – \textit{Raw Materials}, Panel report, paras. 7.153, 7.119.} However, Article XX was not intended to apply to Paragraph 11.3 of China’s Accession Protocol, as “no such [referencing] language is found in Paragraph 11.3 of China’s Accession Protocol.”\footnote{Ibid., para. 7.154.} The Panel therefore concludes that:

\begin{quote}
[T]he wording and the context of Paragraph 11.3 precludes the possibility for China to invoke the defence of Article XX of the GATT 1994 for violations of the obligations contained in Paragraph 11.3 of China’s Accession Protocol. \\
… [T]here is no basis in China’s Accession Protocol to allow the application of Article XX of the GATT 1994 to China’s obligations in Paragraph 11.3 of the Accession Protocol.\footnote{Ibid., paras. 7.158, 7.159.}
\end{quote}


\begin{quote}
To allow such exceptions to justify a violation when no exception was apparently envisaged or provided for, would change the content and alter the careful balance achieved in the negotiation of China’s Accession Protocol. It would thus undermine the predictability and legal security of the international trading system.
\end{quote}
As China’s obligation to eliminate export duties arises exclusively from China’s Accession Protocol, and not from the GATT 1994, we consider it reasonable to assume that, had there been a common intention to provide access to Article XX of the GATT 1994 in this respect, language to that effect would have been included in Paragraph 11.3 or elsewhere in China’s Accession Protocol.\(^{18}\)

The Appellate Body therefore upholds the Panel’s finding that “there is no basis in China’s Accession Protocol to allow the application of Article XX of the GATT 1994 to China’s obligations in Paragraph 11.3 of the Accession Protocol.”\(^{19}\)

However, the Appellate Body’s analysis in China – Publications and Audiovisual Products is problematic, which misleads the China – Raw Materials later on. First of all, the Appellate Body’s analysis is logically problematic and unreasonable. Following the Appellate Body’s reasoning, as Paragraph 5.1 is the only place that contains the “without prejudice” reference, any other commitments in the Accession Protocol should be interpreted in a way causing prejudice against China’s right to regulate trade. For other WTO members, therefore, their “right to regulate trade” will be subject to prejudice if their Accession Protocols do not contain the same reference as paragraph 5.1 does. It should be mentioned here that there is no agreed discipline on export restrictions and taxes under current WTO framework.\(^{20}\) Japan, Switzerland, and European Communities have been advocating in the Doha Development Round negotiations to strengthen the disciplines and even eliminate export taxes.\(^{21}\) This has not been very successful so far. China is the only current WTO member that has imposed self restraint measures of exportation taxes and charges.\(^{22}\) China’s self restraint commitments are therefore voluntary offers without fair consideration in return.\(^{23}\) Denying legitimate flexibility of general exceptions under the GATT framework to China’s commitments under Paragraph 11.3 of the Accession Protocol creates asymmetry between rights and obligations under the WTO framework. China’s reference to general exceptions under paragraph 5.1 unfortunately misled the discussion.

Secondly, the China – Publications and Audiovisual Products reveals the Appellate Body’s failure to understand the context and nature of the trading right commitment in paragraph 5.1. Under the Protocol, just after section 5 “right to trade” about trading rights of enterprises and individuals, section 6 “state trading” covers administration of state trading enterprises. Within this context, Paragraph 5.1 of the Protocol deals with who has the right to trade instead of what goods are to be traded and how. General exception to trade in terms of what goods are to be traded and how is therefore irrelevant. In fact, the U.S. in the case argued that the right to regulate trade “applies to measures addressing the goods being traded rather than the traders of

\(^{18}\) Ibid., para. 293. Emphasis mine.

\(^{19}\) Ibid., para. 307.


\(^{22}\) China – Publications and Audiovisual Products, Appellate Body report, para. 83.

\(^{23}\) Paragraphs 155 and 156 of the Report of the Working Party on the Accession of China (Working Party Report, WT/ACC/CHN/49, 1 October 2001), which are identical to paragraph 11.3 of China’s Accession Protocol, are not included into the WTO Agreement via paragraph 342 of the Working Party Report.
those goods.”24 In the context of the trading right commitment, the Working Party Report states that:

With respect to the grant of trading rights to foreign enterprises and individuals … [t]he representative of China emphasized that foreign enterprises and individuals with trading rights had to comply with all WTO-consistent requirements related to importing and exporting, such as those concerning import licensing, TBT and SPS, but confirmed that requirements relating to minimum capital and prior experience would not apply.25

This clearly indicates that the trading right commitment covers only trader issues instead of goods issues that are to be covered in other commitments relating to licensing, TBT and SPS. The Appellate Body actually admitted that this context “shed[s] light on the types of regulatory measures in respect of trade in goods.”26 It is therefore problematic of the Appellate Body to regard “the obligations assumed by China in respect of trading rights, which relate to traders, and the obligations imposed on all WTO Members in respect of their regulation of trade in goods, as closely intertwined.”27

Thirdly, the Appellate Body’s problematic application of general exceptions to paragraph 5.1 further reveals some theoretical deficits. As the wording “without prejudice to China’s right to regulate trade” in the Protocol indicates, granting enterprises the “right to trade” will be a legitimate limit to China’s right to regulate trade, which entitles enterprises to have China refrain from doing acts that might harm enterprises. What then the trading right commitment under paragraph 5.1 recognizes is a “negative right” to grant enterprises right to foreign trade that they did not have before. This by nature is a negative right, “a right entitling a person to have another refrain from doing an act that might harm the person entitled.”28 On the contrary, a “positive right” means “a right entitling a person to have another do some act for the benefit of the person entitled.”29 Therefore, the trading right commitment, instead of providing for the grant of positive right to exploit certain subject matter, provides for the grant of negative rights to prevent certain acts from being performed by the government. The “negative right” nature excludes the Appellate Body’s broad interpretation embracing what goods are to be traded and how under the trading right commitment.

Finally, the Appellate Body’s interpretation also contains a serious jurisprudential problem. Before WTO entry, the right to engage with foreign trade was limited to FIEs, registered foreign trade companies, and certain SOEs. Should this situation continue, China for sure will violate its trading right commitment. China’s amendment to the Foreign Trade Law in 2004, three years after WTO entry, lifted the ban to foreign trade, through which all enterprises and individuals in China have enjoyed the right to foreign trade since then.30 If the trading right commitment concerns the trader issue only, China’s trading right commitment was then fulfilled. Taking trading right commitment as something related to what goods were to be traded and how would make it a commitment covering licensing, TBT, SPS, and other issues that have been

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27 Ibid., para. 226. Emphasis mine.
29 Ibid.
30 Article 8, the newly added provision in PRC Foreign Trade Law in 2004 extends the coverage of “foreign trade business operators” to all enterprises, organizations, and individuals.
covered by other commitments, which renders the scope and extent of the trading right commitment uncertain and further makes the three year transition period meaningless. Therefore, taking the trading right commitment as one covers both trader and goods issues, the fulfillment of the commitment in three years after entry becomes impossible to assess. This in turn is against the general principle of interpretation as emphasized by the Appellate Body in US – Gasoline that “interpretation must give meaning and effect to all the terms of a treaty.” As the trading right commitment deals with who has the right to trade instead of what goods are to be traded and how, China’s measures concerning how reading materials, sound recordings, and films to be imported are irrelevant to the trading right commitment under Paragraph 5.1 of China’s Accession Protocol.

Therefore, the confusion developed in applying general exceptions to Paragraph 5.1 of China’s Accession Protocol unfortunately affects later analysis in China – Raw Materials. Moreover, as the remaining part of this section shows, the Appellate Body’s errors travel beyond this, covering both interpretation of the meaning of “an integral part of the WTO Agreement” and understanding of the nature of general exceptions as legitimate contingency measures in the WTO framework. Most importantly, the Appellate Body’s interpretation approach—asserting the “common intentions” of all members by using the 1969 Vienna Convention as the codified customary rules of interpretation—reveals some inherent jurisprudential deficits.

2.2 Accession Protocol as an Integral Part of the WTO Agreement

Under the WTO’s accession process, a protocol of accession is a membership treaty signed between the current WTO members and the WTO-member-to-be applying for WTO membership. The “final package” of the accession—consisting of the Working Party Report on the accession, the protocol and the lists of commitments—takes effect upon the applying member’s WTO entry. As the Panel in China – Raw Material suggests, it is well recognized that “the intensively negotiated content of an accession package is the ‘entry fee’ to the WTO system.” Therefore, the WTO member’s commitments as the final result of the accession negotiation are integrated into the WTO Agreement as concession schedules through being attached to the Accession Protocol as lists of commitments. The listed schedules have been recognized as part of respective annexed agreements of the WTO Agreement. In US – Gambling, for example, a member’s service schedules are recognized as “an integral part” of the GATS. Therefore, it would be unreasonable to recognize the schedules attached to an accession protocol as a part of the certain WTO annexed Agreement yet deny the relevant part of the accession protocol to be part of that WTO annexed Agreement concerned.

An accession protocol is therefore considered as part of the WTO Agreement. In fact, China’s WTO Accession Protocol states:

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

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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.\textsuperscript{34}

There are several cases involving issues related to China’s Accession Protocol, of which the panels, Appellate Body and involving parties all recognize that China’s Accession Protocol forms an integral part of the WTO Agreement.\textsuperscript{35} As the immediate legal consequence of being an integral part of the WTO Agreement, the interpretation of an accession protocol is subject to customary interpretative rules of public international law, which is often referred to the 1969 Vienna Convention on the Law of Treaties.\textsuperscript{36} In fact, the purpose of the analysis recognizing the Protocol as an integral part of the WTO Agreement in those several cases involving China is to and only to justify resorting to the Vienna Convention for interpretation of China’s Accession Protocol.\textsuperscript{37} In China – Raw Materials, for example, after asserting that China’s Accession Protocol forms “an integral part” of the WTO Agreement, the Appellate Body continues that:

As such, the customary rules of interpretation of public international law, as codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (the “Vienna Convention”), are, pursuant to Article 3.2 of the DSU, applicable in this dispute in clarifying the meaning of Paragraph 11.3 of the Protocol.\textsuperscript{38} (footnotes omitted)

The analysis is unfortunately problematic or unnecessary at least. As the Appellate Body points out in US – Gasoline that the WTO Agreement and covered agreements are “not to be read in clinical isolation from public international law,” their interpretation of course is subject to customary rules of interpretation of public international law.\textsuperscript{39} Unfortunately, the Appellate Body then stops here without asking further questions, such as “What does the word ‘integral’ mean?” “Of which annexed Multilateral Trade Agreement is the Protocol an integral part?” or “What other legal consequence is to form an integral part of any annexed Multilateral Trade Agreement in addition to being subject to the Vienna Convention?” In fact, these several questions the Appellate Body missed bear fundamental importance to our analysis.

In addition to be used in Mathematics meaning “of or denoted by an integer,” the word “integral” as an adjective describes a relationship between things meaning “necessary to make a whole complete,” or “essential or fundamental.”\textsuperscript{40} In this context, the word “integral” denotes the reliance of the “whole” on the “part,” which means the “part”—the various commitments in the Protocol—brings meaning to the “whole”—the various mechanisms, such as non-discrimination principle and general exceptions, in the WTO Agreement and related covered agreements. Denying the Accession Protocol’s legitimate access to general exceptions is to reject the “integral” reliance of the WTO Agreement on the Protocol.

\textsuperscript{34} Paragraph 1.2, China’s Accession Protocol.
\textsuperscript{36} China – Auto Parts, Panel report, para. 7.741; Appellate Body report, para. 213.
\textsuperscript{37} See, e.g., China – Raw Materials, Panel report, paras. 7.112-7.115.
\textsuperscript{38} China – Raw Materials, Panel report, para. 7.115, or Appellate Body report, para. 278.
\textsuperscript{39} US – Gasoline, Appellate Body report, p. 17.
\textsuperscript{40} Oxford Dictionaries, available online at: <http://www.oxforddictionaries.com> (accessed on 7 July 2012).
Therefore, as the second, yet more important, immediate legal consequence of being an integral to the *WTO Agreement*, commitments made through an accession protocol and attached service schedules become legally binding upon WTO entry. As a matter of fact, even commitments made in the Working Party Report on accession are binding and enforceable too. In *China – Auto Parts*, the Panel suggests that:

All parties agree that China’s commitments under its Working Party Report are enforceable in WTO dispute settlement proceedings. The Accession Protocol is an integral part of the WTO Agreement pursuant to Part I, Article 1.2 of the Accession Protocol. In turn, paragraph 342 of China’s Working Party Report incorporates China’s commitments under its Working Party Report, including paragraph 93, into the Accession Protocol. Therefore, China’s commitment in paragraph 93 of the Working Party Report is also an integral part of the WTO Agreement.\(^{41}\) (footnotes omitted)

There is no exception when it comes to the case of the China’s Accession Protocol. As being an integral part, the China’s Accession Protocol, *without specific reference*, recognizes the binding effect of the WTO annexed Agreements very clearly, saying that:

Except as otherwise provided for in this Protocol, those obligations in the Multilateral Trade Agreements annexed to the WTO Agreement that are to be implemented over a period of time starting with entry into force of that Agreement shall be implemented by China as if it had accepted that Agreement on the date of its entry into force.\(^{42}\)

It would be the natural logical consequence of the above cited paragraph of China’s Accession Protocol that China, *without specific reference*, shall enjoy contingency measures available in the Multilateral Trade Agreements annexed to the *WTO Agreement* as if China had accepted that Agreement on the date of its entry into force, “except as otherwise provided for in the Protocol.”

Moreover, the *WTO Agreement* of which the China’s Accession Protocol forms an integral part is not only limited to the *WTO Agreement* (the *Marrakesh Agreement Establishing the World Trade Organization*), but also covers its annexed Multilateral Trade Agreements, such as the GATT 1994 and the GATS. As the *WTO Agreement* indicates, “[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 [WTO] Agreement, binding on all Members.”\(^{43}\) In its discussion of the phrase “in a manner consistent with the WTO Agreement” in *China – Publications and Audiovisual Products*, the Appellate Body asserts that the phrase “refer[s] to the *WTO Agreement* as a whole, including its Annexes.”\(^{44}\) Therefore, commitments made in China’s Accession Protocol relating trade in goods, such as Article 5.1 on trading rights and Article 11.3 on export taxes and charges, naturally fall into the reins of the GATT 1994, regardless of referencing to the GATT 1994 or not.

Therefore, China’s commitments should not be denied access to contingency measures under the GATT 1994 for the reason of no specific reference made. By the same token, for those trade-in-goods commitments made in the Protocol, China should not deny GATT 1994’s non-

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\(^{41}\) *China – Auto Parts*, Panel report, para. 7.740; Appellate Body report, para. 213.
\(^{42}\) Paragraph 1.3, *China’s Accession Protocol*.
\(^{43}\) Article II.2, *Marrakesh Agreement Establishing the World Trade Organization* (the *WTO Agreement*).
discrimination principle or antidumping and countervailing duty measures for the reason that there is no specific reference that has been made.

The Appellate Body erred in both cases in missing the point that the China’s Accession Protocol forms “an integral part of the WTO Agreement.” More than justifying the legitimacy of the interpretative rules from the 1969 Vienna Convention, being “an integral part” of the WTO Agreement also means that the Protocol fits into both the rigidity and flexibility of the regime of certain annexed Multilateral Trade Agreements in the WTO framework. Without any reference, trade-in-goods commitments in China’s Accession Protocol should naturally enjoy the general exceptions of the GATT 1994, unless the Protocol particularly provides otherwise.

### 2.3 The All-embracing & Unforeseeable Nature of General Exceptions

As an international trading framework, the fundamental function of the WTO is of course to promote free trade. In order to maintain the effectiveness of the regime, however, the rigidity of rules and commitments promoting free trade are subject to checks and balances with flexibility accommodating the political needs of members. The 2009 World Trade Report well illustrates the tension between trade policy commitments and contingency measures:

Trade agreements define rules for the conduct of trade policy. These rules must strike a balance between commitments and flexibility. Too much flexibility may undermine the value of commitments, but too little flexibility may render the rules unsustainable.

Therefore, contingency measures—called also escape clauses, trade remedies, or safety valves—are provided in various agreements in the WTO framework to offer members certain flexibility in fulfilling their WTO obligations. Under the current GATT 1994 framework, general exceptions under Article XX, security exceptions under Article XXI, economic emergency exceptions under Article XIX, regional integration exceptions under Article XXIV, and balance-of-payment exceptions under Articles XII and XVIII:b provide contingency measure flexibility to members for balancing the rigidity of the trading framework.

Moreover, the existence of contingency measures is not just for the sake of convenience, rather is a practical necessity due to the nature of the WTO trading regime. As the 2009 World Trade Report points out:

[A] trade agreement is a contract that does not specify rights and duties of all parties in all possible future states of the world. Trade agreements are incomplete by nature and flexibilities offer an avenue for dealing with difficulties arising from contractual incompleteness in an

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It is important to grasp the central role of the WTO’s rules. Neither the WTO nor the GATT was ever an unrestrained free trade charter. In fact, both were and are intended to provide a structured and functionally effective way to harness the value of open trade to principle and fairness. In so doing they offer the security and predictability of market access advantages that are sought by traders and investors. But the rules provide checks and balances including mechanisms that reflect political realism as well as free trade doctrine. It is not that the WTO disallows market protection, only that it sets some strict disciplines under which governments may choose to respond to special interests.

46 World Trade Report 2009, p. xiii.
agreement. Contract may also be in complete by choice. Governments opt for flexibilities as a trade-off between the benefits of a more detailed agreement and the costs associated with writing such an agreement.\textsuperscript{47}

This “incomplete contract” approach reveals very well the unforeseeable nature of the circumstances for invoking contingency measures. Therefore, “the fundamental reason” for incorporating certain contingency measures into trade agreements “is for governments to manage circumstances that cannot be anticipated prior to their occurrence.”\textsuperscript{48} The GATT Secretariat’s note to the Negotiation Group on Dispute Settlement in the Uruguay Round discussing Article XXIII of GATT 1947 provides a good example of the escape clause’ application under unforeseeable circumstances. The GATT Secretariat states:

The drafters conceived Article XXIII not only as a dispute settlement clause but, notably as regards “situations complaints” in terms of Article XXIII:1(c), also as a sort of escape clause in situations of changed circumstances (somewhat like the general legal concepts of “contract frustration” and “clausula rebus sic stantibus”).\textsuperscript{49}

This is probably why the safety valves, trade remedies, or escape clauses are also called contingency measures. The word “contingency” as a noun means “a future event or circumstance which is possible but cannot be predicted with certainty”, or as in philosophy, “the absence of necessity or the fact of being so without having to be so”.\textsuperscript{50}

In addition to their unforeseeability, the general exceptions are in nature contingency measures with very general application. As the word “general exceptions” implies, Article XX covers a wide range of GATT obligations. As an adjective, the word “general” means “affecting or concerning all or most things, or widespread.”\textsuperscript{51} Compared with other exceptions, such as security exceptions, economic emergency exceptions, and regional integration exceptions, Article XX has more general application. This in fact is consistent with the textual meaning of the word “general.” The Appellate Body’s interpretation in \textit{US - Gasoline} case confirms this reading of the nature of general exceptions. When discussing the introductory clause, the “chapeau” of Article XX of GATT 1994, the Appellate Body states:

The chapeau says that “nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures …” The exceptions listed in Article XX thus relate to \textit{all} of the obligations under the General Agreement: the national treatment obligation and the most-favoured-nation obligation, of course, but others as well.\textsuperscript{52}

This discussion reveals the nature of the extensive coverage of Article XX, which indicates that the GATT general exceptions are indeed “very general.” The Appellate Body’s interpretation of confirming the exception applicable to “all of the obligations under the General Agreement” denotes its nature of general application. As long as it is an obligation under the

\textsuperscript{47} Ibid., p. xiv.
\textsuperscript{48} Ibid., p. xiii.
\textsuperscript{50} Oxford Dictionaries, available online at: \texttt{<http://www.oxforddictionaries.com> } (accessed on 7 July 2012).
\textsuperscript{51} Oxford Dictionaries, available online at: \texttt{<http://www.oxforddictionaries.com> } (accessed on 7 July 2012).
GATT 1994 framework, the Article XX mechanism should apply provided the related requirements are satisfied.

General exception provision’s early drafting history also indicates Article XX’s nature of general application to GATT obligations. The current general exceptions Article XX and security exceptions Article XXI were combined together as Article 32 in the earliest draft of the International Trade Organization charter proposed by the US—the US draft—and remained combined in the later drafts as Article 37 of the London and New York drafts. These provisions, however, were split into two separate articles in the Geneva draft and the final draft *Havana Charter for an International Trade Organization*, i.e. the Article 43 of General Exceptions to Chapter IV Commercial Policy (currently Article XX) and Article 94 of General Exceptions (currently security exceptions Article XXI). The GATT Secretariat points out that “[t]he clear intention of the separation into two articles was, as appears from the title, to have the provisions of Article 43 (XX) relate to the commercial policy chapter, while those of Article 94 (XXI) were to be exceptions to the Charter as a whole.” This drafting history indicates drafters’ intention of applying general exceptions to the obligations under the GATT, which came from a substantial part of the Commercial Policy chapter in the never-adopted Havana Charter.

Moreover, as contingency measures to balance the rigidity of the commitments and due to their nature of general application, resorting to general exceptions is a right of a member whenever certain unforeseeable circumstances occurred. Therefore, from the perspective of the invoking party, it is a right to be protected under the *WTO agreement*. As the Appellate Body insists in *US – Shrimp*, “a balance must be struck between the right of a Member to invoke an exception under Article XX and the duty of that same Member to respect the treaty rights of the other Members.” As it is a right of the member, the member concerned should not be prevented from invoking general exceptions under Article XX, unless the right is explicitly abandoned by the member concerned.

As the general exceptions are contingency measures to provide flexibility in unforeseeable circumstances, reference to its application should not be required due to the unforeseeability of the circumstances for invoking the measures. When it comes to China’s certain commitments in trade of goods under the China’s Accession Protocol, Article XX’s “general” application should of course cover these commitments concerned, as the Protocol is an integral part of the *WTO Agreement*.


The task of interpreting and applying the chapeau is, hence, essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (e.g., Article XI) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement. The location of the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ.

The section above indicates the Panel and Appellate Body in China – Raw Materials were unfortunately misled by previous discussions of China’s trading right commitment, and erred in interpreting how the accession protocol constitutes “an integral part of the WTO Agreement” and in understanding the nature of contingency measures. As indicated above, the purpose of their discussion regarding the accession protocol as “an integral part of the WTO Agreement” was to justify using the Vienna Convention to identify common intentions of all members in relation to the Accession Protocol. As a matter of fact, asserting the common intentions of WTO members through using the 1969 Vienna Convention as the applicable rules of interpretation has been the common interpretation approach of WTO panels and the Appellate Body. Building on the examination above, this section further reveals the inherent judicial activism and theoretical deficits of this interpretation approach in relation to the Panel and Appellate Body’s errors in China – Raw Materials and implications.

3.1 Vienna Convention as the Applicable Interpretative Rules
3.1.1 Vienna Convention as Codified “Customary Rules of Interpretation”

Under the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), the clarification of the provisions of the covered agreements during dispute settlement process should be made in accordance with “customary rules of interpretation of public international law.” The DSU states:

The dispute settlement system of the WTO ... serves to preserve the rights and obligations of 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.\footnote{Article 3.2, Dispute Settlement Understanding (DSU). Emphasis mine.}

As to what constitutes the “customary rules of interpretation of public international law,” the Appellate Body has little hesitation. The Appellate Body in China – Raw Materials asserts that Articles 31 and 32 of the Vienna Convention on the Law of Treaties are the codified “customary rules of interpretation of public international law.”\footnote{China – Raw Materials, Appellate Body report, para. 278.} Similarly, in China – Publications and Audiovisual Products, the Appellate Body confirms that the Vienna Convention has codified the “customary rules of interpretation of public international law.”\footnote{China – Publications and Audiovisual Products, Appellate Body report, para. 348.} Indeed, both China and the U.S., the two sides of the case, acknowledge that the Vienna Convention codifies the interpretative rules of customary international law.\footnote{Ibid., paras. 48, 86. The U.S. currently is not a member of the 1969 Vienna Convention.}

As a matter of fact, confining applicable rules of WTO Agreement interpretation to 1969 Vienna Convention has long been the consistent jurisprudence of WTO panels and the Appellate Body since WTO’s very first case, the US – Gasoline, even since WTO’s inception.\footnote{US – Gasoline, Appellate Body report, pp. 15-16. It is technically the WTO’s second case. However, the first case brought to the WTO, Malaysia — Prohibition of Imports of Polyethylene and Polypropylene, the panel of which was never set up, was terminated as Singapore, the complainant, decided to withdraw its complaint completely.}
general rule of interpretation in Article 31 of the 1969 Vienna Convention—as general international law to interpret the WTO Agreement and covered agreements—has been further confirmed in many other cases.61 Similarly, Article 32 of the 1969 Vienna Convention has also been accorded to the same recognition in WTO’s dispute resolution practice.62 Therefore, recognizing the rule of interpretation in the 1969 Vienna Convention as customary rule or general international law to interpret WTO and covered agreements has become a well-established jurisprudence. Not only in interpretations of the WTO general agreements, but also in interpretation of related tariff concession schedules and interpretation of government procurement and service schedule, has the 1969 Vienna Convention acquired the same recognition.63

However, it is quite unreasonable, if not impossible, for a treaty created in Vienna in 1969 to codify interpretative rules of a treaty framework founded in 1995. To use the Appellate Body’s words rejecting China’s Accession Protocol’s access to general exceptions, “we consider it reasonable to assume that, had there been a common intention [of the founding members] to” confirm that the customary rules of interpretation of public international law have been codified in the 1969 Vienna Convention, “language to that effect would have been included in” Article 3.2 of the DSU.64 Moreover, not all the WTO Members are contracting parties of the 1969 Vienna Convention.65 By “clarifying” the meaning of the Article 3(2) of the DSU, the Appellate Body’s WTO agreement interpretation jurisprudence contains a clear stretching effect of the application of the 1969 Vienna Convention.

Unfortunately, the drafting history indicates that the Vienna Convention has never intended to be a full codification of existing law on treaties. Under the UN Charter, the General Assembly is entrusted to initiate studies and make recommendations for the purpose of encouraging the progressive development and codification of international law.66 The International Law Commission (ILC) was therefore established in 1949 and selected codification

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64 For the Appellate Body’s words used to reject China’s reference to the general exception, see, China – Raw Materials, Appellate Body report, para. 293.

65 The 1969 Vienna Convention has only 111 signature countries so far. Some WTO Members such as the United States, Iran, Ireland, and Afghanistan are still not yet members of the 1969 Vienna Convention. See <http://untreaty.un.org/cod/avl/ha/vclt/vclt.html> (accessed on 18 July 2012).

of the law of treaties as one of the most prioritized topics in its first session. The ILC then considered the topic at its second, third, eighth, and thirteenth to eighteenth sessions in 1950, 1951, 1956, 1959, and 1961 to 1966 respectively. At ILC’s eighteenth session in 1966, the Commission completed the second reading of the draft articles and adopted its final report on the Law of Treaties, which was discussed in UN Conference on the Law of Treaties convened by the General Assembly in 1968 and 1969 at Vienna and adopted at the end of second session on 22 May 1969. One thing that should be particularly mentioned here is that the ILC has double functions in both “progressive development of international law” and “codification of international law.” Therefore, in addition to codifying the existing law, provisions included in the draft articles also reflect those practices of States in which the law has not yet been sufficiently developed. In its second report to the General Assembly on draft articles of the Convention on Special Missions, the ILC states that:

It is the invariable practice of the [International Law] Commission when drafting articles incorporating rules of international law to combine straightforward codification (if there are sufficient customary or written rules of international law) with the method of progressive development of international law (in cases where, although there are no such rules, certain trends exist in international relations, or in cases where it is necessary to make good a deficiency or to alter existing rules).

In the UN Conference on the Law of Treaties, delegations from some countries, such as Ghana, Greek, Liberia, Nigeria, Afghanistan, and Tanzania, raised doubts as to the existence of general rules of treaty interpretation. It is, therefore, unreasonable to assert that rules of interpretation in the Vienna Convention codify existing customary rules of interpretation of public international law.

As a matter of fact, WTO judicial practice so far has transcended the interpretative rules “codified” in the Vienna Convention. Under the Vienna Convention, treaty interpretation should be done “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.” According to the Vienna Convention, the “context” of interpretation includes the text of the treaty, and any related

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68 Article 15 of the Statute of International Law Commission (adopted by the UN General Assembly in resolution 174 (II) of 21 November 1947) states (emphasis mine):
In the following articles the expression “progressive development of international law” is used for convenience as meaning the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States. Similarly, the expression “codification of international law” is used for convenience as meaning the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine.
70 UN Conference on the Law of Treaties: First Session Official Records (Vienna, 26 March – May 1968), pp. 170, 172, 181, and 271. The Greek delegation, for example, states that (p. 172):
[T]he interpretation of a treaty was essentially a mental process of attempting to establish the intention of the parties to the treaties as expressed in words. There was no absolute interpretation with a given text; there were usually several possible interpretations. Consequently, interpretation could not obey set rules. If a treaty contained one or more rules as to its interpretation, those rules themselves would need to be interpreted, but at that point no rules of interpretation would be available.
agreement or instrument made between parties, by taking into account any subsequent agreement, practice, and relevant applicable rules.\textsuperscript{72} Treaty preparatory work or conclusion circumstances might also used as “supplementary means” of interpretation to determine the meaning of the terms of the treaty.\textsuperscript{73} Ironically, the subsequent practice of WTO panels and the Appellate Body has resorted to a broader range of customary interpretative rules than those “codified” in Articles 31 and 32 of the Vienna Convention. Several other rules of interpretation have been used in the dispute settlement process, such as the principle of effective treaty interpretation in US – Gasoline which is followed in Japan – Alcoholic Beverages II, Korea – Dairy, and US – Section 211 Appropriations Act.\textsuperscript{74} In other occasions, WTO panels and the Appellate Body apply the principle of presumption against conflict in EC – Bananas III, the principle of non-retroactivity of treaties in Brazil – Desiccated Coconut, EC – Hormones, and Canada – Patent Term, and the proportionality principle in US – Cotton Yarn and US – Line Pipe.\textsuperscript{75} Under the Vienna Convention, the WTO Dispute Settlement Body’s adopting reports from the panels and the Appellate Body forms the “subsequent practice” of the WTO members, the “context” for treaty interpretation as “codified” in the Vienna Convention.\textsuperscript{76} Taking this “context” of the DSU Agreement into consideration, a reasonable interpretation will lead to a conclusion that the WTO members have never intended to confine the “customary rules of interpretation of public international law” to Articles 31 and 32 of the 1969 Vienna Convention only.

3.1.2 The Activist Tendency in Applying Vienna Convention

Most importantly, the Appellate Body’s agreement interpretation jurisprudence deviates from general practice. The Appellate Body’s assertion presents a clear and almost definite answer to the long-debated question of whether there are unified rules of treaty interpretation in public international law. However, no agreement has been established in public international law on whether there is a unified system of treaty interpretation. Fitzmaurice pointed out in 1952 that it has always been a controversial issue whether or not there are rules of treaty interpretation in

\textsuperscript{72} Ibid.
\textsuperscript{73} Ibid., Article 32.
\textsuperscript{76} Article 31, VCLT.
According to Fitzmaurice, although through practice, it is “inevitable” that the International Court of Justice (ICJ) “should in fact develop a jurisprudence on the subject [of treaty interpretation], reducible to a set of coherent propositions or principles,” ICJ however “has made no pronouncement on the desirability or otherwise of having definite rules of interpretation.” In its discussion of the draft of the Vienna Convention on the Law of Treaties in 1966—the treaty preparatory work and conclusion circumstances—the ILC held a similar point of view. According to the ILC, the codified principles and maxims of treaty interpretation in the law of treaties are “non-obligatory” in nature, and the application of many of these principles and maxims “is discretionary rather than obligatory” and treaty interpretation “is to some extent an art, not an exact science.” This has so far always been the case among contemporary mainstream scholars of public international law. In relation to general rules of treaty interpretation, Brownlie suggests that many of these rules of treaty interpretation are “general, question-begging, and contradictory.” Therefore, the general international practice from the ICJ to public international law academia has always been to take extreme caution in confirming the existence of general rules or a definite system of treaty interpretation. WTO panels and the Appellate Body significantly deviate from the general jurisprudence of public international law. This deviation of the Appellate Body’s agreement interpretation jurisprudence from general international practice presents a challenge to public international law. First of all, it has been generally established that the decisions of the international dispute settlement body has a limited effect only. Under the ICJ Statute, the ICJ’s jurisdiction is voluntary in nature. Not only is the jurisdiction of the ICJ voluntary in nature, but the effect of the ICJ’s decision is also rather limited. According to the ICJ Statute, “[t]he decision of the Court has no binding force except between the parties and in respect of that particular case.” This in fact is also the case in the WTO framework. Except for the biding legal effect on parties of the given dispute, neither panel reports nor Appellate Body reports have any universal effects. As the Appellate Body points out in Japan –Alcoholic Beverages II:

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78 Ibid., 6.

79 Yearbook of the International Law Commission 1966 (YILC 1966), vol. 2, p. 218. The ILC states: The utility and even the existence of rules of international law governing the interpretation of treaties are sometimes questioned. The first two of the Commission’s Special Rapporteurs on the law of treaties in their private writings also expressed doubts as to the existence in international law of any general rules for the interpretation of treaties.

80 Ibid. The ILC suggests:

… [These codified principles and maxims] are, for the most part, principles of logic and good sense valuable only as guides to assist in appreciating the meaning which the parties may have intended to attach to the expressions that they employed in a document. Their suitability for use in any given case hinges on a variety of considerations which have first to be appreciated by the interpreter of the document; the particular arrangement of the words and sentences, their relation to each other and to other parts of the document, the general nature and subject-matter of the document, the circumstances in which it was drawn up, etc. Even when a possible occasion for their application may appear to exist, their application is not automatic but depends on the conviction of the interpreter that it is appropriate in the particular circumstances of the case.


82 Article 36(1), the Statute of the International Court of Justice (ICJ Statute).

83 Ibid., Article 59.
adopted panel reports are an important part of the GATT acquis. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute.\textsuperscript{84}

It has been a well established jurisprudence throughout GATT and WTO dispute resolution practice that panel or Appellate Body reports are not binding precedents and the principle of \textit{stare decisis}—a mechanism well established in the common law legal tradition—does not apply to the interpretations of GATT/WTO Panels or the WTO Appellate Body.\textsuperscript{85} Therefore, WTO panels and the Appellate Body’s role in WTO dispute resolution should be rather passive and limited, no more than an “honest broker” of the WTO Members as a whole.

However, in sharp contrast to the ICJ’s voluntary jurisdiction, WTO panels and the Appellate Body’s jurisdiction is compulsory and exclusive.\textsuperscript{86} Under the DSU, any WTO Member can initiate the dispute resolution process when the Member concerned considers that “any benefits accruing to it directly or indirectly” under the WTO Agreements “are being impaired by measures taken by another Member.”\textsuperscript{87} Building on the principles of Most-Favorable-Nation treatment and National treatment, the individual process of dispute resolution gains its far reaching effects, through which the compulsory jurisdiction of the WTO panels and Appellate Body weaves a seamless web over disputes between Members. From this regard, WTO panels and Appellate Body’s deviation from general international practice indicates an overly active, even aggressive approach to treaty interpretation jurisprudence, which indicates clearly the general tendency of “judicial activism” in the Appellate Body’s jurisprudence.

Secondly, the “judicial activism” in WTO jurisprudence might not be consistent with what the Members intended when they concluded the \textit{WTO Agreement}. Under the DSU, “[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.”\textsuperscript{88} According to Jackson, this DSU provision “resonates in the direction of a caution to the panels to use judicial restraint and avoid being too activist.”\textsuperscript{89} In

\textsuperscript{84} Japan – Alcoholic Beverages II, Appellate Body report, p. 13.


\textsuperscript{86} Article 23.1 and Article 6.1 of the DSU. See also, United States – Sections 301-310 of the Trade Act of 1974 (US – Section 301 Trade Act), WT/DS152/R, Panel report, para. 7.43 (emphasis mine):

Article 23.1 … imposes on all Members to “have recourse to” the multilateral process set out in the DSU when they seek the redress of a WTO inconsistency. In these circumstances, Members have to have recourse to the DSU dispute settlement system to the exclusion of any other system, in particular a system of unilateral enforcement of WTO rights and obligations. This, what one could call “exclusive dispute resolution clause,” is an important new element of Members’ rights and obligations under the DSU.

\textsuperscript{87} Article 3.3, DSU.

\textsuperscript{88} Ibid. 3.2. See also Article 19.2, DSU.

EC – Hormones, the Appellate Body actually accepts the principle of judicial restraint in its discussion of the principle of in dubio mitius as a “supplementary means” of treaty interpretation.90 Similar language can also be seen in the Standard of Review principle in WTO antidumping regime.91 Also, it was suggested that the WTO panels and Appellate Body cannot make law. When discussing Article 3.2 of the DSU in US – Wool Shirts and Blouses, the Appellate Body states that:

Given the explicit aim of dispute settlement that permeates the DSU, we do not consider that Article 3.2 of the DSU is meant to encourage either panels or the Appellate Body to “make law” by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute.92

Therefore, the function of WTO panels and the Appellate Body is quite limited in the dispute resolution process, and judicial restraint instead of judicial activism should be the norm. Not only do WTO panels and the Appellate Body have no authority to make law, but neither do they have any authority to interpret or amend the law in a strict sense. In the WTO framework, the authority to interpret or amend the WTO Agreement and the Multilateral Trade Agreements are vested exclusively on the Ministerial Conference and the General Council.93 Of course, the WTO panels and the Appellate Body will need to interpret laws in order to deliver the judgments of the cases according to those laws. However, this interpretation should only be done to the extent that it “assist[s] in appreciating the meaning which the parties may have intended to attach to the expressions that they employed in a document,” as expressed in Article 3.2 of the DSU; no more, no less.94 Therefore, it is somewhat misleading to take panels and the Appellate Body as the judicial organs of the WTO.95 If ever we take WTO panels or Appellate Body members as judges, they are judges who cannot make law and deliver judicial interpretation with universal effect— judges more in a continental rather than common law tradition.

However, by confining the “customary rules of interpretation of public international law” stated in Article 3(2) of the DSU to the 1969 Vienna Convention, the agreement interpretation jurisprudence of WTO panels and the Appellate Body indicates a certain law-making or law-interpreting effect with a clear tendency of “judicial activism.” This tendency of “judicial activism” deviates from the general practice of public international law from the ICJ to academia. It is also inconsistent with WTO Members’ expectation embodied in the DSU. As a matter of fact, the problematic “judicial activism” can also be seen in schedule interpretation jurisprudence in resorting to “common intentions of all parties” for treaty interpretation.

91 Article 17.6, WTO Antidumping Agreement.
93 Articles 9.2, 10, the WTO Agreement. See also, Article 28, GATT 1994.
3.2 The “Common Intentions” of All WTO Members

3.2.1 The “Common Intention” Approach and Its Theoretical Base

The paper’s analysis above reveals that the Panel and Appellate Body’s interpretation approach is problematic in confining “customary rules of interpretation of public international law” to the 1969 Vienna Convention. This problem is related to their errors in interpreting how the accession protocol forms an integral part of the WTO Agreement in China – Raw Materials. Moreover, as this section will show, the approach’s obsession with the “common intention of all WTO members” contains also some inherent jurisprudential deficits in its judicial activist tendency. To show its obsession with the “common intention” of all WTO members, the Appellate Body in China – Raw Materials states:

Moreover, as China’s obligation to eliminate export duties arises exclusively from China’s Accession Protocol, and not from the GATT 1994, we consider it reasonable to assume that, had there been a common intention to provide access to Article XX of the GATT 1994 in this respect, language to that effect would have been included in Paragraph 11.3 or elsewhere in China’s Accession Protocol.96

This is the key where the Appellate Body denies China’s reference to Article XX of the GATT 1994, as there is no “common intention” of all WTO members so intended. In China – Publications and Audiovisual Products, when dealing with the question of whether China’s GATS schedule entry on “sound recording distribution services” covers distribution of sound recordings in a non-physical form through electronic means, the Appellate Body suggests that:

We further note that the purpose of treaty interpretation under Articles 31 and 32 of the Vienna Convention is to ascertain the “common intention” of the parties, not China’s intention alone. We recall that, in this respect, in US – Gambling, the Appellate Body found that “the task of ascertaining the meaning of a concession in a Schedule, like the task of interpreting any other treaty text, involves identifying the common intention of Members”. The circumstances of the conclusion of the treaty may thus be relevant to this “common intention”.97

Therefore, what matters is the common intention of all WTO members in interpreting China’s WTO Accession Protocol. The early establishment of the “common intention” approach can be traced back to the Appellate Body’s analysis in the EC – Computer Equipment, where the Appellate Body resorts to the “common intentions of all members” to deal with the issue of what LAN equipment should cover in EC’s tariff classification, which states:

The purpose of treaty interpretation under Article 31 of the Vienna Convention is to ascertain the common intentions of the parties. These common intentions cannot be ascertained on the basis of the subjective and unilaterally determined “expectations” of one of the parties to a treaty. Tariff concessions provided for in a Member’s Schedule -- the interpretation of which is at issue here -- are reciprocal and result from a mutually-advantageous negotiation between importing and exporting Members. A Schedule is made an integral part of the GATT 1994 by Article II:7 of the GATT 1994. Therefore, the concessions provided for in that Schedule are part of the terms of the

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treaty. As such, the only rules which may be applied in interpreting the meaning of a concession are the general rules of treaty interpretation set out in the Vienna Convention.\textsuperscript{98}

This “common intention” approach has been repeatedly cited in later cases. It has indeed been a very consistent jurisprudence of WTO panels and the Appellate Body to resort to the “common intentions of all parties” for treaty interpretation in WTO dispute settlement process.\textsuperscript{99}

The approach’s recourse to the “common intentions” of all members is an intentional or unintentional application of the social contract theory in international law. Similar to terms of a contract in domestic law, the adopted text of an international treaty “is the result … of the meeting of minds … [and] the meeting of various motives.”\textsuperscript{100} It is probably in this regard that the Appellate Body states in Japan – Alcoholic Beverage II that “[t]he WTO Agreement is a treaty – the international equivalent of a contract.”\textsuperscript{101} Therefore, that “the treaty is presumed to reflect the common intention of the parties” becomes a natural “fiction.”\textsuperscript{102}

To resort to the intentions of the contracting parties in treaty interpretation has its merits. In fact, recourse to consent for legitimate binding force is in fact an application of social contract theory in the realm of public international law. In general, justifying the legitimacy of governance from consent can be traced back as early as the first half of the 14\textsuperscript{th} century, a medieval maxim, quod omnes tangat, meaning what touches all must be approved by all.\textsuperscript{103} As for how this consent has been given to constitute the governmental legitimacy, many theorists, such as Locke, Rousseau, and Kant all boil it down to a social contract.\textsuperscript{104} Henkin explains well that:

[a] legitimate political society is based on the consent of the people, reflected in a social contract among the people to institute a government. The Social contract generally takes the form of a constitution, which also establishes a framework of government and a blueprint for its institutions.\textsuperscript{105}

\textsuperscript{98} European Communities – Customs Classification of Certain Computer Equipment (EC – Computer Equipment), Appellate Body report (WT/DS62/67/68/AB/R), para. 84. Emphasis original.

\textsuperscript{99} See, e.g., European Communities – Customs Classification of Frozen Boneless Chicken Cuts (EC – Chicken Cuts), Appellate Body report (WT/DS269/286/AB/R), para. 250; US – Gambling, Panel report, para. 6.136, or Appellate Body report, paras. 159-160; European Communities – Regime for the Importation, Sale and Distribution of Bananas: Second Recourse to Article 21.5 of the DSU by Ecuador (EC – Bananas (21.5 II – Ecuador)), Appellate Body report, paras. 408-409, and footnote to para. 445; European Communities and Certain Member States – Measures affecting Trade in Large Civil Aircraft (EC – Aircraft), Appellate Body report (WT/DS316/AB/R), para. 845; Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines (Thailand – Cigarettes (Philippines)), Appellate Body report, para. 201.


\textsuperscript{101} Japan – Alcoholic Beverage II, Appellate Body report, p. 14.

\textsuperscript{102} Isabelle Van Damme, Treaty Interpretation by the WTO Appellate Body (UK: Oxford University Press, 2009; thereafter, Treaty Interpretation.), p. 367.


Social contract theory is also the foundation of the legitimacy of international governance. In his discussion of the relationship of individuals to the state under the framework of sovereignty in the international legal system, Brand suggests that the international legal framework is a “two-tiered social contract,” “under which the individual relates to the state in domestic law, and only the state relates to the international legal order in international law.”

In his discussion of the “Mythology of Sovereignty,” Henkin argues that “states are subject to the International Social contract, and the end of World War II saw a new social contract in the UN Charter.” Yet, while countries are the law-makers of international law, they at the same time are bound by international law. In general, there is no more superior authority above the countries. Therefore, state consent has been the foundation of the source of the binding force of international law. Henkin suggests that “state consent is the foundation of international law” and that “that law is binding on a state only by its consent remains an axiom of the political system, an implication of state autonomy.”

In the EC – Computer Equipment, the EC’s argument serves as a good illustration of this line of logic, which has been summarized in the report as follows:

According to the European Communities, the existence of a common intention forms the basis for the mutual consent of the signatories to be bound by an international agreement. This common intention finds its authentic expression in the text of the treaty, not in the subjective expectations of one or other of the parties to the agreement. The European Communities states that the rules of the Vienna Convention on the Law of Treaties (the “Vienna Convention”) on the interpretation of international agreements are based on this fundamental consideration...The European Communities also submits that “protocols and certifications relating to tariff concessions” are an integral part of the GATT 1994 and, therefore, are part of an international multilateral agreement which is the result of a “meeting of the minds” and not the sum of subjective perceptions or expectations. (footnotes omitted)

Therefore, if the common intentions of an agreement can be asserted, the binding force of that given agreement will be evident. The “common intention” approach will then also further justify the legitimacy of the treaty framework of the current WTO regime.

3.2.2 The Deficits of the “Common Intention” Approach

To depend on common intentions of all parties in WTO agreement interpretation, however, as a simple application of the social contract theory—though it might be an unconscious application—appears to be more destructive than constructive in public international law for several reasons.

Firstly, WTO panels and the Appellate Body’s agreement interpretation jurisprudence deviates clearly from general treaty interpretation practice of public international law. It is

109 EC – Computer Equipment, Appellate Body report, para. 11. Italics original, underline added.
generally accepted that there are three general schools of treaty interpretation: the “intentions of the parties” school, the “textual” or “ordinary meaning of the words” school, and the “teleological” or “aims and objects” school. According to Fitzmaurice, the ICJ as a whole favours the “textual method, while “some of the individual Judges are teleologists.” More importantly, with the existence of the dichotomy of these two views, according to Fitzmaurice,

[n]evertheless it has been common to both points of view to avoid recourse to travaux préparatoires, and relegate to a secondary place any direct inquiry into the intentions of the parties as being per se the object of interpretation.

Fitzmaurice also details the rationale behind ICJ’s favoring text over intentions, which is that after prolonged negotiations, parties should have embodied their intentions in a text, “formally agreed, concluded, and drawn up,” in which the true intentions are to be found. The common practice of international law is also well reflected in the 1969 Vienna Convention which states 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.”

In its meeting going though the final draft of the 1969 Vienna Convention, the International Law Commission points out that the “meaning of the text” is the fundamental element and starting point of interpretation, and that it is desirable to accord the “meaning of text” this significance in treaty interpretation. Textual interpretation has been so far the first choice of interpretation and well-established within mainstream public international law academia, as “what matters is the intention of the parties as expressed in the text.” WTO panels and Appellate Body’s jurisprudence deviates significantly from the general practice in public international law.

The second issue comes from panels and the Appellate Body’s failure to acknowledge the somewhat distinctive nature of WTO commitments. Theoretically, under the Most-Favored-Nation principle, WTO negotiation is conducted under the principle of single undertaking, which means there is no agreement on anything until there is an agreement on everything. This give and take nature of the WTO negotiation does engrave some special features in WTO commitments, in particular those in concession schedules. Under GATT 1994, to modify or withdraw a concession in a schedule, the applicant contracting party needs only re-negotiate with the contracting party initially negotiated and with any other contracting party who has a principal supplying interest and subject to consultation with any other contracting party who has a substantial interest in such concession.

From this regard, it is problematic to consider concession schedules completely as something reflecting the common intentions of all contracting parties. Those agreements done more through “green room” discussions in

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111 Ibid., p. 7.
112 Ibid.
113 Ibid., pp. 11-12.
114 Article 31.1, VCLT. Emphasis mine.
116 Brownlie, op. cit., p. 631.
particular, might reflect only the intentions of several great powers in the WTO rather than reflecting the common intentions of all negotiating parties.\textsuperscript{119}

Also, the common intention approach reveals its failure to understand the incomplete nature of the WTO treaty framework.\textsuperscript{120} As Van Damme suggests, “[t]he common intention is only formed once the treaty language has been drafted and will develop over time and with the accession of new parties.”\textsuperscript{121} Many examinations have demonstrated this unfinished feature of the WTO treaty framework. In his discussion of the GATT/WTO legal system, Hudec suggests that international trade law differs from domestic legal systems in its “overriding concern for ‘flexibility’”—“the insistence that the law’s coercive pressures be applied in a controlled fashion which allows room for maneuver at every stage of the process,” moreover, this flexibility gives the GATT/WTO “a capacity for creative development,” some “possibility of growth.”\textsuperscript{122} Arup too, in discussion of both “deregulatory” and “strong re-regulatory” dimensions of WTO agreements, suggests that, while WTO agreements “impose disciplines, in many respects they are best regarded as ‘unfinished stories’” with room for mediation through successive negotiations as well as adjustment in particular cases through the dispute settlement process.\textsuperscript{123} Therefore, common intention even as reflected in the text, might still be incomplete, which necessitates the provisions of various contingency measures in the WTO framework. As revealed above, the common intention approach has been the main cause leading to the Appellate Body’s failure to apply the contingency measures in \textit{China – Raw Materials} in which the Appellate Body rejected China’s claim to general exceptions.\textsuperscript{124}

The final and the most important flaw of panels and Appellate Body’s “common intention” jurisprudence is the fundamental challenges it presents to the possible development and evolution of an open and non-exclusive international regime. As a matter of fact, whether the intentions of the parties are relevant to treaty interpretation has long been a controversial issue.\textsuperscript{125} In a sharp contrast to the close and inclusive system of domestic contracts, international regimes like the WTO are open and non-exclusive arrangements. In most of the concluding process of international treaty arrangements, while some countries that take part in treaty negotiations might not join the treaty in the end, those acceding countries might have never participated in the negotiation process in the first place. This is particularly the case in the establishment of the WTO. As an open and non-exclusive international treaty framework, the evolving nature of the WTO makes it very difficult, if not impossible, to assert the “common intentions of all members.” John Jackson once points out that,

\begin{itemize}
\item[\textsuperscript{119}]Van Damme, op. cit., \textit{Treaty Interpretation}, p. 317.
\item[\textsuperscript{120}]\textit{See supra} discussion 2.3 on “incomplete contract” approach in \textit{World Trade Report} 2009.
\item[\textsuperscript{121}]Van Damme, op. cit., \textit{Treaty Interpretation}, p. 313.
\item[\textsuperscript{123}]Christopher Arup, \textit{The New World Trade Organization Agreements: Globalizing Law Through Services and Intellectual Property} (UK: Cambridge University Press, 2000), pp. 12-3, 30. Emphasis mine. He also argues that “[w]hile, on the one hand, they [WTO agreements] give some support to mutual recognition and harmonization of regulatory standards, on the other they limit the capacity of members to express their regulatory concerns on a unilateral basis.” Ibid. p. 41. Similarly, he argues that “[i]f the WTO agreements concede space to variations in national regulation by restraining the scope, specificity and compulsion of their norms, another, explicit concession is that certain legitimate regulatory purposes justify exceptions being make to compliance with those norms.” Ibid. p. 75.
\item[\textsuperscript{124}]\textit{See supra} discussion 2.1.
\item[\textsuperscript{125}]Fitzmaurice, \textit{op. cit.}, pp. 3-5.
\end{itemize}
There are some important lessons in the GATT/WTO story … Perhaps the most significant lesson
is that human institutions inevitably evolve and change, and concepts which ignore that, such as
concepts which try to cling to “original intent of draftspersons,” or some inclination to disparage
or deny the validity of some of these evolutions and changes, could be damaging to the broader
purposes of the institutions. Governments (or societies) which consent to become members will
not be frozen in time …\textsuperscript{126}

The single undertaking negotiation framework not only makes “common intention of all
members” unattainable, but also presents challenges to the legitimacy of the trading framework.
Under the single undertaking negotiation principle, there is no agreement on anything until there
is an agreement on everything. For those joining the WTO after its establishment, acceding to the
WTO or not is a “like it or lump it” situation. It is almost impossible that the “intentions” of the
late acceding parties will be acknowledged in the WTO agreements. In this regard, by
intentionally or unintentionally applying social contract theory to international affairs and thus
grounding legitimacy on consent, the intention school’s interpretation in fact destroys the
legitimacy of the international regime as it presents difficulty in reflecting the late acceding
parties’ intentions and consent.

3.3 The Legitimacy Deficit of the “Common Intention” Approach

The discussions above demonstrate that the interpretation approach of asserting common
intentions via \textit{Vienna Convention} contains inherent theoretical deficits. Both WTO panels and
the Appellate Body came to confining customary rules of interpretation to the \textit{Vienna
Convention} during their problematic interpretation of how the Accession Protocol forms an
integral part of the \textit{WTO Agreement}. This problematic application of the \textit{Vienna Convention} has
made a 1969 convention codify the interpretative rules of a 1995-founded trading framework,
which is a bizarre law-making effort revealing the judicial activist tendency of WTO panels and
the Appellate Body. The interpretation approach’s obsession with “common intentions,” on the
other hand, makes the current trading framework subject to the constraint of the founding
intentions of the trading framework. This static and rigid common intention approach leaves no
room for the application of contingency measures, which leads to the Appellate Body’s failure to
apply general exception measures to paragraph 11.3 of China’s Accession Protocol. Therefore,
the interpretation approach of asserting common intentions via \textit{Vienna Convention} explains all
the failures of applying Article XX of GATT 1994 in \textit{China – Raw Materials}.

In addition to the problems above, the interpretative approach reveals a deep-rooted
institutional deficit of the WTO framework in the context of the tension between “judicial
interpretation” vs. “authoritative interpretation.” The law-making move of confining the
“customary rules of interpretation of public international law” to the \textit{Vienna Convention}
essentially constitutes an \textit{ultra vires} attempt that cannot be challenged under the current
institutional framework. The WTO panels and Appellate Body’s clarifications of the WTO
agreements as “judicial interpretation” are effective only to concerned parties in given cases
without universal effect.\textsuperscript{127} The “authoritative interpretation” power is solely reserved to the

\textsuperscript{126} John Jackson, \textit{Sovereignty, the WTO, and Changing Fundamentals of International Trade Law} (UK:
Cambridge University Press, 2006), p. 82.

\textsuperscript{127} See supra discussion 3.1.2.
Ministerial Conference and the General Council only. According to the WTO Agreement, the Ministerial Conference and the General Council are vested with “the exclusive authority to adopt interpretations of this [WTO] Agreement and of the Multilateral Trade Agreements.”128 From an institutional design perspective, this authoritative interpretation “gives the political bodies of the WTO an opportunity to refine existing trade rules,” as well as “to correct (overturn) an interpretation given by a panel or the Appellate Body.”129 The authoritative interpretation is therefore considered as a “necessary instrument of checks and balance” against the judicial interpretation made by panels and the Appellate Body.130 However, as the adoption requires a three-fourths majority of members, the authoritative interpretation under Article IX:2 has never had any practice so far. In fact, even if the Ministerial Conference or General Council wants to overturn the “judicial interpretation” through “authoritative interpretation,” the three-fourths procedure requirement will be much more bothersome compared with panel and the Appellate Body report’s adoption through “reverse consensus,” a quasi-automatic adoption process. The imbalance of the tension between “judicial interpretation” vs. “authoritative interpretation” means that decisions from panels and the Appellate Body gain the “de facto finality as interpretations of the law, even if they lack de jure finality.”131

The imbalance between “judicial interpretation” vs. “authoritative interpretation” has enormous political significance under the contemporary institutional framework of the WTO. As Oesch suggests, “[t]he WTO internal institutional structure has not (yet) developed according to a constitutional tradition of separation and balance of powers.”132 There is no body in the WTO that assumes a truly executive function which can offer checks and balance against the “judicial function” of panels and the Appellate Body. Against the background of the WTO scholarship which is undergoing a paradigm shift from “functionalism to constitutionalism,” the role of panels and the Appellate Body in the dispute settlement process is heading towards a less deferential and more intrusive direction.133 Against this background, we see no remedy for the institutional imbalance between “judicial interpretation” vs. “authoritative interpretation.”

Moreover, the interpretative approach’s obsession with the “common intentions” of all members appears to be more destructive than constructive to the future development of the WTO as an open and non-exclusive international trading regime. By resorting to the “intentions of the parties,” the intention school’s inability to acknowledge the intentions of late acceding parties will inevitably trace back to the intentions of the founding fathers, in which is embedded an “origin-seeking retrospective effect.” It is in this regard that the intention school is also called a “founding fathers” school.134 Upon its establishment, the reflection of the founding fathers’ intention brings in the founding parties’ consent, which obviously legitimizes the binding force of the treaty regime. However, the reflection of late acceding parties’ consent become something

128 Article IX:2, the WTO Agreement.
130 Ibid.
133 Ibid., pp. 239-243.
134 Fitzmaurice, op. cit., p. 1.
impossible due to the “origin-seeking retrospective” mechanism. This “origin-seeking retrospective” mechanism therefore creates two problems. Firstly, the failure of the incorporation of the late acceding parties’ consent renders the enlarged treaty regime illegitimate. Secondly, the treaty regime will maintain the purity of the founding parties’ intentions due to the function of the “origin-seeking retrospective” mechanism, which renders the development and legal evolution of the treaty regime almost impossible.

This brings us to the root of the jurisprudence of the common intention approach, the social contract theory justifying trading regime’s legitimacy through consent found in common intentions. Just like the social contract theory attempting to justify that autonomous and independent individuals submit themselves to the social contract while at the same time remain free and autonomous, the common intention approach binds sovereign countries to the trading regime through consent found in common intentions. However, when the “origin-seeking retrospective” mechanism justifies the legitimacy of the trading regime only through the “common intentions” of the founding members, the common intention approach inevitably encounters the same theoretical deficit of the traditional social contract theory. Eminent legal historian Henry Maine criticizes social contract theory as lawyers’ ahistoric “superstition,” a misuse of the “Roman jurisprudence of Contract.”135 By making the social contract into the first mover of social development, the traditional social contract theory perceives the social development as a sudden leap from the state of nature to the state of civil society upon the birth of a social contract rather than a gradual and imperceptible process.136 Similarly, the common intention approach’s “origin-seeking retrospective” mechanism makes the gradual and imperceptible process of growth of the WTO impossible as it keeps returning the common intention back to the founding members, the point of origin of the birth of the WTO.

The common intention approach’s intentional or unintentional misuse of the social contract theory constructs the “common intentions of all members” at the founding moment as the first mover of the WTO trading regime, and thus reinforces its inability to perceive the evolving nature of the WTO regime. It further completes the “incomplete contract” and finishes the “unfinished stories,” which leaves no room for the play of contingency measures. The so-called common intentions of all members thus frozen at the founding moment of the WTO’s creation further strengthen the rigidity of the trading regime. The flexibility of the contingency measure to balance the rigidity of the rules becomes unavailable.

Under the “origin-seeking retrospective” mechanism, it is, therefore, not surprising at all to see the failure to apply the contingency measures to Paragraph 11.3 of the Protocol. Contrary to the general exceptions’ unforeseeable and forward-looking nature, the decision reveals the Panel and Appellate Body’s backward-looking and closed instead of forward-looking and open perspective on WTO commitments. It is also not surprising to see that the “customary rules of interpretation of public international law” in a 1995 trading framework were confined backwards to a 1969 treaty framework. The obsession with the common intentions at the founding moment therefore sets a limit on WTO jurisprudence, a limit both as an end and a beginning where various non-legal challenges end and legitimacy begins.137 The function of this limit is an

136 Ibid., p. 68. According to Maine, Hobbes and Locke share this problem with each other, although they might be categorized into different schools of social contract theory.
“exercise of purity” which is produced by the “culture of dominance.” Furthermore, this perspective creates a myth of legal transcendence serving as the “ultimate power to determine, define and exclude,” as a “legally-sanctioned oppression” showing the WTO regime’s inability to appreciate difference. To borrow a term from critical legal theory, the common intention approach’s “origin-seeking retrospective” mechanism is “an economy of sameness.”

This “origin-seeking retrospective” mechanism’s inability to accept difference further challenges the WTO’s legitimacy. As the most sophisticated world trading system in history, the WTO is grounded on Ricardo’s theory of comparative advantage, the fundamental theoretical assumption that underpins liberal trade policies. According to this principle, free trade makes every participating country better off because of the existence of differences in production. Something fundamental in the theory of comparative advantage is that difference is the fundamental feature of the constitution of international trade system. When it comes to the question of fairness of international trade law, Jackson argues that some of the “unfairness” problems are in fact “difference” problems. To maintain the differences is fundamental to WTO legitimacy. Hudec also emphasizes the fundamental significance of differences to the WTO in his case study of complaints that resort to the “level-playing-field” fairness concept in order to protest imports from developing countries with lower environmental standards. He argues that it is widely agreed that “some differences in competitive conditions between countries are both natural and proper,” and are “universally considered to be a fair and proper basis of international trade”. Arup too in his examination of the role of WTO agreements in the globalization of law argues that difference and diversity are inevitable and invaluable during the process of globalization. According to Arup, while globalization “produces convergence or homogeneity in law,” “difference remains sustainable;” moreover, globalization as a process of “unity in diversity,” is a “negotiated and contingent” process of global “structuration.” The common intention approach as “an economy of sameness” fundamentally undermines the legitimacy of the WTO trading regime and leaves no room for the regime’s future evolution.

4. Concluding Remarks

Building on our analysis of the Panel and Appellate Body’s decisions in China – Raw Materials, this paper critically examines their application of Article XX of GATT 1994 to paragraph 11.3 of China’s Accession Protocol. The paper’s analysis reveals that both the Panel and Appellate Body’s decisions were misled by discussions of China’s trading rights commitment in a previous case, and erred in their interpretation of the Accession Protocol as an integral part of the WTO Agreement and in understanding the nature of general exceptions as contingency measures. Further examination of the interpretation approach—asserting common intentions of all members through the 1969 Vienna Convention—reveals some theoretical deficits in the Appellate Body’s interpretation jurisprudence.

138 Ibid., p. 20.
139 Ibid., pp. 40-41.
140 Ibid., p. 110.
142 Ibid., pp. 30, 248.
143 Hudec, op. cit., p. 272.
144 Arup, op. cit., pp. 7, 19, 21.
The common intention approach deviates significantly from the general practice of public international law. Stemming from its problematic analysis of the Protocol as an integral part of the WTO Agreement, the Panel and Appellate Body confine “customary rules of interpretation of public international law” to Articles 31 and 32 of the 1969 Vienna Convention. This activist deviation from general jurisprudence of public international law implies a dangerous “judicial activism” tendency. The Panel and Appellate Body’s recourse to “common intentions” of all members for denying application of general exceptions to the Protocol further deviates from general jurisprudence of treaty interpretation which also reveals a judicial activism tendency. As the unchallenged “judicial interpretation” power, the Appellate Body gains itself the “de facto finality” as interpretations of the law, what can be identified as common intention then is the Appellate Body’s intention instead of all WTO members. The WTO is then turning into an Appellate Body-driven instead of member-driven institution. The common intention approach sets the interpretation of the Protocol in a problematic direction and fails in applying Article XX to China – Raw Materials.

A further critical examination reveals that the common intention approach presents further challenges to the legitimacy of the WTO trading regime. The approach’s “origin-seeking retrospective” mechanism functions as an economy of sameness to exclude differences from the contingency measures, which makes the rigidity of the regime unchallenged. This origin-seeking and backward-looking tendency not only presents challenges to WTO legitimacy, but also prevents the healthy evolution of the trading regime. Therefore, extreme caution should be exercised as to the common intention approach of interpretation in particular and the judicial activism of panels and the Appellate Body in general. The “common intentions” of all WTO members should be located in the evolving process of the trading regime instead of statically at the founding moment of the treaty framework. This will allow acknowledgement of differences and facilitate the evolution of the WTO framework. Flexibility of contingency measures will then be recognized to balance the rigidity of the framework, which will make the WTO framework an effective, robust, and evolving trading regime.