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

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

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

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

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