Interpreting GATT Using the Vienna Convention on the Law of Treaties: A Method to Increase the Legitimacy of the Dispute Settlement System

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For most of its history, the General Agreement on Tariffs and Trade (GATT) dispute settlement system has advanced the principles of settlement and negotiation to resolve disputes. This is changing in light of the creation of the World Trade Organization (WTO) in 1994 and the new Understanding on Dispute Settlement (DSU) agreed to by the GATT parties in 1994. The WTO and the DSU instituted new procedures that increase the power of the dispute settlement system to adjudicate disputes by reference to rules, rather than leaving the disputing parties to negotiate a result based on their relative economic or political power. Because the rule-based system is new, the WTO dispute settlement panels which rely on the system must inspire confidence among WTO members by making wound decisions. Increased confidence will encourage the contracting parties to use the dispute settlement system itself instead of using unilateral retaliatory actions. By having a legitimate, predictable rule-based system, the WTO hopes to encourage participation in its dispute settlement system, thereby leading to the increased confidence of WTO members in the power of the negotiated tariffs themselves.

This Note will examine the results of the Appellate Body decision in *European Communities—Custom Classifications of Certain Computer Equipment* ("*Computer Equipment*"). In *Computer Equipment*, the issue turned on what method of treaty interpretation a body used to interpret the GATT. This Note argues that the conclusion of the Appellate Body in *Computer Equipment* advances two principles. First, that the WTO is to be considered a rule-based constitutional body, not a negotiation-based contractual body. Second, that applying a clear and predictable method of treaty interpretation, increases the legitimacy of a decision. Finally, this note argues that this method of interpretation will increase the confidence of parties in getting

predictable results from the dispute settlement system, and will therefore increase the amount of negotiation for new tariff concessions, leading to a reduction in tariffs.

I. GATT: THE EVOLUTION OF THE DISPUTE SETTLEMENT SYSTEM

A. HISTORY OF DISPUTE SETTLEMENT

The GATT[1] was designed to promote the liberalization of trade.[2] To reach this goal, the parties to the treaty advocated tariffs that were binding on the parties and an openness and clarity in governmental trade policy to protect the value of the tariffs.[3] Originally, the International Trade Organization (ITO) was to be the enforcing institution behind the GATT.[4] The ITO's purpose would have been to ensure that countries followed their tariff bindings, and that they did not devalue them by erecting any non-tariff barriers to trade.[5] However, the ITO never came into being,[6] and the parties to the GATT were forced to develop a loose, consensus-based, member-enforced dispute settlement system.[7]

For the first few years of the GATT's existence, the parties settled disputes by negotiation and the consensus of the con-

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1. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194.

2. *See* John H. Jackson, The World Trading System: Law and Policy of International Economic Relations 33 (1989) (explaining the origins of GATT).

3. *See* JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS, 3d ed. 502 (1995) (noting that the philosophy of the GATT is that protection should be transparent and only in the form of tariffs). The author also notes that the tariff bindings are then protected under the Article I Most Favored Nation (MFN) clause, and the Article III National Treatment clause.

4. *See* JACKSON *supra* note 2, at 32.

5. *See id.* Non-tariff barriers include maneuvers such as internal taxation on foreign goods and changing a product's tariff classification to defeat the value of the negotiated tariff.

6. *See* JACKSON *supra* note 2, at 34. One of the reasons the ITO failed was mainly because the United States Senate felt that too much power would be in the hands of other countries, at the expense of state sovereignty.

7. *See id.* at 37; *see also* Michael K. Young, *Dispute Resolution in the Uruguay Round: Lawyers Triumph Over Diplomats*, 29 INT'L LAW. 389, 392 (1995). (Noting that the original dispute resolution was "nonlegalistic." He notes that the working parties, which were developed to resolve disputes, were mostly conciliatory and mediative. *Id.* at 393. The "working parties" main function was to find a mutually acceptable solution rather than to impose a solution based on their own considerations of the provisions of the GATT. *Id.)*

tracting parties.[8] Subsequently, they developed neutral third party Panels to adjudicate disputes.[9] Following the original GATT principle of clarity in international trade, the Panels strictly applied the rules of the GATT in dispute settlements.[10] However, the Panels had no process for enforcing their decisions.[11] Losing countries could block adoption of the ruling and then negotiate a settlement in their favor.[12] Since they could prevail on the merits, but still not be sure of relief, many countries became dissatisfied with the GATT dispute settlement arrangement.[13] In the late 1960's, the dispute settlement system fell into disuse,[14] followed by an increase of usage in the 1970's.[15] Starting in 1980, the dispute settlement system started transforming itself from a diplomatic body into a judicial

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8. *See* JACKSON *supra* note 2, at 95. In the beginning of the GATT, dispute settlement system disputes were settled at semi-annual meetings of the parties. *Id.* Then "working parties," consisting of representatives of the disputing parties, were used to settle disputes. *Id. See also* ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM 31 (1993). The author notes that the original goal of the GATT parties, lower tariffs, was basically realized by the early 1960's. The disputes were not complex and could be solved "as a matter of arithmetic." *Id.* at 31.

9. *See* JACKSON *supra* note 2, at 95.

10. *See* HUDEC *supra* note 8, at 266. The author notes that vague rules, which allow government discretion, would leave such a large organization such as the GATT parties in a shambles. The author notes the *Superfund* case and the *337* case as examples of GATT Panels strictly applying the GATT itself. *Id.* at 266. The reason the Panels decided to apply strict rules is so the rules could provide clear guidance to other countries. *Id.* at 267.

11. *See* Cristoph T. Feddersen, *Focusing on Substantive Law in International Economic Relations:* The Public Morals *of GATT's Article XX(a) and "Conventional" Rules of Interpretation*, 7 MINN. J. GLOBAL TRADE 75, 82 (1998) (noting that the GATT lacked rules for the procedure of dispute settlement and for enforcement of obligations).

12. *See id.*

13. *See* Thomas J. Dillon, Jr., *The World Trade Organization: A New Legal Order for World Trade?*, 16 MICH. J. INT'L L. 349, 354 (1995) (noting that some weaknesses included the fact that there was ambiguity about the power of the contracting parties to make certain decisions, and overall problems with dispute settlement); *see also* Ramon R, Gupta, Comment, *Appellate Body Interpretation of the WTO Agreement: A Critique in Light of Japan—Taxes on Alcoholic Beverages*, 6 PAC. RIM L. & POL'Y J. 683, 689 (1997) (noting that a major purpose of new dispute resolution system was to stop unilateral action by countries who did not think the present system could help them gain relief).

14. *See* HUDEC *supra* note 8, at 31 (pointing out that no countries used the dispute settlement system for a period of years in the late 1960's, with a slight increase in the 1970's).

15. *See id.*

body with its authority based on legal obligation.[16] Member countries accepted the dispute settlement system's increased legal authority.[17] However, by the time of the Uruguay Round of trade negotiations in 1994, there was a growing consensus that the dispute settlement system should evolve even further and have power to make decisive and binding rulings.[18] The parties desired a system in which the final outcome was less dependant on power and diplomacy and more dependant on rules and adjudication.[19]

In 1994, after the Uruguay Round, the contracting parties created the WTO[20] and agreed to the new Understanding on Dispute Settlement (DSU).[21] The WTO was created to be an organizing and enforcing body similar to what the ITO was to have been.[22] The DSU included numerous provisions to increase the power of the dispute settlement system to enforce Panel rulings, including automatic adoption of Panel decisions so that a losing party could not block the adoption of the decisions.[23] Together,

16. *See* Robert E. Hudec, *The New WTO Dispute Settlement Procedure: An Overview of the First Three Years*, 8 MINN. J. GLOBAL TRADE 1, 4 (1999) (noting the evolution of the GATT system).

17. *See id.*

18. *See* JOHN H. JACKSON, RESTRUCTURING THE GATT SYSTEM 16 (1990) (noting that countries took advantage of the many loopholes and ambiguities in the agreement). The author also explains that the dissatisfaction arose as the disputes became more complex. *Id.* at 37. Early disputes had generally been about tariff obligations and were easily negotiated. *Id.* at 36. However, as tariffs were lowered countries began to use non-tariff barriers to trade, such as internal quotas and subsidies. *Id.* at 37. Since these could be administered in a subtle manner, the dispute settlement system was not effective against these problems. *Id.*

19. *See id.* at 52-53 (arguing for a rule-oriented approach). *But see* Phillip R. Trimble, *International Trade and the "Rule of Law"*, 83 MICH. L. REV. 1016, 1026 (1985) (arguing that vague rules which lead to negotiation are better than strictly enforced rules).

20. *See* Dillon *supra* note 13, at 372.

21. Understanding on Rules and Procedures Governing the Settlement of Disputes, 33 I.L.M. 112 (1993) [hereinafter DSU].

22. *See* Dillon *supra* note 13, at 361.

23. *See generally* Kim Rubenstein & Jenny Schultz, *Bringing Law and Order to International Trade: Administrative Law Principles and the GATT/WTO*, 11 ST. JOHN'S J. LEGAL COMMENT. 271, 278 (1996). The changes included that Panel decisions are now automatically binding unless the WTO members vote against them. Previously, the decisions did not take effect until a consensus of the members had voted to enforce them. *Id.* at 288. The old system allowed the losing party to effectively block the adoption of Panel reports. Under the new system that power is gone. *Id.* Another major change is that Panel reports, if not adopted by the parties, were kept secret, now they are published unless there is a consensus objection. *Id.* at 292. This leads to more transparency in the decision-making process.

the WTO and the DSU have led to a more adjudicative, rule-based approach to dispute resolution.[24] Commentators anticipate that under the WTO and the DSU, the system will become more predictable and efficient,[25] furthering the overall purpose of the GATT, which is to lower barriers to trade.[26]

B. LEGITIMACY OF AN ADJUDICATIVE BODY

Although the DSU made the dispute settlement system procedurally stronger, a key factor in developing a rule-based adjudicative system is that the parties using it must have confidence in the substantive decisions of the adjudicative body.[27] The GATT parties have long treated adopted Panel reports as legally binding,[28] and under the new DSU it is very difficult for a losing party to stop the adoption of a report. However, if a harmed party does not think a dispute settlement panel will deliver a clear, rational, and predictable result, the party will forego dispute settlement altogether and take unilateral action.[29]

Another change is that it is easier for a complainant to set up a Panel, while in the past it was easy for the other party to block it and drag out the process. *See* Debra P Steger, *The Significance of the World Trade Organization for the Future of the Trading System*, 88 AM. SOC'Y INT'L. L. PROC. 125, 130 (1994) (noting some of the changes to the system).

24. *See* Amelia Porges, *The WTO and the New Dispute Settlement*, 88 AM. SOC'Y INT'L L. PROC. 131, 135 (1994) ("[t]he procedures in the DSU focus disputes more than ever before on rule compliance, and less on conciliation"); *But see* Young, *supra* note 7, at 390 (noting that not all countries wanted the new system, some preferred the old system of diplomacy and negotiation).

25. *See id.*

26. *See generally* ALAN H. SCHACHTER, INTERPRETATION OF AMBIGUOUS DOCUMENTS BY INTERNATIONAL ADMINISTRATIVE TRIBUNALS 1 (1964) (noting the key purpose of international organizations is to provide peace and stability. He argues that this is best achieved by having a strong and independent administration). *See also* Gupta *supra* note 13, at 700 (noting an analogy between the purpose of the GATT, which was clarity in international trade, and the WTO and DSU, which is clarity and openness in the dispute settlement system).

27. *See* Hudec *supra* note 16, at 11 (stating that the first question to be asked when evaluating whether the new dispute settlement system will work is "what kind of political will stands behind it"); *see also* JACKSON *supra* note 8, at 75 (arguing that without integrity and credibility, a legal system will have no "moral force"); Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705, 705 (1988) ("The surprising thing about international law is that nations ever obey its strictures or carry out its mandates.").

28. *See* John H. Jackson, Editorial Comment, *The WTO Dispute Settlement Understanding—Misunderstandings on the Nature of Legal Obligation*, 91 AM. J. INT'L L. 60 (1997).

29. *See* Young *supra* note 7, at 408. The author notes that people are more likely to accept adverse political decisions if those decisions are made by political institutions they consider legitimate. *See also* ILMAR TAMMELO, TREATY INTERPRETATION AND PRACTICAL REASON: TOWARDS A GENERAL THEORY OF LEGAL

An important factor in developing legitimacy is the quality of the institution's substantive actions.[30] This quality is based on the consistency, clarity, coherence, and persuasiveness of its decisions.[31] Although there is no rule of *stare decisis* in the WTO legal system, dispute settlement panels routinely follow older decisions. Thus, many scholars feel that the WTO must build up solid case law to provide parties with predictable guidance.[32] However, the dispute settlement system's general problem of providing parties with clear and rational reasons for a decision is especially challenging in unstable areas of the law such as treaty interpretation.[33]

C. INTERPRETING TREATIES: THE BATTLE BETWEEN TEXTUALISTS AND INTENTIONALISTS

Courts interpreting treaties generally use one of two methods of interpretation: a textualist approach or an intentionalist approach.[34] Proponents of each method believe that their method advances the most important values underlying treaty law.[35] The textualist believes that treaties should be *objectively*

INTERPRETATION 4 (1967) (stating that states are discouraged from making agreements and from allowing disputes to be settled by a third party when there is an uncertainty as to which principles of interpretation apply); Gupta *supra* note 13, at 701 (stating that Panels are mandated, in light of the purpose of the WTO, to create more predictable rules).

30. *See* SCHACHTER *supra* note 26, at 409; Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193, 212 (1996) (noting that a "reasonable, nuanced approach by WTO Panels" will help the credibility of the dispute settlement system and lessen dangers of unilateral action by governments).

31. *See* SCHACHTER *supra* note 26, at 409; Porges *supra* note 24 at 136 (noting that if Panel reports are to be considered as quasi-binding precedent, the parties will demand that the reports be more formal and transparent); *see also* JACKSON *supra* note 18, at 78 ("[I]t may be more important to clarify and provide predictive guidance about the application of a rule than to see that a 'judgment' be acceptable to either or both parties to the immediate dispute."); *see also* Franck *supra* note 27, at 712 (noting that when a court develops a rule that is coherent and clear, the rule will be seen as being more legitimate than a rule that appears arbitrary).

32. *See* Gupta *supra* note 13, at 701.

33. *See generally* David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. REV. 953, 954 (1994) (looking for a "method in the madness" of treaty interpretation). The author also notes that without a clear doctrine, courts have been inconsistent and confusing. *Id.* at 1034.

34. *See id.* Another school of interpretation is the purposivist school. *Id.* The purposivist looks for the purpose of the treaty and applies that in interpretation. *Id.* Although technically different, for the purposes and scope of this Note, purposivist will be considered analogous to intentionalist.

35. *See id.* at 955.

clear to all the parties to them, and therefore the textualist will find a meaning that is most objectively reasonable.[36] The intentionalist, on the other hand, believes that the actual *subjective* expectations of the parties should be protected, and therefore, the intentionalist will look for evidence of what each party thought the words meant and which meaning captures the true intent.[37]

Intentionalist treaty analysis, in which the most important goal is to discover and enforce the parties' expectations,[38] is analogous to modern common law contract interpretation.[39] Modern contract law interpretation is based on the principle that the most important value in is to protect a party's reasonable expectations.[40] The classical method of contract interpretation, on the other hand, preferred an objective approach, emphasizing that contract law and enforcement should be predictable and clear.[41]

The key difference between the two approaches is that, under the modern intentionalist approach, a contract term will be construed against the party who knew (or should have known) that the other party may give the term a contrary interpretation.[42] Conversely, under the textualist, objective approach, a court simply gives the term the meaning that is most reasonable in light of the circumstances.[43]

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36. *See id.*

37. *See id.*

38. *See generally* MYRES S. MCDOUGAL ET AL., THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER 90 (1967) (noting different values underlying methods of treaty interpretation).

39. *See* JOHN D. CAMILLARI & JOSEPH M. PERILLO, CONTRACTS, 3D ED. (1987).

40. *Id.*

41. *Id.*

42. *See* RESTATEMENT (SECOND) CONTRACTS § 201(2).

> Where the parties have attached different meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made
>
> (a) that party did not know of any different meaning attached by the other, and the other knew the meaning attached by the first party; or
>
> (b) that party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party.

Id.

43. *See,* e.g., RESTATEMENT CONTRACTS (1932). This was the first restatement of contracts, and it did not contain the rule cited *supra*, at note 42, which was developed by the reporter's of the second restatement.

D. INTERPRETING TREATIES: THE VIENNA CONVENTION ON THE LAW OF TREATIES

After World War II, countries around the world desired a consistent and uniform law of treaties.[44] This effort culminated in the *Vienna Convention on the Law of Treaties (Vienna Convention)*.[45] Among numerous sections dealing with various aspects of treaty law,[46] Articles 31 to 33 of the *Vienna Convention* set out the rules an adjudicative body is to use when interpreting a treaty.[47] The interpretative articles were developed in

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44. *See* Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 VA. J. INT'L L. 281, 289 (1988). Until the Vienna Convention, rules dealing with the form, function, duration and scope of treaties were based on custom. *Id.* The process of codifying international law started in 1947 was finally completed in 1969. *Id.* at 290-91.

45. Vienna Convention on the Law of Treaties (May 23, 1969), 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969). *See generally*, I. M. SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 12 (1973) (noting that the Vienna Convention was partly a codification of existing international law, and also an attempt at progressive modification of the existing customary law); Daniel N. Hylton, *Default Breakdown: The Vienna Convention on the Law of Treaties' Inadequate Framework on Reservations*, 27 VAND. J. TRANSNAT'L L. 419, 424 (1994) (noting that the Vienna Convention was attempt to bring certainty to international law).

46. Overall, the Convention deals with treaty issues such as entry into force, termination, application, and so on.

47. *Article 31*

General Rule of Interpretation

1. 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 light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given a term if it is established that the parties so intended.

Article 32

part to end the dispute between the intentionalists and textualists and to provide consistency in treaty interpretation by courts.[48] This consistency would then assist countries to better predict the results of their actions, and permit them to plan with more foresight.

The method used by the *Vienna Convention* is an organized hierarchy of the standard canons of interpretation. Article 31 states that a court should start by looking for the ordinary meaning of the words in light of the context, object, and purpose of the agreement.[49] The court is also to inquire into subsequent agreements by the parties that may shed light on the meaning.[50] Only if the meaning is still unclear may the court then inquire into the negotiating history of the agreement.[51]

Articles 31 and 32 were originally thought to be a victory for the objective, textualist school of interpretation.[52] Advocates of the intentionalist method felt that the *Vienna Convention* method did not give enough emphasis to the parties' intent.[53] However, the *Vienna Convention* method has turned out to be flexible, and courts have a fair amount of discretion when applying it.[54] A court that wants to follow intentionalist principles is still able to justify itself by reference to the *Vienna Conven-*

Supplementary Means of Interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

48. *See* RESTATEMENT (THIRD) FOREIGN RELATIONS OF THE UNITED STATES §325 (1986). The Restatement follows the exact text of the Vienna Convention §31. The reporter notes that its purpose is to make the law consistent.

49. Vienna Convention art. 31(a).

50. *Id.* art. 31(b).

51. *Id.* art. 32.

52. *See* MYRES S. MCDOUGAL ET AL., THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER 90 (1967) (arguing that Vienna Convention goes against the accepted wisdom that the shared expectations of the parties is the goal of treaty interpretation).

53. *See* Bederman *supra* note 33, at 954-955, 975 (noting that the Vienna Convention focuses primarily on the text of the agreement); TAMMELO *supra* note 29, at 19 (stating that the primary goal of the Vienna Convention is not to search for the intention of the parties).

54. *See* Bederman *supra* note 33, at 975-76 (analyzing United State Supreme Court decisions that have used the *Vienna Convention* and finding them inconsistent).

tion.[55] One commentator notes that courts are able to use the *Vienna Convention* method to inquire into the negotiating history in order to evaluate whether the textual meaning is clear in the first place, and then proceed to apply the intentionalist method.[56] Other commentators have also justified using the *Vienna Convention* method to advocate a variety of interpretative techniques.[57]

E. INTERPRETATIONS OF THE GATT BY PANELS

Since clarity and predictability are goals of the dispute settlement system, WTO Panels have consistently said that the *Vienna Convention* is the tool they use to interpret the GATT.[58] Most commentators have focused on the need for the panels to use the *Vienna Convention* in order to develop a body of interpretative decisions that feature clear rules.[59] The commentators believe that with clear, bright-line rules to guide them, future panels will not have to do a case-by-case analysis. Furthermore, the parties to a dispute will be able to predict the result of their actions, and will thus be able to plan accordingly.[60]

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55. *See id.*

56. *See* TSUNE-CHI YU, THE INTERPRETATION OF TREATIES 28 (1927) (arguing that artificial rules are not good, and that courts should develop rules for each specific case).

57. Some have advocated that Panels should protect a state's sovereignty and defer to a state's interpretation of the agreement if it is reasonable. *See* James R. Cannon, Jr. & Karen L. Bland, *GATT Panels Need Restraining Principles*, 24 LAW & POL'Y INT'L BUS. 1167, 1184 (1993). This rule is analogous to the United State administrative agency deference rule developed in *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) (holding that if a statute is ambiguous, then an agency's interpretation of it will only be reviewed under a reasonableness standard). *But see* Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standards of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193, 213 (1996) (arguing against judicial restraint by Panels because it could lead to ambiguous rules).

Others have stated that the overriding principle is that each treaty is different and should be treated differently, and a court should look at the treaty's formation and other factors and then decide which canon of interpretation is most applicable. *See* TAMMELO *supra* note 29, at 49; *see also* Bederman *supra* note 33, at 1034 (concluding that treaties are *sui generis* and that courts should treat them as neither statutes nor contracts).

58. *See e.g.*, Maria Frankowska, *The Vienna Convention on the Law of Treaties before the United States Court*, 28 VA. J. INT'L L. 281, 285 (1988) (noting that even before the Convention entered into force, courts invoked its principles as codifying the existing law).

59. *See* Gupta *supra* note 13, at 685 (arguing that the there is a need for predictability in international trade law, and that the Appellate Body's decision in this case was inadequate to provide that predictability).

60. *Id.*

Another need, which has not been addressed by commentators, is that the Appellate Body needs to put forward the appropriate method, whether intentionalist or textualist, for using the *Vienna Convention* itself. This is important, because depending on how a panel applies the *Vienna Convention*, a decision may come out differently. In *European Communities—Custom Classifications of Certain Computer Equipment* ("*Computer Equipment*"), the Appellate Body overturned the Panel's decision, and in the process set out two clear rules.[61] First, they held that when interpreting a country's tariff schedule, another party's legitimate expectations had no relevance. Second, they held that the Panel had misapplied the *Vienna Convention*, and that panels need to apply the *Vienna Convention* itself clearly and methodically.[62] This Note will analyze what the future impact of the WTO Appellate Body decision in *Computer Equipment* will be.

II. THE SIGNIFICANCE OF THE *COMPUTER EQUIPMENT* DISPUTE

A. ANALYSIS BY PANEL AND APPELLATE BODY

The *Computer Equipment* dispute arose when the United States claimed that the European Community (EC) had violated Article II of the GATT by charging a higher tariff for Local Area Network (LAN) computer equipment than it was allowed to under its bound tariff Schedule.[63] LAN's were not mentioned specifically in the EC Schedule LXXX tariff bindings. However, the United States claimed that LAN equipment should be classified under heading 84.17, as Automatic Data Processing (ADP) equipment, while the EC countered that LAN equipment was properly classified under heading 85.17 as telecommunications equipment. The issue presented to the Panel by the parties was whether the EC had violated Article II.[64] This ultimately turned on the interpretation of the term "ADP."

The parties specifically stipulated that the Panel was not required to find what the correct classification of LAN's should be.[65] Rather, the Panel was only required to find whether the EC had violated their tariff binding by classifying LAN equip-

61. European Communities—Custom Classifications of Certain Computer Equipment, WTO/DS68/AB/R (1998).
62. *Id.*
63. *Id.* ¶ *27.*
64. *Id.* ¶ *1.*
65. *Id.* ¶ *90.*

ment as telecommunications equipment rather than ADP equipment. The Panel used the *Vienna Convention* to ascertain the meaning of ADP. It first looked at the plain meaning of the word and concluded that it could not be determined in isolation. It then looked at the context of the word by looking at Schedule LXXX, Article II of the GATT, and the GATT as a whole. From these, the Panel did not extract the meaning of ADP. However, it did conclude, in light of the context of Article II and the GATT text, that a party's "legitimate expectations" should be protected. It then determined that to protect those expectations, a party's reasonable understanding of the meaning of a term, created during negotiations, was relevant in interpreting that term.

Since the United Kingdom, negotiating on behalf of the EC, had treated LAN equipment as ADP equipment during tariff negotiations, the Panel held that the U.S. had legitimate expectations in believing that is what the term meant.[66] The Panel also held that the *importing* country has the burden of clarifying any ambiguities it has in its Schedules.[67] These two factors led the Panel to conclude that the U.S. was justified in believing that LAN equipment should be classified as ADP equipment, and that the U.K. had not rebutted that justification. The Panel then concluded that the U.S.'s legitimate expectations should determine the meaning of ADP in Schedule LXXX.[68]

The Appellate Body overruled the Panel. It held that a single party's "legitimate expectations" were irrelevant in determining the meaning of a treaty term.[69] It also held that the Panel erred in its use of the *Vienna Convention* by extracting such a doctrine from the context of the GATT. The Appellate Body noted that finding the common meaning of the word, not just one party's interpretation, better serves the values of clarity and predictability.[70] Since GATT is a multi-party document, allowing a single party's meaning to override other parties' meanings would not lead to clarity.[71] The Appellate Body also concluded that the Panel had erred in holding that the U.S. was not required to clarify any ambiguities.[72] It held that all of the

66. *Id.* ¶ *76.*
67. *Id.* ¶ *101.*
68. *Id.*
69. *Id.* ¶ *84.*
70. *Id.*
71. *Id.*
72. *Id.* ¶ *110.*

disputing countries had the duty to clarify a term during negotiations.[73]

The Appellate Body then explained how the Panel should have utilized the *Vienna Convention*.[74] It emphasized that the purpose of the *Vienna Convention* method is to find the common meaning of a term, not one party's meaning. The Appellate Body first applied Article 31 and noted that the meaning of ADP was still ambiguous.[75] Next, it applied Article 32, which allows a court to look at extrinsic information to determine the meaning of a word. The Appellate Body noted that different countries had treated LAN equipment differently, which showed that there was not an accepted meaning of the term.[76] It also noted that the U.S. had treated LAN equipment as telecommunications equipment prior to 1992. Additionally, it also noted that the *Harmonized System*[77] would be valuable in determining the meaning of a term.[78] The Appellate Body found all of these factors, which the Panel had ignored because they were not relevant to the U.S.'s expectations, to be significant in determining the meaning of the term ADP.[79]

B. THE PANEL USED THE *VIENNA CONVENTION* TO INTERPRET THE GATT LIKE A CONTRACT BETWEEN TWO PARTIES

The Panel's result is analogous to what would occur under modern contract law analysis. Under the modern law, as set out in the Second Restatement of Contracts, when two parties disagree on the meaning of a term, the term is construed against the party who knew (or should have known) that the other party might give it another meaning.[80] This view advances the overriding principle of modern contract interpretation, which is to enforce the intent of the parties.[81] This, in turn, leads to greater

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73. *Id.*
74. *Id.* ¶ *85.*
75. *Id.* ¶ *86.*
76. *Id.* ¶ *92.*
77. The *Harmonized System* is a tariff classification system that most WTO members adhere to so that tariff classifications are consistent from country to country. The Panel had not referred to it because the parties had specifically stated that the issue was not where LAN equipment should be classified, but rather whether the UK had broken its tariff binding. The U.S. probably thought they would lose if the issue was the proper classification of LAN equipment, so they tried to make it out to be a case of misrepresentation by the U.K.
78. *Id.* ¶ *89.*
79. *Id.* ¶ *98.*
80. *See supra* note 42 and accompanying text.
81. *See supra* note 39 and accompanying text.

confidence in contracts in general, which courts feel is good for the economy.[82] The Panel held that since the U.K. knew or should have known that the U.S. would think LAN's were ADP's, the burden of clarifying the term was on the U.K. Apparently, the Panel felt that by enforcing the deal, they could increase reliance on negotiation, which would lead to an overall reduction in tariffs.[83]

This would be a logical result except, as the Appellate Body noted, the U.S. and the U.K. are not the only parties bound by the GATT. Since, under the Most Favored Nation (MFN) clause, all countries receive the benefit of the bound tariff,[84] it is important to define the term by reference to all of them. Treating a term in a multi-lateral treaty by the definition misrepresented by one party to another party would lead to increasing ambiguity and disuse of the dispute settlement system.[85] This is because every negotiated term in the treaty would only mean what the exporter thought it meant. The result would be chaos.

C. THE APPELLATE BODY USED THE *VIENNA CONVENTION* TO INTERPRET THE GATT LIKE A CONSTITUTION OR STATUTE

The Appellate Body's interpretation was analogous to the modern textualist approach to statutory interpretation. The Appellate Body appeared to follow the philosophy of the textualists by holding that the subjective interpretations of one of the parties is simply not relevant to the meaning of the term.[86] In the statutory context, textualist courts have held that it is not relevant what the drafter of a statute thought it meant. Since courts apply the statute to the general public, it is only important to discover what the words mean.[87] GATT tariff Schedules are different from statutes because tariff Schedules are formed as if the parties were negotiating a contract. However, because of the MFN clause, the Schedules actually do apply to all members.[88] Therefore, it is important that all members know what the term means. The values that the statutory textualists are attempting to advance are a common understanding of the text

82. *See supra* note 42 and accompanying text.
83. *See supra* note 38 and accompanying text.
84. *See supra* note 3 and accompanying text.
85. *See supra* note 10 and accompanying text.
86. *See supra* note 36 and accompanying text.
87. *Id.*
88. *See supra* note 3 and accompanying text.

by an average person.[89] This is the same value that the Appellate Body is advancing in *Computer Equipment*. The Appellate Body interprets the *common* meaning of the word.

D. THE OVERALL DIFFERENCES BETWEEN THE PANEL AND APPELLATE BODY METHODS

In *Computer Equipment*, the Appellate Body rejected an approach that would inquire into a single party's subjective interpretation of a term and instead mandated a clear, objective method to determine meaning of the term "ADP." The Appellate Body methodically and clearly applied *Vienna Convention* Articles 31 and 32. The Panel, on the other hand, discarded the *Vienna Convention* method after determining that it was impossible to decipher the definition purely on the ordinary meaning of the words. The Appellate Body's rule of strictly following the *Vienna Convention* method is clearer than the Panel's rule. If future panels followed the *Computer Equipment* Panel, they would be able to develop arbitrary rules that fit the facts of the case.[90] The Appellate Body held that panels should not do that; rather they should strictly follow the *Vienna Convention* method.

Another difference between the Panel interpretation and the Appellate Body was use of the *Harmonized System*. The Panel did not even refer to the *Harmonized System* because it felt it would have no bearing on what the U.S. thought ADP meant while negotiating Schedule LXXX. The Appellate Body, on the other hand, felt that the *Harmonized System*'s definition of LAN *was* relevant to the meaning of the term.[91] In deciding this, the Appellate Body again emphasized that the terms are to be defined from a third-person objective viewpoint.[92] The Appellate Body noted that since the GATT has an MFN clause,[93] other parties have to know the meanings of its terms, not just the parties who negotiated it. Therefore, the Appellate Body decided that even if the dispute was only between two countries, the definition of a term is to be ascertained from beyond their view-

89. *See supra* note 36 and accompanying text.

90. *See supra* note 28 and accompanying text.

91. *See supra* note 66 and accompanying text.

92. *See supra* note 36 and accompanying text.

93. Article I of the GATT provides that countries have to afford every other country at least as favorable treatment as the treatment they give to the most favored nation.

points.[94] In terms of interpretation, this means that panels need to investigate how third parties treated the term.

The Appellate Body also differed from the Panel on the relevance of how third-party countries defined LANs. The Panel had noted that the various countries in the EC had been inconsistent in their treatment of LAN equipment. However, Ireland and the U. K. had treated LAN's as ADP's during the relevant time period. The Appellate Body held that it was relevant that the EC had been inconsistent. The Appellate Body reasoned that inconsistency was proof that the term was undefined, and therefore, that the U.S. had no reason to believe that it would be defined a certain way in the future.

Future disputes will be more easily resolved by reference to the Appellate Body's decision. The parties will have a more stable basis to analyze their own actions and predict the results that will occur.[95] Parties will then be more apt to follow the rules and there will be increased respect for the tariff bindings as negotiated.[96]

E. THE VALUES ADVANCED BY THE DIFFERENT METHODS

The Panel Report came up with a fair and reasonable result. The evidence tended to show that the U.K. did give the U.S. reason to believe that LAN's would be treated as ADP's. The Appellate Body might even have allowed this result if the Panel had not created the "legitimate expectations" rule of interpretation. If the Panel had simply gone through the *Vienna Convention* analysis without any side analysis, the Appellate Body would probably not have reviewed the decision so closely.

The Appellate Body had two main grounds of contention with the Panel's analysis. First, the Body did not want the Panel to use the *Vienna Convention* analysis to extract a *new* rule of interpretation. The Appellate Body held that the *Vienna Convention* rules, in themselves, are sufficient to ascertain the meanings of the GATT. Second, the Appellate Body held that even if a panel was allowed to extract new rules, the Panel in this case had extracted the wrong one. The Appellate Body concluded that the purpose of the GATT tariff bindings is not to protect legitimate expectations, but to provide clarity and predictability in international trade.

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94. *See supra* note 36 and accompanying text.
95. *Id.*
96. *See supra* note 10 and accompanying text.

By using objective analysis, the Appellate Body solidified the evolving position of the GATT as a constitutional or statutory type document instead of a contractual one. Although there is still contention among courts and commentators, the trend is that courts interpret the average statute objectively.[97] Moreover, in contract law, the change from the classical objective analysis to the modern subjective approach is almost total, as witnessed by the change from the First Restatement of Contracts to the Second Restatement.[98]

Treating the GATT as a constitution or statutory document instead of a contract is significant because it turns the GATT/WTO from a negotiating forum into a rules-based adjudicative system.[99] In a system where disputes are settled by reference to the relative power of the parties, any rules underlying the dispute are meaningless.[100] The parties will only acknowledge the rules when they agree with them. However, when the dispute is settled by reference to the rules themselves, parties must then confront these rules and agree to be bound by them. This respect for rules automatically leads to more confident negotiating, especially by weaker parties. It was important for GATT/WTO to make the transition, otherwise the powerful members would have mandated what the agreement meant.[101]

The other result of the Appellate Body's method of interpretation is not addressed in their report, though it does flow from it. In a legal system, when a court's opinions are reasonable and clear, members of the community are naturally more confident in the system and more apt to use it.[102] This is especially true in the WTO because there is nothing else binding the members to obey the decisions of the panels.[103] The opinion in *Computer Equipment* sets forth exactly how the Appellate Body wants future panels to use the *Vienna Convention*. The Appellate Body wants the *Vienna Convention* to be followed methodically, and they do not want panels to go off on tangents and extract doctrines from the text and apply them. The Appellate Body emphasized its displeasure with the way the Panel in this case developed the doctrine of legitimate expectations and then applied it with only token regard to the *Vienna Convention*. The

97. *See supra* note 36 and accompanying text.
98. *See supra* note 42 and accompanying text.
99. *See supra* note 23 and accompanying text.
100. *See supra* note 13 and accompanying text.
101. *See supra* note 12 and accompanying text.
102. *See supra* note 26 and accompanying text.
103. *See supra* note 27 and accompanying text.

Panel had quickly decided that the meaning was unascertainable without reference to the U.S.'s legitimate expectations. Since the *Vienna Convention* method is flexible,[104] it is important that the Appellate Body laid down specific guidelines that disputing parties can refer to when they want to calculate their liabilities during a dispute. The predictability a clear rule gives is valuable in a multi-party agreement like the GATT.

CONCLUSION

The Appellate Body in *Computer Equipment* advanced the evolution of the GATT/WTO organization from a negotiating body into a constitutional body. The Appellate Body accomplished this in two ways. First, by interpreting the GATT and tariff Schedules using objective methods instead of subjective methods, the Appellate Body promoted the clarity of the Agreement and the Schedules at the expense of the intent of the parties. This is the most common way to interpret a rule-based agreement such as a constitution. Second, by using a clear, objective method they should also increase the confidence of the WTO members in the dispute settlement system as an adjudicative body instead of a negotiating body. Both of these factors mean that the WTO will be considered a rule-base, adjudicative organization. The WTO members hope this will advance the overall purpose of the GATT/WTO, which is to lower the barriers to international trade.

104. *See supra* note 54 and accompanying text.