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## AN INTRODUCTORY OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE AND THEIR DISPUTE SETTLEMENT SYSTEM

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### ABSTRACT:

*In a general context, corresponds to a study of the World Trade Organization (WTO) and of its Dispute Settlement Understanding (DSU), and how does it work its Dispute Settlement body in the practice. In that light, is important to emphasize and recall the previous events that made the WTO what it is now. So, the aim of this research is how general approximation to study the General Agreement on Tariffs and Trade (GATT) and its Dispute Settlement System. This method used normative legal research. The research shows that The GATT 1947 and its dispute settlement system was in fact a big advance and change in the international trade history. Is remarkable this a "provisional" agreement lasted with full validity around 50 years, making the world trade a better place, mostly after those dark years of the World War II. So in fact, the GATT provide a effective way to deal with the daily outcomes of commerce not only in bilateral relation but in multilateral as well, providing clear rules to emphasize fair trade and tariffs in a secure and reliable way. Almost at the end of the so-called round of negotiations, the system showed some flaws that with the past of the time became more notorious.*

**Keywords;** General Agreement on Tariffs and Trade; World Trade Organization; Dispute Settlement System; Trade.

### A. Introduction

The world was finishing one of its darkest chapters in its history when the World War II ended. At that time, the only thing that all countries had in their plans was to obtain the immediate restoration of world peace, but this time it was necessary to keep peace and security prevail during time. This is also why it was necessary to make a system where the countries of the world could sit down to solve their conflicts and help to deal with the different commercial differences that may arise at any time, since as has been seen throughout history they have always been the main instigators of war conflicts.

There are many famous historical events that clearly demonstrate this last statement, for example the famous case of the "Boston Tea Party", which occurred on December 16 of 1773 and was the event when the American patriots commanded by Samuel Adams, furious by the decision of the English parliament to authorize to the East India Company to export

half million pounds of tea to the American colonies without taxes, boycotted the cargo and threw it into the sea. This fact that was caused by discriminatory commercial treatment from the English Crown towards its colonies in America resulted in the first steps of rebellion by the Americans against their colonizers<sup>1</sup>.

Without a doubt the most serious conflicts in this sense have been the two World Wars that crossed the world during the 20th century. It is true that the entire conflict cannot be attributed to commercial disputes, but it undoubtedly contributed to the escalation of tensions. In the case of the First World War, the previous antecedent of the distribution of Africa by the European powers, did not leave all States satisfied. The United States, on the other hand, increased significantly its economy due to commercial ties with the Allied block when the war started and ended up becoming the main supplier of France and the United Kingdom. In this part of history, the US was forced to break its neutrality and enter into the war due to the German actions of not allowing the free transit of American cargo ships in international waters. This action was precisely to interrupt the supply and therefore the commercial exchange<sup>2</sup>.

In the case of the Second World War, the severe impositions of the Treaty of Versailles against Germany and the inflation that English and French experienced as a result of the cost of rebuilding the devastated areas and the maintenance of their armies. Additionally, a generalized disorder prevailed in the international trade, contributed in a big part to the escalation of a new conflict in Europe<sup>3</sup>. Moreover, given the need to implement changes within the international context, it is essential to underline that the States have to accept international obligations and commitments. As a result of other papers investigation, I found some accurate ideas in professor John H. Jackson. Jackson is one of the most influential writers in International Commercial Law and he believes that precedents play a very important role in the international context, even in systems not attached to the common law.

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<sup>1</sup> BOSTON TEA PARTY SHIPS & MUSEUM, Boston Tea Party. <http://www.bostonteatpartyship.com/history.asp>.

<sup>2</sup> ROBIN W. WINKS, "History of the Civilization, from 1648 to present", volume II, 9th edition, Pearson Education, p. 534-589.

<sup>3</sup> *Ibid.*

He presents a series of events that have taken place in international life in order to establish commitments of international obligation<sup>4</sup>, which I explain below:

- 1) There has been a much-discussed "quasi-legislative" activity on the part of the General Assembly and other bodies of the United Nations, with the intention of placing, expressly or by implication, the requirements of conduct that a State should have, and of finishing or modify existing requirements.
- 2) Tacit recognition has been given to the colloquially referred to "rules of the game," basically based on implicit understandings or unilateral agreed actions. This has been a remarkable feature of the behavior of the world powers around the use of their armed forces.
- 3) There have been social revolutions that have turned to the traditional order, and have challenged the assumptions by which the previous conception of authority was based.
- 4) The growing interdependence of States, especially in economic and technological activities, have increased lavishly patterns of cooperation and reciprocal behavior, which have not been institutionalized within traditional models of legislation.
- 5) The acceptance of an "interventionism", encouraged by the concern about Human Rights, has achieved that matters that in principle were reserved for internal discussion, are taken to collective forums, protected by international criteria.
- 6) Finally, the expansion of science and technology and its international impact, both favorable and harmful, has resulted in an increase in informal means to establish and exercise supervision without having to deal with formal legal procedures.

Now that the historical context has been clearly exposed, I will analyze how the facts that preceded the appearance of the GATT. In a general context, corresponds to a study of the World Trade Organization (WTO) and of its Dispute Settlement Understanding (DSU), and how does it work its Dispute Settlement body in the practice. In that light, is important to emphasize and recall the previous events that made the WTO what it is now. As a result, in this paper I am going to focus extrictly in the GATT from 1947 and its dispute settlement system.

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<sup>4</sup> H. JACKSON, "Legal Problems of International Economic Relations, cases, materials and text", Fourth Edition, American Casebook Series, West Group, St.Paul, Minnesota, 2002. P. 171.

Moreover, in this class of International Public and Political Law I make an investigation to prepare a presentation about the World Governance, which includes Collective Security System, Law of the Land, Sea and Space, Environmental and Development Regime, and International Adjudication. This investigation helped me a lot in order to decide my thesis topic. This is why in this article I am going to make a general approximation to study the General Agreement on Tariffs and Trade (GATT<sup>5</sup>) and its Dispute Settlement System. I believe that is important to understand previous chapters in international trade history in order to make an approximation to study the WTO<sup>6</sup>.

## B. Research Method

This method used normative legal research. Normative legal research is a process to find a legal rules, legal principles, and doctrines of the law to address the legal issues at hand. Results of the study of law are the argument, theory, or the new concept as a prescription in solving the problems faced problems.

## C. Discussion

### 1. Progress and changes between 1947 and 1994: Analysis of the Creation and Development of the GATT

The desire of having a peaceful, interrelated and global economy started to rise and this is when the Atlantic meeting took place. This is the first real advance in international cooperation and organization between countries during the worst days of the Second World War. As Hunter Nottage, a former New Zealand's Ministry of Foreign Affairs and Trade describes in his article the meeting helded between Winston Churchill and Franklin D. Roosevelt when the United States was about to enter into war. In that meeting they agreed sets out some common principles on which both countries pretend to make the world a better place, and end with the big problems that carries war and trade war as well<sup>7</sup>. As Nottage

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<sup>5</sup> General Agreement on Tariffs and Trade, an international treaty (1948-94) to promote trade and economic development by reducing tariffs and other restrictions. It was superseded by the establishment of the World Trade Organization in 1995. <https://en.oxforddictionaries.com/definition/gatt>

<sup>6</sup> The World Trade Organization (WTO) is the only global international organization dealing with the rules of trade between nations. At its heart are the WTO agreements, negotiated and signed by the bulk of the world's trading nations and ratified in their parliaments. The goal is to help producers of goods and services, exporters, and importers conduct their business. [https://www.wto.org/english/thewto\\_e/whatis\\_e/whatis\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm)

<sup>7</sup> Nottage, Hunter. "Trade in War's Darkest Hour: Churchill and Roosevelt's daring 1941 Atlantic Meeting that linked global economic cooperation to lasting peace and security." [https://www.wto.org/english/thewto\\_e/history\\_e/tradewardarkhour41\\_e.htm](https://www.wto.org/english/thewto_e/history_e/tradewardarkhour41_e.htm)

remarks, the Atlantic Charter is one of the most significant documents on history, pretending to set and most important for maintaining peace, security and trade.

Talking about trade and what our particular topic is about, he mention that in clauses 4 and 5 are drafted in an economic matter, referring to the “importance of bringing about “the fullest collaboration between all nations in the economic field” and “to further the enjoyment by all States, great or small, victor or vanquished, of access, on equal terms to the trade ... of the world which are needed for their economic prosperity.<sup>8</sup>” Continuing with the analysis, is important to understand that the one of the main objectives of the GATT was the creation of an institution with applicable rules for a large part of world trade. In that light, is also important to mention that during some of the periods when the GATT was in its full operation, some of the highest growth rates in international trade were recorded. It was created to boost the economy after the Second World War by reducing or eliminating trade tariffs, quotas and subsidies<sup>9</sup>.

The basic purpose of the GATT is to prevent governments from imposing or continuing with a variety of measures that restrict or distort international trade<sup>10</sup>. However, the GATT last 47 years and it was considered provisional, besides it was no more than an agreement with a theoretically provisional organization<sup>11</sup>. The GATT was the only multilateral instrument that governed most of the international commercial traffic before the creation of the WTO, even if it was considering provisional for almost 50 years. A series of negotiations were held in order to make this big institution to work properly and adapt to the needs of that time, these meting are called rounds. In fact, the most important advances in the liberalization of international trade were made through this same mechanism of Negotiating Rounds, all of them held under the auspices of the GATT. In almost of these rounds the most discussed topics were around tariff issues. Between the 50s and 60s, the GATT got more streng and developed trade. Moreover, on 70s the market became more complex, and its effectiveness was decreasing until the supplanting of this one by the OMC.

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<sup>8</sup> Ibid.

<sup>9</sup> Bruce W. Wilkinson, “*The General Agreement on Tariffs and Trade (GATT)*.” <<https://www.thecanadianencyclopedia.ca/en/article/general-agreement-on-tariffs-and-trade>>

<sup>10</sup> H. JACKSON AND OTHERS, *Legal Problems of International Economic Relations, cases, materials and text*, Fourth Edition, American Casebook Series, West Group, St.Paul, Minn., 2002, p.209

<sup>11</sup> WORLD TRADE ORGANIZATION, “*The WTO dispute settlement system*”. Publication of the WTO Secretariat prepared for dissemination by the Legal Affairs Division and the Appellate Body. Editions Yvon Blais, 2004. p.15.

Essentially, while the GATT consisted of a set of rules made by consensus of all nations involved, the WTO is a structurally systematized international organization.

In the first years, the trade negotiations rounds of GATT were focused on continuing the process of reducing tariffs. Afterwards, in the mid 60's, the so-called "Kennedy Round" was held to plan Anti-dumping Agreement in GATT and a section on development. Subsequently, the "Tokyo" Round was held in the 1970s and was the first important attempt to address trade barriers not related to tariffs and improvements to the system. The sole purpose of this round is to reduce tariff rates as much as possible and for that reason it was important to fix some problems that were identified. Among those struggles, appears to be difficulties regarding customs bureaucracies and government restrictions on foreign trade. Other fundamental issues were addressed such as the Generalized System of Preferences that is a program aimed to diversifying the economy granting the elimination of tariffs on income certain products in developed countries and favoring the developing countries.<sup>12</sup>

Finally, the "Uruguay Round" was the eighth and held between 1986 and 1994. This round was the last and largest since it resulted in the birth of the World Trade Organization. As listed on the official page of WTO, here is a complete list of commercial rounds that went through from the creation of the GATT through the end of all the rounds by the creation of the WTO<sup>13</sup>.

<b>Year</b>	<b>Place/name</b>	<b>Subjects covered</b>	<b>Countries</b>
1947	Geneva	Tariffs	23
1949	Annecy	Tariffs	13
1951	Torquay	Tariffs	38
1956	Geneva	Tariffs	26
1960-1961	Geneva Dillon Round	Tariffs	26

<sup>12</sup> The GATT years: from Havana to Marrakesh.  
[https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact4\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm)

<sup>13</sup> Ibid.

1964-1967	Geneva Kennedy Round	Tariffs and anti-dumping measures	62
1973-1979	Geneva Tokyo Round	Tariffs, non-tariff measures, “framework” agreements	102
1986-1994	Geneva Uruguay Round	Tariffs, non-tariff measures, rules, services, intellectual property, dispute settlement, textiles, agriculture, creation of WTO, etc	123

## 2. Dispute Settlement System under the GATT.

The GATT of 1947 ended up becoming a sort of a multilateral organization even if it was not conceived like that properly speaking. The GATT ended up becoming the backbone of a huge part of the world trade and provided a dispute settlement system that experienced a remarkable evolution mainly in Articles XXII and XXIII of the 1947 Agreement. Numerous principles and practices resulting from the evolution of the GATT dispute settlement system were codified in the form of decisions and understandings of the contracting parties. I bring this upfront because it is important to mention an essential principle that from several legislations even takes into account as a source for international law and this is the custom. The entire multilateral system of commerce by which States are governed today is nothing else than the result of international custom, which has gradually been transformed into decisions.

The general rules of Article XXIII, paragraph 2, of the GATT 1947<sup>14</sup> provided that the contracting parties must work together if they had to resolve any differences that occurred between them. Consequently, in the first years of the GATT 1947 the differences were decided by resolutions of the President of the Council. Then, there was a minor change in which the differences should be referred to working groups, which should be composed of representatives of all interested contracting parties, including the parties to the dispute. It is very important to emphasize on this point, that these working groups should adopt their reports by consensus<sup>15</sup>.

<sup>14</sup> Anex 1, General Agreement on Tariffs and Trade of 1947.

<sup>15</sup> Cambridge University Press. “*The WTO at ten, The Dispute Settlement System*” Sacerdote, Giorgio and others. World Trade Organization. 2006., p.35.

The first change occurred when these working groups were replaced by special groups composed of several three to five independent experts, who were not related to the parties of the dispute. These panels prepared independent reports with recommendations and resolutions to resolve the dispute and forwarded them to the GATT Council. It is also important to emphasize that only after the Council approved them, these reports became legally binding for the parties of the dispute<sup>16</sup>. These panels produced very important jurisprudence, as they were getting more accurate by shaping important precedents. They were also very important because their reports became more and more technical and legal as new cases were presented making improvements along the evolution of the GATT<sup>17</sup>. However, this dispute settlement system contained too many weak points. Although, some fundamental principles remained unchanged until the Uruguay Round, for example one of the most important was positive consensus.

Positive consensus means that no contracting party should oppose the decision. For this to happen, an important condition was that the parties of the dispute were not excluded from participating in the decision-making process, in other words, that the defendant could block the establishment of a panel. In addition, the report of the panel should also be approved by positive consensus, as well as the authorization to apply countermeasures to the accused party, who did not apply the decisions. Curiously, the defendant could block these measures<sup>18</sup>.

It is difficult to think that the system will work correctly with those features explained before, but in the practice, it proved it does. In most cases the defendants desisted from blocking the decisions taken by consensus and allowed the differences in which they were involved to continue, even though this could be harmful in the short term. They did it because the parties involved knew that an excessive use of the right of veto would be harmful in the long term, because the rest of the countries could act by paying the same way. However, it should also be noted that authorization to take countermeasures was granted only once<sup>19</sup>.

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<sup>16</sup> Publication of The WTO Secretary prepared by the Legal Affairs and The Appealing Body Division for its Dissemination. " A Handbook on the WTO Dispute Settlement System " World Trade Organization. p.10-16.

<sup>17</sup> Ibid.

<sup>18</sup> WTO Secretariat. "Introduction to the WTO Dispute Settlement System." A Handbook on the WTO Dispute Settlement System, 2nd ed., Cambridge University Press, Cambridge, 2017, pp. 1-20. WTO Internal Only.

<sup>19</sup> Ibid.



The Handbook also showed statistics of the claims submitted and how the GATT 1947 dispute settlement system provided satisfactory solutions for the parties in the vast majority of cases. However, it should be mentioned that these positive statistics are not entirely true since they only reflect what happened in claims submitted and don't analyze that in many occasions, these claims were never filed because of the wariness of a veto that could be presented by the accused State. Vetoes have been given on many occasions especially in economically important or politically sensitive segments such as anti-dumping measures. Finally, in the 1980s, a boom in vetoes, both for the establishment of special groups and for the adoption of their reports, ended up discrediting fully the dispute settlement system of the GATT 1947<sup>20</sup>.

The issue for the special groups was extremely complicated as well because in order to adopt the reports that this group made it should be accepted in the same way by both parties, so they knew that they could not give very controversial or damaging reports against that part, because they would simply veto it. This situation resulted in resolutions not so attached to objectively solutions that can really help solve the dispute at the fullest but resulted in resolutions that were made in a more "diplomatic" way<sup>21</sup>.

#### **D. Conclusion**

The GATT 1947 and its dispute settlement system was in fact a big advance and change in the international trade history. Is remarkable this a "provisional" agreement lasted with full validity around 50 years, making the world trade a better place, mostly after those dark years of the World War II. So in fact, the GATT provide a effective way to deal with the daily outcomes of commerce not only in bilateral relation but in multilateral as well, providing clear rules to emphasize fair trade and tariffs in a secure and reliable way. Moreover, almost at the end of the so-called round of negotiations, the system showed some flaws that with the past of the time became more notorious. The lack of confidence in the system, combined with the lack of effectiveness caused by the vetoes, resulted in a distancing of States towards the use of the GATT 1947 dispute settlement system. Besides, a growing takeover of unilateral actions by the States began to happen during the 80s, while the Uruguay Round negotiations were taking place. Is important to mention that currently the Article XXIII paragraph 1 of Dispute Settlement Understanding excludes this possibility. In

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<sup>20</sup> Ibid.

<sup>21</sup> Ibid

other words, this means that a member will not be able to take retaliatory measures against any other member unless the litigation has ended and the Dispute Settlement Body has granted an express authorization for this purpose. This is just another reason why the world needed to create an organization capable to correct these flaws and bring more security and reassurance to the world trade, this is the World Trade Organization.

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