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REVISITING THE FOUNDATIONS OF THE GLOBAL TRADE ORDER FROM A 21ST CENTURY PERSPECTIVE*

Nowadays we are living in troubled times globally, including in the specific framework of trade relations between the West and Russia. The world economic order in which we live was also set up in a very troubled period: in the immediate aftermath of World War II and the Great Depression of the 1930s. Therefore, a reflection on its foundations can be a reflection into the present that could provide ideas for the future.

The reflection also leads to a discussion of whether the strategy of “more”, in particular “more liberalization”, should be replaced by the strategy of “better” and the strategy of the 3 Cs: Consolidation, Completion and Coherence, a thesis already put forward by one of the authors in 2001 before the launching of the WTO Doha Round of negotiations. The failure of the Doha Round, and in particular the inability to accept that its launch was perhaps not a timely step, seems to strengthen the validity of this thesis. Refs 32.

Keywords: International monetary system, investment framework, preferential trade agreements, national security, trade liberalization, economic/trade sanctions, world economic order reform, World Trade Organization (WTO).

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**ВОЗВРАЩЕНИЕ К ОСНОВАМ ГЛОБАЛЬНОЙ ТОРГОВОЙ СИСТЕМЫ:
ВЗГЛЯД С ПОЗИЦИИ XXI ВЕКА**

В настоящее время человеческое общество находится на непростом этапе развития, включая торгово-экономические отношения между Западом и Россией. Каркас современного мирового экономического порядка был сформирован после Великой депрессии 1930-х годов и Второй мировой войны. Осмысление его основ актуально с научной и практической точки зрения для оценки узловых проблем современной глобальной экономики и направлений ее развития в XXI в.

При решении поставленных вопросов авторы предлагают перейти от стратегии «Больше» (в частности, «больше либерализации») к стратегии «Лучше», включающей в себя такие компоненты, как консолидация, завершение и слаженность. Эта идея была выдвинута одним из авторов настоящей статьи еще в 2001 г., до начала Дохийского раунда переговоров Всемирной торговой организации. Фактический провал этих переговоров, не в последнюю очередь неспособность признать, что в установленном формате их, возможно, вообще не надо было начинать, придают дополнительную актуальность дискуссии о смене стратегии. Библиогр. 32 назв.

Ключевые слова: международная валютная система, инвестиционный климат, преференциальные торговые соглашения, национальная безопасность, торговая либерализация, экономические/торговые санкции, реформа мирового экономического порядка, Всемирная торговая организация (ВТО).

A. Introduction

Trade relations between the West and Russia in the last period are becoming increasingly conflictive. In fact, we are living in rather troubled times globally, not only in the specific framework of trade relations between the West and Russia. And the chain of sanctions (and retaliations) that has developed and continues to develop has motivated an increasing interest on the discussion of the compatibility of such sanctions with GATT Art. XXI [Bhala, 1998; Goodman, 2001; Lindsey, 2003; Alford, 2011; Picket and Lux, 2015] to name some examples But the main thrust of this paper is not so much the analysis of this growing body of literature but that of stimulating reflection on whether they are or not in conformity with GATT's overarching objective.

The main reason for this lies in the fact that the current world economic order was also set up in a very troubled period: in the immediate aftermath of WWII and the Great Depression of the 1930s. Therefore, a reflection on its foundations, based on very general considerations, as simple as very often forgotten or misunderstood, can be a reflection into the present that could provide ideas for the future.

The reflection also leads to a discussion of whether the strategy of “more”, in particular “more liberalization”, should be replaced by the strategy of the “better” and the strategy of the 3 Cs: Consolidation, Completion and Coherence, a thesis already put forward by one of the authors in 2001 before the launching of the WTO Doha Round of negotiations. The failure of the Doha Round, and more in particular the inability to accept that its launch was perhaps not a timely step, seems to strengthen the validity of this thesis.

B. Historical background

From a legal-political-institutional perspective, the current international economic order remains in its essential aspects as the one created in the aftermath of WWII¹ [Herdegen, 2013], which aimed at responding to the specific problems of that historical moment². Its main objective was to avoid the reappearance of the situation between the WWI and WWII [Jackson, 1997] characterized by the conflict between the “capitalist blocs³”, orchestrated in particular through a spiral of growing protectionism leading to trade wars⁴ (consisting mainly of import restrictions and monetary measures influencing trade flows⁵). This undoubtedly led to the aggravation of the economic crisis and paved the way to WWII.

a. WWI and the inter-war period

The period before WWI was characterized by growing worldwide economic prosperity fueled by moderate tariffs and expanding world trade underpinned by a relatively operative international monetary system based on the gold standard see [Eichengreen and Irwin, 2009]. This scenario was later heavily affected by the war, thus causing a very slow rebound of international trade and payments due to the slow-paced lifting of wartime trade controls and tariff levels, which became greater than they were during the pre-war period [Guzman and Pauwelyn, 2012].

Restoration of the world economy was severely hindered by the 1929 worldwide recession and the signature of the US Smoot-Hawley 1930 tariff act [Jackson, 1997], which helped outbreak protectionist practices tending towards reducing world trade. However, it is noteworthy highlighting that even if such race towards protectionism has been repeatedly reported to be quite generalized, evidence suggests that the extent to which countries imposed higher trade barriers varied extensively, notably between countries who decided to stick to the gold standard (thus keeping a fixed currency) and those who

¹ From a political perspective, this fact can be immediately grasped when observing the composition of the United Nations Security Council. Its permanent members are still the US, France, the UK, China and Russia (as the successor of the Soviet Union); from an institutional and economic standpoint, the main pillars of international economic relations remain the same as those created immediately after the war: the WB, the IMF — these two known as Bretton Woods Institutions- and the GATT (which turned into the WTO in 1995).

² For a full historical overview, see [Diebold, 1962].

³ The “Capitalism of Blocs” refers to a situation in which “great powers” split the world into influence zones: on the one hand, the UK and France and their respective colonial empires; on the other hand the US; and finally the emerging zones of influence from both Japan and Germany. In the context of this division of the world, each “great power” tried to find a unilateral solution to the Great Depression of the 30’s by exporting its products and trying to isolate itself from the rest of the world. The idea was to offset a weak domestic demand, the main feature of the Great Depression, through restrictions to imports and export support.

⁴ We mean by ‘trade war’ a situation in which countries engage in a competitive protectionist spiral to raise trade barriers in order to protect domestic producers and retaliate against each other’s barriers. The use of the term “war” may seem an exaggeration to some but, for us, is simply a healthy reminder that “trade wars” can become the best economic context for overall wars, as historical experience, mainly that of the inter-war period in the 1930’s, proves. The ‘trade war’ term will be constantly revisited in this paper. For further reference, see the WTO document “10 benefits of the World Trading System” (<https://www.wto.org>).

⁵ Such as blocking access to foreign currencies, imposing restrictions on international payments, or rather competitive devaluations leading to promoting (and reducing prices of) exports while increasing import prices and restricting imports overall.

departed from it (thus allowing their currencies to depreciate) see [Eichengreen and Irwin, 2009].

In any case, the so-called “beggar-thy-neighbor” policies spread in the 1930s leading to an extensive increase of trade barriers and a consequent breakdown of multilateral trade as countries were willing to insulate their economies from economic downturn [Guzman and Pauwelyn, 2012]. Despite official conferences and multilateral meetings, notably the World Economic Conference in 1933, the spread of inward-looking antitrade economic policies was far from stopping. In the political scenario, skepticism towards democratic governments to manage their economies and the shift towards more authoritarian regimes in Germany and elsewhere exacerbated the tensions [Huntington, 1991].

b. WWII and the rethinking of the international economic order

After WWII, international economic interdependence of states resumed, thanks in particular to the creation of the post-WWII Bretton Woods System [Jackson, Davey and Sykes, 2008]. Initial efforts to establish a multilateral regulation of trade and finance were undertaken by the US to secure its intended economic worldwide expansion, an initiative that was supported by European States, who required foreign capital to restore their economies after widespread destruction during the war [Voitovich, 1995].

In the spirit of the founders of the international order conceived after WWII, three organizations were meant to gravitate around the UN General Assembly, the UN Economic and Social Council and their subsidiary institutions [Carreau and Juillard, 2007]. The Bretton Woods conference gave birth in 1944 to two of such organizations: the IMF and the International Bank for the Reconstruction and Development (IBRD), the original WB institution⁶. The GATT, whose Secretariat became a *de facto* organization fulfilling the duties of the envisaged ITO (the third Bretton Woods institution that only came into existence after the creation of the WTO in 1995), was the crucial engine for decades to avoid protectionist competition among market-oriented industrial countries and promote trade liberalization⁷.

In order to avoid repeating the inter-war situation that led to the outbreak of the WWII, the establishment of an institutional system preventing, regulating or at least limiting the use of economic policy instruments was required. In order to reach this goal, this institutional system had to be built upon two basic principles: *multilateralism*⁸ to prevent the reemergence of influence zones through trade preferences and related conflicts; and the *consolidation of a certain degree of trade liberalization* (not distorted by monetary measures and measures restricting international payments) to avoid increased protectionism or protectionist *summum malum*, a situation where domestic social or economic pressures lead some states to increase or reinstate barriers to trade, thus

⁶ The usual term to refer to the IBRD is “World Bank”, even if, in purity, the IBRD is only one of the institutions (the main one) of the World Bank Group.

⁷ For further reading in depth on the rationale behind the creation of Bretton Woods Institutions, see [Van Meerhaeghe, 1966].

⁸ Rather than a unilateral liberalization as undertaken by Britain in the nineteenth century, the United States promoted a reciprocal trade liberalization scheme fostered by the Trade Agreements act of 1934 whereby it lowered tariffs only when it received reciprocal access to foreign markets [Barton, Goldstein, Josling and Steinbert, 2006].

triggering a competitive reaction in kind by other states, and eventually a “race to the bottom” that is disastrous for the global economy [Howse, 2007].

Other important areas of international economic relations such as international capital flows and foreign direct investment flows (and therefore liberalization of capital movements) were left aside for the sake of ensuring trade liberalization and a relative monetary stability see [Herdegen, 2013]. This explains why, even now, seventy years after, there is a lack of legal of institutional framework for the expansion and internationalization of capital movements, in particular those that are not related to foreign direct investment.

The creation of the IMF aimed at preventing the typical restrictive monetary practices of the inter-war period such as competitive devaluations and quantitative restrictions on international payments (applied unilaterally or bilaterally) through international liquidity creation (above all when turning the dollar into an international currency and allowing its injection in the world system through deficits in the US balance of payments) and through limiting the recourse to devaluation of national currencies see [Hinojosa, 2010]. In sum, the IMF and its exchange rate system were designed to avoid the use of monetary weaponry for trade wars.

In the case of the GATT, its main objective was to regulate the use of trade measures in order to avoid trade wars as well. In order to reach this outcome it established in Arts. I and II two basic principles oriented to prevent them and accompanied them with a series of rules that create a code of conduct to be followed by its Member states when implementing their trade policies [Jackson, 1997]. Among the three typical rules that an international economic agreement may include (rules on uniform law or harmonization, market access rules and rules about treatment — MFN and NT), the GATT only uses the latter two, and the substantive rules are coupled with many exceptions.

The principle of multilateralism, formulated under the MFN clause of GATT Art. I, defines “how” a State should approach its economic relations with other states: as said, its main purpose is that of avoiding the division of the world in competitive zones of influence of the main economic and political powers. Nonetheless, it does not define either the “what” of these relations or “how much” these relations should be liberalized.

This aspect is addressed by Art. II of the GATT as it consolidates a trade “liberalization floor” incorporated in a schedule of concessions. The best way of explaining the meaning of Art. II is through a pedagogic trick: imagine a spiral that opens from less to more liberalization and ask any audience which is the sense of the GATT. The unanimous answer will likely be the opening of such spiral. Such answer is incorrect because the ultimate sense of the GATT is to impede that beyond certain point the spiral gets closed. This is, in fact, the content and the result of its article II: the consolidation of a trade “liberalization floor” (incorporated in a schedule of concessions) that cannot be perforated. Contrariwise, the GATT does not have at its disposal any powerful legal mechanism that forces to open the spiral of trade liberalization. The only obligation imposed by GATT over its Members in this direction is simply to participate in the negotiations that could be initiated without prejudging their outcome. In other words: in a progressive liberalization perspective, what is powerful in GATT is its static aspect (the obligation of not going backwards imposed by Article II) and not its dynamic aspect (the eventual negotiations with a view to further liberalization).

C. The GATT exceptions: the case of national security exception in Art. XXI

The GATT contains a variety of exceptions or emergency provisions in view of certain circumstances in which a Member might need to depart from GATT obligations without triggering a general crisis of confidence in the system, and consequently a reversion to beggar-thy-neighbor protectionism [Howse, 2007]. In overall terms, as long as GATT's main objective is secured, it is not much worried about minor violations. Even if the exceptions to the general regime established by the WTO are still numerous and significant, they are intended to provide certain degree of flexibility to the functioning of the multilateral trading system [Basaldúa, 2007]. These exceptions can be classified as follows:

a. Some relate to the “architecture” of International Trade Relations:

- GATT Art. XXIV: Territorial application — Frontier Traffic — Customs Unions and Free-trade areas
- GATT Art. XXXVI: Principles and Objectives (Including considerations in favor of developing and least-developed countries)

b. Some tend to free from the restrictions imposed by the GATT itself, in more or less well defined cases, some domestic economic policies:

- GATT Art. XII: Restrictions to Safeguard the Balance of Payments
- GATT Art. XIX: Emergency Action on imports of Particular Products

c. Some open the way, in more or less well defined cases, to specific trade measures that would violate Arts. I or II

- GATT Art. VI: Antidumping and countervailing duties

d. Some are purely “ad hoc” (and have been moved from the GATT to the WTO Agreement)

- Art. IX of the WTO Agreement on Decision-Making on waivers.

e. Some are strictly political and are founded in the consideration that other societal interests must prevail over those of trade policy (and international commitments in this area).

- GATT Arts. XX and XXI on General Exceptions and Security Exceptions, respectively.

In this section we will focus on GATT Art. XXI, which is the more exquisitely “political” one. This is why it has been considered, more in political practice than in literature — and barely in the GATT/WTO jurisprudence — as able to be invoked freely and apparently unquestionable. Nevertheless, there have been instances in which this exception has been invoked in the GATT history such as authorizing the application of economic sanctions by some Members. As mentioned in the introduction, there is a vast body of literature discussing trade sanctions (import or export embargo) and their justification under the National Security exception under GATT Art. XXI, and this provision gains special relevance given the recent sanctions and retaliatory actions between the West and Russia.

It is worth mentioning that the “national security” exception of GATT Art. XXI was initially conceived to be part of the general exceptions embedded in Art. XX, as reflected by its initial drafting stages [Bhala, 2005]. This is of special relevance as the subsequent moves to make it a standalone provision have deprived it from being subject to the conditions of the *chapeau* of Art. XX under which the relevant exceptions raised by a Member are subject to an examination of whether they are “arbitrary or unjustifiable discrimination” between countries where the same conditions prevail and whether it constitutes a “disguised restriction on trade”⁹. This *chapeau* of Art. XX is aimed at protecting against abuse of the itemized exceptions.

GATT Art. XXI is of considerable importance even if, as we have just outlined, it has been seldom formally and explicitly invoked. It has helped shield an arsenal of national security statutes from the United States pursuant to which it has taken unilateral action that would otherwise clash with GATT MFN treatment (Art. I), tariff bindings (Art. II), national treatment (Art. III) and quantitative restrictions (Art. XI), which cannot be managed by GATT Art. XXXV:1 (b) that handles economic measures, or Art. XXV dealing with waivers [Bhala, 2005].

GATT Art. XXI clearly states:

Nothing in this Agreement shall be construed:

- (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
- (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
 - (i) relating to fissionable materials or the materials from which they are derived;
 - (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
 - (iii) taken in time of war or other emergency in international relations; or
- (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

Therefore, under GATT Art. XXI, a WTO Member can invoke the security exception either because it has unilaterally decided that its security is threatened, or in order to comply with its obligations with the United Nations Charter for the maintenance of international peace and security [Mavroidis, 2013].

From a close reading to this article several elements can be distilled [Bhala, 2005]:

- It constitutes an **all-embracing** exception as suggested by the word “nothing” at the beginning of GATT Art. XXI. Therefore, upon invocation of such article, there is no GATT obligation free from a possible disrespect by a Member invoking it. This point is further reinforced by the 1949 Decision of the Contracting Parties¹⁰ in a case brought under Art. XXIII of GATT by Czechoslovakia against the United States. Some key considerations of that case are outlined below.

⁹ See GATT Art. XX.

¹⁰ Decision of 8 June 1949, II B. I. S. D. 28 (1952), GATT/CP.3/SR.22.

- **Discretionary** character of Art. XXI (b): this provision contains the word “it”, which leaves to the sole discretion of the Member invoking the sanction the determination of whether an action conforms to the requirements set forth in Art. XXI (b), including the definition of what constitutes “essential security interests”. This leaves out of play other Members or group of Members or WTO panel or other adjudicating body when determining for a sanctioning Member whether a measure satisfies the requirements. This was present in the statement of Ghana concerning Ghana’s boycott of Portuguese goods when Portugal acceded GATT in 1961.

4 principles may be deduced from Art. XXI (b):

1. A sanctioning Member need **not give any prior notice** to impending national security sanctions, nor need it give notice upon or after the imposition of sanctions. However, the Decision Concerning Art. XXI of the General Agreement by GATT Contracting Parties (L/5426, adopted on 2 December 1982, 29S/23) encourages Members to inform to the fullest extent possible of trade measures taken under Art. XXI as a procedural recommendation (subject to the exception of Art. XXI: a). In the case of the sanctions imposed against Russia, leaving aside that the sanctioning countries could use Art. XXI (b) (iii), it is also arguable whether sanctions imposed under Art. XXI (c) as well can be undertaken without having any basis on UN Security Council Resolutions. Perhaps the shortcomings of GATT Art. XXI could be read as in the lines of the panel report in Nicaragua Trade (1986, L/6053 of 13 October 1986) whereby the terms of reference of such panel stated that the panel could not examine or judge the validity or motivation for the invocation of Article XXI by the United States.

2. A sanctioning Member **need not justify its determination** to the WTO or its Members. As reflected in the panel report in US-Export Restrictions (Czechoslovakia, 1949), “every country must be the judge in the last resort on questions relating to its own security”. Even if the wording of the *chapeau* of Art. XXI (b) has been claimed to slightly restrain action (as it requires that the relevant Member makes sure that the measure is “necessary” for the “protection” of that Member’s “essential security interests”), the potential for abuse exists.

3. A sanctioning Member **need not obtain the prior approval or subsequent ratification** of the WTO or its Members.

4. A both **actual and potential damage** could be comprised.

Three possible scenarios are envisaged in the application of Art. XXI [Bossche and Zdouc, 2013]:

1. To restrict trade in order to protect strategic domestic production capabilities from import competition (political in nature).

2. To use trade sanctions as an instrument of foreign policy against other States, which allegedly violate international law or pursue policies considered as unacceptable or undesirable.

3. To prohibit the export of arms or other products of military use to countries with which they do not have friendly relations.

If we were to fit the sanctions imposed to Russia, it seems like the second option is the one that has been applied by Western countries (among them, the United States, the

European Union, Australia, Norway and Canada) after control over Crimea shifted from Ukraine to Russia.

As we noted above, unlike GATT Art. XX, Art. XXI does not have any *chapeau* to avoid misuse or abuse of the exceptions contained therein [Bossche and Zdouc, 2013]. However, even in the Czechoslovakia case cited above, the Panel was clear when stating that “every Contracting Party should be cautious not to take any step which might have the effect of undermining the General Agreement” (Panel Report, US-Export Restrictions (Czechoslovakia) (1949), GATT/CP.3/SR.22, Corr.1) also see [Mavroidis, 2013]. Moreover, in the context of the conflict between the UK and Argentina on the Falkland Islands/ Islas Malvinas, the GATT Contracting Parties adopted a Ministerial Declaration, which stated that “the contracting parties undertake, individually or jointly...to abstain from taking restrictive trade measures, for reasons of a non-economic character, not consistent with the General Agreement” (L/5424, adopted on 29 November 1982, 29S/9, 3).

Fortunately, the exceptions under Art. XXI have been little used by GATT/WTO Member States. However, should the WTO continue in line of what the panel stated in the Nicaragua case, the WTO Dispute Settlement System will be deprived from evaluating the rationale behind the imposition of the sanction in an apparently clear case of disguised protectionism. This threat of using GATT Art. XXI exceptions on unjustified grounds, and the wide open door left to Members with little scrutiny from WTO Dispute Settlement bodies, coupled with the non-existent jurisprudence, serves to get back to the trade-wars we mentioned in the historical context.

D. How to view GATT exceptions, in particular the national security exception in Art. XXI

The amount of literature on how to interpret the GATT’s exceptions, and in particular Art. XXI, is quite vast and cannot be sufficiently reviewed here given the limited scope of this paper. We want to keep to our main point: the risk of resorting systematically to exceptions, and in particular the ones politically minded such as that of Art. XXI, is that of undermining the “Grand Design” of the GATT, which aims at avoiding “Trade Wars”, so close to “overall Wars”. This is why we attempt to draw from different sources of law some aspects that would help strengthen a sound interpretation of Art. XXI in order to avoid moving backwards in the liberalization process already achieved.

a. Fitting EU and US sanctions against Russia under Art. XXI

EU and US trade restrictive measures against Russia could be likely fit under Article XXI (b) (iii) and in a less degree under the Article XXI c). As it was pointed out before, in general terms, Art. XXI provides flexibility and a wide discretion to Members to apply trade-restrictive measures to protect their essential security interests. The lack of a *chapeau* similar to that of Art. XX, as outlined above, the lack of the obligation of prior notification and the self-assessment of what are “essential security interests” seem to confirm this statement. However, if we consider the negotiating history of the GATT and the international customary law in connection with the wording of GATT Art. XXI some doubts arise on the scope of interpretation of such article.

The negotiating history of the GATT clearly shows that the drafters of the original Draft Chapter (EPCT/A/PV 33, p.20–21 and Coorr. 3; EPCT/A/SR/33, p. 3) were aware of

the danger of having a too wide security exception. Several negotiators stressed the need to draft provisions which “*would take care of real security interests and, at the same time, limit the exception so as to prevent the adoption of protection for maintaining industries under every conceivable circumstance*” (EPCT/A/PV/33, p.20–21 and Corr.3; see also EPCT/A/SR/33, p.3). These statements show the willingness of the drafters to seek a balance between a) the inherent sovereign right of Members to protect their real security concerns and b) preventing them to use this provision for pure commercial purposes in actions that would undermine the objectives of the General Agreement.

In addition, the Panel found in relation to the US trade embargo against Nicaragua (1986, L/6053 of 13 October 1986, C/M/188, para. 5.2) that “*this provision should be interpreted in the light of the basic principles of international law and in harmony with the decisions of the United Nations and of the International Court of Justice*”. Considering the wording of GATT Art. XXI, it is difficult to believe that the word “necessary” (for the protection of its essential security interest) appeared by coincidence.

In the concrete case of the EU and US economic sanctions against Russia in view of Art. XXI c) this article may hardly be invoked because it requires an explicit authorisation from United Nation Security Council. This argument was used by Yugoslavia when it claimed inconsistency of the EC trade-restrictive measures under, *inter alia*, Article XXI c) stating that “*there is no decision or resolution of the relevant UN body to impose economic sanctions against Yugoslavia based on the reason embodied in the UN Charter...the “positive compensatory measures” applied by the EC to certain parts of Yugoslavia (are contrary) to the MFN treatment... (DS27/2, dated 10 February 1992).*”

However, as pointed out by Diana Desierto [2014], “an argument could be made that the EU and US sanctions were taken as internationally permissible countermeasures against Russia’s continuing failure to observe UN Assembly Resolution 68/262” (Territorial Integrity of Ukraine, 27 March 2014).

b. “Necessity”, “essential” and “security”

There are several instances under WTO covered agreements where a “necessity test” appears. However, due to the lack of precedent on the specific necessity test under Art. XXI, we find it useful to look at the interpretation of “necessity” under International Law Commission (ILC) as it can shed light at least on the self-judgement exercise that undertakes a Member when imposing trade restrictive measures under such article.

Perhaps some wording that can be illustrative on necessity is Art. 25 of the Draft Articles of the ILC on Responsibility of States for Internationally Wrongful Acts and its comments, whereby necessity has been understood “to denote those exceptional cases where the only way a State can safeguard an essential interest threatened by a grave and imminent peril is, for the time being, not to perform some international obligation of lesser weight or urgency” and it is worth noting that it can include “a great danger either to the essential interests of the State or of the international community as a whole”¹¹. Therefore, a narrow reading of “necessity” avoiding the abuse of such provision seems to be appropriate.

¹¹ See ILC Commentary to such article available at: http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

As regards what constitutes an essential interest, following the ILC comments on Art. 25, the “*extent to which a given interest is essential depends on all the circumstances, and cannot be prejudged*”. What can be drawn from such reading is also that there should be a conflict between the international obligation and the threatened “essential interest” of the State/Member in question, and that the act being challenged must have been the “only means” of safeguarding that interest¹².

Regarding the notion of “security”, some examples can be drawn from Investment Law. For instance, the *LG&E Tribunal (ICSID Case No. ARB/02/1)* rejected the idea that the notion of the security exceptions of Article XI of the US-Argentina BIT may only be applicable in circumstances amounting to military action and war. The Tribunal stated that “when a state’s economic foundation is under siege, the severity of the problem can equal that of any military invasion”. If we were to draw such assumption from the interpretation of Art. XXI, this could suggest a possible reading away from military action and can leave the door open to invoking such article in view of purely economic concerns (see the case of Sweden on import of footwear, who claimed a minimum domestic production capacity in vital industries in order to secure provision of essential products necessary to meet basic needs in case of war or other emergency in international relations, a case quoted in Bhala, 2005, p. 560).

Another consideration that is worth-mentioning is the spillover effects of trade sanctions. In light of the global value chain (GVC) organization of the international economic relations based on the different stages of the production located across different countries (<http://www.oecd.org/sti/ind/global-value-chains.htm>), the unilateral political decision of one country to impose economic sanctions or embargoes may have a negative impact in third countries that *a priori* have nothing to do with this decision. The lack of a standing on third parties to intervene in the imposition of a trade measure or sanction responding to a security concern is a gap or loophole of Art. XXI that was perhaps not envisaged during its drafting. In the context of the current global interdependence, it could be argued that those affected third party Members could be able to respond with counter-measures, thus leaving the Pandora box open for the generalization of trade wars (to be more precise, for the plurilateralization of bilateral trade wars).

From an economic standpoint, the reality shows that the imposition of trade-restrictive measures against Russia hit not only the whole economy and the consumers’ rights in Russia but it also affected certain sectorial producers from EU, Norway, US and Canada although in different proportion [Szczepański, 2015]. Even more, the decrease in the consumption capacity in Russia may potentially affect other economic sectors in third countries. It is difficult to prove in which degree the trade-restrictive measures contributed to the deepness of the economic crises in Russia as their economic impact is difficult to be

¹² As quoted from the ILC Comments of Art. 25: “According to the Commission, the state of necessity can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met. ... In the present case, the following basic conditions ... are relevant: it must have been occasioned by an “essential interest” of the State which is the author of the act conflicting with one of its international obligations; that interest must have been threatened by a “grave and imminent peril”; the act being challenged must have been the “only means” of safeguarding that interest; that act must not have “seriously impair[ed] an essential interest” of the State towards which the obligation existed; and the State which is the author of that act must not have “contributed to the occurrence of the state of necessity”. Those conditions reflect customary international law”. See Gabčíkovo-Nagymaros Project, pp. 40–41, paras. 51–52.

quantified [Szczepański, 2015; Dreyer and Popescu, 2014]. As to the judgement of whether the measures imposed are effective to reinstate the previous situation that motivated the imposition of sanctions, there is no such test on Art. XXI either.

Despite the wide discretion of Members to define the main elements of Art. XXI such as “essential security interest” and, *a priori*, the less restrictive wording of this Article in comparison with GATT Art. XX, we suggest a careful and narrow reading, in conjunction with the negotiating history and with customary law, and in light of the general objectives and principles of the GATT Agreement in order to avoid protectionism, as reflected in the essence of the non-discrimination principles and as outlined in the Preamble of the WTO Agreement¹³.

Historical lessons should not be forgotten and the main challenges today call to a questioning on how to preserve the trading system preventing states to take trade-restrictive measures that may undermine the whole rationale of the GATT by interpreting exceptions widely. Furthermore, it should be stressed that self-assessment or self-judgement of measures shall not serve as an excuse to invoke this article for purposes different from legitimate essential security concerns as it may trigger negative spill-over effects in the increasingly globalized GCV economic order at the same time as increasing the likelihood of the protectionism spiral to raise.

E. Conclusions: more or better (and in any case different): which should be the orientation of international economic relations in the future?¹⁴

In 2001, one of the authors argued [Torrent, 2001] that the international legal framework required, since a very long time, a deep revision and reorientation. Such legal framework, even if it is still based on the post-war legal order, has lost some its essential pieces (the monetary system), has grown in a disordered and contradictory way and is even putting in danger the principle of multilateralism itself, which remains the only key to avoid the re-emergence of dangerous forms of “capitalism of blocs” and conflicts between great powers.

This unquestionable reality has been veiled by an exclusively ideological reason: the hegemony of a vision centered on the promotion of liberalization processes (even if it is at the expense of weakening the architecture of the international economic order). In fact, from 1985 to 2008, the sign that has marked the evolution of international economic relations, in particular trade relations, has been that of “more liberalization” (deepening, broadening, enlarging...) through all possible approaches — unilateral, multilateral, regional or bilateral-, all of which tended to be analyzed under the viewpoint of first, second, third or nth best for economic liberalization.

¹³ As pointed out by Peter van den Bossche [2013] the importance of eliminating discrimination to avoid possible economic and political confrontation was highlighted in the Preamble to the WTO Agreement, where “elimination of the discriminatory treatment in international trade relations” is identified as one of the two main means by which the objectives of the WTO may be attained”.

¹⁴ The central argument of this concluding section is extracted from a *Policy Brief* written in the framework of the Observatory of Relations European Union-Latin America (OBREAL). The “Cs” approach highlighted in the end was already outlined in 2001 by the author in the framework of one of the sessions of the Regional Dialogue on Trade Policy organized by the Department of Trade and Integration of the IADB (<http://www.iadb.org/int/DRP/esp/red1/comerciodoc2.htm>).

We could take as fundamental dates of the beginning of this evolution a) the negotiations and the approval of the Single Act in the European framework (1985–1986) and b) the launch in 1986 of the Uruguay Round of Negotiations under the GATT framework that ended in 1993–1994. The evolution was accelerated through historical processes of decisive importance, most of which culminated in 1992–1994: a) the policies of unilateral trade liberalization in many developing countries, especially in Latin America; b) the launch of processes of regional economic integration such as MERCOSUR or NAFTA, that were allowed by such policies; c) the race towards the conclusion of bilateral agreements by the European Community (accompanied by Member States in agreements that were of wider scope and exceeded the exclusive competence of the Community); d) the disintegration of the Soviet bloc and the integration of its former economies to the capitalist world; e) the deepening (above all, the Monetary Union) and the expansion of the European integration process to new Members.

The Politics of “More” (more liberalization, more coverage) showed clear symptoms of exhaustion since the middle of the 90’s. The first sign was the clamorous failure of the negotiations conducted under the OECD framework for the signature of a Multilateral Agreement (in fact, plurilateral) on Investment (MAI) — years 1995–1998. The second one, the difficulties to make the multilateral liberalization process go forward in the WTO framework after the Singapore Ministerial Conference in 1996 (failure of Seattle, certainly amended in Doha but only in absolutely exceptional circumstances). The third one, the inability of reaching an agreement about the thematic content and the agenda of the Free Trade Agreement of the Americas (FTAA) that, even if it was made public to the whole world after the failure (dressed up as success) of the Miami Ministerial Conference in November 2003, was well noticeable since the beginning to any informed observer with a critical sense. The fourth one, the installation of MERCOSUR since 1995 in a “regulatory plateau” — of low height — upon completion of the first stage of elimination of intra-block trade tariffs, which ratified the apparently insuperable difficulties experimented by the processes of sub-regional integration in Latin America in order to reach the objectives initially fixed.

Regarding the European Integration process, it seemed to many that its progress was unstoppable. However, the institutional and political deterioration of the process was clearly perceptible since a long time ago, as well as the incapacity for defining a coherent strategic project that replaced the initial project (the resolution of the French-German historical conflict through economic cooperation, already successfully culminated). This deterioration and this incapacity were clearly transparent behind a series of strategies by default, the systematic use of the *fuite en avant* tactic and the enthronement of the pathetic “bicycle theory”, which will fall onto the ground if it does not advance, as a decisive argument, not only for the political discourse, but also for academic analysis. Today, nobody discusses anymore that the process is in a deep crisis situation.

The alleged failure of the Doha Round in the WTO framework only confirms this exhaustion. As anticipated, the degree of success has been extremely limited, with the timid adoption of a Trade Facilitation Agreement in the context of the Bali Ministerial Conference¹⁵ (not yet entered into force) and a package in the Nairobi Ministerial Con-

¹⁵ The 9th WTO Ministerial Conference was held in Bali, Indonesia, on 3–7 December 2013. The Bali Package included measures intended to streamline trade, allow developing countries more options for providing food security, boost least-developed countries’ trade and help development more generally. More information available at: https://www.wto.org/english/news_e/news13_e/mc9sum_07dec13_e.htm.

ference¹⁶ whose success is yet to be seen.. Doha Round's failure reflects that the *raison d'être* of the multilateral trading system is not the uncontrolled advance of the liberalization process, but rather the creation of a stable framework of rules that impede the backward step of the liberalization freely agreed thus avoiding trade wars that in a fateful past characterized the "capitalism of blocs".

There is only one process that, at least not long ago, seemed to enjoy perfect health: the negotiation of bilateral trade agreements. However, without discarding the risk that its proliferation could end up causing a complete fragmentation of the world trading (and economic) system, it is very possible to confirm the thesis already pointed by many saying that the only possible bilateral agreements are those that are very asymmetric in the dimensions and power of their Parties, and where the bigger country or block imposes its conception (although we nowadays witness negotiations between powerful parties in the so-called Mega-Regionals including the TPP and the TTIP initiatives). With independence from the assessment made to these asymmetric agreements, many will maybe consider that a) their effects over the whole world system are very limited and b) their interest for big players is not that important either and maybe does not justify the internal difficulties they cause (in the United States, to take an obvious example). In this perspective, we could maybe predict that not even in the bilateral framework the Politics of "More" will continue advancing in a very meaningful way.

We should not be surprised by the exhaustion of the "more" approach. If we had reflected on the enormous scope of the processes we indicated at the beginning and we add to them another one as decisive as the progressive integration of China to the world of international trade relations, we could have realized very easily that this acceleration of the openness and integration processes could not continue indefinitely and had to stop one day.

Once the approach of the "more" is exhausted, which orientation should be followed? It is not hard to find the answer: "the approach of the best", that is, to improve the status of the international economic relations (and in particular trade relations) on the basis of a better use of what already exists. The discussion of this approach clearly exceeds the limits of this paper; however, some ideas can be put forward:

- *In the first place*, it is about making an effort of **consolidation**: not superimposing new and hard reforms over reforms that are still on course and have not developed their whole potential.
- *Secondly*, it is necessary to give priority to the **completion** of pending work. In the case of the WTO, it had to be clear to everyone in the second half of the 1990s that the priority had to be China's accession to the Organization (in order to complete its "world dimension") and not the launching of a new round of negotiations that could never be successful if it overlapped with the transition period established for China. The same type of argument applied and continues to apply (at least until the end of its transition period) in the case of Russia.
- *In the third place*, it is necessary to reinforce the **coherence** of the whole global system and the different agreements that coexist within it in order to avoid

¹⁶ The 10th WTO Ministerial Conference was recently held in Nairobi, Kenya, on 15–19 December 2015. The so-called Nairobi Package comprised six Ministerial Decisions on agriculture, cotton and issues related to least-developed countries. For more information see: https://www.wto.org/english/thewto_e/minist_e/mc10_e/mc10_e.htm.

contradictions among them that reduce or even eliminate their respective beneficial effects and end up making the system ungovernable.

- *In the fourth place*, we should give more time to allow all this multiplicity of legal and political instruments to get better known. To know well (another C in Spanish: “**Conocer**”) is the prerequisite for taking better advantage of agreements system we have at our disposal.

The focus on these four ideas or Cs could have been very useful. For example, the first two ideas could have perhaps discouraged the launch of a new WTO Round of Negotiations before the expiration of the 10-year transition periods contained in the agreements that emerged in the Uruguay Round and before the digestion of a fact of such importance as China’s accession to the organization. They would have also discouraged the superposition of more or less constitutional reforms in the framework of the European integration process before digesting the previous ones. In addition, the last two ideas would have avoided, for example, the absurd discussion about investment as a “new subject” within the WTO when the GATS is, above all, an agreement about foreign direct investment (re-baptized as “commercial presence” or “mode 3” of trade in services) and when the most interested in renegotiating another agreement about investment regime (the TRIMs Agreement) seem to be some developing countries. This is such an absurd discussion that has not allowed the discussion of the compelling task of designing an international legal framework on foreign investment that fills the gaps of the post-war order and puts an end to the proliferation of bilateral agreements.

And if, in spite of everything, we would like to continue promoting the politics of the “more”, it is indispensable to recognize with humility and realism that the advances will not take place if we keep on going through the same path we have been following during these last years, which has not taken us anywhere. Different approaches should be designed and practiced.

This thesis put forward in 2001, adapted in order to take into account two phenomena (the “Mega-regional” agreements — but let’s see what will at the end be the effective content of them... — and Eurasian Integration, which seems to advance quite well), appears to be valid now, in 2015. This thesis offers, in our opinion, the grand picture against which, beyond exquisite discussions on its interpretation, the applicability of GATT Art. XXI and the risks of it should be evaluated, moreover taking into account the request by Russia to negotiate a Decision on its interpretation. Are we, with the current chain of sanctions, more or less justified by Art. XXI, advancing towards the better? We have serious doubts about it.

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