CENTRAL EUROPEAN UNIVERSITY

THIRD PARTIES' LEGITIMACY TO IMPOSE TRADE SANCTIONS UNDER XXI GATT

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Abstract

The main issue which I will explore with my Capstone Project is whether, pursuant to Article XXI of the GATT, the parties to an armed conflict can be the target of lawful trade sanctions imposed by third-party states. This article provides member States with the security exceptions that allow them to deviate from the obligations assumed in the treaty without incurring in a breach which could be potentially challenged in the WTO's dispute settlement mechanism. In this regard, due to the current escalation of the conflict between Russia and Ukraine, I will be focusing on analyzing the legal basis of the sanctions that are currently being imposed on Russia, with a particular focus on those imposed by the EU, the US and the UK.

The analysis will consist of a study of the internal legislative basis to impose the sanctions, as well as of the invoked international sources of law, a revision of the historical invocation of the provision, as well as an in-depth examination of the relevant WTO jurisprudence and communications in the matter.

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Introduction

The establishment of an international order in the field of world trade emerged as a need after the Second World War in order to avoid the chain of events which could have ended up in a third conflict of these dimensions. To this end, the Bretton Woods conference took place, which was a reunion of the allied countries in the WW2 with the goal of reaching certain agreements to avoid trade wars and competitive devaluations that resulted in the previous global depression[1] and in the escalation of political tensions. The conference resulted in the drafting and adoption of the charters of two key institutions of the current financial and economic order: the International Monetary Fund (IMF) and the International Reconstruction and Development Bank (the World Bank).[2] In what is referred to specifically to the trade field, there was an attempt to create the International Trade Organization, which could be considered as a predecessor of the current World Trade Organization, as a third institution that would work together with the IMF and the World Bank to liberalize trade and to put an end to the beggar-thy-neighbour policies that ruled the interwar period. Due to the non-ratification by the US Senate, the organization never came to existence and the GATT was adopted instead.

On February of 2014, Russia started its invasion of the Ukrainian region of Crimea. In February of 2022, Russia launched a full-scale attack on Ukraine, under the narrative of their recognition and the need for the consequent liberation of the Donetsk People's Republic and the Luhansk People's Republic, as well as a "denazification" and demilitarization of Ukraine. These events prompted several other WTO Members, including Members which are not directly involved in the conflict, to impose trade sanctions on Russia. According to the sanctioning Members, those

[1] Benn Steil, The Battle of Bretton Woods: John Maynard Keynes, Harry Dexter White, and the Making of a New World Order (Princeton University Press 2013)
[2] Pablo Zapatero Miguel, 'Level Up: A history of Regime-building at GATT Club' [2020] 12(2) Cuadernos de Derecho Transnacional - Universidad Carlos III, pages 818-819.

measures are justified under article XXI of the GATT, which enables Member States to depart from their usual trade obligations under WTO and GATT due to security reasons; according to Russia and its allies, the measures are illegitimate restrictions on trade that run against the sanctioning Members' obligations.

This capstone project is primarily aimed at ascertaining the legality of the sanctions currently being imposed on Russia by virtue of its military operations in Ukraine, especially where those sanctions are adopted by Members not directly involved in the conflict, making a particular emphasis on those imposed by the European Union (EU), the United States of America (US) and the United Kingdom (UK), and how they would be treated if potentially they were ever to be challenged through the WTO dispute settlement mechanisms. To do so, Chapter 1 will begin by analyzing the internal legislative basis coupled with the international sources of law invoked by the US, the UK and the EU to impose trade sanctions. Chapter 2 will turn to analyze how the sanctions would be analyzed by the Dispute Settlement Mechanism under a potential WTO dispute.

Chapter 1 – Legislative Basis for the Sanctions imposed on Russia

Due to the conflict which has been taking place since 2014 between Russia and Ukraine, exacerbated by the ongoing invasion of the Ukrainian territory, Russia has been subject to the condemnation of most of the world, and sanctions has been imposed mostly by the "West". Regarding the content of these sanctions, some of them would not be relevant in WTO context, such as the ones which target specific individuals who are considered to be mainly responsible for the conflict, while there are others which would be in direct contradiction with the provisions of the WTO agreements if they were not justified under the article XXI exception. The measures relevant in the WTO context would be: the banning of imports of oil, gas, coal, steel, iron, wood, seafood and liquor among other products which would be in breach of the obligations that the Member states assumed under Article XI:1; financial measures such as the removal from Russian banks form the SWIFT system and the prohibition of transactions with the National Central Bank of Russia which would be in breach of the obligations assumed on Article II:1 of GATS; the withdrawal from the Most Favoured Nation from both products and services imported from Russia, which would imply a breach of the obligations established on articles I:1 of GATT and II:1 of GATS, respectively.

In this sense, it is important to analyze the legal basis of the sanctions, both regarding the legislation invoked and the wording of the sanctioning document itself, in order to understand how these sanctions would be treated if they were ever to be challenged at the WTO level requiring the subsequent resolution by the WTO Dispute Settlement Body. Most of the legislation and sources of law which they invoke tend to be local (or regional in the case of the EU), but certain international sources of law have also been mentioned and there has even been certain activity, in the form of communications at WTO.

1.1 Invocation of National (or Regional) Legislation

The US is one of the countries that has been sanctioning Russia since the Crimean conflict in 2014, with the first group of sanctions imposed by the Executive Order 13660 "Blocking Property of Certain Persons Contributing to the Situation in Ukraine" on 6th of March. In the Order, the legislation invoked in order to justify the imposition of sanctions was solely national, more specifically: "the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 et seq.) (NEA), section 212(f) of the Immigration and Nationality Act of 1952 (8 U.S.C. 1182(f)), and section 301 of title 3, United States Code". Section 301 of the US Code, which is legislated in the Trade Act of 1974, is controversial and has already been subject of WTO Litigation. In 1999, at the request of the European Communities, a panel examined the WTO-consistency of sections 301-310 of the Trade Act of 1974. The main target of the EU's challenge was section 304, which enables the United States Trade Representative (USTR) to determine whether another WTO Member "denies US rights or benefits" regarding the WTO agreements even before any dispute resolution mechanism takes place, which would prima facie be inconsistent with article 23 of the Dispute Settlement Mechanism. This provision establish in 23.2 a) that Member States must: *"(a) not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding".* [3] The panel did not find such provisions to be inconsistent with the US' obligations under the WTO, although it did

[3] Annex II: Understanding on rules and procedures governing the settlement of disputes (Uruguay Round 1986-1993), article 23.

specify that *"all these conclusions are based in full or in part on the US Administration's undertakings mentioned above. It thus follows that should they be repudiated or in any other way removed by the US Administration or another branch of the US Government, the findings of conformity contained in these conclusions would no longer be warranted."*[4] In so finding, the panel noted the US' argument that the powers granted to the USTR by sections 301 to 310 would be always used to act in compliance with the WTO rules and provisions. The panel warned that that if they were ever to be used contrary to such rules and provisions, the sections could be found to be inconsistent with the US obligations under WTO.

In the current situation, sections 301-310 are invoked in order to justify the act of sanctioning Russia, since first, it would be necessary to declare a national emergency, in accordance with the National Emergencies Act, in order for the President to make use of the powers (to sanction in this case) granted by section 1702 of the International Emergency Economic Powers Act, in accordance with section 1701 of such act. Finally, since the sanctions which were first announced (and some of the subsequent as well) were directed towards individuals, who may be resident or might own property in the US, therefore they needed a basis on the Immigration and Nationality Act of 1952. The first set of sanctions that would be WTO relevant originated in the Executive Order 14065 of February 21, 2022 "Blocking Property of Certain Persons and Prohibiting Certain Transactions With Respect to Continued Russian Efforts To Undermine the Sovereignty and Territorial Integrity of Ukraine." It invokes the same internal legislation as the first sanction implemented by the Executive Order 13660, and its relevance emerges from the posterior banning of Russia from SWIFT, banning of Russian aircrafts from the US airspace, and the subsequent bans on energy-related products such as oil and gas with basis through the Executive Order 14065.

[4] WTO, *United States: Sections 301-310 of the Trade Act of 1974 —Report of the Panel* (22 December 1999) WT/DS152/R, page 351.

The UK during the 2014 conflict was still part of the EU and therefore, applying the sanctions regime implemented by the EU Council. Due to Brexit, which took effect on January of 2020, the UK adopted the so called "The Russia (Sanctions) (EU Exit) Regulations 2019" on 10 April 2019, in which it invokes as legal basis for the sanctions the "Sanctions and Anti-Money Laundering Act 2018". Once again, the legislation invoked is national. The following sanctions adopted up to date also find the same legal and political basis. It is important to notice that the Sanctions and Anti-Money Laundering Act 2018 would be the equivalent in this situation to the International Emergency Economic Powers Act for the US, since they both could be considered as the main legal justification of the imposition of trade sanctions.

The European Union, even though it differs from the already analyzed states due a complementary invocation of international sources of law, has also been justifying their sanctions on regional legislation. In this sense, their first sanctions imposed in 2014 were instrumented by the "Council Decision 2014/145/CFSP of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine" and consequent "Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine". The Council Decision invokes Article 29[5] of the Treaty on European Union (TEU), which allows the Council of the European Union to adopt sanctions against governments of third countries, non-state entities and individuals (such as terrorists) to bring about a change in their policy or activity[6], while the Council Regulation finds legitimation in Article 215 Treaty on the

[5] Consolidated Version of the Treaty on European Union [2012] OJ C 326/33, article 29 (ex article 15 of the Treaty on European Union 1992): *"The Council shall adopt decisions which shall define the approach of the Union to a particular matter of a geographical or thematic nature. Member States shall ensure that their national policies conform to the Union positions."*

[6] As described in the General Framework for EU Sanctions (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:25_1#:~:text=Article%2029%20of%20the%20Treaty%20on%20European%20Union%20(TEU)%20allows,in%20their%20policy%20or%20activity.)

Functioning of the European Union[7] (TFEU), which allows the Council to take the necessary steps in order to implement the decisions taken on the ground of Article 29 TEU. All the subsequent instruments through which following sanctions were imposed invoke either one of these articles. The first product bans were implemented through the aforementioned Decision and the subsequent Regulation, and were primarily focus on goods which originated in either Crimea or Sevastopol, since they were de-facto Russian controlled territories.

1.2 Invocation of International Sources of Law

The main source for the imposition of sanctions, as analyzed in the previous section, is the national (or regional in the case of the EU) legislation. However, there are certain mentions of international sources of law in the sanctioning instruments as justification for the imposition of the sanctions.

The US, in the 2014 group of sanctions did not make any such mentions. However, in the text "Executive Order on Blocking Property of Certain Persons and Prohibiting Certain Transactions With Respect to Continued Russian Efforts to Undermine the Sovereignty and Territorial Integrity of Ukraine" of the 21 of February of 2022 it is stated that the recognition by Russia of the Donetsk People's Republic and the Luhansk People's Republic "contradicts Russia's commitments under the Minsk agreements".[8] The Minsk Agreements were a number of international agreements with the goal to regularize the situation and end the war in the

[7] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/144, article 215 (ex article 301 TEC): *"1. Where a decision (...) provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. (...) 2. Where a decision adopted in accordance with Chapter 2 of Title V of the Treaty on European Union so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities."*

[8] Executive Order number 14065 on Blocking Property of Certain Persons and Prohibiting Certain Transactions With Respect to Continued Russian Efforts to Undermine the Sovereignty and Territorial Integrity of Ukraine, 21 February 2022, published on the Federal Register on 23 February 2022, Vol. 87, No. 36, second paragraph.

Donbass. Although they did not include specifically any provisions relating to trade itself, they did aim for the creation of a *"programe for the economic revival of Donbass and the resumption of vital activity in the region"*[9]. It is important to take into consideration Russian President Putin's position that the recognition of the aforementioned independent republics puts an end to the agreements.

In the EU case, the references to international sources of law also start with the 2022 sanctions, but with a stronger invocation than that in the US legislation. We can find the strongest mention in the Council Decision (CFSP) 2022/265 of 23 February 2022 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine. In such instrument, in the paragraph 8 of the introduction, it qualifies Russia's recognition of Donetsk and Luhansk independence as an *"(...) illegal act further undermines Ukraine's sovereignty and independence and is a severe breach of international law and international agreements, including the UN Charter, Helsinki Final Act, Paris Charter and Budapest Memorandum, as well as of the Minsk Agreements and UN Security Council Resolution 2202 (2015)."*[10] A number of the following sanctioning instruments make the exact same reference to these international treaties.

In this enumeration, there is a direct mention of the UN Charter and of a Security Council Resolution (which regulated the conditions in which the ceasefire would be implemented). This invocation seems to already have found legitimation for a potential invocation of article XXI GATT, since one of the security exceptions which mentions the article on c) is: "*to prevent any*

[9] Protocol on the outcome of consultations of the Trilateral Contact Group on joint steps aimed at the implementation of the Peace Plan of the President of Ukraine, P. Poroshenko, and the initiatives of the President of the Russian Federation, V. Putin- Mission of Ukraine to the European Union - 8 September 2014, Ministry Foreign Affairs of Ukraine, section 11.

[10] Council Decision (CFSP) 2022/265 of 23 February 2022 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2022] OJ L 42I/98, paragraph 8.

contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security." As the EU considers Russia's acts on Ukrainian territory as illegal, in breach of international law and agreements, and even in violation of the UN Charter, in a possible scenario in which the situation reaches WTO's Dispute Settlement Mechanism, it is possible to assume that the EU would justify the trade measures, at least, under the peacekeeping section c) of article XXI.

On the other hand, in the UK's "Russia (Sanctions) (EU Exit) Regulations 2019", there is no reference or invocation of international treaties or agreements besides the mentioning that the regulations' purpose is to replace the previous EU sanction system which the UK used to belong to. The only reference to international sources of law made by the UK can be found in the joint statement with other States at WTO, which will be analyzed in the chapter 2 of this capstone project.

1.3 References to "National Security" or similar concepts

All of the previously mentioned laws, regulations or decisions directly state that they are being taken due to the conflict between Russia and Ukraine, whether that is the 2014 Crimea conflict or the current invasion. However, some of them make differing level of references to direct or potential threats to their own national security as a consequence of Russia's actions.

In their Regulation, the UK does not make any mention of a potential threat to its own national security, but merely state that: *"These Regulations are made for the purpose of encouraging Russia to cease actions destabilizing Ukraine or undermining or threatening the territorial integrity, sovereignty or independence of Ukraine."*[11]

[11] Exiting the European Union Sanctions - The Russia (Sanctions) (EU Exit) Regulations 2019, SI 855, Explanatory Note, first paragraph.

On the other hand, the EU, besides referring to the threat to Ukraine's sovereignty and territorial integrity, started to mention risks to Europe's regional security in the sanctions imposed since the 2022 military operation, the first one being the "Council Decision (CFSP) 2022/265 of 23 February 2022 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine". Specifically, it states that (referring to the principles on which European security is based): *"The Council stated that those principles are neither negotiable nor subject to revision or re-interpretation and that their violation by Russia is an obstacle to a common and indivisible security space in Europe and threatens peace and stability on the European continent."*[12] Most of the following sanctions included the same sentence. In the "Council Decision (CFSP) 2022/397 of 9 March 2022 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine", the Council goes even further by stating: "*By its illegal military actions, Russia is grossly violating international law and the principles of the UN Charter, and undermining European and global security and stability."*[13]

The US, since the 2014 Crimea conflict, has considered the situation as a threat to their own national security. In the "Executive Order -- Blocking Property of Certain Persons Contributing to the Situation in Ukraine", then-president Obama stated that *"the actions and policies of persons (...) that undermine democratic processes and institutions in Ukraine; threaten its peace, security, stability, sovereignty, and territorial integrity; and contribute to the misappropriation of its assets, constitute an unusual and extraordinary threat to the national*

[12] Council Decision (CFSP) 2022/265 of 23 February 2022 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2022] OJ L 42I/98.
[13] Council Decision (CFSP) 2022/397 of 9 March 2022 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, [2022] OJ L 80/31.

security and foreign policy of the United States (...)"[14]. This has continued in the "Executive Order on Blocking Property of Certain Persons and Prohibiting Certain Transactions With Respect to Continued Russian Efforts to Undermine the Sovereignty and Territorial Integrity of Ukraine" of 21 of February of 2022, where Biden expresses *that "the Russian Federation's purported recognition of the so-called Donetsk People's Republic (DNR) or Luhansk People's Republic (LNR) regions of Ukraine contradicts Russia's commitments under the Minsk agreements and further threatens the peace, stability, sovereignty, and territorial integrity of Ukraine, and thereby constitutes an unusual and extraordinary threat to the national security and foreign policy of the United States".*[15]

If we contrast these statements in the sanctioning instruments with the text of article XXI GATT, we can understand that sanctions taken could be justified as taken in protection of their essential national security interests in times of war or other emergency in international relations, that is under XXI GATT, b), III. In this regard, the definition of the term "emergency in international relations" is a key element to understand the scope of the provision, and its analysis will be done in the following chapter.

Having outlined the legal grounds invoked by the US, the UK, and the EU as a basis for imposing the sanctions, it is now time to assess whether those grounds are consistent with those Members' WTO obligations. In the next Chapter, I will proceed to such an assessment by analyzing the historical invocation of article XXI GATT, its jurisprudence by panels and the Appellant Body, as well as the negotiating history of the provision. I will also look at the communications at the WTO level that have been issued due to the conflict, as well as the evolution of the practice of the Member States regarding the security exceptions.

[14] Executive Order number 13660 Blocking Property of Certain Persons Contributing to the Situation in Ukraine 6 March 2014, published on the Federal Register on 10 March 2014, Vol. 79, No. 46, second paragraph.
[15] Executive Order number 14065 , second paragraph (n 8).

Chapter 2: Analysis of the sanctions under the scope of a potential WTO dispute

2.1 Historical invocation of article XXI

The historical invocation of article XXI can give us certain context regarding the interpretations that Member States have given this provision, which help us to understand the practice that has accompanied it since its drafting and adoption. In this sense, the article has been invoked in some occasions both in the context of the GATT and the WTO dispute resolution mechanism. In 1961, in the context of the accession of Portugal to the WTO and while the Angolan War of Independence from Portugal was taking place, Ghana justified its boycott to Portuguese good under article XXI:(b) (iii)[16], since the Ghanaian government considered the situation in Angola as a threat to its essential security interest. Over 20 years had to pass by for the article to be invoked again in the context of a conflict, this time without specification of which of the sections of it was being invoked, in 1982 by the EEC, Canada and Australia and against Argentinian goods in the context of the Malvinas/Falklands war[17]; Australia was the only one to specify that the restrictions on the imports were justified under article XXI:(c). Regarding this case it is important to note that the states imposing measures maintain the position that article XXI was self-judging without a need of notification nor justification[18], contrary to the Argentinian position which considered that the *"there were no trade restrictions which could be applied without being notified, discussed and justified"*[19].

[16] Analytical Index of the GATT, Official WTO document, page 600 (https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art21_gatt47.pdf).
[17] Ibid, pages 600-601.
[18] Minutes of Meeting - Held in the Centre William Rappard on 29-30 June 1982 (10 August, 1982) C/M/159, page 19 <http://docsonline.wto.org>.
[19] Ibid, pages 14-15; Minutes of Meeting - Held in the Centre William Rappard on 7 May 1982 (22 June, 1982) C/M/157, page 12 <http://docsonline.wto.org>.

Another case in which the invocation of article XXI took place was in 1985 in United States vs Nicaragua, in which the US had imposed trade measures on Nicaragua in the context of the Nicaraguan Revolution, in which they were supporting the "Contras". The measures were justified on article XXI(b)(iii), and the panel did not express its opinion regarding the validity of such justification because the US representative submitted the matter to the panel with the condition that the panel would not be authorized to examine the justifications for which the US had invoked the article.[20] From these cases we can see how the interpretation of the panel regarding the article has evolved to its current interpretation in Russia - Traffic in Transit. Another example of invocation of the article was by Sweden in 1975, when they introduced a global import quota system for certain footwear. Their justification was to ensure they had certain essential products, in this case regarding specific footwear, to be able to use them in case of a war or another type of emergency in international relations.[21] Two years later Sweden removed the quota system due to the concerns and doubts expressed by other members states regarding the Swedish interpretation of article XXI. This could be understood as an example of self-regulation by the Member States regarding a provision which at the moment was understood as self-judging.

Finally, in November 1991 the European Communities imposed sanctions on Yugoslavia, removing their preferential treatment in trade, in the context of the wars after the breakup of Yugoslavia. Article XXI was invoked as the justification provision in defense of the European security interests. Other states which also took trade-restrictive measures towards Yugoslavia were Australia, Austria, Canada, Finland, Japan, New Zealand, Norway, Sweden, Switzerland, and the United States. There was not a panel report drafted despite the request for it by the

[20] WTO, *United States: Trade Measures Affecting Nicaragua — Report of the Panel* (13 October 1986), 11L/6053, (unadopted).
[21] WTO, Sweden: Import Restrictions on certain Footwear - Notification by the Swedish Delegation (17 November 1975), L/4250, page 3 <http://docsonline.wto.org>.

newly formed Federal Republic of Yugoslavia (conformed by Serbia and Montenegro), due to problems regarding the legal heritage of the divided Yugoslavian republics.

2.2 Communications in the World Trade Organization

2.2.1 Joint Statement

The notions that third parties would be legitimated to impose sanctions under article XXI exceptions seems to be reinforced by the current developments in the WTO. In that regard, it is important to take into consideration that communications such as the ones being analyzed in this section of the capstone, refer to an agreement and a subsequent practice which is to be considered when interpreting article XXI, in the terms of article 31.3 a) and b) of the Vienna Convention on the Law of Treaties of 1969 (VCLT).

A communication was issued by Albania; Australia; Canada; European Union; Iceland; Japan; Republic of Korea; Republic of Moldova; Montenegro; New Zealand; North Macedonia; Norway; United Kingdom and United States in which not only they condemn Russia's actions jointly by qualifying its actions as *"an egregious violation of international law, the UN Charter, and fundamental principles of international peace and security"* [22] and announce the possible suspension of most favoured nation treatment to Russian products and services[23], but also consider it necessary to suspend Belarus' accession process to WTO.

The fact that these countries make a joint declaration in which they communicate their willingness to suspend one of the most basic principles over which international trade has been

[22] WTO, Joint statement on aggression by the Russian Federation against Ukraine with the support of Belarus, (15 of March of 2022), WT/GC/244, first paragraph <http://docsonline.wto.org>.
[23] Ibid: "We will take any actions, as WTO Members, that we each consider necessary to protect our essential security interests. These may include actions in support of Ukraine, or actions to suspend concessions or other obligations with respect to the Russian Federation, such as the suspension of most-favoured-nation treatment to products and services of the Russian Federation."

developing since the end of World War II demonstrates that they understand that their actions would be legitimate under GATT, and more specifically, since they are referencing the protection of their essential security interests, to article XXI. This means that as third parties to a conflict which is taking place, in which Russia is attacking a sovereign state, they understand that they are legitimated enough to impose trade sanctions.

The joint statement not only means that certain members of WTO understand article XXI as a legitimating exception to conflicts in which they are third parties, but also has the added significance that these members interpret it as a legitimation to impose sanctions to allies of the belligerent parties. This understanding of the provision as a source of legitimation to impose trade sanctions finds its legal basis on the VCLT, as previously mentioned, more specifically in the article 31.3 a) and b). This article establishes some general rule of interpretation regarding international treaties, stating that the context must be taken into account together with *"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"*[24]. In this sense, the general understanding by the WTO members who participated in the joint statement constitutes a source of law itself since it implies a tacit agreement that article XXI GATT can be invoked by third parties to a conflict in accordance with 31.3 a). In this sense, the Appellant Body has understood in United States – Measures affecting the production and sale of clove cigarettes that: "*We consider, therefore, that a decision adopted by Members, other than a decision adopted pursuant to Article IX:2 of the WTO Agreement, may constitute a "subsequent agreement" on the interpretation of a provision of a covered agreement under Article 31(3)(a)*

[24] United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, Treaty Series, vol. 1155, article 31.3 a) and 31.3 b)

of the Vienna Convention"[25] and continues to develop the concept by establishing two requirements to consider it a subsequent agreement: "*(i) the decision is, in a temporal sense, adopted subsequent to the relevant covered agreement; and (ii) the terms and content of the decision express an agreement between Members on the interpretation or application of a provision of WTO law*."[26] The joint statement fulfills both of these requirements, as it is meets the temporal element, and it was drafted in the understanding that these Member States are acting to protect their essential security interests in the terms of article XXI GATT, implying an agreement between them regarding their legitimation to impose such trade measures.

These Member States go even further by the actual imposition of trade sanctions which would be the "practical" element which is referred to in VCLT 31.3 b). In that regard, the Appellant Body has defined the "practice" referred to in 31.3 b) in Japan – Alcoholic Beverages II as: "a *"concordant, common and consistent" sequence of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties [to a treaty] regarding its interpretation"*[27] and in Chile – Price Band System: "*a discernible pattern of acts or pronouncements implying an agreement among WTO Members on the interpretation of [the relevant provision]*[28]". Therefore, as summarized by the Appellant Body in United States – Measures affecting the cross-border supply of gambling and betting services: *"Thus, in order for "practice" within the meaning of Article 31(3)(b) to be established: (i) there must be a common, consistent, discernible pattern of acts or pronouncements; and (ii) those acts or pronouncements must imply agreement on the interpretation of the relevant provision."* Again the joint statement, together with analyzed internal legislation to implement the sanctions in

[25] WTO, *United States – Measures affecting the production and sale of clove cigarettes - Report of the Appellant Body* (4 April 2012), WT/DS406/AB/R, paragraph 260.
[26] Ibid, paragraph 262.
[27] WTO, *Japan - Taxes on Alcoholic Beverages - Report of the Appellant Body* (4 October 1996) WT/DS8/AB/R WT/DS10/AB/R WT/DS11/AB/R, page 13.
[28] WTO, Chile — *Price Band System and Safeguard Measures Relating to Certain Agricultural Products - Report of the Appellant Body* (7 May 2007), WT/DS207/AB/R, paragraph 214.

the chapter 1, and the practices to be analyzed in the following sections, meet these two requirements. The joint statement is not the only act in which states consider themselves legitimated enough in order to impose trade sanctions on Russia, but a series of internal and international legislation and acts follow this pattern; and all of these acts imply an agreement regarding the interpretation of article XXI in which third parties, and not only Ukraine, are legitimated to impose trade sanction on Russia.

It is important to take into consideration that even though Belarus has been supporting Russia (allowing their troops to go through their territory, letting them do military drills near the Ukrainian border, etc.), they have not directly taken part of the conflict.

In the joint statement, the Member States participating in it directly state that they consider Belarus' accession process to be suspended, which although is not directly a trade sanction, it could be considered an even stricter measure in the way that it keeps the country in isolation from international trade. Furthermore, the European Union, the United States, Canada, and Japan have imposed trade sanction on Belarus.

As Belarus is not yet a member of the WTO, it is not entitled to the same rights and treatment as WTO members, and would not be able to contest any measure or sanction through the dispute settlement mechanism. However, the joint statement does speak of a position which leads to a broad interpretation of article XXI GATT, the concept of "essential security interests" and the term "emergency in international relations", allowing the potential imposition of sanctions to allies, which have not yet engaged in active conflict, of the belligerent parties.

2.2.2 Canada's Communication at WTO

Besides participating in the analyzed joint statement, Canada has also made a communication at WTO in which it manifests the sanctions that it is imposing to Russia invoking their legitimacy under the protection of their essential security interests granted by article XXI.[29]

Canada attached to their communication the publication of the order at the Canada Gazette, the official newspaper of the Government of Canada, in which they treat Belarus the same way as Russia, imposing on both states the withdrawal of the most favoured nation tariffs for good and services imported from these countries. The material effect of this action is a significant increase from the tariff rate of 2.7% to 35%, the highest tariff possible which the only country which is subjected to it is North Korea.[30]

In such document, Canada describes Russian invasion of Ukraine as a *"violation of international law, including Article 2(4) of the Charter of the United Nations, and presents a grave threat to international peace and security and the rules-based international order"*[31] and that their essential security interests "*are threatened by the Russian Federation's violation of international law and its willful disregard of the rules-based international order"*[32]. We can see an invocation of international sources of law, and a direct mention to the United Nations Charter. This means that, if the measures were ever to be challenged through a dispute mechanism settlement, Canada will mostly focus its defense on article XXI c), in its efforts to maintaining international peace and security. Although nothing would impede them to invoke XXI b) iii), since Canada could claim that the measure is taken in times of an emergency in

[29] WTO, Trade Measures taken by Canada against imports from the Russian Federation - Communication from Canada (17 of March of 2022), WT/L/1131, paragraph 6): "Canada considers that the measures described above, as well as other measures adopted in response to this crisis, are necessary to protect its essential security interests and has taken them upon consideration of GATT Article XXI." <http://docsonline.wto.org>.
[30] Regulations Amending the Special Economic Measures (Russia) Regulations, published on Canada Gazette, part 2, Vol 156. NO. 6, page 761.
[31] Trade Measures taken by Canada, paragraph 4) (n 29).
[32] Trade Measures taken by Canada paragraph 5) (n 29).

international relations among two belligerent parties, finding themselves in the same position in which the US was during the World War II, as will be analyzed in section 2.3 of this capstone project.

2.2.3 Russia's response communication at WTO

Russia on the 16th of March of 2022 also made a communication in WTO in response to the Joint Statement, and not to Canada's communication at WTO since it was published on the 17th of March, but to their national order in which they regulate the sanctions imposed on both Russia and Belarus.

In such communication, Russia characterizes the trade measures imposed as "*Direct violations of the basic WTO rules by these Members have put severe pressure on global supply chains, which are still fragile after the pandemic, and jeopardizing the global food security* (…)" [33] and continues to describe the measures which they consider inconsistent with GATT and GATS. In this sense, they make no reference to possible invocation of the sanctioning parties of article XXI, which could be a strategy in order not to recognize the existence of the essential security interests of other states under threat.

Russia also makes emphasis on a "de facto abandonment" of the legal system established under WTO by Canada and "some other countries"[34], following the logic that the "unilateral and unjustified"[35] withdrawal of the most favoured nation treatment, as a basic principle of WTO and international trade, would imply such an abandonment.

It also considers possible scenarios in which the WTO would become inefficient or would potentially lose its position as regulator of international trade. One being the imposition by

[33] WTO, Communication of the Russian Federation (16 of March of 2022), WT/GC/245, third paragraph <http://docsonline.wto.org>.
[34] Ibid, seventh paragraph.
[35] Ibid, seventh paragraph.

states of retaliatory measures among each other, which would weaken the application and enforcement of the WTO agreements[36], and the other in which Russia is isolated from participating in WTO by other members which would lead to a "paralysis of the basic functions of the WTO."[37]

Finally, Russia states the need for a separation among issues of territoriality and trade: *"(...) the recent statements by representatives of some Members demonstrate clear intention to introduce the issue of territoriality into the framework of the WTO. This trend is quite disturbing."*[38] This follows the logic of qualifying the measures taken as sanctions against Russia as "politically motivated".[39]

In summary, Russia's position is focused in characterizing the conflict with Ukraine as a political issue of territoriality to which third states are not legitimized to be taking trade measures (sanctions) on its parties, and understanding that such measures not only threaten the global economy and the trade system which has been developing in the context of WTO, but also the functioning of the WTO itself due to the imposition of sanctions.

2.3 In the current scenario, are the trade sanctions imposed on Russia justified on article XXI GATT?

We are getting closer to the main issue: there is a war among Russia and Ukraine, would then the sanctions imposed on Russia by the US, EU and the UK be justified under XXI GATT, b), III? If so, would they be taken in time of war (in which these states are not directly a part of), or would they be justified since they are taken in time of an emergency in international relations? Could the measures be also taken in pursuance to these States' (or group of States)

[36] Ibid, eight paragraph.
[37] Ibid, eight paragraph.
[38] Ibid, ninth paragraph.
[39] Ibid, first paragraph.

obligations under the United Nations Charter for the maintenance of international peace and security? In this regard, it is important to look at both the jurisprudence which has interpreted article XXI GATT as well as the negotiating history of provision.

The panel in Russia – Traffic in Transit has defined an emergency in international relations as "(…) *a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state. Such situations give rise to particular types of interests for the Member in question, i.e. defence or military interests, or maintenance of law and public order interests.*"[40] In the same report the panel defines "war" as an armed conflict, and a subcategory of the possible emergencies in international relations that may arise.[41] If we complement this definition with the negotiating history of the article, we will get a bigger picture on our question. In this sense, the representative of the United States, during the Geneva negotiating session on 24 July 1947, stated: *"(…) As to the second provision, "or other emergency in international relations," we had in mind particularly the situation which existed before the last war, before our own participation in the last war, which was not until the end of 1941. War had been going on for two years in Europe and, as the time of our own participation approached, we were required, for our own protection, to take many measures which would have been prohibited by the Charter (…)"*[42]

[40] WTO, Russia — *Measures concerning Traffic in Transit - Report of the Panel* (5 April 2019), WT/DS512/R, section 7.93.

[41] Ibid, section 7.72: *"The use of the conjunction "or" with the adjective "other" in "war or other emergency in international relations" in subparagraph (iii) indicates that war is one example of the larger category of "emergency in international relations". War refers to armed conflict."*

[42] Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, Thirty-Third Meeting of Commission A Held on Thursday, 24 July 1947, E/PC/T/A/PV/33, pp. 20-21 (as corrected by Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Corrigendum to Verbatim Report of Thirty-Third Meeting of Commission A, E/PC/T/A/PV/33.Corr.3, pp. 20-21). (emphasis added) See also Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Corrigendum to Verbatim Report of Thirty-Third Meeting of Commission A, E/PC/T/A/PV/33.Corr.1; and Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Corrigendum to Verbatim Report of Thirty-Third Meeting of Commission A, E/PC/T/A/PV/33.Corr.2.

The legal basis for assigning relevance to the negotiating history of the provision as well as the context in which it was drafted, can be found in Article 32 of the VCLT, which establishes *"Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion (...)"*[43]

As we can see, the US, EU and the UK (and all other states which are currently sanctioning Russia, but an analysis of the sanctions imposed by them would be too extensive for this capstone project), find themselves currently in the same position as the US during World War 2 II until the end of 1941, the moment in which they actively joined the war, the armed conflict itself. From this we can conclude that article XXI GATT b), III) in its reference to "actions taken in time of emergency in international relations" was originally thought to be applied by third parties to a conflict, such as the existing one. This, coupled with the definition of the concept of "emergency in international relations" given by the panel in Russia – Traffic in Transit, which would also be applicable to scenario in which the sanctioning states find themselves in, seems to indicate that in a potential dispute settlement initiated to challenge the measures, the decision would favour the sanctioning states.

However, the fact that the imposition of trade sanctions from an historical perspective applies to the current scenario, does not immediately mean that third parties should be able to impose trade sanctions on any state which is part of a conflict regardless of the context.

In this regard, we can see an almost global consensus regarding the illegality of Russian actions on Ukrainian territory, coupled with the disparity between the belligerent states in almost every sense, but specifically in economy and military force. This disparity among the parties in this specific context can be partly reduced by the imposition of trade sanctions on Russia (among other types of actions which exceed the analysis presented in the current capstone project),

[43] VCLT article 32 (n 24).

which have the ultimate goal of generating internal wear and tear on the Russian economy in order to deter their government from continuing with the conflict.

Therefore, even this interpretation of article XXI GATT which is consistent from an historical perspective must be done with caution, because in some other contexts it could be used as a door to abuse one of the belligerent parties, regardless of the legality of their actions. An interpretation of the WTO Dispute Settlement Body is needed, in which limits are determined in order to avoid such abusive situations.

2.4 Analysis of the measures imposed in accordance with the WTO and other bodies interpretations of article XXI GATT.

The case in which the application of trade sanctions by third parties was the most discussed in the context of the WTO was the imposition of trade sanctions on Argentina by the UK, Australia, Canada and the European Communities due to the Malvinas/Falklands war in 1982. The reaction of the Member States towards the sanctions being imposed on Argentina is quite different of the current reaction towards sanctions imposed on Russia. This is the reflection of a change in agreement of the Member States regarding their interpretation of article XXI, and a consequential change in its application and practice in the current conflict.

Argentina had had a de-facto military government since 1976 which was constantly losing any kind of remaining popular support or legitimacy, and in an attempt to unite the country in a common national cause and perpetuate themselves in power decided to reconquer the Malvinas/Falklands islands, a territory for which Argentina continues to claim its sovereignty upon.

In this sense, there is a series of documents regarding the communications in WTO context, which reflect the position of several states regarding the self-judging character of article XXI, as well as the possible legitimacy for third parties to a conflict to impose trade sanctions.

The first communication was made by Argentina on the 29th of April of 1982, in which it states how the trade measures imposed by the EEC, Australia and Canada are infringing the principles and objectives of the GATT, the most favoured nation treatment, articles II, XIII and XXXVI, among others[44]. Argentina also states the lack of legitimation to impose such sanctions under article XXI c) due to a lack of pronouncement or authorization to do so by the Security Council of the United Nations[45]. Finally, Argentina makes a differentiation among the sanctions applied by the UK, and the EEC, Canada and Australia, based on the fact that (regarding the EEC, Canada and Australia) *"the Argentine Republic has maintained relations free of all dispute they constitute a hostile act and a flagrant economic aggression, affecting the basic principles of international law."*[46] It goes further by stating that their interference is unjustified in a territorial dispute which is alien to them.[47]

From this first communication we can understand certain similarities among this scenario and the Russia-Ukraine one which we are analyzing on this Capstone Project. In both cases, if we remove elements from the context such as the motivations behind each aggression, colonization and differences among military and economic power among belligerent parties, we can understand that there is a belligerent state over which sanctions are being imposed by not only the other belligerent part but third parties to the conflict, for non-economic reasons. Not only the factual scenario, but the arguments of both parties regarding the measures imposed on them have elements in common. Russia is currently characterizing the sanctions as an economic

[44] WTO Trade Restrictions Affecting Argentina Applied for Non-Economic Reasons - Communication by the Permanent Mission of Argentina, (30th April 1982) L/5317 <http://docsonline.wto.org>.
[45] Ibid, page 2.
[46] Ibid.
[47] Ibid.

aggression, motivated by political rather than trade reasons, regarding an issue which is territorial and considers these sanctions as unjustified since the "West" is alien to this dispute. Argentina also considered that the measures were of a political character rather than motivated on economic or trade reasons, that their ultimate goal was the imposition of pressure over sovereign decisions of Argentina, and that except the UK, the other sanctioning states were alien to the territorial conflict.

Of course, there are other elements in which the conflicts are not alike: Argentina had always had a territorial claim over the Malvinas since the 1833 occupation while Russia's invasion of Ukraine is based on imperialism (even denying the statehood of Ukraine and therefore denying the right of self-determination of the Ukrainian people). Putting aside the narrative on which the aggression is being justified, the economic and military strength are also inverted (in the Malvinas/Falklands war the UK was the stronger state), as well as the way that the conflicts developed (in the Malvinas/Falklands war there were no civil casualties by Argentinian forces, while there ongoing attack on civil targets in the current conflict, with potential other human rights violations that might be determined once it's over). But overall, in terms of the characterization of the trade measures imposed and the description of the scenario around them, both cases present similarities.

The response to this initial communication by the European Communities, Australia and Canada was merely to state that "*they have taken these measures on the basis of their inherent rights of which article XXI of the General Agreement is a reflection*"[48]. Since these states did not notify these trade measures on WTO context, Argentina did so for them in a communication of the 15th of June of 1982[49].

[48] Trade Restrictions Affecting Argentina Applied for Non-Economic Reasons - Communication by the European Comunities, Australia and Canada, (18th May 1982) L/5319/Rev. 1 <http://docsonline.wto.org>
[49] Trade Restrictions Affecting Argentina Applied for Non-Economic Reasons (15th June, 1982) L/5336 <http://docsonline.wto.org>

On the 7th of May of 1982 there was a meeting of the Contracting parties at the Centre William Rappard in which many states expressed their positions regarding article XXI in general, its character of whether it's a self-judging provision, and the legitimation (or lack of it) by third parties to conflicts to impose sanctions. In that meeting the Argentinian representative repeated and added elements to Argentina's arguments which were presented in previous communications, and also made emphasis on the fact that, except the UK, foreign parties to the conflict were imposing trade measures on Argentina.[50] It also attacked a possible legitimation (which was effectively invoked by Canada and Australia) on article XXI c) since the UN Security Council did not authorize any kind of trade sanctions. [51]

Brazil's position was quite similar to Argentina's, understanding a lack of a legal basis for the trade sanctions either under the UN Charter, resolution 502 of the Security Council (which was about the conflict itself), or the GATT. Brazil stated, however, that this lack of a basis for the sanction does not apply to the UK[52]. In this sense, we can see a clear differentiation among what Brazil considered as the basis to take actions upon article XXI GATT: while the UK is legitimated to impose trade sanctions as a belligerent party, its allies, as aliens and third parties to a conflict, are not. Brazil considered the UK as the only state which was "*taking this action in protection of their essential security interests*." [53] And even though they admitted the possible characterization of the war as an "emergency in international relations", they considered that it was such just in respect of the region in question, as determined by the resolution 502 of the Security Council. [54] Cuba held the same argument based on the resolution

[50] Meeting at Centre William Rappard, page 2 (n 19).
[51] Ibid.
[52] Ibid, page 5.
[53] Ibid.
[54] Ibid.

502 but went further by stating that article XXI does not provide legal grounds for such measures. [55]

The representative of Spain considered that the UK's sanctions were justified under article XXI, b) iii) but expressed doubts regarding the same sanctions taken by the non-belligerent parties.[56] Romania stated that they have always been against trade restriction applied for non-economic reasons[57]. Poland's position was similar, considering that it is not possible to accept *"that the measures in question could be justified by invoking the provisions of Article XXI, whose purpose was to give a contracting party the right to defend its legitimate interests in case of serious danger and not to punish another contracting party for actions which hardly were of an economic nature."*[58]

Spain, Poland and Romania are currently imposing trade sanctions on Russia. From this action we can conclude that there has been an evolution in the way that these countries understand the reach and scope of article XXI in reference to the imposition of sanctions by third parties to a conflict, and in what it regards the motives under which such sanctions can be imposed, since the trade measures that are currently being taken are justified also in non-economic reasons (the sanctioning states invoke motives such as threats towards their own national security, the territorial integrity and sovereignty of Ukraine, violations by Russia of the international order or the UN charter, among other reasons). There might be a counter-argument to this affirmation which is that all of these countries are now acting as a regional block, the EU, and therefore lose part of their sovereignty or general influence over this decision, but at least in the case of Poland this would not apply, since they have applied their own set of sanctions going beyond

[55] Ibid, page 6.
[56] Ibid, page 7.
[57] Ibid.
[58] Ibid, page 9.

the EU ones over both Russia and Belarus[59]. And outside the EU block, Japan in the meeting regarding the Malvinas/Falklands war stated a position similar to these countries regarding a need for separation between politics and trade: *"(...) the interjection of political elements into GATT activities would not facilitate the carrying out of its entrusted tasks."*[60], but currently Japan is sanctioning Russia. This confirms an overall and interregional shift regarding the conception of the role of trade measures imposed by third parties to a conflict.

The US position did not specifically express anything about the legitimation of third parties, but did emphasize that article XXI is self-judging, and in this sense contracting parties should determine what is necessary to protect their essential security interests.[61] The European Communities considered also that each contracting party is "*the judge of the exercise of these rights*", and that they do not require notification, justification, nor approval. [62]

Canada did not expressly invoke article XXI but said that its actions are justified on resolution 502 of the Security Council and that the GATT does not contain a definition of "essential security interests", and neither does it demand notification. [63] Australia claimed that its measures were in conformity with article XXI c) and that they did not require either notification or justification.[64] To conclude the meeting the Chairman proposed, after summarizing the parties concerns regarding the issue, that the matter should be kept open and in the agenda of the council.

Finally, and in accordance with this last statement, a decision regarding article XXI was taken on the 30 of November of 1982. In such decision, the contracting parties determined that: *"1) Subject to the exception in Article XXI: a, contracting parties should be informed to the fullest*

[59] (Poland) The Act on Special Measures to Counteract the Support of Aggression Against Ukraine and to Protect National Security, 2022
[60] Meeting at Centre William Rappard, page 9 (n 19).
[61] Ibid, page 8.
[62] Ibid, page 10.
[63] Ibid.
[64] Ibid, page 11.

extent possible of trade measures taken under Article XXI. 2) When action is taken under Article XXI, all contracting parties affected by such action retain their full rights under the General Agreement. 3) The Council may be requested to give further consideration to this matter in due course."[65]

From this decision we can conclude that although a number of issues were raised by the contracting parties regarding the interpretation of article XXI GATT, an agreement was reached which was limited to informing trade measures when taken and properly notifying them and that the parties retain full rights even though they might be affected by such actions. The fact that there was no pronouncement regarding the legitimation for third parties to a conflict to impose trade sanctions can be understood as a tacit consent, since even Argentina in their proposal for the draft decision[66] on article XXI presented on the 02/11/1982 did not include any reference to the impossibility for third parties to impose such measures. The draft decision, however, did include that the notification should specify the paragraph of article XXI under which the measure was taken[67], which was an element we can understand as rejected since it was not included in the final decision.

From analyzing the position that states took in the context of WTO regarding the Malvinas/Falklands war, to the position they are taking in the current conflict it is possible to understand that there has been an evolution of the practice regarding the scope of article XXI. In 1982 states which raised the issue of whether allies of the UK would be legitimated to impose trade sanctions on Argentina, are currently either directly sanctioning Russia, or at least condemning their actions on Ukrainian territory. This, coupled with the switch from Argentina's initial communication in 1982, to the decision taken on the 30th of November of

[65] Decision Concerning Article XXI of the General Agreement (30th November 1982) L/5426 <http://docsonline.wto.org>
[66] Trade Measures Affecting Argentina Applied for Non-Economic Reasons - Draft Decision (2nd November 1982) C/W/402 <http://docsonline.wto.org>
[67] Ibid, page 1.

1982 reflects a change in the agreement regarding Article XXI and the possibility for third parties to conflicts impose trade sanctions, followed by a subsequent practice in the terms of Article 31.3 a) and b) of the VCLT.

Having recapped the historical invocation of article XXI, analyzing the current communications at WTO level coupled with the imposition of the sanctions by a number of Member States on Russia, even by those states which did not consider that third parties would be legitimated to impose sanctions on Argentina in 1982, I can conclude that in the light of article 31.3 a) and b) VCLT there is a general agreement accompanied by a subsequent practice which interprets the provision as legitimizing third parties to a conflict to impose trade sanctions on the belligerent parties. This is further reinforced by the negotiating history of the provision, which is of relevance in the terms of article 32 VCLT, since as the panel recalls on Russia - Traffic in Transit, the US thought of the concept of "emergency in international relations" of XXI b) iii) as the situation in which they were before entering WW2 in 1941 as a belligerent party.

Conclusion

In summary, I have contrasted the trade sanctions imposed on Russia by the EU, the US and the UK and they were implemented in accordance with their internal legislation. As mentioned before, the only internal provision on which the sanctions are based which could potentially be conflictive are sections 301-310 of the Trade Act of 1974 of the US. But since the trade measures which are being imposed based on those sections are in compliance with the WTO's rules and provisions, and in exercise of the rights of the US stablished by article XXI, this internal legislation would not be inconsistent with the US trade obligations towards Russia.

The trade measures are not only justified on the internal legislation of these states, but also on international sources of law. Russia's actions are being characterized as an illegal act, in breach of international law, in breach of particular peace treaties among the belligerent parties such as the Minsk Agreements, threatening international peace and security, and in violation of the UN charter itself, which gives a solid legal basis on international sources of law for the imposition of such sanctions.

Since there has been an evolution regarding the character of article XXI being self-judging or not, from the beginning of the drafting and negotiating of the provision, to the panel report on Russia - Traffic in Transit, we can understand the dynamic character of WTO's provisions. This dynamic character can be also found regarding the possibility of third parties to a conflict to impose trade sanctions, since as I have analyzed and the panel took into consideration in Russia - Traffic in Transit, during the first negotiations article XXI was understood as a clause for the scenario in which the US was before 1941 and assumed an active role in World War II. That is, for the possibility for the US to impose trade sanctions on the Axis under XXI b) in the context of an emergency in international relations. There has been changes regarding possible interpretations of the article in this sense throughout GATT history, with strong and even

opposite opinions of the Contracting Parties of the GATT reflected in the Meeting of the 7 of May of 1982 over the trade measures imposed on Argentina for non-economic reasons.

The trade measures imposed on Russia in the current conflict together with the communications expressed at WTO level, specifically the Joint Statement, are a representation of an evolution in the general understanding and consequent practice of the international community regarding the exceptions referred to in article XXI. As mentioned before, some countries which held a restrictive interpretation of the provision in 1982, are currently sanctioning Russia, configurating this shift in the practice. It is important then to take into consideration the importance of the practice in the field of interpretation of international treaties as regulated by Article 31.3 a) and b) of the VCLT. Many countries which are not currently imposing such sanctions and used to have this restrictive interpretation, are doing so due to a lack of significance of them due to a lower trade volume among nations, for example Argentina[68], not out of support for Russia. There is a quasi-global understanding that actions such as the ones which are being carried on by Russia would allow for the imposition of trade sanctions, which they are basically an exception to the usual trade obligations that member states of the WTO have, which in this situation could be only be justified by third parties as either being taken "in time of emergency in international relations" (XXI, b) iii) or for the maintenance of international peace and security (XXI, c). This scenario can be confirmed by the UN Assembly Resolution of the 03 of March of 2022, in which 141 States voted in favour of the Condemnation of Russia's actions, demanding to stop the offensive and withdraw its troops from Ukrainian territory. Only 5 countries voted against it, 3 of which are not even WTO

[68] "Alberto Fernández Descarta Desde Berlín Sanciones a Rusia" *DW News* (May 11, 2022): On the 11 of May of 2022 in a press Conference taking place in Berlin, Alberto Fernández, Argentinian President, stated that the imposition of sanctions by Argentina to Russia is not being discussed due to the lack of economic relations among the states. (https://www.dw.com/es/alberto-fern%C3%A1ndez-descarta-desde-berl%C3%ADn-sanciones-a-rusia/a-61763817)

members (Belarus, Eritrea and North Korea), one is Syria which is an observant member, and the last one is Russia itself.

However, as clear as the imposition of sanctions by third parties might be in a situation like the current one, I consider that there is a need for them to be further regulated jurisprudentially by the Dispute Settlement Mechanism of the WTO. This further regulation could set the basic requirements for third parties to impose sanctions in order to avoid situation of abuses, specifically among economically or geopolitically powerful states over the others (the famous global North vs. South dichotomy). As history has been showing us, the imposition of sanctions as a tool to achieve peace, as a means to deter conflicts is more effective when applied to developing countries, since their economy tends not to be self-sufficient and the need for international trade, specifically in certain areas or regarding specific resources, is stronger than for developed countries. Regardless of this, due to the historical role that international trade has played in world peace, trade measures are a key element of peacekeeping and conflict determent, and in certain situations such as the current one, one of the few ways to weaken an imperialist world power.

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