ECONOMIC STATECRAFT: A CLOSER LOOK INSIDE THE EUROPEAN UNION'S EXPANDING TOOLBOX

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I. FROM "EFFECTIVE MULTILATERALISM" TO "OPEN STRATEGIC AUTONOMY"

When it comes to economic statecraft—that is, "the use of financial, regulatory, and economic tools to achieve foreign policy objectives"[1]—the European Union's (EU) record is something of a mixed bag. On the one hand, the EU prides itself in being "the largest economy in the world" and "the world's largest trading bloc"; a market of some 440 million consumers.[2] This gives the EU enormous leverage to influence international trade. Such leverage is not merely hypothetical. In her influential work *The Brussels Effect*, Bradford explains how the EU has become a regulatory superpower, whose legislation sets the global standard in domains ranging from consumer health and safety to data protection and environmental protection.[3] On the other hand, echoing the cliché that "Americans are from Mars and Europeans are from Venus,"[4] it is fair to state that, in comparison to the United States, the EU has been more focused on "soft power"[5] than "hard power," and that the EU is a relative newcomer in the arena of economic statecraft.

This can be partially explained by the fact that the EU is itself a multilateral creation founded in post-War Europe as a vehicle to bring peace through enhanced economic cooperation and integration. Considering its origins and the EU's very *raison d'être*, multilateralism and respect for international law are regarded as cornerstones of the European project. Thus, Article 21(2) of the Treaty on European Union lists among the EU's objectives to "consolidate and support democracy, the rule of law, human rights and the principles of international law,"[6] and to "promote an international system based on stronger multilateral cooperation and good global governance."[7] "Effective multilateralism" surfaced as a guiding mantra for European external action in the 2003

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[1] *See, e.g.*, *Economic Statecraft Initiative*, ATL. COUNCIL, https://www.atlanticcouncil.org/programs/geoeconomics-center/economic-statecraft-initiative (last visited Apr. 18, 2023).

[2] *See, e.g.*, *EU Position in World Trade*, EUR. COMM'N, https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/eu-position-world-trade_en (last visited Apr. 18, 2023).

[3] ANU BRADFORD, THE BRUSSELS EFFECT: HOW THE EUROPEAN UNION RULES THE WORLD (2020).

[4] *See, e.g.*, *Time to Face Reality: Americans Come from Mars, Europeans Are from Venus*, POLITICO (2002), https://www.politico.eu/article/time-to-face-reality-americans-come-from-mars-europeans-are-from-venus; ROBERT KAGAN, OF PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER (2003).

[5] On soft power, see, e.g., JOSEPH S. NYE, SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS (2004).

[6] Consolidated Version of the Treaty on European Union art. 21(2)(b), Oct. 26, 2012, 2012 O.J. (C 326) 15.

[7] *Id.* at art. 21(2)(h).

European Security Strategy;[8] references to multilateralism remain equally rife in the EU's 2016 Global Strategy.[9] Illustrative is the consistent emphasis in the EU's foreign policy on the protection of the rule of law and human rights, including through the widespread use of human rights conditionality in the EU's international agreements (even if such clauses are rarely, if ever, enforced).[10]

Another explanation as to why the EU has remained relatively absent from the realm of economic statecraft—or, some would say, why the EU punches below its weight—relates to the fact that, as an (admittedly supranational) regional organization, the EU can only act where it can muster sufficient support among its Member States. In some domains, a qualified majority will suffice to take action, yet in matters of foreign and security policy, unanimity is still the name of the game, thus making the EU prone to *divide et impera* tactics and at times undermining rapid and efficient decision-making.[11]

In recent years, however, the European Union seems to have shed some of its perceived *naiveté* and to have adopted a more realist approach towards its external relations. The reasons for this evolution are well-known. For starters, Europe finds itself caught in the middle of the systemic rivalry and growing geopolitical and economic confrontation between the United States, as the incumbent hegemon, and China, as its increasingly assertive challenger. Amid their ongoing trade war,[12] the two largest economies in the world steadily drift away from the principles that inform the global trading architecture under the auspices of the World Trade Organization (WTO), leaning towards unilateralism and gradually shifting from a rules-based international order to a power-based one.[13] Whereas geopolitical tensions are part of the fabric of the Westphalian international legal order, the unprecedented degree of economic

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[8] COUNCIL OF THE EUR. UNION, EUROPEAN SECURITY STRATEGY: A SECURE EUROPE IN A BETTER WORLD (2009), https://www.consilium.europa.eu/media/30823/qc7809568enc.pdf.

[9] EUR. EXTERNAL ACTION SERV., SHARED VISION, COMMON ACTION: A STRONGER EUROPE - A GLOBAL STRATEGY FOR THE EUROPEAN UNION'S FOREIGN AND SECURITY POLICY (2016), https://www.eeas.europa.eu/sites/default/files/eugs_review_web_0.pdf.

[10] *See, e.g.*, LORAND BARTELS, HUMAN RIGHTS CONDITIONALITY IN THE EU'S INTERNATIONAL AGREEMENTS (2005).

[11] For a recent study commissioned by the European Parliament examining ways to expand the use of qualified majority voting, see RAMSES A. WESSEL & VIKTOR SZÉP, EUR. PARLIAMENT, THE IMPLEMENTATION OF ARTICLE 31 OF THE TREATY ON EUROPEAN UNION AND THE USE OF QUALIFIED MAJORITY VOTING (2022), https://www.europarl.europa.eu/RegData/etudes/STUD/2022/739139/IPOL_STU(2022)739139_EN.pdf.

[12] Michael C. Bender et al., *U.S. Edges Toward New Cold-War Era with China*, WALL ST. J. (Oct. 13, 2018), https://www.wsj.com/articles/u-s-edges-toward-new-cold-war-era-with-china-1539355839.

[13] Kristen Hopewell, *Beyond U.S.-China Rivalry: Rule Breaking, Economic Coercion, and the Weaponization of Trade*, 116 AMER. J. INT'L L. UNBOUND 58, 59 (2022).

interdependence,[14] and its concomitant weaponization,[15] has magnified the effects and capacity of dominant powers to exert pressure over smaller states in order to advance their multifaceted geopolitical objectives.

As a result of this complex scenario, the EU has grown aware of the urgency of recalibrating its role to face the looming geopolitization of trade. Confronted with a "growing number of irritants" in the EU-China relationship,[16] their common history and shared democratic values would seem to make the United States Europe's natural partner in the global arena. However, it is manifest that the EU faith in the U.S.-EU partnership has suffered severe blows in recent years. The Trump administration's "America First" policy and its crusade against globalism and international institutions has been a major cause for concern on the eastern side of the Atlantic.[17] More recently, European leaders have lamented the continued protectionist tendencies of the Biden administration, with a planned subsidy program exceeding USD $400 billion casting doubts over the United States' commitment to free trade.[18]

The changing wind in Brussels is evident from the discourse of EU leaders and institutions. Thus, the prior emphasis on "effective multilateralism" has made way for new buzzwords, such as the need to foster Europe's "resilience" and its "open strategic autonomy."[19] Lofty declarations aside, EU Member States have also agreed to further join hands and beef up the EU's economic statecraft toolbox with several new legislative proposals following each other in short intervals.[20]

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[14] Yong-Shik Lee, *Weaponizing International Trade in Political Disputes: Issues Under International Economic Law and Systemic Risks*, 56 J. WORLD TRADE 405, 405–06 (2022); STEPHAN SCHILL, THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW 3 (2009).

[15] Henry Farrell & Abraham L. Newman, *Weaponized Interdependence: How Global Economic Networks Shape State Coercion*, 44 INT'L SEC. 42, 45 (2019).

[16] EUR. EXTERNAL ACTION SERV., EU CHINA RELATIONS (2022), https://www.eeas.europa.eu/sites/default/files/documents/EU-China_Factsheet_01Apr 2022.pdf.

[17] Steven Erlanger, *Europe Struggles to Defend Itself Against a Weaponized Dollar*, N.Y. TIMES (Mar. 12, 2021), https://www.nytimes.com/2021/03/12/world/europe/europe-us-sanctions.html.

[18] *See, e.g.*, *The Destructive New Logic that Threatens Globalisation*, ECONOMIST (Jan. 12, 2023), https://www.economist.com/leaders/2023/01/12/the-destructive-new-logic-that-threatens-globalisation.

[19] *See* EUR. COMM'N, SHAPING AND SECURING THE EU'S OPEN STRATEGIC AUTONOMY BY 2040 AND BEYOND (2021), https://data.europa.eu/doi/10.2760/414963.

[20] *See* Proposed Anti-Coercion Instrument, COM (2021) 775 final (2021), at 2, https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/729299/EPRS_BRI(2022) 729299_EN.pdf (providing a visual overview of EU trade and investment initiatives contributing to open strategic autonomy).

They include, among other instruments, a new EU framework for Foreign Direct Investment (FDI) screening.[21] This framework does not supplant the FDI screening mechanisms already in place (or being developed) at the level of individual EU Member States, but rather creates a cooperation mechanism for Member States and the Commission to exchange information and share concerns. It also allows the Commission to issue opinions when an investment is thought to pose a threat to the security or public order of more than one Member State. The underlying idea is to cooperate at the EU level to safeguard key European assets. In the words of Commission Vice President Dombrovskis: "[t]he EU is and will remain open to foreign investment. But this openness is not unconditional."[22] In turn, a new Foreign Subsidies Regulation (FSR), adopted in December 2022,[23] seeks to protect EU companies against distortions caused by foreign subsidies, and to ensure a level playing field for all companies operating within the EU. Under the FSR, companies must inform the European Commission of financial contributions by non-EU governments when they participate in major public procurement procedures within the EU or when engaging in certain mergers.[24] It also empowers the Commission to investigate potential market distortions resulting from foreign subsidies on its own initiative.[25] If distortions with a net negative effect are identified, the EU may block an anticipated concentration, disqualify companies from public tenders, or impose other (structural or behavioral) commitments.[26] While primarily aimed at Chinese state-backed companies, the FSR could also substantially affect U.S. companies, including beneficiaries of the U.S. Inflation Reduction Act.[27]

The FSR and the FDI screening mechanism are just two examples of a much broader set of new tools intended to strengthen the EU's hand in the evolving geo-economic confrontation. The purpose of this Article, however, is not to exhaustively map all relevant EU instruments. Rather, it focusses

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[21] *See* Regulation 2019/452 of the European Parliament and of the Council of 19 March 2019 Establishing a Framework for the Screening of Foreign Direct Investments into the Union, 2019 O.J. (L 79I) 1 (EU); Communication from the Commission, Guidance to the Member States Concerning Foreign Direct Investment and Free Movement of Capital from Third Countries, and the Protection of Europe's Strategic Assets, Ahead of the Application of Regulation 2019/452 (FDI Screening Regulation), 2020 O.J. C (99 I/1) (EU).

[22] European Commission Press Release IP/20/1867, EU Foreign Investment Screening Mechanism Becomes Fully Operational (Oct. 9, 2020).

[23] *See* Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on Foreign Subsidies Distorting the Internal Market, 2022 O.J. (L-1).

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *See* Inflation Reduction Act of 2022, Pub. L. No. 117-169; Kim Mackrael, *EU Foreign-Subsidy Limits Target China but Also Hit U.S. Companies*, WALL ST. J. (Dec. 28, 2022), https://www.wsj.com/articles/eu-foreign-subsidy-limits-target-china-but-also-hit-u-s-companies-11672234980.

specifically on three tools that raise pressing questions from an international law perspective, critically examining how they fit within the international legal framework, and what they reveal about the EU's place therein. These tools are the revised Trade Enforcement Regulation, the revised EU Blocking Statute, and the new "Anti-Coercion Instrument" (ACI).

II. THE EXPANDING RESILIENCE TOOLBOX

A. The Revised Trade Enforcement Regulation

Some of the new instruments in the EU's resilience toolbox were conceived specifically in response to United States policy. Thus, in February 2021 the EU adopted a revised Trade Enforcement Regulation, which enables the EU to adopt trade sanctions by raising customs duties or introducing quantitative import restrictions in several scenarios, including, most prominently, where it obtains a favorable ruling from a WTO panel, but also in cases where the WTO dispute settlement procedure cannot be completed for lack of cooperation of the counter-party.[28] The new instrument was directly inspired by the United States' decision—frustrated with a number of negative rulings and perceived jurisdictional overreach[29]—to block the (re-)appointment of the judges of the WTO Appellate Body (AB), resulting in a deadlock of the AB since 2020. The implication is that WTO panel reports can be appealed into a legal void, whereas WTO trade sanctions can normally be undertaken only when the dispute settlement procedure is finalized, and the State found to be in breach of its WTO obligations fails to withdraw such trade-restrictive measures.

This dilemma has been partially remedied by the creation of a multi-party interim appeal arrangement (MPIA),[30] based on Article 25 of the WTO Dispute Settlement Understanding (DSU) and mirroring the main features of the WTO appeal system. While conceived as a temporary arrangement, more than fifty WTO members have now joined the MPIA, which rendered a first award in December 2022.[31] This does not mean the revised Trade Enforcement Regulation has lost its relevance. Indeed, more than 100 WTO Members remain

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[28] Regulation 2021/167 of the European Parliament and of the Council of 10 February 2021 Amending Regulation (EU) No 654/2014 Concerning the Exercise of the Union's Rights for the Application and Enforcement of International Trade Rules, 2021 O.J. (L-49) 1, 1 (EU).

[29] *See* OFF. OF THE U.S. TRADE REP., REPORT ON THE APPELLATE BODY OF THE WORLD TRADE ORGANIZATION (2020), https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf.

[30] *Multi-Party Interim Appeal Arbitration Agreement Pursuant to Article 25 of the DSU*, WTO Doc. JOB/DSB/1/Add.12 (Mar. 27, 2020).

[31] Award of the Arbitrators, *Colombia—Anti Dumping Duties on Frozen Fries, Arbitration Under Article 25 of the DSU*, WTO Doc. WT/DS591/ARB25 (Dec. 21, 2022).

outside the MPIA (including the United States), and the Biden administration has hitherto shown no signs of wanting to reanimate the WTO dispute settlement regime. *Au contraire*, upon publication of the WTO Panel reports regarding the U.S. Section 232 tariffs on steel and aluminum products from China and other countries circulated in late 2022,[32] the United States simply denounced the Panel's "flawed interpretation and conclusions" and insisted that it would "not cede decision-making over its essential security to WTO panels."[33] The U.S. appeals against the cited panel reports[34] remain pending in judicial limbo, with no prospect of being tackled by the (deadlocked) AB, nor by the MPIA.

From an international law perspective, Article 3aa of the revised Trade Enforcement Regulation is not without controversy. Indeed, under WTO rules, trade sanctions are a measure of "last resort" "subject to authorization" by the Dispute Settlement Body, and contingent on the completion of the WTO dispute settlement procedure.[35] What is more, the DSU is traditionally regarded as a *lex specialis* regime in the context of the international law on state responsibility.[36] In the words of the late ILC Special Rapporteur James

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[32] *See* Panel Report, *United States—Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS544/R (adopted Dec. 9, 2022); Panel Report, *United States—Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS552/R (adopted Dec. 9, 2022); Panel Report, *United States—Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS556/R (adopted Dec. 9, 2022); Panel Report, *United States—Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS564/R (adopted Dec. 9, 2022).

[33] Statement from USTR Spokesperson Adam Hodge, Off. of the U.S. Trade Representative (Dec. 9, 2022), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/december/statement-ustr-spokesperson-adam-hodge. In response, China's WTO ambassador labelled the United States the "destroyer to the multilateral trading system." Emma Farge, *China Calls US "Destroyer" of Global Trading System at WTO*, REUTERS (Dec. 14, 2022), https://www.reuters.com/world/china-calls-us-destroyer-global-trading-system-wto-2022-12-14.

[34] *See, e.g.*, Notification of an Appeal, *United States—Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS544/14 (Jan. 30, 2021); *see also* Notification of an Appeal, *United States—Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS552/16 (Jan. 30, 2023); Notification of an Appeal, *United States—Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS556/21 (Jan. 30, 2023); Notification of an Appeal, *United States—Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS564/21 (Jan. 30, 2023); Notification of an Appeal, *United States—Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS544/14 (Jan. 30, 2023).

[35] *See* Understanding on Rules and Procedures Governing the Settlement of Disputes arts. 3(7), 22–23, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401.

[36] *Draft Articles on the Responsibility of International Organizations, with Commentaries*, [2011] 2 Y.B. INT'L L. COMM'N 40, 140 U.N. Doc. A/CN.4/SER/A/2011/Add.1(Part 2).

Crawford: "One of the cornerstones of . . . WTO dispute resolution is that recourse to individual countermeasures alongside or instead of the WTO system in order to resolve disputes in respect of WTO rights and obligations is not permitted."[37] While the latter position would prima facie seem to exclude the additional set of trade sanctions envisaged by the revised Trade Enforcement Regulation, one view holds that the displacement of the general countermeasures framework—as codified in the U.N. International Law Commission's Articles on State Responsibility[38] (ARSIWA)—is contingent on the self-contained WTO regime itself remaining functional. Conversely, the right to apply countermeasures under general international law would revive in case of a breakdown of the WTO's dispute settlement mechanism.[39] This argument, which was featured in legal doctrine long before the current deadlock of the Appellate Body, appears now to have been embraced by the EU institutions.

Thus, in a Commission Declaration on Compliance with International Law appended to the Regulation, the European Commission asserts that it will act in accordance with the requirements of international law as reflected in the ARSIWA, including by calling upon the WTO Member concerned to implement the panel's findings and recommendations, while adding that trade sanctions would be suspended, for example, if an interim appeal procedure is initiated.[40] At the same time, Article 52(4) of ARSIWA seems to impose a strict test where a dispute is effectively pending before a court or tribunal, in that countermeasures would be permitted only "if the responsible State fails to implement the dispute settlement procedures in good faith."[41] Whether the mere appeal against a WTO panel report before the Appellate Body and the refusal to participate in the MPIA is of itself tantamount to an absence of good faith is, however, debatable.[42] In any case, the EU asserts that Article 3aa provides a measure of last resort.[43] Thus, the Union "will make every reasonable effort to obtain, as early as possible," the agreement of the counter-party to resort to the MPIA mechanism, as long as the Appellate Body is defunct.[44] Another

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[37] JAMES CRAWFORD, STATE RESPONSIBILITY: THE GENERAL PART 711 (2013).

[38] *Draft Articles on the Responsibility of International Organizations, with Commentaries*, *supra* note 36, at 140.

[39] Lorand Bartels, *Article XX of GATT and the Problem of Extraterritorial Jurisdiction: The Case of Trade Measures for the Protection of Human Rights*, 36 J. WORLD TRADE 353, 395 (2002).

[40] Declaration on Compliance with International Law, 2021 O.J. (2021/C 49/03) (EC).

[41] *Draft Articles on the Responsibility of International Organizations, with Commentaries*, *supra* note 36, at 135.

[42] For a negative answer, see Wolfgang Weiß & Cornelia Furculita, *The EU in Search for Stronger Enforcement Rules: Assessing the Proposed Amendments to Trade Enforcement Regulation 654/2014*, 23 J. INT'L ECON. L. 865, 875–77 (2020).

[43] Declaration on Compliance with International Law, *supra* note 40.

[44] *Id.*

declaration annexed to the Regulation insists that the EU "remains committed to a multilateral approach to international dispute settlement, rules-based trade" and "will cooperate in all endeavours . . . which can ensure the effective functioning of the WTO Appellate Body."[45]

B. The Amended EU Blocking Statute

A second instrument in the EU toolbox developed in direct response to United States policy is the so-called Blocking Statute,[46] i.e., an EU Regulation that primarily prohibits EU companies from complying with the extraterritorial legislation of other countries identified in its Annex, albeit in practice, only U.S. legislation is referenced. While the Blocking Statute also features a "claw-back" provision,[47] enabling EU persons and entities to recover damages caused by the application of said extraterritorial legislation, as well as a clause stipulating that judgments and administrative decisions based on such legislation shall not be recognized or enforced in the EU,[48] the prohibition to comply remains the instrument's linchpin provision. Such prohibition is justified on account of the fact that the extraterritorial reach of the targeted laws and regulations are held to violate international law.[49] This reflects a fundamentally different approach with regard to the scope of sanctions in the foreign policy sphere on both sides of the Atlantic. Indeed, the European Union insists that its "restrictive measures" (in EU vernacular) only apply within the territory of the European Union, as well as to EU nationals and companies established within the EU.[50] The United States, by contrast, has further extended the reach

[45] Joint Declaration of the European Parliament, the Council and the Commission, 2021 O.J. (C-49/2).

[46] Council Regulation (EC) No 2271/96 of 22 November 1996 Protecting Against the Effects of the Extra-Territorial Application of Legislation Adopted by a Third Country, and Actions Based Thereon or Resulting Therefrom, 1996 O.J. (L-309/1).

[47] *Id.* at art. 6 ("Any person referred to in Article 11, who is engaging in an activity referred to in Article 1 shall be entitled to recover any damages, including legal costs, caused to that person by the application of the laws specified in the Annex or by actions based thereon or resulting therefrom . . . .").

[48] *Id.* at art. 4 ("No judgment of a court or tribunal and no decision of an administrative authority located outside the Community giving effect, directly or indirectly, to the laws specified in the Annex or to actions based thereon or resulting there from, shall be recognized or be enforceable in any manner.").

[49] *Id.* at pmbl.

[50] The standard clause in EU instruments stipulates that EU sanctions apply "(a) within the territory of the Union; (b) on board any aircraft or any vessel under the jurisdiction of a Member State; (c) to any person inside or outside the territory of the Union who is a national of a Member State; (d) to any legal person, entity or body, inside or outside the territory of the Union, which is incorporated or constituted under the law of a Member State; (e) to any legal person, entity or body in respect of any business done in whole or in part within the Union." *See, e.g.*, Council Regulation 833/2014 of 31 July 2014,

of various sanctions regimes to encompass foreign subsidiaries owned (for 50% or more) by U.S. companies[51] or trade involving "US-origin" goods.[52] At the same time, it has weaponized the centrality of the U.S. dollar in international trade and finance by exercising what is sometimes termed "currency-based jurisdiction."[53] Furthermore, it has imposed a wide range of "access restrictions" that essentially force non-U.S. companies to choose between doing business either with the United States or with the country subject to U.S. sanctions.[54]

The U.S. recourse to far-reaching extraterritorial and/or "secondary" sanctions is problematic from the standpoint of international law, including in particular from the perspective of customary international law on the exercise of jurisdiction.[55] The EU and its Member States also perceive it as undermining their economic and political sovereignty.[56] This was the prevailing sentiment in Europe when the Trump administration withdrew from the "Joint Comprehensive Plan of Action" (JCPoA)—colloquially the "Iran nuclear deal"—in May 2018. As is well known, the JCPoA was concluded following lengthy diplomatic negotiations involving the five permanent members of the

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Concerning Restrictive Measures in View of Russia's Actions Destabilising the Situation in Ukraine, art. 13, 2014 O.J. (L 229/1).

[51] Tom Ruys & Cedric Ryngaert, *Secondary Sanctions: A Weapon Out of Control? The International Legality of, and European Responses to, US Secondary Sanctions*, 89 BRIT. Y.B. INT'L L. 1, 18–19 (2020) ("It is long-standing US sanctions practice to construe the term 'US person' widely as encompassing US-owned or controlled foreign entities. This implies that primary US sanctions do not just apply to entities incorporated in the US, but also to entities incorporated under the laws of a foreign country, provided that they are majority-owned or controlled by a US person."). See also, in the context of the sanctions imposed by the United States against Cuba and Iran, 31 C.F.R. § 515.329 and 31 C.F.R. § 560.215, respectively.

[52] For instance, U.S. sanctions against Iran establish that, "the reexportation from a third country, directly or indirectly, by a person other than a United States person, of any goods, technology, or services that have been exported from the United States is prohibited, if: [u]ndertaken with knowledge or reason to know that the reexportation is intended specifically for Iran or the Government of Iran; and [t]he exportation of such goods, technology, or services from the United States to Iran was subject to export license application requirements." 31 C.F.R. § 560.205(a).

[53] Susan Emmenegger, *Extraterritorial Economic Sanctions and Their Foundation in International Law*, 33 ARIZ. J. INT'L & COMPAR. L. 631, 640 (2016); Susan Emmenegger & Florence Zuber, *To Infinity and Beyond: U.S. Dollar-Based Jurisdiction in the U.S. Sanctions Context*, 2 SWISS REV. BUS. & FIN. MARKET L. 114.

[54] Ruys & Ryngaert, *supra* note 51, at 11–16.

[55] *See id*. at 9–29.

[56] *See, e.g.*, PHILIPPE BONNECARRÈRE, RAPPORT D'INFORMATION SUR L'EXTRATERRITORIALITÉ DES SANCTIONS AMÉRICAINES, [INFORMATION REPORT ON THE EXTRATERRITORIALITY OF AMERICAN SANCTIONS] (2018), https://www.senat.fr/rap/r18-017/r18-0171.pdf (Fr.).

U.N. Security Council, as well as Germany and Iran.[57] It provided for the lifting of both U.N. sanctions and non-U.N. "unilateral" sanctions against Iran, in return for various guarantees in respect of Iran's nuclear program (with monitoring by the International Atomic Energy Agency).[58] Following the conclusion of the JCPoA, various EU-based multinational companies resumed trade with Iran and/or announced investments in the country. The reintroduction of U.S. sanctions—including extraterritorial and secondary sanctions—following the U.S. withdrawal meant that this *volte-face* largely forced EU companies to roll back these projects (at substantial cost),[59] notwithstanding the fact that the EU itself remained committed to implementing the JCPoA. More generally, it strongly reduced the incentive for Iran to abide by its commitments under the JCPoA and largely undid the leverage which other States held over Iran through this agreement.

In recent years, the imposition of U.S. secondary sanctions targeting the construction of the—admittedly controversial—Nord Stream 2 gas pipeline connecting Russia and Germany via the Baltic Sea has caused similar frustration within Germany, with officials denouncing it as a violation of international law and an interference in German, and European, internal affairs.[60] One might assume that U.S. authorities would be similarly displeased if the EU were to impose secondary sanctions targeting U.S. companies engaging in certain trade with Israeli-occupied territory (e.g., activities in the West Bank) or with Saudi Arabia deemed harmful to human rights protection, or if it were to wield secondary sanctions to impede a U.S. energy infrastructure project deemed harmful to the environment (e.g., the construction of a pipeline in an environmentally sensitive area).[61]

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[57] S.C. Res. 2231 (July 20, 2015).

[58] *Id.*

[59] According to the European Council for Foreign Relations, U.S. extraterritorial sanctions against Iran since their re-imposition in 2018 have cost EU businesses more than USD $22.5 billion (approx. EUR 18.8 billion) in direct losses. *See* Ellie Geranmayeh & Manuel Rapnouil, *Meeting the Challenge of Secondary Sanctions*, EUR. COUNCIL ON FOREIGN RELS., https://ecfr.eu/publication/meeting_the_challenge_of_secondary_sanctions.

[60] *See, e.g.*, Rohan Sinha & Stefan Talmon, *Germany Rejects U.S. Sanctions Against Nord Stream 2 as Contrary to International Law*, GPIL – GERMAN PRAC. INT'L L. (Jan. 5, 2021), https://gpil.jura.uni-bonn.de/2021/01/germany-rejects-u-s-sanctions-against-nord-stream-2-as-contrary-to-international-law.

[61] Note that while such EU measures are highly implausible for the time being, it is worth drawing attention to the European Commission *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence*, COM (2022) 71 final (Feb. 23, 2022), which requires certain companies to take measures to identify and mitigate adverse human rights and environmental impacts arising from their operations worldwide. This instrument would also appear to have a broad extraterritorial reach, and would, for instance, apply to U.S. companies with significant EU turnover. *See, e.g.*, Luca Enriques & Matteo Gatti, *The Extraterritorial Impact of the Proposed EU Directive on Corporate Sustainability Due Diligence: Why Corporate America Should Pay*

The EU Blocking Statute is not a recent instrument, having been introduced already in 1996 in direct response to the U.S. Helms-Burton Act,[62] providing for sanctions against Cuba. At the time, however, having regard to strong EU opposition over the extraterritorial application to EU companies and the dispute settlement procedure triggered at the level of the World Trade Organization,[63] a compromise was reached whereby the United States eventually agreed to suspend the application of the Act partially.[64] Strikingly, the May 1998 U.S.-EU Transatlantic Partnership on Political Cooperation asserted that "a partner will not seek or propose, and will resist, the passage of new economic sanctions legislation based on foreign policy grounds which is designed to make economic operators of the other behave in a manner similar to that required of its own economic operators."[65] The implication is that the Blocking Statute essentially lost its relevance—that is, until the transatlantic clash resulting from the U.S. withdrawal from the JCPoA in 2018, when the Blocking Statute again came to the fore and the annexed list of extraterritorial legislation was expanded.[66] The reactivation of the Statute in 2018, however, did not yield the same result as it did in 1996. *Au contraire*, U.S. extraterritorial sanctions have been maintained and expanded, and continue to enjoy broad bipartisan support.[67] The Biden administration has shown no signs of steering away from this approach.[68]

Notwithstanding its symbolic importance, there is broad agreement that the Blocking Statute, in its present form, manifestly fails to protect EU companies from the perceived jurisdictional overreach of U.S. sanctions, and

Attention, OXFORD BUS. L. BLOG (Apr. 21, 2022), https://blogs.law.ox.ac.uk/business-law-blog/blog/2022/04/extraterritorial-impact-proposed-eu-directive-corporate.

[62] Council Regulation (EC) No 2271/96 of 22 November 1996 Protecting Against the Effects of the Extra-Territorial Application of Legislation Adopted by a Third Country, and Actions Based Thereon or Resulting Therefrom, 1996 O.J. (L-309/1).

[63] Request for the Establishment of a Panel by the European Communities, *United States — The Cuban Liberty and Democratic Solidarity Act*, WTO Doc. WT/DS38/2 (Oct. 8, 1996).

[64] Andreas Falke, *The EU-US Conflict Over Sanctions Policy: Confronting the Hegemon*, 5 EUR. FOREIGN AFFS. REV. 139, 160 (2000).

[65] United States/European Union Joint Statement on Transatlantic Partnership on Political Cooperation, 1 PUB. PAPERS 804, 924 (May 18, 1998).

[66] Commission Delegated Regulation 2018/1100 of 6 June 2018, Amending the Annex to Council Regulation (EC) No 2271/96 Protecting Against the Effects of Extra-Territorial Application of Legislation Adopted by a Third Country, and Actions Based Thereon or Resulting Therefrom, 2018 O.J. (LI 199/1) (EU).

[67] As way of illustration, a bi-partisan bill has recently been introduced with the intention to "solidify" the sanctions regime against Iran. *See* H.R. 8868, 117th Cong. (2022).

[68] The extraterritorial scope of U.S. sanctions is, for instance, not called in question in the 2021 Treasury Sanctions Review. DEP'T OF THE TREASURY, THE TREASURY 2021 SANCTIONS REVIEW (2021).

remains essentially a paper tiger.[69] The main flaw is that it inevitably puts EU companies between hammer and anvil. These companies have two options: (1) disregard U.S. sanction laws, thereby exposing EU companies to massive fines or exclusion from the U.S. markets; or (2) disregard the Blocking Statute, risking both administrative fines and criminal prosecution at the EU level. In reality, the economic cost of ignoring U.S. sanctions is often far higher than the cost of ignoring the EU's own Blocking Statute for these EU companies. The enforcement of the Blocking Statute is then left to the competent national authorities of the respective EU Member States (which may have little appetite to go after their "national champions" and whose national legislation might provide for limited administrative fines only). Further problems exist, for instance, relating to the difficulty of *proving* that a company complied with U.S. extraterritorial legislation in breach of the Blocking Statute.[70]

Cognizant of the Blocking Statute's flaws, the EU in 2021 triggered a procedure to revise the instrument and organized a public consultation open to all stakeholders,[71] which included EU-based think tanks weighing in on the debate.[72] Suggestions included the creation of an EU-wide compensation fund to mitigate compliance costs (which would simply shift the burden to European taxpayers) or the addition of more offensive measures to increase the Statute's "bite," potentially moving the Blocking Statute from the realm of unfriendly, yet lawful, retorsions to that of countermeasures—in the international law sense—proper.[73]

Efforts to revise the Blocking Statute were, however, subsequently overtaken by another initiative further addressed below, that is, the introduction of the Anti-Coercion Instrument, and the political interest in the matter appears to have mostly dissipated following the Russian invasion of Ukraine in early 2022. The latter event proved to be a game-changer in the sanctions field, with the United States and the European Union again closely aligned in a joint effort to use sanctions to impose maximum pressure on the Russian

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[69] Ruys & Ryngaert, *supra* note 51, at 98; Lucio Gussetti, *Extraterritorial Sanctions and the EU: Challenges and Legal Counter-Instruments*, *in* EUR. CENT. BANK, BUILDING BRIDGES: CENTRAL BANKING LAW IN AN INTERCONNECTED WORLD 180, 185 (2019).

[70] This matter was addressed by the Court of Justice of the EU in its judgment in Case C-124/20, Bank Melli Iran v. Telekom Deutschland GmbH, ECLI:EU:C:2021:1035 (Dec. 21, 2021).

[71] *Unlawful Extra-Territorial Sanctions – A Stronger EU Response (Amendment of the Blocking Statute)*, EUR. COMM'N, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13129-Unlawful-extra-territorial-sanctions-a-stronger-EU-response-amendment-of-the-Blocking-Statute-_en (last visited Apr. 19, 2023).

[72] *See, e.g.*, Jonathan Hackenbroich et al., *Defending Europe's Economic Sovereignty: New Ways to Resist Economic Coercion*, EUR. COUNCIL ON FOREIGN REL. (Oct. 20, 2020), https://ecfr.eu/publication/defending_europe_economic_sovereignty_new_ways_to_resist_economic_coercion.

[73] *See id.*

Federation.[74] As the feud over U.S. extraterritorial sanctions against Iran and Cuba retreated into the background, the Russia-Ukraine war has also seen a further, albeit limited, *rapprochement* between the United States and the EU in the sanctions' domain. Indeed, the EU regularly asserts that—in contrast with the United States—it does not adopt "extraterritorial sanctions."[75] This is somewhat misleading in the sense that EU citizens and companies are clearly bound by EU restrictive measures also with respect to their conduct *outside* the EU.[76] The desire to halt Russian aggression has undoubtedly led the EU to revisit the outer boundaries of its sanctions legislation. Thus, as the EU adopted sanctions package after sanctions package,[77] it has also broadened their scope of application beyond the traditional reach of EU restrictive measures.[78] It has, for instance, added the facilitation of circumvention of EU sanctions as a ground for listing individuals and companies,[79] and taken steps to turn such circumvention into an EU "crime."[80] In addition, as a member of the G-7 international "Price Cap Coalition," it has prohibited EU companies from providing insurance and financing for the transportation of Russian oil to third countries where the purchase price of such oil exceeds the cap set by the coalition.[81] Meanwhile, some members of the European Parliament have

[74] Viktor Szép, *Unmatched Levels of Sanctions Coordination: The Strength of Transatlantic Cooperation in the Russia's War on Ukraine*, VERFASSUNGSBLOG (Mar. 23, 2022), https://verfassungsblog.de/unmatched-levels-of-sanctions-coordination.

[75] Council of the Eur. Union, *Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU Common Foreign and Security Policy*, at 19, Doc. 5664/18 (May 4, 2018) ("The EU will refrain from adopting legislative instruments having extra-territorial application in breach of international law. The EU has condemned the extra-territorial application of third country's legislation imposing restrictive measures which purports to regulate the activities of natural and legal persons under the jurisdiction of the Member States of the European Union, as being in violation of international law.").

[76] Such exercise of jurisdiction is not problematic under international law as it is solidly grounded on the "nationality principle." Yet, the fact remains that this is an (admittedly lawful) exercise of extraterritorial jurisdiction.

[77] On December 16, 2022, the EU adopted a ninth sanctions package against Russia. *See* 2022 O.J. (L 322I).

[78] *See, e.g.*, Dmitriy Kiku & Ivan Timofeev, *New Stage of EU Sanctions Policy: Extraterritorial Measures*, MOD. DIPL. (Oct. 22, 2022), https://moderndiplomacy.eu/2022/10/22/new-stage-of-eu-sanctions-policy-extraterritorial-measures.

[79] Council Regulation (EU) 2022/1905 of 6 October 2022, Amending Regulation (EU) No 269/2014 Concerning Restrictive Measures in Respect of Actions Undermining or Threatening the Territorial Integrity, Sovereignty and Independence of Ukraine, 2022 O.J. (L 259) 76, 76–77.

[80] European Commission Press Release IP/22/7371, Commission Proposes to Criminalise Violation of EU Sanctions (Dec. 2, 2022).

[81] Council Regulation (EU) 2022/1904 of 6 October 2022, Amending Regulation (EU) No 833/2014 Concerning Restrictive Measures in View of Russia's Actions Destabilising the Situation in Ukraine, 2022 O.J. (L 259) 3, 5; *see also* Eur. Comm'n, *Guidance on Oil*

expressly begun calling for secondary sanctions against companies that continue trading with Russia.[82] It follows that the EU may be moving slightly closer to the United States in terms of the expanding reach of its sanctions instruments.

It is further worth recalling that the EU Blocking Statute does not spell out clear and open-ended criteria to identify impermissible extraterritorial legislation (but instead works on the basis of an annex listing specific third-country legislation covered by the Blocking Statute), while the EU itself has, of course, not shied away from adopting extraterritorial regulation in other fields.[83] Be that as it may, even if the attempt to revise the Blocking Statute has lost some of its momentum at the time of writing, suffering delays arising from hectic geopolitical realities, fundamental differences on the permissible reach of foreign policy sanctions remain lingering in the background, bound to come to the fore again with the next diplomatic crisis where U.S. and EU foreign policy collide.

C. Enter the Anti-Coercion Instrument

Perhaps the clearest illustration of the ongoing strategy adjustment in Europe's external relations is the Anti-Coercion Instrument (ACI) proposed by the European Commission on December 8, 2021,[84] and expected to enter into force in the course of 2023. The proposal came into being in the context of the EU's trade policy review during early 2021[85] and in the process of the

Price Cap (Feb. 27, 2023), https://finance.ec.europa.eu/system/files/2023-03/ guidance-russian-oil-price-cap_en.pdf.

[82] *Debates: Tuesday, 17 January 2023 – Strasbourg*, EUR. PARLIAMENT, https://www.europarl.europa.eu/doceo/document/CRE-9-2023-01-17_EN.html (Mar. 23, 2023) (Remarks of Mr. Verhofstadt) ("The second thing is secondary sanctions. There are still companies and individuals making deals and doing business in Russia. I ask you, as fast as possible, to declare secondary sanctions on this, because that's the only possibility to stop it.").

[83] See, e.g., discussion and sources cited *supra* note 61 on the draft EU Corporate Sustainability Due Diligence Directive. Or consider the controversy over the extension of the EU emission trading scheme to international aviation. *See, e.g.*, Case C-366/10, Air Transp. Ass'n of Am. v. Sec. of State for Energy & Climate Change, ECLI:EU:C:2011:864 (Dec. 20, 2011).

[84] *Proposal for a Regulation of the European Parliament and of the Council on the Protection of the Union and its Member States from Economic Coercion* by *Third Countries*, at 1, COM (2021) 775 final (Dec. 8, 2021) [hereinafter ACI Proposal].

[85] *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Trade Policy Review - An Open, Sustainable and Assertive Trade Policy*, COM (2021) 66 final (Feb. 18, 2021).

adoption of the revised Trade Enforcement Regulation,[86] after Member States, European institutions, and academics alike expressed their concerns arising from the increased use of measures restricting trade or investment by third states seeking to coerce the Union or its Member States.[87]

While the foregoing legislative developments were primarily conceived as reactions to U.S. policy and practice, it was mostly irritation over growing interference from China that inspired the ACI. Indeed, it appears that the boycott that China has been enforcing against Lithuanian businesses since September 2021, as a result of the former's diplomatic and economic ties with Taiwan, could have been the straw that broke the camel's back and gave the EU Commission the impulse needed to conclude the ACI.[88] Even so, the rising use of unilateral sanctions, and in particular the concern with extraterritorial and secondary sanctions imposed by the United States, was also in the back of the drafters' minds. In fact, a number of respondents to the ACI survey specifically called attention to the use of extraterritorial sanctions as a form of coercion that the proposed instrument should address,[89] while concerns were raised regarding a potential overlap between this regulatory body and the Blocking Statute.[90]

The Anti-Coercion Instrument proposal constitutes an effort to close a regulatory gap in the Union's economic statecraft toolbox, enabling the EU to offer an institutional riposte to a growing issue[91]—the resort to economic coercion—and thereby shielding Europe's strategic autonomy from third

[86] When the revised Trade Enforcement Regulation was adopted, the EU institutions added as an annex to a Joint Declaration of the Commission, the Council and the European Parliament on an Instrument to Deter and Counteract Coercive Actions by Third Countries, (2021 O.J. (C 49)1), confirming the intention to prepare a new instrument to counter coercion in the short term.

[87] JONATHAN HACKENBROICH & PAWEL ZERKA, EUR. COUNCIL ON FOREIGN RELS., MEASURED RESPONSE: HOW TO DESIGN A EUROPEAN INSTRUMENT AGAINST ECONOMIC COERCION 3 (2021); *Commission Staff Working Document: Impact Assessment Report, Accompanying the Document: Proposal for a Regulation of the European Parliament and of the Council on the Protection of the Union and its Member States from Economic Coercion by Third Countries*, at 5 SWD (2021) 371 final (Dec. 8, 2021) [hereinafter Impact Assessment Report].

[88] MARCIN SZCZEPAŃSKI, EUR. PARLIAMENT RSCH. SERV., BRIEFING: PROPOSED ANTI-COERCION INSTRUMENT 3 (2022), https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/729299/EPRS_BRI(2022)729299_EN.pdf. See also the multiple references to China contained in the Impact Assessment Report, *supra* note 87.

[89] *See* EUR. COMM'N, DETAILED RESULTS OF THE OPEN PUBLIC CONSULTATION ON AN EU ANTI-COERCION INSTRUMENT 4–7 (2021), https://content.mlex.com/Attachments/2021-09-08_35902J3VEN821YO7/Anti-coercion%20tool_public%20consultation%20report_EU.pdf. Many respondents saw the ACI as a tool to deal with the extraterritorial exercise of jurisdiction (it is somewhat ironic that some even mentioned the Chinese Blocking Statute as an example of "economic coercion").

[90] Impact Assessment Report, *supra* note 87, at 24.

[91] ACI Proposal, *supra* note 84, at 1, 3.

countries seeking to achieve their objectives by subjugating the sovereign decision-making and policies of other states.

Whereas individual member states remain capable of responding to coercion on their own, the European Union does not want to appear as a passive actor sitting on the fence while unilateralism challenges its understanding of a rule-based international order. The main upside of a supranational instrument dealing with economic coercion is self-evident: the EU is an economic powerhouse whose bargaining power can be used as a powerful deterrent, while the strength of a potential retaliatory measure is far stronger to that of a state acting individually.[92]

Deterrence is indeed the name of the game for the Union in relation to the ACI proposal, and this rationale permeates every aspect of the instrument proposed. The ACI's eventual implementation would set up a multi-step procedure, starting with the identification of a third-country act as economic coercion, followed by the recourse to means of cooperative engagement with the coercing state and finally, as *ultima ratio*, the adoption of countermeasures.[93] The potential countermeasures include acts constraining trade or investment, such as the suspension of tariff concessions and the imposition of new or increased duties and charges on goods[94]—in other words, measures that may well contravene the EU's obligations under WTO law. Although the central objective behind the ACI proposal is de-escalation rather than confrontation, the instrument is also a clear illustration of Europe's growing assertiveness and awareness of its economic and geopolitical leverage, aimed at deterring and counteracting such practices.[95]

From an international law standpoint, the ACI proposal oscillates between contributing to the development of international law and its contestation. On the one hand, the instrument may be regarded as a welcome attempt to shed light on a highly indeterminate norm, the prohibition of economic coercion, while also being closely aligned with the ARSIWA conditions for the recourse to countermeasures. At the same time, it threatens to push beyond the existing framework that informs it.

To begin with, the sole decision of choosing economic coercion as the subject-matter or trigger for its proposal for regulation is controversial on its own right. Economic coercion has undoubtedly played a significant role in the post-U.N. Charter era, and its legality has been at the core of the debates dealing with the scope of the principle of non-intervention ever since the inception of the U.N.[96] However, to date, many commentators agree that international

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[92] Impact Assessment Report, *supra* note 87, at 20.

[93] ACI Proposal, *supra* note 84, at 7–9.

[94] *Id.* at 21–23.

[95] *See id.* at 10–11.

[96] Pierre-Emmanuel Dupont, *Unilateral Sanctions as Unilateral Coercive Measures: Discussing Coercion at the UN Level*, *in* RESEARCH HANDBOOK ON UNILATERAL AND

law does not grant states the right to be free from economic coercion,[97] or contrariwise, states and international organizations are under no obligation to abstain from economic coercion unless such measures contravene an obligation arising from a treaty or customary international law,[98] such as, in particular, the principle of non-intervention.

Accordingly, albeit not expressly mentioned by the proposal, the instrument effectively frames economic coercion in the language of the principle of non-intervention. Article 2(1) of the ACI establishes that the instrument applies where a third country "interferes in the legitimate sovereign choices of the Union or a Member State by seeking to prevent or obtain the cessation, modification or adoption of a particular act by the Union or a Member State" by "applying or threatening to apply measures affecting trade or investment."[99] Yet, the illegality of economic coercion is hardly a settled matter under international law.

While the principle of non-intervention is a binding rule of customary international law,[100] its content and scope remain highly ambiguous.[101] In particular, whether economic coercion is encompassed under the prohibition remains a hotly contested topic.[102] Despite numerous U.N. General Assembly (UNGA) resolutions expressly calling upon states to refrain from economic coercion in their international relations starting from 1965 up to 1981,[103] it appears that these resolutions have not yet managed to crystallize into a

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EXTRATERRITORIAL SANCTIONS 366, 366 (Charlotte Beaucillon ed., 2021); Dire Tladi, *The Duty Not to Intervene in Matters within Domestic Jurisdiction*, *in* THE UN FRIENDLY RELATIONS DECLARATION AT 50, at 87, 100 (Jorge E. Viñuales ed., 2020) ("Perhaps no other form of intervention creates controversy like economic coercion.").

[97] Antonios Tzanakopoulos, *The Right to be Free from Economic Coercion*, 4 CAMBRIDGE J. INT'L & COMPAR. L. 616, 633 (2015).

[98] Alexandra Hofer, *The Developed/Developing Divide on Unilateral Coercive Measures: Legitimate Enforcement or Illegitimate Intervention?*, 16 CHINESE J. INT'L L. 175, 192 (2017).

[99] ACI Proposal, *supra* note 84, at art. 2(1).

[100] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 202 (June 27).

[101] Mohamed S. Helal, *On Coercion in International Law*, 52 N.Y.U. J. INT'L L. & POL. 1, 47 (2019); Philip Kunig, *The Prohibition of Intervention*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2008).

[102] Tom Ruys, *Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework*, *in* RESEARCH HANDBOOK ON UN SANCTIONS AND INTERNATIONAL LAW 19, 26–27 (Larissa van den Herik ed., 2017); Tladi, *supra* note 96, at 100–01.

[103] G.A. Res. 25/2625 (XXV), annex, Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (Oct. 24, 1970); G.A. Res. 2131 (XX), Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty (Dec. 21, 1965); G.A. Res. 36/103, annex, Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States (Dec. 9, 1981).

customary rule.[104] Nor has the ICJ's *Nicaragua* judgment of 1986 been particularly helpful in clarifying the legality of economic coercion. In its judgment, the Court dismissed Nicaragua's claims that certain economic measures, including a trade embargo, the cessation of economic aid, and a reduction in the sugar quota for U.S. imports from Nicaragua constituted a breach of the principle of non-intervention.[105]

The truth is that there has been inconsistent state practice and *opinio juris* on the subject,[106] and the European position illustrates this phenomenon. From 1991 and 1996 onwards, respectively, a series of UNGA resolutions have been adopted on an (almost) yearly basis in relation to "economic measures as a means of political and economic coercion against developing countries,"[107] and on "human rights and unilateral coercive measures."[108] Both of these resolutions call upon states to cease their adoption of unilateral coercive measures, among other reasons, due to their detrimental effect upon human rights and trade.[109] Although the votes in favor have progressively increased to comfortably outnumber the rejections, they still depict a disagreement on the subject.[110] European states, in particular, have consistently opposed the

[104] Hofer, *supra* note 98, at 212; Tzanakopoulos, *supra* note 97; Helal, *supra* note 101, at 104.

[105] Military and Paramilitary Activities in and Against Nicaragua, 1986 I.C.J. 14, ¶¶ 244–45.

[106] Derek W. Bowett, *Economic Coercion and Reprisals by States*, 13 VA. J. INT'L L. 1, 2 (1972).

[107] *See* G.A. Res. 76/191, Unilateral Economic Measures as a Means of Political and Economic Coercion Against Developing Countries (Dec. 17, 2021).

[108] *See* G.A. Res. 77/214, Human Rights and Unilateral Coercive Measures (Dec. 15, 2022); Rebecca Barber, *An Exploration of the General Assembly's Troubled Relationship with Unilateral Sanctions*, 70 INT'L & COMPAR. L.Q. 343, 357 (2021); Hofer, *supra* note 98, at 186.

[109] As an illustration, UNGA Resolution 77/214 calls upon states "to cease adopting or implementing any unilateral measures not in accordance with international law, international humanitarian law, the Charter of the United Nations and the norms and principles governing peaceful relations among States, in particular those of a coercive nature, with all their extraterritorial effects, which create obstacles to trade relations among States, thus impeding the full realization of the rights set forth in the Universal Declaration of Human Rights and other international human rights instruments, in particular the right of individuals and peoples to development." G.A. Res. 77/214, Human Rights and Unilateral Coercive Measures, ¶ 1 (Dec. 15, 2022).

[110] A recent resolution, G.A. Res. 76/191, Unilateral Economic Measures as a Means of Political and Economic Coercion Against Developing Countries (Dec. 2021), had the following voting record: Yes: 126 | No: 6 | Abstentions: 46. U.N. GAOR, 76th Sess., 54th plen. mtg. at 6, U.N. Doc. A/76/PV.54 (Dec. 17, 2021). Another recent resolution, G.A. Res. 77/214, Human Rights and Unilateral Coercive Measures (Dec. 15, 2022), had the following voting record: Yes: 130 | No: 53 | Abstentions: 1. *UN General Assembly Resolutions Tables*, DAN HAMMARSKJÖLD LIBR., https://research.un.org/en/docs/ga/quick/regular/77 (Apr. 11, 2023).

latter of the two resolutions, while abstaining in respect of the former.[111] Conversely, the EU has consistently voted as a bloc in favor of the UNGA yearly resolution on the "[n]ecessity of ending the economic, commercial and financial embargo imposed by the United States of America against Cuba" since 1997.[112]

As things stand, the main takeaway from the ACI's proposal is the unequivocal assertion on the part of the EU that economic coercion constitutes a breach of customary international law and that such wrongful conduct may in turn trigger the recourse to countermeasures. Such declaration should not be taken for granted, as it represents a marked departure from Europe's previous stance within the UNGA. The ACI also helpfully articulates a more refined understanding of the notion of unlawful economic coercion by laying down several elements that could be taken into account to determine whether an interference in "the legitimate sovereign choices" of the Union or its Member States would qualify as such. Relevant factors include, for instance, "the intensity, severity, frequency, duration, breadth and magnitude of the third country's measure and the pressure arising from it," or the fact that the country engages in "a pattern of interference."[113] In all, *ad portas* its entry into force, the ACI has the potential to become a significant contribution qua state practice and *opinio juris* which could help elucidate the scope of the principle of non-intervention and which may lead to the creation or crystallization of a prohibition of economic coercion. Whether and how this happens will depend of course on how other States react to it. It cannot be excluded, however, that the ACI will also turn out to be a double-edged sword, as the EU's very denunciation of economic coercion may be invoked by third States to contest the European Union's own conduct within the sanctions domain and beyond.

Furthermore, the ACI's position that the EU can also engage in trade countermeasures in response to economic coercion targeting one or more of its Member States (such as Lithuania), rather than against the EU as a whole, sits uneasily with the traditional assumption that countermeasures should emanate from an injured State (or intergovernmental organization) and raises questions over the permissible scope for "collective" and/or third-party countermeasures. As is well-known, the permissibility of countermeasures by non-injured States (or, rather, "non-directly injured" States) was deliberately left open when the ILC completed its Articles on State Responsibility[114] and has

[111] Hofer, *supra* note 98, at 187–88.

[112] *See* G.A. Res. 77/7, Necessity of Ending the Economic, Commercial and Financial Embargo Imposed by the United States of America Against Cuba (Nov. 3, 2022).

[113] ACI Proposal, *supra* note 84, at art. 2(2).

[114] *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, *supra* note 36, at 139, § 7.

given rise to debate ever since.[115] While several EU Member States have spoken out in support thereof, and while legal scholars often tend to qualify EU "restrictive measures" as a manifestation of countermeasures,[116] not all EU Member States may be equally keen on travelling down this path. While the hesitation of some Member States may well explain why the EU has traditionally refrained from explicitly referencing the notion of third-party countermeasures, the adoption of the ACI demonstrates, unequivocally if implicitly, EU support for this doctrine.[117]

Second, even if the ACI does not as such entail a breach of WTO law, the application of ACI trade countermeasures in response to economic coercion in the trade domain poses a fundamental challenge to the WTO dispute settlement mechanism—one that may well find its way to WTO panels established for specific trade disputes. Indeed, the ACI undeniably starts from the assumption that the WTO regime does not exclude the recourse to trade countermeasures under customary international law in respect of breaches of international legal obligations outside the WTO framework.[118] Whether that approach reflects *lex lata* is, however, controversial.[119] While not uncontested, the traditional position in legal doctrine rather appears to have been the opposite.[120] It is telling that States have traditionally tended to justify non-WTO-compliant behavior by relying on the general exceptions in the WTO instruments and/or the security exception—at times stretching their respective scope to breaking point—rather than by relying on the ARSIWA countermeasures framework. This is often seen as reflecting the conviction of States that these exceptions

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[115] *See, e.g.*, MARTIN DAWIDOWICZ, THIRD-PARTY COUNTERMEASURES IN INTERNATIONAL LAW (2017); CHRISTIAN J. TAMS, ENFORCING OBLIGATIONS *ERGA OMNES* IN INTERNATIONAL LAW (2009).

[116] *See, e.g.*, Martin Dawidowicz, *Third-Party Countermeasures: A Progressive Development of International Law?*, 4 QUESTIONS INT'L L. 3, 14–15 (2016).

[117] The adoption of the ACI also suggests that the EU and its Member States regard the prohibition of economic coercion (whether or not as part of a broader principle of non-intervention) as an *erga omnes* norm.

[118] In the words of the European Commission, "WTO cases, where only the WTO breach forms the basis (and claim) for the legal assessment, do not tackle the question of coercion and its illegality under customary international law. WTO dispute settlement, therefore, is no substitute to the creation of an anti-coercion instrument." *See* Impact Assessment Report, *supra* note 87, at 23.

[119] *See* T. Ruys & F.R. Silvestre, *L'Union contre-attaque – la Proposition d'Instrument Anti-Coercition (IAC) de l'UE vue sous l'angle du droit international* [*The Union Strikes Back: The Proposed EU Anti-Coercion Instrument (ACI) Seen from the Perspective of International Law*], 67 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 143, 143–71 (2021).

[120] *See* Freya Baetens & Marco Bronckers, *The EU's Anti-Coercion Instrument: A Big Stick for Big targets*, EJIL: TALK! (Jan. 9, 2022), https://www.ejiltalk.org/the-eus-anti-coercion-instrument-a-big-stick-for-big-targets. *But see* Danae Azaria, *Trade Countermeasures for Breaches of International Law Outside the WTO*, 71 INT'L & COMPAR. L.Q. 389 (2022).

constitute the exclusive legal bases upon which WTO violations may be excused.[121] Interestingly, in the ACI Impact Assessment Report, the European Commission acknowledges that the matter "remains unsettled," while ostensibly finding comfort in the fact that the country engaging in economic coercion might have little appetite in triggering the WTO dispute settlement mechanism in order not to have the legality of its own conduct subject to scrutiny.[122]

As such, the ACI poses a greater encroachment upon the WTO's *lex specialis* regime for trade sanctions than the abovementioned revised Trade Enforcement Regulation, which only allows for trade sanctions insofar as the WTO dispute settlement mechanism cannot run its normal course (and only temporarily, for as long as the AB deadlock remains). Some have expressed support for this change of heart, noting that it is "in keeping with the WTO's diminishing role overall," and that the EU "needs to be adequately equipped" to handle foreign coercion.[123] In turn, more critical voices have warned that the EU is moving "closer to such states that only commit to multilateralism if it is in their own interest."[124]

III. CONCLUDING THOUGHTS

As the above overview illustrates, the EU has been developing, at a fast pace, a range of instruments aimed at protecting its strategic autonomy and fostering its resilience in the face of mounting instability. By doing so, EU Member States are equipping Brussels with the necessary regulatory tools to match its economic clout in an era of growing geopolitization of international trade. This is part of a broader trend, where the EU's focus is partly shifting from soft power to economic statecraft. At a time of growing unilateralism and protectionism, the EU is sending the message that it is not willing to remain idle and turn the other cheek, and that its faith in, and support for, multilateral institutions is not unconditional. The changing mindset is to some extent echoed in a controversial speech by EU High Representative Josep Borrell at the opening of the European Diplomatic Academy in late 2022. In his speech, Borrell notoriously compared Europe to a garden, while warning that "[m]ost of the rest of the world is a jungle, and the jungle could invade the garden."[125]

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[121] G. Marceau & J. Wyatt, *Dispute Settlement Regimes Intermingled: Regional Trade Agreements and the WTO*, 1 J. INT'L DISP. SETTLEMENT 67, 77 (2010); Bartels, *supra* note 39, at 400.

[122] Impact Assessment Report, *supra* note 87, at 41–42.

[123] Baetens & Bronckers, *supra* note 120.

[124] Weiß & Furculita, *supra* note 42, at 878.

[125] Josep Borrell, High Representative of the EU for Foreign & Sec. Pol'y, European Diplomatic Academy: Opening Remarks at the Inauguration of the Pilot Programme (Oct. 13, 2022), https://www.eeas.europa.eu/eeas/european-diplomatic-academy-opening-remarks-high-representative-josep-borrell-inauguration_en.

In their own way, each of the three instruments examined above illustrates the EU's dilemma, oscillating between the aim of promoting multilateralism and protecting the international rules-based order, and the protection of its own political and economic interests.

On the one hand, the three instruments are essentially defensive or reactive in nature, seeking merely to respond to a prior wrongful act by a third State—that is, a breach of a trade (or investment) agreement (in the case of the revised Trade Enforcement Regulation), the adoption of unlawful extraterritorial legislation in contravention of the customary rules on the exercise of jurisdiction (in the case of the Blocking Statute), and the resort to unlawful economic coercion (the ACI). While the Blocking Statute rather fits the paradigm of unfriendly, but lawful "retorsions," the revised Trade Enforcement Regulation and the ACI are construed with due regard for the substantive and procedural conditions applicable to the recourse to countermeasures under general international law. What is more, each of the tools is primarily conceived as an instrument of deterrence, e.g., aimed at inducing States not to adopt unlawful extraterritorial sanctions or to engage in economic coercion against the EU and its Member States. The instruments accordingly play a mostly symbolic role, and, in an ideal scenario, would rarely if ever be used.

On the other hand, one cannot ignore the challenges these instruments pose to the international rules-based order. As far as the Blocking Statute goes, it is striking that it refrains from laying down meaningful criteria to identify extraterritorial legislation deemed to contravene (customary) international law, whereas the Russia-Ukraine war has inspired the EU to revisit and expand the outer boundaries of its own sanctions legislation. As explained, the revised Trade Enforcement Regulation and the ACI raise fundamental questions regarding their compatibility with the WTO regime, and its conception as a ring-fenced *lex specialis* regime. With regard to the revised Trade Enforcement Regulation, one might argue that the benefits outweigh the risks, inasmuch as it incentivizes other States to agree to the (quasi-)judicial settlement of trade disputes, and could thus contribute to a restoration of the (reformed?) Appellate Body, or, in the interim, to an expanding membership of the MPIA. The ACI, in turn, poses a more existential challenge to the WTO dispute settlement mechanism, and one that would remain even following a successful reform and reactivation thereof.

As far as the deterrent role is concerned, whereas the Blocking Statute was successful in defusing tension between the U.S. and the EU in 1996, in recent times it has proven to be a paper tiger at best, and counterproductive vis-à-vis EU companies at worst. Whether the ongoing reform of the Blocking Statute will alter this sobering picture remains to be seen. In turn, it remains premature to assess the implementation and impact of the 2021 revision of the Trade Enforcement Regulation. This is *a fortiori* true for the ACI, which awaits formal adoption at the time of writing. Each nonetheless carries an inherent risk of escalating inter-State disputes. In particular, rather than acting

as a deterrent, the ACI could easily lead in the opposite direction, with States constantly accusing each other of acting coercively and claiming they are the ones legally adopting countermeasures, in turn fomenting further trade and investment restrictions.

It follows that these tools, and in particular, the ACI, should be handled with care and that overuse should be avoided. In addition, recourse to these tools should not go at the expense of reliance on international dispute settlement mechanisms. It is somewhat surprising in this context that the EU never sought to challenge U.S. extraterritorial sanctions (against Cuba and/or Iran) before the WTO, as it did pursuant to the adoption of the Helms-Burton Act in 1996.[126] Conversely, the EU request in late 2022, to establish a WTO Panel to examine Chinese trade restrictions against Lithuania[127]—i.e., the very measures that inspired the adoption of the ACI—is a welcome sign that the EU remains committed to international dispute settlement and to upholding multilateral institutions.

[126] WTO procedure DS38 was suspended as a political agreement was reached between the EU and the U.S. (the Panel's authority was subsequently left to lapse). On the possibility to challenges extraterritorial and secondary sanctions before international courts and tribunals, see Ruys & Ryngaert, *supra* note 51, at 65.

[127] Request for the Establishment of a Panel by the European Union, *China - Measures Concerning Trade in Goods and Services*, WTO Doc. WT/DS610/8 (Dec. 9, 2022).