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THE UNION STRIKES BACK – THE PROPOSED EU 'ANTI-COERCION INSTRUMENT' (ACI) SEEN THROUGH THE LENS OF INTERNATIONAL LAW

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Abstract

In the face of increasing economic warfare driven by divergent geopolitical interests, the European Union is stepping up its efforts to enhance its resilience, including through the planned adoption of the so-called "Anti-Coercion Instrument" (ACI). The present article critically examines the draft ACI – expected to become law by the end of 2022 – from the perspective of public international law. In particular, it analyzes how the notion of "economic coercion" squares with, and influences, the legal meaning of the customary non-intervention principle. It also highlights the tension between the ACI and the countermeasures doctrine, as codified in the work of the International Law Commission, as well as the challenge it poses to the law of the World Trade Organization as a lex specialis regime.

Keywords

Coercion, non-intervention, countermeasures, international responsibility, WTO, blocking statute

1 Introduction

On 8 December 2021, the European Commission submitted its 'Proposal for a Regulation on the protection of the Union and its Member States from economic coercion by third countries',[1] also referred to as the 'Anti-Coercion Instrument' ('ACI'). The ACI is the outcome of a joint declaration issued in February 2021,[2] whereby the EU institutions acknowledged the existing concerns arising from the increased use of trade or investment-related measures seeking to coerce the Union or its Member States and committed to provide a legislative solution aimed at deterring and counteracting such practices. [3]

The regulation proposal is currently assigned to the Committee on International Trade ('INTA') of the European Parliament, whose Rapporteur already submitted its Draft Report containing amendments in April 2022.[4] The proposal is expected to move to the plenary in September/October 2022 with a view to its adoption before the end of the year. Accordingly, the present analysis is based upon the content of the ACI proposal (subject to possible

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[1] 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. Brussels, 8.12.2021 COM(2021) 775 final 2021/0406 (COD).

[2] Joint Declaration of the Commission, the Council and the European Parliament on an instrument to deter and counteract coercive actions by third countries (2021/C 49/01) OJ C 49, 12.2.2021.

[3] Commission Staff Working Document Executive Summary of the 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, SWD (2021) 371 final, 8 December 2021, p. 5.

[4] Committee on International Trade, Draft Report on the 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. (COM(2021)0775 – C9-0000/2021 – 2021/0406(COD)) – 19.04.2022.

changes in the course of the legislative process), its accompanying documents, most notably the exhaustive Impact Assessment Report ('IAR') carried out by the Commission, and the INTA Draft Report.

The ACI forms part of a broader effort on the part of the EU to adopt a more assertive and resilient stance in the face of mounting geopolitical tension. As follows, the ACI is parallel to other initiatives both presented and approved by the EU with the objective of preserving its open strategic autonomy and strengthening its economic and financial sovereignty. These initiatives include e.g. the revision of the Trade Enforcement Regulation (Regulation 654/2014),[5] the framework for screening foreign direct investment (FDI), or the pending amendments to the Blocking Statute.[6]

In particular, the instrument constitutes an effort to fill an existing gap in the Union's regulatory framework, by providing a legal basis under EU law for the Union to take action in the face of economic coercion directed either at the EU or its Member States.[7] The proposal is timely; EU Member States, scholars and think-tanks agree that Europe, nowadays perhaps more than ever, is at a high risk of being at the receiving end of measures amounting to economic coercion.[8]

Naturally, the underlying issues the ACI intends to resolve did not emerge out of thin air, nor can they be regarded as a recent development. Indeed, the consolidation of a global economic architecture driven by the progressive elimination of trade barriers and tariffs, together with the stability and predictability provided by the WTO framework, has led states to a degree of economic interdependence never experienced before in history.[9] While this increased interconnectedness brings evident benefits, the reverse side of the medal is that it can be easily weaponized by hegemonic powers seeking for newer and more efficient ways to coerce other states,[10] through the adoption of measures restricting trade or investment.

The success of the global economic system has been partly attributed to the idealistic notion that a certain degree of separation exists 'between political struggles and international trade under the rules of international trade law'[11]. Such belief appears chimeric when observing the current state of affairs. As the Impact Assessment Report ('IAR') of the proposed ACI notes, the increased use of economic coercion appears to have blurred the line between economic and geopolitical interests.[12] In turn, Hufbauer considers that 'the consequence of blurring the line between commercial and foreign policy objectives is erosion of the disciplinary effect of international trading rules on major trading countries.'[13] The multilateral trading system is in crisis,[14] as powerful states appear to be moving away from the guiding principles that inform international trade, turning to aggressive unilateralism in order to advance their multifaceted interests.[15]

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[5] Regulation (EU) No 654/2014 of the European Parliament and of the Council of 15 May 2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules, O.J. L-189/50, 27 June 2014.

[6] For a schematic overview of the initiatives contributing to preserve Europe's open strategic autonomy, see European Parliament Research Service ('EPRS') briefing on the Proposed Anti-Coercion Instrument, which contains a general overview, at 2 (Table 1).

[7] ACI Proposal, at 1, 3.

[8] European Council on Foreign Relations, « Measured response: How to design a European Instrument against Economic Coercion », 2021, p. 3; Impact Assessment Report, *op. cit.,* pp. 5-6.

[9] Lee, 'Weaponizing International Trade in Political Disputes: Issues Under International Economic Law and Systemic Risks', 56 *Journal of World Trade* (2022) 405 , at 405–406. S. Schill, *The Multilateralization of International Investment Law* (2009), at 1.

[10] Farrell and Newman, 'Weaponized Interdependence: How Global Economic Networks Shape State Coercion', 44 *International Security* (2019) 42.

[11] Lee, *op. cit.,* at 427.

[12] Impact Assessment Report, *op. cit.,* at. 17.

[13] Hufbauer, 'Economic Sanctions in the Twenty-First Century', in *Research Handbook on Economic Sanctions* (2021) 26 , at 39.

[14] Zhou and Gao, 'US–China Trade War: A Way Out?', 19 *World Trade Review* (2020) 605 , at 605.

[15] Hopewell, 'Beyond U.S.-China Rivalry: Rule Breaking, Economic Coercion, and the Weaponization of Trade', 116 *AJIL Unbound* (2022) 58 , at 59.

As a result, we are living in times of international political instability resembling certain periods of the cold war.[16] Instead of the latent threat of armed confrontation, conflict is mainly being fueled by the constant threat of economic coercion, whereby – to echo Thucydides – "the strong do what they will and the weak do what they must".[17]

Against this background, the EU's response to bolster its resilience and safeguard its autonomy, takes the form of the proposed Anti-Coercion Instrument, a regulation that would serve the role of dissuading potential and ongoing coercion, as well as counteracting its effects once it has taken place.[18] The most immediate benefit of the ACI's entry into force would come from its heightened deterrent force, since the bargaining power of the EU (as the world's no. 1 trading bloc) and the strength of a potential retaliatory measure are far superior to those of any Member State acting individually.[19]

Apart from its political and symbolic importance, the ACI raises important questions under international law, which constitute the focus of the present contribution. Following a brief overview of the proposal (Section 2), section 3 will focus on how the ACI deals with the prohibition of economic coercion and the principle of non-intervention. Subsequently, the analysis will center around the compatibility of the ACI with the law of international responsibility, particularly in relation to countermeasures, to conclude with an overview of how the provisions of the instruments fare with the WTO framework as a *lex specialis* regime (Section 4). Section 5 provides some concluding remarks.

2 The anti-coercion instrument: a brief overview

The legal basis for the proposed Regulation is Article 207(2) of the Treaty on the Functioning of the European Union ('TFEU'), which provides for the adoption of measures defining the framework for implementing the Union's common commercial policy, including those intended to protect trade as it is the case of the ACI.[20]

As explained above, the ACI's *raison d'être* is deterrence, and this underlying rationale pervades the entire mechanism set out by the instrument. The functioning of the ACI entails a multi-step procedure coordinated by the Commission, encompassing first the identification of a third-country measure as economic coercion, secondly the recourse to means of cooperative engagement with the coercing state and finally, the adoption of countermeasures as *ultima ratio*. The central objective is de-escalation over confrontation.

The first stage of the process involves the Commission's examination of a third-country measure, aiming to determine, based on criteria that will be deconstructed in the following section, whether it qualifies as 'economic coercion' in the sense of Article 2 of the ACI. The Commission may initiate its assessment *proprio motu* or following information received from any source. In the event the Commission finds that a situation of economic coercion is in place, it will adopt an official decision and notify the third country, requesting it to cease its coercive behaviour and, when applicable, to repair the injury suffered by the Union or its Member States. The Commission may also decide to inform the third country before its formal decision, allowing the latter to submit its observations, but in any event, whenever economic coercion is confirmed the author of the measures must be notified.[21]

At this point, the second step of the ACI's mechanism is in motion, and the Commission will seek to engage with the third country, aiming to explore alternative pathways to reach an amicable solution warranting the cessation of the third country's coercive measures.[22] These include diplomatic means such as direct negotiations, mediation,

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[16] van Bergeijk, 'Introduction to the Research Handbook on Economic Sanctions', in *Research Handbook on Economic Sanctions* (2021) 1 , at 5.
[17] K. HOPEWELL, op. cit., pp. 61-62..
[18] ACI proposal, *op. cit.,* at. 1.
[19] Impact Assessment Report, *op. cit.,* at. 20.
[20] Ibid, at 19.
[21] ACI proposal, *op. cit.,* pp. 7-8, 14-16, Art. 2,3,4.
[22] Impact Assessment Report, *op. cit.,* at. 30.

conciliation, or good offices, as well as international adjudication.[23] Additionally, the Commission is also entitled to raise the matter in any international forum and to seek cooperation with any other state affected by the same measures.

It is only when cooperative engagement is unsuccessful that the instrument contemplates the possibility to adopt countermeasures as a last resort. Nevertheless, this final phase is not an obligation for the Commission, on the contrary, these measures will only be adopted when action is "necessary to protect the interests and rights of the Union and its Member States in that particular case", and when such action is "in the Union's interest".[24]

As follows, the instrument entrusts the Commission with enough discretion to decide in each case whether to adopt countermeasures or not. It has been argued that this leeway responds to the fact the EU only seeks to retaliate against sufficiently grave instances of economic coercion.[25] The ACI's prioritization of cooperative engagement with the coercing state is largely informed by the 'potential costs and negative consequences of countermeasures.'[26]

In order to implement a countermeasure, the Commission will need to issue an act explicitly establishing the type of measure to be applied, choosing the most appropriate primarily between those provided in Annex I of the ACI.[27] The Commission will thereupon notify the third country, requesting it once again to cease the economic coercion and offering to negotiate a solution. Additionally, the third country will be informed that countermeasures will be in force until the coercive economic measures are discontinued. Where necessary, these requirements may be overlooked in an urgent context, with the purpose of preserving the rights and interests of the Union or its Member States.[28]

The ACI establishes that every countermeasure will be proportional to the injury suffered by the Union or its Member States, and the criteria for their selection will respond to different factors including the gravity of the coercion, the rights affected, the potential effectiveness of a countermeasure in putting an end to coercion, their potential to provide economic relief to economic operators within the Union, the avoidance or minimization of negative effects on subjects affected by the measures imposed.[29] Additionally, the ACI allows the Commission to designate natural or legal persons connected or linked to the government of the third country concerned, and implement countermeasures directly against them.[30] These measures are subject to procedural guarantees in favour of the persons designated.[31]

Finally, the ACI stipulates conditions for the suspension of countermeasures depending on the Union's interest. It equally provides for conditions to discontinue countermeasures under four scenarios; when economic coercion has ceased; when an agreement has been reached between the parties; when a binding decision of an international court or tribunal requires it to withdraw its countermeasures; and, when it is in the interest of the EU.[32]

The potential countermeasures listed under Annex I encompass wide-ranging acts constraining trade or investment, including i.a. the suspension of tariff concessions and the imposition of new or increased duties and charges on goods, quantitative restrictions on imports or exports of goods, the suspension of rights to partake in public procurement to

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[23] ACI proposal, *op. cit.,* p.7, art. 5. It should be noted that these avenues will remain available for the Commission even after countermeasures have been adopted, hinting at the fact that one of the main concerns incorporated into the instrument is to avoid unnecessary escalation of the situation by, encouraging cooperation at every step of the way.
[24] Ibid., p. 16, Art. 7.
[25] F. BAETENS et M. BRONCKERS, « The EU's Anti-Coercion Instrument: A Big Stick for Big targets », EJIL : Talk !, January 19 2022.
[26] Impact Assessment Report, *op. cit.,* at. 30.
[27] ACI proposal, *op. cit.,* Annex I, pp. 1-2. However, the Commission may also adopt alternative measures available pursuant to other EU legal instruments.
[28] Ibid., p. 17, Art. 7.
[29] Ibid., p. 19, Art. 9.
[30] Ibid., p. 18, Art. 8.
[31] Ibid.
[32] Ibid., Annex I, pp. 1-2.

companies operating from the coercing third state, limitations to the transit of goods, restrictions on trade in services, restrictions on foreign direct investment, limitations to the protection of intellectual property rights.[33]

3 The Anti-Coercion Instrument's 'Triggers'

3.1 Breathing (new) life to the prohibition of economic coercion?

There is a plethora of interesting aspects to dissect from the ACI, undoubtedly the most pressing one for the present contribution concerns the instrument's interpretation of economic coercion, the trigger behind the proposal. Nevertheless, before addressing any of these points, a preliminary commentary is required in relation to a salient aspect of the ACI, which is the European Commission's decision to place economic coercion as the central aspect of the regulation instrument, instead of focusing on the broader principle which encompasses coercion under international law, viz. the prohibition of intervention. It is indeed striking that throughout the ACI proposal, the drafters seem to avoid as much as possible any mention of the principle of non-intervention –the sole explicit reference to it is contained not in the proposal itself, but rather in the IAR.[34]

This approach may reflect an interest on the part of the EU in breathing new life into the emergence of a self-standing rule proscribing economic coercion under international law in the present geopolitical climate. Alternatively, it may be that the EU considers that such a norm has already materialized under customary international law, hence it is merely upholding it by choosing it as the trigger for its proposal for regulation.

This interpretation is, however, highly problematic. Economic coercion has been at the core of the debates dealing with the scope of the principles of non-intervention and the non-use of force ever since the inception of the UN. Nonetheless, despite multiple UNGA resolutions expressly calling upon states to refrain from economic coercion in their international relations starting from 1965 up to 1981,[35] numerous scholars have argued that these resolutions do not appear to have translated into the crystallization of a rule prohibiting these measures under customary international law[36]. This is largely explained by the existing rift between developed and developing states regarding the legality of employing economic coercion,[37] a circumstance that has led to inconsistent and often contradicting state practice and *opinio juris* over the matter.[38]

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[33] Impact Assessment Report, *op. cit.,* at. 32-33.

[34] Ibid., p. 8. 'Coercive measures by third countries targeting the EU or Member States can be considered a breach of customary international law, which prohibits certain forms of interference in the affairs of another subject of international law when there is no basis in international law for doing so.'

[35] 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations UNGA Res/25/2625 (XXV) (24 October 1970); Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty General Assembly resolution 2131 (XX) New York, 21 December 1965; Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States. A/RES/36/103 (9 December 1981). The three resolutions contain the following passage: 'No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights'. Carter suggests that 'their evidentiary weight depends on whether they were controversial and what the vote might have been. As noted above, the number of countries opposing these resolutions gradually increased'. B. CARTER, « Economic Coercion », Max Planck Encyclopedia of Public International Law, Oxford, Oxford University Press, § 8 (online edition).

[36] A. HOFER, « The Developed/Developing Divide on Unilateral Coercive Measures : Legitimate Enforcement or Illegitimate Intervention ? », Chinese Journal of International Law, 2017, p. 212 ; A. TZANAKOPULOS, « The Right to Be Free from Economic Coercion », Cambridge Journal of International and Comparative Law, 2015, p. 633 ; M. S. HELAL, « On Coercion in International Law », New York University Journal of International Law and Politics, p. 104 ; B. CARTER, op. cit., § 11.

[37] A. HOFER, op. cit., p. 212 ; M. DORAEV, « The 'Memory Effect' of Economic Sanctions against Russia : Opposing Approaches to the Legality of Unilateral Sanctions Clash Again », University of Pennsylvania Journal of International Law, 2015, p. 375..

[38] Bowett, Economic Coercion and Reprisals by States, Virginia Journal of International Law, 1972, p.2.

The same divergence has continued over the years through a series of UNGA resolutions adopted on a(n almost) yearly basis from 1991 and 1996 onwards respectively in relation to 'economic measures as a means of political and economic coercion against developing countries',[39] and on 'human rights and unilateral coercive measures'.[40] Both 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. Although the votes in favour of adopting these resolutions have progressively increased to comfortably outnumber the rejections, they still depict a disagreement on the subject. European states have consistently opposed the adoption of both resolutions at the UNGA.[41]

In light of the foregoing,[42] many commentators agree that in its current state international law does not guarantee states, or international organizations for that matter, the right to be free from economic coercion,[43] or contrariwise, states and IOs alike are under no obligation to abstain from economic coercion unless such measures contravene an obligation arising from a treaty or customary international law.[44] This has vast repercussions for the ACI, given that the ultimate weapon that the instrument provides is the possibility to adopt countermeasures, the legality of which will depend on a prior breach of an international obligation by another State. Accordingly, unless a measure of economic coercion by a third state breaches a related international obligation, the EU would only be able to legally retaliate through retorsions.

An alternative narrative is that the ACI recognizes, albeit implicitly, economic coercion as an element of the broader prohibition of intervention. This constructive ambiguity chosen by the Commission could be explained by the fact that, even though the prohibition of intervention is a customary rule binding upon every state, [45] the precise scope and substance of its constituent elements are matters shrouded under a veil of vagueness and ambiguity,[46] especially in relation to economic coercion,[47] arguably its most controversial manifestation.[48] At the same time, the Commission may have been concerned with the traditionally inter-state character of the principle of non-intervention, or by the fact that the *Nicaragua* judgment of 1986, the most authoritative assessment of the principle formulated by the ICJ, was not 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 US imports from Nicaragua, constituted a breach of the principle of non-intervention. [49] By stating that the trade embargo imposed by the United States against Nicaragua in 1985 did not constitute a

[39] See the last resolution, UNGA, « Unilateral economic measures as a means of political and economic coercion against developing countries», A/RES/76/191, 17 December 2021.

[40] See the last resolution, UNGA « Human rights and unilateral coercive measures », A/RES/76/161, 16 December 2021. *See* further, R. BARBER, « An exploration of the General Assembly's Troubled Relationship with Unilateral Sanctions », International and Comparative Law Quarterly, 2021, p. 357 ; A. HOFER, op. cit., p. 186..

[41] Conversely, the EU has consistently voted as a bloc in favour of the UNGA yearly resolution on the "Necessity of ending the economic, commercial and financial embargo imposed by the United States of America against Cuba' since 1997. *See* the latest resolution A/RES/75/289, 23 June 2021.

[42] Farer, 'Political and Economic Coercion in Contemporary International Law', 79 *American Journal of International Law* (1985) 405 , at 406; Omer Elagab, The Legality of Non-forcible Counter-measures in International Law (Clarendon Press 1988) 212–213.

[43] A. TZANAKOPOULOS, op. cit., p. 633.

[44] A. HOFER ,op. cit., p. 192.

[45] Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v United States of America) [1986] ICJ Rep 392, para. 202.

[46] Philip Kunig, 'The Prohibition of Intervention' in Max Planck Encyclopedia of Public International Law (April 2008); M. HELAL, op. cit., at. 47.

[47] Ruys, 'Sanctions, Retorsions and Countermeasures : Concepts and International Legal Framework', in L. J. van den Herik (ed.), *Research Handbook on UN Sanctions and International Law* (2017) 19 , at 26–27.

[48] Tladi, 'The Duty Not to Intervene in Matters within Domestic Jurisdiction', in J. E. Viñuales (ed.), *The UN Friendly Relations Declaration at 50* 1 (2020) 87 , at 102.

[49] ICJ, Case concerning military and paramilitary activities in and against Nicaragua, op. cit., paras. 244-245.

breach of the principle of non-intervention,[50] the Court has indeed made it difficult to see when, if ever, 'action on the economic plane', could in its view come to qualify as unlawful intervention.

In any event, it should be noted that the preceding analysis constitutes at most an exercise on semantics, as the intention of the drafters cannot be unequivocally inferred from ACI and its accompanying documents. The main takeaway is that the EU is adopting a legal view it had not (clearly) articulated before, and which appears to depart from its previous stance within the UNGA, namely that economic coercion contravenes international law. The following section examines in greater detail how the ACI proposal fares against the customary prohibition of intervention.

3.2 Pushing the boundaries of the principle of non-intervention, is the ACI shedding light or casting more darkness?

Even within the framework of the prohibition of intervention, the uncertainty concerning its full scope, especially whether it applies to economic coercion, has been the subject of much debate between states and scholars ever since the dawn of the United Nations.[51] This is partially explained by the fact that, despite its crucial importance, international law has failed to provide an authoritative and generally accepted definition of coercion. In the meantime, the increased recourse to economic sanctions and other coercive measures affecting trade and investment over the last decade has rekindled the debate concerning the applicability of the principle of non-intervention to economic coercion.

Coercion is the linchpin of the principle of non-intervention,[52] inasmuch it separates other forms of legitimate interference, such as the use of influence or persuasion, from measures that are prohibited under international law. Without the element of coercion, any interaction between states touching upon matters encompassed within their exclusive sovereign prerogatives could potentially be labelled as an intervention, stretching its scope to the absurd.[53] However, the delimitation between acts that reach that coercive threshold and those that do not is arguably the most challenging aspect for the consistent application of the principle, a fact that is particularly patent in the case of measures of an economic nature.

Within this frame of reference, the ACI proceeds to define economic coercion. Article 2(1) begins by establishing 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'[54]. The ACI then proceeds to clarify in the same article that for the purposes of this regulation, 'such third-country actions shall be referred to as measures of economic coercion.'

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[50] Ibid. As a matter of fact, the Court did not even share the reasoning that led it to the conclusion concerning the cited economic forms of pressure, but it did clarify earlier in paragraph 205, that it would 'define only those aspects of the principle which appear to be relevant to the resolution of the dispute'.

[51] Dupont, 'Unilateral Sanctions as Unilateral Coercive Measures: Discussing Coercion at the UN Level', in *Research Handbook on Unilateral and Extraterritorial Sanctions* (2021) 366 , at 366; Tladi, *supra* note 40, at 100. ('Perhaps no other form of intervention creates controversy like economic coercion')

[52] ICJ, Case concerning military and paramilitary activities in and against Nicaragua, op. cit., para. 205.

[53] Jamnejad and Wood, 'The Principle of Non-Intervention', 22 *Leiden Journal of International Law* (2009) 345 , at 348; Oppenheim, p. 432 ("Interference pure and simple is not intervention").

[54] ACI proposal, *op. cit.,* pp. 14-15, Art. 2 § 1. It should be noted that the syntax chosen by the ACI is not the clearest to identify the elements of economic coercion under the instrument. The INTA amendments incorporate a new Article 1a s directly defining coercion as 'any third country action or measure interfering 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'. Meanwhile economic coercion is subsequently defined as 'coercion through a third-country action or measure affecting trade or investment'. See, Committee on International Trade Draft Report, *op. cit.,* pp. 13-14.

The first aspect of the definition that catches the eye is that the instrument appears, *prima facie*, to conflate or equate coercion with interference. Put differently, the ACI ostensibly establishes that any third-country measure of interference in the legitimate sovereign choices of the Union or its member states will qualify as coercion, regardless of the intensity or severity of the measure (following an objective approach) or the intention of the interfering state (following a subjective approach).[55]

Contrastingly, under international law, coercion is treated as a separate element that helps to qualify a certain act of interference as unlawful. Coercion has traditionally been understood as a requirement that denotes a certain degree of pressure or compulsion applied against another state.[56] For instance, according to an influential, albeit dated, work on the subject, 'intervention is forcible or dictatorial interference by a state in the affairs of another state'.[57] Meanwhile, the ICJ noted in its *Nicaragua* judgment in 1986, that prohibited intervention is wrongful when a state used methods of coercion with regards to choices relating to matters in which each state is entitled to decide freely, while also affirming that 'the element of coercion… is particularly obvious in the case of an intervention which uses force'.[58]

Accordingly, not every act of interference is to be regarded *ipso facto* as coercive under international law. As a matter of fact, the quid of the debate concerning whether economic coercion is encompassed under the principle of non-intervention has centered around the question if these types of measures can reach the coercive threshold or if it is only reserved for forcible or dictatorial conduct. The ACI proposal itself acknowledges the relevance of pressure in its explanatory memorandum, whereupon it affirms that 'economic coercion refers to a situation where a third country is seeking to pressure the Union or a Member State into making a particular policy choice'.[59]

Nevertheless, at least from an objective perspective, a threshold appears to be missing from the definition provided under article 2(1) of the ACI. While it is true that nowadays there are very few arguments to exclude non-forcible coercion from the scope of the principle of non-intervention,[60] failing to provide an objective threshold to distinguish between lawful and unlawful interference could lead to an undesirable overly expansive scope of the instrument. As way of illustration, due to the fully interconnected nature of modern economy, whereupon states operate under a dynamic of competition with their counterparts, there will be several instances where the policies of one state will collide with the policies of another state.[61] In this context, states will attempt to influence the economic policies and decision-making process of another state to advance their own,[62] with the purpose of obtaining a legitimate economic advantage, without a clear dividing line this behavior could eventually be qualified as coercive under the ACI. Moreover, since the instrument does not provide a separate definition of what 'interference' entails, a tautological relationship between such notion and 'coercion' ensues.

Rather, the ACI seemingly follows a subjective approach to determine the existence of economic coercion. According to the instrument, measures affecting trade or investment amount to economic coercion when they interfere in the legitimate sovereign choices of the Union or a Member state, by 'seeking to prevent or obtain the cessation,

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[55] Townley, 'Intervention's Idiosyncrasies: The Need for a New Approach to Understanding Sub-Forcible Intervention', Fordham International Law Journal, 2019, p. 1176. ('States that see the principle of non-intervention as clear have generally taken one or both of two views—that certain actions can be defined in advance as constituting violations of the principle or that what matters is the "intervening" state's intention').

[56] Moynihan, The Application of International Law to State Cyberattacks: Sovereignty and Non-Intervention (Chatham House Research Paper, 2019), at. 28.

[57] L. Oppenheim et al., *Oppenheim's International Law. Vol. 1: Peace* (9th ed, 1996), at 430.

[58] ICJ, Case concerning military and paramilitary activities in and against Nicaragua, op. cit., para. 205.

[59] ACI proposal, *op. cit.,* p.1.

[60] M. JAMNEJAD et M. WOOD, op. cit., p. 370.

[61] Derek W. Bowett, *International Law and Economic Coercion*, 16 VIRGINIA JOURNAL OF INTERNATIONAL LAW 245, 248 (1976). -

[62] *See* further, Schmidt, 'The Legality of Unilateral Extra-Territorial Sanctions under International Law', 27 *Journal of Conflict and Security Law* (2022) 53 , at 56.

modification or adoption of a particular act by the Union or a Member State.'[63] As follows, the coercive element would be primarily determined by the underlying intention of its author, that is to compel the EU or a Member State to modify its behavior or policies, with the ultimate goal to 'deprive the target State of the sovereign control over the issue in question'. [64] In other words, a measure affecting trade or investment will qualify as coercive when it is intended to subordinate the sovereign rights or will of the Union or its Member States. In this way it is also understood by the IAR, which refers to coercive intention as one of the elements of the definition provided by the ACI.[65]

The subjective approach finds some support in the language and content of the 1965, 1970 and 1981 UNGA Declarations, which specifically call upon states to abstain from using or encouraging 'the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind'.[66] A subjective approach would also help to move past the debate concerning whether economic coercion is covered by the principle of non-intervention, since whereas measures of an economic nature would hardly reach a dictatorial level, and they clearly do not qualify as forcible, they can certainly be directed at subordinating the sovereign rights of another state.

Nevertheless, the fact that the instrument predominantly focuses on intent, does not mean that objective criteria are excluded from its purview. *Au contraire*, cognizant of the difficulty of assessing the intention of a state, the ACI incorporates auxiliary criteria to guide the Commission in ascertaining economic coercion. Article 2(2) of the ACI stipulates in particular that the following criteria shall be considered:

> '(a) the intensity, severity, frequency, duration, breadth and magnitude of the third country's measure and the pressure arising from it;
>
> (b) whether the third country is engaging in a pattern of interference seeking to obtain from the Union or from Member States or other countries particular acts;
>
> (c) the extent to which the third-country measure encroaches upon an area of the Union's or Member States' sovereignty;
>
> (d) whether the third country is acting based on a legitimate concern that is internationally recognised;
>
> (e) whether and in what manner the third country, before the imposition of its measures, has made serious attempts, in good faith, to settle the matter by way of international coordination or adjudication, either bilaterally or within an international forum.'[67]

As can be observed, both (a) and (b) refer to predominantly objective elements. What is more, it appears that any examination of the pressure arising from a given act will be carried out in *relative* terms. Put differently: it will depend on the author and recipient of economic coercion, since a measure of a certain intensity, frequency or magnitude employed against a powerful state may not have the same effects when adopted against a smaller country.

In all, it can be concluded that the ACI employs a mixed approach, combining subjective and objective elements into

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[63] ACI proposal, *op. cit.,* pp. 14-15, Art. 2 § 1.

[64] M. JAMNEJAD et M. WOOD, op. cit., p. 348 (« Sovereign rights, or 'the sovereign will', are only subordinated where the intervening state acts 'coercively' ») ; D. TLADI, op. cit., p. 92.

[65] Impact Assessment Report, *op. cit.,* at 8 ('Coercive intention – the third country's objective of attaining a specific outcome lying within the legitimate policymaking space of the EU or Member State; it may affect any area of competence of the EU or a Member States').

[66] 1970 Friendly Relations; Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty General Assembly resolution 2131 (XX) New York, 21 December 1965; 1981 Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States. A/RES/36/103.

[67] ACI proposal, *op. cit.,* p. 15, Art. 2 § 2.

the determination of economic coercion. These criteria are certainly a positive step forward in helping to determine coercion and constitute valuable *opinio juris* which could potentially help international courts in the future in case they are positively received by the international community. The Commission appears to have been influenced by the most prominent academic works and UNGA resolutions on the subject over the last decades, ending with a set of criteria that help clarifying the scope of coercion, helping to overcome the obsolete notion of 'forcible or dictatorial' interference as the defining threshold. Much uncertainty remains, however, concerning the absence of guidelines on how these criteria will be applied, or whether some hierarchy exists between them.[68] Such uncertainty may be remedied (or at least reduced) in due course be when the Commission starts adopting reasoned decisions pursuant to Article 4 of the ACI labelling specific third-State measures as economic coercion.

3.3 Are all sovereign choices legitimate?

As mentioned earlier, the use of economic coercion does not constitute by itself a breach of an international obligation. It is only when it impinges upon a protected sphere of sovereign prerogatives that the principle of non-intervention is applicable. This domain which corresponds to 'matters in which each State is permitted, by the principle of State sovereignty, to decide freely',[69] has received several different names throughout the years, with the ACI opting for a broad notion such as 'legitimate sovereign choices', instead of the more recurrent concept of *domaine réservé*. Regardless of the name, the idea is that a given set of sovereign prerogatives is shielded from the coercive interference of other states. Thus, the challenge is to conclusively define which matters qualify as those over which the EU and its Member States have the right to adopt legitimate sovereign choices.

Traditionally, it has been argued that the matters encompassed under the notion of *domaine réservé* those excluded from international regulation [70] *i.e.,* matters exempt from any obligation arising from customary international law or treaty law [71] Following this logic, the domaine réservé of each Member State will be different from that of others,[72] as it is contingent *upon the specific obligations that each state has adopted individually* Consequently, the determination of the *domaine réservé* is a case-by-case endeavour and cannot be previously established on a general way.

Other authors have a different view and consider that the content of the *domaine réservé* is virtually empty or highly residual, because 'even the matters of choice of a political or economic or social or cultural system, and of formulation of foreign policy may be regulated by international law'[73]. Thus, according to Tzanakopoulos, 'there are barely any fundamental rights of states in any meaningful sense, let alone any fundamental right to be free from economic coercion'.[74]

In spite of this, it should be noted that there is clearly an economic dimension to sovereignty, as confirmed by the ICJ in the *Nicaragua* judgment and UNGA resolutions dedicated to the subject.[75] Moreover, comprised within the notion

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[68] Deepak Raju - Proposed EU Regulation to Address Third Country Coercion – What is Coercion? Ejil Talk (https://www.ejiltalk.org/proposed-eu-regulation-to-address-third-country-coercion-what-is-coercion/)

[69] ICJ, Case concerning military and paramilitary activities in and against Nicaragua, op. cit., para. 205.

[70] PCIJ, Nationality Decrees Issued in Tunis and Morocco, Advisory Opinion, PCIJ Series B no 4, ICGJ 271 (PCIJ 1923), 7th February 1923, p.24.

[71] K. S. ZIEGLER, « Domaine Réservé », Max Planck Encyclopedia of Public International Law, op. cit., § 1.

[72] M.S. HELAL, op. cit., p. 67.

[73] A. TZANAKOPOULOS, op. cit., p. 631.

[74] *Ibid*., at 633.

[75] ICJ, Case concerning military and paramilitary activities in and against Nicaragua, op. cit., para. 205, 1970 Friendly Relations; Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty General Assembly resolution 2131 (XX) New York, 21 December 1965; 1981 Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States. A/RES/36/103.

of economic sovereignty, '[t]here may be ancillary rights, such as the right to regulate the activities of all businesses within its territory and the terms of trade within its territory'.[76]

However, a pertinent criticism to the way in which the ACI treats this element is the wording chosen in Article 2. Not every sovereign choice available to the EU or its Member States, as legitimate as they may regard them, is understood to be contained within the protected sphere of prerogatives that trigger the principle of non-intervention. Many of these sovereign decisions will actually be limited by international obligations, hence, the problem with legitimate sovereign choices as a concept, is that it does not denote exclusiveness or a specially restricted domain. Furthermore, the determination of a choice as 'legitimate' appears excessively broad and discretionary, since many sovereign decisions may appear as legitimate purely in the eye of the beholder. These two considerations could have the effect of broadening the scope of the instrument beyond the parameters established under international law.

In conclusion, it is submitted that the whereas the ACI sheds some light regarding the legality of economic coercion under international law, it arguably also casts some more darkness into an already controversial principle.

3.4 Extraterritorial sanctions – in or out? The link between the ACI and the EU Blocking Statute

As mentioned earlier, the ACI proposal forms part of a broader effort towards building a more resilient Europe in economic and financial matters. Among the various initiatives, one stands out for being closely interrelated and complementary to the ACI and sharing the overarching objective of protecting further the Union and its Member States, and even its citizens and companies, against external pressure emanating from third states, i.e, the ongoing reform of the Blocking Statute.

In a highly globalized economy, states are no longer the sole relevant actors, and multinational corporations and private individuals hold a considerable degree of economic power of their own. As follows, third states seeking to fulfil their geopolitical and economic objectives may choose to target and exert pressure upon these private entities, instead of going against their countries of nationality.[77] Hence, on many instances economic pressure with geopolitical motivations will not be directly targeted at the EU or its Member States, but against private economic operators.

At the same time, the degree of economic interdependence has not only resulted in increased episodes of economic coercion but has also vested states with an enhanced capacity to enact legislation with extraterritorial effects going beyond the limits of prescriptive jurisdiction.[78] However, contrary to the situation of economic coercion, the EU already has at its disposal an instrument to counter the negative effects of extraterritorial legislation.

The Blocking Statute was enacted back in 1996, and constitutes an effort to provide a joint European response against the adoption of extraterritorial legislation by the US aimed at supplementing its sanctions regimes against Cuba, Libya, and Iran.[79] The EU regards the application of extraterritorial sanctions as contrary to international law, based on the fact they go beyond the permissible exercise of jurisdiction under customary international law of the sanctioning state, by attempting to regulate subjects or conduct without the existence of a sufficient nexus between

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[76] Lowe, 'The Problems of Extraterritorial Jurisdiction: Economic Sovereignty and the Search for a Solution', 34 *International and Comparative Law Quarterly* (1985) 724, at 744.

[77] B. STERN, « Can the United States Set Rules for the World ? », Journal of World Trade, p. 5.

[78] Impact Assessment Report, *op. cit.,* at 17.

[79] Council Regulation (EC) 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] OJ L309/1 (the 1996 EU Blocking Statute). The Blocking Statute was revised in 2018, as a response to the US withdrawal from the JCPOA, and re-imposition of extraterritorial sanctions to curtail economic interactions with Iran.

the latter and the sanctioning state.[80] Hence, the Blocking Statute 'provides protection against and counteracts the effects of the extraterritorial application of laws', commonly referred to as extraterritorial sanctions, including its most controversial variant, secondary sanctions.[81]

The linchpin clause of the Blocking Statute prohibits EU persons from complying with specific extraterritorial legislation listed in its Annex, unless authorized by the Commission.[82] As follows, the Blocking Statute orders European corporations and individuals to disregard specific US extraterritorial sanctions, putting them between a rock and a hard place. Reality nonetheless suggests that, based on a cost-benefit assessment, [83] European businesses often opt to disregard the Blocking Statute instead, as the risk of being excluded from the US market or being subject to heavy pecuniary fines by the US authorities, is far more harmful. As a result, the Blocking Statute has remained mostly a paper tiger.[84] In light hereof, in January 2021, the European Commission announced a reform of the Blocking Statute.[85] The reform proposal is expected to arrive during 2022 and would i.a. seek to reduce the costs of compliance for EU companies and individuals.[86]

It is not difficult to notice the similarities between the ACI and the Blocking Statute. Both instruments constitute an attempt to protect the autonomous decision-making of the EU and its Member States on the one hand, and the right to freely conduct legitimate business of the economic agents located in the Union on the other. From an international law standpoint, extraterritorial sanctions can certainly amount to economic coercion and could potentially constitute a breach of the principle of non-intervention. As Wood and Jamnejad observe, '[t]he limits on a state's prescriptive jurisdiction can be viewed as a question of non-intervention. Thus, when the United States sought to impose obligations on foreign companies extraterritorially in support of its own foreign-policy objectives, this was seen as unlawful intervention in the affairs of the states whose companies were affected, and led to countermeasures.'[87] Put differently, when economic agents are compelled through the threat of extraterritorial sanctions to abide by foreign sanction legislation, consequently disregarding the policies and regulations enacted by the state where they are operating or established, the latter could become unable to discharge its sovereign prerogatives freely, losing control over the legitimate choices it is entitled to adopt as a sovereign, in relation to the transactions affected by extraterritorial or secondary sanctions.[88]

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[80] COMBINED EVALUATION ROADMAP/INCEPTION IMPACT ASSESSMENT Ref. Ares(2021)4911405 - 02/08/2021 Amendment of 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, p. 2. However, it is worth noting that this position has not been entirely consistent throughout the years, as the support given to the extraterritorial and secondary sanctions imposed by the US against Iran portrays.

[81] R. BISMUTH, 'Pour une appréhension nuancée de l'extraterritorialité du droit américain – Quelques réflexions autour des procédures et sanctions visant Alstom et BNP Paribas', Annuaire Français de Droit International, 2015, p. 792 ; Sénat, Rapport d'information fait des affaires européennes sur l'extraterritorialité des sanctions américaines, by M. Philippe Bonnecarrère, sénateur, n° 17 (2018-2019), enregistré le 4 octobre 2018, publié sur le site internet du Sénat, pp. 9-11.

[82] Other relevant provisions include the non-recognition or enforcement of any judgment by a foreign court or administrative decision based on the extraterritorial sanctions (Art. 4), and and a 'clawback' provision authorizing EU economic operators to recover damages arising from extraterritorial sanctions (Art. 6).

[83] Ruys and Ryngaert, 'Secondary Sanctions: A Weapon out of Control? The International Legality of, and European Responses to, US Secondary Sanctions', *British Yearbook of International Law* (2020), at 92.

[84] *Ibid*., at 98.

[85] COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN CENTRAL BANK, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS, 'The European economic and financial system: fostering openness, strength and resilience', Brussels, 19.1.2021, COM(2021) 32 final, January 19 2021, at 19.

[86] COMBINED EVALUATION ROADMAP/INCEPTION IMPACT ASSESSMENT of the Blocking Statute, *op. cit.,* at. 2.

[87] M. JAMNEJAD et M. WOOD, op. cit., p. 372.

[88] M. Philippe Bonnecarrère, Rapport d'information fait des affaires européennes sur l'extraterritorialité des sanctions américaines, op. cit., p. 6.

Hence, a close interrelationship between economic coercion and extraterritorial sanctions can be established under international law. Nevertheless, does this interrelationship translate into an overlap between the respective instruments dealing with each situation?

From the very early stages of the ACI legislative process, concerns were raised regarding a potential overlap between this regulatory body and the Blocking Statute.[89] In fact, several respondents participating in the ACI survey precisely drew attention to the use of extraterritorial sanctions as one form of coercion which the envisaged ACI ought to address.[90] However, there is a key distinction between both instruments, viz. their scope of application *ratione personae*. While the protection provided by Blocking Statute is triggered when measures are directed against 'natural persons who are EU residents and nationals of an EU Member State, as well as to legal persons established in the EU',[91] the ACI applies when coercive economic measures are targeted, directly or indirectly, against the EU or its Member States.[92]

Be that as it may, the distinction is not clear-cut. In fact, the definition of coercion and the scope of the ACI is broad enough to fit extraterritorial sanctions under its umbrella. The IAR deals with this situation in depth. According to this document, certain extraterritorial sanctions could fall within the scope of the ACI, if they are adopted with the intention, or have the effect, of coercing the EU or its Member States into modifying or aligning their policies, which are comprised within their legitimate sovereign choices, with those of the state behind the adoption of the extraterritorial sanctions.[93] Put differently, the ACI would not operate when extraterritorial sanctions are aimed exclusively at private actors, unless the latter are considered a conduit, vector or proxy to coerce public authorities of the EU or Member States[94].

Accordingly, a potential partial overlap between the two instruments is on the cards and bound to emerge. A cause for concern in this regard, is that the criteria and methodology to determine when the adoption of an extraterritorial sanction could trigger both instruments at the same time remain largely unsolved. This flows from the ACI's opting for a hybrid approach to establish the existence of coercion, relying both on objective criteria focusing on the effects of the extraterritorial sanctions,[95] as well as a subjective appraisal looking at the intent to coerce[96]. Moreover, any of the criteria provided will be extremely difficult to be ascertained, given that in many cases the underlying motivation to adopt extraterritorial legislation is disguised in measures that apply both to nationals and non-nationals alike.

Without adopting a definitive position, the IAR compares two different scenarios in the event an overlap occurs with the Blocking Statute. The first alternative is that both instruments apply simultaneously, leaving their harmonic implementation in the hands of the Commission, whereas the second pathway involves completely excluding extraterritorial sanctions from the scope of application of the ACI.[97] There is no win-win situation in this context. While the first alternative provides a higher degree of protection, coherence between the different regulatory frameworks would be slightly compromised. The second option is not much better, as even though it would contribute to separate both instruments from each other, it would restrict the range of application of the ACI as well as potentially going against the definition of coercion provided in the ACI itself.

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[89] Impact Assessment Report, *op. cit.,* at. 24.

[90] See detailed results of the open public consultation on an EU anti-coercion instrument, https://trade.ec.europa.eu/doclib/docs/2021/september/tradoc_159792.pdf, p. 4. Many respondents saw the IAC 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").

[91] T. RUYS et C. RYNGAERT, op. cit., p. 83.

[92] It should be highlighted that whereas the scope of the Blocking Statute relates to the effects of extraterritorial against private companies or individuals, these measures can also directly target third states or an international organization such as the EU.

[93] Impact Assessment Report, *op. cit.,* at. 29.

[94] *Ibid.,* at. 10.

[95] *Ibid.,* at 9-10, 29-30.

[96] *Ibid*., at 24.

[97] *Ibid*., at 28-29

4 The Anti-Coercion Instrument and the law of international responsibility: evolution or revolution?

4.1 The ACI: a model application of the countermeasures doctrine?

While the ACI is evidently a tool for 'self-help' and an instrument for unilateralism, seeking to empower the EU to effectively confront economic coercion by third States, that does not mean that the ACI places itself beyond the realm of international law. *Au contraire*, having regard to the EU's strong commitment to the 'strict observance and development of international law' (as enshrined in Articles 3(5) and 21(1) TEU), Article 1(2) of the ACI asserts that "[a]ny action taken under this Regulation shall be consistent with the Union's obligations under international law". In particular, the ACI seeks to observe international law by squarely locating itself within the framework of the International Law Commission's (ILC) Articles on State Responsibility (ARSIWA),[98] specifically the ARSIWA provisions governing the recourse to countermeasures as a 'circumstance precluding wrongfulness'.

Thus, preambular paragraph 10 asserts that "[i]nternational law allows, under certain conditions… the imposition of countermeasures, that is to say of measures that would otherwise be contrary to the international obligations of an injured party vis-à-vis the country responsible for a breach of international law" (read: unlawful economic coercion). The concomitant footnote refers back to ARSIWA Articles 22 and 49-53. The Commission's Impact Assessment Report (IAR) similarly links the ACI to the ARSIWA rules on countermeasures, which are regarded as a codification of customary international law (CIL).[99]

What is more, the ACI does not merely pay lip service to the ARSIWA. Rather, the substantive and procedural conditions under which it envisages recourse to countermeasures are closely aligned with those listed in the ARSIWA. Thus, apart from the fact that the unlawful act must be established,[100] the ACI also provides that the wrongdoing State must be notified of the intention to adopt countermeasures, and must be requested to cease its unlawful conduct,[101] in line with Article 52(1)(c) ARSIWA. The ACI also echoes the requirement of Article 51 ARSIWA that the countermeasures must be 'commensurate' to the injury suffered[102] - although it remains to be seen how this proportionality requirement would be put into practice. The ACI further provides that the Commission shall seek to obtain the cessation of the economic coercion by also raising the matter in any relevant international forum (Art. 5 ACI). Article 10(4) ACI further lists various circumstances in which the Union measures will be terminated, including "where the economic coercion has ceased". The ACI appears to be stricter in this respect than what Article 53 ARSIWA requires, inasmuch as the ILC accepts that countermeasures can aim at ensuring both the cessation of the wrongful conduct *and* reparation for the injury caused.[103] In accordance with Article 49(2) ARSIWA, Union measures under the ACI are addressed to the State responsible for the unlawful conduct, albeit that the ACI construes this broadly, as encompassing designated natural or legal persons 'connected or linked to the government' of that State (Article 8(1)-(2) ACI).[104]

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[98] ILC, Draft articles on responsibility of States for Internationally Wrongful Acts, with commentaries, (2001) *Yb ILC* vol. II, Part Two.

[99] Impact Assessment Report, *op. cit.,* at. 8, 23.

[100] See the previous section on the prohibition of economic coercion under international law…

[101] See, in particular, ACI proposal, *op. cit.,* preambular para. 10 and Articles 4 and 7(3).

[102] See especially, preambular paras. 9 and 10, and 9(1) of the ACI.

[103] See especially ILC, *loc. cit*., supra n. 98, at 131 ("[C]ountermeasures … may also be taken to ensure reparation, … Any other conclusion would immunize from countermeasures a State responsible for an internationally wrongful act if the act had ceased, irrespective of the seriousness of the breach or its consequences, or of the State's refusal to make reparation for it."). Interestingly, several other provisions of the ACI refer to the aim of securing both cessation of the wrongful conduct *and* reparation for the injury caused (e.g. preambular para. 10 or Articles 4 or 7(1)(a) ACI). By contrast, under Article 10(4)(a) ACI cessation of the unlawful coercion must lead to termination of the Union measures, regardless of reparation.

[104] The imposition of targeted sanctions (e.g., 'asset freezes') against the latter individuals is perhaps rather a matter for human rights law than for the law of State responsibility. The Impact Assessment Report appears to dismiss concerns that measures under the ACI would contravene fundamental rights, such as the right to property, by asserting that the action would be taken "on the basis of a proper legal basis… in pursuit of a legitimate objective, and in line with the principle of proportionality". IAC

At first glance then, the ACI presents a rare illustration of a legislative instrument that is closely tailored to meet the ARSIWA conditions for the adoption of countermeasures. By so doing, the ACI can be seen as confirming and strengthening the normative relevance of the ARSIWA framework (as a codification of CIL), and as striking a fair balance between the need for a more robust and resilient posture for the EU to confront mounting economic coercion, on the one hand, and the need to preserve the international rule of law, on the other hand.

4.2 Does the EU have legal standing to adopt countermeasures over economic coercion?

At the same time, the ACI poses several challenges under the traditional doctrine of countermeasures in the law of international responsibility. A first such challenge relates to the fundamental question whether the EU is legally entitled to take countermeasures in response to 'economic coercion' (assuming it contravenes customary international law ('CIL'). The starting point under the Articles on State Responsibility is indeed that countermeasures must in principle originate from an 'injured State' seeking to respond to a breach of an obligation 'owed to' it (Art. 49 ARSIWA). Inasmuch as the conditions for State-on-State countermeasures apply by analogy to countermeasures by an IO against a State,[105] it follows *mutatis mutandis* that an IO can normally only resort to countermeasures in response to a breach of an international obligation owed to it.

In the context of the ACI, however, the trigger for the adoption of countermeasures consists in 'economic coercion' taking the form of 'measures affecting trade or investment' that '*[interfere] in the legitimate sovereign choices of the Union or a Member State*' (our emphasis).[106] The Impact Assessment Report further explains that '[c]oercive measures by third countries targeting the EU *or* Member States can be considered a breach of customary international law" (our emphasis).[107] In other words, the ACI envisages a two-fold trigger: unlawful economic coercion against the EU itself, or unlawful economic coercion against a Member State. Both present problems of their own.

First, as far coercion *against the EU* is concerned, it is clear that an IO is entitled to take proportionate countermeasures when a third State breaches its rights. The most obvious scenario is that of a breach of the *conventional* rights of the European Union under a (bilateral or multilateral) treaty to which the EU is a party. This scenario is in part reflected in the EU's amended Enforcement Regulation (Regulation 654/2014),[108] which provides for measures in response to 'breaches by third countries of international trade rules which affect the Union's interests'.[109] While there is no reason to exclude *a priori* a parallel right for IOs to adopt countermeasures in response to breaches of *customary* international law, the terrain nonetheless becomes murkier here. Thus, while there is substantial literature on the extent to which IOs can contribute to the formation and development of CIL, as well as on the *obligations* they may have under customary law (esp. human rights law),[110] their capacity to possess *rights*

Impact Assessment Report, *loc. Cit.*, supra n. 99, at 51. See also the Commission proposal, *loc. Cit.*, supra n. ..., explanatory Memorandum, at 6. Be that as it may, the suggestion in Article 8(1)(b) that Union persons affected by the economic coercion would be 'entitled to recover' from designated persons 'any damage caused to them ... up to the extent of the designated person's contribution to such measures of economic coercion' raises important questions from the perspective of the right to property and due process - questions which are, however, beyond the scope of this contribution.

[105] ILC, Draft articles on the responsibility of international organizations, with commentaries, (2011) *Yb ILC, vol. II, Part Two,* at 72 (commentary to Article 22).

[106] ACI proposal, *op. cit.,* p. 15, Art. 2 § 1.

[107] IAC Impact Assessment Report, *op. cit.*, at 8.

[108] Regulation (EU) No 654/2014 of the European Parliament and of the Council of 15 May 2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules, O.J. L-189/50, 27 June 2014.

[109] It is noted that this instrument remains controversial for other reasons, chiefly its compatibility with the WTO regime. See further *infra...*

[110] See e.g., M. Wood, 'International Organizations and Customary International Law', (2015) 48 *Vanderbilt Journal of Transnational Law*, pp. 609-620; J. Odermatt, 'The development of customary international law by international organizations', (2017) 66

under CIL, and the identification of those rights, has not attracted much attention. The ongoing discussion as to whether international organizations enjoy immunity under customary international law[111] suggests that while IOs are capable of *having* rights under CIL, such rights are not easily established.

The relevant question in the present context is whether it can be convincingly argued that the European Union, as an IO, enjoys an 'autonomous' right under CIL to be free from economic coercion, separate from the equivalent right of its individual Member States. From an EU perspective, given the historical trajectory of the EU project and the transfer of national competences in the field of trade and investment to the EU level, the question may strike as a no-brainer. From an international law perspective, however, an affirmative answer is less obvious. This is so because the overarching non-intervention principle is traditionally construed as operating on an inter-*State* level. For example, the UNGA Friendly Relations Declaration refers to the duty of States to refrain from coercion against the political independence or territorial integrity 'of any State'.[112] And the Charter of the Organization of American States similarly describes the use of coercion with reference to measures that seek to 'force the sovereign will *of another State*'.[113] Even the ACI itself and the concomitant Impact Assessment Report shift between framing the prohibition of coercion as entailing measures that seek to obtain 'from another *country'* a certain action or inaction,[114] and expanding it to encompass interference 'in the legitimate sovereign choices *of the Union'*,[115] a phrase that may surprise those unfamiliar with the European project (and provoke EU sceptics). The underlying presumption in the ACI that the customary non-intervention principle is an obligation 'owed to' *both* the EU and its Member States can be contrasted, for instance, with the mutual defence clause in Article 42(7) TEU. Rather than suggesting that the EU itself possesses a right of self-defence of its own, the clause simply acknowledges that if one Member State is the victim of armed aggression, the other Member States have an obligation to collectively assist in accordance with Article 51 UN Charter.

If one were to regard the non-intervention principle as applying only between States (to the exclusion of international organizations), could one nonetheless argue that countermeasures can be taken *collectively* at the EU level, by analogy to what is the case for the right of (collective) self-defence? Again, the ACI clearly starts from the assumption that this question must be answered affirmatively. What is more, the ACI and related preparatory documents assume that such collective response is warranted not only when coercive measures affecting trade or investment target the EU Members as a whole, but also when one or more individual Member States are singled out for unlawful coercion. Thus, the Impact Assessment Report provides the fictitious example of a third State that 'imposes an import ban on all widgets from the EU' (thus potentially affecting *all* Member States) in an effort to force the EU to abandon a new regulation to protect the environment.[116] A Briefing Paper of the European Parliament in turn refers to the example of Chinese trade and investment sanctions against Lithuania, following the opening of a Lithuanian trade office in Taipei and a Taiwanese office in Vilnius.[117]

From an international law perspective, the two scenarios are different in important respects. On the one hand, where a coercive measure targets the EU Membership in its entirety (as in the first example), it would appear that *each* individual EU Member State potentially qualifies as an 'injured State' in the sense of the law of international responsibility (even if the impact of the coercion may be felt unevenly from one State to another). Accordingly, each

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International and Comparative Law Quarterly, pp. 491-511; G. Cahin, *La coutume internationale et les organisations internationales : l'incidence de la dimension institutionelle sur le processus coutumier* (Paris : Pedone) (2001), 782 p.; J. Wouters, E. Brems, S. Smit and P. Schmitt (eds.), *Accountability for human rights violations by international organisations* (Intersentia) (2010), 626p.

[111] M. Wood, 'Immunity of International Organizations', in N.M. Blokker and N.J. Schrijver (eds.), *Legal aspects of international organizations* (Brill, 2015), pp. 29-60; N. Blokker, 'Jurisdictional immunities of international organisations – origins, fundamentals and challenges', in T. Ruys and N. Angelet (eds.), *op. cit.*, supra n. **Error! Bookmark not defined.**, pp. 185-200, at 194-7.

[112] 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations UNGA Res/25/2625, *op. cit.*

[113] Charter of the Organization of American States, Art. 20.

[114] ACI proposal, *op. cit.,* p. 12, § 11.

[115] Ibid., p. 15, Art. 2 § 1.

[116] Impact Assessment Report, *op. cit.*, at. 6.

[117] European Parliament Research Service ('EPRS') briefing on the Proposed Anti-Coercion Instrument, *op. cit.,* at 3.

EU Member State would individually be entitled under international law to adopt proportionate countermeasures to bring the infringement to an end. The fact that the adoption of those countermeasures is 'collectivized' or 'pooled' at the EU level is, in such scenario, a change in form only. It would indeed seem of little relevance whether the notification of impending countermeasures (as prescribed by Article 52(1)(c) ARSIWA) were to emanate from 27 EU Member States or take the form of a single letter from the EU institutions. Likewise, the fact that proportionality were to be assessed at the (aggregated) level of the EU as a whole, as opposed to at the level of every individual EU Member State, would not seem consequential. In short: if each individual Member State is entitled to take proportionate countermeasures of its own, it is difficult to see how a reaction by the collective whole of the injured States through EU decision-making would contravene the law of international responsibility.

On the other hand, if the coercion is targeted at one or more EU Member States (as in our second example), but not at the European Union as a whole, this leap from individual to collective countermeasures is less evident. *Pro memorie*, countermeasures must in principle emanate from the 'injured' State (or IO). By contrast, as is well-known, the permissibility for 'non-injured' States or international organizations to have recourse to countermeasures was left open in the 2001 Articles on State Responsibility (since practice was found to be 'embryonic')[118] and again in the 2010 ILC Draft Articles on the Responsibility of International Organizations.[119] Several authors have argued that practice since 2001, especially in the field of economic sanctions, provides ample evidence to support the permissibility under CIL of so-called 'third-party countermeasures' or 'solidarity measures'.[120]

By contrast, it could be observed that this practice remains difficult to interpret (in part because States adopting sanctions refrain from explicitly invoking the countermeasures doctrine) and that many in the Global South remain opposed to the idea of 'third-party countermeasures'.[121] As far as the EU itself is concerned, its frequent adoption of 'restrictive measures' is often read as implicit evidence that the EU favours the permissibility of third-party countermeasures. By asserting that the EU may impose countermeasures in response to economic coercion against individual Member States, the ACI appears to start from the same assumption. And yet, the ACI itself sows confusion in preambular paragraph 8, where it states that "Member States as distinct actors under international law may not be entitled under international law to respond to economic coercion directed against the Union".[122] In other words: the EU can take countermeasures in case of economic coercion against an individual Member State, but not the other way around… From an EU perspective, it is perfectly understandable why this is the preferred outcome, since Member States lack the competence under EU law to adopt the type of trade measures envisaged by the ACI (having delegated this competence to the EU level). From an international law perspective, however, the position does not seem fully coherent.

Even accepting that third-party countermeasures are permitted *de lege lata*, and that this is also the position of the EU, a further complication arises. In particular, echoing the scope of Articles 54 *juncto* 48(1) ARSIWA,[123] even proponents of this approach tend to confine it to breaches of obligations owed to the international community as a whole (*erga omnes* norms), or obligations owed to a group of States and established for the protection of the group's collective interest (*erga omnes partes* norms). This raises the question whether the prohibition of intervention – or the part of it that supposedly excludes economic coercion – possesses an *erga omnes* character. As Jamnejad and

[118] ILC, Draft articles on responsibility of States for Internationally Wrongful Acts, with commentaries, (2001), op. cit., p. 139, § 8
[119] ILC, Draft articles on the Responsibility of International Organizations, op. cit., p. 96.
[120] See for instance, M. DAWIDOWICZ, Third-Party Countermeasures in International Law, Cambridge, Cambridge University Press, 2017; Ch. J. TAMS, Enforcing Obligations Erga Omnes in International Law, Cambridge, Cambridge University Press, 2009.
[121] A. HOFER, « The 'Curiouser and Curiouser' Legal Nature of Non-UN Sanctions: The Case of the US Sanctions against Russia », Journal of Conflict & Security Law, 2018, pp. 97-98.
[122] ACI proposal, *op. cit.,* p. 11, § 8.
[123] In a similar vein see Art. 57 juncto 49 DARIO. Note: a similar limitation can be found in Draft Article 54 of the articles provisionally adopted on second reading by the ILC's Drafting Committee in 2000 https://documents-dds-ny.un.org/doc/UNDOC/LTD/G00/632/25/PDF/G0063225.pdf?OpenElement . Draft Article 54 provided for the possibility of third-party countermeasures (1) in response to serious breaches of peremptory norms (Article 54(2) juncto 41), or (2) in response to other breaches of *erga omnes* norms or *erga omnes partes* norms (Article 54(1) juncto 49(1)). In the latter scenario, however, countermeasures could only be taken 'at the request and on behalf of' the injured State(s).

Wood assert, the prohibition "is not itself a norm of jus cogens"[124] – a finding that is reflected in the marked absence of the non-intervention principle in the (admittedly illustrative) list of peremptory norms drawn up by the International Law Commission.[125] And while the list of *erga omnes* norms is generally thought to be broader than the list of *jus cogens* norms,[126] the 'elusive' character of the principle of non-intervention, and the uncertainty over its content (specifically with regard to the 'economic coercion' component)[127] casts further doubt as to whether it could qualify as such. One might object that the ill-defined content of other rights, such as the right of self-determination, has not prevented these from being regarded as *erga omnes* norms (and even *jus cogens*). Be that as it may, in contrast to the right of self-determination,[128] legal doctrine and case-law attesting the *erga omnes* character of the non-intervention principle, or a more narrow prohibition of economic coercion, is generally lacking.

In conclusion, it is open to debate whether EU countermeasures in response to 'economic coercion' targeting one or more Member States are fully in line with the extant law of international responsibility.

4.3 Does the ACI square with WTO law as a lex specialis regime?

Another challenge is how to square countermeasures under the ACI with the WTO regime on the adoption of trade sanctions.[129] It is indeed striking that the ACI seeks to counter coercive measures in the realm of 'trade or investment', which may well entail a *prima facie* breach of WTO law (and/or of relevant bilateral or regional trade agreements) by engaging in retaliatory measures in the same domain, such as the suspension of tariff concessions, limits on the trade in goods, exclusion from public procurement, etc., many of which would, under ordinary circumstances, similarly contravene WTO law (and/or relevant trade agreements). Interestingly, the Commission acknowledges that countries like Australia and Canada have responded to ostensible coercive practices by bringing complaints before the WTO Dispute Settlement Body (DSB).[130] Evidently, the EU does not regard such demarches as a satisfactory solution for the growing problem of economic coercion.

The question nonetheless remains how this sits with Articles 55 and 50(2)(a) ARSIWA, on the one hand, and Articles 3(7) and 23 of the WTO Dispute Settlement Understanding (DSU), on the other hand. *Pro memorie*, the former provisions assert that the ARSIWA rules are residual rules, which can generally be departed from through the adoption of *lex specialis* rules (Art. 55), and that a State taking countermeasures is not relieved from fulfilling its obligations under any dispute settlement procedure applicable between it and the responsible State (Art. 50(2)(a)). In turn, Article 3(7) DSU refers to the possibility of suspension of WTO obligations as a measure of 'last resort' 'subject to authorization by the DSB', whereas Article 23 DSU prescribes that members seeking "the redress of a violation of obligations or other nullification or impairment of benefits" under the WTO agreements, "shall have recourse to, and abide by" the DSU rules and procedures.[131] As the ARSIWA Commentary acknowledges, the DSU can be seen as a *lex specialis* regime,[132] while Article 23 DSU "has been construed both as an 'exclusive dispute resolution clause' and as a

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[124] Jamnejad & Wood, Leiden JIL, 358.

[125] ILC, Peremptory norms of general international law (jus cogens): Texts of the draft conclusions and Annex adopted by the Drafting Committee on second reading, A/CN.4/L.967, 11 May 2022.

[126] See for instance, Ch. J. TAMS, *op. cit.,* p. 151 et s.

[127] See the previous section on the prohibition of economic coercion in international law.

[128] See ILC, Peremptory norms of general international law (jus cogens), *op. cit.,* p. 8.

[129] Note: the focus of the present section is on the compatibility with WTO law of *specific countermeasures undertaken pursuant to* the ACI, rather than the WTO compatibility of the ACI 'as such'. Indeed, inasmuch as the ACI leaves a great deal of discretion to the Commission as to whether and how to take action, it is difficult to see how the mere adoption of the ACI would of itself entail a breach of WTO law. In this sense: S. Lester, 'Applying the Mandatory/Discretionary Distinction to the EU's Anti-Coercion Instrument', *International Economic Law and Policy Blog,* 20 December 2021.

[130] Impact Assessment Report, *op. cit.,* at. 15.

[131] See also Article 22 of the Dispute Settlement Understanding (WTO) on compensation and suspension of concessions.

[132] ILC, Draft articles on the Responsibility of International Organizations, op. cit., at 140.

clause 'preventing WTO members from unilaterally resolving their disputes in respect of WTO rights and obligations'.[133] As the late ILC Special Rapporteur James Crawford put it: "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".[134]

The relationship between the WTO regime and general international law, and specifically the question whether the former excludes recourse to countermeasures under general international law in the trade domain (at least between WTO Members), has long been subject of debate. The controversy has recently come to the fore again pursuant to the 2021 amendment of the EU's Enforcement Regulation.[135] This amendment seeks to respond to the ongoing paralysis of the WTO Appellate Body (as a result of which WTO panel reports can be appealed into a legal limbo). It does so by empowering the EU institutions (under EU law) to adopt trade restrictions, not only when authorized to do so under the DSU following the adjudication of a WTO trade dispute, but also when, "following the circulation of a WTO panel report upholding, in whole or in part, the claims brought by the Union, if an appeal under Article 17 of the WTO [DSU] cannot be completed and if the third country has not agreed to interim appeal arbitration under Article 25 [DSU]."[136]

Notwithstanding the nexus between the 2021 amendment of the EU Enforcement Regulation and the ACI,[137] the legal appraisal is again rather different. The former instrument envisages the scenario where the EU triggers the WTO dispute settlement procedure and obtains a favourable panel report, but the procedure subsequently hits a dead end when the counterparty lodges an appeal before the Appellate Body without agreeing to make use of the Multi-Party Interim Arbitration Arrangement (MPIA)[138] instead. Under the WTO regime, trade sanctions would be *prima facie* excluded in such setting. Are they nonetheless permitted under general international law? One argument holds that, even if WTO law constitutes a 'self-contained regime', its 'displacement' of the ARSIWA framework is still contingent on the regime remaining functional. Accordingly, the right to apply countermeasures would simply revive in case of a breakdown of the WTO's dispute settlement mechanism.[139] This argument featured in legal doctrine long before the

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[133] Ibid., at 133. Note: an explicit exclusivity provision is generally lacking in non-WTO trade agreements, entailing that the continued application of countermeasures under CIL would seem less problematic from the perspective of these agreements. In this sense: M. Bronckers and G. Gruni, 'Retooling the Sustainability Standards in EU Free Trade Agreements', (2021) 24 *Journal of International Economic Law*, pp. 25-51, at 41.

[134] J. CRAWFORD, State Responsibility: The General Part, Cambridge, Cambridge University Press, 2013, p. 711.

[135] Regulation (EU) 2021/167 of the European Parliament and of the Council of 10 February 2021, amending Regulation (EU) No 654/2014 of the European Parliament and of the Council of 15 May 2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules, O.J. L-49/1, 12 February 2021.

[136] Regulation (UE) 2021/167, op. cit., Art.1, § 3.b. The scope of the Enforcement Regulation is further extended i.a. to trade disputes relating to other international trade agreements "if adjudication is not possible because the third country is not taking the steps that are necessary for a dispute settlement procedure to function…".

[137] As the Commission Explanatory Memorandum to the ACI draft acknowledges, see ACI proposal, *op. cit.,* p. 1, the Joint Declaration of the Commission, the Council and the European Parliament on an instrument to deter and counteract coercive actions by third countries (O.J. C-49/1, 12 February 2021) was adopted in the context of the legislative process to amend the EU Trade Enforcement Regulation where the European Parliament and a number of Member States raised concerns about the issue of economic coercion. See also on the suggestions of the European Parliament's Committee on International Trade (INTA) to further broaden the scope of the Enforcement Regulation to also cover immediate unilateral measures to confront coercion: W. Weiss and C. Furculita, 'The EU in Search for Stronger Enforcement Rules: Assessing the Proposed Amendments to Trade Enforcement Regulation 654/2014', (2020) 23 JIEL, pp. 865-884, 871-872, 879-881. See also the suggested INTA amendment to make an express reference in the ACI to stress that it seeks to complement Regulation (EU) 2021/167: European Parliament Committee on International Trade, Draft report on the 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, 19 April 2022, 2021/0406(COD), 8/35.

[138] WTO, Multi-Party Interim Appeal Arbitration Arrangement pursuant to Article 25 of the DSU (MPIA), JOB/DSB/1/Add.12, 30 April 2020.

[139] See L. Bartels, 'Article XX of GATT and the Problem of Extraterritorial Jurisdiction – the case of trade measures for the protection of human rights', (2002) 36 *Journal of World Trade*, pp. 353-403, 395. Also: M.J. Hahn, *Die einseitige Aussetzung von GATT-Verpflichtungen als Repressalie* (Heidelberg, 1996), p. 283; G. Venturini, ‚Comments' in P. Mengozzi ed.), *International Trade Law on the 50th Anniversary oft he Multilateral Trade System* (Milan, Giuffrè) (1999), 148. But see Weiss and Furculita (*loc. Cit.,* supra n.137, at 874-5), who note that there is no consensus between States and academics regarding this 'fall-back' doctrine and the

current deadlock of the Appellate Body.[140] At the same time, Article 52(4) ARSIWA seems to impose a stricter 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".[141] 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.[142]

Whatever one makes of the foregoing, the recourse to trade restrictions under the ACI is not contingent on any attempted use of the WTO dispute settlement mechanism, and is not justified in terms of the ongoing crisis of the DSB. Rather, as the Commission explains, the ACI is premised more generally on the idea that economic coercion does not as such feature among the possible claims that can be submitted to the DSB.[143] Of course, there can be instances where the contested conduct simultaneously qualifies as a coercive act *and* as a breach of substantial commitments under the WTO Agreement.[144] Such cases "can be challenged successfully in the WTO dispute settlement system", the Commission continues.[145] Still,

> "such 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…"[146]

In short, the ACI starts from the broader assumption that the WTO regime does not exclude the recourse to trade countermeasures under CIL in respect of breaches of international legal obligations outside the WTO framework.

Whether that approach reflects *lex lata* is controversial. Those answering in the negative[147] invoke a variety of arguments, in addition to the text of the DSU and its recognition as a *lex specialis* framework (as discussed above). In particular, it is observed that, in the context of WTO disputes, States have tended to justify non-compliant behaviour by relying on the general exceptions in those instruments (esp. Article XX GATT) and/or the security exception (esp. Article XXI GATT) – at times stretching their respective scope to breaking point – rather than by relying on the ARSIWA countermeasures framework. This is seen as reflecting the conviction of States that these exceptions constitute the exclusive legal bases upon which WTO violations may be excused.[148] Reference can also be made to WTO case-law, including, in particular, *Mexico-Soft Drinks* (2006), where the Appellate Body asserted that Article XX(d) of the GATT could not be invoked to justify WTO-inconsistent measures that seek 'to secure compliance' by another WTO Member with that other Member's international obligations (e.g., under NAFTA).[149] In so doing, the AB emphasized that the DSU did not intend for WTO panels or the Appellate Body itself to become adjudicators of non-WTO disputes.[150] In addition, it has been argued that allowing countermeasures under general international law would run counter to the WTO

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conditions in which it applies, thus making its status as customary international law questionable, whereas the ILC Articles provide a clear basis for, and clear limits to, the revival of the general rules on countermeasures.

[140] *Ibid.*

[141] To be read together with Articles 50(2)(a) and 52(3)(b) ARSIWA.

[142] For a negative answer see Weiss and Furculita, *loc. cit.,* supra n.137, at 875-877. The authors do admit that the situation is arguably different in respect of the United States, given its blockage of the appointment of the Appellate Body Members.

[143] Impact Assessment Report, *op. cit.,* at. 23.

[144] *Ibid.* The Commission provides several examples, including the introduction of excessive and discriminatory border checks for sanitary or phytosanitary purposes, or a selective import ban on products from a particular Member State.

[145] *Ibid.*

[146] *Ibid.*

[147] See e.g., Bartels, *op. cit.*; G. Marceau and J. Wyatt, 'Dispute Settlement Regimes Intermingled: Regional Trade Agreements and the WTO', (2010) 1 *Journal of Int'l Dispute Settlement*, pp. 67-95, at 74, 76-77.

[148] Marceau and Wyatt, *op. cit.*; at 77; Bartels, *op. cit.*, at. 400.

[149] WTO, Appellate Body, Mexico-Tax measures on soft drinks and other beverages, 6 March 2006, WT/DS308/AB/R, § 79.

[150] *Ibid.*, § 78.

objective of eliminating political frictions and conflicts resulting from trade restrictions.[151] This concern finds expression in a Ministerial Declaration of 1982, where the GATT contracting parties declared their intention "to abstain from taking restrictive trade measures, for reasons of a non-economic character, not consistent with the [GATT]".[152] Several authors do acknowledge that the WTO regime leaves limited leeway for trade countermeasures that are authorized by bilateral or multilateral treaties (on the basis that such agreements can, under certain conditions, be seen a permissible *inter se* modification of the WTO regime in the sense of Article 41 VCLT[153]). By contrast, the 'traditional assumption'[154] has been that trade countermeasures under CIL are excluded by the WTO regime.

On the other hand, several authors see the WTO regime less an island entire of itself, operating in 'clinical isolation' from the mainland of general international law, and are more open to the continued relevance of the ARSIWA countermeasures doctrine, at least where States seek to respond to unlawful acts occurring 'outside' the WTO system.[155] In a recent article, for instance, Azaria argues that in order to conclude that the WTO Members intended to curtail their entitlement to adopt trade countermeasures under CIL, there ought to be 'clear evidence' to this end, which she finds to be lacking.[156] In particular, she emphasizes that the WTO security and general exceptions have different content and aims from countermeasures under CIL, and that the practice of WTO Members does not reveal a 'common understanding' that countermeasures overlap with and are excluded by Article XXI GATT and similar security exceptions.[157] Azaria also downplays fears that permitting trade countermeasures under CIL would open Pandora's Box and undermine the predictability of the WTO system. In particular, she recalls that the ARSIWA set stringent conditions on the use of countermeasures, and that the availability of this tool could reduce States' inclination to rely on ever wider interpretations of the WTO security exceptions.[158] By reference to Article 11 DSU,[159] she also advocates that WTO panels are competent to examine a CIL countermeasure defence as part of the adjudicative process.[160]

Interestingly, in the ACI Impact Assessment Report, the Commission appears more hesitant, and acknowledges that it 'remains unsettled' whether the WTO Agreements can be invoked to oppose countermeasures pursuant to the ACI, while asserting that 'it can be reasonably be argued that they cannot, in so far as the countermeasures are compatible with customary international law'.[161] The Commission further appears to take 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.[162] It is, however, hard to escape the feeling that this (somewhat speculative) consideration illustrates that the Commission knows it is threading on unstable legal terrain.

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[151] Bartels, *op. cit*., pp. 353-403, p. 395; . Danae Azaria, 'Trade Countermeasures for Breaches of International Law Outside the WTO', ICLQ, 2022, p. 3 ('unilateral trade countermeasures would endanger stability in international economic relations'); M. J. HAHN, 'Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception', Michigan Journal of International Law, 1991, p. 604.

[152] GATT, Contracting Parties, Thirty-Eighth Session, Ministerial Declaration - Adopted on 29 November, L/5424, BISD 29S/9.

[153] For a detailed analysis, see: Marceau and Wyatt*op. cit*., at. 77 et seq. (see also at p. 82, 94 for the parallel to Article 41 VCLT, which allows for subgroups of States to deviate from a multilateral treaty so long as i.a. the possibility of such modification is not prohibited by the treaty and the modification does not affect the enjoyment by the other parties of their rights or the performance of their obligations.). Also in this sense, Bartels, *op. cit*., at. 402.

[154] F. Baetens and M. Bronckers, *op. cit.*

[155] See e.g., Bronckers and Gruni *op. cit.;* D. Azaria *op. cit*., pp. 389-423.

[156] D. Azaria, *op. cit., p. 389.*

[157] *Ibid*., at. 405.

[158] *Ibid*, at. 416.

[159] According to Article 11 DSU, WTO Panels can examine 'the conformity with the relevant covered agreements', but also 'make such other findings as will assist the DSB in making het recommendations or in giving the rulings provided for in the covered agreements.'

[160] D. AZARIA, *op. cit.,* p. 420. In a similar vein: Bronckers and Gruni, *op. cit.,* at. 44. But see: Weiss and Furculita, *op. cit*., at 875.

[161] Impact Assessment Report, *op. cit.,* at. 41.

[162] *Ibid.,* at. 42.

Indeed, even if one accepts that the WTO regime has not resulted in a wholesale displacement of trade countermeasures under CIL, a complicating factor consists in the fact that in many instances the 'economic coercion' to which the EU seeks to respond may closely resemble a classical breach of the coercing State's WTO obligations, and may simply be impossible to dissociate therefrom. Put differently, while it is easy to argue that breaches of human rights law, environmental law, or of the prohibition on the use of force are wholly 'outside the remit'[163] of WTO law, that argument is much more difficult to make in respect of economic coercion taking the form of, for example, 'a selective import ban or higher-than-bound import duties on products from a particular Member State'.[164] Ultimately, what the EU is saying, is that, having regard to a number of general factors, such as their intensity or duration, as well as the alleged aim of interfering with the 'legitimate sovereign choices' of the EU or its Member States, certain trade restrictions are elevated from 'mere' breaches of WTO law to cases of unlawful economic coercion, which can give rise to trade countermeasures under CIL (regardless even of whether such trade restrictions could plausibly be brought within the scope of the WTO security exception or not and regardless of whether the EU has triggered proceedings at the WTO level[165]). This may be a greater encroachment upon the WTO's *lex specialis* regime than the ACI's drafters are willing to admit. This is further borne out by the fact that, like the 2021 amendment of the Enforcement Regulation, the drafting of the ACI appears to have been inspired at least in part by the growing frustrations with the fundamental weaknesses in the WTO dispute settlement regime.[166] These frustrations go beyond the obvious crisis caused by the deadlock of the Appellate Body, and include other elements, such as the length of the proceedings, the lack of interim relief and the unavailability of reparation for past injury (factors that all play in favour of the norm-breaker).

Baetens and Bronckers note how '[e]xcluding countermeasures against foreign coercion from WTO disciplines would … be in keeping with the WTO's diminishing role overall', as '[t]he world is turning towards a more unilateral economic order … and the EU needs to be adequately equipped to handle its challenges."[167] Others conversely warn that the EU is moving "closer to such states that only commit to multilateralism if it is in their own interest", and warn of a serious (further) erosion of the WTO dispute settlement mechanism.[168] The impact of the ACI is difficult to foretell. Much will inevitably depend on the actual use of the instrument (how frequent?; in response to what conduct?); on whether and how the WTO panels will engage with the countermeasures defence, and; the extent to which other WTO Members will object to the EU's approach or rather follow suit. Either way, what is clear is that the EU has come a long way from its erstwhile assertion in the so-called hormones dispute that the US could not lawfully take countermeasures against it outside the GATT,[169] to its embracing that the WTO regime does not exclude trade countermeasures under CIL.

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[163] In the sense of X. FERNANDEZ PONS, 'Self-help and the World Trade Organization', in P. MENGOZZI (dir.), International Trade Law on the 50th Anniversary of the Multilateral Trade System, Giuffrè, Milan, 1999, p. 95, (citing D. ALLAND, Justice privée et ordre juridique international – Étude théorique des contre-mesures en droit international public, Paris, Pedone, 1994, pp. 289-290), and M. BRONCKERS et G.GRUNI, op. cit., pp. 43-44.

[164] Impact Assessment Report, *op. cit.,* at. 23. See also: C. Furculita, 'Does EU's Anti-coercion instrument violate Art. 23 of the DSU?', *International Economic Law and Policy Blog*, 21 February 2022. According to the author "although measures taken under the ACI should theoretically address violations of customary law, the WTO panel could analyse whether that particular measure is not in fact seeking the redress of a WTO violation. … [T]he conformity of a specific countermeasure adopted under the ACI with Art. 23 of the DSU will depend on the specific facts of the case, especially the available evidence, such as the text of the measure or official statements."

[165] An INTA amendment effectively proposes to introduce a preambular paragraph 'encouraging' the Union "to use proactively all available means of engagement with the third country concerned such as negotiations, adjudication, in particular through the dispute settlement mechanism of the World Trade Organisation …". See Committee on International Trade Draft Report, op. cit., p. 8.

[166] On the nexus between the ACI and the 2021 amendment of the Enforcement Regulation, see supra n. 141.

[167] F. BAETENS et M. BRONCKERS, op. cit.

[168] W. WEIß et C. FURCULITA, op. cit., pp. 878, 880 (the authors add that "[t]he only positive outcome of escalating conflicts between WTO Members… would be a renewed attractiveness of a functioning and respected binding WTO dispute settlement" in the longer run).

[169] See P.J. Kuijper, 'The Law of GATT as special field of international law: ignorance, further refinement or self-contained system of international law', (1994) 25 *Netherlands Yearbook of International Law*, pp. 227-257, at 251.

5 Concluding Remarks

Geopolitical tension and the concomitant weaponization of international trade and finance are on the rise and unlikely to fade away in the short-term. The symptoms are manifold, from the increasingly vocal contestation of the rules-based international order by China and Russia, the growing recourse to ever more far-reaching unilateral sanctions, or the ongoing trade war between United States and China (with Europe caught up in the middle). Confronted with such evolutions, Europe understands it needs to grow resilient. Thus, the proposed Anti-Coercion Instrument represents at first sight a welcome attempt to shield Europe from external interference, in order to safeguard its strategic autonomy from third countries seeking to achieve their objectives by subjugating the sovereign decision-making and policies of other states.

From an international law perspective, the proposal is certainly innovative and delivering on the promise – enshrined in Art. 3(5) TEU and also mentioned in the ACI's preamble[170] - to 'develop international law' (although opinions will surely differ as to whether it should also be seen as a 'progressive' development of international law).

The ACI's main novelty is the unequivocal assertion on the part of the EU that economic coercion constitutes a breach of (customary) international law. This is a remarkable development considering the position previously adopted by EU Member States within the UNGA[171] and considering that scholars have often expressed doubts over the illegality of economic coercion *per se*.[172] As one legal author recently put it: "*You want to know if there is a fundamental right of States to be free from economic coercion? There is not, unless you can identify some specific obligation that has been breached… Do you want there to be a fundamental right of States to be free from economic coercion? Splendid! Go out there and make one*."[173] With the ACI, the EU seems to be doing precisely this, or at least to be providing an important contribution qua state practice and *opinio juris* to the creation/crystallization of a prohibition of economic coercion.

That is not to say that countries in the global South – countries that have traditionally denounced economic coercion in the UNGA – will necessarily welcome the new instrument. Indeed, it must be acknowledged that the EU is itself no stranger to power politics, and regularly engages in conduct that could equally be seen a form of economic coercion, including, but not exclusively, through the adoption of restrictive measures. While the EU has claimed in the past that it only applies restrictive measures in response to a prior breach of an international obligation by another state, the adoption of the ACI could well transform into a double-edged sword, with other states accusing the EU of maintaining double standards and acting in contravention of its own legal architecture.

Besides the express recognition that economic coercion – best viewed as part of the broader prohibition of non-intervention – is contrary to international law, a second innovative aspect of the ACI, is its attempt to put 'flesh to the bones', and provide further guidance as to the contours of a norm that is famous for its high degree of indeterminacy. It does so by adopting a 'hybrid' approach, combining both a subjective element (the intent to coerce) and several objective factors (e.g., intensity and frequency). At the same time, there is certainly room for improvement with regard to the precision of the legal terms incorporated into the instrument. The ACI proposal defines its triggers for application in broad terms, allowing the Commission more flexibility to operate. Nevertheless, it is questionable whether the definition of prohibited coercion fully aligns with the current state of international law, which is potentially the reason why the ACI maintains a certain degree of constructive ambiguity in this regard. Even so, the ACI proposal represents valuable *opinio juris* which could help elucidate the scope of the prohibition of intervention. Further clarification may follow when the Commission begins adopting decisions pursuant to the ACI identifying specific instances of (what it perceives as) unlawful economic coercion.

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[170] ACI proposal, *op. cit.,* p. 10, § 1.
[171] See *supra* n. 39 and 40.
[172] See *supra* n. 39.
[173] A. TZANAKOPOULOS, op. cit., p. 633.

There is no doubt the ACI proposal is a carefully drafted legal instrument, which attempts at every step to fall in line with international law. In particular, the proposal is clearly inspired by the CIL countermeasures framework and tailored to meet by the applicable procedural and substantive conditions enshrined in the ARSIWA. Still, some observations are in order. For one, the ACI's position that the EU can engage in trade countermeasures in response to economic coercion against one or more of its Member States (rather than against the EU as a whole) sits uneasily with the traditional assumption that countermeasures should emanate from an injured State (or IO) and raises questions over the permissible scope for 'collective' and/or third-party countermeasures. Second, even if the ACI does not 'as such' entail a breach 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.

From a broader geopolitical standpoint, the implications of approving a European Anti-Coercion Instrument remain ultimately uncertain. It may well be that, pursuant to the so-called 'Brussels effect',[174] other countries will follow suit and adopt similar legislation. Such proliferation also comes with strings attached. Thus, western countries have responded with suspicion when China, ostensibly inspired by the EU's Blocking Statute, presented to the world its own legislation countering the effects of extraterritorial sanctions in 2021. In an ideal scenario, the ACI would serve as an effective weapon of deterrence, preferably never put to use. Yet, the fate of the EU Blocking Statute – which was similarly meant to discourage the adoption and encourage the termination of extraterritorial sanctions – cautions against excessive optimism.

In recent years and decades, the European Union has often portrayed itself as a champion of 'effective multilateralism'. With the ACI, however, the EU sends out a powerful signal that its commitment to multilateralism is not unfettered or unconditional, and that the Union will strike back, unilaterally if need be, against economic coercion by third States. At the same time, the ACI's potential should be handled with care as over-use 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 escalation. In the end, only time will tell whether the ACI ultimately contributes to undermining, or rather strengthening, the rules-based international order (including the WTO regime). As so often, the proof of the pudding will be in the eating.

[174] A. BRADFORD, The Brussels Effect: How the European Union Rules the World, Oxford, Oxford University Press, 2020.