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EU's Long Arm of Sanctions – The Anti-Coercion Instrument

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Abstract

This article examines the Anti-Coercion Instrument proposed by the European Commission, focusing on the mechanism used to assess unlawful coercion. While mentioning some of the aspects related its legality, the paper looks more closely into the nature and scope of the principle of non-intervention and coercion.

It next contains a table which reflects the legal test proposed in the Anti-Coercion Instrument. Pending issues, such as the 'collective countermeasures' and EU's inherent limitations in areas of exclusive national competence are considered, before ending the article with a conclusion.

1. Introduction

In the past years, the European Union (EU) has been in a quest for stronger enforcement of international rules. This comes in the context of what appears to be a decay of multilateral order, generated partly by shifting geopolitical tectonic plates[1], a refusal of major international actors to comply with international norms[2], and the setback suffered by the World Trade Organisation (WTO), in a world of systemic competition and economic nationalism that does not seem to square well with WTO's rules.

In the 2020 Strategic Foresight Report[3], the European Commission (the Commission) recognises the EU's needs to bolster its '*open strategic autonomy*' and '*global leadership role*' in order to address the challenges brought to the multilateral order. The European Parliamentary Research Service (ERPS) identified that 'trade remains central to EU's power and resilience, and the promotion of a level

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[1] *E.g.* The US refocus on Indo-Pacific region as pledged in the Indo-Pacific Strategy of the US on February 2022, China's breach of 'one country, two systems' principle enshrined in the Sino-British Joint Declaration, China's skirmishes at the Sino-Indian border and Taiwan's air space.

[2] *E.g.* Russia's war of agression waged on Ukraine on February 24, 2022 in breach of Art. 2(4) of the UN Charter.

[3] European Commission, *2020 Strategic Foresight Report,* COM/2020/493 final (September 9, 2020).

playing-field can address existing vulnerabilities'[4]. The need to address economic and geopolitical challenges was reiterated by the Commission in the Trade Policy Review Communication in February 2021[5].

As such, the EU proceeded towards seeking mechanisms to redress third countries' behaviours which derailed from established rules of international law. First, pursuant to Art. 25 of the WTO Dispute Settlement Understanding[6] (DSU), the EU promoted the Multi-Party Interim Arbitration Arrangement[7] (MPIA), in order to address the lack of a dispute settlement mechanism. The mechanism ensures that an appeal lodged by a disputing party will be heard by an arbitration panel, avoiding thus the possibility of a party to lodge an '*appeal into the void*' and to *de facto* obstruct the trade dispute resolution process. However, the ongoing palliative is subject to the willingness of WTO members in accordance with Art. 25(2) of the DSU and as of this moment, a majority of WTO members have still not signed up for the MPIA[8].

To avoid the instance where a third state might appeal a WTO panel's decision into the void, while bypassing the MPIA, the EU proceeded at the beginning of 2022 towards amending Regulation 654/2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules (Regulation 654/2014)[9]. It now allows the EU to suspend or withdraw from its WTO obligations, if an appeal under Art. 17 of the DSU cannot be completed and the third country has not agreed to the interim appeal arbitration under Art. 25 of the WTO DSU[10]. A thorough analysis of the amendments brought to Regulation 654/2014 can be lectured in the paper published by *W Weiß and C Furculiță*[11]. The result of EU's actions allowed the WTO's disputes to carry on their course, albeit in a limited way.

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[4] European Parliament, *Foresight for resilience: The European Commission's first annual Foresight Report* (October 2020).

[5] European Commission, *Communication Trade Policy Review - An Open, Sustainable and Assertive Trade Policy*, COM/2021/66 final (February 18, 2021).

[6] Understanding on Rules and Procedures Governing the Settlement of Disputes, WTO Doc. LT/UR/A-2/DS/U/1 (1994).

[7] Multi-Party Interim Arbitration Arrangement, JOB/DSB/1/Add.12 (April 30, 2020).

[8] The following countries are members of MPIA: Australia; Benin; Brazil; Canada; China; Chile; Colombia; Costa Rica; Ecuador; European Union; Guatemala; Hong Kong, China; Iceland; Macao, China; Mexico; Montenegro; New Zealand; Nicaragua; Norway; Pakistan; Peru; Singapore; Switzerland; Ukraine and Uruguay.

[9] 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, OJ L 189 (June 27, 2014).

[10] Art. 3 aa) of Regulation 654/2014.

[11] W. Weiß and C. Furculiță, *The EU in Search for Stronger Enforcement Rules: Assessing the Proposed Amendments to Trade Enforcement Regulation 654/2014*, 23 Journal of International Economic Law (2020).

On December 8, 2021 the European Commission published its Proposal for a Regulation on the protection of the Union and its Member States from economic coercion by third countries (Anti-Coercion Proposal/Instrument, the Proposal)[12]. The Anti-Coercion Proposal's aim is to deter and to correct states' unlawful economic coercion towards EU or its member states (MSs), by enabling the EU the possibility to adopt economic countermeasures, such as trade and investment restrictions[13]. The Proposal has currently entered into trialogue negotiations[14].

The Anti-Coercion Proposal was drafted based on the provisions enshrined in the International Law Commission's Articles on State Responsibility (ARSIWA)[15]. Chapter II sets out the conditions under which an injured State may impose countermeasures following an international wrongful act committed by another State.

2. Assessment of the mechanism

2.1 Legality

Some aspects of legality have been assessed in a number of opinions previously made by legal scholars. In one of them, *D Raju* cautions about the existence of a fine line between unlawful coercion and legitimate diplomacy[16]. *M Bronckers* and *F Baetens* made the point that a trade restriction legally imposed as a countermeasures would extinguish the unlawfulness under WTO law[17]. Finally, *C Furculiță* argued the instrument's consistency with WTO's rules by distinguishing between a WTO violation, which triggers the application of Art. 23 of DSU and the violation of the principle of non-intervention, which is a customary international law rule that does not fall within the WTO's scope[18]. As a result, the

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[12] Proposal for a Regulation on the protection of the Union and its Member States from economic coercion by third countries, COM(2021) 775 final (December 8, 2021).

[13] European Commission, Annexes to 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) 775 final (December 8, 2021).

[14] Legislative Train Schedule, (https://www.europarl.europa.eu/legislative-train/theme-an-economy-that-works-for-people/file-instrument-to-deter-and-counteract-coercive-actions-by-third-countries) last accessed on June 5, 2022.

[15] International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), (A/56/10), chp.IV.E.1 (November 2001).

[16] D. Raju, *Proposed EU Regulation to Address Third Country Coercion – What is Coercion?* (January 6, 2022), (https://www.ejiltalk.org/proposed-eu-regulation-to-address-third-country-coercion-what-is-coercion/) accessed on June 5, 2022.

[17] M. Bronckers and F. Baetens, *The EU's Anti-Coercion Instrument: A Big Stick for Big targets,* (January 19, 2022), (https://www.ejiltalk.org/the-eus-anti-coercion-instrument-a-big-stick-for-big-targets/) accessed on June 5, 2022.

[18] C. Furculiță, *Does EU's Anti-coercion Instrument violate Art. 23 of the DSU?,* (February 22, 2022), (https://ielp.worldtradelaw.net/2022/02/guest-post-does-eus-anti-coercion-instrument-violate-art-23-of-the-dsu.html) accessed on June 5, 2022.

primacy of Art. 23 DSU would not be triggered by the *lex specialis*[19] character of WTO's rules.

In the following, this paper will focus on the legal test which the Commission would need to apply in order to assess whether coercion exists and whether or not economic countermeasures can be imposed.

2.2 Rules in the proposal

Pursuant to Art. 2(1) of the Anti-Coercion Proposal, its provisions apply whenever a third country (i) 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; (ii) by applying or threatening to apply measures affecting trade or investment.

Following on, Article 2(2) of the Anti-Coercion Proposal lays out a number of criteria that enables the Commission to have a degree of flexibility in its assessment. The provision reads that:

'[i]*n determining whether the conditions set out in paragraph 1 are met, the following shall be taken into account:*

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.'

Article 2 of the Proposal therefore transposes into EU law the right of states enshrined in Art. 49 of the ARSIWA to adopt countermeasures against a third state responsible for an international wrongful act. In cases of coercion, the international wrongful act will be represented by the infringement of the principle of non-intervention via a non-forcible economic coercive action.

[19] Art. 55 of ARSIWA – '*These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law*'.

2.3 The non-intervention principle

The principle of non-intervention has been described by legal scholars as being vague and elusive[20]. It is said to be the corollary of a state's right to sovereignty[21], as the International Court of Justice (ICJ) affirmed in the *Nicaragua* judgment[22].

The principle of non-intervention stems from different sources of law, such as a number international treaties (*e.g.* Art. 2(7) of the UN Charter), customary international law (*e.g.* the 1970 Friendly Relations Declaration[23], the 1981 Declaration on the Inadmissibility of Intervention and Interference[24]) and interpretative ICJ judgments (*e.g. Corfu Channel*, *Nicaragua*)[25].

Intervention of a third state into the sovereign affairs of another one can be done by force (*e.g.* military intervention), or in its absence (*e.g.* political interference, economic coercion, cyberattacks). The use of force is prohibited under Article 2(4) of the United Nations (UN) Charter and arguably represents a *jus cogens* international norm[26]. The other manner in which a state can breach the principle of non-intervention is by pressuring another state (via coercion) in order to secure a change in the latter's policies[27].

The ICJ provided useful guidance when it comes to the application of the non-intervention principle in the *Nicaragua* case. It stated that:

'[…] [t]*he principle forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must*

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[20] V. Lowe, *International Law*, Clarendon Law Series, 104 (2007); M. Jamnejad and M. Wood, *The principle of Non-Intervention*, 22 Leiden Journal of International Law, 345 (2009); J. H. W. Verzjil, W. P. Heere & J.P.S. Offerhaus, *International Law in Historical Perspective*, Leyden: A. W. Sijthoff, 236 (1968).

[21] See Jamnejad, *supra* note 20, at 347; L. F. L. Oppenheim and L. Hersch, *International law: a treatise. Vol. 1:Peace*, London [etc.]: Longmans 428 (1955); C. Henderson, *A Countering of the Asymmetrical Interpretation of the Doctrine of Counter-Intervention*, 8 Journal on the Use of Force and International Law 41 (2021).

[22] Military and Paramilitary Activities in and against Nicaragua, Merit, I.C.J. Reports 1986, para. 202 (27 June 1986).

[23] UN General Assembly, Friendly Relations Declaration, A/RES/2625 (XXV) (1970) - *No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of another State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.*

[24] UN General Assembly, Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, A/RES/36/103 (December 9, 1981).

[25] See Nicarague, *supra* note 22; Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania), Merit, I.C.J. Reports 1949, (9 April 1949).

[26] S. T. Helmersen, *The Prohibition of the Use of Force as Jus Cogens: Explaining Apparent Derogations*, 61 Netherlands International Law Review, (2014).

[27] See Jamnejad, *supra* note 20, at 347.

accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force [...][28].

As such, the breach of the non-intervention principle arises whenever:

i. One state exerts coercion upon another;
ii. With the aim to change the policy of the target state in relation to political, economic, social, cultural and external relations.

2.4 Coercion

A. Scope of coercion

It emerges therefore that coercion plays a central role in the assessment of a prohibited behaviour. The '*coercive interference*' needs to take place in matters which international law leaves to the discretion of states, such as political, economic, social and their external relations[29]. Authors have framed coercion as an action where a state demands in relation to another state to adopt a certain behaviour or to suffer negative consequences – '*do X or else*'[30]. However, other more subtle techniques of coercion can exist, and be just as effective[31].

B. Purpose of coercion

The Friendly Relations Declarations prohibits coercion as a means to '*secure from it advantages of any kind*'[32]. Some authors considered that interference in the affairs of another State is triggered whenever the right of a State to '*adopt any Constitution it likes, arrange its administration in a way it thinks fit, and make use of legislature as it pleases*' is undermined[33]. Based on the available sources, legal scholars concluded that coercive behaviour can extend beyond pressuring a state to implement a policy or restrain its ability to exercise its state powers in some way[34]. In my view, a state would exert a coercive action, if the purpose of it would be to influence the target state's free will, to the benefit of the former.

[28] See Nicaragua, *supra* note 22, para. 205.

[29] See Jamnejad, *supra* note 20, at 380, 381.

[30] H. Moynihan, *The Application of International Law to State Cyberattacks – Sovereignity and Non-intervention*, Research Paper Chatham House 28 (2019); L. F. L. Oppenheim, R. Y. Jennings & A. Watts, *Oppenheim's international law. Vol. 1, Peace,* 9 London; New York: Longman 432 (1996); A. Wertheimer, *Coercion,* Princeton Legacy Library 172 (1988).

[31] See Moynihan, *supra* note 30, at 29.

[32] See Friendly Relations Declaration, *supra* note 23.

[33] See Oppenheim, *supra* note 30, at 221.

[34] See Moynihan, *supra* note 30, at 29.

C. Degree of coercion

Only acts of certain magnitude intended to force a policy change in the target state will contravene the principle[35]. The degree of coercion applied necessary to overcome the target state's free will vary, based on multiple factors, such as the target size, economic power and political stability. If the target state submits without any resistance, or if the pressure applied is such that it can be reasonable resisted, the sovereign will of the target state will not be subordinated[36]. The degree of coercion will thus make the difference between attempts of coercion or international quarrels, and infringements of the non-intervention principle which gives the right to remedies.

D. Economic coercion

Art. 2(1) of the Anti-Coercion Proposal limits the scope of coercion to that of an economic nature, referring to '*measures affecting trade or investments*'. Other types of coercion, such as cyberattacks, rely on separate retaliatory instruments, such as the EU framework for restrictive measures against cyber-attacks threatening the EU and its MSs[37].

Economic measures are deployed by states in order to influence the policy of the target states. For example, this method of coercion was used recently by China against Australia[38] and Lithuania[39].

The challenge for economic coercion is to prove that the actions are capable of overcoming a state's free will, as economic coercion will not easily violate international law[40]. Namely, a state's free will does not easily bend to economic pressure. As *M Jamnejad* argued, states that are more dependent of foreign aid (such as developing countries) or the ones which conduct trade almost exclusively with the state applying the coercion, will have an easy task to prove the breach of the non-intervention principle[41].

But the EU is an economic goliath, with a Gross domestic product (GDP) that follows closely that of the US[42]. The EU trades with multiple partners and it is not

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[35] See Jamnejad, *supra* note 20, at 348.

[36] *Id.*

[37] Council Regulation (EU) 2019/796 of 17 May 2019 concerning restrictive measures against cyber-attacks threatening the Union or its Member States, OJ L 129I (May 17, 2019).

[38] B. Herscovitch, *Australia's Answer to China's Coercive Challenge*, Royal United Services Institute (2021).

[39] K. Andrijauskas, *An Analysis of China's Economic Coercion Against Lithuania,* Council on Foreign Relations (2022).

[40] See Bronckers, *supra* note 17.

[41] See Jamnejad, *supra* note 20, at 371.

[42] According to World Bank data, (https://data.worldbank.org/), last accessed on July 11, 2022.

an economically dependent by one actor[43]. As such, there are not many global actors that can realistically exert an economic pressure on the EU with the view to influence its political decisions.

Notwithstanding, the EU is an economic and political union made out of twenty seven different MSs. Often, decisions adopted by the EU institutions are dependent upon the votes expressed by representatives of each individual state. For example, the European Council consists of Heads of State or Government of individual MSs. It plays a key role in setting up the main political direction and priorities of the Union[44]. It also adopts decisions upon the Union's external action and common foreign and security policy45. Such decisions are adopted unanimously, which means that any MS can veto a decision. As such, in the case of external relations, an area of paramount important in the current geopolitical context, the EU can only be as strong as its weakest member.

This weakness was recently showcased in the crisis generated by the war in Ukraine, where a number of MSs opposed a total ban on the oil and gas imports from Russia, in favour of a more gradual phase-out. It is easy then to imagine a scenario where a successful economic coercion of a MS would be able to influence, or at least stall the policies of the Union, in relation to areas that require an unanimity vote in different bodies of the EU.

In addition, the scope of the Anti-Coercion Proposal is not limited to coercion of the Union, and extends to its MSs. As such, under Art. 1(1) of the Proposal, even when economic coercion aims to change the behaviour of an individual MS, the anti-coercion mechanism would be triggered and the EU would be able to respond accordingly[46].

Going back to one of my previous examples, China arguably applied economic pressure against Lithuania, following the latter's decision in 2021 to open a Taiwanese Representative Office in Vilnius, under the denomination of '*Taiwan*', as opposed to '*Taipei*', which has been the accepted practice

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[43] Acording to Eurostat data, (https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Extra-EU_trade_in_goods), accessed on July 11, 2022.

[44] Art. 15(1) TEU – *The European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof.*

[45] Art. 22 TEU.

[46] Art. 1(1) of the Proposal for a Regulation on the protection of the Union and its Member States from economic coercion by third countries – *This Regulation lays down rules and procedures in order to ensure the effective protection of the interests of the Union and its Members States where a third country seeks, through measures affecting trade or investement, to coerce the Union or a Member State into adopting or refraining from adopting a particular act.*

worldwide[47]. The People's Republic of China adopted directly or indirectly a series of trade restrictions, which led to a ninety percent drop of shipments in goods from Lithuania at the end of 2021, as compared to the previous year[48]. In this case, the apparent economic coercion applied by China is aimed at forcing a policy change at the level of an individual MS – convince Lithuania to revert its decision with regards to the Taiwan's Representative Office. As such, the anti-coercion mechanism could be triggered in this example and the EU could respond with countermeasures affecting trade or investments, in order to prompt China to change its pressure towards Lithuania.

2.5 Legal test for breach of the non-intervention principle under the Draft Proposal

Test	Art. 2(1) of the Proposal	Comments
Is there an interference in the sovereign choices of the EU/MS?	Interferes in the legitimate sovereign choices of the Union or a Member State	This objective test would require an analysis on whether or not the action undertaken by a third state seek to produce a policy change in an area where EU or MS have sovereign competence (such as political, economic, social, cultural and foreign policies areas). For the EU, Arts. 3 and 4 TFEU should serve as a good yardstick for determining its exclusive or shared competence. Areas which fall under Art. 6 TFEU could fall within the scope of EU's sovereign choices to the extent that coercion is applied in order to supress the coordination or support provided by the EU.
	[…] by seeking to prevent or obtain the cessation, modification or adoption of	Although the text of the Proposal suggests that there should be a reason behind the illegal actions of the state, some legal scholars excluded the requirement of proving intent in the analysis of a breach of the non-intervention principle[49]. Indeed, having to prove intent

[47] *E.g.* Blocking credit insurance for traders; a freeze of food export permits to the Chinese market; refusal of Chinese companies to import timber and grains from Lithuania; disruption of supply of Chinese raw materials.

[48] F. Bermingham, *Lithuanian exports nearly obliterated from China market amid Taiwan row*, South China Morning Post (2022), (https://www.scmp.com/news/china/diplomacy/article/3164170/lithuanian-exports-nearly-obliterated-china-market-amid-taiwan), last accessed on July 12, 2022.

[49] See Moynihan, *supra* note 30, at 32.

	a particular act by the Union or a Member State	could be challenging for the targeted state, as coercion may be applied covertly, in the absence of any public statements or acts related to it. This was reflected in the *Nicaragua* judgment, where the ICJ did not find it necessary to assess the existence of intent[50]. However, the existence of a motive would naturally be part of an economic coercion, even if proving it would not be required under the legal test. States would not adopt coercive economic measures against the target state in the absence of any reason, particularly since the measures would probably have a negative effect on their own economies and would jeopardize their diplomatic efforts.
Is there coercion?	[…] by applying or threatening to apply measures affecting trade or investments	An economic coercion applied by a state would not easily overcome the sovereign will of a state[51]. The high threshold needed will be even harder to reach in cases of large economies, such as the EU, or where a third state only threatens with the use of economic measures. While the use of threat can be illegal under international law[52], its qualification as such may not be sufficient to amount to an illegal coercion. Therefore, analysing the existence of coercion would require a sliding scale test, where multiple factors are considered by the Commission or the Council before a decision is made.
Factors to be considered in the assessment of coercion	Art 2(2) of the Proposal	The elements laid out in Art. 2(2) of the Proposal would be determinative in the assessment of the coercion test. As such, factors like the degree of coercion (its intention, severity, frequency, duration,

[50] See Nicaragua, *supra* note 20, at para. 241 - '*[i]n international law, if one State, with a view to the coercion of another State, supports and assists armed bands in that State whose purpose is to overthrow the government of that State, that amounts to an intervention by the one State in the internal affairs of the other whether or not the political objective of the State giving such support and assistance is equally far reaching. [I]t is for this reason that the Court has only examined the intentions of the United States Government so far as they bear on the question of self-defence.*'

[51] See Jamnejad, *supra* note 20, at 369.

[52] See Raju, *supra* note 16, at 4.

		magnitude), the repetitive nature of interference or the existence of any third's country legitimate concerns will all play a role in determining whether the coercion infringes the principle of non-intervention.

3. Sanctions

3.1 Collective countermeasures

A question of legality may arise in case the coercion action is aimed solely at influencing a MS policy, in an area of exclusive competence, such as its national security. Would the EU have a right under international law to adopt countermeasures, since it would not fall within the definition of an injured State in accordance with Arts. 49 and 42 of the ARSIWA? The answer may be that it would not be possible for the EU to legally react by adopting countermeasures. Art. 2 of the Anti-Coercion Instrument reads that its provisions are applicable where a third country interferes in the legitimate sovereign choices of the 'Union or a Members State'. However, Art. 7(1)(b) of the Proposal states that the Commission adopts remedies where action is necessary to protect the interests and rights of the 'Union and its Member States'. The semantical difference between '*or*' - '*and*' signals the fact that economic coercion aimed towards policy areas which do not fall within the Union's remit would not be capable of generating the Union's coercive reaction. In such instances, individual countermeasures may be imposed by the MS which is the victim of coercion.

However, a different venue for the EU and other third countries for that matter to respond to economic coercion directed against an area of exclusive national competence, would be via '*collective countermeasures*' – *i.e.* the possibility of third interested countries to adopt sanctions against the state exerting coercion. The argument in favour of collective countermeasures relies on the nature of the non-intervention principle, which contains an *erga omnes* obligation. Thus, the obligation not to interfere in the sovereign affairs of other states is owed towards the international community as a whole, and as such, every state has an interest in upholding it.

Articles 48 and 54 of the ARSIWA provides the possibility of other states to adopt '*lawful measures*' in cases where the obligation breached is owed to the international community. The meaning of '*lawful measures*' is not clarified within ARSIWA. On the one hand, by referring to '*lawful measures*' as opposed to '*countermeasures*' - which are *per se* derogations from international obligations and therefore unlawful, could signify the exclusion of the latter from collective action. On the other hand, countermeasures become lawful once a state breached an

international obligation towards another, and as such, the expression in Art. 54 of ARSIWA could represent a '*veiled reference to collective countermeasures*.'[53]

The International Law Commission's Special Rapporteur on State Responsibility between 1997-2001 – *James Crawford*, notes that proposals which allowed for '*collective measures*' – taken at the request of an injured state, were tabled but rejected by some of the governments[54]. A compromise was reached in the current form of Article 54 of ARSIWA, '*leaving the matter for development in practice*'[55].

The question on whether or not Article 54 of ARSIWA enshrines the possibility of '*collective countermeasures*' has not been settled yet. There are calls for a global initiative that would mirror NATO's Article 5 with regards to coercion, and would allow non-injured states to adopt collective countermeasures against the perpetrating state[56]. It remains to be seen whether such a mechanism will come to life, and whether or not it will be deemed lawful in the eyes of the ICJ. Ultimately, international law is a dynamic set of rules, which is subject to changes, particularly when there are dramatic shifts in regional politics and challenges to the *status quo* of the international order.

3.2 Countermeasures

Articles 49 and 51 of ARSIWA are the governing rules in relation to countermeasures. According to Art. 49:

(1) 'An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under part two.
(2) Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.
(3) Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of the performance of the obligations in question.'

According to Article 49 of ARSIWA, countermeasures are a temporary suspension of international obligations. The lawfulness of countermeasures depends upon the existence of a State's prior '*wrongful act*'– *i.e.* the act of coercion

[53] C. Herson, *A countering of the asymetrical interpretation of the doctrine of counter-intervention,* 8 Journal of the Use of Force and International Law 55 (2021).

[54] J. Crawford, *The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect,* 96 American Journal of International Law 884 (October 2002).

[55] *Id.*

[56] A. F. Rasmussen and I. Daalder, *Memo on an 'Economic Article 5' to counter authoritarian coercion*, The Chicago Council on Global Affairs (June 2022).

which leads to a breach of the non-intervention principle. According to Art. 51 of ARSIWA countermeasures *'must be commensurate with the injury suffered'*.

The proportionality and provisory nature of countermeasures are enshrined in Articles 9 and 10 of the Anti-Coercion Proposal. In addition, the Commission will use a set of criteria in order to design appropriate responses, such as the assessed effectiveness of the measures in question and the avoidance of negative impacts on the Union policies (Art. 9(2) of the Anti-Coercion Proposal). Annex I of the Anti-Coercion Proposal lays down the types of countermeasures that could be adopted against a State, such as the suspension of tariff concessions and increase of customs duties, quantitative restrictions on imports or exports, restrictions on transiting goods, exclusion from public procurements, limitation on foreign direct investment etc.

4. Conclusion

The Anti-Coercion Proposal tabled by the Commission represents the first instrument of its kind. It aims to address economic coercion against MSs and the EU, in a shifting geopolitical climate which requires stronger enforcement of international norms. If approved, the instrument could pave the way towards the adoption of similar instruments by democratic states seeking to fend off economic coercion. On the outlooks, the instrument appears to be compliant with WTO rules and international law. However, this questions could be settled in future EU, WTO, arbitration or ICJ disputes. Since its formation, the EU has placed great emphasis on the use of '*soft power*' in order to achieve its internal and external objectives. By being the first organisation to propose an anti-coercion instrument, the EU departs from its previous practice and embraces a firmer approach when it comes to compliance with international law.