THE EUROPEAN COMMISSION'S PROPOSED ANTI-COERCION INSTRUMENT FROM AN INTERNATIONAL LAW PERSPECTIVE

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In a global context characterised by rising geopolitical and economic tensions, the European Union (EU) is equipping itself with new tools to ensure its open strategic autonomy and promote fairer and more sustainable international trade. In principle, it wants the rules of the World Trade Organization (WTO) to be reformed and updated. But repeated failures to reach significant global consensus, particularly with China and other emerging economies, is leading the EU to opt to negotiate regional trade agreements and to endow itself with new autonomous legal instruments. Examples include a general sanctions regime for human rights violations, a corporate sustainability due diligence directive, a regulation on foreign subsidies that distort the internal market, a regulation on international public procurement, a carbon border adjustment mechanism, and a new initiative to combat deforestation (Erixon et al., 2022). Far from pursuing discriminatory, protectionist unilateralism, these instruments seek to project essential values and contribute to designing a new regulatory framework for international trade.

Of these instruments, this paper will focus 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) 775 final), which was presented on December 8th 2021. For brevity's sake it will be referred to as the "anti-coercion instrument".

In essence, the instrument aims to establish rules and procedures for the EU to defend itself from economic coercion by third states and includes commercial countermeasures based on international law. At the time of writing, the proposal remains under review by the European Parliament and Council, with the final text expected to be approved by the end of 2022. Several specialists have already commented on the proposal (Baetens and Bronckers, 2022; Hackenbroich, 2022; Szczepanski, 2022), and this paper will contribute a brief analysis from an international law perspective.

First, the paper will focus on what economic coercion means in international relations. Second, the various options states have to defend themselves against economic coercion will be set out, including the

possible use of countermeasures. Third, the question of why the EU needs to adopt an anti-coercion instrument will be examined. Finally, potential incompatibilities between the instrument and WTO rules will be addressed, along with how these issues may be handled.

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1. What is economic coercion in international relations?

Article 2.1 of the European Commission's proposal states that a third country engages in economic coercion when it "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".

In serious cases, at least, economic coercion may involve the violation of one of the basic principles of international law: the "duty not to intervene in matters within the domestic jurisdiction of any State[1]",wherein "No State may use or encourage the use of economic … 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".

The impact assessment report annexed to the European Commission proposal (SWD(2021) 371 final) gives numerous examples of economic coercion in international practice committed by countries including China, the United States, Indonesia, Russia and Turkey. Various cases involve China, whose rise as a great global power has significantly increased its ability to exert pressure. China's economic coercion activities have affected a range of countries and have on many occasions been conducted silently, informally or covertly (Harrell et al., 2018).

In 2020, for example, Australia proposed an international investigation be conducted into the origins of the COVID-19 pandemic. Since then, China has applied a host of trade restrictions against Australia, in some cases under the guise of standard trade defence measures like anti-dumping and countervailing duties on barley and wine, creating a formal separation from any political motivation (Ferguson and Lim, 2021).

Lithuania is another example. In July 2021, the Baltic state announced that a Taiwanese representative office would be opening in Vilnius. Since then, China has applied multiple trade restrictions against Lithuania, both formally and informally (Szczepanski, 2022: 3).

2. How can economic coercion be defended against?

States subjected to economic coercion may respond in various ways. Often, they end up bowing to the pressure or bearing it stoically. But, if a coercive measure is considered incompatible with the rules of the WTO or any other trade or investment agreement in force between the parties involved, the affected state may file a claim via the relevant dispute settlement system.

1. As stated, among other international instruments, in the Declaration on Principles of International Law approved by Resolution 2625 (XXV) of the General Assembly of the United Nations (UN), of the 24th of October 1970.

Australia, for example, has complained to the WTO about China's anti-dumping and countervailing duties on barley (WT/DS598/1) and wine (WT/DS602/1). The EU has also launched a case against China at the WTO over the trade restrictions imposed on Lithuania, submitting a request for consultations on January 27th 2022 (WT/DS610/1), initiating the dispute settlement procedure.

The WTO's dispute settlement mechanism has yet to resolve these recent allegations of Chinese coercion. And it is also worth noting that while that this defensive route can contribute to combatting economic coercion, it is not enough. In particular, the WTO's adjudicating bodies have limited jurisdiction and are restricted to determining whether or not the trade measures implemented are compatible with the specific rules of the WTO. They do not examine economic coercion in the light of international law, as this lies beyond their competence.

The WTO's adjudicating bodies (like those of other trade or investment agreements) thus limit themselves to their own sphere of competence (examining the issue from their particular perspective). They cannot determine that a state has violated a basic principle of international law like non-interference, nor can they draw out all the legal implications (such as the obligation of reparation) provided for in the general rules on the responsibility of states for internationally wrongful acts[2].

In theory, other means of peaceful dispute settlement may be used to respond to an internationally wrongful act under the general rules of international law, including negotiation, conciliation, arbitration, among others. Ideally, states affected by economic coercion could appeal to a competent international court to rule on whether a basic principle of international law has been violated. But this is not easy, because there is no generalised mandatory interstate jurisdiction in the international legal system, and the UN's International Court of Justice (ICJ) can only prosecute if a state has in some way consented to it.

The ICJ's weakness, and that of the international legal system in general, mean that so-called unilateral self-help measures remain protected by international law, and usually take the form of retaliation or countermeasures. Retaliation sees the injured state take unfriendly measures against the responsible state, such as freezing negotiations over a treaty or ruling out future uncommitted investments. Countermeasures, meanwhile, may mean the injured state fails to comply with one or more international obligations it has towards the responsible state in order to force a halt to the illegal act and seek redress for the damages caused. Thus, states subject to economic coercion may seek to defend themselves by applying countermeasures.

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3. Should the EU approve an anti-coercion instrument?

Approving an anti-coercion instrument is a legal necessity for the EU for several reasons. In principle, by virtue of its sovereignty, any state in the world is competent to resort to countermeasures based on the general rules of international law. As an international organisation, however, the EU's powers are conferred via a legal instrument that the EU itself

2. Rules codified in the Draft Articles adopted by the International Law Commission (CDI) in 2001 and annexed to Resolution 56/83 of the UN General Assembly, of December 12th 2001.

promulgates, and which defines its action. The EU is already endowed with provisions that allow it to impose international sanctions within the framework of its Common Foreign and Security Policy (CFSP), like those the Council approved on Russia following the armed aggression against Ukraine, as well as in the final stage of the WTO's dispute settlement process. However, in cases of economic coercion by third countries, the EU lacks a specific instrument that enables the European Commission (without the need for Council intervention) to deploy countermeasures in the areas covered by the common commercial policy (e.g., imposing import restrictions on goods, services, foreign investment, etc.).

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It should also be recalled that in cases like Lithuania's economic coercion by China, EU member states cannot unilaterally raise customs tariffs or apply other trade restrictions on third countries, as these fall within the EU's exclusive competence for the common commercial policy. The proposed anti-coercion instrument will allow the European Commission to defend EU interests and those of each member state, acting, in this case, like a federal state that considers itself injured as a whole by coercion against any of its members.

The proposed anti-coercion instrument grants broad powers to the European Commission to classify specific actions by third states as economic coercion and to respond via negotiation or other international dispute settlement mechanisms and, as a last resort, to apply trade countermeasures.

4. What incompatibilities may arise with WTO rules?

The annexes to the proposal for an anti-coercion instrument set out the measures the European Commission can take in response to a third state engaging in economic coercion. They include, for example: "the imposition of customs duties beyond the most-favoured-nation level, or the introduction of any additional charge on the importation … of goods".

From the outset, these and other planned measures clearly conflict with the basic principles of the WTO (and of other trade and investment agreements concluded by the EU) and are difficult to justify given the exceptions already provided for in these regimes. However, the exceptions to the current General Agreement on Tariffs and Trade (GATT) from 1994, including those related to public morals or security, are not easily applicable in many cases of economic coercion. The security exception relating to restrictions imposed in the event of "serious international tension" is undoubtedly open to multiple interpretations. For example, when tensions escalated between Russia and Ukraine after Euromaidan in 2013 and Russia's illegal annexation of Crimea in 2014, Russia imposed trade restrictions on the transit of goods with Ukraine. In 2016 Ukraine filed a complaint against Russia at the WTO. In the report issued in 2019 the adjudicating body handling the case specified that a member invoking this type of exception must be able to demonstrate the "veracity" of the relationship between the measures imposed and "security interests" (WT/DS512/R, paragraph 7.134). The conclusion in this case was that Russia was entitled to an exception on security grounds, due to the confrontation between the

two countries – a clear sign of the ample discretion the WTO grants states in this area. However, in many cases of economic coercion there is no active or potential armed conflict between the countries involved, and they can hardly be considered security-related.

It should be underlined that the European Commission's proposed anti-coercion instrument does aim to not justify restrictions imposed in response to economic coercion in the light of specific exceptions provided for in WTO rules or other trade and investment regimes. Rather, its justifications are drawn from the general rules on countermeasures in international law, addressing the subject less in terms of violations of a particular rule, than of counteracting economic coercion that amounts to a violation of a basic principle of the international legal order.

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The question of whether particular WTO rules can be breached by countermeasures based on international law has long been contentious among scholars. Some authors (Bartels, 2002: 396) argue that they cannot, because, when it comes to countermeasures, WTO law is a discrete system that is disconnected from the rest of the international legal system.

Other authors (Fernández Pons, 1999: 99; Kuijper, 2008: 706) note that the WTO does not explicitly prevent the use of countermeasures amounting to non-compliance with its rules in response to breaches of international obligations outside its regime. In practice, certain cases appear to demonstrate this. Thus, when Argentina refused to comply with certain rulings by the International Centre for Settlement of Investment Disputes (ICSID) and the United States excluded it from its generalized system of preferences for developing countries, to which it was entitled by virtue of the Enabling Clause in force at the WTO, Argentina made no complaint at the WTO against this US "countermeasure" (Fernández Pons and Lavopa, 2013: 249–250).

The European Commission's proposed anti-coercion instrument fits with the latter approach (Baetens and Bronckers, 2022: 5). In the case of economic coercion that violates, among other things, general rules of international law, it includes the possibility of the EU adopting certain trade restrictions that are clearly incompatible with the most basic substantive WTO rules. Disregarding the specific WTO exceptions, it provides such actions with direct protection as countermeasures in international law.

From a procedural point of view, a further question may be raised. What would happen if the state engaging in economic coercion (for example, China) filed a complaint at the WTO against the trade restrictions adopted by the European Commission under the anti-coercion instrument?

The EU could attempt to defend itself by invoking one of the exceptions provided for in WTO law – claiming, for example, that "serious international tension" affects its security. Certain authors (Azaria, 2022) have argued that the WTO's adjudication bodies should, as an incidental question, find in favour of an EU defence based on the general rules on countermeasures in international law. However, given their circumscribed jurisdiction, the WTO's adjudication bodies seem highly unlikely to accept such a defence.

The European Commission is aware of this. However, the impact assessment points out that, on the one hand, the state engaging in economic coercion will not always react by filing complaints against the anti-coercion measures the institution employs (so as to avoid, for example, airing their original misconduct). On the other hand, without prejudice to what the WTO's adjudicating bodies may decide in reference to its particular regime, the EU will continue to feel entitled to impose anti-coercion measures under the general rules of international law (SWD(2021) 371 final, pp. 16, 22, 23, 41–43).

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5. Final considerations

Economic coercion at an international level is nothing new. But in an increasingly Hobbesian or anarchic international landscape it is a growing issue. Economic coercion involves not only the violation of particular commercial or investment obligations, but also of general norms of international law. Neither the WTO nor other international institutions currently offer specific or fully adequate means of defence against economic coercion. Hence, states often try to defend themselves using self-help measures typical of international law, such as so-called countermeasures.

In a context like the current one, the European Commission needs an anti-coercion instrument in order to defend the EU and its member states from economic coercion by applying trade countermeasures in accordance with the general rules of international law. In some cases, the states that initiate the economic coercion are likely to react with more means of exerting pressure and/or challenge specific anti-coercion measures adopted by the European Commission at the WTO (or other fora), which are unlikely to accept the EU's defence based on the general rules of international law, given the limited nature of their specialised jurisdictions. Nevertheless, the legal basis for European Commission's proposed anti-coercion instrument are basic norms of the international legal order, and the instrument must be conceived, essentially, as a deterrent mechanism that is gradual in nature, and which should be administered with caution.

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