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PhD Dissertation

Economic wars through instruments of trade control

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Abstract

This dissertation analyses the phenomenon of "economic wars" conducted through instruments of trade control from an international law perspective. In recent years, States have increasingly engaged in inter-State confrontations by implementing economic and trade-restricting measures to pursue foreign policy, security, geopolitical, and strategic objectives. Yet, crucial concepts such as "economic war", "economic coercion", and "sanction" remain legally ambiguous and only partially regulated within the existing international legal framework.

This study focuses specifically on trade-restricting instruments employed in inter-State economic confrontations. It examines how these instruments are designed, justified, and classified under international law, by distinguishing between measures originally conceived to coerce and trade instruments that, although designed for commercial or regulatory purposes, are increasingly employed with coercive or strategic objectives.

The research adopts a doctrinal legal methodology grounded in the classical approach to international law sources, complemented by a historical analysis of the evolution of relevant concepts, principles, and State practice, and by the discussion of selected case studies. The central research question – What constitutes an economic war today? – is addressed through three correlated research questions: (i) In the absence of a formal definition of "economic war" in international law, which related concepts are relevant, and to what extent are they recognised or regulated within the existing international legal framework?; (ii) Which trade instruments are employed to conduct 'economic wars', and how can they be legally distinguished?; (iii) Which trade control instruments, and on what legal basis, have States and other actors adopted in recent key cases of economic confrontations?

The dissertation is structured in four chapters. Chapter I examines the concept and legal significance of "economic war" and economic coercion, analysing the possible thresholds under international law and the relationship with crucial principles, including the prohibition of the use of force, self-defence, and non-intervention. Chapters II and III explore the instruments most frequently employed in economic wars by analysing their respective legal frameworks. More specifically, the second chapter focuses on trade instruments designed to coerce – including UN non-armed measures, ARSIWA countermeasures, EU restrictive measures, and unilateral sanctioning measures – while the third chapter discusses trade instruments originally designed with specific trade objectives yet increasingly implemented with coercive and strategic purposes – including WTO-regulated and justifiable trade-restricting measures and commercial policy instruments. Chapter IV applies the analysis to selected cases of economic trade wars, exploring the Western States-Russian Federation sanctions war, the United States-China trade war, and the China-Lithuania dispute.

To support classification and interpretation, this dissertation develops two "analytical tools": a working definition of 'sanction' – elaborated in Chapter II – and a legal classification test – developed in Chapter IV. Overall, the dissertation argues that "economic war" is best understood not as an autonomous legal category, but rather as a strategic conflictual context in which trade-restricting measures are reciprocally and consistently employed with coercive, strategic, security, or economic objectives, and in which existing categories of international law are progressively stretched, overlapped, and reoriented beyond their original design.

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1. Context: The employment of economic instruments in economic wars

Inter-State confrontations have always contained an economic dimension. During wartime, economic instruments, such as blockades and embargoes, were employed alongside military force to weaken the adversary. Their employment during peacetime, however, was codified in the 1919 Covenant of the League of Nations which for the first time regulated the "economic weapon" – or "*arme économique*" – specifically to respond to States resorting to 'armed actions'. The explicit nexus between economic instruments and armed conflicts was removed within the 1945 United Nations (UN) Charter, which notably enables economic measures in response to threats to the peace, breaches of the peace, and acts of aggression under its Article 39.

Today, economic restricting measures are employed in wartime and peacetime and States, notably, implement non-armed economic measures both as part of the UN 'sanctioning' activity and unilaterally. Especially over the last decade, reliance on economic instruments has strongly intensified, provoking renewed scholarly and political debate. The unprecedented scale of current economic measures, the breadth of both sending and targeted States, the proliferation of often overlapping objectives, and the increasingly contested nature, effectiveness, and impact of these instruments have placed the international legal framework governing economically coercive measures under scrutiny.

While the UN framework regulates multilateral non-armed measures – notwithstanding significant criticisms and veto power constraints – the international legal framework governing unilateral economically restricting measures remains fragmented and solely partially regulated. Most notably, the 2001 Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) regulates the enactment of countermeasures, but does not fully encompass the totality of States' unilateral economic measures frequently employed in practice. At the same time, key concepts, such as 'economic war', 'economic coercion', or 'sanction', lack comprehensive and universally accepted definitions, further complicating the assessment of the lawfulness and legal classification under international law of the instruments most frequently employed in these contexts.

Inter-State economic confrontations today are conducted through a wide number of instruments and actors, and in pursuit of multiple objectives. The cumulative employment of economically restricting instruments – including asset freezes; financial restrictions; imports and exports bans; subsidies distorting market competition; dumping practices targeting domestic industries; outbound and inbound screenings; investment policies; travel bans; and, tariffs – frequently aims at considerably different and overlapping goals, ranging from responses to international law violations, strategic and geopolitical aims, security and foreign policy interests, or the achievement of economic advantage and dominance.

The progressive merging of measures and objectives also concerns those measures originally designed to coerce with those intended to regulate trade yet increasingly reoriented towards strategic objectives. In turn, the unilateral reliance on instruments originally designed for a specific goal yet employed with cumulative and overlapping objectives raises crucial questions regarding their legal qualifications under international law. Indeed, existing categories of international law do not always fully grasp the nature and purpose(s) of these measures, and are thus stretched to accommodate measures beyond their original design. The notable erosion of multilateralism in favour of unilateralism is thus accompanied by the gradual erosion of those (few) existing categories of international law governing unilateral economically restricting actions.

In this context, analysing and understanding "economic wars" through the lens of unilateral instruments of trade control is essential not solely to grasp the erosion of multilateralism, but also to comprehend the shifting and reorientation of trade-restricting measures away from their original design, and the legal challenges they pose to existing categories of international law. Strictly grounded in an international law framework, this dissertation examines the legal significance of key concepts and notions, the regulation of the most frequently employed economic-restricting measures, and their legal classification within selected practical cases of economic wars through instruments of trade control.

2. Scope and delimitation of the dissertation

This dissertation focuses specifically on economic instruments that restrict international trade in situations of inter-State confrontations. Its aim is to clarify the international legal framework governing economic wars and trade control measures most frequently implemented in such situations. This objective entails analysing the legal significance of commonly used terms – such as 'economic war', 'economic coercion', 'sanction' – and situating them within the relevant principles and provisions of international law. It further means examining the design and legal framework of the

most frequently employed instruments, analysing whether measures adopted by States correspond to their original design or, alternatively, the extent to which they diverge from it.

For reasons of feasibility and coherence, this dissertation adopts several delimitations: (i) the area of analysis is limited to trade, excluding financial and investment aspects; (ii) the instruments considered are confined to main 'sanctioning' and trade-restricting measures; (iii) the level of analysis is international law, with selective reference to WTO law and relevant domestic and regional legal framework; (iv) the analysis of State practice is limited to three selected cases involving reciprocal unilateral measures; (v) the predominance of focus is on unilateral measures, notwithstanding the in-depth analysis of multilateral frameworks; (vi) the approach is strictly legal, thereby not addressing any economic or political assessment on effectiveness, as well as economic or humanitarian impact; and, lastly, (vii) the temporal scope extends to developments up to March 2026.

Although economic-restricting instruments employed in economic wars are diverse and wide-ranging, this dissertation deliberately focuses solely on those instruments that restrict international trade, therefore excluding financial and investment-related instruments.

Within the field of trade, the dissertation is limited to trade control instruments pertaining to the area of public international law, thereby not examining trade defence instruments such as anti-dumping, countervailing measures (CVD), safeguards, foreign subsidy controls, or public procurement restrictions. While Chapter III includes a brief overview of certain WTO trade defence instruments due to their relevance, the tools of anti-dumping, CVD, and safeguards and their occasional strategic employment, are not examined in depth. This is due to the fact that such instruments are mainly designed to address market distortions and restore fair conditions within the trading system, rather than to act as instruments of inter-State economic coercion.

The analysis is thus confined to coercive trade measures under public international law, commonly referred to either as "trade sanctions" (Chapter II) or "trade-restricting measures" (Chapter III). Despite their different design, nature, and application, these measures share the characteristic of being imposed by States to restrict, suspend, or control trade relations with specific States, foreign entities or individuals for purposes linked to foreign policy, security, or broader strategic objectives. In this regard, certain unilateral trade measures adopted under domestic commercial legislations examined in Chapter III – such as those under Section 301 US Trade Act and Section 232 US Trade Expansion Act – are similarly designed to trade regulation but, unlike classical trade defence instruments, are directed against foreign States' choices and policies concerning foreign policy or affecting national security, rather than purely (and solely) aiming at correcting market distortions.

This dissertation is grounded in the international law framework, with emphasis on both the multilateral and unilateral regimes of economic-restricting measures. In this sense, the United Nations

framework and the law of countermeasures are explored in depth, alongside regional and domestic (yet unilateral) legislations on trade-restricting measures. Crucial international law customary principles and concepts, such as non-intervention and economic coercion, are analysed in relation to these measures and, where relevant, the interaction between international law rules and specific regimes – including WTO law – is also analysed.

Although the main lens of analysis is international law, certain aspects of selected regional or domestic legal frameworks – namely, the European Union (EU) and the United States of America (US) – are briefly addressed throughout the dissertation. This selection is justified by their central role as major senders of trade-restricting measures in current international practice, with their significance further evidenced within the selected case studies and illustrative example examined in Chapter IV.

Alongside its international law analysis, the dissertation engages with relevant and selected State practice. In particular, it examines two selected case studies as paradigmatic examples of the differing employment of unilateral trade-restricting measures, namely, the 'sanctions war' between Western States and the Russian Federation, and the United States-China 'trade war'. The former illustrates the adoption of sanctioning measures originally designed to coerce, as examined in Chapter II; whereas the latter demonstrates the reorientation of trade-restricting measures – originally conceived to regulate and protect domestic markets – into instruments aimed at strategic, security, and geopolitical objectives, as discussed in Chapter III. Brief reference is also made to the China-Lithuania dispute, which constitutes a key example of informal economic coercion implemented through the use of trade-restricting measures.

Inevitably, although the dissertation offers a description of the historical evolution of both concepts, principles and events, an obvious yet key limitation consists in the timeframe of its production and submission. Accordingly, the legal frameworks and the events analysed are updated until March 2026.

Finally, the dissertation covers both multilateral institutional frameworks – *i.e.* the UN and WTO – and unilateral actions adopted by States or regional entities. While both layers are examined throughout the dissertation, the final chapter necessarily focuses more extensively on unilateral measures, reflecting their predominance in State practice and the broader crisis of multilateralism.

This dissertation deliberately refrains from any economic or political assessment of the effectiveness of any trade-restricting measures, nor does it address their economic or humanitarian impact. In turn, the approach is strictly legal in nature, thereby focusing on the legal nature and significance of 'economic wars' and trade-restricting measures, and their relationship with key

concepts of international law. Thus, the selected case studies and illustrative example serve solely to assess the measures' legal classification within the existing legal framework of international law.

3. Research objectives and questions

This dissertation aims to analyse, from a legal perspective, the phenomenon of economic wars conducted through instruments of trade control. Notwithstanding the conceptual ambiguity of the term "economic war" and the tendency to regroup diverse instruments under the broad label of 'sanctions' – as reflected in media discourse, policy discussions, and academic scholarship alike – this dissertation seeks to clarify these notions, identify the relevant international legal framework, distinguish between the most-frequently employed instruments, and analyse selected State practice. In this respect, it examines how trade control measures are employed in economic confrontations, and whether their use remains consistent with their original design or, instead, reflects a progressive reorientation towards broader strategic geopolitical, security, or coercive objectives. The study also traces the historical evolution of the relevant concepts, instruments, and legal frameworks to assess the original conception and design, and determines whether substantial transformations or reorientations have occurred.

The central research question underpinning this dissertation is "What constitutes an economic war today?". This inquiry is supported by three correlated research questions: (i) In the absence of a formal definition of "economic war" in international law, which related concepts are relevant, and to what extent are they recognised or regulated within the existing international legal framework?; (ii) Which trade instruments are employed to conduct 'economic wars', and how can they be legally distinguished?; (iii) Which trade control instruments, and on what legal basis, have States and other actors adopted in recent key cases of economic confrontations?

By addressing these research questions through doctrinal legal analysis and selected case studies, the dissertation aims to provide a comprehensive account of how economic wars are conducted through trade control instruments, and to clarify their legal classification within international law. Accordingly, it seeks to assess how existing international law legal frameworks have regulated (and regulate) such measures, and to what extent State practice reflects these frameworks or, alternatively, demonstrates a transformation in the employment of trade control instruments.

Overall, this dissertation argues that "economic war" is best understood not as an autonomous legal category, but as a strategic conflictual context in which trade-restricting measures are reciprocally and consistently employed with coercive, strategic, security, or economic objectives. Its legal relevance does not derive from the emergence of a new category of international law, but from

the way in which existing legal categories (including sanctions, countermeasures, trade control measures, and others) are progressively stretched, overlapped, and reoriented in the contemporary State practice.

These existing categories regulating unilateral actions under international law do not perfectly fit today's frequent employment of trade control measures. They are stretched to include – only partially and imprecisely – measures that resist precise qualification, reflecting both the insufficiency of international law in regulating unilateral State action and the States' ability to adapt available instruments to serve their current strategic interests, at the cost of legal precision and accountability. This stretching is intensified by the absence of a dedicated framework for economic confrontations and by the crisis of multilateralism, which has weakened collective institutional mechanisms and enhanced unilateral approaches, exposing the limits of existing international law and its legal categories, which were indeed conceived for a fundamentally different world.

The dissertation's original contribution lies in its study of the concept "economic war" and its components, as well as in its analysis of the stretched employment of trade control measures within strategic and reciprocal conflictual contexts. This is investigated through both the study of the instruments' legal frameworks and an analytical classification test developed and applied to two selected case studies and one illustrative example.

4. Methodology

This dissertation adopts a doctrinal legal methodology grounded in the classical approach to international law analysis. Thus, it mainly consists of the systematic examination of international law legal sources, including treaties, customary international law, and general principles of international law. Particular attention is also dedicated to the doctrinal debate surrounding the concepts and instruments under analysis, in order to locate majoritarian and minoritarian interpretations of key legal concepts. In addition, the dissertation also considers relevant regulations and practices of States and international organisations, including legislation, executive orders, guidelines, policy documents, official statements, and relevant jurisprudence.

While selected case studies are briefly presented, they do not properly constitute a full qualitative case study methodology – given the absence, *inter alia*, of extensive empirical data and fieldwork – but rather serve as representative examples of the employment of trade-restricting instruments in situations of economic confrontation. The selection of two case studies and one shorter illustrative example of informal coercion is based on their relevance and analytical utility: in this sense, the chosen cases and example are particularly suitable for the purposes of the dissertation, as they constitute paradigmatic illustrations of trade-restricting measures in contexts of economic

confrontation involving the measures analysed, respectively, in Chapters II and III. Accordingly, the analysis of State practice serves to discuss the legal classification of the measures employed, without addressing other qualitative and evaluative aspects such as their economic or political effectiveness, or economic and humanitarian impact.

Beyond legal analysis, the dissertation incorporates a historical dimension, examining the evolution of relevant concepts, principles, instruments, and States' behaviours in economic conflicts. This simultaneous analysis aims to identify continuities and transformations in the employment of trade-restricting measures within economic wars, as well as in their legal framing.[1] In this regard, access to online historical archives and historical academic literature has been crucial in reconstructing the development of both terminology and legal frameworks.

The combination of legal sources, doctrinal scholarship, State practice, and historical literature enriches the study by providing context and insight into the evolution of the legal regulation and development of "economic wars through instruments of trade control". The dissertation thus focuses both on the analysis of fundamental concepts of the international legal order and their articulation to comprehend their functioning within international law, as well as on their interpretation in assessing the lawfulness (or, better, their classification) of the measures examined.[2]

Within this framework, the dissertation also develops two "analytical tools" to support classification and interpretation: namely, a working definition of 'sanction' – provided in Chapter II – and a 'legal classification test', developed in Chapter IV. Notably, these are not intended to suggest the emergence of a novel legal category or classification mechanism, but rather to serve as analytical and methodological tools to systematise and organise the prevailing doctrinal positions on these issues. In this sense, their methodological contribution consists of providing a dissertation-specific structure to address the controversial concept of 'sanction' and the complex process of legal classification of measures, in accordance with predominant doctrinal debates.

Moreover, the classification test is subject to several limitations, as further explored in the Annex. Inter alia, it is confined to trade-restricting measures and does not extend to the broader range of economically coercive instruments available under international law; it is dissertation-specific; the

[1] To be precise, within this dissertation, the study of the historical evolution of legal instruments and their legal framework is exclusively aimed at illustrating their development, and does not either suggest or provide a critique of power and international law-making. On the relationship between international law and history, *inter alia*, refer to Jens B., *Historicizing International Law*, in Klamberg M., Svanberg K., Rönnelid L. (eds), *Reconstructing Power and Hegemony in Public International Law*, Asser Press, Springer, 2026, pp. 251-262; Koskenniemi M., *Why History of International Law Today?*, Zitiervorschlag: Rechtsgeschichte, no. 4, 2004, pp. 61-66; Orford A., *What is the History of International Law For?*, Global Intellectual History, Vol. 9, no. 6, 2024, pp. 760-782.

[2] According to Corten O., *Méthodologie du droit international public*, Éditions de l'Université de Bruxelles, 2024, pp. 23-27, and p. 32, these objectives correspond to two methods of analysis of international law, *i.e.* the analytical theory of law (literally, *théorie (analytique) du droit*), and the legal technique (literally, *technique juridique*).

"category" nodes of "sanction under the working definition" and "domestic measures justified under GATT exceptions" do not correspond to formally recognised categories of international law; it relies on official declarations and stated justifications whose necessary interpretation limits classificatory precision; it is mainly designed for unilateral measures; and it is significantly undermined where measures are adopted through informal channels, lacking any declared legal basis or stated justification.

Finally, the analysis and methodology remain strictly legal and grounded in international law sources. As noted above, the dissertation does not engage in qualitative or quantitative assessments of the events analysed, nor does it address economic and political evaluations of the measures' effectiveness or humanitarian impact. The general objective is instead to provide a coherent and rigorous legal analysis of both the broader confrontational context – specifically, the legal nature and significance of "economic wars" – and of the trade control instruments most frequently employed within such contexts.

5. Structure of the dissertation

In addition to this general introduction, this dissertation consists of four chapters, followed by concluding remarks, an annex and bibliography.

Chapter I is titled *"Economic war" through the lens of international law: characterisation and boundaries*. It analyses in depth the origins and the legal significance under international law of the much-used term 'economic war' (Section 2), beginning from the analysis of the fundamental, yet controversial, concept of 'war' under international law (section 2.1.), to then discuss its possible declination to economic conflicts (section 2.2.) Subsequently, the key character of economic wars, *i.e.* economic coercion, is analysed (Section 3): after a brief overview of the main attempts to define and regulate this concept (section 3.1.), the relationship between economic war and economic coercion is investigated (section 3.2), moving then to a brief listing of the main instruments of economic coercion (section 3.3.). The following section analyses the legal thresholds of economic coercion and economic wars (Section 4), by mainly assessing the potential classification of economic coercion as use of force under Article 2 (4) UN Charter (section 4.1.), the possibility of claiming self-defence in response to economic 'aggression' (section 4.2.), and the qualification of economic coercion as a violation of the principle of non-intervention (section 4.3.) considering both the perspective of international law (section 4.3.1.) and doctrinal debates (section 4.3.2.). The concluding remarks of Chapter I (Section 5) summarise the main discussions of the chapter.

Chapters II and III provide an in-depth analysis of the most commonly employed trade-restricting instruments in economic wars: Chapter II is titled *Trade instruments designed to coerce*,

whereas Chapter III is titled *Trade instruments implemented to coerce: shifting from specific trade objectives to coercive purposes*. The thesis acknowledges and commits to a generally accepted doctrinal categorisation of trade instruments: namely, those measures that 'sanction' (and coerce) other States, and those measures whose nature is strictly commercial, but are occasionally employed with coercive intent.

Chapter II focuses on *Trade instruments designed to coerce*, by firstly presenting the scholarly debate over the definition and legal significance of the term 'sanction' under international law and then providing a working definition of the term for this specific dissertation (Section 2). The remaining part of the Chapter examines a selection of the main 'sanctioning' tools, as also recognised by the majority of the doctrine. Beginning from the United Nations (UN) framework (Section 3), the Chapter firstly analyses its predecessor, *i.e.* the League of Nations, and its 'economic weapon' as per Article 16 of the Covenant (section 3.1.); and, then the UN framework (section 3.2.) with particular attention to UNSC powers according to Chapters VI and VII UN Charter (section 3.2.1.); Article 39 UN Charter and the UNSC discretion (section 3.2.2.); the non-armed measures (or 'sanctions') under Chapter VII (section 3.2.3.), together with their implementation procedures and the role of UN MS (section 3.2.4) and some final remarks on the UN sanctions system (section 3.2.5.). The second main instrument presented is the countermeasures under the International Law Commission's Draft on Responsibility of States for Internationally Wrongful Acts (ARSIWA) (Section 4), within which the admissibility and lawfulness of third-party countermeasures is discussed (section 4.1.), together with their relationship with the term 'sanction' (section 4.2.) and their limits and vulnerabilities (section 4.3.). A section is then dedicated to the European Union's restrictive measures (Section 5), concerning their legal framework (section 5.1.) and qualification under international law (section 5.2.). The following section instead focuses on unilateral sanctioning measures (Section 6), by firstly analysing the United States of America's legal framework (section 6.1.), and secondly those EU unilateral instruments falling outside the classification of restrictive measures *per se* although still pursuing a sanctioning objective, namely the EU Blocking Statute and the Anti-Coercion Instrument (section 6.2.). Some conclusive remarks (Section 7) reflect on the concept of 'sanctions' under international law and on the tendency to collapse different legal instruments under the single category of sanctions.

Chapter III focuses on *Trade instruments implemented to coerce: shifting from specific trade objectives to coercive purposes*. Beginning from the World Trade Organization (WTO) framework on measures restricting trade (Section 2), the section firstly highlights the evolution of these measures within the multilateral trading system (section 2.1.) and then subdivides the measures into WTO-regulated trade control measures (section 2.2.) and in WTO-justifiable trade-restrictive measures (section 2.3.). Within the first category – *i.e.* WTO-regulated trade control measures (section 2.2.) –

the trade control measures are analysed in relation to the provisions of the General Agreement on Tariffs and Trade (GATT) and of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) (section 2.2.1.), and then discussed with regard to their legal categorisation under international law (section 2.2.2.). The second category – *i.e.* WTO-justifiable trade-restrictive measures (section 2.3.) – likewise firstly presents the justifications and exceptions for these measures under WTO law (section 2.3.1.) and afterwards, their legal categorisation under international law (section 2.3.2.). Concluding the section dedicated to the WTO framework is a short examination of DSU exclusivity and of the scholarly debate over the so-called "non-WTO countermeasures" (section 2.4.), together with some final remarks concerning the shift towards coercive intent of the presented WTO trade-restricting measures (section 2.5.). The second main section of Chapter III deals with commercial policy measures (Section 3), by firstly analysing the US most-relied on instruments (section 3.1.) – namely Section 232 US Trade Expansion Act and Section 301 US Trade Act – and afterwards the EU Common Commercial Policy (CCP) (Section 3.2.). Within the EU analysis, the main differences between CCP and CFSP measures are briefly explored (section 3.2.1.), together with the recent EU unilateral trade measures shifting towards coercive trade policies (section 3.2.2), and the EU Economic Security Strategy and updated Doctrine (section 3.2.3.). Conclusive remarks of the chapter (Section 4) highlight the crisis of multilateralism, and the increased reliance by States and regional organisations on unilateral trade measures originally designed to regulate and protect industries with coercive purposes.

Chapter IV, titled *Economic (trade) wars in action: past and present economic trade conflicts*, begins with the presentation of the developed classification test within the introduction (Section 1), before turning to the analysis of the "sanctions war" *par excellence*, namely that between Western States and the Russian Federation (Section 2), briefly presenting the measures following the 2014 annexation of Crimea (section 2.1.), and the expansions of sanctions after the 2022 aggression against Ukraine (section 2.2.), to then concentrating on the legal qualification of the measures of both parties (section 2.3.). Similarly, the second selected case study – namely, the "trade war" *par excellence* between the US and China – is analysed (Section 3) beginning from its initial measures of 2018 (section 3.1.) to the 2020 deal and the 2025 developments (section 3.2.), to then conclude with a discussion on the legal qualification of the measures of both parties (section 3.3.). The China-Lithuania conflict is analysed as an illustrative example of informal coercion within the wider discussion on trade restrictions as means of formal and informal economic coercion, where the shifting of objectives towards geopolitical and security interests is also presented (Section 4). Conclusive remarks (Section 5) illustrate the transformation of international relations and

international economic law, being now characterised by the erosion of both multilateralism and existing categories of international law.

The final conclusions synthesise the dissertation's findings, highlighting the structural limitations of international law in addressing economic confrontations and outlining the resulting challenges for the legal classification of the trade control measures most frequently employed. The annex presents a brief legend of the classification test developed in Chapter IV and outlines its limitations. The bibliography, notably, includes the sources consulted and analysed that informed and shaped this dissertation.

Chapter I

"Economic war" through the lens of international law: characterisation and boundaries

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1. Introduction

In recent years, the concept of "economic war" has gained increasing prominence in both academic and strategic discourse. This development reflects the intensification of geopolitical conflicts, and the proliferation of trade disputes, as well as the growing reliance on unilateral economic measures as means to conduct inter-State economic relations.

States have progressively turned to economic instruments over military confrontations in order to exert influence, protect national strategic interests, or respond to breaches of international norms. The blurring of the boundaries between economic policies and conflicts led to the frequent invocation of the term "economic war" as a way to describe confrontations between States occurring reciprocally through economic restrictions.

The term "economic war" is now frequently encountered in academic discourse, international and national media, politics, and public debate. However, despite its widespread usage, the notion remains conceptually vague, undefined, and unregulated within the international legal framework. The absence of a precise definition and legal framework gives rise to significant questions regarding its classification, the instruments involved, and its relationship to fundamental principles of international law. Although the terminology "war" appears to suggest a connection with the framework governing armed conflicts and the use of force, economic wars substantially differ from it.

Typically, "economic war" is employed to describe a variety of non-armed inter-States conflicts in which States strategically and reciprocally target each other's economies. These conflicts pursued through economic means encompass a wide range of objectives, including the disruption of the targeted State's economy; political purposes; the achievement of strategic or competitive advantages; responses to violations of international law; the protection of the domestic economy; deterrence; and, the influence of the behaviour of other States.

The instruments employed to conduct economic wars are equally diverse. States rely on various economic restrictive tools that all aim at the economies of other States but may concentrate on distinct aspects of the economy, such as finance, monetary policy, and trade. These include sanctions, tariffs, export controls, subsidies, investment restrictions, or other economic instruments. The present dissertation focuses particularly on trade measures as crucial instruments in the conduct of economic wars.

Central to "economic wars" is economic coercion, intended as the employment of economic instruments to influence another State. It constitutes the means by which economic wars are conducted, and is thus essential to analyse its evolution and its relationship with crucial principles of international law. To be precise, economic conflicts do not necessarily include the element of unlawful coercion. Not every restrictive economic measure automatically reaches the threshold of unlawfulness of coercion, since some measures may constitute solely unfriendly economic actions, while others may amount to retorsions, namely unfriendly but lawful acts under international law.[3]

This chapter is dedicated to unpacking the meaning and legal relevance of the concept of "economic war", with particular attention to the notion of economic coercion. An analysis of the origins and legal ambiguity of the concept of economic war is addressed in Section 2. Section 2.1. explores the traditional notion of war in international law, tracing its historical development and its

[3] Chapter II of this dissertation examines trade instruments designed to coerce – including United Nations non-armed measures, countermeasures, European Union restrictive measures, and unilateral sanctioning measures – with brief mention also of retorsions and reprisals.

codification in international law as use of force. Section 2.2. focuses on the possible application of the concept of war to economic conflicts, examining whether economic war might be equated to armed conflicts, and whether it constitutes a legal concept *per se* or, rather, a rhetorical and political notion of convenience.

Subsequently, Section 3 focuses on the concept of economic coercion. This notion is indeed of fundamental importance within the context of economic conflicts, and is a central component of numerous economic instruments. Section 3.1 reviews the attempts to define and regulate economic coercion within international law, underlining the absence of a uniform definition but the presence of notable attempts within important drafting sessions and the explicit reference within international instruments such as the Charter of the Organization of American States (OAS), and the EU Anti-Coercion Instrument. Section 3.2. addresses the relationship between the concepts of economic wars and economic coercion, while Section 3.3. provides a brief overview of the instruments most commonly employed coercively but refers to Chapters II and III of this dissertation for a more in-depth analysis.

Section 4 explores the potential legal thresholds of economic coercion and, consequently, of economic wars. Section 4.1. examines the potential classification of economic coercion as use of force under Article 2 (4) UN Charter, while Section 4.2. assesses the possibility of classifying economic measures as "armed attacks" capable of triggering the right of self-defence under Article 51 UN Charter. Section 4.3. focuses on whether economic coercion might amount to a violation of the principle of non-intervention, both from a customary international law point of view (Section 4.3.1.) and from the doctrinal debate (Section 4.3.2.). Finally, Section 5 offers some conclusive remarks, summarising the key findings of the chapter concerning the conceptual ambiguity and legal significance of "economic war", and highlighting the challenges of incorporating this concept and its core element – economic coercion – with existing principle of international law.

The chapter seeks to shed light on the characterisation and legal boundaries of "economic war" and economic coercion, by analysing their conceptual foundations, examining their relationship with crucial principles of international law, and by assessing the current international legal framework governing economic confrontations between States.

2. Origins and legal ambiguity of the concept of "economic war"

2.1. The traditional notion of war in international law

At first glance, the meaning of the term 'war' appears straightforward,[4] yet its precise contours – both in terms of definition and legal determination – remain blurred and controversial. International law traditionally classifies norms on the use of armed force into two categories: *ius ad bellum* and *ius in bello*.[5] Historically, international law did not prohibit the use of armed force, granting States an «unlimited *ius ad bellum*»,[6] but bound by *in bellum* rules governing its modalities.[7] The regulation and legitimacy of 'war' dates back to ancient Greece,[8] later refined through moral arguments and legal thoughts[9] also focusing on identifying 'just causes' of war.[10]

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[4] The Oxford English Dictionary (OED) interestingly subdivides the meaning and uses of the noun 'war' in (i) senses relating to armed conflicts, and in (ii) figurative senses relating to hostility, opposition, or competition. The word 'war' originates from late Old English *wyrre* or *werre* (as «large-scale military conflict») derived from Old French *werre* («difficulty, dispute; hostility; fight, combat, war»), and Old High German *werra* («confusion, disruption, harm»), related to the German *verwirren* meaning «to confuse,[…] bring into confusion». This root influenced not only the English term "war" but also "guerra" in French, Catalan, Spanish, Portuguese, and Italian languages. The Latin word for war, *bellum*, was considered as too similar to *bellus*, meaning kind, pleasant, thus, linguistic developments tended to employ more the abovementioned terms related to "*werra*" rather than those related to the Latin "*bellum*". Some aspects, however, remained influenced by the Latin words: among others, the terms "belligerent" or "bellicose" refer to individuals involved in war conflicts. In this regard, *inter alia*, refer to Oxford English Dictionary, *War*, online edition, last accessed on 18 March 2025; Online Etymology Dictionary, *War*, last accessed on 18 March 2025; and Clapham A., *War*, Oxford University Press, 2021, p. 40. According to the Castiglioni L., Mariotti S., *Latin-Italian/Italian-Latin Vocabulary*, 3rd Edition, Loescher Editore, 1996, the Latin word 'bellum' not only means (i) war [lit. guerra]; but also (ii) fighting, battle [lit. combattimento, battaglia] ; (iii) (in the plural form) army/military, weapons, troops [lit. esercito, armi, truppe]; and (iv) (figuratively) war, fight, dispute, and unfriendliness/hostility [lit. Guerra, lotta, contesa, inimicizia].

[5] Notably, *ius ad bellum* regards the conditions under which States may resort to war or to the use of armed force, while the *ius in bello* regulates the conduct of parties involved in an armed conflict.

[6] Ronzitti N., *Diritto internazionale dei conflitti armati*, Giappichelli, 2023, p. 23. Similarly, Gioia A., *Diritto internazionale*, Giuffrè Francis Lefebvre, 2022, p. 444.

[7] As it is known, in order to establish a "state of war", at least one of the involved States should have demonstrated its willingness to engage in war (*i.e. animus bellandi*), either explicitly through a declaration of war (or *ultimatum*) or implicitly through a manifest behaviour (*e.g.* the application of *ius ad bello*).

[8] Philosophers like Aristotle and Cicero introduced the earliest framework regulating the use of force. In this regard, Henderson C., *The Use of Force and International Law*, Cambridge University Press, 2nd Edition, 2024, pp. 24-25; O'Brien J., *International Law*, Cavendish Publishing Limited, 2001, pp. 673-674. A very much interested and detailed analysis on Ancient Greeks' approach to war is provided by Alonso V., *War, Peace, and International Law in Ancient Greece*, in Gazzini T., Tsagourias N. (eds), *The Use of Force in International Law*, Routledge, 2016, pp. 3-22. Clapham A., *War*, op. cited above, p. 40 highlights how ancient Greeks and Chinese employed the term 'war' to indicate conflicts occurring with foreign populations, distinguished from those within the same populations (nowadays described as 'civil war').

[9] For instance, Saint Augustine and Saint Thomas Aquinas, integrated Christian principles into the Roman conception of war, deeply influencing the European tradition. In this regard, Von Elbe J., *The Evolution of the Concept of the Just War in International Law*, in Gazzini T., Tsagourias N. (eds), *The Use of Force in International Law*, op. cited above, pp. 23-46, pp. 24-30. Similarly, Henderson C., *The Use of Force and International Law*, op. cited above, pp. 24-25. On the conception of war and peace by the Islamic religion, refer to Tibi B., *War and Peace in Islam*, in Gazzini T., Tsagourias N. (eds), *The Use of Force in International Law*, op. cited above, pp. 47-64; O'Brien J., *International Law*, op. cited above, p. 674. Philosophers such as Rousseau pinpointed war as a conflict fought between States and not individuals, while legal philosophical scholars such as De Legano J. and Bartolus perceived war as «an institution of the general law of the Empire» strictly connected with the institute of reprisals and with the Divine law. In this sense, Clapham A., *War*, op. cited above, p. 20. *Inter alia*, refer to the Rousseau J-J.' works: Rousseau J-J., *A Lasting Peace Through the Federation of Europe and The State of War*, 1756; and Rousseau J-J., *The Social Contract*, 1762.

[10] In the 1500s, thinkers began to discuss more intensively the need for a just cause to engage in war. *Inter alia*, de Victoria F. argued that differences of religion, desire to expand empire, or the promotion of «personal glory of the ruler» could not

Following the 1648 Peace of Westphalia, resort to force or war was recognised as a right of States to pursue their prerogatives or protect their security and interests,[11] thus, conceiving war as a tool of statecraft «or 'a pursuit of policy by other means'»[12] beyond the reach of international law. In the 19th and early 20th centuries, positivist scholars rejected the just/unjust war distinction, treating war either as a legal remedy of international law, or as an act falling outside the framework of the international legal system,[13] distinguishing it from uses of force "short of war" that instead occur outside a war during times of peace.[14] During this period, war became a formal legal institution,[15] and the «first collective security regime» – the Concert of Europe (1815-1914) –[16] emerged to maintain stability among States.[17]

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be valid justifications to resort to war – thereby contributing to the development of the concept of "proportionality. In this regard, Von Elbe J., *The Evolution of the Concept of the Just War in International Law*, in Gazzini T., Tsagourias N. (eds), *The Use of Force in International Law*, op. cited above, pp. 32-34. Similarly, O'Brien J., *International Law*, op. cited above, pp. 673-675. Notably, Grotius refined the 'just war theory' by individuating defence, recovery of property, and punishment as "just causes" – "Unjust causes" were identified, instead, in those justifications grounded on the desire to acquire lands or to oppress people, as provided by Von Elbe J., *The Evolution of the Concept of the Just War in International Law*, in Gazzini T., Tsagourias N. (eds), *The Use of Force in International Law*, op. cited above, pp. 36-37 – and is recognised to have remarkably contributed to the evolution of the concept bridging theological and legal traditions. Accordingly, Lesaffer R., *Too Much History: From War as Sanction to the Sanctioning War*, in Weller M. (ed), *The Oxford Handbook of the Use of Force in International Law*, Oxford University Press, 2015, pp.35-55, pp. 35 and 41 arguing that Grotius brought «the theological-canonist tradition of just war [at its closest] with the civilian tradition of legal war». Similarly, Henderson C., *The Use of Force and International Law*, op. cited above, p. 25.

[11] Henderson C., *The Use of Force and International Law*, op. cited above, p. 25. Refer also to, Lesaffer R., *Too Much History: From War as Sanction to the Sanctioning War*, in Weller M. (ed), *The Oxford Handbook of the Use of Force in International Law*, op. cited above, p. 46; and, O'Brien J., *International Law*, op. cited above, p. 675.

[12] Henderson C., *The Use of Force and International Law*, op. cited above, p. 25. An interesting analysis of the history and on the interconnection between war and law is provided by Kennedy D., *Of War and Law*, Princeton University Press, 2006.

[13] The first strand of doctrine envisioned war as an institution of international law enabling remedies against a "legal wrong", while the other part of the doctrine perceived war as being outside the framework of the international legal system since international law neither instituted it nor specifically authorised. *Inter alia*, for Grotius war was a legal remedy for the assertion of rights; while for positivists war was an act part of the «uncontrolled sovereignty of the individual state». On this regard, Von Elbe J., *The Evolution of the Concept of the Just War in International Law*, in Gazzini T., Tsagourias N. (eds), *The Use of Force in International Law*, op. cited above, p. 42-43.

[14] Gioia A., *Diritto internazionale*, op. cited above, p. 444. While international law continued to recognise "war" as a sovereign right of States, the use of force short of war began to require legal justification as it inevitably implied a violation of other States' sovereignty and the inapplicability of the *ius in bello*, since – effectively – there was no war happening.

[15] The conception of "war" shifted from a «*de facto* engagement» of two States' armed forces to a formal event with applicable rules.

[16] Henderson C., *The Use of Force and International Law*, op. cited above, pp. 26-27. It is not pacific when the Concert of Europe ceased to exist: some claim it ended with the end of France's threat, others with the collapse of the congress system in Verona in 1822, others in 1848 with the change of consensus, or in 1853/4 with the Crimean War, or in 1914 with the institutional closure and dismissal of officials. Reporting the different doctrinal opinions, among others, Richardson L., *The Concert of Europe and Security Management in the Nineteenth Century*, in Haftendorn H., O Keohane R., Wallender C. (eds), *Imperfect Unions: Security Institutions Over Time and Space*, Oxford University Press, 1999, pp. 48-79, p. 56. The author then proposes a reading of the Concert of Europe' existences as operating in four distinct phases (pp. 57-ss): (i) 1815-1818 (phase of technical cooperation); (ii)1818-1822 (phase of the congress system); (iii) 1822-1848 (phase of management – or self-restraint – of their security relations); and, (iv) 1848-1856 (phase of erosion: the revolution of 1848 and the outbreak of the Crimean War).

[17] The Concert, formed by Austria, the United Kingdom, Prussia, Russia, and France, was indeed established to maintain stability after the Napoleonic Wars through «an oligarchy [managing these countries'] security relations». In this regard, Richardson L., *The Concert of Europe and Security Management in the Nineteenth Century*, in Haftendorn H., O Keohane R., Wallender C. (eds), *Imperfect Unions: Security Institutions Over Time and Space*, op. cited above, p. 51. To be precise, France was admitted to the Congress of Aix-la-Chapelle in 1818.

Although the Concert of Europe developed a relatively advanced framework,[18] States could still decide to engage in war without the obligation to demonstrate a specific legal ground, a requirement instead present for certain self-defence instruments – such as armed reprisals.[19] Proper limitations to war and to the use of force within international relations developed from the 20th century, notably with the 1907 Second Hague International Peace Conference.[20] Notably, this embryonic regulation did not prevent the outbreak of the First World War,[21] whose devastations nonetheless discredited the view of war as an «disagreeable but necessary […] aspect of state power»,[22] prompting the creation of a new collective security regime under the League of Nations.

The League of Nations, established in 1919, constituted the first international organisation aimed at promoting «international cooperation and […] achiev[ing] international peace and security».[23] Its Covenant reflected this commitment: the Preamble recalled the obligation for States not to resort to war,[24] while Article 11 placed the management of war and of threats of war in the

[18] Indeed, there were agreed upon a quite advanced set of rules and procedures, including, *inter alia*, self-restraint, consultations in times of crisis and collective decision-making process; cooperation and intervention by multilateral action; assurance of pacific intent; commitment to the maintenance of stability; the creation of buffer states; prior approval of territorial changes; pacific settlement of disputes; and others. In this sense, a more detailed analysis is provided by Richardson L., *The Concert of Europe and Security Management in the Nineteenth Century*, in Haftendorn H., O Keohane R., Wallender C. (eds), *Imperfect Unions: Security Institutions Over Time and Space*, op. cited above, pp. 52- 53 which, in the following pages, further explores the Concert of Europe's structure and functioning. Scholarly debates discuss whether the experience of the Concert of Europe accounts for an effective collective institutional security regime governed by law, or whether it simply represented a political alliance reflecting the distribution of power of that time. On this debate, among others, Henderson C., *The Use of Force and International Law*, op. cited above, p. 27 which perceives the Concert of Europea as «an alliance of political convenience between the great powers of the time and represented more a 'balance of power'» rather than a system of collective security; and, on the contrary, Richardson L., *The Concert of Europe and Security Management in the Nineteenth Century*, in Haftendorn H., O Keohane R., Wallender C. (eds), *Imperfect Unions: Security Institutions Over Time and Space*, op. cited above, p. 53 which instead – although acknowledging that «certainly, the arrangement was not impervious to the distribution of power» – also precises that «the view of the Concert as a gathering of five roughly equal powers is also misplaced» and concludes that «the Concert was a security management institution».

[19] Ronzitti N., *Diritto internazionale dei conflitti armati*, op. cited above, pp. 23-24.

[20] The First Hague Peace Conference dates back to 1899, when it was convened on the initiative of Nicholas II, Czar of Russia. According to the Final Act, the "guiding sentiment" of the Conference was the following: «The Conference is of opinion that the restriction of military charges, which are at present a heavy burden on the world, is extremely desirable for the increase of the material and moral welfare of mankind». In this sense, refer to Final Act of the International Peace Conference, The Hague, 29 July 1899. As it is known, the Hague Conferences and Conventions limitedly addressed the issues, most notably requiring that war should be preceded by a formal declaration.

[21] Nonetheless, some authors argue that stronger legal restraints on States' actions would not have necessarily prevented the WWI. In this regard, Henderson C., *The Use of Force and International Law*, op. cited above, p. 27.

[22] O'Brien J., *International Law*, op. cited above, p. 676.

[23] Preamble of the Covenant of the League of Nations, 1919. Further elements on the League of Nations and on its historical overview are provided in this dissertation, in Chapter II, section 3.1.

[24] The Preamble of the Covenant of the League of Nations, 1919, states that the parties agreed to the Covenant «in order to promote international co-operation and to achieve international peace and security, *by the acceptance of obligations not to resort to war*, by the prescription of open, just and honourable relations between nations, by the firm establishment of the understandings of international law as the actual rule of conduct among Governments, and by the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organised peoples with one another» (emphasis added).

hands of the League.[25] Subsequent Articles outlined a framework to prevent resort to war by peaceful dispute resolutions (*e.g.* arbitration or judicial settlement),[26] good faith obligations,[27] and compliance with recommendations.[28] Article 16 – which is further analysed in Chapter II, section 3.1. – stipulated that any Member resorting to war would be considered to have committed an act of war against all other members, which could in turn impose measures such as, *inter alia*, the severance of trade and financial relations.[29] Notably, although the prohibition of resorting to war has been a landmark achievement of the League of Nations, the League's framework remained fragile: several exceptions to the non-use of force existed,[30] and key global actors were absent – most notably, the United States of America, which never joined the League.[31] Efforts to strengthen and develop the legal framework

[25] Article 11 of the Covenant of the League of Nations, 1919, establishes that «any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations. In case any such emergency should arise the Secretary General shall on the request of any Member of the League forthwith summon a meeting of the Council».

[26] In this regard, Article 12 of the Covenant of the League of Nations, 1919, which argues that in case of «any dispute likely to lead to a rupture», the League' members agreed to «submit the matter either to arbitration or judicial settlement or to enquiry by the Council, and […] in no case to resort to war until three months after the award by the arbitrators or the judicial decisions, or the report by the Council».

[27] Article 13 of the Covenant of the League of Nations, 1919, reiterated that the League' members agreed to «carry out in full good faith any award or decision that may be rendered, and that they will not resort to war against a Member of the League which complies therewith»

[28] Article 15 of the Covenant of the League of Nations, 1919, establishes that «the Members of the League agree that they will not go to war with any party to the dispute which complies with the recommendations of the report».

[29] Article 16 of the Covenant of the League of Nations, 1919. Article 17 of the Covenant of the League of Nations extends this provision to non-member States. As such, whenever a State «so invited shall refuse to accept the obligations of membership in the League for the purposes of [a] dispute, and shall resort to war against a Member of the League», Article 16' provisions would be applicable. The economic measures adoptable by the League' members in response to an act of war *ex* Article 16 Covenant are analysed in Chapter II of this dissertation, in section 3.1., where the evolution and the regulation of the League's "economic weapon" is presented.

[30] *Inter alia*, (i) the necessity to wait (solely) three months after the award, decision or report before being able to resort to war (Art. 12 Covenant); and, (ii) the possibility to resort to war with parties not compliant with the recommendations of the report (Art. 15 Covenant); (iii) the opportunity to resort to war in case awards and judicial decisions were not enact within «a reasonable time» and in case the Council report was not provided within six months after the submission of the dispute» (Art. 12 Covenant). To be precise, Article 12 of the Covenant does not explicitly provide that in case of failure of reaching an award, judicial decision, or Council report, States were entitled to resort to war. Nonetheless, this might be inferred by the provision, according to many authors such as, among others, Henderson C., *The Use of Force and International Law*, op. cited above, p. 28; Lesaffer R., *Kellogg-Briand Pact (1928)*, in Max Planck Encyclopediae of Public International Law, 2011, paragraph 9. Authors highlight that the Covenant text did not effectively provide a framework for a general and total prohibition to resort to war. In this sense, Brierly J.L., *Some Implications of the Pact of Paris*, British Yearbook of International Law, Vol. 10, 1929, pp. 208-223; Henderson C., *The Use of Force and International Law*, op. cited above, p. 28; Lesaffer R., *Kellogg-Briand Pact (1928)*, op. cited above, paragraph 9. Ronzitti N., *Diritto internazionale dei conflitti armati*, op. cited above, p. 24 notices that the League of Nations Covenant also failed to prohibit "violent self-defence procedures different from war" (lit. «procedimenti di autotutela violenta diversi dalla guerra») since the system solely referred to "war", thereby being still lawful and legitimate actions such as armed reprisals. An interesting comment on the League of Nations' regulation of war – and, more generally, on the concept and history of war – is provided by Neff S.C., *War and the Law of Nations: A General History*, Cambridge University Press, 2005.

[31] A presentation of the League of Nations' formation and its development through the involved League of Nations MS is provided in this dissertation, in Chapter II, section 3.1.

– such as the 1923 Draft Treaty on Mutual Assistance and the 1924 Protocol for the Settlement of International Disputes – failed to achieve a sufficient number of ratifications to enter into force.[32]

A successive important instrument was the 1928 General Treaty for the Renunciation of War, commonly known as the "Kellogg-Briand Pact" or "Pact of Paris",[33] which declared the parties' renunciation to war as an instrument of national policy.[34] Despite being generally accepted with reservations and lacking an enforcement mechanism,[35] the Pact influenced States, doctrinal debates, and subsequent texts such as the UN Charter.[36]

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[32] The Protocol condemned the use of force and restricted force to acts of aggression or where it had been sanctioned by the League of Nations Council. In this regard, O'Brien J., *International Law*, op. cited above, p. 677.

[33] These two denominations derive – in the first case – from the American Secretary of State and the French Foreign Minister that drafted it, and – in the second – from the city of signature.

[34] This Pact drafted by the United States of America and France, was influenced by the League of Nations Covenant provisions and by the Protocol's basic ideas. Still into force, it comprises three articles – two substantive and one procedural on ratifications and implementation – mainly declaring the parties' renunciation to war as an instrument of national policy and committing the parties to peaceful resolutions of disputes. In this regard, Henderson C., *The Use of Force and International Law*, op. cited above, p. 28; Lesaffer R., *Kellogg-Briand Pact (1928)*, op. cited above, paragraph 8; Ronzitti N., *Diritto internazionale dei conflitti armati*, op. cited above, p. 25; and, O'Brien J., *International Law*, op. cited above, p. 677. Articles I and II focus respectively on the parties «solemnly declar[ing…] that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another» (Art. I Kellogg-Briand Pact), and on the parties' agreement that settlement or solution of all disputes or conflicts «of whatever nature or of whatever origin they may be, which may arise among [the parties], shall never be sought except by pacific means» (Art. II Kellogg-Briand Pact). The Pact, which is still into force, was initially signed and ratified by 15 States (*i.e.* Germany, the United States, Belgium, France, Great Britain, Canada, Australia, New Zealand, South Africa, Ireland, India, Italy, Japan, Poland and Czechoslovakia), and was then acceded to by other 48 States, reaching a total of 63 Member States. Interestingly, Lesaffer R., *Kellogg-Briand Pact (1928)*, op. cited above, reports (at paragraph 2) that France and Great Britain made reservations, while Japan and the United States submitted interpretative statements. When the member States reached 63 parties, the Pact included all the members of the League of Nations except for Argentina, Bolivia, El Salvador and Uruguay. The USSR, Egypt and Persia rejected the reservations of other States at their accession, while Nepal, San Marino and Yemen, which were not members of the League, did not accede to the Pact. Refer also to the subsequent paragraphs of the above-mentioned article where the author provides a detailed historical description of the context and the drafting stages of the Pact.

[35] Significant weaknesses of the Kellogg-Briand Pact include (i) the lack of an enforcement mechanism in case of violations of the prohibition to recourse to war; (ii) the absence of a definition of the term "war" and of the specification of whether it considered solely declared wars or also other types of uses of force such as reprisals, self-defence, or forcible interventions; (iii) the presence of many States' reservations and interpretative statements; (iv) the classification of war as «an instrument of national policy» (Art. I Kellogg-Briand Pact), implying that resort to war for purposes other than national policy – such as for "international" policies – might not be prohibited; (v) the provision to "seek" the settlement of disputes through pacific means (Art. II Kellog-Briand Pact), and not the obligation to settle their disputes in such a way; (vi) the failure to address the totality of the international community, limiting the application of the Pact (and the prohibition of recourse to war) solely to the contracting parties; and, (vii) the lack of coordination with the League of Nations Covenant. Despite these weaknesses, the importance of Kellogg-Briand Pact is undeniable, especially for its contribution in (implicitly) distinguishing between war of aggression and measures of self-defence. On this, Henderson C., *The Use of Force and International Law*, op. cited above, p. 29; and, Lesaffer R., *Kellogg-Briand Pact (1928)*, op. cited above, paragraphs 11, 12, 13, 15, and, 16; Ronzitti N., *Diritto internazionale dei conflitti armati*, op. cited above, p. 25; and, O'Brien J., *International Law*, op. cited above, p. 677. Interestingly, Ruys T., *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice*, Cambridge University Press, 2010, notices that although no express mention of self-defence was made within the Kellogg-Briand Pact, many States effectively submitted express reservations on that issue.

[36] Scholars notice the Pact' influence in the UN Charter, in doctrinal approaches upholding the illegality under customary international law of the use of force "as an instrument of national policy" (except for self-defence cases), and in States' preference to qualify armed actions as «measures short of war, most frequently as self-defence» to avoid the qualification of formal war. In this sense, Lesaffer R., *Kellogg-Briand Pact (1928)*, op. cited above, paragraph 18. Similarly, on the first element, Henderson C., *The Use of Force and International Law*, op. cited above, p. 29; and, also, Clapham A., *War*, op. cited above, p. 29.

As it is well known, these normative developments did not prevent WWII, but the post-war period marked a decisive moment for the regulation of war and use of force. The UN Charter commits to preventing wars but refrains from using the term "war" – except in references to WWII – preferring instead the term of "use of force".[37] Notably, Article 2 (4) UN Charter – considered the Charter's «cornerstone» –[38] prohibits the "threat or use of force" in international relations,[39] binding both UN MS and non-UN members alike.[40] The Article's precise scope and limitations remain subject to debate,[41] yet – together with the obligation to settle international disputes by peaceful means (Article

[37] The Preamble of the UN Charter of 1945 interestingly states that «we the peoples of the United Nations determined [:] to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind […]». Curiously, further mention of the word "war" within the Charter solely refers to the Second World War, such as in Articles 53, 77, and 107. Respectively, Article 53 (2) UN Charter reads that «The term enemy state as used in paragraph 1 of this Article applies to any state which during the Second World War has been an enemy of any signatory of the present Charter»; Article 77 (1) UN Charter states that «The trusteeship system shall apply to such territories in the following categories as may be placed thereunder by means of trusteeship agreements: (1.) territories now held under mandate; (2.) territories which may be detached from enemy states as a result of the Second World War; and (3.) territories voluntarily placed under the system by states responsible for their administration»; while Article 107 UN Charter provides that «Nothing in the present Charter shall invalidate or preclude action, in relation to any state which during the Second World War has been an enemy of any signatory to the present Charter, taken or authorized as a result of that war by the Governments having responsibility for such action». Interestingly, the UN Charter – and international law – abandoned the more ambiguous term "war" (used in its predecessor, the League of Nations Covenant, but also in the Kellogg-Briand Pact), preferring instead the concept of "use of force", thereby covering also acts involving the use of force that fall short of war, both within *ius ad bellum* and *ius in bello*. In this sense, Henderson C., *The Use of Force and International Law*, op. cited above, p. 30; Ronzitti N., *Diritto internazionale dei conflitti armati*, op. cited above, pp. 25-26; Gioia A., *Diritto internazionale*, op. cited above, p. 445; and, Clapham A., *War*, op. cited above, p. 30. The use of "armed force" is mentioned within the Preamble – *i.e.* «[…] and for these ends [:…] to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest […]» – and in Articles 41 (although in the negative sense, as "measures not involving the use of armed force"), 43, 44, 46, 47, 51 UN Charter (all under Chapter VII of the UN Charter, notably named "Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression"). As mentioned above, Article 41's reference concerns «measures not involving the use of armed force», *i.e.* also called UN "non-armed measures" or "sanctions", which are further explained in this dissertation in Chapter II, section 3.2.

[38] This conception is shared by both scholars and case law. As for the first, *inter alia*, Henderson C., *The Use of Force and International Law*, op. cited above, p. 31; Brierly J.L., *The Law of Nations*, 6th editions, Oxford University Press, 1963, p. 414; Ronzitti N., *Diritto internazionale dei conflitti armati*, op. cited above, pp. 28-29 which indicates the provision as a "fundamental principle", to be now qualified as an "imperative norm of international law" at least in its element of prohibition of aggression (lit. «principio fondamentale, da qualificare ormai come norma imperativa del diritto internazionale, almeno nel suo nucleo essenziale relativo al divieto di aggressione». As for the case law, *inter alia*, International Court of Justice, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, Reports of Judgements, Advisory Opinions and Orders, paragraph 148.

[39] This Article provides that «all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations».[39] As specified by Article 2 (6) UN Charter, also non-MS of the UN are bound to the Principles and, thus, to the prohibition of the use of force enshrined in Article 2 (4) of the UN Charter. Literally, Article 2 (6) UN Charter reads as follow: «The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security». A preliminary distinction within the analysis of the UN Charter's provisions on the use of force concerns (i) those provisions on the use of force of States; and (ii) those provisions on the use of force by the UN Security Council (UNSC). The first category certainly includes Article 2 (4) UN Charter and its exceptions – *e.g.* Article 51 UN Charter on self-defence – while the second category is represented and regulated by Chapter VII of the Charter, especially Article 42 UN Charter. Chapter VII of the UN Charter is further analysed in this dissertation in Chapter II.

[40] This is, arguably, supported by reading the provision in conjunction with paragraph 6 of the same Article.

[41] Scholars have questioned the meaning of «international relations» highlighting the inapplicability of the prohibition to cases of insurgences; while some suggests that the Article wording of prohibiting the threat or use of force «against the

2 (3)), and the establishment of a collective security system under Chapters VI and VII – this development constituted «a revolutionary moment» in the regulation of the use of force under international law.[42] The principle has since been reinforced through its inclusion in crucial international treaties – including the United Nations Convention on the Law of Sea (Arts. 19, 39, and 301),[43] the Rome Statute of the International Criminal Court (Art. 8 *bis*),[44] and the Rio de Janeiro Inter-American Treaty of Reciprocal Assistance (Art. 1)[45]– as well as in customary international

territorial integrity or political independence of any state» implies that force is allowed as long as it does not target the two elements of territorial integrity or political independence; others argue that the specification of «or any other manner inconsistent with the Purposes of the United Nations» would enable certain purposes of the UN – such as the promotion of human rights – to overcome the prohibition in those cases. Describing these arguments, the drafting history of the Article, and the counterarguments is, *inter alia*, Henderson C., *The Use of Force and International Law*, op. cited above, pp. 32-40. On some of these arguments, *inter alia*, Ronzitti N., *Diritto internazionale dei conflitti armati*, op. cited above, pp. 30-33; Gioia A., *Diritto internazionale*, op. cited above, pp. 447-448; Gray C., *The Use of Force and the International Legal Order*, in Evans M.D. (ed), *International Law*, Oxford University Press, 2014, pp. 601-635, pp. 620-626.

[42] Henderson C., *The Use of Force and International Law*, op. cited above, p. 30. Similarly, Ronzitti N., *Diritto internazionale dei conflitti armati*, op. cited above, p. 28. Other scholars, instead, debate whether Article 2 (4) UN Charter was indeed a «revolutionary new provision or whether international customary law had already developed along the lines of Article 2 (4) by the time of the creation of the UN». In this latter sense, Gray C., *The Use of Force and the International Legal Order*, in Evans M.D. (ed), *International Law*, op. cited above, pp. 618-647, p. 619.

[43] United Nations Convention on the Law of Sea (UNCLOS), 10 December 1982. Accordingly, Article 19 – titled "Meaning of innocent passage" – reads as follow, in its paragraph 2: «Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities: (a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations; (b) […]»; Article 39 - named "Duties of ships and aircraft during transit passage" – states, in paragraph 1, that «Ships and aircraft, while exercising the right of transit passage, shall: (a) proceed without delay through or over the strait; (b) refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of States bordering the strait, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations; (c) […]»; and, lastly, Article 301 on "Peaceful uses of the sea" provides that «In exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations».

[44] Rome Statute of the International Criminal Court, 17 July 1998. The Preamble also reaffirms «the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations». Article 8 bis – titled "Crime of aggression" and inserted by resolution RC/Res. 6 of 11 June 2010 – in its paragraph 2, reads that «For the purpose of paragraph 1, "act of aggression" means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression: (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof; (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State; (c) The blockade of the ports or coasts of a State by the armed forces of another State; (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State; (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement; (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State; (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein».

[45] Rio de Janeiro Inter-American Treaty of Reciprocal Assistance (Rio Treaty), 09 February 1947. Article 1 provides that «The High Contracting Parties formally condemn war and undertake in their international relations not to resort to the

law.[46]Although Article 2 (4) does not explicitly list exceptions, two are widely recognised: actions of self-defence *ex* Article 51 UN Charter – analysed in-depth in section 4.2. of this Chapter – and armed actions authorised by the UNSC under Chapter VII UN Charter.

This brief historical overview of the concept of war in international law demonstrates the progressive regulation of the phenomenon, moving from an unlimited sovereign right to an almost total prohibition under the UN Charter. Additionally, it also crucially demonstrates that, although the terminological refinement from "war" to "use of force", the notion continued to strictly indicate and be limited to armed and military conflicts.

Yet, part of the doctrine conceives economic confrontations as constituting "wars" or "uses of force", mainly on the basis of their effects, which are argued to comparably equate to the severity of the harm and consequences produced by armed conflicts.[47] This doctrinal argument is explored further in Section 4 of this Chapter, while the following section examines the preliminary issue of whether the concept of "economic war" may itself be regarded as a legal category under international law. Indeed, if the notions of "war" and "use of force" under international law were to extend to

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threat or the use of force in any manner inconsistent with the provisions of the Charter of the United Nations or of this Treaty».

[46] Most notably, the International Court of Justice, *Nicaragua v. United States* (Military and Paramilitary Activities in and against Nicaragua), Merits, at para 34, provides that «There can be no doubt that the issues of the use of force and collective self-defence raised in the present proceedings are issues which are regulated both by customary international law and by treaties, in particular the United Nations Charter». It is however debated within the doctrine whether also the "threat of use of force" likewise constitutes a norm of customary international law.

[47] The comparable harm of the two phenomena is notably supported by Mulder N., *The Economic Weapon*, Yale University Press, 2022, which compellingly demonstrates the harmful potential of economic measures. Furthermore, as the author observes, economic measures can produce consequences even exceeding those produced by military operations. Indeed, at p. 5, it is reported that «if we compare the three major anti-civilian weapons of the interwar period – air power, gas warfare, and economic blockade – it becomes clear that blockade was by far the deadliest». Building on these and more recent cases – such as the case of Iran sanctions – part of the doctrine contends that certain economic measures should be interpreted as "war" or as "use of force" since they can produce significant humanitarian consequences – sometimes mirroring those resulting from traditional military actions. *Inter alia*, Davis S., Ness I., *Introduction: Why Are Economic Sanctions a Form of War?*, in Davis S., Ness I. (eds), *Sanctions as War: Anti-Imperialist Perspectives on American Geo-Economic Strategy*, Brill, 2022, pp. 1-24, pp. 2-3 which strongly argue for sanctions as a form of war. In this sense, also Whyte J., *Economic Coercion and Financial War*, Journal of Australian Political Economy, no. 90, 2022, pp. 5-25, at p. 9 stating that «Sanctions are weapons of war whose worst effects are on those who lack economic and political power». Arguing for the recognition of these measures as part of the "use of force" framework, instead, Batinga J., *Reconciling the Global North-South Divide on the Use of Force: Economic Coercion and the Evolving Interpretation of Article 2 (4)*, Wisconsin International Law Journal, Vol. 41, no. 2, 2024, p. 142 contending that «it is worth considering whether the acts of economic coercion that result in war-like consequences should be regulated as a use of force»; and, Milaninia N., *Jus ad bellum economicum and jus in bello economico: The Limits of Economic Sanctions Under the Paradigm of International Humanitarian Law*, in Marossi A.Z., Bassett M.R. (eds), *Economic Sanctions under International Law: Unilateralism, Multilateralism, Legitimacy, and Consequences*, Springer, 2015, pp. 95-111, p. 106 which argues that sanctions are «likely to fall short of causing the type of consequences necessary to classify [them] as an act of force», however, «the widespread harm caused by some sanction regimes justifies classification as an act of violence». Refer also to Gross M.L., *Proportionate Self-Defence in Unarmed Conflict*, in Gross M.L., Meisels T. (eds), *Soft War: The Ethics of Unarmed Conflict*, Cambridge University Press, 2017, pp. 217-327, p. 219 arguing that the consequences of economic sanctions are in certain cases – *e.g.* when they cause grave humanitarian crises – «sufficiently severe to permit an armed response». The same author, at p. 228, states that «effective "smart" sanctions […] are permissible soft war tactics». On the argument of including "economic coercion" within the framework of "use of force" – and, thus, possibly be prohibited by Article 2 (4) UN Charter – refer to this Chapter I, Section 4.1.

economic conflicts, measures being part of the so-called "economic wars" could fall within the scope of Article 2 (4) of the UN Charter, thereby being subject to both the prohibition on the threat or use of force and its recognised exceptions.

2.2. The potential declination of the concept of war to economic conflicts

Traditional armed warfare – though not having ceased to exist – has been increasingly discouraged by the international community in favour of other forms of conflict, such as economic confrontation. These economic conflicts are commonly referred to as "economic wars", mainly because they consist of conflicts between States in which both parties employ economic tools to coerce, retaliate, influence, deter, or weaken the other State.[48]

As previously discussed, the concept of "war" lacks a precise definition in international law,[49] yet – although the term is occasionally used by the international community, scholars, and States in relation to events not involving the use of armed force – [50] it is generally recognised that 'war' denotes

[48] As there is no generally accepted legal definition of "war" in international law, the same is true for the notion of "economic war". Dictionaries define "economic war" differently, sometimes referring to armed conflicts (but arguing that «economic war constitutes all economic measures taken, before, during or instead of a military war, to harm an enemy»), or relying exclusively on the economic context (by, for instance, defining economic war as «the deliberate, aggressive use of appropriate means to destroy or devalue human capital, physical capital, intellectual capital, and organizational or social capital of an economic rival by individuals, corporations, and/or states without moral reservations or under their justification or support in a demarcated market to maintain or achieve economic dominance»). Interestingly, the conclusions of an Irish national case law state that «What is remarkable is that, notwithstanding all the argument, no party was in a position to refer to any accepted legal definition of what is mean by war in national or international law. It is equally true that, among the several general dictionaries opened, the word is defined as having a variety of meanings, but these cannot be accepted as constituting a clear legal definition of the word either. […] What seems clear from more modern writing or thinkers is that the position has changed or evolved, and that in more recent times, there are wars, armed hostilities, armed conflicts, police actions, and several phrases used to describe hostilities of one kind or another, not all of which are to be treated in the same way, or in the same way as between each of them and war». Refer to *Dubsky v The Government of Ireland*, The Minister for Foreign Affairs, The Minister for Transport, Ireland and The Attorney General, IEHC 442, 13th December 2005, Conclusions. Refer also to Wiles P.J.D., *Economic War*, The New Palgrave Dictionary of Economics, Palgrave Macmillan, 1987; and, Blum U., *Economic War*, in Marciano A., Ramello G.B. (eds), *Encyclopedia of Law and Economics*, Springer, 2021.

[49] Interestingly, Eagleton C., *The Attempt to Define War*, International Conciliation, Vol. 15, March 1932, pp. 237-287 studies the "missed opportunity" of the League of Nations Covenant to define war by arguing that the aim of the League of Nations was, at that time, to ensure peace and avoid the use of force, thus separating the notion of "war" from other inter-states conflicts was not conceived as a key aspect to regulate. Similarly, Clapham A., *War*, op. cited above, pp. 29-30. It is pacific within legal scholarship that 'war' might consist in a "state" or a situation (*i.e.* "a state of war") and not exclusively in a series of acts of force against another party. In this sense, *inter alia*, Ronzitti N., *Diritto internazionale dei conflitti armati*, op. cited above; Gioia A., *Diritto internazionale*, op. cited above; Brierly J.L., *International Law and Resort to Armed Force*, in Gazzini T., Tsagourias N. (eds), *The Use of Force in International Law*, op. cited above, pp. 67-78, p. 70, at p. pp. 67-68 the author defines war as the most "extreme" form of the use of force, and argues for the existence of «certain measures of coercion by violent means, but not amounting to war and regarded as consistent with the continuance of a state of peace between the parties» (p. 67). It is then presented the example of the 1902' blockage of Venezuela ports implemented by Germany and Great Britain in which, although at first claimed to be a "pacific blockade" was later recognised to be "a state of war".

[50] In this regard, it is nowadays very common to discuss "war against terrorism", "war on terror", "hybrid war", and "economic war".

conflicts in which the parties resort to armed force.[51] This signifies that from the point of view of the current international law framework, the qualification of non-armed events as being all part of the concept "war" is unfeasible.[52]

Nonetheless, part of the doctrine advocates for the recognition of non-kinetic conflicts as "war",[53] often relying on the argument that economic coercion may qualify as "use of force" – an issue already raised in the drafting of the UN Charter.[54] This reasoning is understandable to a certain extent: since economic conflicts are not governed by a universally accepted international law legal framework – as it is instead the case of the use of force, as above presented – comparing economic conflicts to armed conflicts would provide a solid, well-established legal framework also to economic confrontations. Indeed, as recalled earlier, should "economic war" be considered as a "proper war" or as "use of force" from an international perspective, both Article 2 (4)'s prohibition and its exceptions would apply to economic conflicts likewise.

Curiously, Article 16 of the League of Nations Covenant linked the concept of war to economic measures, as States could enact economic "sanctions" as a response to an act of war of another Member of the League.[55] Nonetheless, the fact that economic measures might be enacted by States in response to or as disapproval of another State's war does not imply that economic conflicts amount to "wars" within international law. It is indeed undeniable that armed conflicts are extremely different from economic conflicts in terms of both nature and means used.[56]

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[51] *Inter alia*, Ronzitti N., *Diritto internazionale dei conflitti armati*, op. cited above, p. 150 and p. 153 clearly states that within international law the notion of "war" is intended as "armed conflict". Recent national case law also confirmed that «war refers to armed conflict».

[52] This is shared by most part of the doctrine, which also contests current expressions like "war on terrorism" by arguing that these are concepts proper to political science rather than being rightfully related to the notion of international armed conflicts. In this regard, Ronzitti N., *Diritto internazionale dei conflitti armati*, op. cited above, p. 150 and p. 153.

[53] The entity and content of this argument range widely among scholars, with some advocating for the inclusion of non-armed conflict, and others more specifically providing alternative definitions. *Inter alia*, Clapham A., *War*, op. cited above, p. vi, identifies war as being «sometimes a *state of mind*». According to Wolfendale J., *Defining War*, in Gross M.L., Meisels T. (eds), *Soft War: The Ethics of Unarmed Conflict*, op. cited above, pp. 3-19, p. 16, a war exists when «(1) there are two or more organized groups; (2) these groups are engaged in intense hostilities; (3) no party to the conflict and no other third party has the authority and ability to effectively adjudicate between the opposing sides, punish them, and otherwise maintain effective control in the arena of the conflict».

[54] This conception is opposed to the traditional interpretation of Article 2 (4) UN Charter, which considers economic coercion to be excluded by its applicability to cases of "use of force". This perspective, together with the counterarguments of the doctrine supporting the qualification of certain cases of economic coercion as a violation of Article 2 (4) UN Charter is presented in section 4.1. of this Chapter where the concept of economic coercion is analysed in-depth.

[55] Article 16 of the League of Nations Covenant is explored in detail within Chapter II of this dissertation, together with its successor Article 41 of the UN Charter. In this regard, refer to Section 3, Chapter II.

[56] As recalled, the effects of the conflicts are one crucial element of debate in the qualification of economic conflicts as "wars" or "uses of force". The prevailing viewpoint within the international community perceives Article 2 (4) as entirely not involving economic coercion, while part of the doctrine calls for an effect-based interpretation, arguing that the destructive consequences and severe harm provoked by economic conflicts do compare to those produced by armed conflict and thus the first should equally be treated as "uses of force". Refer to section 4.1. of this Chapter for further analysis.

The majority of legal scholars concur that the notion of "economic war" does not constitute a legal concept *per se*.[57] Notwithstanding the lack of a formal definition in international law (which – *per se* – does not preclude a possible recognition of the notion as a legal concept), the qualification of "economic war" as a legal concept would necessitate a uniform legal framework, a precise demarcation between lawful and unlawful economic measures and of its goals, and enforceability.[58]

Despite this, the term remains widespread. This is certainly due to the fact that the expression "economic war" rapidly conveys the core elements of a conflictual situation, where there is no armed engagement but reliance on economic instruments to target the targeted country's economy. Some

[57] Sorel J.-M., *Propos introductifs: Le droit comme arme de la guerre economique?*, in De Nanteuil A. (direction scientifique), Société Française pour le Droit International, *Un approche juridique de la guerre économique*, Actes de la Journée d'étude du 22 septembre 2021 l'Université Paris Est Crèteil, Editions Pedone, 2024, pp. 11-18, p. 6, at p. 7 the author argues that "the concept of economic war is not a legal concept, but a state of competition" (lit. «*la guerre économique n'est donc pas un concept juridique mais un état de fait compétif*»). Similarly, De La Rosa S., *La promotion de l'autonomie strategique et l'introdution de nouveaux instruments de defense commerciale*, in De Nanteuil A. (direction scientifique), Société Française pour le Droit International, *Un approche juridique de la guerre économique*, op. cited above, pp. 39-49, p. 39; Salva J-M., *La question des sanctions et la guerre economique*, in De Nanteuil A. (direction scientifique), Société Française pour le Droit International, *Un approche juridique de la guerre économique*, op. cited above, pp. 27-38, p. 27; Hagemeyer-Witzleb T.M., *The International Law of Economic Warfare*, Springer, 2021, p. 14 which nonetheless opens to such possibility by stating that «economic warfare is not (yet) a legal concept».

[58] What makes a concept a legal concept is notably not enumerated in international law instruments. Briefly, it could be argued that legal concepts are terms, principles, and notions characterised by a specific meaning, function, and legal consequences attached. The recognition, codification, and enforceability of that concept by the law is thus essential for that concept to be recognised as a proper legal concept.

continue to discuss its definition and limitations,[59] while part of the doctrine acknowledges its legal imprecision but argues for a use of "convenience".[60]

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[59] In this regard, doctrine argues that the concept and its use (i) are «too inconsistent to derive a suitable definition»; that (ii) it is superfluous; and (iii) possesses a descriptive and a mobilising function. On the first two conceptions, Hagemeyer-Witzleb T.M., *The International Law of Economic Warfare*, op. cited above, respectively, p. 16 and 17 which individuates the second strand as proper of part of economist scholars. Moreover, the same author, at pp. 19-22, reports the strand of doctrine arguing for the impossibility of a definition and those instead preferring broad interpretations and definitions. The author then develops a working definition which reads as follow: «Irrespective of whether being referred to as such, economic warfare consists of measures of an exclusively economic character taken by subjects of international law to express disapproval of the acts of the target, to induce that target to a particular conduct, or to further an economic goals of the imposing subject of international law» (p. 29). It also provides further specifications over this definition at pp. 30-50. The third conception is instead reported by De La Rosa S., *La promotion de l'autonomie strategique et l'introdution de nouveaux instruments de defense commerciale*, in De Nanteuil A. (direction scientifique), Société Française pour le Droit International, *Un approche juridique de la guerre économique*, op. cited above, p. 39, which, moreover, individuates two dimensions of the notion of "economic war": (i) a descriptive one, highlighting the evolution of forms of conflicts; and (ii) a mobilitation one, enabling the adoption of new measures. French scholars extensively explored the concept, often seeking and proposing definitions. Among others, refer to the contributions in De Nanteuil A. (direction scientifique), Société Française pour le Droit International, *Un approche juridique de la guerre économique*, op. cited above; Mainguy D., *Droit de la «guerre atypique»: Réflexions sur les conflits non armés et non militaires (lawfare, guerre économique et informationnelle)*, LGDJ Lextenso, 2023; and Laidi's articles and books such as, Laïdi A., *Aux sources de la guerre économique: fondements historiques et philosophiques*, Armand Colin, 2012 (in which a specific section is dedicated to "define the economic war", lit. «*Définir la guerre économique*»); Laïdi A., *Le droit, nouvelle arme de guerre économique: comment les États-unis déstabilisent les entreprises européennes*, Actes Sud, 2019; and, Laïdi A., *Histoire mondiale de la guerre économique*, Perrin, 2020. Refer also to Harbulot C., *La guerre économique systémique*, in Harbulot C., de Maison Rouge O., Laïdi A., *La guerre économique systémique*, EGE, 2020, pp. 27-51, p. 29, which argues that «*La guerre économique systémique est un mode de domination qui évite de recourir à l'usage de la puissance militaire pour imposer une suprématie durable. Il ne s'agit plus de soumettre l'autre par la force mais de le rendre dépendant par la technologie*». Critics contend that the French scholars rather describe the phenomenon, instead of defining it; frequently lacking operability in international law; and, neglecting certain key aims of economic wars – such as punishment or weakening of States and/or international organisations. In this sense, and on other more detailed criticisms of the so-called "French School of Economic Warfare", refer to Hagemeyer-Witzleb T.M., *The International Law of Economic Warfare*, op. cited above, pp. 17-18.

[60] According to Sorel J.-M., *Propos introductifs: Le droit comme arme de la guerre economique?*, in De Nanteuil A. (direction scientifique), Société Française pour le Droit International, *Un approche juridique de la guerre économique*, op. cited above, pp. 10-11 relying on the term "economic war" might be useful to acknowledge the severe consequences and implications of the events generally denominated as such. Ascensio H., *Les regles du commerce international comme armes de la guerre economique*, in De Nanteuil A. (direction scientifique), Société Française pour le Droit International, *Un approche juridique de la guerre économique*, op. cited above, pp. 13-25, p. 25 argues instead that the scenario shows both the fracture of international trade, and a need for change thus, "economic war" – especially after the Covid-19 pandemic and the Russian's aggression against Ukraine in 2022 – well highlights the structural problems of todays' international order such as the diversity of the national political-economical systems; the social problems; the difficulty to maintain national industrial capacities within strategic sectors; and the adaptation pf the production systems to the environmental risks. De La Rosa S., *La promotion de l'autonomie strategique et l'introdution de nouveaux instruments de defense commerciale*, in De Nanteuil A. (direction scientifique), Société Française pour le Droit International, *Un approche juridique de la guerre économique*, op. cited above, p. 39, instead, notices the sporadic use of the expression "economic war" within EU's institutions, contending that such notion is perceived as "too bellicose, rowdy, and easily manipulated" (lit.«*trop belliqueuse, un tantinet tapageuse et aisément instrumentalisable, cette formule s'accommode mal avec le fonctionnement institutionnel de l'Union*»). Others notice how the use of the term "war" helps denote an "aggressive" behaviour, thereby identifying a "common enemy" against which it becomes justifiable to enact «exceptional measures that would not be acceptable in peacetime». In this regard, Sorel J.-M., *Propos introductifs: Le droit comme arme de la guerre economique?*, in De Nanteuil A. (direction scientifique), Société Française pour le Droit International, *Un approche juridique de la guerre économique*, op. cited above, p. 11; Clapham A., *War*, op. cited above, p. 1; and, De La Rosa S., *La promotion de l'autonomie strategique et l'introdution de nouveaux instruments de defense commerciale*, in De Nanteuil A. (direction scientifique), Société Française pour le Droit International, *Un approche juridique de la guerre économique*, op. cited above, pp. 39-49, p. 39 which more strictly focus on the notion of "economic war" and its double dimension of (i) description; and (ii) mobilation (to rely of new instruments). Critics of this approach warn against the use of the term "war" when dealing with economic conflicts since the liberal economic system naturally induces oppositions, and since "war" must be clearly distinct from "competition", even when the latter is implemented with illegal

Scholarly opinion is thus divided into three broad positions: those who oppose the term's use in the legal domain, those who accept it as a practical notion for economic non-armed conflict between states, and those who embrace it as a modern and necessary evolution of inter-state conflicts. Legal scholars highlight the political and rhetorical use of the term "economic war", but also debate whether there is a right for States to resort to "economic war" (*i.e.* the so-called "*ius ad belllum economicum*") and whether there is (or, better, whether there should be) a body of law regulating "economic wars", *i.e.* the "*ius in bello economico*".[61]

Briefly, some argue that States do enjoy such a right – although this does not entail «a presumption of legality of economic war» –[62] but also notice that the framework remains predominantly unregulated.[63] Others caution that extending the *ius ad bellum* prohibition of the use of force to economic measures might conflict with the intention of the drafters of the UN Charter, which specifically refrained from including "economic coercion" as a tool of "use of force".[64] A stronger and comprehensive *ius in bello economico* is instead generally supported in order to obtain a more uniform regulation of the conduct of States engaged in economic conflicts.[65]

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means. Others would avoid the link between "war" and economic measures for diverse reasons. These include the "easy" linkage to military intervention and to its potential application as a legitimate response to economic measures; the frequent association with the idea of illegality; the blurring between peacetimes and wartimes; and the consideration that «even the fiercest competition is not equivalent to (the terrors of) war», according to Hagemeyer-Witzleb T.M., *The International Law of Economic Warfare*, op. cited above, p. 32, which also reports the abovementioned arguments by the doctrine. Conversely, some defend the use of the term "war" to increase the measures' accountability or to reflect the current reality of international conflict. *Inter alia*, Wolfendale J., *Defining War*, in Gross M.L., Meisels T. (eds), *Soft War: The Ethics of Unarmed Conflict*, op. cited above, p. 29, argues that sanctions should be recognised as "war" since, by being excluded from such recognition, «sanctions have eluded both the scrutiny and the criticism which would have been forthcoming if the same acts were seen as a form of warfare». Drawing historical parallels, these scholars assert that international law is currently handling «the phenomenon of economic war similarly to the phenomenon of war prior to its ostracism». As argued by Hagemeyer-Witzleb T.M., *The International Law of Economic Warfare*, op. cited above, p. 33 which, accordingly, more precisely, considers the term 'economic war' to represent «a modern form of inter-state pursuit of interests and conflicts, as did the term war in its time».

[61] The distinction between "*ius ad bellum economicum*", *i.e.* the right to resort to economic measures in specific circumstances, and in "*ius in bello economico*" (intended as the rules governing the scope of those economic measures *i.e.* how they should be designed and implemented) is proposed, *inter alia*, by Milaninia N., *Jus ad bellum economicum and jus in bello economico: The Limits of Economic Sanctions Under the Paradigm of International Humanitarian Law*, in Marossi A.Z., Bassett M.R. (eds), *Economic Sanctions under International Law: Unilateralism, Multilateralism, Legitimacy, and Consequences*, op. cited above, pp. 95-124, p. 104; and, Reisman W., *Sanctions and International Law*, Intercultural Human Rights Law Review, Vol. 4, 2009, pp. 9-20, p. 16. Others, instead, do not differentiate the two situations, discussing instead of "*ius ad bellum oeconomicum*": in this regard, for instance, Hagemeyer-Witzleb T.M., *The International Law of Economic Warfare*, op. cited above, pp. 323-353.

[62] Hagemeyer-Witzleb T.M., *The International Law of Economic Warfare*, op. cited above, p. 353.

[63] *Ibid*, p. 325 and p. p. 348.

[64] In this regard, Milaninia N., *Jus ad bellum economicum and jus in bello economico: The Limits of Economic Sanctions Under the Paradigm of International Humanitarian Law*, in Marossi A.Z., Bassett M.R. (eds), *Economic Sanctions under International Law: Unilateralism, Multilateralism, Legitimacy, and Consequences*, op. cited above, pp. 104-105. Part of the doctrine considers appropriate to include economic measures (and economic coercion) to the qualification of "use of force". This argument and the exclusion of "economic coercion" from the prohibition of Article 2 (4) UN Charter is discussed in detail in this Chapter, in section 4.1.

[65] *Inter alia*, Hagemeyer-Witzleb T.M., *The International Law of Economic Warfare*, op. cited above, p. 353; and Milaninia N., *Jus ad bellum economicum and jus in bello economico: The Limits of Economic Sanctions Under the Paradigm of International Humanitarian Law*, in Marossi A.Z., Bassett M.R. (eds), *Economic Sanctions under International Law: Unilateralism, Multilateralism, Legitimacy, and Consequences*, op. cited above, p. 116. Furthermore,

Notwithstanding these debates surrounding the expression "economic war", it is undeniable that the term cannot be fully recognised as a legal concept of international law. Likewise, the declination of the notion "war" to economic conflicts – although occurring reciprocally and capable of provoking consequences sometimes comparable to those of armed confrontations – is generally rejected mainly on three grounds: the exclusive association of "war" with armed conflict; the intentional exclusion of economic coercion from the notion of "use of force" by the UN Charter's drafters; and, the failure of the effects-based argument to achieve formal recognition within the international community. For these reasons, legal scholars generally situate economic conflicts between States within the principle of non-intervention, rather than within the concepts of "war" or "use of force", as it is further explored afterwards in section 4.3. of this Chapter.

The following section turns to the concept that lays at the foundation of economic confrontations: economic coercion. As a matter of fact, States involved in economic conflicts inevitably resort to economic measures designed to compel the other party into a certain behaviour or action. In this sense, whether in the form of sanctions or trade-restricting measures, economic coercion constitutes the core element of what is commonly referred to as "economic war". Section 3 firstly analyses the meaning and the attempts to regulate the concept of economic coercion, before briefly presenting the instruments commonly employed to exert economic coercion, whose legal frameworks are further analysed in Chapter II of this dissertation.

3. At the core of economic wars: the concept of economic coercion

3.1. Attempts to define and regulate economic coercion

Coercion is a fundamental feature of legal systems, both domestic and international,[66] assuming different forms including military, political, and economic pressure. Broadly defined, coercion refers to the will or the actions of one entity (a State or an organisation) to compel another to undertake or

it is argued that principles applying to the 'general' *ius in bello – i.e.* necessity, distinction, and, proportionality – should equally be considered and applied in the case of economic measures. Extensively on this, Milaninia N., *Jus ad bellum economicum and jus in bello economico: The Limits of Economic Sanctions Under the Paradigm of International Humanitarian Law*, in Marossi A.Z., Bassett M.R. (eds), *Economic Sanctions under International Law: Unilateralism, Multilateralism, Legitimacy, and Consequences*, op. cited above, pp. 116-121 which contends that «Borrowing from IHL, jus in bello economico relates to the just implementation of economic sanctions, including a demonstration that: (1) economic sanctions are necessary to achieve an explicit and lawful objective; (2) that the severity of sanctions are proportional to that objective; and (3) that sanctions are designed in ways that enable the imposing party to differentiate between those responsible for the offensive behavior and civilians».

[66] Zoller E., *Peacetime Unilateral Remedies: An Analysis of Countermeasures*, Transnational Publisher, 1984, p. xi argues that «coercion accompanies law like a shadow».

refrain from a specific action.[67] As such, coercion consists of a method or mechanism through which objectives might be pursued, and it is thus in itself neither inherently lawful or unlawful.

Its legality therefore cannot be assessed solely on the instrument employed, but rather also on the instrument's legal basis, the context, the objectives, and compliance with international law principles. Lawful coercive objectives might be law enforcement[68] or collective security, but unlawful coercion is the one conducted in matters in which a State is entitled to decide freely, thereby violating the principles of State sovereignty and of non-intervention under international law.[69]

Despite the acknowledged centrality of the notion of coercion, international law does not provide a specific and universally accepted definition of "coercion" or "economic coercion". Equally, there is no specific framework regulating the use and boundaries of such a widely ranging concept. Certain aspects of coercion, however, have been occasionally addressed by international law instruments and by the international community.[70] An early and remarkable attempt to regulate (by prohibiting) economic coercion within international law emerged during the UN Charter's drafting conference.[71] Although ultimately rejected by the drafters, the debate over whether economic coercion might be framed as "use of force" under Article 2 (4) UN Charter remains ongoing – with the prevailing view nonetheless continuing to exclude economic coercion from the concept of "use of force" – as further presented in section 4.1. of this Chapter.

Beyond the framework of use of force, coercion has been addressed in connection to the law of State responsibility. The ARSIWA – particularly Article 18 named "Coercion of another State" and dealing with derived responsibility –[72] establishes the conditions of responsibility for a coercing State, but fails to provide a clear definition of the concept. The Commentary adopts a narrow interpretation,

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[67] In this regard, *inter alia*, Ronzitti N., *Sanctions as Instruments of Coercive Diplomacy: An International Perspective*, in Ronzitti N. (ed), *Coercive Diplomacy, Sanctions and International Law*, Brill, 2016, pp. 1-32, p. 1. Similarly, Milanovic M., *Revisiting Coercion as an Element of Prohibited Intervention in International Law*, The American Journal of International Law, Vol. 11, no. 4, 2023, pp. 601-650, p. 615; Sapienza R., *Il principio di non intervento negli affari interni: contributo allo studio della tutela giuridica internazionale della potestà di governo*, Giuffrè Editore, 1990, p. 111. A very interesting and comprehensive text is the renowned book of Martin L.L., *Coercive Cooperation: Explaining Multilateral Economic Sanctions*, Princeton University Press, 1992 which with a quantitative analysis approach (mainly game theory method, but includes Ordered Probit Analysis and Event Count Analysis) identifies and tests a number of factors that influence the level of cooperation in sanctions and coercive measures.

[68] Roscini M., *International Law and the Principle of Non-Intervention: History, Theory, and Interactions with Other Principles*, Oxford University Press, 2024, p. 161. On the role of sanctions as law enforcement refer to Chapter II, Section 2, of this dissertation.

[69] The principle of non-intervention in international law is analysed in section 4.3., of this Chapter I.

[70] Importantly, debates over the notion of coercion – and over its sub-category of "economic coercion" – arise also in connection to specific measures widely recognised as "coercive" (such as "sanctions") and to principles of international law (such as non-intervention). These issues are discussed in this thesis, respectively in Chapter II (Section 2), and in this Chapter (Section 4.3.).

[71] As explained in Chapter II of this dissertation, Section 3, regulations of the so-called "economic weapon" – *i.e.* sanctions – date back to earlier attempts, most notably in the Covenant of the League of Nations.

[72] Article 18 ARSIWA – titled "Coercion of another State" – states that «A State which coerces another State to commit an act is internationally responsible for that act if: (a) the act would, but for the coercion, be an internationally wrongful act of the coerced State; and (b) the coercing State does so with knowledge of the circumstances of the act».

specifying that coercion «has the same essential character» as *force majeure*: solely forcing the will of a State by giving it no alternative choices if not to comply with the wishes of the coercing State meets the threshold of "coercion", whereas complicating its compliance or assisting and directing its conduct cannot be recognised as coercive behaviour.[73] The Commentary also mentions "unlawful coercion", but it clarifies that coercion under Article 18 is not limited to unlawful acts of coercion; yet, accordingly, most cases falling within the Article's scope are cases of unlawful coercion since they involve threat or use of force or constitute intervention.[74] Although countermeasures might be coercive, they do not constitute unlawful coercion as their aim is to induce compliance – not to compel unlawful acts and conducts –[75] and a State 'coerced' into compliance with international obligations is not, by definition, an international wrongful act.[76] The Commentary also acknowledges other forms

[73] More precisely, the Commentary specifies that coercion for the purposes of Article 18 «has the same essential character» of *force majure* under Article 23. Accordingly, «Nothing less than conduct which forces the will of the coerced State will suffice, giving it no effective choice but to comply with the wishes of the coercing State. It is not sufficient that compliance with the obligation is made more difficult or onerous, or that the acting State is assisted or directed in its conduct» (ILC ARSIWA Commentary, Article 18, para 2). Para 4 specifies that «The equation of coercion with force majeure means that in most cases where article 18 is applicable, the responsibility of the coerced State will be precluded vis-à-vis the injured third State. This is reflected in the phrase "but for the coercion" in subparagraph (a) of article 18. Coercion amounting to force majeure may be the reason why the wrongfulness of an act is precluded vis-à-vis the coerced State. Therefore, the act is not described as an internationally wrongful act in the opening clause of the article, as is done in articles 16 and 17, where no comparable circumstance would preclude the wrongfulness of the act of the assisted or controlled State. But there is no reason why the wrongfulness of that act should be precluded vis-à-vis the coercing State. On the contrary, if the coercing State cannot be held responsible for the act in question, the injured State may have no redress at all». Moreover, the act coerced must be «the very act which is internationally wrongful» (ILC ARSIWA Commentary, Article 18, para 2). The responsibility of the coercing state, however, «derives not from its act of coercion, but rather from the wrongful conduct resulting from the action of the coerced State» (ILC ARSIWA Commentary, Article 18, para 1). Para 5 highlights that «It is a further requirement for responsibility under article 18 that the coercing State must be aware of the circumstances which would, but for the coercion, have entailed the wrongfulness of the coerced State's conduct. The reference to "circumstances" in subparagraph (b) is understood as reference to the factual situation rather than to the coercing State's judgement of the legality of the act. This point is clarified by the phrase "circumstances of the act". Hence, while ignorance of the law is no excuse, ignorance of the facts is material in determining the responsibility of the coercing State». Moreover, para 6 adds that «A State which sets out to procure by coercion a breach of another State's obligations to a third State will be held responsible to the third State for the consequences, regardless of whether the coercing State is also bound by the obligation in question. Otherwise, the injured State would potentially be deprived of any redress, because the acting State may be able to rely on force majeure as a circumstance precluding wrongfulness. Article 18 thus differs from articles 16 and 17 in that it does not allow for an exemption from responsibility for the act of the coerced State in circumstances where the coercing State is not itself bound by the obligation in question». The ARSIWA Commentary also notices, at para 7, that State practice supports «the principle that a State bears responsibility for the internationally wrongful conduct of another State which it coerces», by then discussing the Romano-Americana case.

[74] ILC ARSIWA Commentary, Article 18, para 3. Accordingly, the majority of the cases falling within Article 18 ARSIWA are cases of unlawful coercion, «*e.g.* because they involve a threat or use of force contrary to the Charter of the United Nations, or because they involve intervention, *i.e.* coercive interference, in the affairs of another State».

[75] ILC ARSIWA Commentary, Article 18, para 3. The ARSIWA Commentary recognised the possibility of the «coercive character» of countermeasures but also specifies that their aim (as per Article 49 ARSIWA) is «to induce a wrongdoing State to comply with obligations of cessation and reparation towards the State taking the countermeasures, not to coerce that State to violate obligations to third States». Thus, coercing a State through countermeasures does not constitute coercion under Article 18 ARSIWA, and «the 'coerced' state can only be 'coerced' to comply with its international obligations» (compliance which, by definition, is not an international wrongful act). The instrument of countermeasures is presented in detail in Chapter II of this dissertation, in Section 4 in which also the goals and aims of the instrument are further analysed.

[76] Tzanakopoulos A., *The Right to be Free from Economic Coercion*, Cambridge Journal of International and Comparative Law, Vol. 4, 2015, pp. 616-633, p. 622 and p. 623.

of coercion,[77] but it does not define coercion or provide a clear distinction between lawful or unlawful coercion.

Coercion has been also (attempted to be) regulated in connection with the principle of non-intervention. The 1948 Charter of the Organisation of American States (OAS) – which, as analysed in Section 4.3. of this Chapter significantly recognised the relationship between economic coercion and the principle of non-intervention – specifically prohibits reliance on economic and political coercive measures aimed at forcing the sovereign will of another State or obtaining advantages.[78] Being the first treaty-based explicit prohibition of economic coercion,[79] the provision is pioneering but fails to precisely establish the core characteristics and boundaries of the concept. A further (partial) framing of the notion of coercion in connection to the non-intervention principle derives from the landmark ICJ *Nicaragua* case – further analysed in Section 4.3. of this Chapter – which addressed the concept through the lenses of the prohibition of intervention. Accordingly, the principle of non-intervention is identified as involving both the prohibition of coercion in areas where a State is entitled to decide freely, and the prohibition of certain means and methods of coercion.[80] As in the previous instances, the ICJ *Nicaragua* case did not provide a comprehensive definition of coercion nor did it address the concept of economic coercion entirely, yet it did recognise that – under certain conditions – economic pressure might amount to a violation of the principle of non-intervention.

A novel stance on the concept and definition of "coercion" is provided by the European Union's Anti-Coercion Instrument of 2023 (hereinafter, ACI),[81] which not only defines 'economic coercion' and regulates EU's responses to it, but also explicitly interprets it as a wrongful act. According to ACI Preamble, coercion is indeed prohibited and constitutes a wrongful act whenever measures (*e.g.* restrictions of trade or investment) are enacted to obtain an action/inaction which the country is not obliged to undertake under international law, thereby touching upon that State's

[77] ILC ARSIWA Commentary, Article 18, para 3 mentions other forms of coercion such as «serious economic pressure, provided that it is such as to deprive the coerced State of any possibility of conforming with the obligation breached».
[78] Article 20 OAS Charter precisely provides that «No State may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind».
[79] Roscini M., *International Law and the Principle of Non-Intervention: History, Theory, and Interactions with Other Principles*, op. cited above, p. 103.
[80] Roscini M., *International Law and the Principle of Non-Intervention: History, Theory, and Interactions with Other Principles*, op. cited above, pp. 146-147. Similarly, Abi-Saab G., *Some Thoughts on the Principle of Non-Intervention*, in Wellens K. (ed), *International Law: Theory and Practice, Essays in Honour of Eric Suy*, Martinus Nijhoff Publishers, 1998, pp. 225-235, pp. 231-232 contending that «what is protected is thus the State, and the legal substance of its sovereignty, *i.e.* the two elements […]: the exclusive jurisdiction of the State to take certain decision or actions […] and the unbounded freedom of choice in decision-making on certain matters».
[81] Regulation (EU) 2023/2675 of the European Parliament and of the Council of 22 November 2023 on the protection of the Union and its Member States from economic coercion by third countries. This Regulation is analysed in detail in Chapter II of this dissertation, under Section 6.2.

sovereignty.[82] Article 2 (1) ACI then identifies (and defines) economic coercion as existing when «a third country applies or threatens to apply measures affecting trade or investments in order to prevent or obtain the cessation, modification or adoption of a particular act by the Union or a Member State, thereby interfering within the[ir] legitimate sovereign choices […]».[83] In turn, ACI covers solely non-forcible coercion, but explicitly includes also threats of coercion, while the reference to the "legitimate sovereign choices" arguably indicates the focus on breaches of non-intervention principle and State's *domain réservé*,[84] suggesting that the instrument targets unlawful coercion specifically.[85]

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[82] Preamble ACI, para 15, more precisely providing that coercion is prohibited and therefore [constitutes] a wrongful act under international law» whenever measures (*e.g.* restrictions of trade or investment) are enacted «in order to obtain from another country an action or inaction which that country is not obliged to perform under international law and which falls within its sovereignty» and whenever «the coercion reaches a certain qualitative or quantitative threshold, depending both on the objectives pursued and the means used». Article 1 ACI provides that the Regulation applies «in cases of economic coercion by a third country», establishing rules and procedures to safeguard the interests of the EU and of its MS from third countries' economic coercion. The main goal of the Regulation is to deter economic coercion or obtain its cessation while enabling a last resort framework to respond and counteract economic coercion and to seek reparation.

[83] For the purposes of the Regulation, the expression "third country" does not solely involve States but also «any […] separate customs territory or other subject of international law, other than the Union or a Member State» (Article 3 (4) ACI). Interestingly, the ACI Preamble, at para 7, specifies that «such entities are also capable of economic coercion». Interestingly, Article 3 ACI also clarifies that «"third-country measure' means any action or omission attributable to a third country under international law; […] particular act' means any legal or other act, including an expression of a position, by an institution, body, office or agency of, respectively, the Union or of a Member State, or of a third country; […and,] 'injury to the Union' means a negative impact, including economic damage, on the Union or a Member State, including on Union economic operators, caused by economic coercion; […]». Cogan J.K., *Two Approaches to Economic Coercion*, Yale Journal of International Law Online, 09 August 2024, notices how the ACI's definition predominantly focuses on goals instead of means, such as it does the Joint Declaration of 2023 signed by the G7's four non-EU members, Australia and New Zealand. Refer to the Governments of Australia, Canada, Japan, New Zealand, the United Kingdom, and the United States of America, *Joint Declaration Against Trade-Related Economic Coercion and Non-Market Policies and Practices*, 09 June 2023, that found its origins within the G7's Leaders *Statements on Economic Resilience and Economic Security* of the 20th May 2023, available at https://ustr.gov/about-us/policy-offices/press-office/press-releases/2023/june/joint-declaration-against-trade-related-economic-coercion-and-non-market-policies-and-practices, [last accessed on 11 July 2025]. Schaupp L., *The EU's Anti Coercion Instrument between EU Strategic Autonomy and Member State Sovereignty*, Working Paper 2023/8, 2023, p. 6 and pp. 7-9 explains that the most contested area was not the definition of the boundaries of economic coercion – since it was recognised that a broad definition was needed – but rather factors such as the nature of the coercion, its impact on trade and investments, the concept of interference and the extent to which it constraints EU or EU MS' sovereignty. Similarly, also Schäffer J., *The EU Anti-Coercion Instrument: Anti-What, Exactly?*, CELIS Blog, 19 February 2024, available at https://www.celis.institute/celis-blog/the-eu-anti-coercion-instrument-anti-what-exactly/, [last accessed on 06 May 2025].

[84] In this regard, Schäffer J., *The EU Anti-Coercion Instrument: Anti-What, Exactly?*, op. cited above. Similarly, on the interpretation of unlawful economic coercion as a violation of the principle of non-intervention, refer also to Nguyen A., *The Anti-Coercion Instrument – The Practical Repercussions of the ACI's Entry into Force (Part I)*, CELIS Blog, 10 January 2024, available at https://www.celis.institute/celis-blog/the-anti-coercion-instrument-the-practical-repercussions-of-the-acis-entry-into-force-part-i/, [last accessed on 07 May 2025]. More generally, on the relation between economic coercion, principle of non-intervention and the State's *domain réservé* refer also to Tzanakopoulos A., *The Right to be Free from Economic Coercion*, op. cited above, pp. 618-620, and pp. 630-633; and Milanovic M., *Revisiting Coercion as an Element of Prohibited Intervention in International Law*, op. cited above, pp. 602-617 and pp. 622-626, which – at p. 649 – interestingly argues that the ACI's position considers as prohibited coercion (*i.e.*, intervention) those measures that are designed to induce compliance of matters which the targeted state «"is not internationally obliged to perform"».

[85] *Inter alia*, Nguyen A., *The Anti-Coercion Instrument – The Practical Repercussions of the ACI's Entry into Force (Part I)*, op. cited above, argues that this, potentially, justifies the URM (*i.e.* the ACI's response measures) as lawful countermeasures under the ARSIWA framework. Accordingly, «Under Art. 22 ARSIWA, countermeasures can only be taken in response to an internationally wrongful act. This is why it is vital for the EU to make a watertight international law argument that unlawful economic coercion has taken place. If this fails, the wrongfulness of the ACI's

Interestingly, the EU Parliamentary Research Service also classifies three typologies of coercion: explicit coercion, disguised coercion, and silent coercion. Explicit coercion occurs through formal measures (such as under Section 301 US Trade Act);[86] disguised coercion takes place with the abuse of instruments with legitimate purposes (such as the 2014 Russian' ban on Polish imports of fruits and vegetables under public health concerns);[87] and, lastly, silent coercion or "boycott" occurs as informal restrictions exerted by state-influenced private players (such as Chinese's boycotts of EU firms Adidas and H&M in 2021).[88]

As a regulatory attempt, the ACI's definition of "economic coercion" is at the same time significant – because it constitutes a novel binding determination of such a phenomenon –, and unsuccessful – because it fails to precisely define the boundaries of "economic coercion" within international law and its relationship with the principle of non-intervention, and to clearly distinguish lawful and unlawful forms. Although potential instances falling within the scope of ACI already occurred without leading to its employment, its first implementation is still awaited and may provide more detailed insights on its applicability, boundaries, and characteristics.[89]

Overall, the various attempts to define and regulate economic coercion at the international level have, thus, been largely unsuccessful. Although some international instruments have recognised and identified crucial elements of the phenomenon – such as the OAS Charter and the EU ACI – there still is no uniform consensus within the international community on a universally accepted definition or legal framework governing economic coercion under international law. This is perhaps partly due to the complexity of formulating a robust definition of "economic coercion": the concept indeed

countermeasures cannot be precluded under Art. 22 ARSIWA». Similarly, Schäffer J., *The EU Anti-Coercion Instrument: Anti-What, Exactly?*, op. cited above.

[86] Szczepański M., *EU Anti-Coercion Instrument*, European Parliamentary Research Service (EPRS), PE 729.299, March 2024, p. 4. Section 301 US Trade Act of 1974 constitutes a very important provision often implemented by the US in various instances, as further presented and discussed in this dissertation, Chapter III, Section 3.1.

[87] *Ibid*., p. 5. This followed the introduction of Poland's restrictive measures against Russia for its 2014' invasion.

[88] *Ibid*., p. 6. This occurred in response to the EU imposition of restrictive measures over the violation of Uighurs' human rights in the Xinjiang region of China.

[89] These elements join other ACI's controversial issues – such as, among others, its compatibility with WTO law, the peculiarity of the decision-making process, the qualification of the Union Response Measures (URM), and the novel Commission's powers – which are further explored in Chapter II, Section 6.2., of this dissertation. *Inter alia*, Verellen T., *Imperial Presidency Versus Fragmented Executive? Unilateral Trade Measures and Executive Accountability in the European Union and the United States*, German Law Journal, Vol. 24, no. 7, 2023, pp. 1127-1145; Olsthoorn K., *The EU's Anti-coercion Instrument: A Return of Unlawful Unilateral Trade Countermeasures in Disguise?*, Legal Issues of Economic Integration, Vol. 51, no. 1, 2024, pp. 47-86; Wu C.-H., *The EU's Proposed Anti-Coercion Instrument: Legality and Effectiveness*, Journal of World Trade, Vol. 57, no. 2, 2023, pp. 297-316; Szép V., *The Legislative History of the EU's Anti-Coercion Instrument*, ERA Forum, Vol. 25, 2024, pp. 127-139; Furculita C., *Does EU's Anti-coercion Instrument Violate Art. 23 of the DSU?*, in International Economic Law and Policy Blog, 21 February 2022, available at https://ielp.worldtradelaw.net/2022/02/guest-post-does-eus-anti-coercion-instrument-violate-art-23-of-the-dsu.html, [last accessed on 26 October 2024].

encompasses a variety of instruments employed by States or international organisations in pursuit of diverse political, strategic, or economic aims, thereby complicating precise delimitations.[90]

Before a brief overview, in Section 3.3., of the most frequently employed instruments of economic coercion, the following section explores the relationship between the concepts of economic war and economic coercion.

3.2. Economic war as a narrative label of (certain) cases of economic coercion

As previously discussed, "economic war" does not constitute a legal term *per se*, but rather a political notion whose core feature consists of instances of economic coercion. It may be composed of one or a plurality of economic coercive practices, yet its function remains mainly narrative: to individuate situations in which States reciprocally and strategically target each other's economies through non-armed instruments. Economic war, thus, represents a form of conflict conducted mainly through economic means, codifying the employment of economic coercion within a broader context characterised by conflictual States' behaviours. As such, while economic coercion lies at the core of economic wars, this latter concept remains a political notion that regroups events of economic coercive acts under a "warfare" narrative.

Economic coercion, by contrast, refers to the will and actions of a State to compel another to undertake or refrain from a specific action, as above presented, through economic pressure. It is, thus, strictly linked to a specific objective and/or behaviour, thereby not necessarily representing a situation of reciprocal confrontation through economic measures. Rather, economic coercion constitutes an element that may be employed within economic confrontations,[91] either in isolation or as part of a broader economic conflict.

Economic war may, therefore, be understood as a narrative and strategic label incorporating elements of economic coercion in its practice within a broader adversarial framework. It reflects the employment of economically coercive measures, but applied and framed in relation to the "warfare" model, *i.e.* structured with an attacker vs attacked, and with reciprocal confrontations. In this sense, all economic wars involve and rely on economic coercion (through economic coercive measures), but not all acts of economic coercion amount to economic wars.

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[90] By contrast, although still debated because wished to be more comprehensive, the consensus over the fact that use of force refers to armed measures is comparatively easier to reach. This is largely due to its regulation in Article 2 (4) UN Charter and due to the consistent State practice and Courts pronunciations.

[91] *Inter alia*, Iskandarov K., Gawliczek P., *Economic Coercion as a Means of Hybrid Warfare: The South Caucasus as a Focal Point*, Security and Defence Quarterly, Vol. 40, no. 4, 2022, pp. 47-57, p. 50, describe economic coercion as «one of the most immediately applicable forms of hybrid warfare as an alternative to the use of force. […] The strategy of economic coercion as an element of hybrid warfare entails the activities of a hybrid attacker to capitalise on its economic superiority and the victim's dependence». On the relationship between economic coercion and the use of force, refer to section 4.1. of this Chapter.

Indeed, instances of economic coercion might remain isolated measures aimed at inducing compliance or other objectives; or they might begin or contribute to the emergence or prolongation of wider conflicts. As a way of example, the UN, US, and EU economic coercive measures against Iran and North Korea in response to concerns regarding their nuclear programs are not generally recognised as amounting to "economic wars". Rather, they are framed as economically coercive responses against countries which posed risks to the international peace and security, thereby aiming at compliance with international obligations.

Differently, the Western States-Russia sanctions war and US-China trade war are commonly described as "economic wars". They clearly represent economic conflicts in which the parties rely on economically coercive measures to strategically and reciprocally target each other's economy. Yet, economic coercion is not the unique element of these economic confrontations, since they also involve measures falling outside the 'classical' understanding of economic coercive measures, such as the diversification (and withdrawal of previous) providers; restructuring of domestic supply chains; investment screening mechanisms; policies aimed at reducing dependencies; and, even voluntary withdrawals from private companies.

Economic coercion remains the core element of these economic confrontations, yet it does not fully define them or constitute their unique component. The conflict goes beyond economic coercive measures, assuming more a systemic character of confrontation occurring through various and diversified economic means. Neither the characteristic of reciprocity, duration, nor timeframe alone suffices to qualify a situation as "economic war". The exchange of restrictive measures between the EU and Belarus – initiated prior to 2022 and continuing thereafter – illustrates that, although reciprocally enacted and six years long, the event is commonly referred to as EU-Belarus sanctions regimes, rather than EU-Belarus economic war.[92] Similarly, reliance on the term 'economic war' cannot be explained merely as a linguistic evolution of the 21st century, as the term economic warfare has long been present in political and academic discourse.[93]

The concept of "economic war" should thus be understood as a narrative label – rather than a legal category *per se* – applicable to cases containing economic coercion embedded within a broader context of reciprocity of acts, strategic objectives, and adversary framing. A plurality of economic coercive acts might be part of such economic confrontations, yet they may also remain isolated acts or compliance-oriented measures not necessarily frameable as "economic war". The crucial

[92] On the EU-Belarus case, refer to, *inter alia*, Leukavets A., *EU Sanctions Against Belarus in 2020-2022: Time for a Reappraisal*, SCEEUS Report, no. 7, 2022; and, Preigerman Y., *EU's Sanctions and Belarus's Counter-Sanctions (as of 1 July 2024)*, Minks Dialogue – Backgrounder, no. 18, 2024.

[93] In this regard, refer to Section 2, Chapter I, for a historical evolution of the term of war, also in connection to economic matters.

distinction, thus, lies not in the sole presence of economic coercion, reciprocity, or duration, but in the systemic, strategic, and, conflictual context within which those measures are enacted.

3.3. Instruments of economic coercion: from 'sanctions' to trade measures

The definition of economic coercion in international law remains controversial, but its practical employment is increasingly evident on a daily basis. Instruments of economic coercion are employed at the intersection of international law, politics, and economic policy, and are implemented by States strategically to achieve various aims, including responding to an internationally wrongful conduct, promoting human rights, or protecting strategic and economic interests. Although these instruments are frequently driven by political reasons, their legality remains determined by and grounded in specific legal norms and frameworks at both international, regional, and domestic levels.

The subsequent chapters – namely, Chapters II and III – will investigate in-depth the instruments most frequently employed to economically coerce other entities. Nonetheless, a distinctive classification is drawn between those instruments designed to coerce (Chapter II), and those implemented to coerce but not originally designed to (Chapter III). In this sense, UN sanctions, ARSIWA countermeasures, EU restrictive measures, and US sanctions will firstly be analysed in Chapter II, while trade measures falling within WTO law and commercial policy frameworks – such as the US Sections 232 and 301, and the EU's CCP measures – will be explored in Chapter III. As previously noted, for reasons of scope and feasibility, the subsequent chapters will be limited to those instruments employed in the context of trade relations, without tackling other key areas where economic wars and coercion occur, such as the financial sector.

Each instrument of economic coercion possesses its own legal basis, and – thus – its own decision-making process, goals, and implications. Prior to addressing these specific instruments in detail, however, it is necessary to assess whether international law provides any legal constraints applicable to economic wars and economic coercion. For these reasons, the specific regulation of economic coercion through trade instruments is deferred to Chapters II and III, while the following section of this chapter investigates whether and how general principles of international law applies to economic coercion.

4. Legal thresholds of economic coercion and economic wars

4.1. The classification of economic coercion as use of force under Article 2 (4) UN Charter

As previously noted, the proposals to recognise economic coercion as use of force emerged already during the UN Charter's drafting conference, but were ultimately rejected. Although a part of the

doctrine continues to propose equating economic coercion with force, the majority view maintains the distinction between the two concepts. This is generally grounded by both historical and textual arguments: firstly, the explicit rejection of the Brazil's proposal at the San Francisco Conference to include economic coercion within the scope of Article 2 (4); and secondly, the repeated association of the term "armed" with the term "force" in the other Charter provisions, thereby reinforcing that (also) Article 2 (4) and its prohibition of the threat and use of force strictly concern solely armed force.[94]

Furthermore, General Assembly Resolutions frequently likewise refrained from linking "force" and "economic coercion", instead reading "economic coercion" in connection with the principle of non-intervention.[95] Nonetheless, especially recently, scholars and several Global South States have contended the recognition and qualification of "economic coercion" as a proper "use of force", and, thus, envisage its prohibition by Article 2 (4) UN Charter. This argument focuses on the severe human rights and developmental consequences of economic coercion, which are claimed to «mirror the effects of traditional military acts».[96] Similarly, with regard to cyber operations, it is

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[94] Ronzitti N., *Diritto internazionale dei conflitti armati*, op. cited above, p. 29; and, Ronzitti N., *Diritto internazionale*, Giappichelli, 2023, p. 456. Among others, refer to Milaninia N., *Jus ad bellum economicum and jus in bello economico: The Limits of Economic Sanctions Under the Paradigm of International Humanitarian Law*, in Marossi A.Z., Bassett M.R. (eds), *Economic Sanctions under International Law: Unilateralism, Multilateralism, Legitimacy, and Consequences*, op. cited above, p. 105; and, Sapienza R., *Il principio di non intervento negli affari interni: contributo allo studio della tutela giuridica internazionale della potestà di governo*, op. cited above, pp. 116-118.

[95] The principle of non-intervention is further analysed in section 4.3. of this Chapter. Among others, the GA Resolution 2625 (XXV), *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, 1970, in which under the heading "The principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter" it is stated that «[…] 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 and to secure from it advantages of any kind». Furthermore, refer to the GA Resolution 42/22*, Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations*, 1987, in which armed force is distinguished from economic coercion as – within Section I – it is provided that «1. Every State has the duty to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. Such threat or use of force constitutes a violation of international law and of the Charter of the United Nations and entails international responsibility. […] 8. 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 and to secure from it advantages of any kind», thereby clearly distinguishing the threat and use of force from economic coercion. On this argument, Ronzitti N., *Diritto internazionale dei conflitti armati*, op. cited above, p. 29.

[96] Batinga J., *Reconciling the Global North-South Divide on the Use of Force: Economic Coercion and the Evolving Interpretation of Article 2 (4)*, op. cited above, pp. 103-143, which thus argues that «economic coercion […] should qualify as use of force under Article 2 (4)» UN Charter, refer to respectively p. 103 and p. 105. At p. 142, the author specifies that not «every act of coercion can – or should – implicate Article 2 (4). Rather, it is worth considering whether the acts of economic coercion that result in war-like consequences should be regulated as a use of force». Interestingly, the author mainly focuses on economic sanctions, by arguing that «economic sanctions [mainly, extraterritorial and comprehensive sanctions, see p. 107] should thus qualify as a use of force» (p. 103). Similarly, Milaninia N., *Jus ad bellum economicum and jus in bello economico: The Limits of Economic Sanctions Under the Paradigm of International Humanitarian Law*, in Marossi A.Z., Bassett M.R. (eds), *Economic Sanctions under International Law: Unilateralism, Multilateralism, Legitimacy, and Consequences*, op. cited above, p. 106 argues that «In most instances, the use of sanctions is likely to fall short of causing the type of consequences necessary to classify as an act of force. In other instances, however, the widespread harm caused by some sanction regimes justifies classification as an act of violence.

argued that the prohibition of Article 2 (4) should be interpreted in light of the «"scale and effects" of a state action» rather than on the instruments employed.[97] A related but distinct argument understands the UN concept of "force" to include «economic duress» as it is the sole interpretation of Article 2 (4) consistent with the Charter's duty to preserve friendly relations among nations.[98]

Attempts to recognise economic coercion as "force" also occurred during the drafting of the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (also "Declaration on Friendly Relations"). Proposals from several States – including Czechoslovakia, Yugoslavia, Ghana, India, Algeria, Cameroon, China, Kenya, Madagascar, Nigeria, Syria, the United Arab Republic – were ultimately rejected.[99] The text thus detaches economic coercion from the use of force, linking it instead to the principle of non-intervention.[100] It indeed urges States to refrain from the use of economic, political or other types of measures to coerce States in order to «subordinat[e] the exercise of its sovereign rights» or secure advantages.[101] While some scholars argue that this reflects a broader

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Indeed, in some instances sanctions have an even greater impact on the targeted State's civilian population than military force would have».

[97] Batinga J., *Reconciling the Global North-South Divide on the Use of Force: Economic Coercion and the Evolving Interpretation of Article 2 (4)*, op. cited above, p. 103. Refer also to pp. 113-120. The "scale and effects" expression is used by the author as meaning "consequences", see p. 106. Reporting this doctrinal argument, also Subedi S.P., *The Status of Unilateral Sanctions in International Law*, in Subedi S.P. (ed), *Unilateral Sanctions in International Law*, Hart Publishing, 2021, pp. 19-60, pp. 28-30. Similarly, also Milaninia N., *Jus ad bellum economicum and jus in bello economico: The Limits of Economic Sanctions Under the Paradigm of International Humanitarian Law*, in Marossi A.Z., Bassett M.R. (eds), *Economic Sanctions under International Law: Unilateralism, Multilateralism, Legitimacy, and Consequences*, op. cited above, pp. 107-108 which presents the International Group of Experts (IGE)'s non-exhaustive factors that might determine an act as "act of force": (i) severity; (ii) immediacy; (iii) directness; (iv) invasiveness; (v) measurability of the effects; (vi) military character; (vii) State involvement; and, (viii) presumptive legality.

[98] O'Brien J., *International Law*, op. cited above, p. 678-679. This author grounds this argument on three main factors: (i) the intention of the drafters, which – accordingly – sought to create an international community where the maintenance of peace through the UN's offices was preferrable to unilateral actions; (ii) the 1966 International Covenant on Civil and Political Rights which in its Article 1 (1) guarantees the right of the people to «freely pursue their economic, social and cultural development»; and, (iii) the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations which recalls the duty of States to refrain from economic coercion. Refer to Article 1 (1) International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, General Assembly Resolution 22004 (XXI).

[99] Batinga J., *Reconciling the Global North-South Divide on the Use of Force: Economic Coercion and the Evolving Interpretation of Article 2 (4)*, op. cited above, p. 11, reports that these proposals possessed slight differences, but all aimed at the recognition of "coercion" as "force". The Declaration is the GA Resolution 2625 (XXV), *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, 1970.

[100] The Preamble of the Declaration on Principles of International Law Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations provides as follows: «Recalling the duty of States to refrain in their international relations from military, political, economic or any other form of coercion aimed against the political independence or territorial integrity of any State».

[101] The principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter, provides that: «No State or group of State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other 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. 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

understanding of "force", the drafting history and the Declaration's choice to pose the concept of economic coercion under the "duty not to intervene" suggest that economic coercion is conceptually distinct from the "use of force" and is more closely linked to the principle of non-intervention.

Coercion by the threat or use of force is addressed in Article 52 of the Vienna Convention on the Law of Treaties (VCLT), which renders a treaty void if procured by the threat or use of force in violation of the principles of international law embodied in the UN Charter.[102] While it is pacific that this provision refers to armed force as per Article 2 (4) UN Charter and not economic force,[103] authors notice that even if economic coercion were included, it would still need to be unlawful under international law to render void a treaty.[104]

The prevailing legal doctrine maintains the distinction between economic coercion and violations of Article 2 (4) UN Charter or the application of Article 52 VCLT. As mentioned, a growing number of doctrinal and States proposals advocate for the inclusion of economic coercion within the concept of "force", mainly focusing on the harmful impact of economic measures rather than their form or legal nature. Nonetheless, recognising economic coercion as "use of force" under Article 2 (4) UN Charter would significantly expand the scope of the UN prohibition, potentially rendering several economic measures unlawful *per se* – unless justified under the exceptions provided by international law, namely self-defence, and UNSC authorisation.

In light of this evolving debate, it is also worthwhile considering whether, in certain circumstances, economic coercion might be equated to an "armed attack" and, thus, entail a legitimate

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sovereign rights and to secure from it advantages of any kind. Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State. The use of force to deprive peoples of their national identity constitutes a violation of their inalienable rights and of the principle of non-intervention. Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State. Nothing in the foregoing paragraphs shall be construed as affecting the relevant provisions of the Charter relating to the maintenance of international peace and security». These aspects have been evoked by many subsequent documents of the General Assembly when condemning the use of economic coercive measures. *Inter alia*, refer to Resolution adopted by the General Assembly on 19 December 2023 [on the report of the Second Committee (A/78/459/Add.1, para. 25)] 78/135, Unilateral Economic Measures as a Means of Political and Economic Coercion Against Developing Countries; and others

[102] More precisely, Article 52, Vienna Convention on the Law of Treaties, adopted 23 May 1969, entered into force 27 January 1980 – titled "Coercion of a State by the threat or use of force" – provides that «A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations».

[103] Tzanakopoulos A., *The Right to be Free from Economic Coercion*, op. cited above, p. 621; and, Sapienza R., *Il principio di non intervento negli affari interni: contributo allo studio della tutela giuridica internazionale della potestà di governo*, op. cited above, p. 118 which agrees with the exclusive reference to armed force but also notices that external declarations to the Convention specifically condemned the threat or use of "pressure in any form, whether military, political or economic". Undoubtedly, although important, this declaration has no legally binding force, but testifies the inclusion within the Convention' discussions of the nature of economic coercion. Refer also to Roscini M., *International Law and the Principle of Non-Intervention: History, Theory, and Interactions with Other Principles*, op. cited above, pp. 170-171 which, however, argues that the VCLT drafting history neither supports the existence of a prohibition of economic coercion under customary international law, neither it entirely rejects it since the VCLT «only addresses coercion as a ground for invalidating treaties, and not as an element of the principle of non-intervention» (p. 171).

[104] Indeed, Article 52 VCLT specifies that such coercion should occur «in violation of the principles of international law». In this regard, Tzanakopoulos A., *The Right to be Free from Economic Coercion*, op. cited above, p. 622.

self-defence response under Article 51 UN Charter. This possibility and the surrounding legal and doctrinal discussions are explored in the following section.

4.2. The possibility of self-defence in response to economic 'aggression': the debated meaning of "armed attack" as per Article 51 UN Charter

Notably, Article 51 of the UN Charter codifies the individual and collective right of States to self-defence.[105] While this right was not expressly mentioned either in the League of Nations Covenant nor in the Kellogg-Briand Pact, it is pacific that it existed implicitly within international law.[106] Interestingly, the inclusion of the right of self-defence in the UN Charter was not initially intended, but it was introduced following pressure from American States already parties of a collective self-defence regime – namely, the Inter-American Reciprocal Assistance and Solidarity (Act of Chapultepec) of 1945, then formalised in the Inter-American Treaty of Reciprocal Assistance (also "Rio Treaty") in 1947.[107]

[105] Article 51 UN Charter states that «Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security». Moreover, UN MS should immediately report to the UNSC any measure taken in the exercise of their right of self-defence, and should not «in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security».

[106] In this regard, Ronzitti N., *Diritto internazionale dei conflitti armati*, op. cited above, p. 35; and, Ronzitti N., *Diritto internazionale*, op. cited above, p. 462. Similarly, O'Brien J., *International Law*, op. cited above, p. 682; Ruys T., *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice*, op. cited above, p. 58; Randelzhofer A., Nolte G., *Article 51*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, Oxford University Press, 2012, pp. 1397-1428, p. 1399.

[107] The Inter-American Reciprocal Assistance and Solidarity (Act of Chapultepec) of March 6, 1945, from the Resolution approved by the Inter-American Conference on Problems of War and Peace at Mexico March 6,1945, entered into force March 8, 1945. See point 3 of the declaration stating «That every attack of a State against the integrity or the inviolability of the territory, or against the sovereignty or political independence of an American State, shall, conformably to Part III hereof, be considered as an act of aggression against the other States which sign this Act. In any case invasion by armed forces of one State into the territory of another trespassing boundaries established by treaty and demarcated in accordance therewith shall constitute an act of aggression». The final act of the Inter-American Conference on Problems of War and Peace was signed on March 8, 1945, by delegates representing Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, the Dominican Republic, Ecuador, El Salvador, Guatemala Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, the United States, Uruguay, and Venezuela (as provided in Part III of the Act). The updated text of the Act of Chapultepec also specifies, in its notes, that «The provisions became obsolete in part on termination of World War II and were incorporated in part in the inter-American treaty of reciprocal assistance of Sept. 2, 1947 (TIAS 1838, post, vol. 4), and in part in the Charter of the Organization of American States (2 UST 2394 TIAS 2361». Refer to Henderson C., *The Use of Force and International Law*, op. cited above, p. 259. Ronzitti N., *Diritto internazionale*, op. cited above, p. 484 specifies that the contribution of the States signatories of the Act of Chapultepec pertained the introduction of the right to collective self-defence since the Act so established. Similarly, Gray C., *The Use of Force and the International Legal Order*, in Evans M.D. (ed), *International Law*, op. cited above, p. 634; and, Ruys T., *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice*, op. cited above, p. 62 which specifies that the inclusion of Article 51 «was motivated first and foremost by the wish of certain States expressly to affirm compatibility with the UN Charter of existing and future collective arrangements» (refer also to pp. 62-67). Differently, O'Brien J., *International Law*, op. cited above, p. 682 argues that due to the *Caroline* test «when the United Nations Charter (1945) was being drawn up, it was therefore quite natural to include some reference to the principle of self-defence».

The right to self-defence constitutes an exception to the prohibition of the use of force *ex* Article 2 (4) UN Charter,[108] yet it does not refer to the concept "use of force" but, rather, to "armed attack". Self-defence is permitted «if an armed attack occurs» against a UN MS,[109] yet the scope and

[108] Although it is generally accepted that self-defence constitutes an exception to the prohibition of the use of force as per Article 2 (4) UN Charter, there is no specific link within the UN Charter between Article 51 and Article 2 (4). Some authors advance the argument that Article 51 UN Charter's self-defence does not constitute «an exception *in toto*» to the prohibition of use of force under Article 2 (4) UN Charter. Refer to Henderson C., *The Use of Force and International Law*, op. cited above, p. 278, and to the subsequent pages where the author also reports some counter-arguments (pp. 279-281). Similarly, Ronzitti N., *Diritto internazionale dei conflitti armati*, op. cited above, p. 40 arguing that the notion of "armed attack" is "completely autonomous from Article 2 (4) of the UN Charter" (lit. «*la nozione di attacco armato è completamente autonoma dall' art. 2, par. 4, della Carta*»).

[109] This short expression opens a wide debate – other than the one presented in this chapter on the meaning of "armed attack". Indeed, «if an armed attack occurs» has been contended to permit (or not) preventive self-defence. Despite the evolving modern weapons and novel modalities to conduct "war", the majority of the doctrine agrees that latent and not imminent threats cannot justify lawful reliance on self-defence under Article 51. In this regard, Ronzitti N., *Diritto internazionale dei conflitti armati*, op. cited above, p. 37 which analyses the notion of "preventive war" articulated by the US President Bush according to which the right of self-defence applies also to cases where there is a threat of terrorist attack or of use of mass-destruction weapons even in the absence of an imminent armed attack. The author clearly argues that such conception does not respect international law (lit. «Ma tale teoria, così come formulata, non corrisponde al diritto internazionale»). Similarly, Gioia A., *Diritto internazionale*, op. cited above, p. 450 which instead contends that the US interpretation post-2001's attack of 11th September exceeds the extensive interpretation of Article 51 UN Charter, by seemingly confusing the notion of self-defence and those of state of necessity. On the "Bush Doctrine" and on the Obama approach to "necessary force" refer to the analysis of Henderson C., *The Use of Force and International Law*, op. cited above, pp. 368-381; Randelzhofer A., Nolte G., *Article 51*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 1422-1423; Ruys T., *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice*, op. cited above, pp. 305-367; and, Gray C., *The Use of Force and the International Legal Order*, in Evans M.D. (ed), *International Law*, op. cited above, pp. 633-634 confirming the still «little sign of support for a fundamental transformation of self-defence along the lines suggested in the US *National Security Strategy* under President Bush» (p. 634). Discussions also concern the meaning and possible types of "preventive self-defence". Some argue that preventive self-defence encompasses both "anticipatory self-defence" (meaning self-defence exerted in the immediacy of an armed attack *i.e.* when the armed attack has not yet reached the targeted State but has already begun) and "pre-emptive self-defence (meaning self-defence exercised against terrorist movements and States ("rouge States") perceived as threatening international peace and security by possessing weapons of mass destructions or by supporting terrorism), *e.g. inter alia*, Gioia A., *Diritto internazionale*, op. cited above, p. 450; and Ronzitti N., *Diritto internazionale dei conflitti armati*, op. cited above, p. 37. Henderson C., *The Use of Force and International Law*, op. cited above, pp. 358-360 also includes "interceptive self-defence", *i.e.* self-defence actions occurring «after an attack has been launched but before it has reached its target or its effects have been felt» (p. 359). According to this author, "anticipatory self-defence refers instead to «the taking of defensive military action at the point immediately preceding the physical launching of an armed attack» (p. 360, refer also pp. 361-364); while "pre-emptive self-defence" are «armed forcible action taken to prevent more temporally remote threats of an armed attack from coming to fruition at some point in the future» (p. 365, refer also to pp. 364-381).Even more differently, Ruys T., *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice*, op. cited above, pp. 251-254 (also p. 525) which finds four categories: (i) reactive self-defence; (ii) interceptive self-defence; (iii) anticipatory action (covering both pre-emptive and preventive self-defence); and, (iv) preventive self-defence. Accordingly, (i) «reactive self-defence stands opposite to anticipatory self-defence. Strictly reactive self-defence (excluding interceptive action) follows when an armed attack has struck the territory of the defending State, or its external manifestations abroad. The attack may be completed or may still be ongoing, but its material nature is to some extent an observable fact of reality»; (ii) «interceptive self-defence covers the situation where an attack has been launched, but has not yet struck the 'defending' State. *In casu*, there must be clear and compelling evidence that the opponent has embarked upon an apparently irreversible course of action, thereby 'crossing the legal Rubicon'. This category is located on the fault line between reactive and anticipatory self-defence. The clearest example is the scenario whereby a missile has been launched, but is still in the air»; (iii) «anticipatory action covers both pre-emptive and preventive self-defence. Pre-emptive self-defence is directed against an attack which has not yet been launched, but which is 'imminent'. This presupposes that there have been certain preparations for attack, such as the mobilization of conventional forces»; and, (iv) «preventive self-defence, on the other hand, seeks to counter diverse future threats, which have not yet fully materialized. There are no concrete indications that an attack will be launched in the near future, yet action is allegedly undertaken to 'prevent' the threat from becoming imminent» (pp. 253-254). At p. 265, the author specifies that institutions often tend to confuse these concepts, and that the «dividing line

meaning of "armed attack" remains contentious, albeit particularly crucial as it constitutes the sole prerequisite for invoking the right under Article 51 of the Charter.[110]

Certainly, the notion of "armed attack" is different from "use of force". While all armed attacks constitute uses of force, not all uses of force reach the threshold of "armed attacks". The ICJ, within *Nicaragua v. United States*, distinguished the «most grave forms of use of force (those constituting an armed attack) from other less grave forms»,[111] thereby seemingly distinguishing uses

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between 'interceptive' and 'pre-emptive' self-defence is fairly thin». Further debates over this Article concerns the Article's specific reference to the nature of «inherent right» of self-defence which, according to some, signifies that the UN Charter espoused the precedent customary regulation of such right, thereby enabling reliance on preventive self-defence. Interestingly, according to Randelzhofer A., Nolte G., *Article 51*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, p. 1403 the reference to "inherent" «simply means that the right is also vested in States other than UN members, and that UN members may give assistance to a non-member falling victim to an armed attack». Others, instead, contend that this adjective solely acts as emphasis and, thus, the UN Charter's explicit mention of «if an armed attack occurs» specifically signifies that the occurrence of an armed attack is required, and thus excludes the admissibility of the preventive self-defence. Nonetheless, the latter strand of interpretation has been partially contested due to, among others, (i) the existence of a "preventive self-defence" already within the Covenant of the League of Nations and the Kellogg-Briand Pact; and, (ii) the questionable applicability to the current landscape, given that certain categories of weapons, *e.g.* nuclear ones, might signify that a lawful self-defence response could occur solely after a State had been attacked (and potentially completely destroyed?) by nuclear arms. In this sense, Ronzitti N., *Diritto internazionale dei conflitti armati*, op. cited above, pp. 36-37; Gray C., *The Use of Force and the International Legal Order*, in Evans M.D. (ed), *International Law*, op. cited above, p. 631; and Ruys T., *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice*, op. cited above, p. 60, and p. 250. Interestingly, the ICJ case on the *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion and Orders, 8 July 1996 discusses the proportionality principle of self-defence applied to nuclear weapons. The latter argument, however, has been occasionally criticised due to the deterrence nature of nuclear weapons, and to the risk of relying on military intervention justified as "self-defence" in order to prevent a State from developing nuclear programmes: accordingly, refer to Ruys T., *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice*, op. cited above, pp. 527-528, while on the deterrent aspect of nuclear weapons, refer to para 48 of the ICJ case on the *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion and Orders, 8 July 1996. Moreover, it remains present also the risk of mistakes in recognising the "true" intention of the other State, together with the risk of escalation and of a disproportionate response. On this latter regard, Gray C., *The Use of Force and the International Legal Order*, in Evans M.D. (ed), *International Law*, op. cited above, p. 631; and, similarly, Ruys T., *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice*, op. cited above, pp. 532-535 which, interestingly, also adds the risk of relying on the self-defence justification as a «pretext for domestic interference or territorial annexation» (p. 533). More in general, reporting the different arguments and the doctrinal debate over preventive self-defence, refer to, *inter alia*, Ronzitti N., *Diritto internazionale dei conflitti armati*, op. cited above, p. 36; Randelzhofer A., Nolte G., *Article 51*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, p. 1422; Gray C., *The Use of Force and the International Legal Order*, in Evans M.D. (ed), *International Law*, op. cited above, p. 628; O'Brien J., *International Law*, op. cited above, p. 683; Ruys T., *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice*, op. cited above, pp. 255-367; and, Henderson C., *The Use of Force and International Law*, op. cited above, pp. 357-399.

[110] Henderson C., *The Use of Force and International Law*, op. cited above, p. 261. Similarly, to Randelzhofer A., Nolte G., *Article 51*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, p. 1404.

[111] International Court of Justice, *Nicaragua v. United States* (Military and Paramilitary Activities in and against Nicaragua), Merits, 27 June 1986, para 191. At para 195 the ICJ also states that «There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks. In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to" (*inter alia*) an actual armed attack conducted by regular forces, "or its substantial involvement therein". This description, contained in Article 3, paragraph (g), of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX), may be taken to reflect customary international law. The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been

of force according to the "gravity" of the acts. A different ICJ case law, instead, recognised that both the UN Charter's prohibition of the use of force and the UN's right to self-defence «apply to any use of force, regardless of the weapons employed».[112]

It remains nonetheless pacific that the amount of force needed to appeal to Article 2 (4) UN Charter is lower to the level of force required to invoke Article 51.[113] Generally, States distinguish "use of force" from "armed attack"[114] thereby limiting self-defence to cases of armed attacks.[115]

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carried out by regular armed forces. But the Court does not believe that the concept of "armed attack" includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States». Critics of the distinction presented by the ICJ in the Nicaragua case are explained by Ruys T., *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice*, op. cited above, pp. 143-149.

[112] International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion and Orders, 8 July 1996, para 39. Firstly, at para 38 it is provided that «This prohibition of the use of force is to be considered in the light of other relevant provisions of the Charter. In Article 51, the Charter recognizes the inherent right of individual or collective self-defence if an armed attack occurs. A further lawful use of force is envisaged in Article 42, whereby the Security Council may take military enforcement measures in conformity with Chapter VII of the Charter»; while at para 39 it is indeed stated that «These provisions do not refer to specific weapons. They apply to any use of force, regardless of the weapons employed. The Charter neither expressly prohibits, nor permits, the use of any specific weapon, including nuclear weapons. A weapon that is already unlawful *per se*, whether by treaty or custom, does not become lawful by reason of its being used for a legitimate purpose under the Charter».

[113] Milaninia N., *Jus ad bellum economicum and jus in bello economico: The Limits of Economic Sanctions Under the Paradigm of International Humanitarian Law*, in Marossi A.Z., Bassett M.R. (eds), *Economic Sanctions under International Law: Unilateralism, Multilateralism, Legitimacy, and Consequences*, op. cited above, p. 109. Similarly, Batinga J., *Reconciling the Global North-South Divide on the Use of Force: Economic Coercion and the Evolving Interpretation of Article 2 (4)*, op. cited above, pp. 108-109 arguing that «every armed attack is definitionally a use of force, but not every use of force is an armed attack» (p. 109); and Ruys T., *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice*, op. cited above, pp. 516-517; Randelzhofer A., Nolte G., *Article 51*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, p. 1401 specifying that «not every use of force contrary to Art. 2 (4) may be responded to with armed self-defence» and p. 1402.

[114] In this regard, Henderson C., *The Use of Force and International Law*, op. cited above, pp. 285-286 reports the position of the Netherlands of 2019 which specified how an «armed attack is not the same as the use of force within the meaning of article 2 (4) of the UN Charter» (Dutch Minister of Foreign Affairs, Letter to the Parliament on the International Legal Order in Cyberspace, 5 July 2019). Refer also to p. 282, where the author specifies that the US's position concerning «the absence of a distinction between the 'use of force' and an 'armed attack' represents the view of a single state, and […] the United States is often painted as an outsider in terms of its position on this issue».

[115] Nonetheless, in practice, States often refrain from explicitly distinguishing between the notions of "use of force" and "armed attack", focusing instead mostly on the necessity and proportionality of the response exerted, as argued by Henderson C., *The Use of Force and International Law*, op. cited above, p. 283. Necessity and proportionality – together with immediacy – constitute the fundamental limits of the right of self-defence, even if not explicitly specified by Article 51 UN Charter. Although not expressly mentioned within the UN Charter, the necessity and proportionality requirements of self-defence acts are recognised elements of any response of self-defence. The third requirement of immediacy is likewise recognised as essential to the acts of self-defence. On these requirements, *inter alia*, Gioia A., *Diritto internazionale*, op. cited above, pp. 453-454, Ronzitti N., *Diritto internazionale dei conflitti armati*, op. cited above, pp. 41-43; Henderson C., *The Use of Force and International Law*, op. cited above, pp. 296-322; Ruys T., *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice*, op. cited above, pp. 91-125, and p. 519; and, Randelzhofer A., Nolte G., *Article 51*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, p. 1425 which argues that the violation of the necessity and proportionality principles would constitute «an 'additional ground of wrongfulness'» (refer also to pp. 1426-1427). Reference to necessity and proportionality is also mentioned with regard to the possibility of considering the accumulation of minor events as "armed attack" enabling self-defence ex Article 51 UN Charter. Some disagree with this possibility, others notice that it might be conceivable, as long as the response would be necessary and proportionate, or as long as the attacks are consecutive and are «linked in time, cause and source». On the first conception: *inter alia*, Ronzitti N., *Diritto internazionale dei conflitti armati*, op. cited above, pp. 37-38; Henderson C., *The Use of Force and International Law*,

Conversely, the US instead maintains a specific position, asserting that self-defence might be exerted «against any illegal use of force».[116]

The increasing cyber threats – which blur the line between economic harm and physical damage – have prompted new doctrinal interpretations, particularly regarding the qualification of cyberattacks as "armed attacks" under Article 51.[117] Although it is generally accepted that self-defence is legitimate when the suffered harm is comparable to the one provoked by a traditional kinetic attack[118] – particularly, when grave damage, serious physical injury, or death occurred –[119], some States have also classified events causing no human or physical damage as "armed attack".[120]

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op. cited above, pp. 290-296 which provides an overview of the theory and the positions of both the ICJ and of States; Ruys T., *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice*, op. cited above, pp. 168-175; and, Randelzhofer A., Nolte G., *Article 51*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 1409-1410. On the second interpretation, instead: *inter alia*, Gioia A., *Diritto internazionale*, op. cited above, p. 450; Ruys T., *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice*, op. cited above, p. 175, p. 177, and also p. 519 and p. 523; and, Randelzhofer A., Nolte G., *Article 51*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, p. 1427. Some scholars highlight the French version of the UN Charter which Article 51' expression "armed attack" is «*aggression armée*», thereby possibly suggesting that self-defence is lawful solely when an act of aggression occurs, while others perceive as necessary the presence of an '*animus aggressionis*' for an action to constitute an "armed attack". On this, Gioia A., *Diritto internazionale*, op. cited above, p. 450. Similarly, also Randelzhofer A., Nolte G., *Article 51*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, p. 1402; and, Ruys T., *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice*, op. cited above, pp. 127-139 which, moreover, at p. 522, specifies that this substantive element «in principle consists in the actual *intent to attack*», thereby calling for a UNGA definition of "armed attack" and proposing a possible draft definition at pp. 535-545.

[116] United States of America Department of Defense, *Law of War Manual*, June 2015 (updated July 2023), para 1.11.5.2., titled "Use of Force Versus Armed Attack", pp. 47-48, precisely states that «The United States has long taken the position that the inherent right of self-defense potentially applies against any illegal use of force. Others, however, would be inclined to draw more of a distinction between "armed attacks" and uses of force that do not give rise to the right to use force in self-defense». Interestingly, as note confirming the second sentence (*i.e.* of those "inclined" to distinguish between armed attacks and uses of force) the Manual cites the Nicaragua v. United Sates judgment. Nonetheless, the US practice is claimed to be «more nuanced and inconsistent» compared to the formal position. In this regard, Henderson C., *The Use of Force and International Law*, op. cited above, p. 281 also reports some factual cases in pp. 281-285.

[117] A further debated issue – both in general terms and specifically in cyber-attacks cases where it is complex to precisely identify a responsible State – concerns whether self-defence might be invoked also when an attack is committed by a non-State entity (*e.g.* the case of terrorist groups). The doctrine seems to majorly support this possibility, although opposed interpretations are also present both within the doctrine, States, and ICJ's judges. On this, Gioia A., *Diritto internazionale*, op. cited above, pp. 451-453; Henderson C., *The Use of Force and International Law*, op. cited above, pp. 263-272, and pp. 400-441. Similarly, Ruys T., *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice*, op. cited above, pp. 368-510, and pp. 528-532; and, Randelzhofer A., Nolte G., *Article 51*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 1414-1419.

[118] Gioia A., *Diritto internazionale*, op. cited above, pp. 450-451; Henderson C., *The Use of Force and International Law*, op. cited above, p. 286; Randelzhofer A., Nolte G., *Article 51*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, p. 1419. Refer also to Gross M.L., *Proportionate Self-Defence in Unarmed Conflict*, in Gross M.L., Meisels T. (eds), *Soft War: The Ethics of Unarmed Conflict*, op. cited above, pp. 217-232, p. 218 clearly stating that «when a non-kinetic attack causes similarly catastrophic consequences, it rises to the level of an armed attack and permits an armed response».

[119] Henderson C., *The Use of Force and International Law*, op. cited above, p. 286; and, Randelzhofer A., Nolte G., *Article 51*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, p. 1419 discussing «substantial and immediate destructive effects» (also at p. 1420).

[120] Henderson C., *The Use of Force and International Law*, op. cited above, pp. 283-284, and p. 286.

There is no agreement on whether non-physical or indirect and long-term effects – such as economic harm – qualify.[121] Mainly, this possibility is excluded, although some States and scholars suggest that considerable economic effects may justify self-defence under Article 51.[122] Despite the evident necessity to more effectively address cyber threats and attacks, the classification of economic impacts as 'armed attacks' under Article 51 appears to stretch the current boundaries of international

[121] Reporting these arguments, Randelzhofer A., Nolte G., *Article 51*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, p. 1419; and, Henderson C., *The Use of Force and International Law*, op. cited above, pp. 288-289.

[122] In this regard, refer to the positions of France and the Netherlands. As for the first case, the French Ministère des Armées, *Droit international appliqué aux opérations dans le cyberspace*, 09 September 2019, at p. 9 argues that "a cyberattack provoking substantial human casualties, or considerable physical or economic damages might qualify as armed attack" (lit. «*Une cyberattaque pourrait être qualifiée d'agression armée dès lors qu'elle provoquerait des pertes humaines substantielles, ou des dommages physiques ou économiques considérables*»). This concept is then again supported in document "*International Law Applied to Operations in Cyberspace*", paper shared by France with the Open-ended working group established by resolution 75/240, United Nations Office for Disarmament Affairs, available at https://documents.unoda.org/wp-content/uploads/2021/12/French-position-on-international-law-applied-to-cyberspace.pdf, [last accessed on 24 April 2025]. Refer to para 1.2. – titled A cyberattack that causes damage of a significant scale or severity may constitute an armed attack giving entitlement to the use of self-defence – which provides that «In accordance with the case law of the International Court of Justice (ICJ), France distinguishes the gravest forms of the use of force, which constitute an armed attack to which the victim State may respond by individual or collective self-defence, from other less grave forms. Cyberattacks may constitute a grave form of the use of force to which France could respond by self-defence»; and at para 1.2.1 (titled Categorisation of a cyberattack as an armed attack) that reads as follow: «France reaffirms that a cyberattack may constitute an armed attack within the meaning of Article 51 of the United Nations Charter, if it is of a scale and severity comparable to those resulting from the use of physical force. In the light of these criteria, the question of whether a cyberattack constitutes armed aggression will be examined on a case-by-case basis having regard to the specific circumstances. A cyberattack could be categorised as an armed attack if it caused substantial loss of life or considerable physical or economic damage. That would be the case of an operation in cyberspace that caused a failure of critical infrastructure with significant consequences or consequences liable to paralyse whole swathes of the country's activity, trigger technological or ecological disasters and claim numerous victims. In such an event, the effects of the operation would be similar to those that would result from the use of conventional weapons. To be categorised as an armed attack, a cyberattack must also have been perpetrated, directly or indirectly, by a State. Leaving aside acts perpetrated by persons belonging to State organs or exercising elements of governmental authority, a State is responsible for acts perpetrated by non-state actors only if they act de facto on its instructions or orders or under its control in accordance with the rules on State responsibility for internationally wrongful acts and ICJ case law. In accordance with ICJ case law, France does not recognise the extension of the right to self-defence to acts perpetrated by non-state actors whose actions are not attributable, directly or indirectly, to a State. France has, in exceptional cases, invoked self-defence against an armed attack perpetrated by an actor having the characteristics of a "quasi-State", as with its intervention in Syria against the terrorist group Daesh (ISIS/ISIL). However, this exceptional case cannot constitute the definitive expression of recognition of the extension of the concept of self-defence to acts perpetrated by non-state actors acting without the direct or indirect support of a State. Nonetheless, it cannot be ruled out that general practice may shift towards an interpretation of the law of self-defence as being authorised in response to an armed attack by non-state actors whose acts are not attributable to a State. However, any such development will have to be made bearing in mind the Rome Statute of the International Criminal Court (ICC) as amended in 2010 to add the crime of aggression, and the case law of the ICC that may emerge in this sphere». More recently, refer also to Ministère des Armées, *Manuel de droit des operations militares*, (sous la direction de Faure C., Stamminger R.), 2022. Similarly to the French position is the Netherlands's one which, through its Minister of Defence of 2018 (*i.e.* Ank Bijleveld MA), argued that «The report [*i.e.* the 2011 'Cyber Warfare' report] stated that a cyber-attack can be considered an 'armed attack', if it leads to a serious disruption with long-lasting consequences. For instance, if a cyber-attack targets the entire Dutch financial system or if it prevents the government from carrying out essential tasks such as policing or taxation...it would qualify as an armed attack. And it would thus trigger a state's right to defend itself, even by force. The Dutch government supports the general conclusions of this report». In this sense, Keynote of Ank Bijleveld MA, Minister of Defence, *We Have to Steer the Cyber Domain, before it Steers us*, 2018, available at https://puc.overheid.nl/mrt/doc/PUC_248478_11/1/, [last accessed on 24 April 2025]. On these arguments, refer also to Henderson C., *The Use of Force and International Law*, op. cited above, p. 289; Oorsprong F., Ducheine P., Pijpers P., *Cyber-attacks and the Right of Self-defense: A Case Study of the Netherlands*, Policy Design and Practice, Vol. 6, no. 2, 2023, pp. 217-239.

law. As briefly outlined below, the potential severe consequences of certain economic measures have been recognised by the international community since the drafting of the League of Nations Covenant, and, subsequently, of the UN Charter. Thus, the employment of the term "armed" in this context appears to be a deliberate exclusion of "economic attacks/impacts" from the concept of "armed attack".

Expanding Article 51 UN Charter to include severe economic impacts as qualifying elements of an armed attack would raise significant legal challenges. In particular, it would complicate the assessment of the thresholds of force – *e.g.* whether impacts on financial markets might justify forcible measures –; of proportionality – *e.g.* whether military response is proportionate to a mere economic damage –; and the attribution of the responsible States – *e.g.* especially within cyber operations where anonymisation techniques and proxy actors might hide the main responsible entity.

Beyond individual self-defence, Article 51 also permits "collective self-defence", allowing States that have not themselves suffered an armed attack to intervene in support of another State that has been attacked.[123] Enshrined in the UN Charter – especially due to the contribution of American States signatory to the Act of Chapultepec – the right to collective self-defence is also reflected in crucial international instruments, most notably the North Atlantic Treaty Organization (NATO).[124]

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[123] Ronzitti N., *Diritto internazionale dei conflitti armati*, op. cited above, p. 59; and Randelzhofer A., Nolte G., *Article 51*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, p. 1420. The meaning and the difference between individual self-defence and collective self-defence is not completely straightforward. O'Brien J., *International Law*, op. cited above, p. 684 reports four possibility: «(i) individual self-defence individually exercised, that is, state A attacks state B and state B exercises its individual right of self-defence; (ii) individual self-defence collectively exercised, that is, where state A attacks states B, C and D and these states each exercise their own rights of self-defence; (iii) collective self-defence individually exercised, that is, where state A attacks state B and state C although beyond the range of attack comes to the aid of state B; and (iv) collective self-defence collectively exercised, that is, where state A attacks state B and state C and state D join together to resist such an attack». Others, instead, notice how instead of "collective self-defence" it would be more appropriate to refer to "collective defence". In this latter sense, Ruys T., *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice*, op. cited above, p. 85.

[124] NATO regulates its MS' right to individual and collective self-defence within Article 5 of the North Atlantic Treaty (1949), by also explicitly recalling the UN provisions of Article 51 UN Charter. Interestingly, Article 6 of the North Atlantic Treaty specifies the meaning of "armed attack" for the purpose of Article 5, *i.e.* an armed attack to the territory of any NATO MS, to the forces, vessels, or aircraft of any of the NATO MS. The European Union also regulates the right to collective self-defence under Article 42 (7) Treaty on the European Union (TEU), by likewise mentioning Article 51 UN Charter and NATO's commitments (Article 42 (7) TEU reads that «If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States. Commitments and cooperation in this area shall be consistent with commitments under the North Atlantic Treaty Organisation, which, for those States which are members of it, remains the foundation of their collective defence and the forum for its implementation»). Similarly, both the 1947 Inter-American Treaty of Reciprocal Assistance, in its Article 3, and the 1992 Collective Security Treaty – linked to the successive Charter of the Collective Security Treaty Organization (CSTO) of 2002 – in its Article 4 provide for the right of their MS to collective self-defence and mention Article 51 UN Charter.

In general terms, it is accepted that the same conditions and requirements applying to the individual self-defence must also apply to cases of collective self-defence.[125] Nevertheless, some additional requirements have been identified both by the ICJ[126] and by scholars.[127] Most importantly, the qualification of "armed attack" is under the responsibility of the victim State which must declare itself the target of an attack and must explicitly request assistance. The assisting State might nonetheless independently assess whether the conditions of intervention do exists.[128] Assistance may undoubtedly be armed intervention, with some scholars envisaging also non-armed intervention such as economic, financial, or logistical support.[129]

Part of the doctrine also argues that non-armed measures directed at the responsible State – rather than to the victim State – such as economic and financial sanctions, may be justified under the

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[125] Ronzitti N., *Diritto internazionale dei conflitti armati*, op. cited above, p. 59. Similarly, Ruys T., *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice*, op. cited above, p. 83.

[126] Additional conditions have also been introduced by the remarkable case law Nicaragua v. United States (*i.e.* International Court of Justice, *Nicaragua v. United States* (Military and Paramilitary Activities in and against Nicaragua), Merits, 27 June 1986). Accordingly, key additional elements for collective self-defence concern: (i) the victim State should declare «itself to be the victim of an armed attack» (para 195 where it is explicitly argued that «It is also clear that it is the State which is the victim of an armed attack which must form and declare the view that it has been so attacked. There is no rule in customary international law permitting another State to exercise the right of collective self-defence on the basis of its own assessment of the situation. Where collective self-defence is invoked, it is to be expected that the State for whose benefit this right is used will have declared itself to be the victim of an armed attack»); (ii) the victim State should expressly request the assistance of a third State (para 199, providing that «At all events, the Court finds that in customary international law, whether of a general kind or that particular to the inter-American legal system, there is no rule permitting the exercise of collective self-defence in the absence of a request by the State which regards itself as the victim of an armed attack. The Court concludes that the requirement of a request by the State which is the victim of the alleged attack is additional to the requirement that such a State should have declared itself to have been attacked». At para 232 this additional requirement is restated as it follows: «The exercise of the right of collective self-defence presupposes that an armed attack has occurred; and it is evident that it is the victim State, being the most directly aware of that fact, which is likely to draw general attention to its plight. It is also evident that if the victim State wishes another State to come to its help in the exercise of the right of collective self-defence, it will normally make an express request to that effect». The approach of the Court has also been criticised on the ground that no international law provision requires such additional elements. In this regard, *inter alia*, Greig D.W., *Self-defence and the Security Council: What Does Article 51 Require?*, International and Comparative Law Quarterly, Vol. 40, no. 2, 1991, pp. 366-402, p. 375-376; Henderson C., *The Use of Force and International Law*, op. cited above, p. 339; and, Ruys T., *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice*, op. cited above, pp. 83-91. Thus, a not-attacked State cannot intervene in support of another State which has been a victim of an attack, unless such "victim" State declares to be victim and requests assistance. Ronzitti N., *Diritto internazionale dei conflitti armati*, op. cited above, p. 60 notices that although the request of the victim state and the consensus are required elements, it is not needed the existence of a previous treaty between the two actors establishing the possibility of acting in collective self-defence. Moreover, Gioia A., *Diritto internazionale*, op. cited above, p. 454 specifies that, nonetheless, the presence of a collective defence treaty effectively binds those MS which are part of it.

[127] For instance, some argue that preventive collective self-defence is lawful, but the immediacy of the attack must be as serious as justifying the intervention of the not-attacked State(s) which, thus, should be strictly necessary, as the 'victim state' would be unable to respond to the future attack (solely) with its own abilities and means. In this regard, Ronzitti N., *Diritto internazionale dei conflitti armati*, op. cited above, pp. 59-60.

[128] This "judgment of verification" by the non-attacked State – conducted prior to actually intervening in the victim State – mainly concerns the existence of the conditions of intervention, *i.e.* whether an "armed attack" has occurred or is going to immediately occur. If such elements were absent, and a not-attacked State were to intervene in another State, this intervention would constitute an international wrongful act under international law for the not-attacked State – regardless of the request received by the State "pretending" an imminent or ongoing armed attack. In this regard, Ronzitti N., *Diritto internazionale dei conflitti armati*, op. cited above, p. 60 which literally refers to a «"*giudizio di verifica*"».

[129] Gioia A., *Diritto internazionale*, op. cited above, p. 454.

collective self-defence framework.[130] Arguably, this would constitute a more robust justification than the one provided by the framework of ARSIWA countermeasures, where reliance on "collective countermeasures" enacted without UNSC authorisation is controversial.[131] The self-defence regime would offer a more extensive proportionality principle and preventive action, unlike countermeasures, which apply solely after the occurrence of an internationally wrongful act.[132] However, as noted, firstly, States generally prefer to justify measures under the ARSIWA framework, and, secondly, the goals of the measures are different: collective self-defence seeks to prevent or respond to an attack, whereas collective countermeasures aim to induce compliance with international obligations.[133]

A further link between the concept of self-defence and coercive measures arises from the so-called "until clause" of Article 51 UN Charter, which permits self-defence «until the Security Council has taken measures necessary to maintain international peace and security». It is widely accepted that Article 42's measures (namely, UN armed measures) suspend the right to self-defence,[134] while whether this also applies to Article 41's measures (namely, UN non-armed measures, or "UN sanctions") is debated. If Article 41 were also "necessary measures",[135] the enactment of UN

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[130] Part of the doctrine contends that «unjust or indeterminately unjust sanctions» may also justify reliance on proportionate self-defence. In this regard, Gross M.L., *Proportionate Self-Defence in Unarmed Conflict*, in Gross M.L., Meisels T. (eds), *Soft War: The Ethics of Unarmed Conflict*, op. cited above, p. 227. At p. 228, the author interestingly concludes that «each type of economic warfare – collective sanctions, smart sanctions, blockades, boycotts – merits proportionate self-defence when morally unjust». As specified at pp. 228-229, the injustice of economic warfare «does not necessarily turn on illegality. […] Rather, injustice turns on unjust consequences (*e.g.* a humanitarian crisis), a violation of the target's rights (*e.g.* the right of self-determination), or a violation of the antecedent conditions of just unarmed conflict (*e.g.* effectiveness)». Similarly, Milaninia N., *Jus ad bellum economicum and jus in bello economico: The Limits of Economic Sanctions Under the Paradigm of International Humanitarian Law*, in Marossi A.Z., Bassett M.R. (eds), *Economic Sanctions under International Law: Unilateralism, Multilateralism, Legitimacy, and Consequences*, op. cited above, pp. 107-111 which discusses "economic sanctions taken in self-defense" by analysing the self-defence's requirements of necessity and proportionality and by concluding that «When applied to economic sanctions, the test requires that economic sanctions taken in self-defense be narrowly tailored to prevent unintended, collateral consequences» (p. 111). The author later argues that also UNSC sanctions should «abide by the principles of *jus in bello economico*» (p. 113), *i.e.* necessity, distinction, and proportionality (p. 115). Thus, «Borrowing from IHL, *jus in bello economico* relates to the just implementation of economic sanctions, including a demonstration that: (1) economic sanctions are necessary to achieve an explicit and lawful objective; (2) that the severity of sanctions are proportional to that objective; and (3) that sanctions are designed in ways that enable the imposing party to differentiate between those responsible for the offensive behavior and civilians» (p. 116), as further developed by the author at pp. 116-121.

[131] Gioia A., *Diritto internazionale*, op. cited above, pp. 454-455. The instrument of countermeasures and its international law framework are presented in this dissertation, in Chapter II, Section 4. Notably, collective countermeasures are often also referred to as "countermeasures in the general interest", "third-party countermeasures", "*erga omnes partes* countermeasures", or "*erga omnes* countermeasures". Reliance on this typology of countermeasures is regulated by Articles 48 and 54 ARSIWA, further analysed in Section 4, Chapter II, of this dissertation.

[132] Gross M.L., *Proportionate Self-Defence in Unarmed Conflict*, in Gross M.L., Meisels T. (eds), *Soft War: The Ethics of Unarmed Conflict*, op. cited above, p. 220.

[133] Article 49 (1) ARSIWA clearly states the aim of countermeasures. In this regard, Gioia A., *Diritto internazionale*, op. cited above, p. 455. Chapter II also provides a description of the countermeasures' aims, together with the presentation of other instruments' aims and the scholarly debate.

[134] Accompanying this argument is the doctrinal interpretation according to which Article 51 UN Charter's "necessary measures" refers to measures which possess a «comparable nature» to the initiating act – *i.e.* "armed attack" – and thus, consist in UNSC forcible measures.

[135] In this regard, Henderson C., *The Use of Force and International Law*, op. cited above, p. 351; and, Ruys T., *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice*, op. cited above, p. 78-83, and p. 518.

sanctions would terminate the UN MS's right to individual and collective self-defence. Critics contend that this interpretation «overstate […] the role and authority» of UNSC sanctions which often are ineffective to cease attacks and insufficient to maintain international peace and security.[136]

In conclusion, the possibility of invoking self-defence in response to economic 'aggression' remains widely debated. The expansion of the notion of "armed attack" to include economic measures risks blurring the distinction between economic coercion and armed conflict, thereby undermining the threshold of what constitutes "use of force" under international law. As discussed above, equating economic coercion to the use of force under Article 2 (4) UN Charter remains controversial, as it stretches both its textual and historical interpretations. Moreover, such an expansion would create disbalanced and disproportionate consequences: if economic coercion were to qualify as a violation of Article 2 (4) UN Charter, it would theoretically justify a military response under the right of self-defence. This would effectively lower the threshold for lawful resort to military force, allowing States to lawfully rely on armed force in response to economic actions which, however coercive, might be aimed at inducing compliance or behavioural changes.

Economic coercion may, under certain conditions, constitute a violation of international law, in particular, when it infringes the principle of non-intervention – as further explained in the following section. In such cases, the injured States (and, in certain circumstances, also non-injured parties) may lawfully resort to specific international law instruments, including retorsions, non-armed reprisals, and ARSIWA countermeasures, as explored in Chapter II of this dissertation. However, even unlawful coercion, and regardless of its unintended consequences, cannot reach the threshold required to trigger the international legal framework governing armed force: equating economic coercion to use of force and blending the two distinct legal frameworks together would risk legitimising a broad range of (disproportionate) military responses to non-military and purely economic actions.

Excluded that economic coercion may qualify as use of force and enable military self-defence, the core legal question shifts from the "law of armed force" to the "law of non-intervention", becoming thus whether and when economic coercion crosses the threshold of prohibited intervention in matters within States' sovereign domain. The key issue therefore lies in understanding the scope of the principle of non-intervention applied to cases of economic coercion, rather than in expanding the concept of military force to include purely economic actions.

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[136] Henderson C., *The Use of Force and International Law*, op. cited above, p. 351. Although this latter argument may be true from a perspective of States and their practice, the UNSC's reliance on Article 41' measures is effectively bound to the aim of maintenance and restoration of international peace and security, as stated in Article 39 UN Charter. This Article and the doctrinal debate over the goal of Article 41 measures are further presented in Chapter II of this dissertation, in Section 3.2.

The following section will examine the relationship between economic coercion and the principle of non-intervention, with a view of clarifying the legal boundaries governing these concepts.

4.3. Economic coercion as a violation of the principle of non-intervention

4.3.1. International law on the relationship between economic coercion and the principle of non-intervention

The principle of non-intervention in other States' affairs is one of the oldest and most important principles of international law. Its relevance has increased nowadays, as digital interconnection and economic interdependence provide States with novel means to intervene and interfere.[137]

The principle – part of customary international law – requires States to refrain from, directly or indirectly, coercively intervening in the internal or external affairs of other States. It is grounded on two key elements: (i) an interference with a State's internal or external affairs; and, (ii) the coercive character of the action.[138]

Throughout the years, the principle underwent different interpretations and conceptions: initially lacking significance,[139] the concept has been then linked to the concepts of sovereignty and

[137] Jamnejad M., Wood M., *The Principle of Non-intervention*, Leiden Journal of International Law, Vol. 22, no. 2, 2009, pp. 345-381, p. 346 and p. 381; and, Roscini M., *International Law and the Principle of Non-Intervention: History, Theory, and Interactions with Other Principles*, op. cited above, p. 2. Reasoning on the interdependence of economies and the consequences on the principle of non-intervention is Sapienza R. already in the 90s in Sapienza R., *Il principio di non intervento negli affari interni: contributo allo studio della tutela giuridica internazionale della potestà di governo*, op. cited above, pp. 108-109. Interestingly, Ronzitti N., *Sanctions as Instruments of Coercive Diplomacy: An International Perspective*, in Ronzitti N. (ed), *Coercive Diplomacy, Sanctions and International Law*, op. cited above, p. 9 notices how «some forms of economic coercion are, in today's integrated world economy, more dangerous than a minor violation of the principle of non-use of force».

[138] In this regard, Milanovic M., *Revisiting Coercion as an Element of Prohibited Intervention in International Law*, op. cited above, p. 602; and, Abi-Saab G., *Some Thoughts on the Principle of Non-Intervention*, in Wellens K. (ed), *International Law: Theory and Practice, Essays in Honour of Eric Suy*, op. cited above, pp. 227-229.

[139] Prior to the 15th century, rulers and cities lacked exclusive jurisdiction over their territories and populations; thus, the principle of non-intervention in domestic and external affairs was void of any meaning. The development of the concept of "non-intervention" can be contended to date back to ancient times. Roscini M., *International Law and the Principle of Non-Intervention: History, Theory, and Interactions with Other Principles*, op. cited above, pp. 9-11 reports the 1278 BC treaty between Ramses II - pharaoh of Egypt – and Hattousilis III – king of the Hittites – as a first case of mutual assistance agreement between the two rulers.

equality among States,[140] then solely bound to armed actions,[141] and slowly interpreted also in light of other coercive behaviours.

During the 19th century, the concept of intervention became a proper legal notion used to refer to coercive acts, yet still limited to armed and diplomatic means, thus excluding economic coercion.[142] Within the interwar period, the invocation of self-preservation as a justification for intervention – prevalent in the 19th century – began to decline, while the right of a State to determine its system

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[140] With the consolidation of national kingdoms in the 15th century, kings effectively possessed power over their territories, developing an initial concept of sovereignty espoused to the unwillingness to endure external interferences. The 1648 Peace of Westphalia notably enhanced the concept of sovereignty and the consolidation of powers and exclusive jurisdictions. A legal obligation to non-intervene in other States' internal or external affairs unfolded in the 17th century, as strictly correlated to the concept of State sovereignty. *Inter alia*, Henderson C., *The Use of Force and International Law*, op. cited above, p. 25; Lesaffer R., *Too Much History: From War as Sanction to the Sanctioning War*, in Weller M. (ed), *The Oxford Handbook of the Use of Force in International Law*, op. cited above, p. 46; O'Brien J., *International Law*, op. cited above, p. 675; and, Roscini M., *International Law and the Principle of Non-Intervention: History, Theory, and Interactions with Other Principles*, op. cited above, pp. 11-13. Similarly, Sapienza R., *Il principio di non intervento negli affari interni: contributo allo studio della tutela giuridica internazionale della potestà di governo*, op. cited above, pp. 44-48. For a critical analysis of the concept of State sovereignty, refer to Koskenniemi M., *State Sovereignty and the Origins of International Legal Formalism*, in Klamberg M., Svanberg K., Rönnelid L. (eds), *Reconstructing Power and Hegemony in Public International Law*, op. cited above, pp. 291-361.

[141] A legal obligation to non-intervene in other States' internal or external affairs unfolded in the 17th century, as strictly correlated to the concept of State sovereignty. In this context, the concept of intervention was understood to encompass both the implementation of armed force and the unauthorised exercise of jurisdiction within the sovereign territory of another State, as extensively discussed by Roscini M., *International Law and the Principle of Non-Intervention: History, Theory, and Interactions with Other Principles*, op. cited above, p. 13. Significant developments to the concept occurred within the 18th century when just war theorists – as recalled *supra* – discussed just causes of war and, consequently, of intervention. Emer de Vattel (1714-1764) is commonly considered the "father of the principle of non-intervention", having affirmed nations' legal equality and non-interference as a result of States' independence, «that is […] external sovereignty». Accordingly, interference is a wrongful act, but the obligation of non-interference is not an absolute principle, as exceptional cases – such as civil war, unsuccessful mediation, just grounds of the assisted state, requests of help, lack of treaties and alliances prohibiting interference – might enable interference. *Inter alia*, Jamnejad M., Wood M., *The Principle of Non-intervention*, op. cited above, p. 349; and, Abi-Saab G., *Some Thoughts on the Principle of Non-Intervention*, in Wellens K. (ed), *International Law: Theory and Practice, Essays in Honour of Eric Suy*, op. cited above, p. 225. Moreover, Roscini M., *International Law and the Principle of Non-Intervention: History, Theory, and Interactions with Other Principles*, op. cited above, p. 18 reports that – arguably – Vattel is the first scholar to adopt the term "*intervenir*", although only twice «and not in any technical sense». Similarly, Sapienza R., *Il principio di non intervento negli affari interni: contributo allo studio della tutela giuridica internazionale della potestà di governo*, op. cited above, pp. 42-44 studies the use by Vattel of "intervenir" and "se mêler" noticing that these terms might indicate behaviours somehow similar or linked to each other.

[142] During the 19th century, the expansion of commercial globalisation facilitated external interferences in domestic unrests occurring both on the European continent, and on the American one. In this regard, Roscini M., *International Law and the Principle of Non-Intervention: History, Theory, and Interactions with Other Principles*, op. cited above, p. 28; Neuhold H., *The Law of International Conflict: Force, Intervention and Peaceful Dispute Settlement*, Brill Nijhoff, 2016, p. 163; and, Ronzitti N., *Sanctions as Instruments of Coercive Diplomacy: An International Perspective*, in Ronzitti N. (ed), *Coercive Diplomacy, Sanctions and International Law*, op. cited above, p. 3. Moreover, Roscini M., *International Law and the Principle of Non-Intervention: History, Theory, and Interactions with Other Principles*, op. cited above, pp. 29-32 argues that diplomatic intervention encompassed «hortatory representations (typically accompanied by a threat of force), imposed mediation, or premature recognitions» and was unlawful as the armed intervention (also named "dictatorial interference") «because it too involved the unauthorized exercise of sovereign powers in the sphere of exclusive jurisdiction of another sovereign» (p. 30). Sapienza R., *Il principio di non intervento negli affari interni: contributo allo studio della tutela giuridica internazionale della potestà di governo*, op. cited above, pp. 41-42 outlines how, in the past, the principle of non-intervention also prohibited the premature recognition of insurgents and other behaviour not necessary (solely) corresponding to armed intervention. The same author, at pp. 48-50, discusses also the concepts of "diplomatic" and "armed" intervention. On this period, importantly, Abi-Saab G., *Some Thoughts on the Principle of Non-Intervention*, in Wellens K. (ed), *International Law: Theory and Practice, Essays in Honour of Eric Suy*, op. cited above, p. 226.

without external interferences gained recognition as a principle of international law.[143] Despite regulating the use of force, neither the Covenant of the League of Nations nor the Kellogg-Briand Pact expressly codified the principle of non-intervention.[144]

Following WWII, the principle gained prominence in various international and regional treaties.[145] The UN Charter does not explicitly mention non-intervention,[146] but it is implicitly established through its provisions prohibiting threat and use of force, enhancing equality between States, and protecting sovereignty – *i.e.* Articles 2 (4), 1 (2), 2 (1), and 78.[147] Interestingly, Article 2

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[143] Roscini M., *International Law and the Principle of Non-Intervention: History, Theory, and Interactions with Other Principles*, op. cited above, pp. 70-74.

[144] Some interwar regional treaties, instead, specifically provide for non-intervention duties such as the 1933 Anti-War Treaty of Non-Aggression and Conciliation ("Saavedra-Lamas Pact") or the 1933 Convention for the Definition of Aggression. Refer to the Anti-War Treaty of Non-Aggression and Conciliation ("Saavedra-Lamas Pact"), Rio de Janeiro, 10 October 1933. This Treaty was then superseded by the American Treaty on Pacific Settlement ("Pact of Bogotà") of 1948. Article III of the Saavedra-Lamas Pact specifically provides that the parties will not resort in any case to intervention, either diplomatic or armed one, unless established by other treaties of which the parties are signatory (literally «[…] *pero no recurrirán en ningún caso a la intervención, sea diplomática o armada; salvo la actitud que pudiera corresponderles en virtud de otros Tratados colectivos de que esos Estados sean signatarios*»). The Treaty was originally signed by Argentina, Brazil, Chile, Mexico, Paraguay, and Uruguay. Despite not being an initial signatory, the United States later signed the Treaty. Solely Bolivia and Costa Rica did not sign the Treaty out of the 21 American republics of the inter-American system. Some European States also signed the Treaty, *i.e.* Bulgaria, Czechoslovakia, Finland, Romania, Spain, Yugoslavia, and Italy, although with reservations. For an overview of this Treaty, refer to Caminos H., *Saavedra Lamas Treaty (1933)*, Max Planck Encyclopedias of International Law [MPIL], December 2006. Moreover, Article II of the Convention for the Definition of Aggression, London, 3 July 1933, considers "aggressor in an international conflict" those States that is the first to, *inter alia*, «Provision of support to armed bands formed in its territory which have invaded the territory of another State, or refusal, notwithstanding the request of the invaded State, to take, in its own territory, all the measures in its power to deprive those bands of all assistance or protection». Article III specifies also that «No political, military, economic or other considerations may serve as an excuse or justification for the aggression referred to in Article 2. (For examples, see Annex.)», *i.e.* the internal condition of a State («*E.g.*, its political, economic or social structure; alleged defects in its administration; disturbances due to strikes, revolutions, counter-revolutions, or civil war») and the internal conduct of a State («*E.g.*, the violation or threatened violation of the material or moral rights or interests of a foreign State or its nationals; the rupture of diplomatic or economic relations; economic or financial boycotts; disputes relating to economic, financial or other obligations towards foreign States; frontier incidents not forming any of the cases of aggression specified in Article 2»). The parties to this Convention were Romania, Estonia, Latvia, Poland, Turkey, Persia, the Union of Soviet Socialist Republics (USSR), Afghanistan, and, Finland.

[145] This occurred despite many cases of interventions in other States' domestic affairs took place especially during the Cold War. In this sense, Roscini M., *International Law and the Principle of Non-Intervention: History, Theory, and Interactions with Other Principles*, op. cited above, p. 98 reports the cases of interventions that during the Cold War mainly involved the Soviet Union and the United States, aiming at overthrowing regimes or supporting friendly governments. *Inter alia*, the Soviet Union intervened in East Germany in 1953, in Hungary in 1956, and in Czechoslovakia in 1968; while the US notably intervened in Guatemala in 1954, in Cuba in 1961, in the Dominican Republic in 1965, in Nicaragua in 1981 until 1989, in Grenada in 1983 and in Panama in 1989-1990.

[146] As recalled by the ICJ, the principle of non-intervention «is not, as such, spelt out in the Charter» (Nicaragua case, para 202).

[147] Notably, Article 2 (4) UN Charter prohibits UN MS to refrain from the threat or use of force «against the territorial integrity or political independence of any state»; Article 1 (2) UN Charter includes the purpose of the UN to be, *inter alia*, the development of «friendly relations among nations based on respect for the principles of equal rights and self-determination of peoples»; Article 2 (1) UN Charter abides the UN to the «principle of the sovereign equality of all its Members»; and, Article 78 UN Charter requires the relations between UN MS to «be based on respect for the principle of sovereign equality». Interestingly, Abi-Saab G., *Some Thoughts on the Principle of Non-Intervention*, in Wellens K. (ed), *International Law: Theory and Practice, Essays in Honour of Eric Suy*, op. cited above, p. 225 notices how the UN Charter innovated by using the expression "sovereign equality", thereby merging the principle of sovereignty and the principle of equality of States in one single concept, without affecting the normative significance. Notably, Articles 1 (2) and 2 (1) UN Charter specifically address the Organisation and not its MS which are, instead, addressed by Articles 2 (4) and 78 UN Charter. Nonetheless, also these latter Articles cannot be framed as 'proper' general prohibition of non-

(7) UN Charter restricts UN interference in domestic matters, although some scholars interpret it as applying to member States as well.[148] Prohibition of intervention and the customary international law status of the principle is explicitly recalled within the 1970 UN Declaration on Principles of International Law.[149] Over time, several UN General Assembly Resolutions,[150] bilateral

intervention since Article 78 solely concerns the principle of sovereign equality, and since Article 2 (4) is specifically framed within the context of (armed) force and, thus, it is generally read as prohibiting intervention implemented through armed force. In this regard, Roscini M., *International Law and the Principle of Non-Intervention: History, Theory, and Interactions with Other Principles*, op. cited above, p. 101; and, similarly, Henderson C., *The Use of Force and International Law*, op. cited above, pp. 92-94. Refer also to Neuhold H., *The Law of International Conflict: Force, Intervention and Peaceful Dispute Settlement*, op. cited above, p. 165 which, at p. 163, interestingly contends that «the legal principle of sovereign equality between all states irrespective of their power was 'overruled' by political reality for a long time». On the wider debate on the meaning of "force" in Article 2 (4) UN Charter, *supra*, section 4.1. of this Charter.

[148] Article 2 (7) UN Charter constitutes the Charter's sole explicit mention of 'intervention'. It provides that «nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII». Western States and part of the doctrine highlight that this provision specifically refer to the relationship between UN organs and UN MS, and thus does not constitute a prohibition of intervention for States. Others, instead, apply the legal reasoning '*argumentum a maiore ad minus*' and argue by analogy that if the UN itself is bound by the principle of non-intervention, so are all its MS in their relations with each other. On the first argument, Jamnejad M., Wood M., *The Principle of Non-intervention*, op. cited above, p. 351; Ronzitti N., *Sanctions as Instruments of Coercive Diplomacy: An International Perspective*, in Ronzitti N. (ed), *Coercive Diplomacy, Sanctions and International Law*, op. cited above, p. 4; and, Roscini M., *International Law and the Principle of Non-Intervention: History, Theory, and Interactions with Other Principles*, op. cited above, p. 100. On the latter, Neuhold H., *The Law of International Conflict: Force, Intervention and Peaceful Dispute Settlement*, op. cited above, p. 165. On the '*argumentum a maiore ad minus*' and, more widely, on the use of analogy in international law refer to Vöneky S., *Analogy in International Law*, Max Planck Encyclopedias of International Law [MPIL], February 2008, which defines the legal reasoning at hand as «a special type of legal reasoning by analogy. It says that a rule which covers a particular case A has to be applied even a fortiori to case B, as the underlying rationale of the legal rule covering A is even more decisive in regard to case B» (para 1). Arguing that the principle of non-intervention also applies to policies of States: Orakhelashvili A., *Sanctions and Fundamental Rights of States: The Case of EU Sanctions Against Iran and Syria*, in Happold M., Eden P. (eds), *Economic Sanctions and International Law*, Hart Publishing, 2016, pp. 13-26, p. 25.

[149] More precisely, The 1970 Declaration on Principles of International Law Concerning Friendly Relations contains instead a number of explicit references to the prohibition of intervention – with one principle specifically dedicated to it – and the assertion that «the practice of any form of intervention not only violates the spirit and letter of the Charter, but also leads to the creation of situations which threaten international peace and security» (Preamble which, similarly, also mentions «the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter»). Refer also to the third principle of the Declaration.

[150] Aside from the pivotal 1970 Declaration on Principles of International Law Concerning Friendly Relations mentioned above, other Resolutions focused on the principle such as, *inter alia*, the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty of 1965 (Res. 2131 (XX), of 21 December 1965); Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States of 1981 (Res. 36/103, of 03 December 1981), and the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations of 1987 (Res. 42/22, of 18 November 1987). Pivotal is also the Charter of Economic Rights and Duties of States (Res. 3281 (XXIX) , of 1974) which bears the objective «to promote the establishment of the new international economic order, based on equity, sovereign equality, interdependence, common interest and co-operation among all States, irrespective of their economic and social systems» (Preamble) and which, in Chapter I, provides that «Economic as well as political and other relations among States shall be governed, *inter alia*, by the following principles: (a) Sovereignty, territorial integrity and political independence of States; (b) Sovereign equality of all States; (c) Non-aggression; (d) Non-intervention; […]» (Chapter I). Most recent are the UN Millennium Declaration of 2000 (General Assembly Resolution 55/2, of 08 September 2000) in which it is recalled the «non-interference in the internal affairs of States» (I, para 4), and the 2005 World Summit Outcome (General Assembly Resolution 60/1, of 16 September 2005) which likewise adopts the term of "non-interference".

declarations,[151] constitutions, and military manuals[152] reaffirmed the principle of non-intervention or non-interference.

An early and significant recognition of the relationship between economic coercion and the principle of non-intervention occurred within the 1948 Charter of the Organisation of American States (OAS).[153] The Charter explicitly prohibits intervention in Articles 1, 2, 3, and 19 establishing States'

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[151] *Inter alia*, the remarkable 2016 Declaration on the Promotion of International Law signed by Russia and China which reports the prohibition of both 'interference' and 'intervention'. At para 4, it is stated that «The Russian Federation and the People's Republic of China fully support the principle of non-intervention in the internal or external affairs of States, and condemn as a violation of this principle any interference by States in the internal affairs of other States with the aim of forging change of legitimate governments. The Russian Federation and the People's Republic of China condemn extraterritorial application of national law by States not in conformity with international law as another example of violation of the principle of non-intervention in the internal affairs of States».

[152] As for what regards constitutions, *inter alia*, refer to the Constitution of Mexico which specifically mentions the principle of non-intervention in Article 89 (x) providing that the powers and rights of the President of the Republic are, *inter alia*, «to lead the foreign policy; to make and execute international treaties; as well as to end, condemn, suspend, modify, amend, withdraw reservations and make interpretative declarations relating such treaties and conventions, requiring the authorization of the Senate. For these purposes, the President of the Republic shall observe the following principles: the right to self-determination; non-intervention; peaceful solution of controversies; outlawing the use of force or threat in international relations; equal rights of States; international cooperation for development; the respect, protection and promotion of human rights; and the struggle for international peace and security»; to the Constitution of Qatar which chooses the term "interference" in Article 7 establishing that «The foreign policy of the State shall be based on the principle of consolidating international peace and security, via encouraging the peaceful resolution of international disputes, in line with the State's role in resolving such disputes at both the regional and international levels through mediation and dialogue, and all that is required thereby for maintaining balanced relations with all parties, supporting the right of people to self-determination, refraining from interference in the internal affairs of countries, and cooperating with peace-loving nations»; to the Constitution of the Republic of North Macedonia likewise referring to it as "interference" within Article 49 providing that «[…] the Republic shall not interfere with the sovereign rights of other states and with their internal affairs»); and, to the Constitution of China which similarly adopts the term "interference" but solely within the Preamble in which it is mentioned that «[…] The future of China is closely bound up with the future of the world. China pursues an independent foreign policy, observes the five principles of mutual respect for sovereignty and territorial integrity, mutual nonaggression, mutual noninterference in internal affairs, equality and mutual benefit, and peaceful coexistence, keeps to a path of peaceful development, follows a mutually beneficial strategy of opening up, works to develop diplomatic relations and economic and cultural exchanges with other countries, and promotes the building of a human community with a shared future. […]». As for military manuals, the prohibition on intervention is mentioned in the French, US, New Zealand, Norway, Denmark, and Canada's manuals as it is also present in the Tallinn Manuals.

[153] Also African States within the 1963 Charter of the Organization of African Unity (OAU) prohibited interference in internal affairs of States together with establishing the respect of sovereignty and territorial integrity of States, although not mentioning economic coercion. Most Asian and European treaties of that period, instead, did not provide for explicit reference to non-interference or non-intervention. More precisely, Article II (c) OAU Charter in which the Organisation purpose is, *inter alia*, «to defend their sovereignty, their territorial integrity and independence»; and Article III which provides for the OAU MS's principles of «1. The sovereignty equality of all Member States. 2. Non-interference in the internal affairs of States. 3. Respect for the sovereignty and territorial integrity of each States and for its inalienable right to independent existence». Charter of the Organization of African Union (OAU), 1963, signed also in subsequent years, by Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Congo, Côte d'Ivoire, Djibouti, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea Bissau, Kenya, Lesotho, Liberia, Libyan Arab Jamahiriya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Morocco, Mozambique, Namibia, Niger, Nigeria, Rwanda, Sahrawi Arab Democratic Republic, Sao Tome and Principe Senegal, Seychelles, Sierra Leone, Somalia, South Africa, Sudan, Swaziland, Tanzania, Togo, Tunisia, Uganda, Zambia, Zimbabwe, (Morocco, one of the original signatories to the Charter, withdrew from the OAU and its obligations in 1984, subsequent to the admission of the Sahrawi Arab Democratic Republic), was then replaced by the Constitutive Act of the African Union (AU) of 2000. The right to non-interference in the internal affairs of other AU MS has been incorporated also in the AU Constitutive Act, in Article 4 (g), together with mention to sovereign equality and interdependence among the Union MS in Article 4 (a), and to sovereignty, territorial integrity and independence of MS in Article 3 (b). Intervention is admitted by the Union in MS «pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity» (Article 4 (h) AU Constitutive Act) or under request of a MS to «restore peace and security» (Article 4 (j) AU Constitutive Act). With regard to other treaties, the 1945 Pact of the League of Arab

right to determine, without external interference, their political, economic, and social systems.[154] Article 19 prohibits States «or group of States»[155] from intervening with armed force but also with «any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements».[156] As mentioned above, the subsequent Article – despite not mentioning intervention – specifically prohibits reliance on economic and political coercive measures aimed at forcing the sovereign will of another State or obtaining advantages.[157]

Together, these Articles constitute an important treaty reference and linkage between the principle of non-intervention and economic coercion.[158] Afterwards, the 1970 Declaration on Principles of International Law Concerning Friendly Relations affirmed the crucial link between non-intervention and economic coercion, by establishing that armed intervention and other forms of interference are a violation of international law, and that no State «may use or encourage the use of economic political or any other type of measures to coerce another State».[159] Despite the relevance

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States establishes its purpose to be, *inter alia*, the safeguard of independence and sovereignty (Article 2). Non-intervention or interference is not mentioned but Article 8 of the Pact provides that «Every member State of the League shall respect the form of government obtaining in the other States of the League, and shall recognize the form of government obtaining as one of the rights of those States, and shall pledge itself not to take any action tending to change that form». As for European treaties, Roscini M., *International Law and the Principle of Non-Intervention: History, Theory, and Interactions with Other Principles*, op. cited above, p. 108 reports that solely the 1955 Warsaw Pact and the 1959 Charter of the Council for Mutual Economic Assistance (COMECON) – both treaties signed among Eastern European States – contained some explicit reference to the principle of non-intervention. The subdivision between Eastern European countries (also named "socialist countries") and Western ones also concerned the interpretation of the principle of non-intervention with the former being strong supporter of its introduction in treaties, and the seconds interpreting it as an overlapping with the prohibition of the use of force. Solely in the mid-1970s the non-binding Final Act of the Conference on Security and Co-operation in Europe (CSCE) of 1975 explicitly refers to non-intervention.

[154] While Article 1 specifies that no provision of the OAS Charter «authorizes [States] to intervene in matters that are within the internal jurisdiction of the Member States», Article 2 (b) specifically calls for the respect of the principle of non-intervention. Article 3 (e) establishes the right of every State to «choose, without external interference, its political, economic, and social system and to organize itself in the way best suited to and has the duty to abstain from intervening in the affairs of another State», thereby effectively linking the principle of non-intervention to the one of sovereignty.

[155] Roscini M., *International Law and the Principle of Non-Intervention: History, Theory, and Interactions with Other Principles*, op. cited above, p. 103 notices how the specification of "group of States" constitutes a novelty, envisioned to «put an end to the doctrinal and the practical movements that were favouring collective intervention during the [Second World] war and made clear that multilateral intervention is as harmful and unacceptable as is unilateral». Articles 18 and 19 OAS Charter are recognised to represent the Monroe Doctrine. In this regard, Sapienza R., *Il principio di non intervento negli affari interni: contributo allo studio della tutela giuridica internazionale della potestà di governo*, op. cited above, p. 23.

[156] Article 19 OAS Charter, 1948.

[157] More precisely, Article 20 OAS Charter precisely provides that «No State may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind». Roscini M., *International Law and the Principle of Non-Intervention: History, Theory, and Interactions with Other Principles*, op. cited above, p. 104 notices that the introduction of Article 20 OAS Charter «strictly speaking, […] was not necessary» as Article 19's broad language already included also the prohibition of economic coercive measures.

[158] Interestingly, the General Assembly Resolutions 2131 of 1965 and 2625 of 1970 (*i.e.* Declaration on Principles concerning Friendly Relations) recall Article 19 and Article 20 – although with some adjustments – thereby similarly establishing that intervention might be armed, economic, political, and through other types of coercive measures or subversive actions.

[159] In this regard, the third principle of the Declaration, *i.e.* the "principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter", is complemented as follow: «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 these provisions and of the link between non-intervention and economic coercion, their precise boundaries remain controversial.

Certainly, this ambiguity derives from differing Cold War-era conceptions: Western States limited non-intervention to armed coercion; socialist States justified interventions to suppress counterrevolutionary movements or to support non-independent populations from colonial powers; and, non-aligned States emphasised shielding ex-colonial States from neo-colonial interferences.[160] Despite these perspectives have partially evolved, the current prevailing debate focuses on the delineation of thresholds in which economic and political coercion may constitute prohibited intervention under international law.[161]

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of any other 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. 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 and to secure from it advantages of any kind. Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State. The use of force to deprive peoples of their national identity constitutes a violation of their inalienable rights and of the principle of non-intervention. Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State. Nothing in the foregoing paragraphs shall be construed as reflecting the relevant provisions of the Charter relating to the maintenance of international peace and security». Also the fourth principle, *i.e.* the "duty of States to co-operate with one another in accordance with the Charter", mentions non-intervention in its commentary as it provides that «States shall conduct their international relations in the economic, social, cultural, technical and trade fields in accordance with the principles of sovereign equality and non-intervention».

[160] In this regard, Roscini M., *International Law and the Principle of Non-Intervention: History, Theory, and Interactions with Other Principles*, op. cited above, pp. 112-115. Similarly, Sapienza R., *Il principio di non intervento negli affari interni: contributo allo studio della tutela giuridica internazionale della potestà di governo*, op. cited above, p. 29 and p. 119; Neuhold H., *The Law of International Conflict: Force, Intervention and Peaceful Dispute Settlement*, op. cited above, p. 164; and, Jamnejad M., Wood M., *The Principle of Non-intervention*, op. cited above, p. 350.

[161] To be precise, the debate on non-intervention also concerns issues such as whether during civil wars intervention is prohibited solely in support to insurgents or also to assist the in-office government; and whether the protection of human rights might justify intervention (also called 'humanitarian intervention'). On this, refer to *inter alia*, Jamnejad M., Wood M., *The Principle of Non-intervention*, op. cited above, p. 361; and, Roscini M., *International Law and the Principle of Non-Intervention: History, Theory, and Interactions with Other Principles*, op. cited above, p. 143, and – more extensively on both issues – respectively pp. 144-195 and pp. 196-245. On this, generally, refer also to Pustorino P., *The Principle of Non-Intervention in Recent Non-International Armed Conflicts*, Questions of International law (QIL), Zoom-in, Vol. 53, 2018, pp. 17-31; Sapienza R., *Il principio di non intervento negli affari interni: contributo allo studio della tutela giuridica internazionale della potestà di governo*, op. cited above, pp. 41-42; Neuhold H., *The Law of International Conflict: Force, Intervention and Peaceful Dispute Settlement*, op. cited above, pp. 168-170; Abi-Saab G., *Some Thoughts on the Principle of Non-Intervention*, in Wellens K. (eds), *International Law: Theory and Practice, Essays in Honour of Eric Suy*, op. cited above, p. 226 and pp. 232-233; and, Ronzitti N., *Diritto internazionale*, op. cited above, pp. 477-480. Interestingly, Jamnejad M., Wood M., *The Principle of Non-intervention*, op. cited above, p. 360 and pp. 375-377 seem to be rather sceptical over the legitimacy of the justification of promotion and protection of human rights to intervene. Another strand of doctrine, instead, discusses the possibility to define the principle. Despite it is mostly agreed that the principle of non-intervention is strictly related to the concept of sovereignty, part of the doctrine argues that a definition would be unfeasible, or too broad or narrow, or anyway not useful – especially in relation to terms not precisely defined within international law. Despite this, classifications of this principle have been proposed and discussed not only by scholars, but also by States during draft processes of treaties, agreements, and resolutions, and by courts such as the ECJ and the International Court of Justice (ICJ). Scholars extensively apply criteria to assess intervention: *inter alia*, the relationship between intervention and coercion (as further analysed later), the role of the intent of the State intervening, the means and methods used, the objectives of the actions, the targeted entities, the relation between the objective and the means, and the impact of the measures on the targeted entities. Equally, States and scholars discussed the notion within drafting processes of treaties, agreements, and resolutions as briefly mentioned above. On the mentioned criteria, among others, Neuhold H., *The Law of International Conflict: Force, Intervention and Peaceful Dispute Settlement*, op. cited above, p. 160; Jamnejad M., Wood M., *The Principle of Non-intervention*, op. cited above, p. 370 which concludes that

Notably, and as mentioned above, the ICJ addressed this issue in the landmark 1986 case *Nicaragua v. United States of America* (hereinafter also "Nicaragua judgment").[162] Interestingly, Nicaragua accused the US of violating – *inter alia* – Article 2 (4) UN Charter, Articles 18 and 20 OAS Charter, and the customary international law principles of sovereignty, and non-intervention,[163]

«It is clear from the multitude of instruments relating to intervention that the principle is to apply to acts other than the use of armed force, and there is no reason to exclude economic measures»; Abi-Saab G., *Some Thoughts on the Principle of Non-Intervention*, in Wellens K. (ed), *International Law: Theory and Practice, Essays in Honour of Eric Suy*, op. cited above, pp. 226-228; and, Milanovic M., *Revisiting Coercion as an Element of Prohibited Intervention in International Law*, op. cited above, pp. 626-648. On the link between intervention and sovereignty, *inter alia*, Abi-Saab G., *Some Thoughts on the Principle of Non-Intervention*, in Wellens K. (ed), *International Law: Theory and Practice, Essays in Honour of Eric Suy*, op. cited above, p. 228, and p. 231; Sapienza R., *Il principio di non intervento negli affari interni: contributo allo studio della tutela giuridica internazionale della potestà di governo*, op. cited above, p. 134, and pp. 161-166, which contends that the principle of non-intervention intends to protect the States' sovereignty against acts of any nature which attempt at its exclusivity or disturb the exercise. Accordingly, the principle of non-intervention protects the principle of sovereignty and of the exclusivity of territory since the latter is the principle that guarantees the co-existence between States in the international context; and, Jamnejad M., Wood M., *The Principle of Non-intervention*, op. cited above, p. 371 providing that «the purpose of the non-intervention principle is to prevent the 'subordination of sovereign will'». Concerning more generally the principle of non-intervention, refer, *inter alia*, also to Higgins R., *Intervention and International Law*, in Bull H. (ed), *Intervention in World Politics*, Clarendon Press, 1984; and, Reus-Smit C., *The Concept of Intervention*, Review of International Studies, Vol. 39, no. 5, 2013, pp. 1057-1076.

[162] Before that, in the 1949 within the judgment known as *Corfu Channel*, the ICJ established that «the right of intervention [is a] manifestation of a policy of force», arguably considering intervention as characterised by (i) the involvement of force (not necessarily armed); and, (ii) the manifestation of this force to the victim State. Of this analysis, Roscini M., *International Law and the Principle of Non-Intervention: History, Theory, and Interactions with Other Principles*, op. cited above, p. 146. Although not concerning the link with economic coercion, also the ECJ – in the *Liberation Tigers of Tamil Eelam v. EU Council* case of 2014 – dealt with the principle of non-intervention. The Court firstly recognised the principle of non-intervention as a principle of customary international law, and then provided that it «concerns the right of any sovereign State to conduct its affairs without external interference and constitutes a corollary of the principle of sovereign equality of States». Refer to Judgment of the General Court (Sixth Chamber, Extended Composition), *Liberation Tigers of Tamil Eelam (LTTE) v. Council of the European Union* (supported by Kingdom of the Netherlands, by United Kingdom of Great Britain and Northern Ireland, and by European Commission), Joined Cases T-208/11 and T-508/11, 16 October 2014, ECLI:EU:T:2014:885. The citation is at para 69 in which it is also cited the ICJ Nicaragua case. The *Liberation Tigers of Tamil Eelam v. EU Council* case concerned the EU's adoption of restrictive measures against terrorism in 2001 and, in 2006, of freezing measures against the Liberation Tigers of Tamil Eelam (LTTE), involved in armed conflicts against the armed forces of the Sri-Lanka Government. LTTE asked for annulment of implementing regulations claiming that the list of frozen funds constituted «interference by a third country in an armed conflict, contrary to the principle of non-interference» (para 44), while the Council considered the actions unfounded. The Commission interestingly argued that the principle of non-interference «is established for the benefit of States and, accordingly, can be invoked only by them, and not by 'rebel groups'» (para 51). The Court found that «Contrary to the LTTE's submissions, the placing on the list relating to frozen funds of a movement — even if it is a liberation movement — in a situation of armed conflict with a sovereign State, on account of the involvement of that movement in terrorism, does not therefore constitute an infringement of the principle of non-interference» (para 69).

[163] Other principles and treaties claimed to have been violated were the principle of freedom in high sea and others, and the bilateral 1956 Treaty of Friendship, Commerce and Navigation. Shortly, After the fall of the Nicaraguan Government in July 1979, a Junta of National Reconstruction and a government was empowered by the Frente Sandinista de Liberación Nacional (FSLN), a body which conducted armed conflicts with the former Government. The United States initially supported the FSLN Government with economic aid, but it later interrupted it in 1981 due to the involvement of the Nicaraguan Government in the provision of arms to El Salvador. Armed opposition to the new Nicaraguan Government was generally named "*contras*" and comprised mainly two groups: the Fuerza Democrática Nicaragüese (FDN) and the Alianza Revolucionaria Democrática (ARDE). Although initially undisclosed, it then became public (through specific US legislative provisions) that the US financially supported the *contras*, despite the latter committing crimes such as indiscriminate killings of civilians, torture, rape, and kidnapping. According to Nicaragua, the US not only recruited, trained, armed, equipped, financed and directed the actions of *contras* but it also carried operations such as mining of ports and attacks to ports, oil and naval bases. Also economically, Nicaragua contended the US pressure on the State by withdrawing aids, reducing the quota for imports of sugar, imposing a trade embargo, and influencing the Inter-American Development Bank and the International Bank for Reconstruction and Development to block loans to the State.

while the US justified its actions as collective self-defence under Article 51 UN Charter.[164] Notably, the ICJ found that the US violated the prohibition of force and the principle of non-intervention, rejecting the US's self-defence claim.[165]

Beyond its notably important clarifications on the status and meaning of the principle of non-intervention which nonetheless falls outside the precise scope of this dissertation,[166] the case is particularly significant because it demonstrates that Articles 2 (4) and Article 51 UN Charter are the international legal basis invoked to justify economic measures connected to intervention, and because it determines that economic measures may be examined under the principle of non-intervention, at least when they involve coercion in matters within a State's sovereign domain. The ICJ indeed clearly stated that intervention is prohibited when it involves coercion over matters in which a State has a sovereign freedom to decide, such as its political, economic, social and social system and its foreign policy.[167] Nonetheless, the Court notably refused to expressly classify measures of economic

[164] The US presented a Counter-Memorial on the question of jurisdiction and admissibility of the Court in which it claimed to be acting in its inherent right of (collective) self-defence as guaranteed by Article 51 of the UN Charter, but did not submit other arguments on the merits of the dispute.

[165] Nicaragua v United States, paras 227-238. At para 292, the Court decided that the US «by training, arming, equipping, financing and supplying the *contra* forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to intervene in the affairs of another State».

[166] Accordingly, the principle is part of customary international law and «involves the right of every sovereign State to conduct its affairs without outside interference» (para 202). Despite recalling that the principle is not expressly «spelt out in the [UN] Charter», it is also provided that «it was never intended that the Charter should embody written confirmation of every essential principle of international law in force» (para 202). The Court then proceeded by analysing international declarations and inter-American treaties or Conventions in which the US and Nicaragua participated in which the principle of non-intervention was clearly established, thereby noting that the US accepted those declarations and conventions as such without reservations in connection to the non-intervention principle (paras 203-204). At the end of para 204 it is clearly stated that «it can be inferred that the text testifies to the existence, and the acceptance by the United States, of a customary principle which has universal application».

[167] The Court notoriously established that «the 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 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, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State» (para 205). After discussing the practice of States, the Court also concludes that there is no general right of intervention «in support of an opposition within another State» in international law (para 209). Specifically on the case of US-Nicaragua, the Court, at para 241, specifies that the intention of the US was «to coerce the Government of Nicaragua in respect of matters in which each State is permitted, by the principle of State sovereignty, to decide freely». Despite finding not necessary to seek to establish whether the US intentions were a "mere" change of government policies in Nicaragua or the overthrow of the Nicaraguan Government, the Court concludes that «in 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» (para 241). On this refer also to the successive ICJ *case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* of 19 December 2005, also known as "DRC v Uganda", in which the ICJ finds a violation of non-intervention even though the intervening State's objective was not to overthrow the other State's President. Indeed, at para 163 of the Merits, it is provided that «The Court considers that the obligations arising under the principles of non-use of force and non-intervention were violated by Uganda even if the objectives of Uganda

constraints as violations of the principle of non-intervention, stating that this matter fell outside its jurisdiction.[168]

Thus, the ICJ did not recognised a prohibition of economic coercion *per se*, but acknowledged that – under certain conditions – economic pressure might violate the principle of non-intervention.[169] In turn, if coercive measures are already unlawful under specific primary rules – such as GATT – the principle of non-intervention is not applicable, while when such measures are not regulated elsewhere, they may violate non-intervention if they concern matters in which the victim State has no obligation to act in a specific way.[170]

This landmark ICJ case and the extensive employment of economic restricting measures raise the question, further explored in doctrinal debates, of whether economic coercion should always be considered as a form of intervention.

4.3.2. Doctrinal approaches: is economic coercion always a form of intervention?

The question of whether economic coercion constitutes a form of intervention under international law is a controversial issue. This is so because the scope and application of the principle

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were not to overthrow President Kabila, and were directed to securing towns and airports for reason of its perceived security needs, and in support of the parallel activity of those engaged in civil war».

[168] The ICJ clearly stated that «The Court does not here have to concern itself with possible breaches of such international economic instruments as the General Agreement on Tariffs and Trade. […] any such breaches would appear to fall outside the Court's jurisdiction. […] At this point, the Court has merely to say that it is unable to regard such action on the economic plane as is here complained of as a breach of the customary-law principle of non-intervention» (para 244-245). At para 242, instead, the Court pronounced itself on economic aid. In this sense, while the financial support, training, supply of weapons, intelligence and logistics to the contras constitute a violation by the US of the principle of non-intervention, the humanitarian aid to persons of forces in another country – regardless of their political affiliations or goals – is not unlawful intervention or anyway contrary to international law.

[169] Sapienza R., *Il principio di non intervento negli affari interni: contributo allo studio della tutela giuridica internazionale della potestà di governo*, op. cited above, p. 121. The author, at pp. 83-86, reports the argument according to which the principle of non-intervention is the prohibition of coercion in the case of diplomatic intervention, thereby classifying intervention as a coercive behaviour (a «dictatorial interference») consisting in the State's demand for a specific behaviour of another State, also accompanied by the threat of sanctions. In this regard, the author notices that, in this case, the intent to modify another State's behaviour must be clear. At p. 87 then, the author specifies that, differently, not all interventions are coercive, thus the coercive intent is necessary within the diplomatic interventions, but does not constitute an essential characteristic of the wider concept of intervention.

[170] Roscini M., *International Law and the Principle of Non-Intervention: History, Theory, and Interactions with Other Principles*, op. cited above, p. 164. The author interestingly individuates three pillars of the principle of non-intervention: (i) the prohibition of armed coercion (also banned by the prohibition of use of force); (ii) the prohibition of economic and political coercion aimed at subordinate the exercise of sovereign rights of the targeted State to secure advantages; (iii) the prohibition of supporting subversive, terrorist, or armed activities and of interfering in civil strife in another State. Extensively, *Ibid*., p. 147, and, pp. 169-194. The author interestingly specifies that, with regard to the first pillar, the provisions against armed coercion guaranteed by the principle of non-intervention are different from those guaranteed by Article 2 (4) UN Charter. Accordingly, at p. 170, non-intervention prohibits armed coercion in those matters in which the State is entitled to decide freely (thus, it does not ban the possibility to rely on armed countermeasures in which armed coercion is aimed at compliance with international obligations); and prohibits solely coercive acts, intended as "non-consensual acts" (while Article 2 (4) UN Charter also prohibits consensual forms of armed actions, if inconsistent with UN purposes).

of non-intervention to economic measures is not clearly delineated, as mentioned above, neither by international law instruments, nor by judicial decisions.

Traditionally, economic measures are not considered to constitute *per se* violations of the principle of non-intervention, unless they involve the use or threat of force and, thus, violate Article 2 (4) UN Charter. Nonetheless, the deep link between coercion and notions of sovereignty, *domain réservé* (or reserved domain), interference, and, intervention,[171] raises issues regarding their relationship and implications. For instance, while part of the doctrine allows for coercive acts between States under certain conditions;[172] others more strictly argue that the principle of sovereign equality is violated by «the power to coerce» of States which – according to the Latin maxim "*par in parem non habet imperium, non habet jurisdictionem*", meaning «an equal has no dominion over an equal, has no jurisdiction» – should observe the non-intervention principle.[173] A further strand of scholarship highlights that the object of non-intervention is the reserved domain, while the instrument or method of non-intervention is coercion.[174]

Against this background, there is likewise considerable doctrinal divergence with regard to the role of coercion within the framework of intervention. While some authors argue that «coercion is a necessary ingredient of prohibited intervention»,[175] others adopt a stricter approach contending that «coercion is intervention» and is «unlawful because it invades a state's 'sphere of freedom'».[176] In sharp contrast, a third view holds that coercion is not a component of the prohibited intervention,[177]

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[171] The notion of *domain réservé* is generally defined negatively, inasmuch as it signifies that «which remains within the sphere of free action of the state is simply that on which the state has not assumed an international obligation to act in any particular way», according to Tzanakopoulos A., *The Right to be Free from Economic Coercion*, op. cited above, p. 620. Milanovic M., *Revisiting Coercion as an Element of Prohibited Intervention in International Law*, op. cited above, at p. 609 curiously links the concept of reserved domain to the one of coercion by arguing that «The reserved domain is the *object* of prohibited intervention, while coercion is its *instrument or method*. The two elements are cumulative». The author also specifies that the reserved domain anyway exists within the boundaries of international law, and that it should not be conceived as «referring to those matters in a state's internal or external affairs that are entirely unregulated by international law» since those internal or external affairs «belong to the reserved domain if a state *has any measure of discretion* within the bounds of international law regarding such issue» (p. 610). Some cases of reserved domain and intervention/interference are then presented by the author, at pp. 611-612, which concludes by arguing that «the notion of reserved domain in the non-intervention context is fluid and relative». On the notion of reserved domain and the principle of non-intervention refer also to Sapienza R., *Il principio di non intervento negli affari interni: contributo allo studio della tutela giuridica internazionale della potestà di governo*, op. cited above, pp. 53-72; and, Jamnejad M., Wood M., *The Principle of Non-intervention*, op. cited above, p. 346.

[172] On the necessity for a domestic and international system to possess coercive instruments in determined circumstances, refer to Chapter II of this dissertation where the concept of (and need for) 'sanctions' is examined.

[173] *Inter alia*, Zoller E., *Peacetime Unilateral Remedies: An Analysis of Countermeasures*, op. cited above, p. 93.

[174] Milanovic M., *Revisiting Coercion as an Element of Prohibited Intervention in International Law*, op. cited above, p. 609 which specifies that these two elements are cumulative.

[175] Ronzitti N., *Sanctions as Instruments of Coercive Diplomacy: An International Perspective*, in Ronzitti N. (ed), *Coercive Diplomacy, Sanctions and International Law*, op. cited above, p. 5. Interestingly, at p. 6 the author concludes that «(1) Intervention implies coercion; (2) The coercion, to constitute intervention, should be unlawful».

[176] Tzanakopoulos A., *The Right to be Free from Economic Coercion*, op. cited above, respectively p. 620 and p. 623.

[177] Milanovic M., *Revisiting Coercion as an Element of Prohibited Intervention in International Law*, op. cited above, p. 650 where the author concludes that «coercion should not be regarded as a constituent element of prohibited intervention *at* all, partly because it may be impossible to come up with a principled approach to defining it». The author however

and that conceiving coercion «as a sub-category of prohibited intervention […] is *de facto* inoperable».[178] It is however widely accepted, particularly in light of the ICJ Nicaragua judgment, that coercion lies at the core of the principle of non-intervention.[179] Various forms of coercion have been identified by the doctrine in relation to the principle of non-intervention, including dictatorial and forcible coercion;[180] coercion as extortion or control;[181] and, economic and political coercion.[182]

The assessment of the intent behind economic coercive measures is considered pivotal in determining whether they consist of "regular" economic interactions between States or of interventions. Economic restrictions aimed at supporting the sender State's economy are generally not considered interventions. By contrast, economic measures aimed at «dictat[ing] the policy of another state by injuring its economic interests rather than to protect one's own»[183] or intended to

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acknowledges that «Pragmatically, that seems an unlikely direction of travel» since States increasingly formally perceives coercion as an essential element of the prohibition of intervention, especially in relation to cyberspace issues.

[178] In this regard, Nguyen A., *The Anti-Coercion Instrument – The Practical Repercussions of the ACI's Entry into Force (Part I)*, op. cited above, which specifically refers to the EU ACI, grounding this analysis on the assumption that the Nicaragua case classifies as "non-intervention" solely military and political coercion, excluding economic coercion.

[179] The coercive element is also argued to discern what is "intervention" from what is, instead, "interference". Despite the latter term is frequently used by some States instead of "intervention" – thereby supporting "the principle of non-interference" – interference does not possess the coercive character proper to intervention, and is not reflected in customary international law, as is the principle of non-intervention. In this regard, Roscini M., *International Law and the Principle of Non-Intervention: History, Theory, and Interactions with Other Principles*, op. cited above, p. 151. Accordingly, interference is distinguishable from intervention because the former lacks the coercive character, being merely «influential», thus becoming 'intervention' solely once the intention is (or becomes) to coerce the other State: according to Henderson C., *The Use of Force and International Law*, op. cited above, pp. 90-91. Differently, some intend 'interference' as a «type of intervention», thereby being characterised by the element of coercion but, seemingly, with a different degree of intensity. In this latter sense, Jamnejad M., Wood M., *The Principle of Non-intervention*, op. cited above, p. 368 which discuss political interference and argue that it constitutes a «type of intervention [which] encompasses acts of greatly differing intensity and coerciveness». Accordingly, «the most coercive form of political interference is 'regime change'». Accordingly, the principle prohibits «coercive interference» in those matters in which States possess discretion under international law, such as political, economic, and foreign policy issues. In this regard, Jamnejad M., Wood M., *The Principle of Non-intervention*, op. cited above, pp. 380-381 which intend the element of coercion as a «limit» of the principle of non-intervention since «without it, any act which had an effect on another state could fall within the prohibition». Indeed, the coercive element «not only removes minor international friction from the scope of the principle, but means that it only applies to those acts that to some degree 'subordinate the sovereign will' of another state» (p. 381).

[180] In this regard, Roscini M., *International Law and the Principle of Non-Intervention: History, Theory, and Interactions with Other Principles*, op. cited above, pp. 152-158 according to which dictatorial coercion consists in «compelling another state to do or not to do something» while forcible coercion is «taking control of a certain matter and forcibly imposing a condition of things» on another State (p. 152).

[181] According to Milanovic M., *Revisiting Coercion as an Element of Prohibited Intervention in International Law*, op. cited above, coercion as extortion consists in imposing costs to the targeted State in order to modify its decision-making calculus and policy choices, while coercion as control consists in removing the targeted State's ability to exercise control over its policy choice (p. 605). On this, refer also to p. 617 and pp. 626-648.

[182] Roscini M., *International Law and the Principle of Non-Intervention: History, Theory, and Interactions with Other Principles*, op. cited above, pp. 175-186 which defines economic coercion as «the use of economic means of pressure to coerce another state and secure advantages which might be of economic or other nature» (p. 175), while political (or diplomatic) coercion consists in the «quintessential means of dictatorial coercion» involving «the use of political means of pressure to coerce another state into doing or not doing something» which can consists in demands with threats but also in 'premature' recognition of governments, belligerency, statehood etc (p. 184).

[183] Roscini M., *International Law and the Principle of Non-Intervention: History, Theory, and Interactions with Other Principles*, op. cited above, p. 159.

modify the targeted State's policies[184] are considered to cross the threshold of intervention. Nonetheless, the boundaries are very thin. As economic measures aimed at ensuring compliance with international obligations are not generally considered to be unlawful intervention,[185] also competitive actions, such as technology export controls, are claimed to possibly be coercive but not constituting intervention if their aim is not to change a State's behaviour but rather to enable a domestic economic advantage of the imposing State.[186] Grounding the assessment of whether economic coercion constitutes unlawful intervention solely on the declared goals of the measures is highly problematic,[187] since States might strategically declare a legitimate objective to shield instead an economic coercive intervention.

While the establishment of an international framework governing economic coercion would contribute to legal clarity, current international law sources solely partially regulate the issue, thereby failing to provide a comprehensive regime. As noted, the OAS Charter – in its Articles 19 and 20 – is the sole binding treaty explicitly prohibiting economic forms of intervention.[188] Likewise, the General Assembly Resolutions 2131 and 2625, along with the 1975 Helsinki Final Act,[189] call on States to

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[184] Jamnejad M., Wood M., *The Principle of Non-intervention*, op. cited above, p. 371 identify two elements of the principle of non-intervention: (i) coercion; and, (ii) intention to change the policy of the target state. Similarly, on the key role of intention, Sapienza R., *Il principio di non intervento negli affari interni: contributo allo studio della tutela giuridica internazionale della potestà di governo*, op. cited above.

[185] Milanovic M., *Revisiting Coercion as an Element of Prohibited Intervention in International Law*, op. cited above, p. 623 which at p. 649 notices that, nevertheless, although this typology of coercion does not constitute intervention, it may violate other international law rules such as GATT rules, human rights and others.

[186] In this regard, Sapienza R., *Il principio di non intervento negli affari interni: contributo allo studio della tutela giuridica internazionale della potestà di governo*, op. cited above, p. 112 which presents the example of competition between capitalistic and communist systems. However, during the years, these measures began to be characterised by objectives of foreign policy and, thus, began also to possess the aim to modify the targeted State's behaviour. On the importance of the intent – and of its assessment – to frame whether an economic coercive act is intervention or not, refer also to pp. 123-134.

[187] Milanovic M., *Revisiting Coercion as an Element of Prohibited Intervention in International Law*, op. cited above, analyses the "problem of justification". Precisely, it argues that «While intuitively we regard some forms of coercion to be justified, the non-intervention rule is framed categorically, as admitting no exceptions. It has no inbuilt balancing test that could accommodate pressuring other states for good reasons. The prohibition of intervention is a rule that is, by its design, structurally apt at being either overinclusive or underinclusive, thus incentivizing arguments about its scope. In particular, the tendency of states and some scholars to argue that some forms of state actions, such as economic pressure, are inherently not coercive, is directly shaped by their view that sometimes such measures can be used for good ends. But because they cannot argue that coercion is justified, they are compelled to argue that there is no coercion at all, especially when the measures concerned are otherwise lawful. This is in my view deeply problematic, and inevitably leads to a distorted, moralized understanding of what coercion is or is not» (p. 649).

[188] Interestingly, as noticed above, during the ICJ judgment, Nicaragua also claimed a violation of those OAS Charter's provisions by the US. The Court assessed, however, that «it should exercise the jurisdiction conferred upon it by the United States declaration of acceptance under Article 36, paragraph 2, of the Statute, to determine the claims of Nicaragua based upon customary international law notwithstanding the exclusion from its jurisdiction of disputes "arising under" the United Nations and Organization of American States Charters» (para 182).

[189] The so-known "Helsinki Final Act" of 1975 is indeed the Final act of the Conference on Security and Co-operation in Europe that took place in Helsinki from 1973 to 1975. The participants were the High Representatives of Austria, Belgium, Bulgaria, Canada, Cyprus, Czechoslovakia, Denmark, Finland, France, the German Democratic Republic, the Federal Republic of Germany, Greece, the Holy See, Hungary, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Monaco, the Netherlands, Norway, Poland, Portugal, Romania, San Marino, Spain, Sweden, Switzerland, Turkey, the Union of Soviet Socialist Republics, the United Kingdom, the United States of America and Yugoslavia. During the meetings, contributions and statements from non-participant States (*i.e.* the Democratic and Popular Republic of Algeria, the Arab

refrain from intervention through military, political, economic or other types of coercion aimed at subordinating a State to its own interests. Nonetheless, these legal instruments do not provide a clear legal framework with obligations and enforcement rights applicable to all (or to a selected number of identified) cases of economic coercion.[190]

Some scholars interestingly argue that there is no right of States to be free from economic coercion, unless States possess specific obligations that have been breached.[191] From this perspective, it is the breaching of an international obligation that constitutes the core element distinguishing unlawful coercion (or intervention) from lawful coercion (or interference/pressure).[192] Coercive measures directed to induce compliance with existing legal obligations where the targeted State has no discretion – such as, for instance, refrain from the threat and use of force ex Article 2 (4) UN Charter – do not amount to intervention.[193] However, despite not being intervention, those coercive measures might anyway breach rules of international law – including human rights law or WTO law.

It follows that economic coercion cannot be regarded as inherently or systematically a form of intervention under international law. While coercion is a crucial element of prohibited intervention, not all economically coercive measures meet the threshold of unlawfulness of intervention, but determining the precise threshold at which coercion becomes unlawful intervention remains

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Republic of Egypt, Israel, the Kingdom of Morocco, the Syrian Arab Republic, Tunisia) were also received. Principle VI of the Helsinki Final Act explicitly provides that States should refrain (i) «from any intervention, direct or indirect, individual or collective, in the internal or external affairs falling within the domestic jurisdiction of another participating State», (ii) «from any form of armed intervention or threat of such intervention», (iii) «from any other act of military, or of political, economic or other coercion designed to subordinate to their own interest the exercise by another participating State of the rights inherent in its sovereignty and thus to secure advantages of any kind», and (iv) «from direct or indirect assistance to terrorist activities, or to subversive or other activities directed towards the violent overthrow of the regime». Despite not being an international treaty, the importance of the Helsinki Final Act also resides in constituting the first 'formal' acceptance by Western States of the prohibition of economic intervention and not solely, as instead usually claimed, of armed intervention.

[190] Furthermore, although economic coercion is widely implemented by States and entities, it is not part of (and thus, is not permitted *tout court* by) customary international law, since it lacks uniform *opinio juris*. On this stance, Roscini M., *International Law and the Principle of Non-Intervention: History, Theory, and Interactions with Other Principles*, op. cited above, p. 178 which at p. 195 argues for a «trend towards its [*i.e.* economic coercion] inclusion in the customary content of the principle of non-intervention». Similarly, Jamnejad M., Wood M., *The Principle of Non-intervention*, op. cited above, p. 358, p. 367, and p. 380.

[191] Tzanakopoulos A., *The Right to be Free from Economic Coercion*, op. cited above, p. 633.

[192] *Ibid*, p. 620. Similarly, Ronzitti N., *Sanctions as Instruments of Coercive Diplomacy: An International Perspective*, in Ronzitti N. (ed), *Coercive Diplomacy, Sanctions and International Law*, op. cited above, p. 31 which argues that the «illegality of economic coercion […] should encompass a violation of international treaties». Refer also to Roscini M., *International Law and the Principle of Non-Intervention: History, Theory, and Interactions with Other Principles*, op. cited above, p. 151 which instead argues that «coercion is what distinguishes intervention from a mere interference».

[193] Milanovic M., *Revisiting Coercion as an Element of Prohibited Intervention in International Law*, op. cited above, p. 603 and p. 649. Interestingly, the author also argues that this is the conception of the EU ACI which «counts as prohibited coercion (*i.e.*, intervention) only those measures designed to compel compliance with demands that the target state "is not internationally obliged to perform"» (p. 649, note 272). On this issue, also Roscini M., *International Law and the Principle of Non-Intervention: History, Theory, and Interactions with Other Principles*, op. cited above, pp. 162-164; and, similarly, Jamnejad M., Wood M., *The Principle of Non-intervention*, op. cited above, pp. 380-381.

controversial. Generally, this assessment depends on several factors: the measures' goals, their nature, their effects,[194] and whether they concern matters in which the targeted State has freedom of choice.

Each of these elements, nonetheless, presents its own challenges. As mentioned above, identifying a measure's goal might be complex, since measures may present multiple or undeclared intents. The nature of measures offers limited guidance, given the absence of an enumerated and exhaustive list of coercive purposes or "prohibited interventions". Moreover, the effect-based approach is predominantly rejected, as qualifying a measure as unlawful intervention would depend on its impact on the targeted State, meaning that identical measures directed at different targets may constitute prohibited intervention in one case and not in the other, solely depending on the capability of each State to endure the coercive act.[195] Finally, the argument that prohibited intervention occurs when economic coercive measures affect matters in which the targeted State has freedom of choice is crucial, yet the lack of a universally agreed and exhaustive list of such matters continues to generate controversy.

The complexity of determining the threshold between coercive actions and prohibited intervention is also evident in doctrinal debate. On one side, part of the doctrine contends that unilateral economic measures – whether sanctions or countermeasures – are unlawful *per se* because they always constitute intervention in another State's affairs.[196] On the other side, more moderate

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[194] On the consequences, it is worthwhile to recall the argument contending the freedom of States to develop and continue (or not) economic relations with other States. Interestingly, this argument had been one of the core US arguments contended in the Nicaragua case. Sapienza R., *Il principio di non intervento negli affari interni: contributo allo studio della tutela giuridica internazionale della potestà di governo*, op. cited above, pp. 110-111 notices that while trade relations involve the interests of all concerned States, these interests do not constitute rights *per se* since it always prevails each State's right to conduct its economic system within its territory. Abi-Saab G., *Some Thoughts on the Principle of Non-Intervention*, in Wellens K. (ed), *International Law: Theory and Practice, Essays in Honour of Eric Suy*, op. cited above, pp. 233-234 discusses this argument and concludes by arguing that when the rupture of economic ties creates serious harm or threaten the State's survival, then this may cross the threshold and thus become unlawful intervention. Literally, the author states «It is true that a State is free to have or not to have trade or other economic relations with any other State. But is it not reasonable to consider that once established, if these relations create such a situation of dependence that a brutal rupture would inflict appreciable harm to the other part or even threaten its survival, this rupture would constitute an act of intervention by its effects and by the intention to harm that motivates it?». The author finally asks «where does the zone of free bargaining end, and where does it slide into that of coercion which annihilates free will?», calling for objective criteria in international law.

[195] Reporting this approach, Milanovic M., *Trump's Coercion of America's Allies and the Prohibition of Intervention*, Blog of the European Journal of International Law (EJIL: Talk!), 13 January 2025, which concludes that «the fact that Denmark or Panama will in all likelihood resist US demands to sell Greenland or the Canal – at least unless Trump crosses all legal and moral boundaries and actually uses force – does not mean that these states have not been coerced. […] The same goes for any coercive measures that the US actually implements against its allies; to the extent that they interfere with these state's internal or external affairs, they will violate the prohibition of intervention».

[196] Supporting that unilateral economic measures are interventions are Jamnejad M., Wood M., *The Principle of Non-intervention*, op. cited above, p. 380; and, Orakhelashvili A., *Sanctions and Fundamental Rights of States: The Case of EU Sanctions Against Iran and Syria*, in Happold M., Eden P. (eds), *Economic Sanctions and International Law*, op. cited above, pp. 13-26, which concludes that UN and EU sanctions against Iran and Syria violated the State's freedom from external interference (p. 36). Refer also to Subedi S.P., *The Status of Unilateral Sanctions in International Law*, in Subedi S.P. (ed), *Unilateral Sanctions in International Law*, op. cited above, p. 28. Also States adopted this argument. This is particularly evident in the Declaration of the People's Republic of China and the Russian Federation on the Promotion of International Law (2016) in which extraterritorial sanctions are contended to be a violation of the principle of non-

approaches focus on 'factual' considerations, taking into account factors such as the nature, scope, and actual intent of specific measures. For instance, comprehensive embargoes – such as the long-standing US embargo against Cuba – or measures aimed at modifying a State's nature may meet the threshold and thus constitute prohibited intervention occurring through economic coercion.[197] Measures compelling States to choose specific vendors or technologies – such as US measures against Huawei's 5G infrastructure – constitute interference in a State's reserved domain but do not necessarily amount to coercive actions, particularly when they are limited to diplomatic persuasion.[198] In the cyber scholarship, it is generally agreed that unlawful interventions are those cyber operations directed at disrupting critical State functions, whereas the classification of cyber influence operations – *e.g.* to shape public opinion or electoral attitudes – as unlawful interventions remains unsettled.[199]

Economic coercive measures aimed at obtaining compliance with international obligations are generally not classified as unlawful interventions. In this sense, certain coercive actions – including UN-authorised sanctions, ARSIWA countermeasures, reprisals, sanctions aimed at ensuring compliance with international obligations,[200] human rights-related sanctions,[201] and measures

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intervention in the internal affairs of States. This has been recently restated in the Joint Declaration of the People's Republic of China and the Russian Federation on Further Strengthening Cooperation to Uphold the Authority of International Law of May 2025. Ronzitti N., *Sanctions as Instruments of Coercive Diplomacy: An International Perspective*, in Ronzitti N. (ed), *Coercive Diplomacy, Sanctions and International Law*, op. cited above, p. 6 argues, instead, that unlawful sanctions or countermeasures may then constitute prohibited intervention. On a slightly different stance, Abi-Saab G., *Some Thoughts on the Principle of Non-Intervention*, in Wellens K. (ed), *International Law: Theory and Practice, Essays in Honour of Eric Suy*, op. cited above, p. 226 which identifies sanctions – intended as reprisals or as «the various means of enforcement of rights» – as a permissible ground of intervention. On this issue, refer to Chapter II, Section 2, which explores in detail doctrinal and States' debate and positions.

[197] Investigating this element, *inter alia*, Milanovic M., *Revisiting Coercion as an Element of Prohibited Intervention in International Law*, op. cited above, p. 611, concluding that «there can be no doubt, therefore, that, when taken as a whole, the U.S. embargo against Cuba interferes with Cuba's internal affairs».

[198] *Ibid*., p. 612, where the author discusses the Trump Administration exerting pressures on allies and other world countries not to install Huawei equipment of 5G telecommunications. This activity, according to the author with «no doubt» constitutes interference with the reserved domain of these states since «the choice of using one vendor or another for infrastructure projects is a decision squarely within the internal affairs of each state, as such subject to no international legal obligation». Nonetheless, this does not amount to coercion, as specified also by the same author at p. 613: «Simple diplomatic engagement with another state, even if it regards matters that clearly fall within that state's reserved domain, such as its choice of a political system or its choice as to what kind of 5G infrastructure it wants to build, cannot be coercion».

[199] *Inter alia*, Sardu A., *Non-intervention and Cyberspace*, Questions of International Law (QIL), Zoom-in, Vol. 110, 2025, pp. 5-24, p. 23. Similarly, Joyner C.C., Lotrionte C., *Information Warfare as International Coercion: Elements of a Legal Framework*, European Journal of International Law (EJIL), Vol. 12, no. 5, 2001, pp. 825-865, p. 848-849.

[200] The legal frameworks of UN sanctions, ARSIWA countermeasures, and other crucial "sanctioning" measures are explored in the following chapter of this dissertation. *Inter alia*, Abi-Saab G., *Some Thoughts on the Principle of Non-Intervention*, in Wellens K. (ed), *International Law: Theory and Practice, Essays in Honour of Eric Suy*, op. cited above, p. 226 identifies sanctions – intended as reprisals or as «the various means of enforcement of rights» – as a permissible ground of intervention. On this issue, refer to Chapter II, Section 2, which examines in detail the legal basis of many of these legal instruments and their related doctrinal and States' debate.

[201] Differently, Silingardi S., *Sanctions for Human Rights and Democracy*, in Sossai M., Portela C., Charron A. (eds), *Elgar Encyclopedia of International Sanctions*, Edward Elgar Publishing, 2025, pp. 265-271, pp. 268-269, interestingly discusses the «international legality» of human rights sanctions by invoking the necessity to conduct a case-by-case analysis taking into account «the nature of the violations they address and their compatibility with other principles of international law, such as the principle of non-intervention, rules on the responsibility of states», etc.

justified under the responsibility to protect doctrine[202] – are widely accepted by the international community and international law as permissible grounds for intervention through coercive actions.[203]

[202] Within doctrinal discussions, it is marginally debated the possibility of invoking the Responsibility to Protect (R2P) as a legal basis for conducting economic coercion. Nonetheless, it is generally accepted that the R2P justification lacks legal certainty and thus, applicability. Briefly, R2P represents «a political commitment to end the worst forms of violence and persecution» (United Nations - Office on Genocide Prevention and the Responsibility to Protect, *About the Responsibility to Protect*, available at https://www.un.org/en/genocide-prevention/responsibility-protect/about [last accessed on 17 August 2025]) encompassing both military intervention and measures not involving the use of force, as discussed by Stojkovski L., *Non-UN Sanctions and the "Responsibility to Protect": Legality, Legitimacy and Their Significance for R2P*, in Sancin V., Kovic Dine M. (eds), *The Limits of Responsibility to Protect*, University of Ljubljana – Faculty of Law, 2023, pp. 21-39, p. 21-22. This concept emerged in response to the major crimes of the 1990s, notably in Rwanda, the Balkans, and Kosovo, but was formally introduced in 2001 by the International Commission on Intervention and State Sovereignty (ICISS) Report – under the initiative of the Canadian Government – as a doctrine linking state sovereignty to the duty to protect populations from serious harm. The United Nations – Office on Genocide Prevention and the Responsibility to Protect, *About the Responsibility to Protect*, cited above, highlights a "primary responsibility" for the State itself to protect its population, and of a "residual responsibility" for the broader international community of States triggered when a State is unwilling or unable to fulfil its responsibility. In this sense, R2P is intended as a «positive responsibilit[y of States] for their population's welfare, and to assist each other». As provided by the ICISS Report, «the principle of non-intervention yields to the international responsibility to protect», thereby strictly linking R2P to both the notion of sovereignty of States and to the principle of non-intervention (ICISS Report and to the Follow-up to the Outcome of the Millennium Summit, A/59/565, December 2004, para 201). According to ICISS Report, two basic principles underpin R2P: (i) State sovereignty implies responsibility and the primary responsibility for the protection of its people lies with the state itself; (ii) where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect (ICISS Report, p. XI). This notion embraces three specific responsibilities: responsibility to prevent, responsibility to react, and responsibility to rebuild. According to the Report, the responsibility to prevent is to address both the root causes and direct causes of internal conflict and other man-made crises putting populations at risk; the responsibility to react is to respond to situations of compelling human need with appropriate measures, which may include coercive measures like sanctions and international prosecution, and in extreme cases military intervention; while the responsibility to rebuild is to provide, particularly after a military intervention, full assistance with recovery, reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert. A detailed analysis of these three R2P categories: Breau S., *The Responsibility to Protect in International Law: An Emerging Paradigm Shift*, Routledge, 2016, pp. 181-254; Schmidt J., *The European Union and the Responsibility to Protect*, European Foreign Affairs Review, Vol. 24, no. 3, 2019, pp. 309-326. The Report also specified that R2P is founded in (i) the concept of sovereignty; (ii) the UNSC responsibility to maintain international peace and security; (iii) human rights obligations, covenants, declarations, treaties, international humanitarian law, and national law; and, (iv) the developing practice of States, regional organisations and the UNSC. Endorsed by the UN within the 2005 World Summit Outcome, R2P was envisaged as a tool in the hands of both States and the UN through «appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter» (UN General Assembly Resolution, 2005 World Summit Outcome, A/RES/60/1, 24 October 2005, paras 138-139). On the Document and States' positions: Zifcak S., *The Responsibility to Protect*, in Gazzini T., Tsagourias N. (eds), *The Use of Force in International Law*, op. cited above, pp. 571-596, pp. 578-588; Focarelli C., *The Responsibility to Protect Doctrine and Humanitarian Intervention: Too Many Ambiguities for a Working Doctrine*, in Gazzini T., Tsagourias N. (eds), *The Use of Force in International Law*, Routledge, 2016, pp. 597-619, pp. 606-615; Vashakmadze M., *Responsibility to Protect*, in Simma B., Khan D-E., Nolte G., Paulus A. (eds), *The Charter of the United Nations: A Commentary*, Oxford University Press, 2024, pp. 1541-1576, paras 13-14, p. 1547, para 139 which all also comment on the positive contribution of the ICISS Report, respectively at pp. 576-577; pp. 599-605; and, paras 6-10, pp. 1544-1546. At the UN level, R2P was articulated in the 2005 World Summit Outcome as the «Responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity», such responsibility falls upon both each individual State and the international community as a whole. Individual States possess the responsibility to protect its population from the abovementioned crimes, but the international community – through the United Nations – likewise should protect populations. It is envisaged timely and decisive collective action, through the UNSC and in accordance with the UN Charter, on a case-by-case basis and in cooperation with regional organisations «should peaceful means be inadequate and national authorities are manifestly failing to protect their populations» (para 139). Thus, the role of the UNSC is pivotal in R2P's actions, but challenges arise when the UNSC is passive or blocked by a veto power of a permanent member (Interestingly, the ICISS Report suggested that the permanent members should agree not to rely on their veto powers in cases of human rights violations. Refer to paras 6.20-6.21, in which it is provided that «there be agreed by the Permanent Five a "code of conduct" for the use of the veto with respect to actions that are needed to stop

Thus, despite no customary international law rule prohibits economic coercion *per se*, the international legal framework provides for a range of coercive instruments as lawful responses to specific sets of events, including violations of international obligations, and maintenance of international peace and security. There is no universally accepted legal standard to determine when economic coercion crosses the threshold into unlawful intervention, and the relevant elements

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or avert a significant humanitarian crisis. The idea essentially is that a permanent member, in matters where its vital national interests were not claimed to be involved, would not use its veto to obstruct the passage of what would otherwise be a majority resolution» (para 6.21). This is suggested since «It is unrealistic to imagine any amendment of the Charter happening any time soon so far as the veto power and its distribution are concerned. But the adoption by the permanent members of a more formal, mutually agreed practice to govern these situations in the future would be a very healthy development» (para 6.21). Similarly, Vashakmadze M., *Responsibility to Protect*, in Simma B., Khan D-E., Nolte G., Paulus A. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, paras 63-65, pp. 1572-1575. Some authors argue that unilateral coercive economic measures enacted outside the UN framework are justifiable under the R2P doctrine. Notably, this argument is supported by three main considerations: (i) the focus of the 2005 World Summit was military intervention and not unilateral coercive measures, thus the framework might not fully apply; (ii) only one out of the four crimes mentioned in the Document is a war crime while the other might also be committed in peacetime, thus constituting both a threat to international peace and a violation of international law; and, (iii) the use of unilateral coercive measures as R2P is not incompatible with UNSC sanctions. In this regard, Stojkovski L., *Non-UN Sanctions and the "Responsibility to Protect": Legality, Legitimacy and Their Significance for R2P*, in Sancin V., Kovic Dine M. (eds), *The Limits of Responsibility to Protect*, op. cited above, p. 26 which curiously categorises unilateral coercive measures as «foreign policy tool[s], legally available to States, aimed at addressing a legal (or moral-political) violation, such as R2P»; Breau S., *The Responsibility to Protect in International Law: An Emerging Paradigm Shift*, op. cited above, p. 4, p. 21, p. 29, p. 213, p. 240 which also provides some cases of unilateral intervention under R2P; and, Schmidt J., *The European Union and the Responsibility to Protect*, op. cited above, pp. 309-326, which focuses on EU unilateral actions justified by R2P. Other scholars, instead, emphasise the 2005 World Summit's focus on collective actions, thereby contending that R2P was intended to operate within the UN collective security system rather than through unilateral actions: in this regard, Henderson C., *The Use of Force and International Law*, op. cited above, pp. 210-211; Breau S., *The Responsibility to Protect in International Law: An Emerging Paradigm Shift*, op. cited above, p. 21; and, Vashakmadze M., *Responsibility to Protect*, in Simma B., Khan D-E., Nolte G., Paulus A. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, para 72, p. 1576, which argues that R2P «it does not encourage the practice of regional organizations to take coercive action outside the framework of the Charter (although this may be justified in situations of extreme urgency)». Overall, R2P is not a legal norm *per se*, but rather a political commitment. Yet, the matter is highly debated: to some it is an international norm, for others it is an international 'ethical' norm or a international 'legitimacy' norm, and others view it is a mere political concept. Refer to, *inter alia*, Chesterman S., *Responsibility to Protect and Humanitarian Intervention: From Apology to Utopia and Back Again*, in Geiß R., Melzer N. (eds), *The Oxford Handbook of the International Law of Global Security*, Oxford University Press, 2021, pp. 808-820, pp. 814-815 and p. 820 where the author concludes that «Although R2P may not create rights or impose legal obligations, it may amount to more than rhetoric if it is understood as a means of determining jurisdiction, as Anne Orford has argued. […] Seen through that lens, the vague formulations embraced by the 2005 World Summit do not invoke 'responsibility' in the strict legal sense of an obligation to act in a specific way, but rather in the sense of an allocation of responsibility to respond to a situation». Thus, it seems difficult to argue that the R2P doctrine might justify economic coercion *per se*. Although R2P may support non-military measures, it remains strictly bound to responding to gross violations of human rights. This significantly differentiates the applicability of R2P to the broader motivations frequently behind economic coercion – such as competition, geopolitical strategies, breaches of international law. Solely in those cases involving serious human rights abuses, unilateral coercive measures might be arguably justified under such doctrine. Overall, the political character of the R2P doctrine, in combination with its strict association with human rights violations, renders it a weak justification for how economic coercion is typically employed in economic conflicts.

[203] This does not mean that these measures are lawful *tout cour* and always. Indeed, they do not constitute prohibited intervention, but their lawfulness should be assessed on other grounds, such as WTO rules, human rights obligations, etc. Differently, Milanovic M., *Trump's Coercion of America's Allies and the Prohibition of Intervention*, op. cited above, argues that also lawful harms can be coercive if the impact on the targeted state is sufficiently severe: «Thus, a threatened or implemented economic measure that is legal on its own would become illegal, as prohibited intervention, if it is coupled with a demand that intrudes upon the victim state's internal or external affairs. The prohibition of intervention would thus prohibit not only conduct that *is prohibited already*, under some other rule, but also conduct that would otherwise be lawful were it not for its purpose – compelling the victim to comply with an illegitimate demand».

available – namely, intent, nature, effects, and impact on reserved domain – do not always suffice to determine the qualification.

In conclusion, the international legal order does not provide for an unconditional prohibition of coercive measures as prohibited intervention, nor does it guarantee a clear-cut permission for their use. Rather, it is the specific context of each measure and its implementation which determines whether coercive actions cross the threshold into prohibited interventions. In this sense, both the measures' legal frameworks – explored in Chapters II and III – and their factual uses – analysed through selected case studies and illustrative example in Chapter IV – provide a clearer understanding of their lawfulness.

5. Conclusive remarks

This chapter has sought to unpack the meaning, legal relevance, and the relationship with principles of international law of the concepts of economic war and its core element, namely economic coercion. Overall, the present chapter demonstrates the grey area in which "economic wars" and "economic coercion" commonly operate. International law does not provide a clear legal framework for either of these concepts, nor the association of these with existing principles of international law is completely unproblematic.

The examination of the concept of "war" and of the conceptual ambiguity of the notion of "economic war" has revealed that the latter expression – despite its widespread use within political discourses – remains largely undefined and unregulated. In turn, "economic war" does not amount to a legal concept of law *per se* but rather to a political notion employed to describe economic confrontations between States. It consists in a descriptive term that efficiently conveys the idea of a conflict between States characterised by reciprocal economic restricting measures, but lacks legal consequences, in contrast to those instead present in cases of armed conflicts.

Economic wars are conducted with economic coercion. The latter constitutes indeed the mean and the core element of confrontations occurring through economic restricting measures. Arguably, the difficulty to legally define and regulate economic conflicts at the international level might also derive from the fact that such conflicts occur through instruments not originally conceived to be employed within conflictual situations characterised exclusively by economic measures.[204] However,

[204] Economic coercive measures had been frequently employed alongside armed conflicts, as discussed in Chapter II of this dissertation. However, both 'sanctioning' measures – explored in Chapter II – and non-sanctioning ones – discussed in Chapter III – refer to different original design. In this sense, also the original character of sanctioning measures was conceived to constitute a "response to" another State's wrongful behaviour, rather than as an autonomous means to reciprocally target each other's economies strategically and with a variety of different purposes.

as explored in this chapter, attempts to regulate economic coercion have occurred on different occasions.

The analysis of the concept of economic coercion and of its relationship with existing principles of international law demonstrated the complexity of fitting the concept within the current legal categories and principles. In this sense, economic coercion is neither use of force as Article 2 (4) UN Charter, nor an armed attack as per Article 51 UN Charter. However, it is, occasionally, intervention. This is indeed occurring exclusively when the coercive act is conducted against areas in which a State has its right and freedom to decide.

Despite partial clarifications by the ICJ and intense scholarly debate, the precise boundaries between economic pressure, economic coercion, and prohibited intervention are not fully settled. Economic pressure refers the broad range of economic influence and leverage employed by States to shape the conduct of others, such as through the modification of commercial terms or trade contracts. It is not inherently unlawful as it may be employed as a «lawful and indispensable tactic[…] of diplomacy»,[205] or as an act of retorsion, i.e. an unfriendly but legally permissible act, such as terminating discretionary trade relations or voluntary aid programmes. Nonetheless, economic pressure might, in certain circumstances, violate the principle of non-intervention, and thus become unlawful.[206]

Economic coercion may be considered as an "intensified" form of economic pressure. As discussed above, economic coercion refers to the will or the actions of one entity (a State or an organisation) to compel another to undertake or refrain from a specific action,[207] thereby possessing the additional character of aiming to "force" a State into a specific conduct. In itself, economic coercion is neither inherently lawful nor unlawful. Unlawful coercion arises when coercion crosses the threshold into an internationally wrongful act under international law, i.e. it breaches an international obligation, without being allowed, for instance, under the law of countermeasures.

Prohibited intervention represents a "higher threshold" of unlawful coercion, arising where coercion directly targets a State's *domaine réservé* – i.e. matters in which a State has a sovereign freedom to decide, such as its political, economic, social and social system and its foreign policy – rather than "merely" breaching an international obligation, as in the case of unlawful economic coercion.[208]

The debate surrounding the question of whether the effects of economic measures should determine their legal character is particularly controversial. Indeed, considering the effects of an

[205] Helal M.S., *On Coercion in International Law*, International Law and Politics, Vol. 52, no. 1, 2019, pp. 1-122, p. 4.
[206] This latter argument has been mentioned above in Section 4.3.1. of this Chapter I.
[207] In this regard, refer to section 3 of this Chapter I.
[208] On the principle of non-intervention, refer to Section 4.3. of this Chapter I.

action – for instance, the severe humanitarian harm – as the sole criterion to qualify economic coercion as reaching the threshold of unlawfulness is problematic. This is due to the fact that, arguably, the consequences of a measure might be attributed to a multitude of different reasons, including the context,[209] and thus may differ widely in each circumstance. In turn, those arguments equating economic war to armed conflicts, or coercion to the use of force or armed attacks, lack legal relevance.

On the contrary, an approach focused on the means and the intention (*i.e.* aims and goals) of economic restricting measures appears to be more persuasive. This enables an analysis of each measure, of its legal basis, its original design, its aims, and its expected results. In turn, this approach enables a more precise distinction between those instruments that are lawful under international law – including retorsions and countermeasures – and those that are unlawful or debated to be as such – such as unilateral coercive measures. The subsequent two chapters will comprehensively analyse the main instruments employed to economically coerce States, differentiating those originally designed as such, and those not originally intended for such purpose but frequently applied to coerce.

[209] Studies on the 'effectiveness' of sanctions compellingly demonstrate the centrality of the context – composed by, *inter alia*, the type of sanction, the sender, the target, the structural and institutional architecture of the targeted State, and so on – in determining the consequences. In this regard, *inter alia*, Gutmann J., Neuenkirch M., Neumeier F., *The Economic Effects of International Sanctions: An Event Study*, Journal of Comparative Economics, Vol. 51, no. 4, December 2023, pp. 1214-1238; Özdamar Ö., Shahin E., *Consequences of Economic Sanctions: The State of the Art and Paths Forward*, *International Studies Review*, Vol. 23, no. 4, December 2021, pp. 1646-1671.

Chapter II
Trade instruments designed to coerce

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1. Introduction

Nowadays international relations are increasingly characterised by the employment of economic instruments as means of influence, pressure, and coercion among States. As presented in Chapter I of this dissertation, the international community and political discourse frequently employ the controversial and legally undefined concept of "economic war" to describe to a wide range of non-armed inter-States conflicts in which States strategically and reciprocally target each other's economy. Accordingly, these "economic wars" might pursue several objectives – such as, economic coercion, deterrence, or responses to a previous violation of international law – and might take multiple forms (or subcategories of "economic wars"), including "trade wars", "tariff wars", "investment wars", "currency wars", and "sanctions wars".

Globalisation and the growing economic interdependence between States have enabled strategic reliance on economic instruments. As a result, States and international entities now commonly resort to a multitude of instruments of economic nature, including subsidies, dumping practices, investment restrictions, tariff introductions, bans or restrictions to exports and imports, economic and financial "sanctions". Concepts such as the weaponisation of economic interdependence well describe the current landscape in which parts of a State's economy – if not the entire economy itself – might be targeted through numerous non-armed instruments at the disposal of the opposing State.

Despite an in-depth study of the "economic wars" phenomenon would necessarily require the analysis of all these instruments, this dissertation adopts a narrower approach by specifically concentrating on instruments targeting international trade, and, thus, on "economic (trade) wars". As clarified within the thesis' introduction, this study is limited to trade-related instruments governed by international public law, and does not comprise other economic tools, such as anti-dumping, countervailing, safeguard measures and subsidies.

States and international entities frequently enact multiple typologies of measures aimed at regulating and controlling international trade, each possessing distinctive traits and characteristics when analysed from a legal perspective. In this sense, this second chapter of the dissertation examines the trade instruments most frequently employed to engage in "economic trade wars" and commonly labelled as "trade sanctions"; whereas the third chapter focuses on the so-called "commercial/trade restrictions" and their legal framework.

This subdivision reflects the preliminary differentiation provided by scholarly works alike between two main categories of trade-restricting measures: on the one hand, "sanctioning" measures

specifically designed to coerce other states (often named "sanctions"); and, on the other, commercial policy instruments not specifically designed as pressuring tools but often employed to act as coercive. This distinction is based not only on the intent and historical evolution of the instruments concerned, but also on their respective legal frameworks, including decision-making process, involved actors and voting procedures, potential consequences, and expected results. Notably, each instrument's legal basis determines a specific balance of powers between a State, an entity, or a group of States.[210]

One of the most interesting and fitting examples of this crucial differentiation is provides by the EU trade-related measures: namely, trade restrictive measures, and commercial policy measures. EU restrictive measures fall under the EU Common Foreign and Security Policy (CFSP), while the second typology is regulated by the EU Common Commercial Policy (CCP). As explained in the Chapters II and III, both CFSP and CCP enable the implementation of trade-restricting measures, yet these importantly differ in legal nature, decision-making mechanisms, and EU institutions-EU MS balance of powers. Although occasional overlaps occurred, crucial distinguishing factors exist between CFSP and CCP measures, regardless of their mutual and frequent classification as 'sanctions'.

The practice of convoluting different measures within the same label of 'sanction' is not an event occurring solely at EU level, but also characterises international law instruments and domestic frameworks – such as the US's one. At the core of this practice lies the fundamental definitional problem of the term "sanction". International law does not provide a general definition of "sanction", nor it does the doctrinal debate and the international community. Measures commonly classified as "sanctions" may differ substantially in their legal nature, purpose, and applicable legal framework with its procedural requirements and limits.

This dissertation acknowledges that the term "sanction" does not constitute a uniform legal category under international law, but rather a broadly-encompassing term regrouping different instruments with distinct legal frameworks. Accordingly, Section 2 of this Chapter addresses the definitional problem surrounding the term "sanction", presenting the main doctrinal approaches employed to qualify measures as sanctions, namely according to their purposes, the actor enacting the measures, and the area or sector tackled. A "working definition" of the concept of "sanction" is

[210] Lenaerts K., *Some Thoughts about the Interaction between Judges and Politicians*, University of Chicago Legal Forum, no. 1, 1992, pp. 93-134, p. 123. Interestingly, the author discusses this issue with regard to the European Union and the role of the European Court of Justice. Accordingly, at pp. 123-124, the author identified three main aspects linked to the balance of powers created by a determined legal basis: (i) a substantive aspect, concerning «whether the content of the legislative enactment is within the material scope of powers» of the enacting power, *i.e.* in this case the EU according to the Treaties provisions; (ii) an institutional aspect, which «relates to the precise terms of the decisionmaking process», *i.e.* in the EU specific case the Council' voting procedures as being either under simple majority, qualified majority, or unanimity and the role (or absent role) of the European Parliament; and, lastly, (iii) an instrumental aspect whose represents the «compromise of divided sovereignty» between the EU and its MS.

adopted within this Chapter, functioning as an analytical category rather than as an autonomous legal category. Despite acknowledging that the concept of "sanction" lacks a precise legal meaning under international law, for the purpose of this dissertation "sanctions" are identified as coercive non-armed measures, individual or collective, adopted by a State or an international organisation against another entity either (i) as international law enforcement through the UN system; or (ii) in response to violations of international law, with the aim of compelling compliance with international law and its obligations. Sanctions may thus be categorised into two types: first, centralised measures aimed at international law enforcement, and, second, measures designed to induce compliance after a violation of international law. While both categories share a coercive and non-punitive nature, the first category operates through the centralised UN system also prior to specific violations (*e.g.* in case of "threats to the peace"); while the second includes UN measures responding to breaches of international law and decentralised measures exclusively responding to prior violations of international law.

While doctrinal debate continues, States and entities with the power to enact measures commonly employ such term to refer to a wide number of diverse instruments, ranging from pure commercial policy measures to coercive measures. Nonetheless, accordance is mostly found when it comes to associating the word "sanction" with the system of the United Nations and its non-armed measures.[211] Section 3 examines the UN framework governing non-armed measures. It begins with a brief historical overview of the League of Nations and its regulation of the so-called 'economic weapon' under Article 16 of its Covenant (section 3.1). The analysis then turns to the UN Charter system (Section 3.2.), focusing on the UNSC powers and discretion, and the conditions for the adoption of measures under Charter VII, the typologies of measures and their implementation by the UN MS, and some final remarks (respectively, sections 3.2.1.-3.2.5).

Section 4 presents the instrument of countermeasures as regulated by the International Law Commission Draft on Responsibility of States for International Wrongful Acts (hereinafter, ILC ARSIWA or ARSIWA). Countermeasures constitute a distinct legal instrument under international law, regulated by specific substantive and procedural conditions. This section studies their scope, the possibility for non-injured States to adopt them (section 4.1.), their legal nature and their differentiation from the concept of sanction (section 4.2.), together with their limits and vulnerabilities (section 4.3.).

Section 5 focuses on the European Union' restrictive measures, examining their legal framework (section 5.1), the various categories of measures adoptable, and their qualification under international law (section 5.2.). Finally, Section 6 addresses unilateral 'sanctioning' instruments. It

[211] As it is majorly recognised, UN non-armed measures are the "sanctions" *par excellence*.

firstly analyses the United States's framework (Section 6.1), before turning to the European Union's unilateral instruments, with specific reference to the EU Blocking Statute and the Anti-Coercion Instrument (Section 6.2.).

The concluding Section 7 offers conclusive remarks, reflecting on the fragmented linguistic employment of the term "sanction" and the legal implications of regrouping distinct frameworks regulating economic coercive measures.

2. How to define tools to coerce States: a definitional problem around the term "sanction"

The term "sanction" is an inherently ambiguous concept within international law. Although its approximate meaning appears evident in common usage, no universally accepted legal definition within international law exists. In practice, it is frequently employed to indicate an extremely wide amount of non-armed economic measures imposed against a 'targeted' subject (either a State, a non-state actor, or individual/s), ranging from tools of coercion, instruments of law enforcement, or measures of political or economic influence.

Nonetheless, this conventional use encompasses measures which are essentially different from a legal perspective. Indeed, what colloquially is referred to as "sanction" may include collective enforcement actions – such as UN non-armed measures –, lawful countermeasures, retorsions, or national economic measures which each are governed by different legal frameworks, principles, and requirements. Thus, the ambiguity surrounding the term "sanction" does not merely concern a linguistic imprecision, but a deeper legal concern.

This terminology is widely and consistently employed across international and regional organisations, governments, media outlets, and scholarly works to indicate diversified categories of non-armed measures. Within the UN, measures not involving the use of armed force – *i.e.* Article 41 UN Charter measures – are officially referred to as "UN sanctions".[212] The World Trade Organization (WTO), despite formally preferring the terms "trade restrictions" or "trade-restrictive measures",[213]

[212] The UN website – under its section named "Sanctions" – specifically reports that «sanctions measures, under Article 41, encompass a broad range of enforcement options that do not involve the use of armed force», in this sense refer to United Nations website, "*Sanctions*", available at https://main.un.org/securitycouncil/en/sanctions/information, [last accessed on 20 December 2024]. Likewise, "sanctions committees" are established by the United Nations Security Council specifically to manage the adopted measures (or "sanctions regimes"). Many UN official documents and official websites of UN organs commonly refer to Article 41 UN Charter' measures as "sanctions" too. The framework of the UN non-armed measures is presented in this Chapter II, in Section 3 together with the provisions of the precedent League of Nations.

[213] *Inter alia*, Remarks by Okonjo-Iweala N. (WTO Director-General) per Jacobsson Lecture 2024 – Ngozi Okonjo-Iweala: "*Delivering on New Global Challenges: How Can we Keep Multilateral Coherence Whilst Re-Imagining The Multilateral Trading System?*", 26 October 2024, available at https://www.wto.org/english/news_e/spno_e/spno51_e.htm, [last accessed on 26 November 2024] where it is explicitly mentioned that «unilateral measures or threats […] becom[*ing*] increasingly widespread, trade policy has been getting more restrictive» and where it is reported that «these are among the over 130 new trade-restricting measures recorded by the WTO Secretariat since the start of this year. This number represents an 8% increase to the stockpile of over 1600 restrictive measures introduced between 2009 and 2023, which

occasionally (but not officially) refers to UN, unilateral measures, and (less often) to the Dispute Settlement Body' authorised-response measures as "sanctions".[214] Regional institutions likewise adopted similar patterns: the African Union (AU) utilise the term "sanction" to identify its own non-armed measures against its Member States;[215] while the EU distinguishes between (i) "UN sanctions", *i.e.* UN non-armed measures under Article 41 UN Charter to be transposed into EU law; (ii) "mixed sanctions", *i.e.* measures strengthening UN non-armed measures; and (iii) "EU autonomous sanctions", *i.e.* EU restrictive measures under Article 215 TFEU.[216]

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as of last year were already affecting over 10% of world goods trade». Refer also to Remarks by Okonjo-Iweala N. on the Report of the TPRB from the Director-General on Trade-Related Developments, 27 July 2022, available at https://www.wto.org/english/news_e/spno_e/spno30_e.htm, [last accessed on 26 November 2024]; and to WTO, *G20 Trade Policy Direction Becoming More Restrictive Amid Continued Slow Trade Growth*, 18 December 2023, https://www.wto.org/english/news_e/news23_e/trdev_18dec23_e.htm, [last accessed on 26 November 2024].

[214] Among documents employing the term "sanction" published under the WTO system but specifically disclaiming their not representation of WTO positions or opinions, refer to WTO, *International Export Regulations and Controls: Navigating the Global Framework beyond WTO Rules*, January 2024 referring to UN non-armed measures as "sanctions". Silvy A., Adrian C., Probst D., Ugarte C., *Report by the WTO Secretariat, Trade Policy Review: United States of America 2022*, Part B, January 2024, repeatedly mention United States' measures as "sanctions". The WTO, *World Trade Report 2024, Trade and Inclusiveness: How to Make Trade Work for All*, September 2024 although possessing the abovementioned disclaimer of non-representation and reflection of WTO' positions or opinions, mentions «trade sanctions and the appearance of new forms of trade weaponization (*i.e.*, interference with open trade for geopolitical reasons)» (p. 55). On p. 112, the opinion of Maggi G., *Soft Rules and the Informational Role of the WTO*, is reported stating, *inter alia*, that «One way to understand this is that an important role of the DSB is to disseminate information across the trading community, thereby facilitating multilateral normative pressures. As argued in Maggi (1999), multilateral enforcement does not have to take the form of all-out multilateral trade sanctions in response to violations of the agreement». Once again, the opinion piece is specified to be of the sole responsibility of the author and of not necessarily reflect the opinions of WTO MS or of the WTO Secretariat.

[215] As provided by, among others, Article 7 (g) of the AU Peace and Security Council Protocol. Interestingly, a recently inaugurated AU body is the "Sanctions Sub-Committee of the Peace and Security Council". Accordingly, refer to AU, *Concept Note: Inaugural Meeting of the Sanctions Subcommittee of the Peace and Security Council*, 12 June 2024, PSC/SSC/CN.01-(2024) which, on para 5, reads as follow: «Article 7(g) of the PSC Protocol provides for the PSC to institute sanctions whenever an unconstitutional change of Government occurs in a Member State, as provided for in the 2000 Lomé Declaration, the Constitutive Act and the PSC Protocol». Refer also to the official document AU, *An Instrument on Sanctions*, available at the AU website, https://papsrepository.africa-union.org/handle/123456789/2119, [last accessed on 26 November 2024], which regroups the AU' legal basis for adopting sanctions and the sanctioning regimes enacted against AU MS from 2003 to 2023.

[216] On this labelling refer to, *inter alia*, European External Action Service (EEAS), *European Union Sanctions*, available at EEAS website, https://www.eeas.europa.eu/eeas/european-union-sanctions_en, 07 October 2023, [last accessed on 26 November 2024]; European Council and Council of the European Union, *How the EU Adopts and Reviews Sanctions*, available at Consilium website, https://www.consilium.europa.eu/en/policies/sanctions-adoption-review-procedure/, [last accessed on 26 November 2024]; European Commission, *Overview of Sanctions and Related Resources: A Key Tool for the EU to Intervene Where Necessary to Prevent Conflict or Respond to Current or Emerging Crises*, available at the Commission website, https://finance.ec.europa.eu/eu-and-world/sanctions-restrictive-measures/overview-sanctions-and-related-resources_en, [last accessed on 26 November 2024], which interestingly specifies that «Although they are called 'sanctions', EU restrictive measures are not punitive». Despite the EU Treaties specifically label these measures as "restrictive measures", not only official websites name the measures as "sanctions" but also other official acts (such as the EU Global Human Rights Sanctions Regime (EUGHRSR)) and documents of the EU. In this latter sense, *inter alia*, refer to the Council of European Union, *Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy*, 15579/03, 3 December 2003; Council of the European Union, *Sanctions Guidelines – update*, 5664/18, 4 May 2018; Council of the European Union, *Basic principles on the Use of Restrictive Measures (Sanctions)*, 10198/1/04, 7 June 2004; and, Council of the European Union, *Restrictive measures (Sanctions) – Update of the EU Best Practices for the effective implementation of restrictive measures*, 8519/18, 4 May 2018. The framework of EU restrictive measures – and the latter mentioned documents too – are analysed in this Chapter II, in Section 5. The EU Blocking Statute, and the EU Anti-Coercion Instrument are instead explored in Section 6.2., Chapter II.

At State level, *inter alia*, the US explicitly adopts the term "sanction" within legislation regulating non-armed measures, while its Office of Foreign Assets Control (OFAC) is officially entrusted to manage and enforce «sanctions based on US foreign policy and national security goals».[217] The Russian Federation and the People's Republic of China likewise frequently employ the term both when implementing UN non-armed measures and when contesting Western economic measures,[218] while portraying their own sanctioning activities as lawful countermeasures.[219]

Finally, the media broadly assign the term "sanction" to various non-armed measures enacted by different actors or States, or against different targets, and with different purposes;[220] while scholarly works from multiple disciplines similarly adopt the term to refer to a wide amount of diversified non-armed economic measures: UN sanctions; WTO DSB measures[221] (while others

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[217] Refer to Office of Foreign Assets Control (OFAC), *Mission*, available at the OFAC website, https://ofac.treasury.gov/, [last accessed on 26 November 2024]. Among other laws regulating the US "sanctioning" ability, the Countering America's Adversaries Through Sanctions Act (CAATSA), and the 1996 Iran and Libya Sanctions Act specifically include the term "sanction" in their heading. The US framework on sanctioning measures, together with a description of the Departments and bodies involved and of the mentioned above legislation and other pieces of legislation, is presented in this Chapter II, in Section 6.1.

[218] The perceptions of the Russian Federation and of the People's Republic of China on economic coercive measures (also called by those States "sanctions"), especially with regard to those unilaterally adopted by States, are briefly presented in this Chapter II, in Section 5.2. In general, refer to the Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law, 25 June 2016 (and specifically, to para 6). Similarly in the opposition to the adoption of unilateral "sanctions" are the Non-Aligned Movement (NAM), and the BRICS countries as Section 1.4.2. of this Chapter II briefly explains.

[219] The instrument of countermeasures, as per the International Law Commission' Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) of 2001, is presented in this Chapter II, in Section 4. Interestingly, both Russian and Chinese legislations on coercive measures are mainly titled in opposition to foreign measures and, thus, to mainly counter Western non-armed measures. In this sense, the Russian Federation, among others, adopted the Federal Law no. 127-FZ "On Retaliation Measures (Countermeasures) on Unfriendly Actions of the United States of America and Other Foreign Countries" in June 2018, or the remarkable Federal Law no. 281-FZ of December 2006 "On Special Economic Measures and Coercion Measures" recently amended in August 2023. The People's Republic of China, instead, adopted the renowned "Anti-Foreign Sanctions Law" in 2021. A brief presentation of Russian response to Western' latest coercive measures, together with a detailed analysis of both Russian and Chinese actions to counter specific imposition of coercive economic measures against them is presented in Chapter IV of this dissertation, in which it is discussed the Western States-Russia sanctions war (Section 2) and the US-China trade war (Section 3).

[220] Examples of this diversified usage are extremely numerous: *inter alia*, Mackenzie J., *Satellite Images Show Russia Giving N Korea Oil, Breaking Sanctions*, BBC, 22 November 2024; Coughlan S., *Sanctions for Russian Disinformation Linked to Kate Rumours*, BBC, 28 October 2024; Lee J., *Sanctioned Tanker Is Taking Russian Crude the Long Way to Suez*, Bloomberg, 03 December 2024; ANSA, *La Russia sanziona ministri, politici e giornalisti britannici*, 26 November 2024; ANSA, *Sanzioni Usa contro 50 banche russe, anche Gazprombank*, 21 November 2024; Bembaron E., *Économie d'énergie : le grand cafouillage autour des sanctions annoncées pour TotalEnergies et Dalkia*, Le Figaro, 26 November 2024; Moleiro A., *Venezuela aprueba una ley que persigue por traición a la patria a quienes apoyen las sanciones internacionales*, El País, 28 November 2024; New Delhi Times, *Israel Sanctions Oldest Newspaper Over Critical Coverage*, 26 November 2024; Nikkey Asia, *EU to Discuss Adding Tankers, Chinese Firms to Russia Sanctions List*, 27 November 2024; Waldenberg S., Pozzebon S., *US to Sanction Madure-Aligned Officials, to Put Pressure on Venezuela's President to Accept Election Results*, CNN, 27 November 2024.

[221] Charnovitz S., *Rethinking WTO Trade Sanctions*, American Journal of International Law, Vol. 95, no. 4, 2001, pp. 792-832, which, at pp. 792-793, interestingly – although previously acknowledging that the WTO Agreement does not rely on the term "sanction" – then argues that «the WTO utilizes a sanction» since its purpose is to induce compliance, as those measures «properly called sanction[s]» do. Accordingly, especially with the transposition to the WTO system, «the trade policy community […] has increasingly employed the term "sanction" to describe what DSU Article 22 authorizes». To be precise, however, at p. 802, the author then specifies how the more appropriate and technical term is "countermeasure". On the denomination of WTO DSB' measures as "sanctions", refer *inter alia* to Davey W.J., *Sanctions in the WTO: Problems and Solutions*, in Brown C.P., Pauwelyn J. (eds), *The Law, Economics and Politics of Retaliation in WTO*

prefer the notion of "WTO countermeasures");[222] AU measures against its MS; EU restrictive measures;[223] States' unilateral measures;[224] measures of counter-reaction to a previous measure (sometimes referred as "counter-sanctions");[225] or even trade policy measures ascribable to the entity' or the State's commercial policy.[226]

Dispute Settlement, Cambridge University Press, 2010, pp. 360-372; and, Sykes A.O., *Optimal Sanctions in the WTO: The Case for Decoupling (and the Uneasy Case for the Status Quo)*, Stanford University School of Law & Economics Research Paper Series, no. 379, 2009.

[222] *Inter alia*, Azaria D., *Trade Countermeasures in Response to Breaches of Obligations outside the WTO*, International and Comparative Law Quarterly, Vol. 71, no. 2, 2022, pp. 389-423; Ngangjoh H.Y., *Collective Countermeasures and the WTO Dispute Settlement: "Solidarity Measures Revisited"*, Nordic Journal of Commercial Law, no. 2, 2004; and, Pauwelyn J., *Enforcement and Countermeasures in the WTO: Rules Are Rules-Toward a More Collective Approach*, The American Journal of International Law, Vol. 94, no. 2, 2000, pp. 335-347. The categorisation of WTO measures is analysed in Chapter III, in Section 2.

[223] On the AU' measures, among others, Boateng Frimpong F., *The Unintended Consequence on African Union Sanctions of Member States: Myths and Realities*, in Kirkham K. (ed), *The Routledge Handbook on the Political Economy of Sanctions*, Routledge, 2024, pp. 197-208; and, Hellquist E., *Regional Sanctions as Peer Review: The African Union against Egypt (2013) and Sudan (2019)*, International Political Science Review, Vol. 42, no. 4, 2021, pp. 451-468. On the EU restrictive measures, *inter alia*, Bělín M., Hanousek J., *Which Sanctions Matter? Analysis of the EU/Russian Sanctions of 2014*, Journal of Comparative Economics, Vol. 49, 2021, pp. 244-257; Biersteker T., Portela C., *EU Sanctions in Context: Three Types*, European Institute for Security Studies (EUISS), 2015; Gestri M., *Sanctions Imposed by the European Union: Legal and Institutional Aspects*, in Ronzitti N. (ed), *Coercive Diplomacy, Sanctions and International Law*, op. cited above, pp. 70-102; and, Giumelli F., Hoffmann F., Książczaková A., *The When, What, Where and Why of European Union Sanctions*, European Security, Vol. 30, no. 1, 2021, pp. 1-23. The possible categorisation of EU restrictive measures is discussed in section 5.2., Chapter II, where it is presented the scholarly debate over these measures' potential classification as ARSIWA' countermeasures.

[224] *Inter alia*, Flanigan E., *The Long Arm of U.S. Sanctions Jurisdiction: The Extraterritorial Application of U.S. Sanctions Regimes to Both U.S. and Non-U.S. Actors and the Importance of Compliance Programs to Combat Potential Violations*, Mayland Journal of International Law, Vol. 39, no. 1, 2024, pp. 86-104; and, Yang J., Askari H., Forrer J., Teegen H., *U.S. Economic Sanction: An Empirical Study*, The International Trade Journal, Vol. 18, no. 1, 2004, pp. 23-62. Section 6.1., Chapter II, of this dissertation presents the US "sanctioning" framework.

[225] Among others, Bělín M., Hanousek J., *Imposing Sanctions Versus Posing in Sanctioners' Clothes: The EU Sanctions Against Russia and the Russian Counter-Sanctions*, in van Bergeijk P.A.G. (ed), *Research Handbook on Economic Sanctions*, Edward Elgar Publishing, 2021, pp. 249-263; and, Peksen D., Jeong J.M., *Coercive Diplomacy and Economic Sanctions Reciprocity: Explaining Targets' Counter-Sanctions*, Defence and Peace Economics, Vol. 33, no. 8, 2022, pp. 895-911.

[226] As for what regards the EU CCP tools, *inter alia*, the Anti-Coercion Instrument (ACI) has been discussed in terms of its overlapping with the Common Foreign and Security Policy (CFSP), while the Carbon Border Adjustment Mechanism (CBAM) has been read as a coercive tool, and as enabling trade sanctions. As for what regards the ACI's relationship with CFSP, refer to this Chapter II, Section 6.2. As for what regards CBAM' mentioned critics, refer to Corvino F., *The Compound Injustice of the EU Carbon Border Adjustment Mechanism (CBAM)* Ethics, Policy & Environment, 2023, pp. 1-20, p. 16, which, for instance, argues that the imposition of tariffs through CBAM would very similarly act as «trade sanction» (and, thus, as an instrument of pressure against third countries) but «without the punitive aspects» of it. Similarly, US Section 232 US Trade Expansion Act of 1962, and Section 301 of the US Trade Act of 1974 have been occasionally regrouped under the denomination of "trade sanctions". Among others, Corcoran P., *Trade and Wars: Checking the President's Overbroad Trade Sanction Authority*, New York University Journal of Legislation and Public Policy, Vol. 23, no. 2, 2021, pp. 687-744; Eizenstat J.L., *The Impact of the World Trade Organization on Unilateral United States Trade Sanctions under Section 301 of the Trade Act of 1974: A Case Study of the Japanese Auto Dispute and the Fuji-Kodak Dispute*, Emory International Law Review, Vol. 11, no. 1, 1997, pp. 137-188; and, Puckett A.L., Reynolds W.L., *Rules, Sanctions and Enforcement Under Section 301: At Odds with the WTO?*, American Journal of International Law, Vol. 90, no. 4, 1996, pp. 675-689. Commercial policy measures are analysed in Section 3, Chapter III, of this dissertation. More specifically, section 3.1. deals with two of the most important (and most employed) US trade instruments of commercial policies (*i.e.* Section 232 US Trade Expansion Act of 1962, and Section 301 of the US Trade Act of 1974), while Section 3.2. presents the EU provisions on Common Commercial Policy (CCP) and its relationship with CFSP measures (section 3.2.1), the Union's recent CCP instruments (among which the EU Carbon Border Adjustment Mechanism (CBAM), in section 3.2.2), and the EU Economic Security Strategy and its update to the Economic Security Doctrine (section 3.2.3). The important CCP-based Regulation on the Anti-Coercion Instrument of the EU is, instead, presented in Section 6.2., Chapter II.

Authors have also emphasised the historical and linguistic connotations of the word "sanction". Derived from the Latin "*sancire*" – meaning to "ratify" or "underwrite" –[227] the term originally possessed a positive connotation, referring to an instrument «conferring […] legitimacy and dignity of law». In contrast, its negative connotation identified "sanctions" as instruments aimed at «penalty or punishment of deviant behaviour».[228] Both due to the term's twofold significance and to the absence of linkage of this word to a specific typology of measure, it is debated which was the first use of "sanctions" in history.

Scholars generally identify the first case of "economic sanction" in Athens's commercial ban against Megarian merchants in 432 BC.[229] However, the legal nature of the Megarian decree and the different conceptions of commercial prohibitions at that time suggest refuting such historical determination. Historians notice that the modern use of restrictive trade measures – such as commercial bans – as instruments to materially exclude a State from international trade to safeguard international norms cannot be retroactively transposed to events preceding the mid-nineteenth century, when globalisation reshaped economic, political, and cultural conditions.[230]

The eighteenth and nineteenth centuries were indeed «period[s] of self-help», during which States autonomously employed non-armed or armed measures in cases of breaches of obligations «to remedy or to punish that breach».[231] The establishment of the League of Nations and, subsequently,

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[227] In this regard, Mulder N., *The Economic Weapon*, op. cited above, p. 13. Similarly, Hakimdavar G., *A Strategic Understanding of UN Economic Sanctions: International Relations, Law and Development*, Routledge, 2014, p. 20, analyses the Latin word "sanction" by assessing its meaning of «a law or decree that is sacred or inviolable». Accordingly, instead, in the English language the use of the term "sanction" was first recorded in the mid-1500s as «law, decree», but as soon as in 1635, the meaning became to be «the penalty enacted to cause one to obey a law or decree». In addition, the author argues that «the literal translation of the term "sanctions" denotes anything from punitive measures to military action against a given country or agent». Interestingly, Hagemeyer-Witzleb T.M., *The International Law of Economic Warfare*, op. cited above, p. 41 recalls the words' derivation to the Latin adjective *sanctus*, meaning "holy" or "sacred", while the verb meaning "to make holy, irrevocable" or "to approve", which later became "to prohibit".

[228] Abi-Saab G., *The Concept of Sanction in International Law*, in Gowlland-Debbas V. (ed), *United Nations Sanctions and International Law*, Kluwer Law International, 2001, pp. 29-41, p. 29. On this double meaning (positive/negative) of the term "sanction", refer also to Mulder N., *The Economic Weapon*, op. cited above, pp. 13-14 which argues that the negative connotation of the term "sanction" as a tool of guarantee or enforcement to be implemented through «measures to uphold "civilization" against "barbarism"» (p. 14) was acquired in the nineteenth century as the international system witnessed a hierarchical governance led by a group of great powers adhering to European principles of law. Similarly, Hakimdavar G., *A Strategic Understanding of UN Economic Sanctions: International Relations, Law and Development*, op. cited above, p. 20.

[229] Kaempfer W.H., Lowenberg A.D., *The Political Economy of Economic Sanctions*, in Sandler T., Hartley K. (eds), *Handbook of Defense Economics*, Elsevier B.V., Vol. 2, 2007, pp. 867-911, p. 869. Similarly, Hakimdavar G., *A Strategic Understanding of UN Economic Sanctions: International Relations, Law and Development*, op. cited above, p. 21; Nyun T., *Feeling Good or Doing Good: Inefficacy of the U.S. Unilateral Sanctions against the Military Government of Burma/Myanmar*, Washington University Global Studies Law Review, Vol. 7, no. 3, 2008, pp. 455-518, p. 461; and, Thouvenin J.-M., *History of Implementation of Sanctions*, in Asada M. (ed), *Economic Sanctions in International Law and Practice*, Routledge, 2020, pp. 83-92, p. 83.

[230] Mulder N., *The Economic Weapon*, op. cited above, pp. 13-14. On the existence of previous examples and on the meaning of such measures refer also to Giumelli F., *Coercing, Constraining, Signalling: Explaining UN and EU Sanctions after the Cold War*, ECPR Press, 2011, pp. 9-11, although this book does not offer (solely) an historian account.

[231] White N.D., Abass A., *Countermeasures and Sanctions*, in Evans M.D. (ed), *International Law*, op. cited above, pp. 531-560, p. 537. To be precise, the authors utilise the words "non-forcible" and "forcible" measures, then define forcible

of the UN restricted the use of armed measures of self-help (*e.g.* of armed reprisals) and codified self-defence through Article 51 UN Charter, but did not explicitly regulate non-armed measures of self-defence.[232] Despite the UN Charter provides for UN-centralised non-armed measures, unilateral (decentralised) non-armed measures of self-defence remain legally controversial.[233] Partially, such discipline has been structured within the International Law Commission' Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) in 2001 which, notably, codified "countermeasures" as lawful responses to wrongful acts.[234] Nonetheless, the category of self-help remains sporadically regulated within international law, partly due to the persistent ambiguity of the term "sanction" which, as noted above, seems to encompass a wide range of measures in the hands of both States and organisations.

The conceptual and practical ambiguity over the term "sanction" has led to many attempts of definitions and categorisation. By analysing the term's significance within legal systems – either domestic or international – it is generally agreed that the significance of the word "sanction" is contingent on the chosen interpretation of law: sanction might either be perceived as an unessential element of law, or as a feature of the legal system as a whole.[235] In turn, some advocate for the «broadest possible» understanding, encompassing all those measures responding to violations of

measures as «rang[ing] from measures short of war, such as armed reprisals, or could take the form of war». Similarly, Cassese A., *International Law*, Oxford University Press, 2005, p. 296.

[232] White N.D., Abass A., *Countermeasures and Sanctions*, in Evans M.D. (ed), *International Law*, op. cited above, pp. 538-539. Similarly, Cassese A., *International Law*, op. cited above, p. 301 also argues that armed reprisals in times of peace are unlawful except under specific circumstances in which, as permitted, are termed 'countermeasures'.

[233] The League of Nations and the United Nations' framework on non-armed measures are presented in this Chapter II, in Section 3. Unilateral non-armed measures conceived as "sanctions" are, instead, discussed in Section 6, Chapter II.

[234] Curiously, however, the same ILC explicitly differentiates the instrument of "countermeasures" from "sanctions", as it is later on presented in this introduction. The instrument of countermeasures as per ARSIWA is presented in this Chapter II, Section 4.

[235] *Inter alia*, Abi-Saab G., *The Concept of Sanction in International Law*, in Gowlland-Debbas V. (ed), *United Nations Sanctions and International Law*, op. cited above, pp. 30-31, which – after reporting such diverse interpretations – explicitly agrees with the latter view. Similarly on the different views of understanding of international law and the term "sanction", refer to Gowlland-Debbas V., *UN Sanctions and International Law: An Overview*, in Gowlland-Debbas V. (ed), *United Nations Sanctions and International Law*, Kluwer Law International, 2001, pp. 1-28, pp. 4-5; Klabbers J., *International Law*, Cambridge University Press, 2024, p. 180; and, Ruys T., *Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, Edward Elgar Publishing, 2017, pp. 19-51, pp. 19-20. Similarly, White N.D., Abass A., *Countermeasures and Sanctions*, in Evans M.D. (ed), *International Law*, op. cited above, pp. 552-553. Refer also to Lessig L., *Code: Version 2.0*, Basic Books, 2006, pp. 340-341 which – discussing of law, architecture of space and behaviours of people – interestingly argues that «Law is a command backed up by the threat of a sanction» (p. 340) and that they are «imposed after a violation has occurred» (p. 342). On the domestic system' conception of the term "sanction", refer also to Fulgenzi M., *La "guerra delle sanzioni": L'Unione Europea e la Federazione Russa nell'era dell'interdipendenza economica globale*, Il Cerchio, 2021, p. 15, which claims that in the internal States' legal systems the concept of "sanction" signifies a "coercive action that might occur against a transgressor of a legal norm" [literally, the author's words are the following «azione coercitiva che può essere intrapresa d'imperio nei confronti del trasgressore di una norma giuridica»]; and, Forlati Picchio L., *La sanzione nel diritto internazionale*, Cedam, 1974, pp. 9-47.

international law and those guaranteeing effectiveness of the law,[236] while others limit the term to measures «designed to enforce the law».[237]

In domestic law, enforcement refers to the procedures and the measures at disposal of a public authority or organ to force, coerce or impel compliance with the law,[238] thereby enabling a clear distinction between regulated measures (namely, "sanctions") which, thus, are lawful, and forcible acts which enforce and coerce but are unlawful because they do not consist in «authorized institutional reaction[s] to a wrong».[239] Differently, the international legal order does not possess such distinction.[240] Whilst some authors broadly contend the lack of a centralised organ with the authority to enforce international law, others conceive within Chapter VII of the UN Charter the power of the UN to enact «enforcement measures».[241] Nonetheless, whether "sanctions" constitute enforcement measures, or vice versa, remains contested. Some scholars argue that a «*latu sensu* definition» of sanctions – conceiving sanctions as «an attribute of the legal system as such» – includes all measures ensuring the «normative integrity of the system», whereas a «*stricto sensu* definition» – as «coercive measures taken in execution of a decision of a competent social organ» – restricts sanctions to a «species of enforcement or forcible execution measures».[242]

Doctrinal scholarship has attempted to clarify the nature and function of "sanctions" within international law through different definitional approaches. Mainly, three doctrinal approaches to

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[236] Beaucillon C., *Restrictive Measures as Tools of EU Foreign and Security Policy: Promoting Values, from Antiterrorism to Country Sanctions*, in Montaldo S., Costamagna F., Miglio A. (eds), *EU Law Enforcement: The Evolution of Sanctioning Powers*, Routledge, 2021, pp. 188-214, p. 195 which cites and supports Scelle G.' view on the inclusion under the term "sanction" of «all the legal or material procedures designed to ensure effectiveness of the law or of the rule of law», thus also involving «invalidity, damages, and enforcement proceedings».

[237] White N.D., Abass A., *Countermeasures and Sanctions*, in Evans M.D. (ed), *International Law*, op. cited above, p. 552. Slightly similarly, Zoller E., *Peacetime Unilateral Remedies: An Analysis of Countermeasures*, op. cited above, p. xiii, argues that «the word "sanction" is to mean any coercive device, phycological or physical, used to obtain observance of law». Interestingly, White N.D., *Shades of Grey: Autonomous Sanctions in the International Legal Order*, in Subedi S.P. (ed), *Unilateral Sanctions in International Law*, op. cited above, pp. 61-85, p. 84, argues that "sanctions" are «largely imposed to enforce peace not law».

[238] *Inter alia*, Abi-Saab G., *The Concept of Sanction in International Law*, in Gowlland-Debbas V. (ed), *United Nations Sanctions and International Law*, op. cited above, p. 31; and, Cassese A., *International Law*, op. cited above, p. 296.

[239] Cassese A., *International Law*, op. cited above, p. 296.

[240] Cassese A., *International Law*, op. cited above, p. 296. Interestingly, refer also to White N.D., Abass A., *Countermeasures and Sanctions*, in Evans M.D. (ed), *International Law*, op. cited above, pp. 552-553 which also analyses the differences between "sanctions" within the domestic system and the international legal order, by highlighting – citing Brierly J.L., *Sanctions*, Transaction of the Grotius Society, Vol. 17, 1931, pp. 67-84 – how whilst within the domestic system sanctions are organised in a systematic procedure, within international law these measures are «left indeterminate» (p. 553). Similarly, Zoller E., *Peacetime Unilateral Remedies: An Analysis of Countermeasures*, op. cited above, p. xiii.

[241] This Chapter is identified as «the most important sanctions provided by the Charter». Kelsen H., *The Law of the United Nations: A Critical Analysis of its Fundamental Problems*, Stevens & Sons Limited, 1950, p. 724. The author, however, points out that doubts over the "enforcement measures" as per Chapter VII may be «properly characterised as sanctions», thereby confirming its interpretation on the enforcement characteristic of "sanctions" but debating whether Chapter VII' enforcement measures can be included within the concept of "sanctions".

[242] Abi-Saab G., *The Concept of Sanction in International Law*, in Gowlland-Debbas V. (ed), *United Nations Sanctions and International Law*, op. cited above, pp. 31-32, pp. 35-36, and, pp. 39-40. The competent social organ is defined by the author as «an organ legally empowered to act in the name of the society or community that is governed by the legal system».

define "sanction" are identified: (i) a purpose-oriented approach focused on the aims of the measure (*e.g.* respond to/punish breaches of international law, deter, signal, etc); (ii) an identity-oriented approach focused on the identity of the actor enacting the measures (*e.g.* "multilateral/international organisations' sanctions" vs "unilateral/States sanctions"); and, (iii) a typology-oriented approach focused on the type of measures adopted (*e.g.* "economic sanctions", "financial sanctions", "targeted sanctions", etc).[243]

i. Measures as sanctions according to their purpose

Notably, those measures generally labelled as "sanctions" serve distinct purposes: coercion, deterrence, punishment, signalling, or even reparation. Most frequently, the declared outcome of these measures consists in obtaining a behavioural change from the targeted State or entity.

Thus, a strictly related argument concerns whether, as supported by part of the doctrine, "sanctions" are those measures that operate as reactions to illegality.[244] In this sense, the purpose of the measures is possibly coercion, punishment or/and deterrence, yet the central element is the willingness of responding to a prior violation. Nonetheless, not all measures commonly labelled as "sanctions" constitute a reaction to a prior breach of international law both with regard to State's measures,[245] and to UN sanctions. The latter, indeed, – perceived by many as "sanctions" *par*

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[243] On this classification of the legal debate, refer to Ruys T., *Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, pp. 19-22. Similarly, Fulgenzi M., *La "guerra delle sanzioni": L'Unione Europea e la Federazione Russa nell'era dell'interdipendenza economica globale*, op. cited above, pp. 17-20.

[244] Among others, Forlati Picchio L., *La sanzione nel diritto internazionale*, op. cited above, p. 15, p. 21, p. 25, and p. 40; Kelsen H., *The Law of the United Nations: A Critical Analysis of its Fundamental Problems*, op. cited above, p. 706; Subedi S.P., *The Status of Unilateral Sanctions in International Law*, in Subedi S.P. (ed), *Unilateral Sanctions in International Law*, op. cited above, pp. 19-59, p. 21; Tzanakopoulos A., *State Reactions to Illegal Sanctions*, in Happold M., Eden P. (eds), *Economic Sanctions and International Law*, op. cited above, pp. 67-86, pp. 67-68; and, Tzanakopoulos A., *Sanctions Imposed Unilaterally by the European Union: Implications for the European Union's International Responsibility*, in Marossi A.Z., Bassett M.R. (eds), *Economic Sanctions under International Law: Unilateralism, Multilateralism, Legitimacy, and Consequences*, op. cited above, pp. 145-161, p. 147. Interestingly, Forlati Picchio L., *La sanzione nel diritto internazionale*, op. cited above, pp. 11-10 reporting such debate, and, p. 10 where the author argues that the efficacy of a reaction to a violation assumes that the entity has a certain degree of "power-force" and an interest in the maintenance of the context ensured by the breached norm. The same author, on p. 20, specifies that although "sanction" is indeed an unfavourable consequence to the responsible actor of a violation, it is also the material damage on the responsible actor. Refer also to Ronzitti N., *Sanctions as Instruments of Coercive Diplomacy: An International Perspective*, in Ronzitti N. (ed), *Coercive Diplomacy, Sanctions and International Law*, op. cited above, pp. 1-32, p. 9 which recognises that the classification of "sanctions" does not necessarily imply the wrongfulness of an act to respond to, but also precises that «this is usually the case» (notice also on p. 15 the author arguing that «While the notion of countermeasures is linked to a violation of a norm of international law, the idea of sanction is linked to a situation which might or may not constitute a violation of international law»). In this regard, sanctions are intended as «coercive measures […] to be taken in case of contrary behaviour, or, what amounts to the same, in case of violation of the law» according to Kelsen H., *The Law of the United Nations: A Critical Analysis of its Fundamental Problems*, op. cited above, p. 706. The author also explains that the use of the term "violation" is occasionally misleading and, thus, the terms "delict", and "wrong, illegal act" are to be preferred.

[245] Most notably, this is the case of many United States' measures enacted throughout the years. Mainly, the so-called (and very much contested) Helms-Burton Act of 1996 [*i.e.* The Cuban Liberty and Democratic Solidarity Act (LIBERTAD), P.L. 104-114, 110 Stat. 785, 22 U.S.C. §6021-6091] has been debated over the lack of a precedent breach of international law, by many argued to constitute – in fact – an action taken in order to serve foreign policy objectives. In this sense, *inter*

excellence – are not necessarily triggered by violations of international law. Although some authors argue that the UNSC's practice shows such approach,[246] the UN Charter specifically links its Chapter VII' measures to "threats to the peace, breaches of the peace, or act of aggression" as per Article 39, rather than to illegality *per se*.

Differently, Article 16 of the League of Nations Covenant enabled the adoption of measures when a violation of international law occurred (namely, an act of war), thereby arguably incontrovertibly classifying these measures as "sanctions".[247] Similarly, countermeasures under Article 49 ARSIWA are specifically triggered by the occurrence of an internationally wrongful act,[248] but the ARSIWA Commentary specifically discerns the instrument of countermeasures from "sanctions", even if not on the basis of the measures' reaction or aim. The aim of ARSIWA countermeasures is limited to inducing compliance,[249] while both the UN Charter and the League of Nations Covenant refrain from explicitly specify the aims of their respective measures. Both provisions are comprehensively intended to achieve, maintain, and/or restore international peace and

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alia, Ruys T., *Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, p. 23. Similarly, Fulgenzi M., *La "guerra delle sanzioni": L'Unione Europea e la Federazione Russa nell'era dell'interdipendenza economica globale*, op. cited above, p. 24. On the illegality under international law of the Helms-Burton Act of 1996, refer to Lowenfeld A.F., *Unilateral Versus Collective Sanctions: An American's Perception*, in Gowlland-Debbas V. (ed), *United Nations Sanctions and International Law*, op. cited above, pp. 95-103, p. 102. The Helms-Burton Act of 1996 is mentioned in several parts of this dissertation (*inter alia*, Sections 6.1. and 6.2., Chapter II).

[246] Accordingly, the practice of the UNSC shows that «Determinations under Article 39 have […] been linked to alleged breaches of international law, the violation becoming therefore a constituent element of the threat to or breach of the peace». In this latter sense, Gowlland-Debbas V., *UN Sanctions and International Law: An Overview*, in Gowlland-Debbas V. (ed), *United Nations Sanctions and International Law*, op. cited above, p. 9. Refer also to the same author and reference, at p. 11, where it is argued that «Since findings of illegality have formed in practice a constituent part of Council determinations, it is evident that peace could not be restored without putting an end to the violation». *Inter alia*, on the UNSC imposition of Article 41' UN Charter measures on the basis of a violation of international law, refer to Fulgenzi M., *La "guerra delle sanzioni": L'Unione Europea e la Federazione Russa nell'era dell'interdipendenza economica globale*, op. cited above, p. 23; Krisch N., *Article 41*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 1276-1339, p. 1310, para 9; White N.D., Abass A., *Countermeasures and Sanctions*, in Evans M.D. (ed), *International Law*, op. cited above, p. 554 and p. 557; and, Wolfrum R., *Article 1*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 102-120, pp. 113-114, paras 21-22.

[247] Kelsen H., *The Law of the United Nations: A Critical Analysis of its Fundamental Problems*, op. cited above, p. 724.

[248] Article 49 (1) ARSIWA more precisely reads that «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». The definition of an internationally wrongful act is notably provided by Article 2 ARSIWA according to which it is a «conduct consisting of an action or omission (a) attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State».

[249] The ARSIWA countermeasures' purposes are explicitly mentioned within Article 49 (1) and (2) ARSIWA – *i.e.* to induce the State responsible for the breach into compliance with its provisions –, as it also limits such measures to the non-performance (and, thus, countermeasures refrain to act as punishments for a breach of obligations).

security,[250] but enforcement of international law itself was not the key goal of either the Covenant or of the 1945 collective security system.[251]

As a consequence, if the classification of a measure as a "sanction" depends (solely?) on its characteristic of reaction to illegality and/or on law-enforcing character, this would potentially exclude (at least some of) UN non-armed measures from the category of "sanctions", thereby countering the widespread doctrinal recognition of these measures as the sole "lawful" sanctions properly entitled of such term.

Some authors associate the term 'sanctions' to actions taken in cases of violations with objectives of reparation, punishment, deterrence, conformity, or behavioural change.[252] While the aims of reparation, deterrence, conformity, and behavioural change are most commonly recognised as potential objectives of 'sanctioning measures', the punitive dimension of "sanctions" is highly controversial. Some authors argues that UN sanctions possess a punitive character,[253] distinguishing

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[250] Both organisations' purpose is indeed to achieve or maintain and restore international peace and security. In this regard, the Preamble of the Covenant of the League of Nations reads as follow: «The High Contracting Parties, in order to promote international cooperation and to achieve international peace and security by the acceptance of obligations not to resort to war, by the prescription of open, just and honourable relations between nations, by the firm establishment of the understandings of international law as the actual rule of conduct among Governments, and by the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organised peoples with one another, Agree to this Covenant of the League of Nations». Similarly, Article I UN Charter specifically states that «The Purposes of the United Nations are: 1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace; 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace; 3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and 4. To be a center for harmonizing the actions of nations in the attainment of these common ends». The development, purposes and the framework of both the League of Nations and of the United Nations are presented in this Chapter II, Section 3.

[251] Cassese A., *International Law*, op. cited above, p. 301. Thus, this renders UN non-armed measures not strictly dependent to (re)act when a violation of international law occurred but, instead, expressly linked to cases of a threat to the peace, a breach of the peace, or an act of aggression as provided by Article 39. This Article, together with other central provisions of the UN non-armed framework, is presented in detail in Section 3.2. of this Chapter II.

[252] Abi-Saab G., *The Concept of Sanction in International Law*, in Gowlland-Debbas V. (ed), *United Nations Sanctions and International Law*, op. cited above, pp. 35-36. Similarly, Forlati Picchio L., *La sanzione nel diritto internazionale*, op. cited above, p. 11 stating that the traditionally intended objectives of sanctions are: reintegration, or late satisfaction of the breached obligation; reparation of the equivalent, *i.e.* the reparation of the economic damage or satisfaction; and retribution through the infliction of a penalty. In this regard, the author subdivides sanctions into those aimed at punishment and those aimed at reparations (literally, "sanzioni afflittive" and "sanzioni riparatorie"), and recalls those instead preventive.

[253] The UN framework on non-armed measures is presented more in detail in this Chapter II in Section 3. Additionally, this Section will provide a brief analysis on the adopted measures, on the (possible) goals, and on the criticisms. On the punitive character of some United Nations non-armed measures, refer to, among others, Gowlland-Debbas V., *UN Sanctions and International Law: An Overview*, in Gowlland-Debbas V. (ed), *United Nations Sanctions and International Law*, op. cited above, p. 12; Kochler H., *Sanctions and International Law*, International Organisations Research Journal, Vol. 13, no. 3, 2019, pp. 22-47, p. 32; Mohamad R., *Unilateral Sanctions in International Law: A Quest for Legality*, in Marossi A.Z., Bassett M.R. (eds), *Economic Sanctions under International Law: Unilateralism, Multilateralism, Legitimacy, and Consequences*, op. cited above, pp. 71-81, p. 74; and, White N.D., Abass A., *Countermeasures and Sanctions*, in Evans M.D. (ed), *International Law*, op. cited above, p. 555.

them from ARSIWA countermeasures which, instead, aim at achieving compliance and «restitution of a legal relationship».[254] On the contrary, however, part of the doctrine refrains from identifying "sanctions" as punitive, or even as (solely) coercive, as it would exclude measures central to the efficacy of the system,[255] and because it would unproperly merge the international and domestic meaning of "sanction".[256] Overall, both the identification of a punitive purpose in certain measures (*e.g.* UN non-armed measures) and its linkage to justify their classification as "sanctions" are contested elements within the doctrinal debate. Interestingly, official EU documents on restrictive measures explicitly emphasise their non-punitive character.[257]

Notably, a widely-employed classification identifies three main categories of scope of sanctions: (i) coercion, *i.e.* aiming at imposing a burden on targeted entities to affect their cost/benefit calculations to act in a certain way, thereby wishing for a change of behaviour of the targeted entities or for the creation of a «bargaining chip»; (ii) constraint, *i.e.* aiming at instituting a burden on the targeted entities to prevent them from acting in a certain way, thereby wishing to impose a burden on the entities, or for such entities to cease the behaviour; and, (iii) signal, *i.e.* aiming at signalling the perspective and the position of senders (*i.e.* the actors enacting the measures) without the material imposition of a burden to the targeted entities, thereby expecting, among others, commitment and the establishment of international standards and/or of diplomatic pressure.[258] Accordingly, the design of

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[254] White N.D., Abass A., *Countermeasures and Sanctions*, in Evans M.D. (ed), *International Law*, op. cited above, p. 555. Differently, Zoller E., *Peacetime Unilateral Remedies: An Analysis of Countermeasures*, op. cited above, pp. 106-107 argues that UN measures cannot possess any punitive character, as instead "sanctions" do (but not countermeasures). The same author, on pp. 46-62, discusses more widely the purposes of peacetime unilateral remedies. In turn, these authors submit that States wishing for «deeper, more punitive or coercive measures» should rely on a regional organisation and, by preference, on the UN (*Ibid*., p. 559). Accordingly, the reliance on such regional (or international) organisations would «help[…] to ensure that such measures are taken for the purpose of protecting a community norm, and are not taken out of pure self-interest».

[255] Forlati Picchio L., *La sanzione nel diritto internazionale*, op. cited above, p. 37 and pp. 40-41. It is generally accepted that "sanctions" should not aim at punishment or penalization of a State's behaviour. In this latter sense, *inter alia*, Hagemeyer-Witzleb T.M., *The International Law of Economic Warfare*, op. cited above, p. 46.

[256] In this view, the domestic understanding of "sanctions" does signify a coercive action against an illegal act. Of this perspective, Fulgenzi M., *La "guerra delle sanzioni": L'Unione Europea e la Federazione Russa nell'era dell'interdipendenza economica globale*, op. cited above, p. 15.

[257] The Council of European Union, *Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy*, cited above, Annex I, p. 46, provides that the EU restrictive measures are «preventive, non-punitive, instruments which should allow the EU to respond swiftly to political challenges and developments». This document together with the EU framework on restrictive measures is analysed in Section 5 of this Chapter II.

[258] Giumelli F., *Coercing, Constraining, Signalling: Explaining UN and EU Sanctions after the Cold War*, op. cited above, pp. 32-35. Interestingly, the author previously defined international sanctions as measures in response to a breach of international standards or obligations. In this sense, on p. 16, international sanctions are defined as «politically motivated penalties imposed as a declared consequence of the target's failure to observe international standards or international obligations by one or more international actors (the *senders*) against one or more others (the *targets*)». Adopting a similar classification also some legal scholars, *inter alia*, Ruys T., *Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, pp. 22-23; Subedi S.P., *The Status of Unilateral Sanctions in International Law*, in Subedi S.P. (ed), *Unilateral Sanctions in International Law*, op. cited above, p. 21; and, van den Herik L., *Peripheral Hegemony in the*

sanctions should reflect whether the final aim is to coerce, constrain, or signal.[259] Although this classification is not strictly legal, legal scholarship recognises both the coercive element of "sanctions"[260] as mean to force the targeted State into compliance with legal norms;[261] and the signalling function of these measures since they unite States in opposing wrongdoings and symbolically expose and condemn such conducts.[262]

Quest to Ensure Security Council Accountability for its Individualized UN Sanctions Regimes, Journal of Conflict and Security Studies, Vol. 19, no. 3, 2014, pp. 427-449, p. 433.

[259] Giumelli F., *Coercing, Constraining, Signalling: Explaining UN and EU Sanctions after the Cold War*, op. cited above, p. 149.

[260] This occurs regardless of the authors' perception and definition of the term "sanction". The coercive nature of the measures is identified, among others, by Abi-Saab G., *The Concept of Sanction in International Law*, in Gowlland-Debbas V. (ed), *United Nations Sanctions and International Law*, op. cited above, p. 39; and, Kelsen H., *The Law of the United Nations: A Critical Analysis of its Fundamental Problems*, op. cited above, p. 706. Refer also to other authors identifying the coercive element of these measures such as, *inter alia*, Fulgenzi M., *La "guerra delle sanzioni": L'Unione Europea e la Federazione Russa nell'era dell'interdipendenza economica globale*, op. cited above, p. 15; White N.D., Abass A., *Countermeasures and Sanctions*, in Evans M.D. (ed), *International Law*, op. cited above, p. 543; and, Ronzitti N., *Sanctions as Instruments of Coercive Diplomacy: An International Perspective*, in Ronzitti N. (ed), *Coercive Diplomacy, Sanctions and International Law*, op. cited above, p. 31. Refer also to Salva J-M., *La question des sanctions et la guerre economique*, in De Nanteuil A. (direction scientifique), Société Française pour le Droit International, *Un approche juridique de la guerre économique*, op. cited above, pp. 27-49, p. 27 defining economic sanctions as States's measures to exert pressure on another State and force it to change its position (lit. «*une sanction économique es tune mesure adoptée par un Etat pour exercer sur un autre une pression et le forcer ainsi à changer sa position*»). These measures' aim to modify, cease and conform a behaviour within the international community is also generally shared – to different extents – by scholars both from political sciences and sociology. *Inter alia*, refer to Abi-Saab G., *The Concept of Sanction in International Law*, in Gowlland-Debbas V. (ed), *United Nations Sanctions and International Law*, op. cited above, p. 32; Beaucillon C., *Practice Makes Perfect, Eventually? Unilateral State Sanctions and the Extraterritorial Effects of National Legislation*, in Ronzitti N. (ed), *Coercive Diplomacy, Sanctions and International Law*, op. cited above, pp. 103-126, p. 106; Bothe M., *Compatibility and Legitimacy of Sanctions Regimes*, in Ronzitti N. (ed), *Coercive Diplomacy, Sanctions and International Law*, op. cited above, pp. 33-42, p. 33; Giumelli F., *Coercing, Constraining, Signalling: Explaining UN and EU Sanctions after the Cold War*, op. cited above, p. 15; Ronzitti N., *Conclusion*, in Ronzitti N. (ed), *Coercive Diplomacy, Sanctions and International Law*, op. cited above, pp. 287-293, p. 287; Salva J-M., *La question des sanctions et la guerre economique*, in De Nanteuil A. (direction scientifique), Société Française pour le Droit International, *Un approche juridique de la guerre économique*, op. cited above, pp. 27-38, p. 27; and, Thouvenin J-M., *Articulating UN Sanctions with Unilateral Restrictive Measures*, in Beaucillon C. (ed), *Research Handbook on Unilateral and Extraterritorial Sanctions*, Edward Elgar Publishing, 2021, pp. 149-164, p. 151. Chapter I provides a detailed analysis of the concept of coercion in international law.

[261] A remarkable author identifies sanctions as being «coercive measures» (either armed, non-armed, material, moral or purely legal actions) which, by involving coercion, are by definition against the will of the targeted State and aimed at «bend[ing that State'] will in order to bring it back to a conduct compatible with legal prescriptions». Refer to Abi-Saab G., *The Concept of Sanction in International Law*, in Gowlland-Debbas V. (ed), *United Nations Sanctions and International Law*, op. cited above, p. 39. This author defines "sanctions *stricto sensu*" as «coercive measures taken against a target State or entity in application of a decision by a socially competent organ», identifying three main elements of this definition and concept: (i) the coercive element (as briefly presented above); (ii) the "opposing" characteristic of these measures, *i.e.* their nature of being enacted against («*i.e.* at the detriment of the target State») thereby involving a deprivation or a loss of its material or moral patrimony; and, (iii) their fundamental characteristic of being taken in application of a decision or recommendation of a competent social organ (as briefly it will be presented later on in this Section). *Inter alia*, commenting on this author's definition refer to Crawford J., *The Relationship Between Sanctions and Countermeasures*, in Gowlland-Debbas V. (ed), *United Nations Sanctions and International Law*, op. cited above, pp. 57-68.

[262] For instance, Cassese A., *International Law*, op. cited above, p. 312, acknowledges two purposes of collective sanctions: (i) to act as a «catalysing factor uniting a group of States» which oppose to an «alleged misbehaviour» of another State; and (ii) to act as «a symbol of public exposure and condemnation of the States allegedly misbehaving», thereby being aimed not at damaging the targeted State but rather at collectively condemning and «delegitimiz[ing]» the wrongful behaviour of such targeted State in front of the whole international community.

Nonetheless, scholars also note that sanctions may serve other objectives such as (hidden) political, foreign policy, or economic objectives,[263] or prevention. Indeed, both legal scholars and organs of international organisations or entities (such as the UNSC and the CJEU) have recognised preventive aims particularly within UN and EU non-armed measures.[264] Debates surrounding the aims of sanctions and their classification within that category frequently concerns their morality, transparency, humanitarian impact, and abuse. Critics argue that acting through «fear for sanctions is [akin to] a dictatorship»,[265] while other defend sanctions as a necessary alternative to inaction of governments or force.[266]

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[263] Among many contributions on the link between "sanctions" and foreign policy objectives, refer to Subedi S.P., *The Status of Unilateral Sanctions in International Law*, in Subedi S.P. (ed), *Unilateral Sanctions in International Law*, op. cited above, p. 23; and Terry P.C.R., *Secondary Sanctions, Access Restrictions, and Customary International Law*, in Ruys T., Ryngaert C., Rodríguez Silvestre F. (eds.), *The Cambridge Handbook of Secondary Sanctions and International Law*, Cambridge University Press, 2025, pp. 117-144, p. 117. In this perspective, Ronzitti N., *Sanctions as Instruments of Coercive Diplomacy: An International Perspective*, in Ronzitti N. (ed), *Coercive Diplomacy, Sanctions and International Law*, op. cited above, p. 11 notices that the achievement of the desired political objective of the measures often leads to the lifting of measures.

[264] In this regard, as for the scholarly debate, refer to, *inter alia*, Forlati Picchio L., *La sanzione nel diritto internazionale*, op. cited above, pp. 37-38; Fulgenzi M., *La "guerra delle sanzioni": L'Unione Europea e la Federazione Russa nell'era dell'interdipendenza economica globale*, op. cited above, p. 24. An example of the UNSC' declaration of the preventive nature of its non-armed measures is within UNSC, Resolution 2083 (2012), Adopted by the Security Council at its 6890th meeting, on 17 December 2012, (S/RES/2083 (2012)), where it is expressly mentioned that «the measures referred to in paragraph 1 of this resolution are preventative in nature» (preamble); that it is recognised «the need to take measures to prevent and suppress the financing of terrorism and terrorist organizations» (preamble); and moreover, that measures are particularly meant, among others objectives, to «prevent unfrozen assets from being used for terrorist purposes» (para 31) and to «prevent[…] the criminal misuse of the Internet by Al-Qaida, and other individuals, groups, undertakings and entities associated with it» (para 64 (r)). The CJEU, instead, pronounced itself on the preventive nature of restrictive measures in the famous Kadi judgments, later analysed more in detail in this Chapter II in Sections 3.2.4. In this sense, in the Judgment of the Court (Grand Chamber) of 18 July 2013, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, at paras 130 and 132 the Court respectively states that «Having regard to the preventive nature of the restrictive measures at issue […]» (para 130) and that «Notwithstanding their preventive nature, the restrictive measures at issue have […]» (para 132). As a way of example, UN non-armed measures had been enacted as responses to "threat to the peace" identified – among others – as the proliferation of chemical and nuclear weapons; as the right of people to self-determination; and as risks to democracy legitimacy. On this matter, and on the wide interpretation by the UNSC of the concept of "threat to the peace" refer also to this Chapter II, Section 3.2.2. Similarly, the EU restrictive measures might be adopted to «fight terrorism and the proliferation of weapons of mass destruction and […] to uphold respect for human rights, democracy, the rule of law and good governance» aiming at (a) safeguarding the Union's values, fundamental interests, security, independence and integrity; (b) consolidating and supporting democracy, the rule of law, human rights and the principles of international law; and, (c) preserving peace, prevent conflicts and strengthen international security. In this regard, refer to the Council of the European Union, *Basic principles on the Use of Restrictive Measures (Sanctions)*, cited above, para 3 which – together with other important EU official document on its restrictive measures – will be analysed in this Chapter II in Section 5. These objectives – frequently referred to as the goals of restrictive measures – are part of the more numerous objectives of the Union's External Actions, as established by Article 21 (2) TEU as later in also discussed in section 3.2., Chapter III.

[265] Klabbers J., *International Law*, op. cited above, p. 198.

[266] Lowenfeld A.F., *Unilateral Versus Collective Sanctions: An American's Perception*, in Gowlland-Debbas V. (ed), *United Nations Sanctions and International Law*, op. cited above, pp. 95-103, pp. 102-103 contend that the instrument of sanctions is necessary since «the alternatives – doing nothing or applying force – may well be even more unattractive», thereby arguing that «sanctions are supposed to hurt [, …] to deter, […] if possible, to change conduct, and […] to express outrage», and acknowledging that, even if it is preferable to hurt the government «more than its population […], everyone is hurt as a consequence of a program of sanctions» especially if collectively implemented, as those deriving from UNSC resolutions. The same author, moreover, interestingly argues that «sanctions are a middle ground, as the drafters of Article 41 of the UN Charter understood, between resort to military force and "business as usual"» (p. 103). Similarly, Subedi S.P., *The Status of Unilateral Sanctions in International Law*, in Subedi S.P. (ed), *Unilateral Sanctions in International*

As explored, the purpose-oriented approach qualifies measures as "sanctions" according on their aims, yet these objectives are not uniformly agreed within the international community or within the instruments most often recognised as "sanctions". Measures labelled as "sanctions" might aim to coerce; deter; punish; signal disapproval; limit harm or risks; prevent conflicts or violations; provoke reputational damage; obtain domestic advantage; or, even reshaping geopolitical structures and powers. Therefore, this approach – although being beneficial to enhance clarity of the measures' goals and, potentially, their legitimacy – remains controversial and heterogeneous. Indeed, there is not a uniform consensus on which purposes render a measure effectively a sanction, as well as there is the risk that declared goals might strategically conceal different purposes.

An alternative method of classification consists in the identity-oriented approach, focusing on the identity of the actor enacting the measures rather than on their purposes.

ii. Measures as sanctions according to the actor enacting the measure

The identity-oriented approach ranges from those classifying measures as "sanctions" solely when they entail an international social organ, to those acknowledging the presence of other typologies of actors – including individual States – thus, distinguishing between multilateral and unilateral sanctions.

The involvement of a socially recognised international institution is widely acknowledged as a crucial element in defining "sanctions", although different degrees of interpretations exist. Some scholars restrict the term exclusively to measures deriving from an international organisation[267] or to those adopted in application of a decision of a competent international organ;[268] while others partially espouses the ILC's understanding, describing institutional/collective sanctions as «reaction[s] of an international organisation to an internationally wrongful act» – though the ILC notably avoids linking

Law, op. cited above, p. 21. Refer also to Milaninia N., *Jus ad bellum economicum and jus in bello economico: The Limits of Economic Sanctions Under the Paradigm of International Humanitarian Law*, in Marossi A.Z., Bassett M.R. (eds), *Economic Sanctions under International Law: Unilateralism, Multilateralism, Legitimacy, and Consequences*, op. cited above, p. 122 arguing that «the increasing tendency by States to use economic sanctions is a positive development, as it shows a shift away from war and its corresponding physical destruction. To that aim, States should be encouraged», although also highlighting the sanctions' «broader goals, […and,] serious and lasting impact on civilian populations».

[267] Possibly falling within this category is Cassese A., *International Law*, op. cited above, p. 311 which identifies «'sanctions properly so called'» in those collective reactions decided, authorised, or recommended by international bodies. Accordingly, these collective responses are «centralized countermeasures», identified by the author as «measures that are (1) in breach of international obligations, (2) intend to respond to an international wrongful act of another State; and (3) are taken jointly by a plurality of States upon decisions or recommendation of an international organization». Slightly differently, White N.D., Abass A., *Countermeasures and Sanctions*, in Evans M.D. (ed), *International Law*, op. cited above, p. 554 consider fundamental the «auspices» of a competent international organisation which, accordingly, effectively render a sanction to be lawful.

[268] Abi-Saab G., *The Concept of Sanction in International Law*, in Gowlland-Debbas V. (ed), *United Nations Sanctions and International Law*, op. cited above, pp. 39-40 which claims that "sanctions *stricto sensu*" are «coercive measures taken against a target State or entity in application of a decision by a socially competent [international] organ».

the concept of "sanction" to internationally wrongful acts.[269] Early definitions of the term 'sanction' already reflected a "collective element": in 1938, the Royal Institute of International Affairs associated the term to "actions adopted by the international community" – although whether to interpret 'international community' as 'international organisation' remains contested.[270]

In contrast, part of the doctrine disagrees with the interpretation of "sanctions" as those actions enacted by a socially recognised authority.[271] Accordingly, while this conception acknowledges that in domestic law sanctions derives from "superior" domestic organs,[272] it rejects extending this reasoning to the international framework where it is contested the public nature of the action of the "delegated" entity (and the "sanctioning" nature of its "delegated" reaction); the "collective" and authoritative nature of the social organ; and, the absence of an international binding procedure for the "assessment of the law" outside of specific agreements capable of ensuring dispute resolutions.[273]

The UN is generally regarded as the "socially-recognised international institution" *par excellence* empowered to impose "sanctions", especially from after the Cold war when the UNSC robustly adopted non-armed measures.[274] Nevertheless, neither the UN Charter[275] nor the Covenant of the League of Nations explicitly employed the term "sanction". Solely the League's 1924 Protocol for the Pacific Settlement of International Disputes – never entered into force – explicitly labelled

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[269] Tzanakopoulos A., *State Reactions to Illegal Sanctions*, in Happold M., Eden P. (eds), *Economic Sanctions and International Law*, op. cited above, pp. 68-69.

[270] Reporting the uncertainty of interpretation, refer to White N.D., Abass A., *Countermeasures and Sanctions*, in Evans M.D. (ed), *International Law*, op. cited above, p. 554.

[271] Forlati Picchio L., *La sanzione nel diritto internazionale*, op. cited above, pp. 23-24 reports some criticisms over this interpretation. Moreover, according to the author, only the typology of "privative sanction" (lit. «*sanzione privativa*») has a concrete social character, while those actions aimed at protecting, repairing or punishing an entity is an expression of self-help (lit. «*autotutela*») thus, as such, a manifestation of private defence that, in turn, has no relationship with public powers delegation.

[272] *Ibid*., p. 28 in which the author textually claims that «*la sanzione non si esaurisce infine nella reazione di organi sovraordinati, benché in tale reazione trovi la manifestazione saliente*».

[273] In this regard, *Ibid*., pp. 29-36. The author considers "international sanctions" as "public reaction to illegality". More precisely, and literally, the author argues that supporting the thesis according to which international sanctions, «*come reazione "pubblica" all'illecito*» (p. 29), would be precluded given the difficulty of (i) «*"leggere" l'intervento del terzo quale azione pubblica*» (p. 31); (ii) «*concepire il corpo sociale come autorità sovraordinata ai membri uti singuli*» (p. 32); (iii) «*configurare la reazione del soggetto leso come azione sanzionatoria in quanto ad esso delegata da tale pretesa autorità*» (p. 33); and, given (iv) «*l'inesistenza nel diritto internazioanle generale di procedimenti ad esito vincolante di accertamento del diritto diversi dall'accordo (libero nel diritto consetudinario), da un procedimento cioè che – essendo sprovvisto di effetti giuridici processuali – non è comunque "qualificato" come atto risolutivo di controversie*» (p. 35). This criticism recalls discussions over the nature (and authority) of international law as "law" which, in fact, has also been discussed in relation to the definition and classification of the concept of "sanctions". *Inter alia*, Fulgenzi M., *La "guerra delle sanzioni": L'Unione Europea e la Federazione Russa nell'era dell'interdipendenza economica globale*, op. cited above, p. 15; Klabbers J., *International Law*, op. cited above, p. 180; and Ruys T., *Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, p. 19.

[274] In this regard, among others, White N.D., Abass A., *Countermeasures and Sanctions*, in Evans M.D. (ed), *International Law*, op. cited above, p. 552. An overview of the UNSC measures is presented in the Section 3 of this Chapter II.

[275] The UN Charter, indeed, preferred instead the word "measures". *Inter alia*, reporting this also the ILC Commentary on ARSIWA, Chapter II, para 3, pp. 497-498 which, indeed, notices how the UN Charter solely refers to "measures" and not to "sanctions", despite including a great variety of measures among which those involving the use of armed force.

Article 16 measures as "sanctions",[276] with other official League' documents specifically discussing these measures as "economic weapons".[277]

Both the League's Article 16 measures and UN's Article 41 measures are nevertheless frequently referred to as "sanctions",[278] although some authors contest the latter classification while accepting the former. Accordingly, by defining sanctions as responses to violations of obligations, these scholars recognise the League's Article 16 measures as sanctions but reject applying this term to the UN measures, since they are not explicitly framed as reactions to violations of law.[279] Thus, the decisive factor is not whether the decision-making is decentralised (*e.g.* the case of the League)[280] or centralised (*e.g.* the case of the UN),[281] but whether the measures are explicitly linked and respond to a breach of international law.[282] Other authors contend the opposite: if "sanctions" require the

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[276] Article 4 (6) League of Nations Protocol for the Pacific Settlement of International Disputes (1924) reads that «[…] Should a State in disregard of the above undertakings resort to war, the sanctions provided for by Article 16 of the Covenant, interpreted in the manner indicated in the present Protocol, shall immediately become applicable to it». The term "sanction" is linked to the measures adoptable under Article 16 of the League of Nations Covenant also as per Article 11 of the Protocol [stating that «As soon as the Council has called upon the signatory States to apply sanctions, as provided in the last paragraph of Article 10 of the present Protocol, the obligations of the said States, in regard to the sanctions of all kinds mentioned in paragraphs 1 and 2 of Article 16 of the Covenant, will immediately become operative in order that such sanctions may forthwith be employed against the aggressor»]; Article 12 of the Protocol [according to which «[…] the Council shall forthwith invite the economic and financial organisations of the League of Nations to consider and report as to the nature of the steps to be taken to give effect to the financial and economic sanctions and measures of co-operation contemplated in Article 16 of the Covenant and in Article 11 of this Protocol»]; and, Article 13 of the Protocol [reporting that «In view of the contingent military, naval and air sanctions provided for by Article 16 of the Covenant and by Article 11 of the present Protocol, the Council shall be entitled to receive undertakings from States determining in advance the military, naval and air forces which they would be able to bring into action immediately to ensure the fulfilment of the obligations in regard to sanctions which result from the Covenant and the present Protocol»]. In this sense, among others, Forlati Picchio L., *The Legal Core of International Economic Sanctions*, in Forlati L.P., Sicilianos L.-A. (eds), *Les sanctions économiques en droit international / Economic Sanctions in International Law*, Martinus Nijhoff, 2004, pp. 99-207, p. 106; and, Thouvenin J-M., *Articulating UN Sanctions with Unilateral Restrictive Measures*, in Beaucillon C. (ed), *Research Handbook on Unilateral and Extraterritorial Sanctions*, op. cited above, pp. 149-164, p. 150.

[277] *Inter alia*, League of Nations, *The Economic Weapon of the League*, League of Nations Official Journal, Vol. 3, no. 9, September 1922, pp. 1032-1033.

[278] This occurs under different motivations and approaches, *e.g.*, due to either their collective nature as an organ; to their socially recognised international character; to their aims of enforcement or as responses to violations of international law; and others.

[279] Kelsen H., *The Law of the United Nations: A Critical Analysis of its Fundamental Problems*, op. cited above, pp. 724-725. Nonetheless, the author subsequently discusses the fact that Chapter VII was not «intended to deal particularly with sanctions» and how solely binding UNSC actions (not recommendations) might be considered as "sanctions" (pp. 733-734). Accordingly, Article 41 UN Charter' measures are sanctions since, having the character of reprisals, they are permissible solely as responses to violation of international law which, eventually, is the discerning element for identifying a measure as a proper "sanction", according to the author (p. 735). The author interestingly frames this debate in the discussion over the classification of Articles 41 and 42 UN Charter as either "sanctions" or "political measures", defined by the same author on p. 733 as «measures which the Security Council may apply at its discretion for the purpose to maintain and restore international peace». The author then concludes by stating that «if enforcement actions are sanctions, then any conduct against which the Security Council is authorised by the Charter to react with enforcement actions must have the character of a violation of the Charter» (p. 736).

[280] It is indeed the case of Article 16 of the Covenant of the League of Nations where the individual States adopted measures without the Council determination or authorisation. This is further explored in the following section of this Chapter.

[281] Article 41 UN Charter indeed provides for the UNSC to enact non-armed measures to be then implemented by States. This is further explored in the following section of this Chapter.

[282] Of this view, which – thus – might be framed within the first category of defining sanctions, *i.e.* the one focused on the purpose of the measures, is Kelsen H., *The Law of the United Nations: A Critical Analysis of its Fundamental*

involvement of an international organisation, then the centralised character of UN's determination is precisely what qualifies Article 41's non-armed measures as proper "sanctions", in contrast to the decentralised League's system.

It is noteworthy that some UNSC resolutions expressly employ the term "sanctions" also when the measures respond to «lawful, or not necessarily unlawful, acts».[283] This practice perhaps suggests the UNSC's willingness to classify Article 41 measures as "sanctions", regardless of whether they address violations of international law. Accordingly, some authors argue that the UNSC's reliance on Chapter VII measures to respond to violations of international law, with the aim of inducing States to respect legal norms, renders these «enforcement measures […] a form of countermeasures».[284]

This interpretation, however, is rarely supported by the doctrine since non-armed measures may serve different purposes;[285] and since countermeasures are mainly bilateral – although it is debated the legitimacy of collective countermeasures – and typically imposed in peacetime.[286] The ILC ARSIWA Commentary reinforces this distinction by identifying 'sanctions' as actions against a State taken by a group of States or mandated by an international organisation.[287] This seems to support

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Problems, op. cited above, p. 726. Interestingly, Cassese A., *International Law*, op. cited above, p. 311 seems to likewise disagree with the distinction between "sanctions" and other measures according to the centralised or de-centralised nature of such measures. This might possibly be derived from the argument of the author according to which «in both cases it is States that take the sanctions; in the former case [*i.e.* those measures decided by international bodies] States are legally bound to do so, whereas in the latter case [*i.e.* those measures authorized or recommended by such bodies] they are not». Nonetheless, this author recognises the 'properly called sanctions' in the measures acting as "collective responses" consisting, accordingly, in both in «collective countermeasures *decided* by international bodies» and in «those *authorized* or *recommended* by such bodies». Also similarly, Thouvenin J-M., *Articulating UN Sanctions with Unilateral Restrictive Measures*, in Beaucillon C. (ed), *Research Handbook on Unilateral and Extraterritorial Sanctions*, op. cited above, p. 151. More precisely, the author concludes that «However, it is arguable that UN Security Council measures fall into the category of sanctions in so far as they are adopted against those who breach the '*obligation*, which is imprecise but *included in the Charter*, to refrain from any act constituting a threat to peace or a breach of the peace and from any act of aggression'».

[283] Asada M., *Definition and Legal Justification of Sanctions*, in Asada M. (ed), *Economic Sanctions in International Law and Practice*, op. cited above, pp. 3-23, p. 4.

[284] Krisch N., *Introduction to Chapter VII: The General Framework*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, p. 1249, para 27. The author recognised that response to violations of international law does not constitute the sole motivation for action by the UNSC but nonetheless discusses the aim of these measures to «make States respect specific legal norms». Interestingly, on p. 1239, para 1, the author claims that Chapter VII UN Charter effectively empowers the UNSC with the role of an «executive of the international community», or of an «international government».

[285] Relying on the purpose-approach mentioned above, part of the doctrine argues that "sanctions" are recognised to be specific measures with punitive and «exemplary» character, while countermeasures remain temporary measures of coercive character, but without a punitive or exemplary objective. In this regard, Zoller E., *Peacetime Unilateral Remedies: An Analysis of Countermeasures*, op. cited above, p. 75 and p. 106. On this author's arguments, refer also to White N.D., Abass A., *Countermeasures and Sanctions*, in Evans M.D. (ed), *International Law*, op. cited above, pp. 553-554 which notice that the enactment of unilateral sanctions «in the sense used by Zoller is unlawful», supporting instead the argument that solely sanctions pursued by international organisations are lawful measures.

[286] *Inter alia*, White N.D., Abass A., *Countermeasures and Sanctions*, in Evans M.D. (ed), *International Law*, op. cited above, p. 554. As for what concerns the aims, the authors argue, at p. 555, that «sanctions imposed by the UN serve much wider purposes than the concept of unilateral, or even collective, countermeasures as defined by the ILC».

[287] ILC ARSIWA Commentary, Chapter II, para 3, pp. 497-498. According to some scholars, the ILC distinction between countermeasures and "sanctions" might signify the necessity to refrain from the use of the term "sanctions" «as it implies a legitimate legal response to an initial breach of law». Of this perspective, Thouvenin J-M., *Articulating UN Sanctions with Unilateral Restrictive Measures*, in Beaucillon C. (ed), *Research Handbook on Unilateral and Extraterritorial*

the actor-based approach that qualifies sanctions as strictly being either collective measures or measures from an international organisation, viewing thus countermeasures as something distinct.[288] As a result, scholars conceive countermeasures as the only other instrument available to States in case of UNSC inaction,[289] or anyway as better suited for inter-States relations,[290] yet in neither case frameable as "proper sanctions".

Discussions during the drafting of ARSIWA highlighted the preference to employ the term 'sanction' to identify measures adopted by international organisations.[291] Nevertheless, the later-

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Sanctions, op. cited above, p. 152. The Commentary nonetheless specifically labelled the term "sanction" as «imprecise» (ILC ARSIWA Commentary, Chapter II, para 3, pp. 497-498).

[288] Slightly similarly, some authors understand sanctions as «collective responses undertaken within an institutional framework», as opposed to countermeasures which, differently, are measures individually adopted by States. In this regard, Cassese A., *International Law*, op. cited above, p. 302. Although the collective/individual nature of the measures is one of the generally accepted distinguishing elements between countermeasures and sanctions, countermeasures and UN non-armed measures – widely recognised as "sanctions" – do share certain common characteristics. As later further specified in this Chapter, authors notice a resemblance between the two measures in regard to their nature of responding to violations of international law; their assessment of elements of law (and not solely of facts); their coercive nature; their forcible temporary suspension of rights of another entity; their imposition of reparations duties; and their temporality. *Inter alia*, on these elements, refer to Crawford J., *The Relationship Between Sanctions and Countermeasures*, in Gowlland-Debbas V. (ed), *United Nations Sanctions and International Law*, op. cited above, pp. 60-62; and, Gowlland-Debbas V., *UN Sanctions and International Law: An Overview*, in Gowlland-Debbas V. (ed), *United Nations Sanctions and International Law*, op. cited above, p. 12; Kochler H., *Sanctions and International Law*, op. cited above, pp. 9-11.

[288] *Inter alia*, for this classification, refer to Hakimdavar G., *A Strategic Understanding of UN Economic Sanctions: International Relations, Law and Development*, op. cited above, pp. 24-25; and, Schmidt J*., The Legality of Unilateral Extra-territorial Sanctions under International Law*, Journal of Conflict & Security Law, Vol. 27, no. 1, 2022, pp. 53-81, p. 58. Remarkably, Subedi S.P., *The Status of Unilateral Sanctions in International Law*, in Subedi S.P. (ed), *Unilateral Sanctions in International Law*, op. cited above, p. 22, defines "unilateral sanctions" as «measures of exercising pressures short of the threat or use of military force directed against a target state or entity, which are taken by an individual state or a group of states, which are not authorised by the United Nations and which seek to limit or deprive altogether the freedom that other states enjoy as sovereign states under international law». Refer also to pp. 27-38 in which the author discusses and presents an overview of the doctrinal debate over the lawfulness of "unilateral sanctions", intended as those measures enacted lacking an UN authorisation. On this, also White N.D., *Shades of Grey: Autonomous Sanctions in the International Legal Order*, in Subedi S.P. (ed), *Unilateral Sanctions in International Law*, op. cited above, pp. 80-84.

[289] Ronzitti N., *Conclusion*, in Ronzitti N. (ed), *Coercive Diplomacy, Sanctions and International Law*, op. cited above, pp. 287-293, p. 288, p. 290, p. 29 which considers "sanctions" as exclusively being UN non-armed measures. Curiously, the author also argues – in Ronzitti N., *Sanctions as Instruments of Coercive Diplomacy: An International Perspective*, in Ronzitti N. (ed), *Coercive Diplomacy, Sanctions and International Law*, op. cited above, p. 20 – that individual States might adopt unilateral measures solely in the form of countermeasures when the UNSC is unable to enact its non-armed measures Moreover, the UNSC does not possess the power to recommend and bind individual States to terminate countermeasures «since the right to take countermeasures is derived by general international law and it is not made conditional upon a decision of the SC». The relationship between UN non-armed measures and countermeasures is further explained in Section 4 where the instrument of ARSIWA countermeasures is analysed in detail.

[290] Ronzitti N., *Conclusion*, in Ronzitti N. (ed), *Coercive Diplomacy, Sanctions and International Law*, op. cited above, p. 291 which, accordingly, argues that sanctions are specifically aimed at restoring peace and international security, while countermeasures are better suited for inter-States relations and are, in fact, a «State to State concern», aside from the case of countermeasures taken in the general interest. Presenting such an argument, refer to Spagnolo A., *Entering the Buffer Zone between Legality and Illegality: EU Autonomous Sanctions under International Law*, in Montaldo S., Costamagna F., Miglio A. (eds), *EU Law Enforcement: The Evolution of Sanctioning Powers*, op. cited above, pp. 215-240, p. 219. The so-called "countermeasures in the general interest" – also denominated "countermeasures *erga omnes*", "collective countermeasures" or "third-party countermeasures" – and their discussed admissibility under international law and under ARSIWA' provisions is discussed in this Chapter II, in section 4.1. Moreover, within section 5.2., Chapter II, it is briefly investigated whether EU restrictive measures might be justified as "countermeasures in the general interest".

[291] Yoshimura S., *UN Economic Sanctions and Financial Measures – Evolution and Challenges*, in Yoshimura S. (ed), *United Nations Financial Sanctions*, Routledge, 2021, pp. 1-17, p. 3; and, Tzanakopoulos A., *Sanctions Imposed Unilaterally by the European Union: Implications for the European Union's International Responsibility*, in Marossi A.Z.,

adopted – and more specifically focused – 2011 ILC Draft Articles on the Responsibility of International Organizations (DARIO) likewise refrained from employing the term "sanction" in relation to measures enacted by international organisations, preferring once again the term "countermeasures".

According to the ILC DARIO Commentary, sanctions are measures adopted by an international organisation against its own members, and are therefore not assimilable to countermeasures.[292] By specifying this, DARIO effectively limits the notion of 'sanctions' to measures enacted by an international organisation to its MS (often labelled by scholars as "institutional sanctions"),[293] rather than to those measures adopted against any subject of the international community – as instead it might be inferred from ARSIWA. Critics argue that DARIO's strict classification contrasts both with the actual practice of international organisations – such as the EU's imposition of restrictive measures against non-EU MS countries – and with States' unilateral reliance to such measures.[294]

The widely employed distinction between multilateral and unilateral sanctions specifically focuses on the actors imposing the measures, thereby equally considering "sanctions" both measures adopted by international organisations and those adopted by States. Notably, multilateral sanctions are those measures enacted (or mandated) by an international organisation, while unilateral sanctions are measures adopted by States.[295] Divergent interpretations are also present in this classification: for some multilateral sanctions are also those measures collectively adopted by a number of States;[296]

Bassett M.R. (eds), *Economic Sanctions under International Law: Unilateralism, Multilateralism, Legitimacy, and Consequences*, op. cited above, p. 147.

[292] Accordingly, «sanctions, which an organization may be entitled to adopt against its members according to its rules, are *per se* lawful measures and cannot be assimilated to countermeasures». ILC, Draft articles on the responsibility of international organizations, with commentaries 2011 (DARIO), Article 22, p. 72, para 3. Brief mention of DARIO is present in this Chapter II, under section 5.2.

[293] Ruys T., *Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, p. 21.

[294] In this latter sense, Fulgenzi M., *La "guerra delle sanzioni": L'Unione Europea e la Federazione Russa nell'era dell'interdipendenza economica globale*, op. cited above, pp. 18-19.

[295] *Inter alia*, for this classification, refer to Hakimdavar G., *A Strategic Understanding of UN Economic Sanctions: International Relations, Law and Development*, op. cited above, pp. 24-25; and, Schmidt J., *The Legality of Unilateral Extra-territorial Sanctions under International Law*, op. cited above, p. 58. Remarkably, Subedi S.P., *The Status of Unilateral Sanctions in International Law*, in Subedi S.P. (ed), *Unilateral Sanctions in International Law*, op. cited above, p. 22, defines "unilateral sanctions" as «measures of exercising pressures short of the threat or use of military force directed against a target state or entity, which are taken by an individual state or a group of states, which are not authorised by the United Nations and which seek to limit or deprive altogether the freedom that other states enjoy as sovereign states under international law». Refer also to pp. 27-38 in which the author discusses and presents an overview of the doctrinal debate over the lawfulness of "unilateral sanctions", intended as those measures enacted lacking an UN authorisation. On this, also White N.D., *Shades of Grey: Autonomous Sanctions in the International Legal Order*, in Subedi S.P. (ed), *Unilateral Sanctions in International Law*, op. cited above, pp. 80-84.

[296] Hakimdavar G., *A Strategic Understanding of UN Economic Sanctions: International Relations, Law and Development*, op. cited above, pp. 24-25. Slightly similarly, Cassese A., *International Law*, op. cited above, p. 311 which individuates collective responses as those "sanctions properly so called". According to the author, part of the category of collective responses are both (i) collective countermeasures decided by international bodies; and (ii) those authorised or recommended by such bodies.

while others strictly contend that this measures remain unilateral since – although consisting in a "group action" – they do not entail an international actor.[297]

Overall, also the identity-oriented approach focusing on the identity of the actor enacting the measures present significant ambivalence on the interpretation of the term and on the qualifying elements. While limiting the notion of "sanctions" to measures enacted by international organisations might theoretically enhance coherence and clarity of enforcement and of international law, the States' increasing adoption of restricting measures labelled as "sanctions" and the debated nature of international organisation – most notably, the EU – suggest that the identity approach alone may not be sufficient to uniformly determine which measure qualify as "sanction" under international law.

A further alternative approach focuses on what the concerned measures target and seek to tackle, thereby qualifying measures according to their typology.

iii. Measures as sanctions according to the typology of area tackled

The typology-oriented approach classifies measures as "sanctions" according to the sector or activity they target. This approach typically includes within the notion of "sanctions" various economic measures – such as embargoes, import and export restrictions, but also "targeted" measures such as asset freezes and travel bans –,[298] distinguishing them from more "purely commercial" instruments such as general "trade restrictions" or tariffs.[299]

Some authors stress that "sanctions" are «politically motivated» and, thus, not adopted for «commercial reasons».[300] Others distinguish "economic sanctions" from "political sanctions": the

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[297] Schmidt J., *The Legality of Unilateral Extra-territorial Sanctions under International Law*, op. cited above, p. 58, which classifies UN non-armed measures as "multilateral sanctions" since they «reflect[…] the collective will of the members of the UN». In turn, "unilateral sanctions" are instead States' measures enacted outside the UN framework (and not based on an UN resolution), regardless of whether those States acted individually or collectively. According to the author, on p. 60, unilateral sanctions are adopted on the basis of each States' foreign policy objectives, might pursue several aims – among which also punishment –, and possess an extra-territorial nature *per se*. Similarly, Subedi S.P., *The Status of Unilateral Sanctions in International Law*, in Subedi S.P. (ed), *Unilateral Sanctions in International Law*, op. cited above, p. 22 which classifies as "unilateral sanctions" both measures taken individually by a State and those taken by a group of states, lacking the UN authorisation.

[298] *Inter alia*, Bothe M., *Compatibility and Legitimacy of Sanctions Regimes*, in Ronzitti N. (ed), *Coercive Diplomacy, Sanctions and International Law*, op. cited above, p. 35; and, Ruys T., *Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework*, in van den Herik L (eds)., *Research Handbook on UN Sanctions and International Law*, op. cited above, p. 21. Interestingly, on asset freezes from the perspective of international monetary law, refer to Viterbo A., *Extraterritorial Sanctions and International Economic Law*, in European Central Bank (ECB), *Building Bridges: Central Banking Law in an Interconnected World*, ECB Legal Conference 2019, December 2019, pp. 157-179, pp. 163-166; and, Viterbo A., *The Enforcement of Extraterritorial Sanctions: Asset Freezes and International Monetary Law*, in Ruys T., Ryngaert C., Rodríguez Silvestre F. (eds.), *The Cambridge Handbook of Secondary Sanctions and International Law*, Cambridge University Press, 2025, pp. 287-304.

[299] Differentiating "trade restrictions" from "sanctions" on this basis, among others, Gestri M., *Sanctions Imposed by the European Union: Legal and Institutional Aspects*, in Ronzitti N. (ed), *Coercive Diplomacy, Sanctions and International Law*, op. cited above, p. 71, differentiating "sanctions" from "restrictions to trade" within the EU framework; and, Mulder N., *The Economic Weapon*, op. cited above, p. 14 distinguishing "economic sanctions" from "tariffs",

[300] Ronzitti N., *Sanctions as Instruments of Coercive Diplomacy: An International Perspective*, in Ronzitti N. (ed), *Coercive Diplomacy, Sanctions and International Law*, op. cited above, p. 10.

former are taken in response to breaches of international law and may amount to "centralised countermeasures" whenever they suspend prior legal commitments (*e.g.* trade agreement), whereas the latter consists in unfriendly but lawful acts (*e.g.* the interruption of diplomatic relations).[301] Within the "sanctions doctrine", further distinctions between measures exists – such as "primary" vs "secondary" (or/and "extraterritorial") sanctions –[302] as well as measures identified from the area and country tackled – such as country-based or horizontally-based sanctions –[303] and from their legal ground, such as the "Global Magnitsky sanctions".[304]

Further classifications distinguish between "comprehensive sanctions" and "targeted" or "smart" sanctions, focusing on the measures' scope, the amount of targeted persons and of the affected population, and the sectors of the economy involved.[305] Nonetheless, this latter classification concerns the impact on the population and the areas tackled by the measures, rather than whether the measure qualifies as "sanctions". Similarly, other "descriptive" classifications – *e.g.* financial, human rights, democratic, diplomatic, anti-money laundering, anti-corruption, arms control sanctions, and others – refer either to the area tackled, the aim pursued, or the reason/violation igniting the adoption of the measures, without resolving the legal qualification of such measures.

Overall, this approach highlights the sectors affected, but lacks a clear criterion for identifying what legally constitutes a "sanction" under international law. Beyond these approaches, a further

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[301] Cassese A., *International Law*, op. cited above, p. 311. Accordingly, the former act to «undo previous legal commitments made by the sanctioning States», while the second are actions «not *per se* illegal, but which amount to unfriendly conduct».

[302] These definitions will be briefly presented and analysed in this Chapter II. In this regard, refer to Chapter II, Section 6.1. discussing US reliance on extraterritorial sanctions. It is noteworthy to highlight here that Silingardi S., *La liceità internazionale delle misure imposte dall'UE nei confronti della Federazione Russa anche alla luce dei nuovi obiettivi anti-elusione*, in Alì A. (ed), *Le sanzioni dell'UE nei confronti della Russia tra sicurezza internazionale e diritti umani*, G. Giappichelli Editore, 2025, pp. 17-53, pp. 32-33, interestingly discusses that extraterritorial sanctions are not always frameable as "secondary sanctions". Accordingly, the former not always possess the objective of inducing third States or third nationals to modify their behaviour with regard to the 'primary' target of the sanction. Moreover, the author discusses that their distinction also relies on the issue of legality under international law: while extraterritorial sanctions are unlawful solely when they act beyond the boundaries of international law rules of extraterritoriality, secondary sanctions are instead considered unlawful because contrasting with territorial sovereignty and the principle of non-intervention. Refer also to Silingardi S., *Unilateral Sanctions Before the General Court: Venezuela v. Council*, Common Market Law Review, Vol. 61, no. 4, 2024, pp. 1123-1142, p. 1138. Similarly, Viterbo A., *Extraterritorial Sanctions and International Economic Law*, in European Central Bank (ECB), *Building Bridges: Central Banking Law in an Interconnected World*, op. cited above, pp. 159-163, presents cases of primary sanctions with extraterritorial application and cases of secondary sanctions, specifically focusing on US framework, as also in Viterbo A., *The Extraterritorial Sanctions Policy of the United States and the (Ab)Use of the US Dollar as a Jurisdictional Link*, op. cited above, pp. 361-381.

[303] *Inter alia*, Silingardi S., *Sanctions for Human Rights and Democracy*, in Sossai M., Portela C., Charron A. (eds), *Elgar Encyclopedia of International Sanctions*, op. cited above, p. 266 which divides unilateral human rights sanctions in "horizontal" (or "thematic" or Magnitsky-style) sanctions – *i.e.* those that focuses on a particular theme rather than countries – and "country-based" sanctions, *i.e.* those specifically targeting a State.

[304] The United States' Global Magnitsky Acts (*i.e.* the "Sergei Magnitsky Rule of Law Accountability Act" of 2012; and the "Global Magnitsky Human Rights Accountability Act" of 2016 (GMA)) are also briefly mentioned in Section 6.1. of this Chapter.

[305] A brief presentation of these two categories with a historical overview is provided in this Chapter II in Section 3.2.3.

necessary analysis concerns whether retorsions and reprisals – both forms of States' self-help – might fall under the label of "sanctions".

According to the ILC ARSIWA Commentary, retorsion (occasionally also "retortion") consists of an «"unfriendly" conduct which is not inconsistent with any international obligation of the State engaging in it even though it may be a response to an internationally wrongful act».[306] Typically, these might include the prohibition or limitations of diplomatic relations, the withdrawal of voluntary aid programmes, and even embargoes. However, as long as such actions are not inconsistent with the State's international obligations, and regardless of their motivation, these measures cannot be considered "countermeasures".[307] In this sense, the ILC ARSIWA Commentary differentiates the concepts of lawful reactions (*i.e.* retorsion) and of unlawful reactions (*i.e.* countermeasures, which are then justified by the ARSIWA' framework), but does not specify the relation with the notion of "sanction". It is nonetheless generally accepted that retorsions are not "sanctions", although a minoritarian part of the doctrine contends that a lawful measure might still constitute a "sanction" whenever it is oriented towards 'sanctioning' objectives,[308] thereby leading some to classify also retorsions as "sanctions".[309]

The instrument of reprisals is defined within the *Naulilaa* arbitration award as «acts of self-help by the injured states, acts in retaliation for acts contrary to international law on the part of the offending States».[310] Historically, they include both armed and unarmed actions. Nowadays, the

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[306] ILC ARSIWA Commentary, Part III, Chapter II, para 3, pp. 497-498. Many authors attribute additional characteristics to the instrument of retorsions, such as the requirement of necessity, of proportionality in the gravity of the conduct, the measures' termination when the 'wrong' conduct has ceased, and the respect of general principles of international law. On these characteristics, among others, Cassese A., *International Law*, op. cited above, p. 310; and, White N.D., Abass A., *Countermeasures and Sanctions*, in Evans M.D. (ed), *International Law*, op. cited above, p. 544.

[307] *Ibidem*, ILC ARSIWA Commentary, Part III, Chapter II, para 3, pp. 497-498. Differently, within the ARSIWA' drafting process, opinions perceived retorsions and non-forcible reprisals as countermeasures. Presenting such debate and the different viewpoints and legal arguments of diverse scholars, refer to Abi-Saab G., *The Concept of Sanction in International Law*, in Gowlland-Debbas V. (ed), *United Nations Sanctions and International Law*, op. cited above, pp. 36-39.

[308] Forlati Picchio L., *La sanzione nel diritto internazionale*, op. cited above, p. 21 more precisely argues that a lawful behaviour *per se* (*e.g.* the one originated from lawfully derived power) might be considered as "sanction" whenever, if capable of achieving "sanctioning" objectives, it is unequivocally oriented towards those aims. The author literally provides that «può considerarsi sanzione un comportamento di per sé lecito (oggetto ad esempio di libertà o di poteri comunque goduti) che, idoneo al raggiungimento di fini tipicamente sanzionatori, sia a tali fini inequivocamente orientato». The author then claims that extending the concept of "sanction" to those behaviours lawful *per se* is indispensable if it is accepted that the essential function of such concept is to express the relationship between the illegality and the effectivity. Refer also to p. 28 where the author states that self-hep measures available to the entity who suffered a violation are as well "sanctions". On the contrary, explicitly arguing that retorsions cannot be qualified as "sanctions" is, *inter alia*, Ruys T., *Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, p. 32.

[309] Klabbers J., *International Law*, op. cited above, p. 182 which identifies retorsion as «perhaps the most ubiquitous of sanctions known to international law».

[310] Responsabilité de l'Allemagne a raison des dommages causés dans les colonies portugaises du Sud de l'Afrique (Sentence sur le principe de la responsabilité), Portugal contre Allemagne, Lausanne, 31 Juillet 1928, textually reporting that «La *représaille* est un acte de propre justice (Selbsthilfehandlung) de l'État lésé, acte répondant — *après sommation restée infructueuse* — à un acte contraire au droit des gens de l'État offenseur» (p. 1026). On this remarkable case, refer

doctrine distinguishes (i) cases of self-defence as "armed reprisals" when the use of force occurs; and (ii) countermeasures as non-armed/peacetime reprisals when there is no armed action.[311] Evidently, armed actions cannot be qualifiable as 'sanctions' which, as predominantly accepted, are non-armed measures. Moreover, their claimed punitive goal also distinguish "peacetime reprisals" from countermeasures, which instead lack any punitive character and aim solely at compliance.[312] This difference in purpose also differentiates reprisals from the "WTO countermeasures",[313] while some scholars contend that the wording of Article XXI (b) (iii) GATT suggests its possible application to cases of reprisals.[314] As to whether reprisals may qualify as 'sanctions', it once again depends on the chosen interpretation. The characteristics of peacetime reprisals that may include or exclude their classification as 'sanctions' involve their reactive nature to violations of international law, their enforcement or punitive objectives, their unilateral character, and their lack of institutional or

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inter alia, to Klabbers J., *International Law*, op. cited above, pp. 183-185; and, Ruys T., *Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, p. 33.

[311] The concept of self-defence has been analysed previously in Chapter I, Section 4.2., of this dissertation. The differentiation of reprisals is also provided briefly in this Chapter II, in Section 2. On the differentiation of these categories, *inter alia*, Cassese A., *International Law*, op. cited above, pp. 299-301 also arguing that armed reprisals in times of peace are unlawful except under specific circumstances in which, as permitted, are termed 'countermeasures'; Ronzitti N., *Sanctions as Instruments of Coercive Diplomacy: An International Law Perspective*, in Ronzitti N. (ed), *Coercive Diplomacy, Sanctions and International Law*, op. cited above, p. 11; Klabbers J., *International Law*, op. cited above, p. 183; Ruys T., *Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, p. 33; and, Zoller E., *Peacetime Unilateral Remedies: An Analysis of Countermeasures*, op. cited above, pp. 35-44 which, nonetheless, contends that reprisals and self-defence possess significant distinctions. Similarly, O'Brien J., *International Law*, op. cited above, argues that reprisals and self-defence acts are different since the latter «normally defensive action to repel while [reprisals are] often retributive or punitive action[s]» These categories are also occasionally referred to as "belligerent reprisals" and "peacetime reprisals"; or as "military" and "peaceful" reprisals. The latter category is supported by the ILC ARSIWA Commentary which precises that the term "countermeasures" covers those actions recognised as "peacetime reprisals", *i.e.* reprisals occurring outside armed conflicts. In this sense, ILC ARSIWA Commentary, Part III, Chapter II, para 3. To be more precise, the ILC ARSIWA Commentary only refers to «reprisals not associated with armed conflict». This issue is analysed also in Section 4 of this Chapter II.

[312] *Inter alia*, on this regard, refer to Ronzitti N., *Sanctions as Instruments of Coercive Diplomacy: An International Law Perspective*, in Ronzitti N. (ed), *Coercive Diplomacy, Sanctions and International Law*, op. cited above, p. 11; and, White N.D., Abass A., *Countermeasures and Sanctions*, in Evans M.D. (ed), *International Law*, op. cited above, p. 545.

[313] Pons J.F., *Self-Help and the World Trade Organization*, in Mengozzi P. (ed), *International Trade Law on the 50th Anniversary of the Multilateral Trade System*, Giuffrè Editore, 1999, pp. 55-112, p. 83 which, however, acknowledges that the evolution of the instrument of reprisals tends to eliminate the punitive element of its intentions. This author justifies such argument on the application of general international law within GATT which, however, is not pacific within the doctrine as presented in section 2.4, Chapter III. More precisely to the integration of the law of reprisals within the GATT system and with a contrary argument to the one presented by the previously mentioned author, refer to Marceau G., Wyatt J., *Dispute Settlement Regimes Intermingled: Regional Trade Agreements and the WTO*, Journal of International Dispute Settlement, Vol. 1, no. 1, 2010, pp. 67-95, p. 74 noticing that neither the WTO Panel nor AB ever pronounced on such issue.

[314] Hahn M.J., *Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception*, Michigan Journal of International Law, Vol. 12, no. 3, 1991, pp. 558-620, p. 593 and p. 597 specifying, however, on p. 594, that such possibility is compatible with GATT solely whenever the targeted State has committed an «international delict, *i.e.* either a violation of a treaty or a customary law obligation». Accordingly, this limitation is reconciled with Article XXI GATT' purpose. This issue is analysed further in section 2.3., Chapter III.

collective participation and authorisation. Nonetheless, although not pacific,[315] the majority of scholars agree that peacetime reprisals are the nowadays countermeasures.[316]

Thus, retorsions, countermeasures, and reprisals constitute distinct categories of self-help within international law. Retorsions are lawful but unfriendly conducts at the State' discretion generally limited to suspend international obligations owed to a responsible State, occasionally in response to a prior international wrongful act; countermeasures are unlawful acts *per se* intended to induce compliance in response to a prior internationally wrongful act; while reprisals are aimed at punishing the responsible State.[317]

In light of this, the notion of "sanction" cannot be assimilated to the abovementioned instruments of self-help. Indeed, aside from the ARSIWA countermeasures whose differences with 'sanctions', as mentioned, is specified in its Commentary; the 'unfriendly' character of retorsions fall outside the prevailing understanding of the nature and aims of sanctions; and the armed category of reprisals certainly cannot be categorised as sanctions given their armed nature; such as for peacetime reprisals actions since these are widely intended to act, instead, as countermeasures.

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[315] As mentioned above, White N.D., Abass A., *Countermeasures and Sanctions*, in Evans M.D. (ed), *International Law*, op. cited above, p. 543; and, Ronzitti N., *Sanctions as Instruments of Coercive Diplomacy: An International Perspective*, in Ronzitti N. (ed), *Coercive Diplomacy, Sanctions and International Law*, op. cited above, p. 11 distinguishes reprisals from countermeasures according to the reprisals' punitive aims.

[316] *Inter alia*, Bothe M., *Compatibility and Legitimacy of Sanctions Regimes*, in Ronzitti N. (ed), *Coercive Diplomacy, Sanctions and International Law*, op. cited above, p. 34; Cassese A., *International Law*, op. cited above, p. 301; Hagemeyer-Witzleb T.M., *The International Law of Economic Warfare*, op. cited above, p. 47; Klabbers J., *International Law*, op. cited above, p. 183; Mohamad R., *Unilateral Sanctions in International Law: A Quest for Legality*, in Marossi A.Z., Bassett M.R. (eds), *Economic Sanctions under International Law: Unilateralism, Multilateralism, Legitimacy, and Consequences*, op. cited above, p. 75; Ruys T., *Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, p. 32; and, Tzanakopoulos A., *Sanctions Imposed Unilaterally by the European Union: Implications for the European Union's International Responsibility*, in Marossi A.Z., Bassett M.R. (eds), *Economic Sanctions under International Law: Unilateralism, Multilateralism, Legitimacy, and Consequences*, op. cited above, p. 146. On the contrary, subdividing reprisals from the instrument of countermeasures refer to White N.D., Abass A., *Countermeasures and Sanctions*, in Evans M.D. (ed), *International Law*, op. cited above, pp. 543-544 which classify and distinguish such instruments as per their aims: with reprisals being punitive and countermeasures being instrumental.

[317] White N.D., Abass A., *Countermeasures and Sanctions*, in Evans M.D. (ed), *International Law*, op. cited above, p. 543. Similarly, Ronzitti N., *Sanctions as Instruments of Coercive Diplomacy: An International Perspective*, in Ronzitti N. (ed), *Coercive Diplomacy, Sanctions and International Law*, op. cited above, p. 11 distinguishes reprisals from countermeasures as per the first' punitive character. Also, Ruys T., *Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, p. 24, contending that retorsions might contain a punitive character (it also argues that – although not uniformly accepted within the international community – retorsions are «widely regarded as a freedom (as opposed to a right to which certain limitations may apply) and is accordingly largely unregulated by international law»). Refer also to Schmidt J., *The Legality of Unilateral Extra-territorial Sanctions under International Law*, op. cited above, p. 73 presenting the opinions of Giegerich Thomas and of Bowett Derek which, respectively, consider retorsions as "illegal" if «they are used to coerce a state 'to make concessions in a matter within its domaine réservé'» (according to Giegerich T.), or if «they pursue an 'improper motive or purpose', and thus [are] based on their 'intent rather than their effect'» (according to Bowett D.). Similarly, Spagnolo A., *Entering the Buffer Zone between Legality and Illegality: EU Autonomous Sanctions under International Law*, in Montaldo S., Costamagna F., Miglio A. (eds), *EU Law Enforcement: The Evolution of Sanctioning Powers*, op. cited above, p. 226. Refer also to Schmidt J., *The Legality of Unilateral Extra-territorial Sanctions under International Law*, op. cited above, p. 71 on the characteristic of retorsions to be based on a State' freedom to trade; and, Klabbers J., *International Law*, op. cited above, p. 183.

This suggests that, although the concept of 'sanction' may share some similarities with forms of self-help, it nonetheless constitutes a separate category. Several authors argue that measures of unilateral self-help (or practices of "private justice") acting outside the framework of a social organ cannot be qualified as "sanctions".[318] Therefore, neither regional organisations nor States (acting both individually and in groups) possess the «general power of sanctions» attributed to the UN under Article 41 UN Charter.[319] Rather, they may enact measures of self-help without prior UN authorisation solely in cases of retorsions or countermeasures,[320] given that – nonetheless – these measures do not acquire the qualification of 'sanctions'.

In conclusion, the term "sanction" is a scholarly construct,[321] rather than an autonomous concept of international law.[322] It is employed to describe an extensive amount of measures regardless of their formal classification under international law, the involved actors, their degree of regulation within international law, their connection (or lack of) to a prior violation of international law, their aims, or the sectors they tackle.

The definitional problem persists across multiple disciplines, enabling the frequent re-grouping of heterogeneous legal instruments under a single ambiguous label. Albeit the prominent

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[318] Abi-Saab G., *The Concept of Sanction in International Law*, in Gowlland-Debbas V. (ed), *United Nations Sanctions and International Law*, op. cited above, p. 32. Nonetheless, self-help instruments should be taken into consideration as tools present and admitted (even if «confined to […] very narrow limits») within international law, and as «means and guarantees available in the international legal system to ensure its normative integrity» (*Ibidem*). Similarly, as presented by Spagnolo A., *Entering the Buffer Zone between Legality and Illegality: EU Autonomous Sanctions under International Law*, in Montaldo S., Costamagna F., Miglio A. (eds), *EU Law Enforcement: The Evolution of Sanctioning Powers*, op. cited above, p. 219, part of the doctrine contends that UN non-armed measures and countermeasures do differentiate themselves precisely because «the former reflect[s] the existence of a centralised organ in the international community competent for adopting sanctions, while the latter reflect[s] the classical form of private justice in international law».

[319]Ronzitti N., *Sanctions as Instruments of Coercive Diplomacy: An International Perspective*, in Ronzitti N. (ed), *Coercive Diplomacy, Sanctions and International Law*, op. cited above, pp. 17-18, where the author interestingly argues that «the number of participating States cannot render lawful a measures that is unlawful if it were imposed by an individual State». Differently, some authors more extensively contend that «sanctions are not a monopoly» of the UNSC or the UN since «autonomous (unilateral) sanctions» outside the UN are widespread even in the absence of a UN mandate. In this sense, Asada M., *Definition and Legal Justification of Sanctions*, in Asada M. (ed), *Economic Sanctions in International Law and Practice*, op. cited above, pp. 3-23, p. 10. Slightly similar, although posing attention to the aspect of "inflicting economic damages", Thouvenin J.-M., *History of Implementation of Sanctions*, in Asada M. (ed), *Economic Sanctions in International Law and Practice*, op. cited above, p. 88 arguing that «The practice of inflicting economic damages is not the monopoly of the UN. To the contrary, it has been increasingly used by States unilaterally».

[320] Ronzitti N., *Sanctions as Instruments of Coercive Diplomacy: An International Perspective*, in Ronzitti N. (ed), *Coercive Diplomacy, Sanctions and International Law*, op. cited above, p. 17. The author more precisely analyses the constitutive instrument of the regional organisations by concluding such a statement for those cases in which measures are adopted against third States or against their MS but not contemplated by the constitutive instrument. Refer also to pp. 31-32. Similarly, Schmidt J., *The Legality of Unilateral Extra-territorial Sanctions under International Law*, op. cited above, p. 71 and pp. 76-77 arguing that solely retorsions and countermeasures are «accepted forms of self-help» and, thus, States might lawfully rely solely on those forms of «decentralised economic pressure» and not on others (p.71).

[321] Spagnolo A., *Entering the Buffer Zone between Legality and Illegality: EU Autonomous Sanctions under International Law*, in Montaldo S., Costamagna F., Miglio A. (eds), *EU Law Enforcement: The Evolution of Sanctioning Powers*, op. cited above, pp. 215-240, p. 218, which specifically argues that the notion is a «scholarly creation».

[322] Tzanakopoulos A., *Sanctions Imposed Unilaterally by the European Union: Implications for the European Union's International Responsibility*, in Marossi A.Z., Bassett M.R. (eds), *Economic Sanctions under International Law: Unilateralism, Multilateralism, Legitimacy, and Consequences*, op. cited above, p. 146.

source of ILC ARSIWA Commentary provides fundamental definitions among many instruments often termed "sanctions" – specifications, in principle, accepted within the international community – entities, States, and scholars alike continue to regroup fundamentally different legal instruments under the ambiguous term of "sanction".[323] The persistent vagueness reveals, according to some, the reluctance to adopt precise legal classification, thereby enabling confusion and facilitating manipulation and circumvention.[324] Yet, each instrument commonly labelled as "sanction" possesses its own historical evolution, underlying ratio, regulatory framework, and legal consequences or outcomes.

For the purpose of this dissertation, and notwithstanding the above, "sanctions" are identified as coercive non-armed measures, individual or collective, adopted by a State or an international organisation against another entity either (i) as international law enforcement through the UN system; or (ii) in response to violations of international law, with the aim of compelling compliance with international law and its obligations. Within this framework, coercion constitutes the central factor: the main objective of these measures is not punitive, but rather to enforce or restore compliance with international norms and obligations. Thus, despite sanctions may also express institutional or political discontent, their aim remains enforcing or restoring international law obligations – thereby distinguishing them both from retorsions, which are unfriendly but lawful acts lacking a specific coercive factor to respond to a prior violation, and from purely punitive conceptions of sanctioning measures, as mostly occurs within domestic legal orders or peacetime reprisals.

Measures recognised as "sanctions" may thus be categorised into two types: first, measures aimed at international law enforcement, and, second, measures designed to induce compliance after a violation of international law.

The first category is represented by UN non-armed measures under Chapter VII of the UN Charter, which serve as institutionalised coercive tools aimed at maintaining and restoring international peace and security. They are measures coercive in nature and intended to render States compliant, both preventively (*e.g.* prior to specific violations, such as in cases of "threats to the peace", as further explained afterwards) and reactively.

The second category includes measures that respond to violations of international law. This encompasses not only UN non-armed measures that respond to prior violations, but also ARSIWA countermeasures, including third-party countermeasures. Countermeasures coercively respond to

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[323] Noticing this ambiguity, Ronzitti N., *Conclusion*, in Ronzitti N. (ed), *Coercive Diplomacy, Sanctions and International Law*, op. cited above, pp. 287-293, p. 287.

[324] Abi-Saab G., *The Concept of Sanction in International Law*, in Gowlland-Debbas V. (ed), *United Nations Sanctions and International Law*, op. cited above, p. 36 and p. 37 respectively, more precisely argues that this constitutes the attempt to «avoid being tied down with too constraining legal classifications», thereby perpetuating confusion and facilitating intentional manipulations of terms to «by-pass one of the conditions required by the specific category».

internationally wrongful acts with the objective of inducing compliance, although in a decentralised manner. Nonetheless, as explored in Section 4.2. of this Chapter, ARSIWA countermeasures form a distinct legal category under international law governed by specific modalities, limitations, and objectives, distinguishing them from the broader and unregulated concept of "sanctions". Finally, unilateral States measures may qualify as "sanctions" under this category when their legal framework specifically assigns them a coercive intent aimed at inducing compliance with international law, rather than solely pursuing foreign policy or economic objectives.

Albeit recognising measures as "sanctions" does not correspond to a lawful justification under international law – since the instrument of "sanction" is unregulated – the importance of framing certain specific measures as such lies in the centrality of the notion within both legal and political discourse. Framing specific actions as "sanctions" signifies distinguishing them from other typologies of measures – such as those that are 'solely' coercive yet not necessarily responses to prior breaches of international law – which are frequently included within the concept.[325] This distinction enables a clearer understanding of non-armed economic measures that international law provides, both through the UN system, and collective entities or individual States.

This chapter examines the classical "sanctioning" measures: UN non-armed measures, ARSIWA countermeasures, and EU and US 'sanctioning' frameworks. Chapter III will instead address measures not originally designed to coerce (but rather to regulate trade or protect domestic industries) yet occasionally employed as coercive instruments.

3. The framework of United Nations non-armed measures

3.1. The UN predecessor: the League of Nations measures under Article 16 of its Covenant

The League of Nations, founded in 1919, was the first intergovernmental organisation established with the purpose to «promote international cooperation and […] achieve international peace and

[325] An example is the case of EU restrictive measures – analysed in Section 5 of this Chapter – which do not always constitute responses to prior violations of international law.

security».[326] Among the Articles of Covenant of the League of Nations,[327] Article 16 fundamentally introduced the so-called "economic weapon" or "*arme économique*"[328] after extensive discussions.[329] Although economic pressure had long been employed – particularly during armed conflicts through blockades –[330] the codification of such "economic weapon" in Article 16's of the Covenant of the League of Nations officially transposed a wartime tool into a peacetime one.[331]

Under Article 16, whenever a MS of the League would resort to war, the other MS were entitled to «immediately» adopt measures against it such as «severance of all trade or financial relations, the prohibition of all intercourse […], and the prevention of all financial, commercial or

[326] Preamble of the Covenant of the League of Nations, 1919. Founded in the aftermath of the First World War within the 1919 Paris Peace Conference, it initially comprised 41 Member States and then later reached a total of 63 States. At the time, these 41 states represented more than 70% of the world's population. In this regard, the United Nations website, *The League of Nations*, available at https://www.ungeneva.org/en/about/league-of-nations/overview, [last accessed on 20 August 2023]. In the Annex of the Covenant are listed the original members of the organisation divided between those signatories of the Treaty of Peace and those invited to accede to the covenant. The named countries are: United States of America, Belgium, Bolivia, Brazil, British Empire, Canada, Australia, South Africa, New Zealand, India, China, Cuba, Ecuador, France, Greece, Guatemala, Haiti, Hedjaz, Honduras, Italy, Japan, Liberia, Nicaragua, Panama, Peru, Poland, Portugal, Romania, Serb-Croat-Slovene State, Siam, Checho-Slovakia, Uruguay; and then, Argentine Republic, Chile, Colombia, Denmark, Netherlands, Norway, Paraguay, Persia, Salvador, Spain, Sweden, Switzerland, and Venezuela. Nonetheless, the League of Nations never fully became a universal organisation and, importantly, the United States never joined the League of Nations as Member State.

[327] The League of Nations's founding document was signed in June 1919 as part of the Treaty of Versailles and became effective in 1920 with the establishment of the organisation. Many meetings and drafts preceded the final version which, eventually, comprised a totality of 26 Articles covering aspects of the organisation, mechanisms for settlements of international disputes and obligations of the Member States.

[328] Among other official documents, refer to the League of Nations, *The Economic Weapon of the League*, cited above, pp. 1032-1033.

[329] A crucial element of the discussions over the formation of the League of Nations and over the drafting of its Covenant regarded the establishment of an "economic coercive" tool. Interestingly, delegates involved in the creation of the League of Nations openly discussed and worked in order to guarantee a provision enabling such tool of "economic coercion" within the powers of the institution. In this sense, *inter alia*, Mulder N., *The Economic Weapon*, op. cited above, p. 1, pp. 56-57, p. 63, and pp. 82-87. Similarly, Nolde B.B.E., *Russia in the Economic War*, Yale University Press, 1928 pp. 152-170; and Thouvenin J.-M., *History of Implementation of Sanctions*, in Asada M. (ed), *Economic Sanctions in International Law and Practice*, op. cited above, p. 85.

[330] Thouvenin J.-M., *History of Implementation of Sanctions*, in Asada M. (ed), *Economic Sanctions in International Law and Practice*, op. cited above, pp. 83-84. Similarly, Mulder N., *The Economic Weapon*, op. cited above, pp. 27-85.

[331] Mulder N., *The Economic Weapon*, op. cited above, p. 2. Accordingly, at p. 15, the two founding characteristics of blockades were their adoption as a belligerent act (and, thus, occurring solely after a declaration of war and throughout the conflict); and the material use of the instrument. While trade interdependence was still very limited at the time, blockades without a proper declaration of war were imposed by Western allies towards Hungary and the Soviet Republics already in 1919 (refer to p. 8 and pp. 88-108). Analysing specifically the blockade of Russia, Nolde B.B.E., *Russia in the Economic War*, op. cited above, pp. 22- 46. As a matter of fact, while blockades were *per se* a belligerent and material act against another State, the new design of the instrument within the League of Nations Covenant enabled, instead, the possibility of economically pressure other States without being officially at war against them. Interestingly, blockades are nowadays mentioned under Article 42 UN Charter which regulates those measures involving the use of force (armed measures). Upton F.H., *The Law of Nations Affecting Commerce During War: With a Review of the Jurisdiction, Practice and Proceedings of Prize Courts*, J.S. Voorhies, 1861, p. 189, defines blockade as «the carrying into effect by an armed force, of that rule of war which renders commercial intercourse, with the particular port or place subjected to such force, unlawful […]», arguing for the existence of «the right of blockade», also denominated as «belligerent right». Differently, for Hagemeyer-Witzleb T.M., *The International Law of Economic Warfare*, op. cited above, p. 46 blockade is «a measure to isolate the economy of the target state by sealing off its coast and ports».

personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not».[332]

Thus, solely an act of war by another MS of the League could trigger economic measures, conceived as tools to preserve and restore international peace after a war act.[333] States retained the power to assess when enacting measures, while the Council could solely recommend actions and measures to better «protect the covenants of the League».[334] From 1921 onwards, attempts to strengthen the Council's role – such as enabling it to recommend actions plans, assist through a technical commission;[335] give opinions on the existence of breaches, or notify timing of measures – [336] were never fully ratified and, thus, they remained non-binding.[337]

The potential of Article 16 was revealed as early as 1921, when the threat of the League's measures deterred Yugoslavia's expansionist ambitions towards Albania.[338] However, the first actual collective enactment of Article 16 measures occurred in 1935 against Italy, following its invasion of

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[332] Article 16 of the Covenant of the League of Nations, 1919.

[333] Mulder N., *The Economic Weapon*, op. cited above, p. 112. However, as pointed out by the author at p. 156, the idea of many internationalists of the time was that the purpose of Article 16 was indeed to preserve peace and stabilise the post WWI world order, but also to punish the crimes of aggressions committed by another Staes. In this sense, the author reports, at p. 156, a German diplomat statements of 1925 according to which such purpose was to enable «the war of all against war». According to the same Article, resorting to war was *ipso facto* intended as an «act of war against all the other Members» which – in turn – could act with measures while mutually supporting one another as to «minimise the loss and inconvenience» and resist possible "counter-measures" against them. At pp. 158-164, the author calls this provision of mutual assistance – especially advocated by France, Finland, and Poland – as «the positive economic weapon».

[334] Article 16 of the Covenant of the League of Nations, 1919.

[335] Assembly of the League of Nations, Report of the Sixth Committee. On this, *inter alia*, refer to the League of Nations, *Letter from the Secretary-General to the Members of the League concerning the Obligations arising out of Article 16 of the Covenant*, 27 February 1921, League of Nations Official Journal, Vol. 2, no. 2, March-April 1921, pp. 220-222; and to the League of Nations, *Draft Amendments to the Covenant of the League: Proposed by the Danish, Norwegian and Swedish Governments Respectively*, League of Nations Official Journal, Vol. 1, no. 6, September 1920, pp. 353-366. On the Assembly Report, Krisch N., *Article 41*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 1305-1329, pp. 1306-1307, para 1, calling it "guidelines".

[336] League of Nations, *Amendments to the Covenant, Letter from the Secretary-General Transmitting Copies of the Protocols of Ratification*, 24 November 1921, League of Nations Official Journal, Vol. 3, no. 1, January 1922, pp. 6-31 which report several amendments to Article 16, from Annexe 8 until 11 (pp. 20-25). They concerned amendments to the 2nd para of Art. 16 (to be: «It is for the Council to give an opinion whether or not a breach of the Covenant has taken place. In deliberations on this question in the Council the votes of the Members of the League alleged to have resorted to war and of Members against whom such action was directed shall not be counted» (Annexe 9, pp. 22-23)); the 3rd (as: «the Council will notify to all Members of the League the date which it recommends for the application of the economic pressure under this Article» (Annexe 10, pp. 23-24)); and, the 4th (as: «Nevertheless, the Council may in case of particular Members, postpone the coming into force of any of these measures for a specified period where it is satisfied that such postponement will facilitate the attainment of the object of the measures referred to in the preceding paragraph, or that it is necessary in order to minimise the loss and inconvenience which will be caused to such Members» (Annexe 11, pp. 24-25)). *Inter alia*, other proposed amendments were presented in the League of Nations, *Amendment of the Covenant of the League of Nations in order to Bring it Into Harmony with the Pact of Paris*, League of Nations Official Journal, Vol. 11, no. 5, May 1930, pp. 353-383.

[337] Krisch N., *Article 41*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 1306-1307, para 1.

[338] Mulder N., *The Economic Weapon*, op. cited above, pp. 122-125. The author presents also other cases of – as the author identifies it – "deterrence" with the threat of use of Article 16 of the Covenant.

Ethiopia. Despite the lack of an official Italian war declaration, Italy was declared an aggressor prompting the MS of the League to impose arms embargo, financial measures, import embargo, certain export limitations, and the creation of a mutual support fund.[339] Notably, these measures did not deter the Italian invasion – which completed in 1936 – and were lifted some months later.

This constituted the first and sole application of Article 16.[340] Its failure significantly contributed to the collapse of the League of Nations, widely recognised to have occurred by 1936.[341] However, the League continued to exist in a formal and limited capacity until April 1946, when it was fully succeeded by the newly established United Nations. Despite Article 16's failure, the "economic weapon" was transposed into the UN framework, with broader support at the 1945 San Francisco Conference than the 1919 Paris Peace Conference,[342] enabling its transformation into the more effective Article 41 UN Charter.[343]

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[339] These measures were seen as a «fulfilment of [the Member States'] duties under Article 16» of the Covenant, according to Ruiz Guinazù Enrique, the president of the Council of the League of Nations, citing an Assembly Resolution of 1921. In this regard, Baer G., *Test Case: Italy, Ethiopia, and the League of Nations*, Hoover Institution Press, 1976, p. 7.

[340] Interestingly, Taylor A.J.P, *The Origins of the Second World War*, Simon and Schuster, 1961, p. 96, argues that this failure of the League of Nations represented its real death.

[341] To be precise, the Council convened for the last time the 14 December 1939, in which, curiously, Article 16 of the Covenant was also invoked. The failure of economic measures against Italy in preventing its conquest of Ethiopia is notably not the only decisive element for the League of Nations' collapse. Among others, another decisive element was the non-presence of the United Nations within the League of Nations, although directly participating in its creation and in the drafting of Article 16 of the Covenant itself, the US Senate did not in the end approve the entrance of the state as a member of the League. Other States which instead were Member States withdrew from the organisation as early as in 1933, such as Germany and Japan. In this regard, among others, Carisch E., Rickard-Martin L., Meister S., *The Evolution of UN Sanctions: From a Tool of Warfare to a Tool of Peace, Security and Human Rights*, Springer, 2017, p. 9 and p. 17; Chesterman S., Johnstone I., Malone D.M., *Law and Practice of the United Nations: Documents and Commentary*, Oxford University Press, 2016, p. 3; Khan D.-E., *Drafting History*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 1-44, pp. 1-23, p. 3; Lowe V., Roberts A., Welsh J., Zaum D., *Introduction*, in Lowe V., Roberts A., Welsh J., Zaum D. (eds), *The United Nations Security Council and War: The Evolution of Thought and Practice since 1945*, Oxford University Press, 2008, pp. 1-58, pp. 10-11; Mulder N., *The Economic Weapon*, op. cited above, p. 225, and p. 263; and, Thouvenin J.-M., *History of Implementation of Sanctions*, in Asada M. (ed), *Economic Sanctions in International Law and Practice*, op. cited above, p. 86.

[342] Interestingly, Mulder N., *The Economic Weapon*, op. cited above, p. 287 and p. 297 argues that this fact was due to the fact that the United Nations seemed to be a «surer protector of state sovereignty» since, differently from the League of Nations, it involved also non-capitalist and non-Western States in the Security Council – namely China and the Soviet Union. See also the same author at pp. 288-290 in which, among other issues, it is discussed how the persistence of such tool between the Second World War and the two organisations was certain due to the instruments' capability. Similarly, O'Brien J., *International Law*, op. cited above, p. 716 argues that the failure of the League of Nations' tool of non-armed measures against Italy was perceived as «less important than the fact that it demonstrated that some form of collective security system was unavoidable in the modern world». On the drafting of Chapter VII, Krisch N., *Introduction to Chapter VII: The General Framework*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 1237-1271.

[343] Mulder N., *The Economic Weapon*, op. cited above, p. 287 argues it to be more «forceful, precise and streamlined». Similarly, Klabbers J., *International Law*, op. cited above, p. 186 arguing that the international community «created a much more effective system» when drafting the UN Charter and its provisions on non-armed measures; and Krisch N., *Introduction to Chapter VII: The General Framework*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, p. 1239 on the wide UNSC discretionary powers within Chapter VII UN Charter – compared to the one granted under the League of Nations Covenant – as a consequence of the «unsatisfactory experience» of the framework established by the Covenant.

Differently from the League system – which empowered its MS to decide, adopt, and enact measures and gave the Council only a recommendatory power – the UN framework assigns to the UNSC the exclusive role in the decision-making process, by possessing the authority to both recommend and decide measures, while the implementation is delegated to the UN MS.[344] Furthermore, whereas Article 16 grouped military and non-military measures, the UN Charter – drawing partially from a Soviet memorandum ranking measures of pressures according to their coercive force –[345] introduced a clear separation between non-armed (Article 41) and armed (Article 42) measures, a distinction that to some constituted the main innovation in the economic measures' architecture post-WWII.[346] Both the Covenant and the Charter indicate as their main objective the protection of international peace and security, yet solely the UN charter links this intent to non-armed measures, whereas Article 16 framed its measures merely as means to protect the Covenant itself.[347]

The conditions for enacting the measures differ significantly: Article 16 applied solely when a MS of the League resorted to war, narrowly interpreted as «"armed actions" against the "territorial integrity" or "political independence" of a member states»;[348] while Article 39 UN Charter permits measures in response to a wider range of situations ranging from threats to the peace, to breaches of

[344] The transfer of decision-making powers from States to the Security Council provided «institutional solidity» to the UN sanctioning architecture. On this regard, Achilleas P., *United Nations and Sanctions*, in Asada M. (ed), *Economic Sanctions in International Law and Practice*, op. cited above, pp. 24-38, p. 26. According to Chesterman S., Johnstone I., Malone D.M., *Law and Practice of the United Nations: Documents and Commentary*, op. cited above, p. 3 the empowerment of the Security Council to decide and enact non-armed measures or armed ones efficiently resolved one of the most important weaknesses of the League of Nations, *i.e.* the regulation of such issue in general terms and the delegation of its decision-making process to Member States. On the importance of a collective decision at the organisation level instead of collective action made by single-States' measures refer to Krisch N., *Introduction to Chapter VII: The General Framework*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, p. 1240, para 3 where it reports how the Italian government contested the League of Nations' measures directly to the involved States, and not to the organs of the organisation of the League of Nations.

[345] Memorandum on an International Security Organization by the Soviet Union, August 1944. On this, Khan D-E., *Drafting History*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 9-10, para 24. Similarly, Mulder N., *The Economic Weapon*, op. cited above, pp. 286-287.

[346] Mulder N., *The Economic Weapon*, op. cited above, p. 286 indeed reads this distinction as the distinction between measures involving the use of force and those who instead presuppose economic "coercion" (and thus still officially preserved peace).

[347] The objective is emphasised in the Preambles of both the Covenant and of the UN Charter. Differently, while Article 39 of the UN Charter specifically states that measures might be enacted «to maintain or restore international peace and security», Article 16 of the League of Nations Covenant refers to the use of measures in order «to protect the covenants of the League».

[348] The narrow interpretation of Article 16 was supported by the International Blockade Committee (IBC) in 1921. The Committee indeed argued that solely an act of aggression (defined in Article 10 of the Covenant of the League of Nations) could amount to a justification for measures under Article 16 of the Covenant of the League of Nations. *Inter alia*, Mulder N., *The Economic Weapon*, op. cited above, p. 118. Interestingly, the questions regarded (i) the procedure to determine whether a case has arisen for the application of Article 16 of the Covenant; (ii) the carrying into effect of the Blockade; (iii) the principle of identical action, and the support between MS of the League; (iv) the status of countries which are not Member States of the League; and, (v) the establishment of a permanent organisation specifically designed for dealing with questions concerning economic blockade arising from the application of Article 16 of the Covenant. In this sense, refer to the International Blockade Committee, *Circular Letter from the Secretary-General to the Members of the International Blockade Committee* of 15 June 1921, League of Nations Official Journal, Vol. 2, no. 5 and 6, July-August 1921, pp. 430-437.

the peace, and acts of aggression. As a result, differently from Article 16 measures, UN non-armed measures might be adopted even in the absence of a violation of international law,[349] allowing action in response to threats to the peace that do not necessarily involve already-occurred violations of international law.[350] Over the years, the UNSC has interpreted "threat to the peace" widely to include civil wars and human rights violations – none of which would have triggered Article 16 measures. Lastly, while the League employed Article 16 measures solely once, the UN has relied extensively on Article 41, establishing 31 sanctioning regimes (of which 15 are currently ongoing) since 1966.[351]

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[349] Krisch N., *Introduction to Chapter VII: The General Framework*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, p. 1245, para 17, argues that this last element is reflected particularly in Article 1 (1) UN Charter which – accordingly – requires UNSC' observance of international law solely for those actions in the area of dispute settlement, but not for measures under Chapter VII of the Charter. In this sense, also Wolfrum R., *Article 1*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 102-120, pp. 113-114, paras 21-22; Krisch N., *Article 41*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, p. 1310, para 9; Fulgenzi M., *La "guerra delle sanzioni": L'Unione Europea e la Federazione Russa nell'era dell'interdipendenza economica globale*, op. cited above, p. 23; and, White N.D., Abass A., *Countermeasures and Sanctions*, in Evans M.D. (ed), *International Law*, op. cited above, p. 554 and p. 557. Krisch N., *Article 39*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 1272-1296, p. 1278, para 10, distinguishes the provisions of the League of Nations Covenant from those of the UN Charter since the latter is argued to be a «system of collective security […] not conceived as a reaction to a violation of international law, but as a preventive tool to ensure the maintenance of peace». Interestingly, however, Krisch N., *Introduction to Chapter VII: The General Framework*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, p. 1249, para 27, argues that «Although the violation of international law is no condition for action under Chapter VII, enforcement measures are often taken explicitly in order to make States respect specific legal norms, thus constituting a form of countermeasures to breaches of international law». The instrument of countermeasures is analysed in this Chapter II, in Section 4.

[350] On the fact that a threat to the peace does not necessarily entail a violation of international law, refer to Achilleas P., *United Nations and Sanctions*, in Asada M. (ed), *Economic Sanctions in International Law and Practice*, op. cited above, p. 28; and, Conforti B., Focarelli C., *The Law and Practice of the United Nations*, Brill / Nijhoff, 2016, p. 190. Interestingly, Gowlland-Debbas V., *UN Sanctions and International Law: An Overview*, in Gowlland-Debbas V. (ed), *United Nations Sanctions and International Law*, op. cited above, p. 9 noticed that, in fact, the practice of the UNSC shows that «Determinations under Article39 have […] been linked to alleged breaches of international law, the violation becoming therefore a constituent element of the threat to or breach of the peace».

[351] In this regard, the United Nations website, Section on "*Sanctions*", available at https://www.un.org/securitycouncil/sanctions/information, [last accessed on 20 August 2023]. This certainly constitutes a less crucial difference between the two experiences, in part because the League of Nations had a much shorter life than the one of the United Nations, which indeed still persists as a functioning international organisation. Briefly, The UNSC' first employment of non-armed measures occurred in 1966 against Southern Rhodesia, and – with the sole addition of measures against South Africa in 1977 – the UNSC imposition of non-armed measures remained rare throughout the Cold war. Interestingly, the South African' case was also the first time in which non-armed measures were imposed against a UN Member State. A crucial turning point emerged with the imposition of comprehensive non-armed measures against Iraq and Kuwait in 1990, which provoked severe humanitarian consequences. The Iraq non-armed measures were argued to constitute the most comprehensive UNSC sanctioning regime, according to Cortright D., Lopez G.A., Gerber-Stellingwerf L., *The Sanctions Era: Themes and Trends in UN Security Council Sanctions Since 1990*, in Lowe V., Roberts A., Welsh J., Zaum D. (eds), *The United Nations Security Council and War: The Evolution of Thought and Practice since 1945*, op. cited above, pp. 205-225, p. 207. The authors provide a detailed description of the Iraq case, at pp. 207-210. Particularly crucial in assessing the humanitarian conditions of the population of Iraq already in 1991 is the so-called Ahtisaari Report. This report made by Mr. Martii Ahtisaari, the Under-Secretary-General for Administration and Management, in March 1991 displayed critical humanitarian concerns in many primary areas. Interestingly, it as well states that the measures imposed by the Security Council «had already adversely affected the country's ability to feed its people» and seriously affected livestock farming since many feed products were imported. Moreover, these measures also affected the availability of insecticides, instead, would have been very much needed. Quite famously, in its initial general remarks, the report discusses how «nothing that we had seen or read had quite prepared us for the particular form of devastation which has now befallen the country. The recent conflict has wrought near-apocalyptic results […]». The

Article 16 of the League of Nations Covenant importantly constituted the first 'official' codification of economic measures within an international organisation. While the practice proved unsuccessful, it represented the peacetime (potential) application of economic measures within an institutionalised framework, embodying the conceptual and legal precursor from which the UN Charter developed its own framework for non-armed measures.

3.2. The United Nations advent: Charter provisions and the organisation's approach to non-armed measures

Already during the Second World War, the international community discussed the establishment of a new international organisation with similar purposes and aims to the League of Nations.[352] In 1941, the "United Nations alliance" – whose aims were enshrined in the Atlantic Charter – was essentially a «wartime alliance».[353] The involvement of the United Nations alliance in economic pressure was soon referred to as the "United Nations blockade".[354]

A decisive moment towards the establishment of the Organisation of the United Nations occurred at the Moscow Conference in October 1943, where the foreign ministers of the United States, United Kingdom, Soviet Union and China officially agreed to establish a post-war security

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controversy surrounding these regimes prompted a significant redesign of UN non-armed measures, marking a shift from the broad, comprehensive nature to a more narrowly targeted approach. Subsequently, the so-called "sanction decade" began, witnessing an unprecedent increase of UN non-armed measures, with regimes established against the former Yugoslavia (1991); Libya (1992); Somalia (1992); Haiti (1993); parts of Angola controlled by UNITA (1993); Rwanda (1994); Liberia (1995, and then 2001 and 2003); Sierra Leone (1997); the Afghan faction of Taliban (1999); Eritrea and Ethiopia (2000). The UNSC "sanction" practice remained active also after 2000, with non-armed measures imposed against Congo (2003); Côte d'Ivoire (2004); Sudan (2005); on those involved into the terrorist killing of the former Lebanese Prime Minister Hariri (2005); Iran (2006); North Korea (DPRK) (2006); Eritrea (2009); Libya (2011); Guinea-Bissau (2012); the Central African Republic (CAR) (2013); Yemen (2014); South Sudan (2015); Mali (2017); and Haiti (2022). On the concept of "sanction decade", refer to Asada M., *Definition and Legal Justification of Sanctions*, in Asada M. (ed), *Economic Sanctions in International Law and Practice*, op. cited above, pp. 3-23, p. 3. Similarly, Cortright D., Lopez G.A., *The Sanctions Decade: Assessing UN Strategies in the 1990s*, Lynne Rienner Publishers, 2000. Sicilianos L.A., *Sanctions institutionnelles et contre-mesures: tendances récentes*, in Forlati L.P., Sicilianos L.-A. (eds), *Les sanctions économiques en droit international / Economic Sanctions in International Law*, op. cited above, pp. 3-98, p. 3 interestingly argues that the Security Council seemed to use this period of wide proliferations of such measures to refine an instrument that might be more destructive than armed force. Notably, the UNSC has occasionally proven incapable of enacting non-armed measures in situations where threats, breaches of the peace or even acts of aggression were evident, raising persistent doubts over its capability to fulfil its primary responsibility to maintain international peace and security. Indeed, Pursuant to Article 24 (1) UN Charter, «In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf».

[352] Conforti B., Focarelli C., *The Law and Practice of the United Nations*, op. cited above, pp. 1-2. Similarly, among others, Carisch E., Rickard-Martin L., Meister S., *The Evolution of UN Sanctions: From a Tool of Warfare to a Tool of Peace, Security and Human Rights*, op. cited above, p. 18; and, Khan D-E., *Drafting History*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 5-8, paras 9-18.

[353] Mulder N., *The Economic Weapon*, op. cited above, p. 259 and p. 282.

[354] *Ibid*., pp. 282-284 specifies that the usage of such terminology dates back to 1943. Moreover, the alliance's role in these so-called "blockades" was both economic, air wars planners, material assistance and aids to civilians.

organization.[355] The organisation named United Nations – whose purpose is to maintain international peace and security –[356] came then into existence in 1945 with the Charter's adoption and ratification by 51 states.[357]

The UN might take «effective collective measures» to prevent and remove threats to the peace, suppress acts of aggression or other breaches to the peace.[358] These measures fall within the exclusive power[359] of the UN Security Council (UNSC), which holds the «primary responsibility for the maintenance of international peace and security», under Article 24 (1) UN Charter.[360] Article 24 (2)

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[355] Khan D-E., *Drafting History*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, p. 13, para 34. Similarly, Conforti B., Focarelli C., *The Law and Practice of the United Nations*, op. cited above, p. 2; and, Mulder N., *The Economic Weapon*, op. cited above, pp. 284-285.

[356] Notably, this is stated in the preamble and in Article 1 (1) of the UN Charter.

[357] The original members of the United Nations were: Argentina, Australia, Belgium, Bolivia, Brazil, Byelorussian Soviet Socialist Republic, Canada, Chile, China, Colombia, Costa Rica, Cuba, Czechoslovakia, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, Greece, Guatemala, Haiti, Honduras, India, Iran, Iraq, Lebanon, Liberia, Luxembourg, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Philippine Republic, Poland, Saudi Arabia, Syria, Turkey, Ukrainian Soviet Socialist Republic, Union of South Africa, Union of Soviet Socialist Republics, United Kingdom, United States, Uruguay, Venezuela, Yugoslavia. On this, the United Nations website, Section "*Founding Member States*", available at https://research.un.org/en/unmembers/founders, [last accessed on 20 August 2023]. The United Nations is nowadays composed of 193 Member States. In this regard, the United Nations website, Section "*Growth in United Nations Membership*", available at https://www.un.org/en/about-us/growth-in-un-membership, [last accessed on 20 August 2023].

[358] Article 1 (1), Chapter I, UN Charter, 1945. Notably, some authors noticed how the purpose of maintaining and restoring international peace and security is not «necessarily identical with the law». In this sense, Kelsen H., *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems*, op. cited above, p. 294. A comprehensive commentary on this Article is provided by Wolfrum R., *Article 1*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 107-120.

[359] The specification that the UNSC holds the exclusive power to enact measures aimed at maintaining and restoring international peace and security is important when discussing the distinction of powers between the Security Council and the General Assembly. Especially between 1950 and 1960 the relationship between the two mentioned organs with respect to Chapter VII actions had been a frequently discussed issue. This is so because given the inability of the UNSC to act on the Korean War of 1950 due to the Soviet Union' vetoes, the General Assembly adopted the famous Uniting for Peace Resolution (UNGA Resolution 377 A(V), November 1950). Accordingly, in case of inaction by the Security Council, the Security Council functions and powers with regard to the maintenance of peace and security were to automatically be transferred to the General Assembly. Many scholars agree on the lack of provisions under the UN Charter recognising such competence to the General Assembly. This argument develops around Article 11 (2) of the UN Charter which indeed gives the power to the General Assembly to discuss any questions related to the maintenance of international peace and security and make recommendations. However, Article 11 (2) of the UN Charter also specifies that «any questions on which action is necessary shall be referred to the Security Council […]». According to the majority of scholars, such reservation signifies that the General Assembly has no power to act pursuant Chapter VII, if not to recommend measures under Article 40 of the UN Charter. On this issue, among others Achilleas P., *United Nations and Sanctions*, in Asada M. (ed), *Economic Sanctions in International Law and Practice*, op. cited above, p. 26; Conforti B., Focarelli C., *The Law and Practice of the United Nations*, op. cited above, pp. 335-352; Gioia A., *Diritto internazionale*, op. cited above, pp. 462-463; Krisch N., *Introduction to Chapter VII: The General Framework*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, p. 1248; Klabbers J., *International Law*, op. cited above, pp. 191-192; Orakhelashvili A., *The Impact of Unilateral EU Economic Sanctions on the UN Collective Security Framework: The Cases of Iran and Syria*, in Marossi A.Z., Bassett M.R. (eds), *Economic Sanctions under International Law: Unilateralism, Multilateralism, Legitimacy, and Consequences*, op. cited above, pp. 3-22, p. 11; Peters A., *Article 24*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 761-786; and, Ronzitti N., *Diritto internazionale*, op. cited above, p. 501.

[360] Article 24 (1), Chapter V, UN Charter, 1945. Refer to Peters A., *Article 24*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 761-786, for a detailed commentary on this Article.

UN Charter specifies that the UNSC' powers are laid down in Chapters VI, VII, VIII and XII of the UN Charter – respectively governing the pacific settlement of disputes; threats or breaches of international peace and security and acts of aggressions; regional arrangements; and the international trusteeship system. Although not expressly mentioned within Article 24 (2) UN Charter,[361] Article 94 UN Charter empowers the UNSC to recommend or decide measures to enforce a ICJ judgment – [362] measures frequently regarded as analogous to those under Chapter VII,[363] yet never enacted to date. [364]

3.2.1. UNSC powers in addressing threats to international peace and security: Chapters VI and VII of the UN Charter

Notably, Chapters VI and VII of the UN Charter delineate the UNSC' actions when confronted with threats or breaches to the international peace and security.

Chapter VI of the UN Charter (Articles 33-38) is devoted to the peaceful settlement of disputes, requiring parties to seek a solution through methods of pacific settlement – such as negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resorting to regional agencies or arrangements or others peaceful means.[365] The UNSC might investigate disputes,

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[361] Nor within Chapter V of the UN Charter – dealing with the UNSC composition, functions and powers, voting and procedures – or within Chapter VII.

[362] Article 94, Chapter XIV, UN Charter, 1945. Refer to Oellers-Frahm K., *Article 94*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 1957-1991 for a detailed commentary on this Article.

[363] Gioia A., *Diritto internazionale*, op. cited above, p. 431. Interestingly, Kelsen H., *The Law of the United Nations: A Critical Analysis of its Fundamental Problems*, op. cited above, pp. 720-721 categorises measures under Article 94 UN Charter as "sanctions" whenever «these measures have the character of enforcement measures» (p. 721). Moreover, the author specified that «enforcement measures taken by the Security Council under Article 94, paragraph 2, need not necessarily to be enforcement measures under Article 39» since, accordingly, the UNSC may implement Article 41' measures «without applying Article 39, that is to say, without having previously determined the existence of a threat to, or breach of, the peace» (p. 721). Nonetheless, it is also specified that Article 39' measures might be taken in cases of non-compliance with a decision of the Court (even if lacking the «character of a 'judgment'») but after the UNSC' determination that «such non-compliance constitutes a threat to, or breach of, the peace» (p. 721). On this issue, Oellers-Frahm K., *Article 94*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 1967-1971, paras 22-31 discussing also the relationship between Article 94 UN Charter and Chapter VI UN Charter. Interestingly, scholars discuss whether the UNSC is entitled to adopt such measures in all those cases in which a State fails to perform its obligations pursuant an ICJ judgment, or solely in those cases in which such failure to comply endangers peace and security as per Article 39 of the UN Charter. In this sense, Ronzitti N., *Diritto internazionale*, op. cited above, p. 318. Similarly, Achilleas P., *United Nations and Sanctions*, in Asada M. (ed), *Economic Sanctions in International Law and Practice*, op. cited above, p. 25 which notices that such measures are to be considered of criminal nature since the refusal to comply with an ICJ judgment is a criminal offence *per se*; and, Oellers-Frahm K., *Article 94*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 1968, para 23.

[364] Gioia A., *Diritto internazionale*, op. cited above, p. 431 finds that the not-yet usage of Article 94 UN Charter by the Security Council might be justified by the fact that States generally comply with ICJ judgments, but also because of the reliance by permanent members of the UNSC to the veto power. In the case Anglo-Iranian Oil CO. (United Kingdom v. Iran) of July 22, 2952, Article 94 (2) of the UN Charter was invoked but the ICJ ruled no jurisdiction on the case. In this regard, Achilleas P., *United Nations and Sanctions*, in Asada M. (ed), *Economic Sanctions in International Law and Practice*, op. cited above, p. 25.

[365] Interestingly, Article 33 of the UN Charter addresses this to those parties to a dispute which might jeopardise international peace and security. Article 33, Chapter VI, UN Charter, 1945. For a commentary on Article 33, refer to

determine whether their persistence could endanger international peace and security, and recommend settlement of disputes through peaceful means.[366] Importantly, under Chapter VI, the UNSC cannot bind UN MS but solely act through recommendations,[367] thereby exercising a «conciliatory function».[368]

Chapter VII of the UN Charter (Articles 39-51) governs UNSC actions to maintain international peace and security. Under Article 39 UN Charter, the UNSC is granted the power to determine the existence of a threat to the peace, a breach of the peace or an act of aggression, and to recommend or decide the necessary measure under Articles 41 and 42 UN Charter.[369] Article 40 enables provisional measures,[370] such as requests to ceasefires; suspensions of hostilities; troops withdrawal; prisoners liberations; abstention of third parties from supporting one specific party of the conflict or from having a conduct which might aggravate the situation; truce; and others.[371]

The Charter does not specify whether the UNSC should first exhaust the peaceful means of settlement under Chapter VI before resorting to the measures envisaged in Chapter VII.[372] The two Chapters are distinguished by various elements.

Tomuschat C., *Article 33*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 1069-1085.

[366] Article 33 (2) and Article 34, Chapter VI, UN Charter, 1945. On Article 34 refer to Schweisfurth T., *Article 34*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 1086-1107.

[367] Articles 36, 37 and 38, Chapter VI, UN Charter, 1945. On these Articles, refer to Giegerich T., *Article 36*, *Article 37*, and *Article 38*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, respectively at pp. 1119-1145 (*Article 36*); pp. 1146-1160 (*Article 37)*; pp. 1161-1170 (*Article 38*).

[368] Conforti B., Focarelli C., *The Law and Practice of the United Nations*, op. cited above, p. 190. Similarly, Tomuschat C., *Article 33*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, p. 1070, para 2, arguing that under Chapter VI the UNSC is limited to non-coercive measures.

[369] Article 39, Chapter VII, UN Charter, 1945. A commentary of this Article is provided by Krisch N., *Article 39*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 1272-1296.

[370] More precisely, before relying on the measures of Article 41 and/or Article 42 of the UN Charter, Article 40 provides the possibility for the UNSC to «call upon the parties concerned to comply with […] provisional measures» as needed or desirable. Although aimed at preventing the aggravation of a situation, these measures presuppose the determination of a situation as per Article 39 of the UN Charter. Refer also to the commentary by Krisch N., *Article 40*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 1297-1304; and, De Wet E., *The Chapter VII Powers of the United Nations Security Council*, Hart Publishing, 2004, p. 179. On the relationship between Article 40 and Article 39 UN Charter, refer also to Krisch N., *Article 40*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 1298-1300.

[371] Gioia A., *Diritto internazionale*, op. cited above, p. 465. Similarly, among others, De Wet E., *The Chapter VII Powers of the United Nations Security Council*, op. cited above, p. 179; Krisch N., *Article 40*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 1300-1301; O'Brien J., *International Law*, op. cited above, p. 721; and, Ronzitti N., *Diritto internazionale*, op. cited above, pp. 500-501.

[372] Interestingly, both the General Assembly and the Security Council adopted favourable instances on the potentiality of consequentiality of measures and Chapters. In this regard, Achilleas P., *United Nations and Sanctions*, in Asada M. (ed), *Economic Sanctions in International Law and Practice*, op. cited above, p. 34. On an introductory note for both Chapters refer to Tomuschat C., *Article 33*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 1070-1071; and, Krisch N., *Introduction to Chapter VII: The General*

Chapter VI addresses potential disruptions of international peace and security,[373] whereas Chapter VII applies to ongoing threats to the peace, breaches of the peace, or acts of aggressions. The precise distinction between a «*potential* danger and a *current* threat to peace»[374] is often complex to accurately assess, though some authors identify the core difference in the threat's greater seriousness and risk to develop into a conflict, in contrast to the situations addressed under Chapter VI.[375]

Under Chapter VI, the UNSC has a limited recommendary and «peacemaker»[376] role, in which the will of the involved States is essential to facilitate dispute resolution. In contrast, under Chapter VII, the UNSC has a central role within which it directs measures at States regardless of their will and requires implementations by the totality of the UN MS. Furthermore, Chapter VI allows only non-binding recommendations, whereas Chapter VII permits both recommendations and binding decisions.[377]

UNSC voting procedures further distinguish the Chapters. Both recommendations and decisions are non-procedural in nature, thus, they require nine affirmative votes, including the concurring votes of the five permanent members,[378] who possess the "right to veto" or "veto power".[379] These States'

Framework, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 1237-1271. Moreover, Krisch N., *Article 39*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, p. 1274, para 2, argues that the refusal to specifically distinguish between two forms of "threats to the peace" (as proposed instead in the Dumbarton Oaks Proposals) was also justified by the unwillingness to «tie Chapter VII too closely to Chapter VI».

[373] Indeed, it focuses on those disputes whose «continuance is likely to endanger the maintenance of international peace and security» as per Articles 33, 34, and 37, Chapter VI, UN Charter, 1945.

[374] Conforti B., Focarelli C., *The Law and Practice of the United Nations*, op. cited above, p. 190. Similarly, Krisch N., *Introduction to Chapter VII: The General Framework*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, p. 1247, para 20.

[375] Krisch N., *Introduction to Chapter VII: The General Framework*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, p. 1247, para 20.

[376] Conforti B., Focarelli C., *The Law and Practice of the United Nations*, op. cited above, p. 191.

[377] Ronzitti N., *Diritto internazionale*, op. cited above, p. 499 notices that the UNSC relied on recommendations to adopt measures pursuant Chapter VII especially during the Cold War period, while – currently – the usual typology of acts used under Chapter VII are binding decisions. Similarly, Conforti B., Focarelli C., *The Law and Practice of the United Nations*, op. cited above, pp. 279-280.

[378] Article 27 (3) UN Charter precisely provides that «an affirmative vote of nine members [*out of the fifteen members composing the UNSC*] including the concurring votes of the permanent members» (Article 27 (3), Chapter VII, UN Charter, 1945). Prior to 1965, Article 27 (3) UN Charter provided for the affirmative vote of seven members, including the concurring votes of the permanent ones, instead of the nine required in the current version of the Article. Notably, Resolution 1991-XVIII of December 17, 1963 (entered into force in August 1965) modified Article 23 UN Charter as to increase the number of the Security Council' members from 11 (of which 6 were non-permanent) to the today's number of 15 (of which 10 are non-permanent members). For a comprehensive commentary on Article 27 UN Charter, refer to Zimmermann A., *Article 27*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 871-938.

[379] The permanent members of the UNSC are the following: the Republic of China, France, the Union of Soviet Socialist Republics (now Russian Federation), the United Kingdom of Great Britain and Northern Ireland, and the United States of America. Article 23 (1), Chapter V, UN Charter, 1945. On this Article, refer to Geiger R., *Article 23*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 751-760.

right to block any non-procedural decisions might occur either by casting their negative vote or by being absent to the voting session.[380]

It is nonetheless specified within the UN Charter that the «party to a dispute shall abstain from voting» in the case of decisions taken under Chapter VI,[381] but no similar provision exists for those taken under Chapter VII. This absence has significantly constrained the UNSC's capability to adopt Chapter VII measures,[382] rendering the enactment of measures impracticable not only in the absence of uniform consensus among the permanent members, but also when such measures are directed

[380] A precision is needed in order to discuss the instruments of the "veto" and of the "double veto". The expression "veto power" generally refers to the capability of permanent members to block a resolution of the Security Council in the different ways above analysed. Instead, the problem of the "double veto" arises from the distinction between procedural and non-procedural matters which is at the essence of the voting procedure of the Security Council as per Article 27 UN Charter. More specifically, while procedural matters require the affirmative vote of nine members (Article 27 (2) UN Charter), the non-procedural ones require the affirmative vote of nine members including the concurring vote of the permanent members (Article 27 (3) UN Charter). As a consequence, although central to the voting system of the Council, such determination is not always straightforward. In this regard, among others, Conforti B., Focarelli C., *The Law and Practice of the United Nations*, op. cited above, pp. 87-94; and, Zimmermann A., *Ch. V The Security Council, Voting, Article 27*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 874-938, pp. 903-908, paras 135-160. Moreover, interestingly, while the absence of a permanent member to a Security Council session does constitute an effective veto, its abstention does not. On this regard, Ronzitti N., *Diritto internazionale*, op. cited above, p. 498. Similarly, Klabbers J., *International Law*, op. cited above, p. 187; and, Zimmermann A., *Ch. V The Security Council, Voting, Article 27*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 916, 918, paras 192, 199-200. Conforti B., Focarelli C., *The Law and Practice of the United Nations*, op. cited above, pp. 80-86 present a detailed analysis of the two cases of abstention and of absence. Interestingly, the authors explain that despite it is possible to interpret the «spirit» of Article 27 as to signify that abstention is to be considered as a veto, the practice of the UN has effectively shown that UNSC's decisions are considered to be valid even if adopted with the abstention of one or more permanent members. Thus, the authors at p. 83, describe this rule as «one of the unwritten rules in the Organization that derogate from the Charter provisions». Instead, as for what regards the issue of absence, the authors conclude that the meaning of absence of a permanent member - and thus its consequences – depends on the «meaning given by the State that is absent», p. 86. In this sense, if a State is absent with the intention to block the Security Council activity, then its absence is compared to a negative vote and thus it is a veto. Differently, if a State is absent but solely in order to show its disagreement and to dissociate from the vote but without willingly wanting to prevent the adoption of the resolution, then the case is associable to a non-participation in the vote and thus to an abstention which, as mentioned above, does not have the consequence to veto. Differently, part of the doctrine argues that the absence of a permanent member should be treated as an abstention. Accordingly, this is so because, when absent, the permanent member is violating Article 28 (1) of the UN Charter which states that the Security Council should be able to function continuously, and that each member of such organ «shall for this purpose be represented at all times at the seat of the Organization». In this regard, De Wet E., *The Chapter VII Powers of the United Nations Security Council*, op. cited above, pp. 277-278.

[381] In this regard, Article 27 (3) UN Charter. To be precise, Article 27 (3) UN Charter establishes this provision also for decisions adopted under Article 52 (3), Chapter VIII, UN Charter, 1945. Notably, this provision is based on the principle of *nemo judex in re sua*, usually translated as "nobody is the judge in his own matter". In this regard, Conforti B., Focarelli C., *The Law and Practice of the United Nations*, op. cited above, p. 95; and, Zimmermann A., *Ch. V The Security Council, Voting, Article 27*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, p. 919, para 2014, and p. 924, para 229.

[382] Authors also note that the lack of this provision for what regards Article 94 (2) of the UN Charter constitutes a problem. Indeed, it renders it unfeasible for the Security Council to recommend or decide measures against a State which is a permanent member and not compliant with a decision of the International Court of Justice. This is notably the case of the refusal from the United States of America to comply with the decision of the International Court of Justice of June 27, 1986 in the remarkable case *Nicaragua v. United States* (Military and Paramilitary Activities in and against Nicaragua). In this regard, Conforti B., Focarelli C., *The Law and Practice of the United Nations*, op. cited above, p. 95. Similarly, Zimmermann A., *Ch. V The Security Council, Voting, Article 27*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, p. 920, paras 216-217.

against one of the permanent members itself.[383] Interestingly, the Covenant of the League of Nations required the abstention of an involved State in voting procedures both in Article 15 – which partially resembles Chapter VI UN Charter on peaceful dispute settlement – and in Article 16 which regulated the adoption of measures against a State.[384]

Disputes and situations endangering international peace and security might be brought to the attention of the Security Council or of the General Assembly by UN MS (Article 35 (1) UN Charter)[385] and non-UN MS (Article 35 (2) UN Charter).[386] The General Assembly may also bring situations to the UNSC attention (Article 11 (3) UN Charter),[387] such as the Secretary General (Article 99 UN Charter).[388] Once seized under Articles under Articles 35, 11 ((2) and (3)), or 99 UN Charter, the UNSC should convene a meeting,[389] although these might be called also by the President or by a UNSC member.[390]

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[383] Gioia A., *Diritto internazionale*, op. cited above, p. 462. Similarly, Achilleas P., *United Nations and Sanctions*, in Asada M. (ed), *Economic Sanctions in International Law and Practice*, op. cited above, p. 27.

[384] Article 15 of the Covenant of the League of Nations clearly states that «If a report by the Council is unanimously agreed to by the Members thereof other than the Representatives of one or more of the parties to the dispute, the Members of the League agree that they will not go to war with any party to the dispute which complies with the recommendations of the report. If the Council fails to reach a report which is unanimously agreed to by the members thereof, other than the Representatives of one or more of the parties to the dispute, the Members of the League reserve to themselves the right to take such action as they shall consider necessary for the maintenance of rights and justice». Article 16 of the Covenant of the League of Nations, instead, lays out that «Any Member of the League which has violated any covenant of the League may be declared to be no longer a Member of the League by a vote of the Council concurred in by the Representatives of all the other Members of the League represented thereon». While this paragraph specifically refers to the voting procedure in the case of expulsion of a Member State, authors agree that the exclusion of the Member State directly involved in the dispute is applicable also to the previous paragraphs of the Article which, as mentioned above, regard the League of Nations sanctioning power. In this sense, Conforti B., Focarelli C., *The Law and Practice of the United Nations*, op. cited above, pp. 95-96; and, Zimmermann A., *Ch. V The Security Council, Voting, Article 27*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, p. 877, paras 9-10.

[385] More precisely, Article 35 (1) of the UN Charter grants to Member States the ability to bring to the attention of the two UN organs «any dispute, or any situation» that – as referred to in Article 34 of the UN Charter – «might lead to international friction». Articles 35 (1) and 34, Chapter VI, UN Charter, 1945. On Articles 34 and 35 UN Charter, respectively refer to Schweisfurth T., *Article 34*, and*, Article 35*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, respectively at pp. 1086-1107 (*Article 34*); and pp. 1108-1118 (*Article 35*).

[386] Differently, Article 35 (2) of the UN Charter enables non-Member States to bring to the attention of the two organs any dispute in which they are a party, provided their prior acceptance of adhering to the Charter provisions of pacific settlement. Conforti B., Focarelli C., *The Law and Practice of the United Nations*, op. cited above, p. 193 specify that Article 35 (2) of the UN Charter «does not grant third States a real "power" to seize the Council, […], but it imposes on the *Organization* to act upon it when a dispute is brought to its attention by a third State».

[387] Article 11 (3) of the UN Charter provides for the General Assembly to bring to the attention of the UNSC «situations which are likely to endanger international peace and security».

[388] The Secretary-General may seize the UNSC on «any matter which in his opinion may threaten the maintenance of international peace and security», as per Article 99 of the UN Charter.

[389] As per Rule 3 of the Security Council Provisional Rules of Procedure: Rule 3, Chapter I, Provisional Rules of Procedure, S/96/Rev.7 (1982). Once convened, the UNSC will determine whether the situation does fall within its functions, and act accordingly. On this regard, Conforti B., Focarelli C., *The Law and Practice of the United Nations*, op. cited above, pp. 195-196. Similarly, O'Brien J., *International Law*, op. cited above, p. 717.

[390] The Security Council's President might also call meetings when it deems necessary – as per Rule 1 of the Security Council Provisional Rules of Procedure – or when requested by a Member State of the UNSC – as per Rule 2 of the Security Council Provisional Rules of Procedure. Rules 1 and 2, Chapter I, Provisional Rules of Procedure, S/96/Rev.7

3.2.2. UNSC actions under Chapter VII: Article 39's criteria and the UNSC discretion

In order to act under Chapter VII, the UNSC should first «determine the existence of any threat to the peace, breach of the peace, or act of aggression», as provided by Article 39 UN Charter.[391]

Arguably the successor of Article 11 of the Covenant of the League of Nations – providing for the League's action in response to «any war or threat of war» –[392] Article 39 accords wide powers to the UNSC in case of threat to the peace, breach of the peace, and act of aggression.[393] Nonetheless, the UN Charter provides no definition of the three situations – ordered for increasing gravity: threat, breach, act –[394] nor does it define the underlying concepts of peace and aggression.[395]

(1982). However, to be precise, the provisions of Rule 3 and Rule 2 of the Provisional Rules of Procedure differ. Indeed, Rule 3 refers to the totality of the UN Members, and thus also members of the Security Council, requesting a Security Council meeting. Rule 2, instead, is directed solely to a request of meeting by a member of the UNSC. In this sense, Conforti B., Focarelli C., *The Law and Practice of the United Nations*, op. cited above, p. 195 highlight, Rule 2 is «relevant mainly when the Council is already considering a question, included on the agenda» and, importantly, «takes away from the President the […] power of *prima facie* investigation: he/she is in *any case* obligated to convoke the Council».

[391] Article 39, Chapter VII, UN Charter, 1945.

[392] Textually, Article 11 of the Covenant of the League of Nations reads as follow: «Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations. In case any such emergency should arise, the Secretary General shall on the request of any Member of the League forthwith summon a meeting of the Council. It is also declared to be the friendly right of each Member of the League to bring to the attention of the Assembly or of the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends»

[393] On the relationship between Article 11 of the League of Nations Covenant and Article 39 UN Charter, among others, Krisch N., *Article 39*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 1273-1274, paras 1-2. Kelsen H., *The Law of the United Nations: A Critical Analysis of its Fundamental Problems*, op. cited above, p. 727 notices that the scope of Article 29 UN Charter is larger than the one of Article 16 Covenant of the League of Nations which is limited to the enactment of measures solely to respond to «illegal resort to war».

[394] Achilleas P., *United Nations and Sanctions*, in Asada M. (ed), *Economic Sanctions in International Law and Practice*, op. cited above, p. 28. Interestingly, Gowlland-Debbas V., *UN Sanctions and International Law: An Overview*, in Gowlland-Debbas V. (ed), *United Nations Sanctions and International Law*, op. cited above, p. 8 notices how, differently, the order of the measures to be adopted by the UNSC is not required to follow their gravity: *i.e.*, accordingly, the UN Charter does not require the UNSC «to match the gravity of the situation – threat to the peace, breach of the peace or act of aggression – to a rising scale of severity of the response, since it is not explicitly required to adopt the measures provided under Chapter VII in any order».

[395] Discussions on the legal meaning of these concepts are long-standing, and no clear-cut and generally accepted definitions exist. In general terms, the notion of "peace" is recognised to include not only the absence of international or inter-state armed conflicts but also the existence of political, social, and economic conditions ensuring a state's development and preventing the outbreak of conflicts. In this regard, Hakimdavar G., *A Strategic Understanding of UN Economic Sanctions: International Relations, Law and Development*, op. cited above, p. 30. Similarly, among others, Achilleas P., *United Nations and Sanctions*, in Asada M. (ed), *Economic Sanctions in International Law and Practice*, op. cited above, p. 28; Conforti B., Focarelli C., *The Law and Practice of the United Nations*, op. cited above, p. 221; and, De Wet E., *The Chapter VII Powers of the United Nations Security Council*, op. cited above, pp. 138-139. Interestingly, the definition provided here combines two main opinions in the doctrine. The first definition of peace - intended as negative – provides that peace is the absence of international and interstates armed conflict. The second, instead, falls within a more positive definition which considers the notion of peace to include also friendly relations between states which, together with the favourable conditions of economy, social, political and environment, contribute (and are needed) to obtain peace. An interesting analysis of this dichotomy and of the respective critical points is provided by De Wet E., *The Chapter VII Powers of the United Nations Security Council*, op. cited above, pp. 138-144. On the conceptions of the term "peace", refer also to Krisch N., *Article 39*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 1277-1278, paras 7-9. The term "aggression" – although an unsuccessful Bolivian proposal sought to include a definition – is not defined by the Charter likewise but, to some extent, it is framed by the UN Charter in its Article 1 (1) as a peculiar case of breach of the

peace. According to Krisch N., *Article 39*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, p. 1274, para 2, the Bolivian proposal was eventually abandoned – although founding a discrete support – because of the opposition of the US and UK as they contested that «an exclusive list of acts of aggression would not be possible, and that binding the SC so rigidly could lead to a premature imposition of sanctions». Article 1 (1) of the UN Charter provides that collective measures shall be taken «for the prevention and removal of threats to the peace, and for the suppression of *acts of aggression or other breaches of the peace*» (emphasis added). In this regard, Gioia A., *Diritto internazionale*, op. cited above, p. 464. Similarly, Krisch N., *Article 39*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, p. 1293, para 42. A commentary on this Article is provided by Wolfrum R., *Article 1*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 107-120. The notion of "aggression" has been defined by the General Assembly Resolution no. 3314 of December 14, 1974 where, in Article 1 of the Annex, aggression is outlined as «the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State or in any other manner inconsistent with the Charter of the United Nations» (Article 1 Annex "Definition of Aggression, A/RES/3314 (XXIX), 1974). A number of events which qualify as acts of aggression regardless of a declaration of war are also listed in Article 3 of the General Assembly Resolution mentioned above (Article 3 Annex "Definition of Aggression" of A/RES/3314 (XXIX), 1974). Notably, such General Assembly' definition acts solely as a «guideline» since it is not binding on the UNSC (*Inter alia*, Ronzitti N., *Diritto internazionale*, op. cited above, p. 499. Similarly, Gioia A., *Diritto internazionale*, op. cited above, p. 464). In this sense, Article 2 of such Resolution specifies that although the «first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression», the UNSC might conclude that such committed acts are not acts of aggression in light of «other relevant circumstances», such as the «not sufficient gravity» of the acts concerned or of their consequences (Article 2 Annex "Definition of Aggression" of A/RES/3314 (XXIX), 1974. Klabbers J., *International Law*, op. cited above, p. 190 reports that the GA' «saving clause» providing that acts in accordance with the UN Charter do not constitute aggression was considered as needed since the GA' definition «runs the risk that any of these [*i.e.* the listed ones] activities would automatically be condemned, regardless of the circumstances and the intention behind them (think of bombing in self-defence)». According to the author, however, this signified that «the international community was right back where it started; the Charter is not very precise on what constitutes aggression, so any definition referring back to the Charter can only be considered circular and, eventually, inadequate»). Nonetheless, the importance of this document has been extensively acknowledged both by the doctrine and by the international community as a whole, but also by the ICJ – specifically mentioning the GA definition of aggression as reflecting customary international law – and within the Rome Statute of the International Criminal Court (ICC) which refers to the GA definition of aggression in its Article 8 bis. In the remarkable case Nicaragua v. United States (Military and Paramilitary Activities in and against Nicaragua) of 27 June 1986, the International Court of Justice in the Merits at para 195 stated that «This description, contained in Article 3, paragraph (g), of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX), may be taken to reflect customary international law». Article 8 bis, Rome Statute of the International Criminal Court. Precisely, Article 8 bis was inserted in the Statute in 2010, by Resolution RC/Res.6 of 11 June 2010 (refer to the depositary notification C.N.651.2010.TREATIES-8 of 29 November 2010). Article 8 bis, titled "Crime of aggression", reads as follow: «1. For the purpose of this Statute, "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations. 2. For the purpose of paragraph 1, "act of aggression" means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression: (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof; (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State; (c) The blockade of the ports or coasts of a State by the armed forces of another State; (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State; (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement; (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State; (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein».

Despite the Dumbarton Oaks Proposals contained a distinction between two forms of "threats to the peace" – with one being the failure to achieve a peaceful settlement of a dispute, and the second comprising a general threat to the peace, a breach of the peace, or an act of aggression –, the San Francisco Conference curtailed such distinction, as to both avoid unduly restraint to the UNSC discretion, and excessive connection between Chapters VI and VII.[396]

In practice, particularly since the end of the Cold War,[397] the UNSC has interpreted "threat to the peace" broadly to encompass any «current (not potential) danger to peace, whether military or not»[398] not necessarily arising from a violation of international law,[399] including events such as the danger of a conflict outbreak between two States, civil wars, arms proliferation, piracy, or State support or failure to act against non-State terrorist groups.[400] Overall, the concept of a "threat to the peace" requires a political determination, rather than a strictly legal one.[401] The notion of "breach of the peace" presupposes the existence of a conflict with use of force, although scholars diverge on

[396] Krisch N., *Article 39*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, p. 1274, para 2.
[397] Chesterman S., Johnstone I., Malone D.M., *Law and Practice of the United Nations: Documents and Commentary*, op. cited above, p. 127 and p. 128 where the authors explain how the expansion of the definition of "threat of the peace" within the UN began at the Security Council summit of 1992. Similarly, O'Brien J., *International Law*, op. cited above, p. 719. On the «non-traditional» use of Chapter VII UN Charter by the UNSC (such as for the creation of international criminal tribunals or international territorial administrations) refer to Krisch N., *Introduction to Chapter VII: The General Framework*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, p. 1243, para 13, reporting how the twofold reactions of the doctrine: those strongly criticising such wide interpretation, and those supporting such responses in a view of the absence of an «effective international governance».
[398] Achilleas P., *United Nations and Sanctions*, in Asada M. (ed), *Economic Sanctions in International Law and Practice*, op. cited above, p. 28. Similarly, Conforti B., Focarelli C., *The Law and Practice of the United Nations*, op. cited above, p. 190.
[399] Asada M., *Definition and Legal Justification of Sanctions*, in Asada M. (ed), *Economic Sanctions in International Law and Practice*, op. cited above, p. 19. Interestingly, Krisch N., *Article 39*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 1278- 1279, paras 12-15, discuss the three main dimensions of debate when analysing the concept and the eventuality of an event as a threat to the peace: *i.e.* (i) time and breadth; (ii) scope of situation; (iii) actors affected.
[400] Ronzitti N., *Diritto internazionale*, op. cited above, p. 498. Similarly, Gioia A., *Diritto internazionale*, op. cited above, p. 463; and, O'Brien J., *International Law*, op. cited above, p. 720; and, Krisch N., *Article 39*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 1280-1283, paras 16-21, which – moreover – also discusses the classification as threat to the peace of those «threats to human security» (*i.e.* protection of civilians in armed conflicts; violations of human rights; and, violation of democratic principles), at pp. 1284-1288, paras 22-29.
[401] Conforti B., Focarelli C., *The Law and Practice of the United Nations*, op. cited above, p. 220. Similarly, De Wet E., *The Chapter VII Powers of the United Nations Security Council*, op. cited above, p. 369; Hakimdavar G., *A Strategic Understanding of UN Economic Sanctions: International Relations, Law and Development*, op. cited above, p. 49 and p. 53; and, Ronzitti N., *Sanctions as Instruments of Coercive Diplomacy: An International Pespective*, in Ronzitti N. (ed), *Coercive Diplomacy, Sanctions and International Law*, op. cited above, p. 9. Differently, Tzanakopoulos A., *Disobeying the Security Council: Countermeasures against Wrongful States*, Oxford University Press, 2011, pp. 62-63 argues that the determination of the existence of a threat to the peace is a legal determination since it involves a qualification of a factual situation that then leads to certain legal consequences – taken by the Security Council within its discretionary powers – which, indeed, are the adoption of measures as per Chapter VII. On the political (contraposed to legal) nature of UNSC' decisions and actions under Chapter VII UN Charter, refer also to Gowlland-Debbas V., *UN Sanctions and International Law: An Overview*, in Gowlland-Debbas V. (ed), *United Nations Sanctions and International Law*, op. cited above, p. 8.

whether this always applies whenever armed force is used within international relations,[402] or whether it requires the presence of force but not necessarily the armed activity – because, otherwise, it would have been identifiable as aggression.[403] In practice, the UNSC often relies on the category of "breach of the peace" even in situations of acts of aggression, mainly for diplomatic reasons as to avoid a precise identification of the aggressor between the two conflicting states.[404]

Formal UNSC's categorisation of situations as "aggression" is quite rare,[405] while the category of "threat to the peace" is frequently invoked in a wide range of contexts – from violations of human rights, chemical and nuclear weapons proliferation, terrorism, right of people to self-determination, internal armed conflicts, risks to democracy legitimacy, and even the spread of the virus "Ebola".[406] Although critics contend that this wide interpretation incorporates also States' domestic matters, it is worth mentioning that Article 2 (7) UN Charter clarifies the Organisation' non-intervention principle in the domestic jurisdiction of States but also specifies that this principle should not «prejudice the application of enforcement measures under Chapter VII».[407]

Notably, the UNSC enjoys broad discretionary power in deciding when to act (thus, interpreting events and determining the appropriate category)[408] – as per Article 39 UN Charter – and

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[402] Gioia A., *Diritto internazionale*, op. cited above, p. 464. Similarly, Krisch N., *Article 39*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, p. 1293, para 41. Perhaps, this connotation is justified in light of the UNSC' practice of relying on the notion of "breach of the peace" even in cases of acts of aggression

[403] Conforti B., Focarelli C., *The Law and Practice of the United Nations*, op. cited above, p. 221. Similarly, Achilleas P., *United Nations and Sanctions*, in Asada M. (ed), *Economic Sanctions in International Law and Practice*, op. cited above, p. 28; and, De Wet E., *The Chapter VII Powers of the United Nations Security Council*, op. cited above, p. 143.

[404] Achilleas P., *United Nations and Sanctions*, in Asada M. (ed), *Economic Sanctions in International Law and Practice*, op. cited above, p. 28. In this regard, also Ronzitti N., *Diritto internazionale*, op. cited above, p. 499.

[405] Ronzitti N., *Diritto internazionale*, op. cited above, p. 499. Moreover, Achilleas P., *United Nations and Sanctions*, in Asada M. (ed), *Economic Sanctions in International Law and Practice*, op. cited above, p. 28 and p. 35, notices that within the Security Council which, instead, relies more on a mild terminology such "acts of aggression", "aggressive acts" and "armed invasion". However, as Gioia A., *Diritto internazionale*, op. cited above, p. 464, notices, the identification of acts as aggressions is often relegated to the General Assembly, especially when such acts are accountable to a permanent member of the Security Council which, thus, possesses the veto power. Notably, in 2022 the General Assembly Resolution ES-11/1 of the 01 March 2022 effectively qualified the Russian invasions against Ukraine as aggression.

[406] On this, Achilleas P., *United Nations and Sanctions*, in Asada M. (ed), *Economic Sanctions in International Law and Practice*, op. cited above, p. 28. Similarly, among others, Conforti B., Focarelli C., *The Law and Practice of the United Nations*, op. cited above, pp. 223-227; Gioia A., *Diritto internazionale*, op. cited above, p. 463; Klabbers J., *International Law*, op. cited above, p. 190; Krisch N., *Article 39*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 1289-1293, paras 30-39; Rensmann T., *Reform*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 25-70, pp. 52-53, para 9; and, Ronzitti N., *Diritto internazionale*, op. cited above, p. 498. Specifically on UNSC and human rights sanctions, Silingardi S., *Sanctions for Human Rights and Democracy*, in Sossai M., Portela C., Charron A. (eds), *Elgar Encyclopedia of International Sanctions*, op. cited above, pp. 265-271, which at p. 265 notices the prevailing practice of combining human rights reasons with other purposes.

[407] Article 2 (7), Chapter I, UN Charter, 1945 precisely establishes a general prohibition for the Organisation to «intervene in matters which are essentially within the domestic jurisdiction of any state». On this Article and paragraph, refer to Nolte G., *Article 2 (7)*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 280-311.

[408] van den Herik L., *The Individualization and Formalization of UN Sanctions*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, pp. 1-18, p. 6, p. 8; and, Krisch N., *Article 39*, in

with which instrument to act – as per Articles 40, 41 and 42 UN Charter. Nonetheless, the UNSC is not formally required to qualify a situation as either a threat to the peace, a breach of the peace or as an act of aggression,[409] and indeed it often proceeds under Chapter VII by simply invoking the said Chapter.[410] This practice certainly avoids the attribution of responsibility to one sole party of the dispute, thus preventing disagreements between the permanent members.[411] While some authors criticise this lack of formal UNSC assessment[412] and call for precise definitions of the categories,[413] others advocate for the benefits of interpretation.[414] A further strand of the doctrine argues that the

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Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 1275-1276, paras 3-6. Similarly, Gowlland-Debbas V., *Sanctions Regime under Article 41 of the UN Charter*, in Gowlland-Debbas V. (ed), *National Implementation of United Nations Sanctions: A Comparative Study*, Martinus Nijhoff Publishers, 2004, pp. 3-31, p. 4; and, Kochler H., *Sanctions and International Law*, op. cited above, p. 31. Differently, Tzanakopoulos A., *Disobeying the Security Council: Countermeasures against Wrongful States*, op. cited above, p. 61 argues instead that the interpretation of the Security Council must anyway conform to law and thus, the notion of threat to the peace cannot be interpreted *contra legem*. Additionally, Krisch N., *Introduction to Chapter VII: The General Framework*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, p. 1243, para 13, reports the two strands of doctrinal debate: those authors arguing that the UNSC is completely «legally free» to decide and adopt measures, and those subjecting the UNSC to the respect of certain limits such as human rights, proportionality, and international law.

[409] Ronzitti N., *Diritto internazionale*, op. cited above, p. 499. Similarly, Gordon R., Smyth M., Cornell T., *Sanctions Law*, Hart Publishing, 2019, p. 13; Klabbers J., *International Law*, op. cited above, p. 191; Krisch N., *Article 39*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, p. 1275, para 5; and, Krisch N., *Introduction to Chapter VII: The General Framework*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, p. 1246, para 18.

[410] Gioia A., *Diritto internazionale*, op. cited above, p. 463. Similarly, Gordon R., Smyth M., Cornell T., *Sanctions Law*, op. cited above, p. 13; and, Krisch N., *Article 39*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 1294-1295, paras 45-47. Orakhelashvili A., *The Impact of Unilateral EU Economic Sanctions on the UN Collective Security Framework: The Cases of Iran and Syria*, in Marossi A.Z., Bassett M.R. (eds), *Economic Sanctions under International Law: Unilateralism, Multilateralism, Legitimacy, and Consequences*, op. cited above, p. 8 argues that in the case of UN measures against Iran «the UNSC goes very near to the ambit of Article 39 but does not cross its boundaries by specifying that these risks constitute a threat. Resolutions 1737 (2006) and 1803 (2008) do not specify that conduct by Iran constitutes the "threat to the peace" either». Interestingly, Tzanakopoulos A., *Disobeying the Security Council: Countermeasures against Wrongful States*, op. cited above, p. 22 argues that the case of adoption of a resolution by the Security Council under Chapter VII without the determination of the existence of a threat to the peace (as per Article 39 of the UN Charter), or where such determination is not inferable or it is questionable, accounts for one of those conducts of the Security Council susceptible to engage in international responsibility of the UN. Differently, Krisch N., *Article 39*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, p. 1295, para 47, discusses that while the UNSC determination that one of the Article 39' situations exists, «it need not expressly refer to this provision or to Chapter VII in general», although it is currently standard practice. Nonetheless, by admitting the possibility for the UNSC to avoid reference, «resolutions should be interpreted narrowly and should not be regarded as providing for enforcement action», signifying that when the UNSC explicitly refer to Chapter VII it deliberately creates binding obligations, while when it does not then the resolutions do not possess binding force.

[411] Ronzitti N., *Diritto Internazionale*, op. cited above, pp. 498-499. Similarly, Achilleas P., *United Nations and Sanctions*, in Asada M. (ed), *Economic Sanctions in International Law and Practice*, op. cited above, p. 28; and, Klabbers J., *International Law*, op. cited above, p. 191.

[412] Ronzitti N., *Diritto internazionale*, op. cited above, p. 499 specifies that this argument is supported by a minor part of the scholars. Tzanakopoulos A., *Disobeying the Security Council: Countermeasures against Wrongful States*, op. cited above, p. 60 argues that both national courts and the Security Council too agree on the determination under Article 39 of the UN Charter as a prerequisite to resort to the measures as per Chapter VII.

[413] Hakimdavar G., *A Strategic Understanding of UN Economic Sanctions: International Relations, Law and Development*, op. cited above, p. 28 and p. 59.

[414] In this regard, among others, Conforti B., Focarelli C., *The Law and Practice of the United Nations*, op. cited above, p. 220; and, De Wet E., *The Chapter VII Powers of the United Nations Security Council*, op. cited above, p. 136.

Charter's express indication of these categories – instead of a more general reference – accounts for a *de facto* limitation of the UNSC discretionary power, by confining its action solely to those three situations.[415]

Certain limitations do apply to UNSC's activities:[416] Article 24 (2) UN Charter requires it to act in accordance with the UN's purposes and principles,[417] while scholars note it is also bound by the principle of proportionality,[418] international human rights law, and principles of general international law.[419]

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[415] *Inter alia*, Chesterman S., Johnstone I., Malone D.M., *Law and Practice of the United Nations: Documents and Commentary*, op. cited above, p. 127; Conforti B., Focarelli C., *The Law and Practice of the United Nations*, op. cited above, pp. 220-221; and De Wet E., *The Chapter VII Powers of the United Nations Security Council*, op. cited above, p. 136. Connected to this argument, some scholars discuss that the purpose of Article 39 of the UN Charter is indeed meant to enable the Security Council to assess situations on a case-by-case basis. In this sense, among others, Tzanakopoulos A., *Disobeying the Security Council: Countermeasures against Wrongful States*, op. cited above, p. 61.

[416] To be precise, a part of the doctrine argues that the Security Council's discretion under Article 39 is absolute. In this regard, De Wet E., *The Chapter VII Powers of the United Nations Security Council*, op. cited above, pp. 135-136 provides a detailed analysis of the main arguments of this part of the doctrine. Similarly, the same author discusses, at pp. 136-137, the arguments of those scholars which argue for the existence of limitations to the Security Council's discretion. On this doctrinal debate, also Krisch N., *Article 39*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, p. 1276, para 6.

[417] More precisely, the Security Council must «act in accordance with the Purposes and Principles of the United Nations», which are mentioned in the Preamble and in Chapter I of the UN Charter. Some scholars argue that the lack of the reference to "justice and international law" within the first part of Article 1 (1) of the UN Charter signifies that the Security Council does not have a duty to comply with international law, and that, thus, it has unlimited discretion in its actions concerning enforcement measures. Respect of justice and international law, accordingly, is to be ensured solely when the Security Council acts for the settlement of international disputes, since the reference is solely mentioned in the second part of the Article 1 (1) of the UN Charter. On this point, De Wet E., *The Chapter VII Powers of the United Nations Security Council*, op. cited above, pp. 185-186. For a detailed analysis of the purposes and principles of the Charter as limitations to the UNSC' activities refer to the same author and reference at pp. 191-215.

[418] In this regard, among others, Gordon R., Smyth M., Cornell T., *Sanctions Law*, op. cited above, p. 14; Krisch N., *Introduction to Chapter VII: The General Framework*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, p. 1243, para 13, and pp. 1256-126, paras 38-52; Peters A., *Article 25*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 787-854, p. 820, para 106; Ruys T., *Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, p. 37; and, Tzanakopoulos A., *Disobeying the Security Council: Countermeasures against Wrongful States*, op. cited above, pp. 64-67. Differently, De Wet E., *The Chapter VII Powers of the United Nations Security Council*, op. cited above, pp. 184-185 argues that the Security Council is not bound by a principle of proportionality since the UN organ is free «to choose a (combination of) measures under Chapters VI and/or VII to be adopted». Moreover, Gordon R., Smyth M., Cornell T., *Sanctions Law*, op. cited above, at p. 14 argues that – although the UNSC is indeed bound to the respect of international law principles – the lack of a formal UNSC judicial review and the UNSC wide discretion renders this argument «purely theoretical».

[419] Among others, Gowlland-Debbas V., *Sanctions Regime under Article 41 of the UN Charter*, in Gowlland-Debbas V. (ed), *National Implementation of United Nations Sanctions: A Comparative Study*, op. cited above, p. 4; Krisch N., *Introduction to Chapter VII: The General Framework*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, p. 1243, para 13, and pp. 1256-126, paras 38-52; Peters A., *Article 25*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, p. 819, para 102; and, Zamani S.G., Mazaheri J., *The Need for International Judicial Review of UN Economic Sanctions*, in Marossi A.Z., Bassett M.R. (eds), *Economic Sanctions under International Law: Unilateralism, Multilateralism, Legitimacy, and Consequences*, op. cited above, pp. 219-236, p. 227. Similarly, Tzanakopoulos A., *Disobeying the Security Council: Countermeasures against Wrongful States*, op. cited above, p. 83, which, however, at pp. 69-70, analyses also the argument of those that support that «general international law is irrelevant when the Council is acting under Article 41» of the UN Charter. Similarly on this argument, Krisch N., *Introduction to*

3.2.3. Measures under Chapter VII: the "UN sanctions"

Under Chapter VII, aside from provisional measures pursuant to Article 40 UN Charter, the UNSC might recommend or decide to adopt either measures not involving the use of armed force under Article 41 UN Charter, or measures involving action «by air, sea or land forces» under Article 42 UN Charter whenever Article 41 measures are – or have proved to be – inadequate.[420]

Article 41 measures, often called "UN sanctions", are considered by some as the only measures rightfully recognised as "sanctions" under international law.[421] The UNSC determines which non-armed measures to employ, and call upon UN MS to implement them.[422] These may include diplomatic, economic, and financial measures such as those enumerated in Article 41's non-exhaustive list: complete or partial interruption of economic relations, communication (by rail, sea, air, postal, telegraphic, radio, and other means), and the severance of diplomatic relations.[423] Military actions, blockades, or operations by air, sea or land are excluded since they fall under Article 42 UN Charter.[424]

Since 1945, Article 41 measures have evolved from comprehensive sanctions – as those imposed on Iraq, which caused severe humanitarian consequences – [425] to targeted or "smart"

Chapter VII: The General Framework, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, p. 1243, and pp. 1256-126, paras 38-52.

[420] Article 42, Chapter VII, UN Charter, 1945. For a commentary on this Article, refer to Krisch N., *Article 42*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 1330-1350.

[421] Refer to Section 2 of this chapter for a debate on the meaning and characteristics of "sanctions".

[422] Article 41, Chapter VII, UN Charter, 1945. A detailed commentary on this Article is provided by Krisch N., *Article 41*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 1305-1329.

[423] Article 41, Chapter VII, UN Charter, 1945.

[424] Ronzitti N., *Sanctions as Instruments of Coercive Diplomacy: An International Law Perspective*, in Ronzitti N. (ed), *Coercive Diplomacy, Sanctions and International Law*, op. cited above, p. 15. Similarly, Krisch N., *Article 41*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 1311-1312, para 13, arguing that despite the wide number of measures adoptable under Article 41 UN Charter, actions involving the use of force are excluded, such as those applying armed force (since the latter are instead based on Article 42 UN Charter).

[425] In Security Council Resolution S/RES/678 (1990) the Security Council specifically «authorizes Member States […] to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area». Resolution S/RES/661 (1990) provided for all States to prevent (a) import into their territories of all commodities and products originating in Iraq or Kuwait exported after the resolution; (b) any activities by their nationals or in their territories which would promote export or trans-shipment in any commodities from the countries; (c) the sale or supply by their nationals or from their territories or using their flag vessels of any commodities or products, including weapons or any other military equipment excluding supplies strictly intended for medical purposes and in humanitarian circumstances foodstuffs, to any person or body in Iraq or Kuwait or to any person or body for the purposes of any business carried on in or operated from Iraq or Kuwait. In this sense, a comprehensive trade embargo was imposed on Iraq and Kuwait. Over the years, other regimes were adopted against Iraq and Kuwait. Other cases in which UN measures as per Article 41 of the UN Charter had been applied comprehensively are the ones against Haiti (1994) and Yugoslavia (1992).

sanctions targeting specific sectors, individuals, or entities responsible for a State's actions,[426] reducing impact on the general population.[427]

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[426] Cortright D., Lopez G.A., Gerber-Stellingwerf L., *The Sanctions Era: Themes and Trends in UN Security Council Sanctions Since 1990*, in Lowe V., Roberts A., Welsh J., Zaum D. (eds), *The United Nations Security Council and War: The Evolution of Thought and Practice since 1945*, op. cited above, p. 213. Similarly, among others, Biersteker T., Tourinho M., Eckert S., *Thinking About United Nations Targeted Sanctions*, in Biersteker T., Eckert S., Tourinho M. (eds), *Targeted Sanctions: The Impacts and Effectiveness of United Nations Action*, Cambridge University Press, 2016, pp. 11-37, p. 13; Chesterman S., Johnstone I., Malone D.M., *Law and Practice of the United Nations: Documents and Commentary*, op. cited above, p. 370 and p. 386; Eckert S.E., *The Evolution and Effectiveness of UN Targeted Sanctions*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, pp. 52-72, p. 53; Eckert S., Biersteker T., Tourinho M., *Introduction*, in Biersteker T., Eckert S., Tourinho M. (eds), *Targeted Sanctions: The Impacts and Effectiveness of United Nations Action*, op. cited above, pp. 1-10, pp. 1-2; Krisch N., *Article 41*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, p. 1309, para 6; and, Suzuki K., *Iran: The Role and Effectiveness of UN Sanctions*, in Asada M. (ed), *Economic Sanctions in International Law and Practice*, op. cited above, pp. 178-199, p. 180, and p. 192. In this regard, these measures target specific sectors of activities or/and designated individuals who are part of elites, government officials or companies allegedly involved in the decision-making process of the contested State' action. *Inter alia*, Honda M., *"Smart Sanctions" by the UN and Financial Sanctions*, in Yoshimura S. (ed), *United Nations Financial Sanctions*, op. cited above, pp. 18-33, p. 24 highlights a change in the targets of "smart sanctions". Accordingly, when first introduced in the early 1990s these measures were applied solely on sovereign heads of states or political and military leaders and elites but, especially after 2001, these measures began to be applied as counterterrorism and questions of potential violations of human rights begun to arise. On the categories involved in targeted measures, among others, Achilleas P., *United Nations and Sanctions*, in Asada M. (ed), *Economic Sanctions in International Law and Practice*, op. cited above, pp. 29-30; Chesterman S., Johnstone I., Malone D.M., *Law and Practice of the United Nations: Documents and Commentary*, op. cited above, p. 370 and p. 386; Cortright D., Lopez G.A., Gerber-Stellingwerf L., *The Sanctions Era: Themes and Trends in UN Security Council Sanctions Since 1990*, in Lowe V., Roberts A., Welsh J., Zaum D. (eds), *The United Nations Security Council and War: The Evolution of Thought and Practice since 1945*, op. cited above, p. 213; Dörfler T., *Security Council Sanctions Governance: The Power and Limits of Rules*, Routledge, 2019, p. 42; and, van den Herik L., *The Individualization and Formalization of UN Sanctions*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, p. 6.

[427] To be precise, these "targeted UN measures" still impose obligations on States as in the case of comprehensive measures, but – differently – they regard «the treatment of individuals». In this sense, Conforti B., Focarelli C., *The Law and Practice of the United Nations*, op. cited above, p. 277. Similarly, van den Herik L., *The Individualization and Formalization of UN Sanctions*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, pp. 7-8 which, interestingly, at p. 5, discusses this shift from comprehensive measures to targeted ones as "the individualization of UN sanctions". Accordingly, the shift towards targeted measures against individuals is part of a wider trend focusing on the «humanization of international law and, more specifically, [*on*] the individualization of enforcement in international law». Similarly, Krisch N., *Article 41*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, p. 1309, para 6. By being not directly addressed against the entire population of the targeted State, the humanitarian impacts on the inhabitants should be prevented (Happold M., *Targeted Sanctions and Human Rights*, in Happold M., Eden P. (eds), *Economic Sanctions and International Law*, op. cited above, pp. 87-111, p. 88. Similarly, Chesterman S., Johnstone I., Malone D.M., *Law and Practice of the United Nations: Documents and Commentary*, op. cited above, p. 386; Cortright D., Lopez G.A., Gerber-Stellingwerf L., *The Sanctions Era: Themes and Trends in UN Security Council Sanctions Since 1990*, in Lowe V., Roberts A., Welsh J., Zaum D. (eds), *The United Nations Security Council and War: The Evolution of Thought and Practice since 1945*, op. cited above, p. 213; Honda M., *"Smart Sanctions" by the UN and Financial Sanctions*, in Yoshimura S. (ed), *United Nations Financial Sanctions*, op. cited above, p. 18; and, Suzuki K., *Iran: The Role and Effectiveness of UN Sanctions*, in Asada M. (ed), *Economic Sanctions in International Law and Practice*, op. cited above, p. 192), or at least diminished (Biersteker T., Tourinho M., Eckert S., *Thinking About United Nations Targeted Sanctions*, in Biersteker T., Eckert S., Tourinho M. (eds), *Targeted Sanctions: The Impacts and Effectiveness of United Nations Action*, op. cited above, p. 13. Similarly, Dörfler T., *Security Council Sanctions Governance: The Power and Limits of Rules*, op. cited above, p. 42; Dupont P.-E., *Human Rights Implications of Sanctions*, in Asada M. (ed), *Economic Sanctions in International Law and Practice*, op. cited above, pp. 39-61, p. 48; Honda M., *"Smart Sanctions" by the UN and Financial Sanctions*, in Yoshimura S. (ed), *United Nations Financial Sanctions*, op. cited above, p. 18; and, Zamani S.G., Mazaheri J., *The Need for International Judicial Review of UN Economic Sanctions*, in Marossi A.Z., Bassett M.R. (eds), *Economic Sanctions under International Law: Unilateralism, Multilateralism, Legitimacy, and Consequences*, op. cited above, p. 220), since costs are posed on those individuals who are responsible and not on the population as a whole. Refer to, Cortright D., Lopez G.A., Gerber-Stellingwerf L., *The Sanctions Era: Themes and Trends in UN Security Council*

However, the process of identification of the individuals is often untransparent since it relies on «secret information and discretionary procedures»,[428] raising due process and human rights concerns in different courts. The creation of an UN Ombudsperson office entrusted with addressing delisting instances[429] constituted nonetheless an effort by the organisation to ensure due process for designated individuals.[430]

Although the UN Charter lacks a procedure for the termination of Article 41 measures, they are intended as temporary and should be terminated by the UNSC once the objectives are achieved.[431] Nonetheless, scholars observe that some measures have become permanent,[432] since their termination

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Sanctions Since 1990, in Lowe V., Roberts A., Welsh J., Zaum D. (eds), *The United Nations Security Council and War: The Evolution of Thought and Practice since 1945*, op. cited above, p. 213; Biersteker T., Tourinho M., Eckert S., *Thinking About United Nations Targeted Sanctions*, in Biersteker T., Eckert S., Tourinho M. (eds), *Targeted Sanctions: The Impacts and Effectiveness of United Nations Action*, op. cited above, p. 13; and, Chesterman S., Johnstone I., Malone D.M., *Law and Practice of the United Nations: Documents and Commentary*, op. cited above, p. 386.

[428] Conforti B., Focarelli C., *The Law and Practice of the United Nations*, op. cited above, p. 274. Similarly, Klabbers J., *International Law*, op. cited above, p. 195; Portela C., *National Implementation of United Nations Sanctions: Towards Fragmentation*, International Journal, Vol. 65, no. 1, 2009, pp. 13-30, pp. 26-27; and, Thouvenin J.-M., *History of Implementation of Sanctions*, in Asada M., *Economic Sanctions in International Law and Practice*, op. cited above, p. 87. Interestingly, Honda M., *"Smart Sanctions" by the UN and Financial Sanctions*, in Yoshimura S. (ed), *United Nations Financial Sanctions*, op. cited above, p. 24 notices how, for instance, after September 2001, «the names of individuals that the United States proposed were added to the list with little or no questioning or opposition».

[429] The Office of the Ombudsperson was created by the UNSC Resolution S/RES/1904 (2009). Subsequent Resolutions updated and introduced a series of changes to the Ombudsperson Office – in this regard, S/RES/1988 (2011); S/RES/1989 (2011); S/RES/2083 (2012); S/RES/2161 (2014); S/RES/2253 (2015).

[430] Kanetake M., *Implementation of Sanctions: Japan*, in Asada M. (ed), *Economic Sanctions in International Law and Practice*, op. cited above, pp. 136-154, p. 147. Similarly, Boon K.E., *Timing Matters: Termination Policies for UN Sanctions*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, pp. 236-264, p. 253; Honda M., *"Smart Sanctions" by the UN and Financial Sanctions*, in Yoshimura S. (ed), *United Nations Financial Sanctions*, op. cited above, p. 30; Portela C., *National Implementation of United Nations Sanctions: Towards Fragmentation*, op. cited above, p. 27; Ruys T., *Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, p. 30; and Sullivan G., *The Law of the List: UN Counterterrorism Sanctions and the Politics of Global Security Law*, Cambridge University Press, 2020. Interestingly, in the famous Kadi judgment the ECJ also strongly criticised the UN de-listing procedures. Happold M., *Targeted Sanctions and Human Rights*, in Happold M., Eden P. (eds), *Economic Sanctions and International Law*, op. cited above, p. 91 notices how – during the discussions in the 1990s on targeted measures – there was actually little reference to their potential effects on their targets' human rights. On the evolution of the UN Office of the Ombudsperson, *inter alia*, Dörfler T., *Security Council Sanctions Governance: The Power and Limits of Rules*, op. cited above, pp. 54-56; Sullivan G., *The Law of the List: UN Counterterrorism Sanctions and the Politics of Global Security Law*, op. cited above, pp. 131-249; and, Eden P., *United Nations Targeted Sanctions, Human Rights and the Office of the Ombudsperson*, in Happold M., Eden P. (eds), *Economic Sanctions and International Law*, op. cited above, pp. 135-170, pp. 145-156 and pp. 161-168.

[431] Ronzitti N., *Sanctions as Instruments of Coercive Diplomacy: An International Law Perspective*, in Ronzitti N. (ed), *Coercive Diplomacy, Sanctions and International Law*, op. cited above, p. 11. Similarly, Gioia A., *Diritto internazionale*, op. cited above, p. 466. Interestingly, Boon K.E., *Timing Matters: Termination Policies for UN Sanctions*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, pp. 239-245 analyses models of terminating UN Article 41' measures and the circumstances linked to the models of termination.

[432] Interestingly, Gioia A., *Diritto internazionale*, op. cited above, p. 466 argues that these measures resemble acts of "international legislature", and, more precisely, that these acts seem to possess «*durata tendenzialmente illimitata*». Similarly, Boon K.E., *Timing Matters: Termination Policies for UN Sanctions*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, p. 236; Hakimdavar G., *A Strategic Understanding of UN Economic Sanctions: International Relations, Law and Development*, op. cited above, p. 92; and Tzanakopoulos A., *Disobeying the Security Council: Countermeasures against Wrongful States*, op. cited above, p. 23. On the UNSC acting as a legislator, also refer to Krisch N., *Introduction to Chapter VII: The General Framework*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp.

requires the same voting procedure as their adoption, allowing the permanent members to block termination with their veto.[433]

3.2.4. Implementation of UNSC measures and the role of States in enforcing UN sanctions

The implementation of measures adopted under Article 41 UN Charter is not a responsibility of the UNSC itself, but a duty entrusted to UN MS. Article 41 authorises the UNSC to «call upon» UN MS to apply the measures it adopts, despite this provision nor any other in the Charter specifies detailed rules governing implementation. Instead, under Article 25 UN Charter, UN MS are required to «accept and carry out» UNSC decisions,[434] including those taken pursuant to Chapter VII.[435]

1251-1254, paras 31-34 although the author then concludes that such UNSC «law-creation can be regarded as analogous to executive regulation rather than true legislation» (para 31), although recognising the increasing role of UNSC as a legislator and its problematic extents. Refer also to the same author and collection, at pp. 1267-1268, paras 63-64.

[433] Gowlland-Debbas V., *Sanctions Regime under Article 41 of the UN Charter*, in Gowlland-Debbas V. (ed), *National Implementation of United Nations Sanctions: A Comparative Study*, op. cited above, p. 7. Similarly, Krisch N., *Introduction to Chapter VII: The General Framework*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, p. 1267, para 62; and, Kochler H., *Sanctions and International Law*, op. cited above, p. 31. Interestingly, De Wet E., *The Chapter VII Powers of the United Nations Security Council*, op. cited above, p. 60, p. 252, p. 255, pp. 270-271, p. 317 and p. 375 calls "reverse veto" the veto power used by one (or more than one) permanent member to block the termination of measures pursuant Chapter VII. In this sense, also Chesterman S., Johnstone I., Malone D.M., *Law and Practice of the United Nations: Documents and Commentary*, op. cited above, p. 37; Krisch N., *Introduction to Chapter VII: The General Framework*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, p. 1267, para 63; Krisch N., *The Security Council and the Great Powers*, in Lowe V., Roberts A., Welsh J., Zaum D. (eds), *The United Nations Security Council and War: The Evolution of Thought and Practice since 1945*, op. cited above, pp. 133-153, p. 143. Moreover, Boon K.E., *Timing Matters: Termination Policies for UN Sanctions*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, p. 236 argues that the decision to terminate measures is a political one, just as the one for adopting them. The same author then analyses in detail the arguments for "short" and "long" duration of Article 41' measures at pp. 245-252.

[434] Debates on the exact meaning of the Article focus mainly on the part establishing that such acceptance and carrying out of the UNSC decisions must be made «in accordance with the present Charter». In this regard, it is controversial whether such specification refers to the modalities in which the Member States must act (*i.e.* in conformity with the Charter), or to the fact that the decisions of the UNSC possess binding nature (and thus it is not required to Member States to carry out those 'decisions' which are not binding - *i.e.* recommendation), or to the obligation of the Member States to implement the UNSC's decision which it is itself authorised by the Charter to adopt (and thus, the sentence refers to the UNSC, and not to the Member States, requiring the UNSC to act in conformity with the Charter as a legal limitation of its actions and discretion). On this debate, Tzanakopoulos A., *Disobeying the Security Council: Countermeasures against Wrongful States*, op. cited above, p. 58 and pp.164-166; and, Peters A., *Article 25*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 807-808, paras 56-60. Refer also to Klabbers J., *International Law*, op. cited above, pp. 196-197. According to Tzanakopoulos A., *Disobeying the Security Council: Countermeasures against Wrongful States*, op. cited above, p. 58, the latter view is the predominant one. Similarly, De Wet E., *The Chapter VII Powers of the United Nations Security Council*, op. cited above, p. 37, agreeing with the latter interpretation of the reference. For a detailed commentary on this Articles, refer to Peters A., *Article 25*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 787-854.

[435] This view is generally accepted within the international community and scholars. Interestingly, Carisch E., Rickard-Martin L., *Implementation of United Nations Targeted Sanctions*, in Biersteker T., Eckert S., Tourinho M. (eds), *Targeted Sanctions: The Impacts and Effectiveness of United Nations Action*, op. cited above, pp. 150-171, p. 150 agree but specify that – although Article 25 of the UN Charter has been widely recognised and interpreted as providing the Member States of the UN to be «the primary implementers of sanctions» - this is only partially correct. Indeed, accordingly, these «misperceptions based on misplaced emphasis on Member States' implementation duties [mainly deriving from the fact that Article 25 of the UN Charter only mentions Members States in relation to Security Council's decisions] have allowed the UN Secretary and UN agencies to eschew implementation responsibilities». This is so because, according to the authors, the Member States are not the sole entity responsible for the implementation of measures adopted pursuant Article

Although several UNSC resolutions address "all States", it is settled that solely UN MS are legally bound.[436] Pursuant to Article 24 (1) UN Charter, UN MS have granted the UNSC's power to act on their behalf in matters of international peace and security, whereas Article 48 requires them to implement its decisions.[437] Similarly to Article 16 of the League of Nations Covenant, Article 49 UN Charter stipulates mutual assistance among UN MS when carrying out the UNSC measures.

The delegation of implementation duties to UN MS certainly provokes attempts to circumvent measures; inadequate implementing legislation;[438] and differing interpretations of the measures and their boundaries. To monitor States' implementation, the UNSC frequently establishes a Sanctions Committee[439] – *i.e.* a UNSC subsidiary organ composed of all the UNSC members and typically established in the same resolution adopting the measures. These Committees oversee and assist

41 of the UN Charter, but also other entities are supposed to share this obligation and implement such UN measures. Among others, entities sharing such role are the Secretariat, Sanctions Committees, Panels of Experts, regional and international organizations, civil society, and even the private sector. For a detailed analysis of the international actors involved into the implementation of UN measures pursuant Article 41 of the UN Charter according to the authors, *Ibid*., pp. 156-160. At pp. 163-164, the authors discuss on the role of the private sector in implementation of such UN measures. Similarly, Dmitrenko A., *Implementation and Enforcement of UN Sanctions – The Private Sector's Key Role and Evolving Standards*, in Yoshimura S. (ed), *United Nations Financial Sanctions*, op. cited above, pp. 111-119, pp. 111-118. Moreover, Tzanakopoulos A., *Disobeying the Security Council: Countermeasures against Wrongful States*, op. cited above, p. 58 explains the different views on the meaning of such Article: accordingly, some argue that Article 25 of the UN Charter refers to the ways in which the Member States must carry out the Security Council's decisions, while others discuss that the Article simply reiterates the fact that the Security Council has the power to adopt decisions which are binding on the Member States. The same author and reference, at p. 67, moreover, argues that Article 25 of the UN Charter focuses solely on the decisions of the Security Council, thereby excluding the Member States' duty to carry out the organ's recommendations. Similarly, White N.D., Abass A., *Countermeasures and Sanctions*, in Evans M.D. (ed), *International Law*, Oxford University Press, 2014, pp. 537-362, p. 557.

[436] In this regard, Gioia A., *Diritto internazionale*, op. cited above, p. 466; and Lavranos N., *UN Sanctions and Judicial Review*, in Wouters J., Nolkaemper A., de Wet E. (eds), *The Europeanisation of International Law: The Status of International Law in the EU and its Member States*, T.M.C. Asser Press, 2008, pp. 185-204, p. 191. Differently, other scholars suggest that Article 2 (6) of the UN Charter requires compliance to UN non-armed measures also to non-UN member states. In this regard, among others, Peters A., *Article 25*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, p. 800, paras 32-33; and, Yoshimura S., *UN Economic Sanctions and Financial Measures – Evolution and Challenges*, in Yoshimura S. (ed), *United Nations Financial Sanctions*, op. cited above, pp. 1-17, p. 5. Interestingly, Talmon S., *Ch. I Purposes and Principles, Article 2 (6)*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 268-298, p. 268, para 46, reports that the first time in which the Security Council avoided distinguishing between UN members and not UN members dates back in 1977 in S/R/418. On this discussion, refer also to Krisch N., *Introduction to Chapter VII: The General Framework*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 1268-1269, paras 65-66.

[437] Interestingly, a State (or more than one) might be relieved from its implementation duties by the UNSC, as established in Article 48 (1) of the UN Charter.

[438] Ronzitti N., *Sanctions as Instruments of Coercive Diplomacy: An International Law Perspective*, in Ronzitti N. (ed), *Coercive Diplomacy, Sanctions and International Law*, op. cited above, p. 16. Interestingly, Portela C., *National Implementation of United Nations Sanctions: Towards Fragmentation*, op. cited above, pp. 17-18 argues that targeted measures exacerbated and increased the obstacles of implementation.

[439] Solely two cases of sanctioning regimes did not provide the creation of a linked Sanctioning Committee, *i.e.* South Rhodesia and Sudan, both in the 1990s. An analysis of Sanctions Committee is given by Sato R., *Functions of Security Council Subsidiary Organs in the UN Financial Sanctions Regimes: From the Perspective of the Law of International Organizations*, in Yoshimura S. (ed), *United Nations Financial Sanctions*, op. cited above, pp. 19-51, pp. 40-41; and by Dörfler T., *Security Council Sanctions Governance: The Power and Limits of Rules*, op. cited above, pp. 44-50.

States' implementation, receiving periodic reports from States on their implementation activities.[440] Panels/Groups of Experts are also established to assist the Committees by providing information, reporting violations, and offering recommendations. Appointed by the Secretary-General based on expertise, their members are expected to act independently and objectively.[441]

Beyond the risk of evasion by States – partially tackled through Sanctions Committees and Panels of Experts –, the delegation of implementation to States produces additional challenges, as implementing legislations might diverge from both UNSC resolutions and other State's legislation in content, interpretation, speeds of implementation, entry into force, application, legal basis, approaches to extraterritorial effects, practical results, and compliance mechanisms,[442] thereby undermining the uniform implementation of UNSC measures.

A further aspect of complexity arises from the interaction between UN MS and their international treaty obligations. Notably, Article 103 UN Charter grants primacy to UN Charter-based obligations – including those arising from UNSC resolutions –[443] over those deriving from a State's international agreement.[444] International organisations may become involved in UNSC' actions both

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[440] Carisch E., Rickard-Martin L., *Implementation of United Nations Targeted Sanctions*, in Biersteker T., Eckert S., Tourinho M. (eds), *Targeted Sanctions: The Impacts and Effectiveness of United Nations Action*, op. cited above, p. 162 report a very low quantity of reports effectively received by Sanctions Committees – *i.e.* around 46 per cent of the cases. Similarly, Gowlland-Debbas V., *Sanctions Regime under Article 41 of the UN Charter*, in Gowlland-Debbas V. (ed), *National Implementation of United Nations Sanctions: A Comparative Study*, op. cited above, p. 21.

[441] Carisch E., Rickard-Martin L., *Implementation of United Nations Targeted Sanctions*, in Biersteker T., Eckert S., Tourinho M. (eds), *Targeted Sanctions: The Impacts and Effectiveness of United Nations Action*, op. cited above, p. 154, p. 160. The authors also present some criticism of the last years. Accordingly, the nominations had been chosen as representatives of the five permanent members of the Security Council, and, in other cases, they proved to be ineffective (refer at p. 169). Similarly, Dörfler T., *Security Council Sanctions Governance: The Power and Limits of Rules*, op. cited above, pp. 50-54; and Sato R., *Functions of Security Council Subsidiary Organs in the UN Financial Sanctions Regimes: From the Perspective of the Law of International Organizations*, in Yoshimura S. (ed), *United Nations Financial Sanctions*, op. cited above, pp. 41-42.

[442] Gowlland-Debbas V., *Implementing Sanctions Resolutions in Domestic Law*, in Gowlland-Debbas V. (ed), *National Implementation of United Nations Sanctions: A Comparative Study*, op. cited above, pp. 33-80, pp. 37-55 provides a detailed analysis of these problematic aspects. Similarly, Ishigaki T., *Recent Challenges Regarding the Implementation of UN Security Council Sanctions*, in Yoshimura S. (ed), *United Nations Financial Sanctions*, op. cited above, pp. 52-66, pp. 57-59; Portela C., *National Implementation of United Nations Sanctions: Towards Fragmentation*, op. cited above, pp. 18-20 and p. 29; and Yoshimura S., *UN Economic Sanctions and Financial Measures – Evolution and Challenges*, in Yoshimura S. (ed), *United Nations Financial Sanctions*, op. cited above, pp. 11-12.

[443] Although secondary in nature, obligations arising from UNSC resolutions prevail over UN MS' other international agreements. Gowlland-Debbas V., *Sanctions Regime under Article 41 of the UN Charter*, in Gowlland-Debbas V. (ed), *National Implementation of United Nations Sanctions: A Comparative Study*, op. cited above, p. 20. Similarly, Asada M., *Definition and Legal Justification of Sanctions*, in Asada M. (ed), *Economic Sanctions in International Law and Practice*, op. cited above, p. 5; Cárdenas E.J., Garcia-Rubio M., *Argentina*, in Gowlland-Debbas V. (ed), *National Implementation of United Nations Sanctions: A Comparative Study*, op. cited above, pp. 81-102, p. 82; De Wet E., *The Chapter VII Powers of the United Nations Security Council*, op. cited above, p. 183; Lavranos N., *UN Sanctions and Judicial Review*, in Wouters J., Nolkaemper A., de Wet E. (eds), *The Europeanisation of International Law: The Status of International Law in the EU and its Member States*, op. cited above, p. 191; and Report of the Study Group of the International Law Commission (finalized by Koskenniemi M.), *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, The Erik Castrén Institute Research Reports, 21/2007, 2007, pp. 169-181.

[444] Tzanakopoulos A., *Disobeying the Security Council: Countermeasures against Wrongful States*, op. cited above, p. 75 specifies that this prevalence is limited to treaty law only and not to all those international law norms. In this sense, Article 103 of the UN Charter «does not aspire to establishing hierarchy between norms of international law, but simply to

indirectly, through their mutual MS, and directly, when explicitly addressed in resolutions.[445] While international organisations are not directly bound by UNSC resolutions, obligations might arise from their agreements with the UN.[446] Indirect involvement of international organisations follows Article 48 (2) UN Charter, which requires UN MS to carry out the UNSC decisions «directly and through their action in the appropriate international agencies of which they are members».[447]

The European Union represents a particular case: despite not a UN MS, it nonetheless implements UNSC measures. Arguably, the EU's authority to implement UNSC measures derives from Article 48 (2) UN Charter.[448] The EU's own legal framework further reinforces the organisation commitment to UN values and principles in Articles 3 (5), 21 (1) and (2) (c), and 42 (1) TEU,[449] as

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resolving normative conflicts stemming from treaties». On this debate, also Asada M., *Definition and Legal Justification of Sanctions*, in Asada M. (ed), *Economic Sanctions in International Law and Practice*, op. cited above, pp. 5-6 and p. 18; and, Gioia A., *Diritto internazionale*, op. cited above, p. 467. Interestingly, White N.D., Abass A., *Countermeasures and Sanctions*, in Evans M.D. (ed), *International Law*, op. cited above, p. 556 hold that a justification for the provisions of Article 103 of the UN Charter is that «the UN was established, or has become recognized, as having the competence to uphold and protect community norms, and can therefore direct a collection of States to take measures which would otherwise be unlawful», naming this attitude «partial constitutionalization». On a comprehensive commentary on Article 103 UN Charter, Paulus A., Leiß P., *Article 103*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 2110-2137. More specifically, Krisch N., *Introduction to Chapter VII: The General Framework*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 1261-1262, paras 48-51, analyses Article 103 UN Charter in connection to Chapter VII UN Charter.

[445] The tendency of the Security Council to explicitly call upon non-state entities, such as international organisations, recalls the references to "all States" instead of "all UN Member States".

[446] Gioia A., *Diritto Internazionale*, op. cited above, p. 466. Interestingly, Talmon S., *Ch. I Purposes and Principles, Article 2 (6)*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, p. 269, para 49, reports that in 1991 the Security Council requested to «all international organisations to act strictly in accordance» with its binding decision to impose an embargo against Iraq. Peters A., *Article 25*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 800-804, paras 34-44, discusses the practice by the Security Council to include non-state actors and argues that a Security Council Resolution can be binding on non-Members States and non-States actors solely if there is the subjects/entities expressed consent. However, in pp. 803-804, para 4, the author concludes that «the better view seems to be that the Security Council decisions can deploy internationally binding effects on international legal subjects (States and others, such as individuals) independently of consent, because of the special quality of the UN Charter».

[447] Article 48 (2), UN Charter. On this Article refer also to Reinisch A., Novak N., *Article 48*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 1376-1384.

[448] Gowlland-Debbas V., *Implementing Sanctions Resolutions in Domestic Law*, in Gowlland-Debbas V. (ed), *National Implementation of United Nations Sanctions: A Comparative Study*, op. cited above, p. 46. Differently, other authors argue that Article 48 (2) of the UN Charter gives responsibility of implementation of UNSC measures to the Member States of the Organization and, «if necessary, use the organisations to which they belong». In this regard, Beaucillon C., *Restrictive Measures as Tools of EU Foreign and Security Policy: Promoting Values, from Antiterrorism to Country Sanctions*, in Montaldo S., Costamagna F., Miglio A. (eds), *EU Law Enforcement: The Evolution of Sanctioning Powers*, op. cited above, p. 198 which, moreover, holds that in view of Article 48 (2) «the European Union is a simple tool at the disposal of its Member States». Similarly on this issue, Krisch N., *Introduction to Chapter VII: The General Framework*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 1269-1270, para 67; and, Lavranos N., *UN Sanctions and Judicial Review*, in Wouters J., Nolkaemper A., de Wet E. (eds), *The Europeanisation of International Law: The Status of International Law in the EU and its Member States*, op. cited above, p. 193-194.

[449] Article 3 (5) of the Treaty on European Union, the EU commits to «contribute to peace, security […] as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter». Also with regard to the European Union's external action, the organisation commits to «respect for the principles of the United Nations Charter» and to «promote multilateral solutions to common problems, in particular in the framework of the United Nations» – as per Article 21 (1) TEU – and to «preserve peace, prevent conflicts and strengthen international

well as in the Preamble of the TFEU.[450] Most importantly, Article 347 TFEU requires EU MS to consult and protect the functioning of the internal market when a EU MS implements measures adopted to perform its obligations «for the purpose of maintaining peace and international security».[451]

As a result, the implementation of UNSC measures within the EU requires a delicate balance between the Union itself and its MS. The centralisation of implementation in the hands of the EU – decided by the EU MS themselves – was intended to enhance efficacy and ensure uniform implementation.[452] The Kadi judgments remarkably testimony the tensions of this approach: the European Court of Justice annulled the EU implementing legislation,[453] and established that the prevalence of UN obligations (as per Article 103 UN Charter) does not automatically mean that EU acts are not reviewable by judicial organs.[454] While some criticise the Court of unlawfully reviewing the UNSC decisions, others emphasise that the Court operated a judicial review not on the UNSC

security, in accordance with the purposes and principles of the United Nations Charter», as per Article 21 (2) (c) TEU. Article 42 (1) TEU refers to the common security and defence policy. Other instances in which the TEU mentions the United Nations framework are Article 34 (2) TEU on EU Members which are also members of the UNSC and Article 42 (7) TEU on armed aggressions and mutual aid and assistance «in accordance with Article 51 of the United Nations Charter».

[450] Other provisions of the TFEU mention the United Nations and its Charter. Article 208 (2) TFEU – under Chapter I on Development Cooperation - provides for the Union and its Member States to «comply with the commitments and take account of the objectives they have approved in the context of the United Nations»; Article 214 (7) TFEU establishes the Union's responsibility to ensure humanitarian assistance in a coordinated and consistent manner with the United Nations system; and, Article 220 (1) TFEU guarantees cooperation between the Union, the organs of the United Nations and its specialised agencies. Protocol no. 10 mentions as well provisions on the cooperation between the European Union and the United Nations.

[451] Article 347 TFEU. To be precise, the Article does not exclusively refer to obligations arising from the purpose of maintaining peace and international security but also to those measures taken «in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war».

[452] Portela C., *National Implementation of United Nations Sanctions: Towards Fragmentation*, op. cited above, p. 20.

[453] Interestingly, Beaucillon C., *Restrictive Measures as Tools of EU Foreign and Security Policy: Promoting Values, from Antiterrorism to Country Sanctions*, in Montaldo S., Costamagna F., Miglio A. (eds), *EU Law Enforcement: The Evolution of Sanctioning Powers*, op. cited above, p. 198, argues that the implementation of UNSC measures is «a matter of incorporating the obligations of Members into Union law». Accordingly, this incorporation of EU Member States' obligations under the UN into the EU legal framework is enabled by Article 29 TEU. On the Kadi judgments refer to also, among others, Eden P., *United Nations Targeted Sanctions, Human Rights and the Office of the Ombudsperson*, in Happold M., Eden P. (eds), *Economic Sanctions and International Law*, op. cited above, pp. 139-145; Gioia A., *Diritto internazionale*, op. cited above, p. 468; Honda M., *"Smart Sanctions" by the UN and Financial Sanctions*, in Yoshimura S. (ed), *United Nations Financial Sanctions*, op. cited above, pp. 26-27; Kato A., *Judicial Challenges Against UN Financial Sanctions*, in Yoshimura S. (ed), *United Nations Financial Sanctions*, op. cited above, pp. 120-133, pp. 121-123; Portela C., *National Implementation of United Nations Sanctions: Towards Fragmentation*, op. cited above, pp. 23-24; and, Tzanakopoulos A., *Disobeying the Security Council: Countermeasures against Wrongful States*, op. cited above, p. 135.

[454] Judgment of the Court (Grand Chamber), *Kadi and Al Barakaat International Foundation v Council and Commission*, 3 September 2008, Joined Cases C-402/05 P and C-415/05 P, paras 299-300 and 303, 306, 308. On this matter, White N.D., Abass A., *Countermeasures and Sanctions*, in Evans M.D. (ed), *International Law*, op. cited above, p. 558; Eden P., *United Nations Targeted Sanctions, Human Rights and the Office of the Ombudsperson*, in Happold M., Eden P. (eds), *Economic Sanctions and International Law*, op. cited above, p. 156-161; Gioia A., *Diritto internazionale*, op. cited above, p. 468; and, Klabbers J., *International Law*, op. cited above, pp. 195-196.

resolution *per se* but, instead, on the «internal lawfulness of the domestic act implementing the council resolution»[455] which indeed falls under the Court's jurisdiction.[456]

The process of "indirect" judicial review of UNSC measures is another crucial consequence of the delegation of Chapter VII's implementation to MS. Notably, there is no UN organ nor a formal procedure for judicial review of UNSC resolutions.[457] Provided that the International Court of Justice (ICJ) has no direct competence to review UNSC acts, whenever – either incidentally or through advisory proceedings – the ICJ questions and assesses the legality of a UNSC decision, such determination is not binding on the UN or UNSC.[458] Differently, domestic courts might judicially

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[455] Portela C., *National Implementation of United Nations Sanctions: Towards Fragmentation*, op. cited above, p. 25. Similarly, *inter alia*, Happold M., *Targeted Sanctions and Human Rights*, in Happold M., Eden P. (eds), *Economic Sanctions and International Law*, op. cited above, p. 92; and, Peters A., *Article 25*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, p. 839, para 166. Differently, and more generally, Nevill P., *Interpretation and Review of UN Sanctions by European Courts*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, pp. 418-444, pp. 435-439 lists the problematic issues of the Kadi judgments. Critics also highlight the danger of «let[ting] international peace and security depend on the workings of hundreds or even thousands of local courts, regardless of whether they are located in Luxembourg or Tehran, Karlsruhe or Pyongyang», as reported by Klabbers J., *International Law*, op. cited above, p. 196.

[456] Despite common foreign and security policy (CFSP) matters are excluded from judicial reviews of the Court of Justice of the EU by Article 24 (1) TEU and Article 275 TFEU, Article 275 TFEU itself also provides for some exceptions such as, the possibility to review «the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union». The nexus between EU law and international law is further discussed in Section 5.2. of this Chapter, where it is analysed the relationship of EU restrictive measures with UN non-armed measures, international law as a whole, and the law of countermeasures. On the EU courts' powers within CFSP, among others, Hillion C., Wessel R.A., '*The Good, the Bad and the Ugly': Three Levels of Judicial Control Over the CFSP*, in Blockmans S., Koutrakos P. (eds), *Research Handbook on the EU's Common Foreign and Security Policy*, Edward Elgar Publishing, 2018, pp. 65-87, pp.67-73; and, Eckes C., *The Law and Practice of EU Sanctions*, in Blockmans S., Koutrakos P. (eds), *Research Handbook on the EU's Common Foreign and Security Policy*, op. cited above, pp. 206-229.

[457] Tzanakopoulos A., *Disobeying the Security Council: Countermeasures against Wrongful States*, op. cited above, p. 110 interestingly studies the concept of judicial review to then conclude that «It appears thus that there is no possibility for judicial determination of UN responsibility for Council action. There is no possibility for 'judicial review' properly so called, in the sense of judicial review of Council action in both a binding and systematic manner». In this regard, among others, Achilleas P., *United Nations and Sanctions*, in Asada M. (ed), *Economic Sanctions in International Law and Practice*, op. cited above, p. 27; Chesterman S., Johnstone I., Malone D.M., *Law and Practice of the United Nations: Documents and Commentary*, op. cited above, p. 127 and p. 129; Conforti B., Focarelli C., *The Law and Practice of the United Nations*, op. cited above, p. 73; Gordon R., Smyth M., Cornell T., *Sanctions Law*, op. cited above, p. 14; Kochler H., *Sanctions and International Law*, op. cited above, p. 31; Klabbers J., *International Law*, op. cited above, p. 196; and, Zamani S.G., Mazaheri J., *The Need for International Judicial Review of UN Economic Sanctions*, in Marossi A.Z., Bassett M.R. (eds), *Economic Sanctions under International Law: Unilateralism, Multilateralism, Legitimacy, and Consequences*, op. cited above, p. 234. Interestingly, Peters A., *Article 25*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, p. 836, para 159 notices, instead, that while the mandates of UN monitoring bodies of such measures «do not explicitly foresee any review of legality of the Council decisions [it does] not exclude such assessments either». Similar to this latter argument, Boon K.E., *Timing Matters: Termination Policies for UN Sanctions*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, pp. 253-254.

[458] Peters A., *Article 25*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 835-836, paras 156-157. Similarly, Chesterman S., Johnstone I., Malone D.M., *Law and Practice of the United Nations: Documents and Commentary*, op. cited above, p. 127 and p. 129; Conforti B., Focarelli C., *The Law and Practice of the United Nations*, op. cited above, p. 5, p. 17; De Wet E., *The Chapter VII Powers of the United Nations Security Council*, op. cited above, p. 55; Lowe V., Roberts A., Welsh J., Zaum D., *Introduction*, in Lowe V., Roberts A., Welsh J., Zaum D. (eds), *The United Nations Security Council and War: The Evolution of Thought and Practice since 1945*, op. cited above, p. 41; Tzanakopoulos A., *Disobeying the Security Council: Countermeasures against Wrongful States*, op. cited above, p. 110, p. 112; and, Zamani S.G., Mazaheri J., *The Need for*

review implementing legislation and thus indirectly review UNSC measures, despite their judgments bind solely the State concerned and not UN organs.[459] If a domestic court finds a violation, the State should disapply the relevant UNSC measures,[460] thereby risking a breach of its Article 25 UN Charter obligation to accept and carry out UNSC decisions, and potentially triggering its responsibility under international law. [461]

International Judicial Review of UN Economic Sanctions, in Marossi A.Z., Bassett M.R. (eds), *Economic Sanctions under International Law: Unilateralism, Multilateralism, Legitimacy, and Consequences*, op. cited above, pp. 227-228. Interestingly, Tzanakopoulos A., *Disobeying the Security Council: Countermeasures against Wrongful States*, op. cited above, p. 54 reports the opposition of the Great Powers to the proposal at San Francisco to enable the ICJ with compulsory jurisdiction over the legality of UN political acts and, at p. 98, argues how the ICJ would actually be the only court able to undertake judicial review of UN and Security Council actions. Moreover, the author, at pp. 105-107 argues that an ICJ incidental determination might anyway result in a binding decision – although solely for the parties involved in the dispute and not for the whole UN. De Wet E., *The Chapter VII Powers of the United Nations Security Council*, op. cited above, pp. 25- 129 discusses the ICJ's role as for what pertains the judicial review of the United Nation's actions by focusing particularly on the instrument of advisory opinions.

[459] Tzanakopoulos A., *Disobeying the Security Council: Countermeasures against Wrongful States*, op. cited above, p. 109. At p. 112 the author argues that although «there is some possibility of (indirect) 'judicial review' of Security Council action, this can certainly not serve as an adequate control mechanism». Similarly, Gowlland-Debbas V., *Implementing Sanctions Resolutions in Domestic Law*, in Gowlland-Debbas V. (ed), *National Implementation of United Nations Sanctions: A Comparative Study*, op. cited above, pp. 33-78, p. 59 which argues that such judicial review can solely be incidental and points out how domestic courts do not always have the competence to review implementing legislation. Moreover, it is argued that domestic courts are likely to uphold the measures of the Security Council by attaching their legitimacy from the Security Council Resolution, especially when it concerns matters of national security. Similarly, on the issue of the competence of national courts on judicially reviewing on questions concerning national security, Gowlland-Debbas V., *Concluding Remarks*, in Gowlland-Debbas V. (ed), *National Implementation of United Nations Sanctions: A Comparative Study*, op. cited above, pp. 643-658, p. 655.

[460] Tzanakopoulos A., *Disobeying the Security Council: Countermeasures against Wrongful States*, op. cited above, p. 109. Interestingly, Zamani S.G., Mazaheri J., *The Need for International Judicial Review of UN Economic Sanctions*, in Marossi A.Z., Bassett M.R. (eds), *Economic Sanctions under International Law: Unilateralism, Multilateralism, Legitimacy, and Consequences*, op. cited above, p. 234 suggest that, subsequent to the Kadi and Al Barakaat judgments, the lack of critics by the Security Council and, instead, the improvement of its procedures (*e.g.* the creation of the Ombudsperson mentioned above) signify that the «indirect review is welcome[d]».

[461] Among others, Cárdenas E.J., Garcia-Rubio M., *Argentina*, in Gowlland-Debbas V. (ed), *National Implementation of United Nations Sanctions: A Comparative Study*, op. cited above, p. 98; Gowlland-Debbas V., *Implementing Sanctions Resolutions in Domestic Law*, in Gowlland-Debbas V. (ed), *National Implementation of United Nations Sanctions: A Comparative Study*, op. cited above, p. 35; Nevill P., *Interpretation and Review of UN Sanctions by European Courts*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, p. 418; and Tzanakopoulos A., *Disobeying the Security Council: Countermeasures against Wrongful States*, op. cited above, p. 190. Interestingly, Tzanakopoulos A., *Disobeying the Security Council: Countermeasures against Wrongful States*, op. cited above, at p. 23, argues that the delegation of the implementation of Chapter VII measures to Member States which are in violation of the UN Charter might constitute a UNSC conduct that gives rise to the Organisation's international responsibility. Differently, De Wet E., *The Chapter VII Powers of the United Nations Security Council*, op. cited above, pp. 376-377 argues that by analysing Article 25 of the UN Charter together with Article 2 (5) of the UN Charter, it is evident that Member States are bound to respect Security Council' Resolutions pursuant Chapter VII solely when those are not illegal. In this sense, the author argues that «It then becomes illogical to see how member states can be obliged, in terms of Article 25, to follow binding resolutions which are not in accordance with the Charter. It also implies that the "supremacy rule" articulated in Article 103 of the Charter would only apply to Security Council decisions that remains within the boundaries of the Charter» (p. 377). See also, pp. 377-384. Similarly interesting, Peters A., *Article 25*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, p. 838, para 164 argues that «a domestic court decision finding that an implementing act is, for example, unconstitutional in the domestic legal order, does not as such relieve the State from its international legal obligation to implement under Art. 25». Moreover, the same author, at p. 840, para 170, discusses how if judicial review of the Security Council' decisions is delegated to domestic courts, Article 25 «would be deprived of its practical effect (*effet utile*)». Moreover, the author argues that a judicial review of Member States is not automatically a violation of Article 25 by that State whenever such review of an implementing legislation is «temporary» and as «residual device when plausible indicators and serious problems of international law which have their root cause in council decisions themselves».

Debates over the legality of States' non-compliance with UNSC resolutions revolve around the ICJ's possible determination,[462] the interpretations of Articles 25 and 2 (5) UN Charter,[463] and the possible invocation of the instrument of countermeasures.[464] Domestic and regional courts have nevertheless judicially reviewed UNSC decisions,[465] despite such review is frequently complicated

[462] In this regard, De Wet E., *The Chapter VII Powers of the United Nations Security Council*, op. cited above, at p. 58, which argues that an ICJ opinion of illegality of a specific Security Council's resolution would have effect and undermine the legitimacy of such act and reduce compliance. Thus, an ICJ found illegality would justify States' non-compliance. Similarly, Peters A., *Article 25*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, p. 835, paras 156-157.

[463] While some authors highlight that Article 25 of the UN Charter does not effectively provide for a justification of States' non-compliance with Security Council' decisions, others argue that it would be illogical to oblige States to compliance as per Article 25 of the UN Charter in specific cases. For the first viewpoint, among others Burdeau G., Stern B., *France*, in Gowlland-Debbas V. (ed), *National Implementation of United Nations Sanctions: A Comparative Study*, op. cited above, pp. 195-232, p. 197; Gowlland-Debbas V., *Implementing Sanctions Resolutions in Domestic Law*, in Gowlland-Debbas V. (ed), *National Implementation of United Nations Sanctions: A Comparative Study*, op. cited above, p. 35; and, Tzanakopoulos A., *Disobeying the Security Council: Countermeasures against Wrongful States*, op. cited above, p. 190. For the second instance, instead, De Wet E., *The Chapter VII Powers of the United Nations Security Council*, op. cited above, pp. 376-377 and pp. 377-384; and, Peters A., *Article 25*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, p. 840, para 170. A commentary of these Articles is provided by – respectively – Peters A., *Article 25*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 787-854; and, Aust H.P., *Article 2 (5)*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 235-251.

[464] *Inter alia*, Krisch N., *Article 41*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 1324-1325, para 35; Ruys T., *Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, p. 39; and, Tzanakopoulos A., *Disobeying the Security Council: Countermeasures against Wrongful States*, op. cited above, pp. 184-185 and pp. 189-190. The instrument of countermeasures will be analysed in detail in this Chapter II, in Section 4.

[465] Tzanakopoulos A., *Disobeying the Security Council: Countermeasures against Wrongful States*, op. cited above, p. 125 highlights how when an indirect judicial review occurs within an international organisation, it increases its intrinsic value since acquires a collective aspect. Many examples of indirect judicial review are identifiable. Among others, both the Organisation of African Unity (OAU) – now African Union (AU) – and the Organisation of Islamic Cooperation (OIC) pronounced themselves against some of the Security Council's Article 41 measures. In this regard, OAU's AHG/Dec.127 (XXXIV) of June 1998 in which it is clearly stated that «decides not to comply any longer with Security Council Resolutions 748 (1992) and 883 (1993) on sanctions, with effect from September 1998, […], owing to the fact that the said resolutions violate Article 27 paragraph 3, Article 33 and Article 36 paragraph 3 of the United Nations Charter, and the considerable human and economic losses suffered by Libya and a number of other African peoples as a result of the sanctions; 3. decides on moral and religious grounds and with immediate effect that the OAU and its members will not comply from now on with the sanctions imposed against Libya related to religious obligations, providing humanitarian emergencies or fulfilling OAU statutory obligations» asking for suspension of said resolutions imposing a sanctioning regime against Libya. Afterwards, the sanctioning regime had been indeed suspended by the UN. The OIC, instead, contested the UN measures against Yugoslavia. In this sense, refer to the same author and reference mentioned above at pp. 125-126 and pp. 154-200. At the European level, among others, the most remarkable are the Kadi case and the Yusuf case. In this regard, Nevill P., *Interpretation and Review of UN Sanctions by European Courts*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, p. 420-421, pp. 425-433; and, Ruys T., *Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, p. 38. National courts examined as well UNSC measures such as the case of the Dutch case of Stichting Al-Haramain Humanitarian Aid (2006), the Pakistan case of Hafiz Muhammad Saeed and Others v. Government of Punjab (2009), the UK case of Hay v HM Treasury (2009) and many others. In this regard, Tzanakopoulos A., *Disobeying the Security Council: Countermeasures against Wrongful States*, op. cited above, pp. 131-136 which presents a detailed analysis of many cases in this regard. On this, also Honda M., *"Smart Sanctions" by the UN and Financial Sanctions*, in Yoshimura S. (ed), *United Nations Financial Sanctions*, op. cited above, pp. 27-28; Nevill P., *Interpretation and Review of UN Sanctions by European Courts*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, p. 421; and, Peters A., *Article 25*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 837-840, paras 160-169.

by reasons of secrecy or national security, especially when courts seek evidence underpinning individuals' designations to other national courts.[466] International entities – most notably, the ECtHR – have as well pronounced over States' implementing legislation.[467]

These elements highlight that, although the UN framework lacks a formal review mechanism, UNSC measures are occasionally subjected to a limited system of judicial scrutiny through domestic, regional, and international entities. Nonetheless, this review remains sporadic, fragmented, heterogeneous, and purely based on the implementing legislations of States.

3.2.5. Final remarks on the UN sanctions system

Both the UN Security Council and its resort to non-armed measures have been substantially criticised by the international community over the years. As briefly noted above, concerns frequently include the UNSC wide discretion; the lack of transparency; the occasional political rationale; the so-called «fairness lacunae»;[468] the absence of judicial review; the ineffective termination procedure; the human rights impact; and accountability.[469] UN non-armed measures have also been contested in terms of their effectiveness and morality, with some scholars arguing that they contradict the UN

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[466] Gioia A., *Diritto Internazionale*, op. cited above, p. 468. Similarly, Portela C., *National Implementation of United Nations Sanctions: Towards Fragmentation*, op. cited above, p. 28.

[467] Among others, Human Rights Committee, the Committee on Economic, Social and Cultural Rights, and the ECtHR case law. On this, among others, Gioia A., *Diritto internazionale*, op. cited above, p. 468; Kato A., *Judicial Challenges Against UN Financial Sanctions*, in Yoshimura S. (ed), *United Nations Financial Sanctions*, op. cited above, pp. 123-126; Nevill P., *Interpretation and Review of UN Sanctions by European Courts*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, pp. 422-425 and pp. 433-435; Peters A., *Article 25*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 836-837, paras 158-159; Ruys T., *Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, p. 38; and, Tzanakopoulos A., *Disobeying the Security Council: Countermeasures against Wrongful States*, op. cited above, p. 109, p. 131.

[468] Prost K., *Security Council Sanctions and Fair Process*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, pp. 213-235, p. 216.

[469] Among others, Achilleas P., *United Nations and Sanctions*, in Asada M. (ed), *Economic Sanctions in International Law and Practice*, op. cited above, p. 26, p. 32; Hakimdavar G., *A Strategic Understanding of UN Economic Sanctions: International Relations, Law and Development*, op. cited above, p. 56; Hovell D., *Glasnost in the Security Council: The Value of Transparency*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, pp. 194-212, pp. 194-199; Klabbers J., *International Law*, op. cited above, p. 191; Krisch N., *Introduction to Chapter VII: The General Framework*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 1243-1243, paras 13-15; Krisch N., *Article 41*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 1314-1319, paras 19-25; Kochler H., *Sanctions and International Law*, op. cited above, pp. 31-32; Prost K., *Security Council Sanctions and Fair Process*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, pp. 213-218; Tzanakopoulos A., *Disobeying the Security Council: Countermeasures against Wrongful States*, op. cited above, p. 9; van den Herik L., *The Individualization and Formalization of UN Sanctions*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, p. 7; and, Yoshimura S., *UN Economic Sanctions and Financial Measures – Evolution and Challenges*, in Yoshimura S. (ed), *United Nations Financial Sanctions*, op. cited above, p. 10. The decision-making process of the UNSC has been criticised by the Non-Aligned Movement (NAM) as well, which, interestingly, comprises two-third of UN membership. In this regard, and on other criticisms, Ishigaki T., *Recent Challenges Regarding the Implementation of UN Security Council Sanctions*, in Yoshimura S. (ed), *United Nations Financial Sanctions*, op. cited above, pp. 53-59.

mandate of economic cooperation, constituting a threat to the peace and security,[470] or even amounting to «collective punishment».[471]

A further notorious challenge to UNSC' credibility is its inability to act in situations clearly falling within Article 39 UN Charter. This inability – largely attributable to the permanent members' veto power – has been invoked by States to justify unilateral adoption of non-armed economic measures against other States. Although the UN retains the exclusive power to maintain and restore international peace and security, its Charter does not explicitly prohibit the possibility for States or regional organisations to adopt measures.[472] Instead, Article 53 (1) UN Charter envisages that the UNSC may rely on «regional arrangements or agencies for enforcement action under its authority».[473] This is possible solely in presence of a prior UNSC authorisation,[474] yet unilateral economic measures are often enacted without any UNSC authorisation.

While the legality of many unilateral measures is contested under international law,[475] it is important to recall that certain economic measures are specifically provided by international law and thus do possess a recognised legal basis. This is exemplified by the instrument of countermeasures, regulated by the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA).

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[470] Hakimdavar G., *A Strategic Understanding of UN Economic Sanctions: International Relations, Law and Development*, op. cited above, p. 53.

[471] Kochler H., *Sanctions and International Law*, op. cited above, p. 32 argues that the UN comprehensive measures against Iraq amounted to «a form of collective punishment of the entire population of the country». Similarly, Mohamad R., *Unilateral Sanctions in International Law: A Quest for Legality*, in Marossi A.Z., Bassett M.R. (eds), *Economic Sanctions under International Law: Unilateralism, Multilateralism, Legitimacy, and Consequences*, op. cited above, p. 74; and, White N.D., Abass A., *Countermeasures and Sanctions*, in Evans M.D. (ed), *International Law*, op. cited above, p. 554. Interestingly, Gowlland-Debbas V., *UN Sanctions and International Law: An Overview*, in Gowlland-Debbas V. (ed), *United Nations Sanctions and International Law*, Kluwer Law International, 2001, pp. 1-28, p. 12 reads the element of "punishment" contested by some authors to the UN non-armed measures as the measures' «creation of irreversible damage to the target state concerned».

[472] Spagnolo A., *Entering the Buffer Zone between Legality and Illegality: EU Autonomous Sanctions under International Law*, in Montaldo S., Costamagna F., Miglio A. (eds), *EU Law Enforcement: The Evolution of Sanctioning Powers*, op. cited above, pp. 215-240, p. 219.

[473] Article 53 (1), Chapter VIII, UN Charter, 1945. Walter C., *Article 53*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 1478-1524, provides a commentary of this Article. On an introduction on regional arrangements in the UN Charter, refer also to Walter C., *Introduction to Chapter VIII*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 1429-1444 which also discuss about the relationship between Chapter VIII and Chapter VII at pp. 1443-1444, paras 31-34.

[474] Article 53 (1), Chapter VIII, UN Charter, 1945. Exceptions are provided within the same Article for those «measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state». As per Article 53 (2) of the UN Charter an enemy state – as used in paragraph 1 of Article 53 – «applies to any state which during the Second World War has been an enemy of any signatory of the present Charter».

[475] The legality of the panorama of unilateral economic measures enacted by States will be analysed in Section 6 of this Chapter.

4. The instrument of countermeasures as per the International Law Commission's Draft on Responsibility of States for Internationally Wrongful Acts

The International Law Commission – a UN body established in 1947 – codified the regime of international responsibility of states for internationally wrongful acts in the Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter, ARSIWA) in 2001. While the UN General Assembly has acknowledged this codification, no official UN codification or treaty has been concluded, thus, ARSIWA remains soft law and its provisions are not binding on States.[476] Despite this, ARSIWA has been cited by both States and the ICJ, acquiring significant importance in the international community.

This dynamic reflects the ARSIWA's «paradoxical relationship between form and authority»,[477] namely the tension between its lack of a formal binding force and its considerable influence within the international legal order. Most frequently, ARSIWA provisions are invoked as an authoritative restatement of customary international law provisions, although other provisions are instead recognised as retaining a *lex ferenda* character, thereby reflecting a progressive development rather than codification.[478] ARSIWA's legal value as soft law derives from its "soft codification", which circumvents the legal certainty typical of treaty-based provisions, being favourable to States, as it enables them to preserve a high degree of interpretation and discretionary application that solely soft law instruments allow.

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[476] Gioia A., *Diritto internazionale*, op. cited above, p. 388. Similarly, Tams C.J., *Enforcing Obligations Erga Omnes in International Law*, Cambridge University Press, 2005, p. 13.

[477] In this regard, Caron D.D., *The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority*, American Journal of International Law, Vol. 96, no. 4, 2002, pp. 857-873 discussing that the paradox lies in the fact that ARSIWA might have «more influence as an ILC text than as a multilateral treaty»; and, Bordin F.L., *Still Going Strong: Twenty Years of the Articles on States Responsibility's 'Paradoxical' Relationship Between Form and Authority*, Blog of the European Journal of International Law (EJIL: Talk!), 03 August 2021.

[478] Bordin F.L., *Still Going Strong: Twenty Years of the Articles on States Responsibility's 'Paradoxical' Relationship Between Form and Authority*, op. cited above. This ambiguity is also linked to the broader issue of the nature of ILC products. In this sense, while ILC products are generally classifiable as «teachings of the most highly qualified publicists of the various nations, [that might be employed] as subsidiary means for the determination of rules of law» under Article 38 (1) (d) of the ICJ Statute, this issue remains contested precisely due to the *lex ferenda* nature of some ILC provisions – including ARSIWA. In this regard, Wood M., *Teachings of the Most Highly Qualified Publicists (Art. 38 (1) ICJ Statute)*, Max Planck Encyclopedia of Public International Law [MPEPIL], March 2017, para 13. Similarly, Bordin F.L., *Still Going Strong: Twenty Years of the Articles on States Responsibility's 'Paradoxical' Relationship Between Form and Authority*, op. cited above. The International Law Commission (ILC), *Draft Conclusions on Identification of Customary International Law, with Commentaries*, A/73/10, 2018, Conclusion 14 "Teachings", paragraph (3), p. 151, of also specifies that caution is needed as «writers may aim not merely to record the state of the law as it is (*lex lata*) but also to advocate its development (*lex ferenda*). In doing so, they do not always distinguish clearly between the law as it is and the law as they would like it to be». Additional arguments suggest caution: inter alia, particularly within arbitration investment cases – which often rely on ARSIWA – ARSIWA' use is claimed to exceed the meaning of "teachings", therefore challenging the provision. On this practice, inter alia, Lekkas S-I., *Uses of the Work of International Law Commission on State Responsibility in International Investment Arbitration*, in Merkouris P., Kulick A., Álvarez-Zarate J.-M., Żenkiewicz M. (eds.), *Custom and its Interpretation in International Investment Law*, Cambridge University Press, 2024, pp. 93-122, p. 95. More widely, on the meaning of "the most highly qualified publicists", refer to Helmersen S.T., *Finding 'the Most Highly Qualified Publicists': Lessons from the International Court of Justice*, European Journal of International Law, Vol. 30, no. 2, May 2019, pp. 509-535.

A State's international responsibility arises from any internationally wrongful act,[479] defined in Article 2 ARSIWA as an action or omission attributable to the State and constituting a breach of its international obligations. As a consequence, the injured State might enact countermeasures against the responsible State, as per Article 49 ARSIWA. Such countermeasures are internationally wrongful acts *per se* but, when enacted in accordance with the ARSIWA provisions, their wrongfulness is precluded, as established by Article 22 ARSIWA.[480] Notably, the ILC ARSIWA Commentary specifies that the preclusion of wrongfulness for countermeasures is «relative» since it only concerns the relationship between the injured and responsible States, not third parties whose obligations may be breached by the injured State' countermeasures.[481]

Countermeasures – regulated in Articles 49-54 ARSIWA – are temporary measures which might be taken from an injured State[482] against a State who is «responsible for an internationally wrongful act» in order to prompt compliance with its obligations,[483] rather than act as punishment.[484] The State adopting the countermeasures assess the existence of a wrongful act on its own, without the need for an official assessment by, for instance, a competent international body or third-party mechanism.[485] Countermeasures shall consist in non-performance of obligations,[486] without affecting crucial international principles such as use of force, human rights, and peremptory norms of general international law.[487]

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[479] Article 1, ARSIWA.

[480] ARSIWA (in Part I, Chapter V) outlines six circumstances precluding the wrongfulness of an act or omission of a State: (i) valid consent by the State to the commission of such act (Article 20 ARSIWA); (ii) lawful actions taken in self-defence (Article 21 ARSIWA); (iii) actions constituting countermeasures (Article 22 ARSIWA); (iv) acts due to force majeure (Article 23 ARSIWA); (v) acts taken under distress or with no other reasonable possibility (Article 24 ARSIWA); and, (vi) necessary acts as defined by ARSIWA (Article 25 ARSIWA).

[481] ILC ARSIWA Commentary, Article 49 ARSIWA, paras 4 and 5. It is however specified that in some cases «indirect or collateral effects cannot be entirely avoided» (para 5).

[482] A State is "injured" when the obligation breached was owed to (a) that State individually, or (b) a group of States including that State, or the international community as a whole, where the breach affects especially that State or it radically changes all the other States' position on performance of obligations (*i.e.*, the case of interdependent obligations). Regarding the example, Ruys T., *Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, p. 35; and, Asada M., *Definition and Legal Justification of Sanctions*, in Asada M. (ed), *Economic Sanctions in International Law and Practice*, op. cited above, p. 13 and p. 15.

[483] Article 49 (1), ARSIWA.

[484] These essential elements of the instrument of countermeasures are highlighted in Article 49 ARSIWA, but are also mentioned by the ILC ARSIWA Commentary, Article 49 ARSIWA, paras 1-4 and para 7.

[485] Ronzitti N., *Sanctions as Instruments of Coercive Diplomacy: An International Law Perspective*, in Ronzitti N. (ed), *Coercive Diplomacy, Sanctions and International Law*, op. cited above, p. 12. In fact, the ARSIWA Commentary specifies that unilateral assessments are pursued at the State's «own risk» and thus, its international responsibility over a wrongful action based on an incorrect assessment is not precluded, as per ILC ARSIWA Commentary, Article 49, para 3.

[486] As per Article 49 (2) ARSIWA, countermeasures shall consist of the injured State' non-performance of its obligations towards the responsible State.

[487] More precisely, as per Article 50 (1) ARSIWA – the obligations (a) to refrain from the threat or the use of force, as established by the UN Charter; (b) to protect fundamental human rights; (c) of humanitarian character; (d) of peremptory norms of general international law. Interestingly, Ronzitti N., *Diritto internazionale*, op. cited above, p. 435 explains that, indeed, a countermeasure in violation of peremptory norms of general international law would affect not only the responsible state but also all the other states entitled to those obligations arising from peremptory norms of general

Countermeasures should be proportionate to the «injury suffered», taking into consideration both the «gravity» of the internationally wrongful act and the rights involved.[488] The ARSIWA Commentary highlights that proportionality is more easily fulfilled when countermeasures are directed at «the same or a closely related» obligations to the ones breached,[489] though there is no duty to enact "reciprocal countermeasures" which might be unfeasible and «inconceivable», especially regarding human rights,[490] or peremptory norms.[491]

Before enacting countermeasures, the injured State should call upon the responsible State to perform its obligations, notify decisions on such measures, and offer negotiations, but «urgent countermeasures» – such as freezing assets – may be taken whenever necessary to «preserve its rights».[492] Resumption of performance of obligations should be guaranteed, and countermeasures should terminate when the responsible State has complied with its obligations,[493] or suspended whenever the internationally wrongful act has terminated and whenever the dispute is pending before a binding court.[494] Thus, as noted, the goal of countermeasures is not to punish the responsible State but, instead, to induce it to cease the international wrongful act, guarantee non-repetition, and provide full reparation for the injury caused.[495]

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international law. Similarly, dispute settlement procedures between the two states and the inviolability of diplomatic agents and premises are obligations which both states should continue to fulfil also throughout countermeasures (Article 50 (2) ARSIWA).

[488] Article 51 ARSIWA.

[489] ILC ARSIWA Commentary, Part III, Chapter II, para 5.

[490] ILC ARSIWA Commentary, Part III, Chapter II, para 5. The clarification on the non-identicality between tackled obligations and violation suffered is aimed at ensuring that each countermeasure is assessed according to the specific situation, as much as preventing possible abuses as argued by the ILC ARSIWA Commentary, Part III, Chapter II, para 6 on the need of «adequate safeguards against abuse».

[491] This is a further example of non-reciprocity between countermeasures and breached obligations. As mentioned above, Article 50 (1) ARSIWA precludes the possibility of countermeasures to affect obligations under peremptory norms of general international law. Article 26 ARSIWA specifies that any act in violation of an obligation arising from a peremptory norm of general international law is an internationally wrongful act, and thus its wrongfulness is not precluded as in other cases presented above.

[492] Article 52 (1) and (2) ARSIWA.

[493] Articles 49 (3) and 53 ARSIWA.

[494] Article 52 (3) ARSIWA. However, Article 52 (4) ARSIWA specifies that suspension of countermeasures when these events occur is not due if the responsible State does not rely on good faith in dispute settlement procedures.

[495] The conjunct reading of Article 49 and 53 ARSIWA is also suggested by the ILC ARSIWA Commentary under Article 53 ARSIWA, para 2. Moreover, Article 53 ARSIWA mentions that termination shall occur when «the responsible State has complied with its obligations under part two in relation to the internationally wrongful act», which in Chapter I (Articles 30 and 31 ARSIWA) establishes the obligations of the responsible State to cease the international wrongful act, to offer assurances and guarantees of non-repetition and to make full reparation of the caused injury (both material or moral), and in Chapter II regulates reparation. Moreover, the ILC ARSIWA Commentary, Part II, Chapter III, paras 5 and 6 specifies that punishment of States is not a practice within international law. To this end, the Commentary argues that in Nuremberg and in the Tokyo Military Tribunals neither Germany nor Japan were considered as "criminals". Within this context, the Commentary also cites the International Military Tribunal (Nuremberg) case of 1st October 1946 in which it was notably stated that «[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced».

4.1. Countermeasures adoptable by States other than the injured party

Article 54 ARSIWA establishes that the Articles do not «prejudice the right of any State, entitled under Article 48, paragraph 1» to invoke the responsibility of another State and to take lawful measures to ensure cessation of the breach and reparation of the injured State or other beneficiaries. Importantly, Article 48 ARSIWA allows States other than the injured one to invoke responsibility whenever (a) the breached obligation is «owed to a group of States» including the State invoking the responsibility and is established to protect the collective interests of such group (*i.e.* obligations *erga omnes partes*); or (b) the breached obligation is «owed to the international community as a whole»[496] (*i.e.* obligations *erga omnes*).[497]

Thus, while such States may lawfully invoke responsibility and demand cessation and performance in cases involving violations of *erga omnes partes* or *erga omnes* obligations,[498] it remains controversial whether they may also adopt countermeasures. Scholarly interpretations diverge. A part of the doctrine maintains that countermeasures are solely available to injured States, thus other States might adopt countermeasures solely within an international organisation or with its authorisation.[499] Others highlight that Article 54 ARSIWA refers to "lawful measures" rather than "countermeasures", suggesting that solely intrinsically lawful measures – such as retorsions – are envisioned for non-injured States.[500] Yet, for some, the reference to "lawful measures" is redundant, since measures that are lawful *per se* – such as retorsions – do not require specific qualification as

[496] Article 48 (1), ARSIWA.

[497] To be precise, Article 48 ARSIWA does not use the wording of "*erga omnes partes* obligations" and of "*erga omnes* obligations". In this regard, the ILC ARSIWA Commentary, Article 48, paras 6 and 9, recognises the use of the two categorisations but declares that the avoidance of use within the Articles was chosen because the term "obligations *erga omnes*" «conveys less information than the Court's reference to the international community as a whole and has sometimes been confused with obligations owed to all the parties to a treaty» (para 9).

[498] Moreover, ARSIWA and its Commentary do not provide specification on of which rights are indeed "collective rights". The ICJ case law might help to assess which rights are collective rights. On this, the famous Barcelona Traction (ICJ, *Case concerning the Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain), 1970) seems to suggest – at para 34 – that acts of aggression, genocide, basic human rights, protection from slavery and racial discrimination might be included as obligations *erga omnes*. Differently, Simma B., *From Bilateralism to Community Interest in International Law*, The Hague Academy Collected Courses Online / Recueil des cours de l'Académie de La Haye en ligne, Vol. 250, Brill / Nijhoff, 1994, pp. 217-384, pp. 235-242 identifies as "community interests" international peace and security, solidarity between developed and developing countries, protection of the environment, common heritage, and human rights. On the definition of the *erga omnes* obligations, among others, Petman J., *Resort to Economic Sanctions by Not Directly Affected States*, in Forlati Picchio L., Sicilianos L.-A. (eds), *Les sanctions économiques en droit international / Economic Sanctions in International Law*, op. cited above, pp. 309-377, pp. 309-325, and pp. 357-360; Spagnolo A., *Entering the Buffer Zone between Legality and Illegality: EU Autonomous Sanctions under International Law*, in Montaldo S., Costamagna F., Miglio A. (eds), *EU Law Enforcement: The Evolution of Sanctioning Powers*, op. cited above, pp. 236-237; and, Tams C.J., *Enforcing Obligations Erga Omnes in International Law*, op. cited above, pp. 97-157.

[499] Reporting such argument, Gioia A., *Diritto internazionale*, op. cited above, p. 440; and White N.D., Abass A., *Countermeasures and Sanctions*, in Evans M.D. (ed), *International Law*, op. cited above.

[500] Indeed, as mentioned above, countermeasures are measures unlawful *per se*, unless enacted in response to an internationally wrongful act and in accordance with ARSIWA, and thus cannot constitute "lawful measures".

lawful responses to internationally wrongful acts.[501] Others view the allocation of Article 54 ARSIWA within the section on "countermeasures" as an obvious indication that the provision indeed concerns – and enables – countermeasures.[502]

The ARSIWA commentary explains that the use of 'lawful measures' in Article 54 ARSIWA was intended to «not prejudice any position» on measures taken by non-injured States to protect collective interests or obligations owned to the international community.[503] Accordingly, Article 54 «leave[…] open the question» on whether countermeasures might be taken to respond a «general interest», distinguishable from that individual of the injured State.[504] While the commentary recalls the ICJ's "Barcelona Traction" case[505] to affirm that all States have a legal interest in the compliance of obligations owed to the international community as a whole,[506] it highlights the limited practice and resulting legal uncertainty, [507] and therefore concludes that it was not «appropriate» to include in the ARSIWA a provision allowing non-injured States to enact countermeasures.[508]

Beyond the ILC's caution, some scholars warn that allowing countermeasures in response to violations of *erga omnes partes* or *erga omnes* obligations – also referred to as "countermeasures in the general interest", "collective countermeasures" or "third-party countermeasures" – risks shifting the enforcement of collective interests to individual states «acting on their own understanding of international legality» of conducts,[509] thereby increasing the danger of abuse.[510] Others argue that such measures would increase the costs of breaching international law and strengthen the international

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[501] Spagnolo A., *Entering the Buffer Zone between Legality and Illegality: EU Autonomous Sanctions under International Law*, in Montaldo S., Costamagna F., Miglio A. (eds), *EU Law Enforcement: The Evolution of Sanctioning Powers*, op. cited above, p. 235. Similarly, *inter alia*, Asada M., *Definition and Legal Justification of Sanctions*, in Asada M. (ed), *Economic Sanctions in International Law and Practice*, op. cited above, p. 17; Gioia A., *Diritto internazionale*, op. cited above, p, 440; White N.D., Abass A., *Countermeasures and Sanctions*, in Evans M.D. (ed), *International Law*, op. cited above, p. 543; and, Ronzitti N., *Sanctions as Instruments of Coercive Diplomacy: An International Perspective*, in Ronzitti N. (ed), *Coercive Diplomacy, Sanctions and International Law*, op. cited above, pp. 28-29.

[502] Article 54 ARSIWA is indeed allocated under Part III, Chapter II of the Articles entitled "Countermeasures". In this regard, Asada M., *Definition and Legal Justification of Sanctions*, in Asada M. (ed), *Economic Sanctions in International Law and Practice*, op. cited above, p. 17.

[503] ILC ARSIWA Commentary, Article 54 ARSIWA, para 7.

[504] ILC ARSIWA Commentary, Article 22 ARSIWA, para 6.

[505] ICJ, *Case concerning the Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain), 1970.

[506] ILC ARSIWA Commentary, Article 22 ARSIWA, para 6. Tams C.J., *Enforcing Obligations Erga Omnes in International Law*, op. cited above, pp. 202-204 explains in detail the debate around the Barcelona Traction case in connection to the discipline of countermeasures.

[507] ILC ARSIWA Commentary, Article 54 ARSIWA, paras 3 and 6. Similarly, ILC ARSIWA Commentary, Part III, Chapter II, para 8. Tams C.J., *Enforcing Obligations Erga Omnes in International Law*, op. cited above, p. 311 argues that, instead, practice on countermeasures in response to breaches of *erga omnes* obligations is instead not insufficient. Moreover, it is not mainly western-based, as sometimes claimed, and neither is lacking *opinio juris* on the matter.

[508] ILC ARSIWA Commentary, Article 54 ARSIWA, para 6.

[509] Ruys T., *Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, p. 47.

[510] Tams C.J., *Enforcing Obligations Erga Omnes in International Law*, op. cited above, p. 199. Similarly, Spagnolo A., *Entering the Buffer Zone between Legality and Illegality: EU Autonomous Sanctions under International Law*, in Montaldo S., Costamagna F., Miglio A. (eds), *EU Law Enforcement: The Evolution of Sanctioning Powers*, op. cited above, p. 233.

rule of law.[511] Central to these debates is also the concept of solidarity,[512] which was also discussed in the different drafts of the Articles,[513] with some stressing the "social role" of *erga omnes* obligations in protecting collective interests,[514] while others envisage countermeasures in the general interests as «the beginnings of international public enforcement», yet remain cautious about potential asymmetries.[515]

Between the extremes of debate on the admissibility (or rejection) of countermeasures in the general interests, part of the international community considers them admissible but under certain conditions. These include requiring prior UNSC or GA authorisation,[516] the presence of a formal request to intervene from the directly injured State,[517] or introducing a formal UN notification of any third-party countermeasure adopted detailing the unlawful conduct identified, nature of the measures, duration, and the proportionality assessment.[518] Some propose the introduction of additional

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[511] Ruys T., *Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, p. 47; and Spagnolo A., *Entering the Buffer Zone between Legality and Illegality: EU Autonomous Sanctions under International Law*, in Montaldo S., Costamagna F., Miglio A. (eds), *EU Law Enforcement: The Evolution of Sanctioning Powers*, op. cited above, p. 233.

[512] While the role of solidarity within State Responsibility is certainly recognised, the existence (or nor) of a «normative dimension» of this concept in international law is widely discussed. In this regard, Kassoti E., Idriz N., *'The Kindness of Strangers' – Solidarity in International and EU Law: An Introduction*, in Kassoti E., Idriz N. (eds), *The Principle of Solidarity: International and EU Law Perspectives*, Springer, 2023, pp. 1-14, p. 5. On the concept of solidarity in the context of State responsibility, among others, Eggett C., *Solidarity as an International Legal Norm*, in Kassoti E., Idriz N. (eds), *The Principle of Solidarity: International and EU Law Perspectives*, op. cited above, pp. 29-53, p. 44 and p. 50; Nissel A., *The ILC Articles on State Responsibility: Between Self-Help and Solidarity*, International Law and Politics, Vol. 38, 2006, pp. 355-371; Stejskal P., *The Principle of Solidarity in the Law of Transboundary Groundwater*, in Kassoti E., Idriz N. (eds), *The Principle of Solidarity: International and EU Law Perspectives*, op. cited above, pp. 55-74, p. 63; and, Tladi D., *In Search of Solidarity in International L*aw, in Kassoti E., Idriz N. (eds), *The Principle of Solidarity: International and EU Law Perspectives*, op. cited above, pp. 17-28, pp. 25-26. Interestingly, Koskenniemi M., *Solidarity Measures: State Responsibility as New International Order?*, British Yearbook of International Law, Vol. 72, no. 1, 2001, pp. 337-356, p. 339 refers to the measures in response to violations of *erga omnes* obligations as "solidarity measures".

[513] In this regard, Nissel A., *The ILC Articles on State Responsibility: Between Self-Help and Solidarity*, op. cited above, p. 359, and pp. 362-363; and Koskenniemi M., *Solidarity Measures: State Responsibility as New International Order?*, op. cited above, pp. 341-347. Similarly, Tams C.J., *Enforcing Obligations Erga Omnes in International Law*, op. cited above, pp. 59-60.

[514] Accordingly, the doctrine highlights the importance of the social role of *erga omnes* obligations within the international community's architecture since they act as those representative bodies that – in more developed communities compared to the more "inorganic" international community – protect collective interests. *Inter alia*, Ronzitti N., *Diritto internazionale*, op. cited above, p. 212. On the legal meaning and evolution of the concept of *erga omnes* obligations, Tams C.J., *Enforcing Obligations Erga Omnes in International Law*, op. cited above.

[515] Koskenniemi M., *Solidarity Measures: State Responsibility as New International Order?*, op. cited above, p. 340 and p. 344 where the author explains that these kind of measures would be excellent because of «the need to respond to egregious violations in which the injured State should not be left alone» but, at the same times, it presents the risk for certain States to act as «world police».

[516] On this hypothesis, Cassese A., *International Law*, op. cited above, 2005, p. 275; Gioia A., *Diritto internazionale*, op. cited above, p. 440; Krisch N., *Introduction to Chapter VII: The General Framework*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, p. 1267, para 62; Ronzitti N., *Diritto internazionale*, op. cited above, p. 439; and, Ruys T., *Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, p. 48.

[517] Simma B., *From Bilateralism to Community Interest in International Law*, op. cited above, p. 319.

[518] Ruys T., *Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, p. 49.

principles – as due process, transparency, and judicial review – specifically for third-party countermeasures,[519] while others argue that they should be admissible when the breached *erga omnes* obligations are particularly incisive,[520] or when the violations are largescale or systematic.[521]

The practice of non-injured States to invoke responsibility is rather scarce, as States most frequently prefers to act through UN mechanisms or within international organisations of which they are members.[522] Nevertheless, most existing practice on countermeasures concerns measures taken in the general interest.[523]

The legality of "collective" countermeasures from non-injured States gained renewed attention after the Russian aggression against Ukraine which prompted many Western States to adopt measures against the Russian Federation. Although States have generally avoided specifying the detailed legal nature of these measures,[524] part of the doctrine justifies them either as collective countermeasures protecting *erga omnes* obligations or collective self-defence under Article 51 UN Charter.[525] Both justifications are nonetheless *per se* controversial: as noted, the admissibility of countermeasures in the general interest is disputed, while reliance on Article 51 UN Charter is

[519] Koskenniemi M., *Solidarity Measures: State Responsibility as New International Order?*, op. cited above, p. 355.
[520] In this regard, Ronzitti N., *Diritto internazionale*, op. cited above, p. 439 which, more precisely, finds admissible such countermeasure if the violation regards *erga omnes* obligations «*particolarmente incisivi*» such as, for instance, serious human rights violations or violations of territorial integrity. Similarly, Ruys T., *Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, p. 49; Silingardi S., *I trattati commerciali*, in Crespi Reghizzi Z., Vellano M. (eds), *I trattati internazionali alla prova del conflitto russo-ucraino*, Quaderno 32 della Comunità Internazionale, Editoriale Scientifica, 2025, pp. 75-101, p. 97; and, Silingardi S., *Le sanzioni unilaterali e le sanzioni con applicazione extraterritoriale nel diritto internazionale*, Giuffrè Francis Lefebvre, 2020.
[521] Tams C.J., *Enforcing Obligations Erga Omnes in International Law*, op. cited above, p. 249 and p. 250. Similarly, Ruys T., *Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, p. 49.
[522] Gioia A., *Diritto internazionale*, op. cited above, p. 411.
[523] Tzanakopoulos A., *Sanctions Imposed Unilaterally by the European Union: Implications for the European Union's International Responsibility*, in Marossi A.Z., Bassett M.R. (eds), *Economic Sanctions under International Law: Unilateralism, Multilateralism, Legitimacy, and Consequences*, op. cited above, pp. 145-161, p. 156. Similarly, Asada M., *Definition and Legal Justification of Sanctions*, in Asada M. (e), *Economic Sanctions in International Law and Practice*, op. cited above, p. 17; Ruys T., *Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, p. 46; Spagnolo A., *Entering the Buffer Zone between Legality and Illegality: EU Autonomous Sanctions under International Law*, in Montaldo S., Costamagna F., Miglio A. (eds), *EU Law Enforcement: The Evolution of Sanctioning Powers*, op. cited above, p. 235; and, Tams C.J., *Enforcing Obligations Erga Omnes in International Law*, op. cited above, p. 250.
[524] Gioia A., *Diritto internazionale*, op. cited above, pp. 440-441; and, Tams C.J., *Enforcing Obligations Erga Omnes in International Law*, op. cited above, p. 216.
[525] Article 51, Chapter VII, UN Charter, 1945 provides that the Charter does not preclude the «inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations». On this argument, Gioia A., *Diritto internazionale*, op. cited above, p. 440. A detailed commentary on Article 51 UN Charter is provided by Randelzhofer A., Nolte G., *Article 51*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 1397-1444. Interestingly, Silingardi S., *La liceità internazionale delle misure imposte dall'UE nei confronti della Federazione Russa anche alla luce dei nuovi obiettivi anti-elusione*, in Alì A. (ed), *Le sanzioni dell'UE nei confronti della Russia tra sicurezza internazionale e diritti umani*, op. cited above, p. 51 argues that Western States' measures adopted against the Russian Federation from 2022 importantly give significance to the notion of "lawful measures" under Article 54 ARSIWA.

questioned because the provision specifically refers to self-defence in response to an armed attack and presupposes a request for intervention by the attacked States.[526]

Accordingly, some scholars maintain that such measures cannot be justified under either ARSIWA or Article 51 UN Charter, and several States have likewise qualified the recent measures against Russia as unlawful under international law and not reconcilable with ARSIWA's legal framework.[527] While prior UNSC authorisation could, in principle, provide a stronger legal basis for such countermeasures, as part of the doctrine suggest,[528] the exercise of veto powers would preclude States from enacting third-party countermeasures,[529] including in the present global environment.

Excluding the possibility for non-injured States to adopt countermeasures against a State responsible for a violation of international law seems rather restrictive. Within the current world order, where the UN system frequently lacks the ability to adopt non-armed measures – due to the permanent members' veto power – excluding the possibility of decentralised instruments of "law enforcement" could be problematic and, in some cases, counterproductive to the functioning of the international legal order. Recognising the possibility for other States to act collectively in response to blatant violations of international law is thus essential to guarantee the respect for international law and the integrity of the international legal order.

Granted that the list of *jus cogens* violations should remain strictly limited,[530] instances of manifest violations of peremptory norms of international law must prompt coordinated responses from the international community through non-armed measures aimed at inducing the targeted State

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[526] Tams C.J., *Enforcing Obligations Erga Omnes in International Law*, op. cited above, p. 300. Similarly, Gioia A., *Diritto internazionale*, op. cited above, pp. 440-441 and pp. 449-455.

[527] Ronzitti N., *Sanctions as Instruments of Coercive Diplomacy: An International Law Perspective*, in Ronzitti N. (ed), *Coercive Diplomacy, Sanctions and International Law*, op. cited above, p. 13 notices how, usually, third states contesting non-armed measures outside the UN framework do not distinguish between lawful countermeasures (as per ARSIWA' articles) and unilateral measures.

[528] This option has been suggested by part of the international community and doctrine. Among others, on this hypothesis, Cassese A., *International Law*, op. cited above, p. 275; Gioia A., *Diritto internazionale*, op. cited above, p. 440; Krisch N., *Introduction to Chapter VII: The General Framework*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, p. 1267, para 62; Ronzitti N., *Diritto internazionale*, op. cited above, p. 439; and, Ruys T., *Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, p. 48.

[529] In this regard, Ronzitti N., *Diritto internazionale*, op. cited above, p. 439.

[530] Notably, the *ILC Draft Conclusions on the Identification and Legal Consequences of Peremptory Norms of General International Law (Jus Cogens)*, 2022, in its Conclusion 23, provides a non-exhaustive list of jus cogens norms: (a) the prohibition of aggression; (b) the prohibition of genocide; (c) the prohibition of crimes against humanity; (d) the basic rules of international humanitarian law; (e) the prohibition of racial discrimination and apartheid; (f) the prohibition of slavery; (g) the prohibition of torture; and, (h) the right of self-determination. Interestingly, the capability of States to act in cases of violations of jus cogens norms is not mentioned, while it is mentioned the possibility of States to invoke the responsibility of those States breaching jus cogens norms, according to ARSIWA (Conclusion 17, para 2). Conclusion 19, para 1, however, opens to the possibility of "lawful means" providing that «States shall cooperate to bring to an end through lawful means any serious breach by a State of an obligation arising under a peremptory norm of general international law (jus cogens)». On this issue, also Silingardi S., *La liceità internazionale delle misure imposte dall'UE nei confronti della Federazione Russa anche alla luce dei nuovi obiettivi anti-elusione*, in Alì A. (ed), *Le sanzioni dell'UE nei confronti della Russia tra sicurezza internazionale e diritti umani*, op. cited above, p. 29.

into compliance. In cases in which centralised systems of responses are unavailable or ineffective, third-party countermeasures may provide a valuable – and perhaps necessary – alternative for inducing States into compliance with international law.

4.2. The place of "countermeasures" in the international legal order: autonomous category or part of the broader concept of "sanctions"?

Debates revolving around recent State practice – and most notably the measures adopted in response to major crises such as the Russian aggression of Ukraine – have concerned the long-lasting uncertainties regarding the definition and legal categorisation of such measures. Despite States rarely specify whether their actions constitute countermeasures, retorsions, sanctions, or other typologies of responses, this classification is crucial from a legal perspective.

Under ARSIWA, the ILC specifically employs the term "countermeasures" to designate non-forcible measures enacted in response to an internationally wrongful act, preferring it over alternative terminologies such as "sanctions", "legitimate reprisals", measures of "self-protection", "self-help", or "reprisals".[531] This terminology also covers "peacetime reprisals" – namely, reprisals occurring outside armed conflicts –,[532] yet, as noted above, some scholars note that the distinctive non-punitive goal of countermeasures renders punitive "peacetime reprisals" contrary to international law.[533]

The ARSIWA Commentary further distinguishes countermeasures from retorsions – defined as unfriendly conducts not inconsistent with international law' obligations, though potentially employed in response to a wrongful act; sanctions – identified as actions taken by a group of States or within an international organisation; and terminations or suspensions of treaties due to material breach under Article 60 of the 1969 Vienna Convention on the Law of Treaties (VCLT).[534]

As noted above, both retorsions and the ILC's interpretation of 'sanction' differ from countermeasures in terms of their nature, purpose, and scope.[535] These differences arise also with regard to Article 60 VCLT measures: although both may involve the suspension or temporary non-

[531] ILC ARSIWA Commentary, Article 22 ARSIWA, para 3. An analysis of the significance and use of the term "sanction" is presented in this Chapter II, Section 2.
[532] ILC ARSIWA Commentary, Part III, Chapter II, para 3. To be precise the ILC ARSIWA Commentary only refers to «reprisals not associated with armed conflict». The distinction between "belligerent reprisals" and "peacetime reprisals" (also "military" vs "peaceful" reprisals) is present within the doctrine, such as, among others, Cassese A., *International Law*, op. cited above, p. 299; Ronzitti N., *Sanctions as Instruments of Coercive Diplomacy: An International Law Perspective*, in Ronzitti N. (ed), *Coercive Diplomacy, Sanctions and International Law*, op. cited above, p. 11; and, Ruys T., *Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, p. 32.
[533] Ronzitti N., *Sanctions as Instruments of Coercive Diplomacy: An International Law Perspective*, in Ronzitti N. (ed), *Coercive Diplomacy, Sanctions and International Law*, op. cited above, p. 11. *Inter alia*, White N.D., Abass A., *Countermeasures and Sanctions*, in Evans M.D. (ed), *International Law*, op. cited above, p. 545.
[534] ILC ARSIWA Commentary, Part III, Chapter II, paras 3 and 4.
[535] Refer to, *supra*, Section 2, Chapter II, analysing the concept of "sanctions".

performance of treaty obligations, Article 60 VCLT measures affects substantive legal obligations of States, while countermeasures address the international responsibility arising from a breach.[536] They also differ in scope – Article 60 VCLT is confined to breached treaty, while countermeasures might extend to other areas – and in duration, as Article 60 VCLT provoke treaty termination while countermeasures are temporary.[537]

Some scholars question the ILC "soft" approach to the distinction between countermeasures and other non-armed measures arguing that the mere separation does not suffice to qualify countermeasures as lawful, and others as unlawful.[538] In turn, the narrow and specific limitations on countermeasures are rendered ineffective, given that States continue to have other, less regulated, instruments at their disposal.[539]

The interconnection and relationship between countermeasures and the UN system raise further significant considerations. As noted above, countermeasures are unilateral measures taken by Staes in response to an internationally wrongful act, and are lawful solely when implemented in accordance with ARSIWA. UN measures are instead adopted by the UNSC to address threats to or breaches of the peace and acts of aggression, irrespective of any prior violation of international law.[540]

Although the two regimes may similarly affect areas such as trade, countermeasures strictly address the bilateral obligations between the States involved, whereas UN measures involve inter-State relations more broadly, deriving from States' legal obligations and their discretionary choices in implementing UNSC decisions.[541] Furthermore, under Article 103 UN Charter, States may lawfully derogate from treaty obligations when implementing UNSC measures even in the absence of a prior wrongful act by the targeted State, while countermeasures may justify non-performance of treaty obligations solely in response to a prior international wrongful act. [542] Their respective purposes also diverge: countermeasures aim to induce compliance of the responsible State, while UN measures focus on restoring peace and security.[543] Moreover, countermeasures are essentially peacetime

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[536] In this regard, ILC ARSIWA Commentary, Part III, Chapter II, para 4. Similarly, White N.D., Abass A., *Countermeasures and Sanctions*, in Evans M.D. (ed), *International Law*, op. cited above, pp. 541-542 which specifies that it is also possible for a measure to be identified as both Article 60 VCLT' measures and countermeasures.
[537] White N.D., Abass A., *Countermeasures and Sanctions*, in Evans M.D. (ed), *International Law*, op. cited above, p. 541.
[538] *Ibid*., pp. 543-544.
[539] *Ibid*., p. 543, p. 550 and p. 559.
[540] As presented in Section 3.2. of this chapter, the cases in which UN measures had been adopted in response to prior violations of international law are discussed as evidence qualifying UN non-armed measures as "proper sanctions" under international law.
[541] Orakhelashvili A., *The Impact of Unilateral EU Economic Sanctions on the UN Collective Security Framework: The Cases of Iran and Syria*, in Marossi A.Z., Bassett M.R. (eds), *Economic Sanctions under International Law: Unilateralism, Multilateralism, Legitimacy, and Consequences*, op. cited above, p. 17.
[542] *Ibid*., p. 17.
[543] Some scholars argue that UN measures in practice possess additional aims such as punishment or, similarly to ARSIWA measures, tackling States' responsibility for breaches of international law. On the first conception, White N.D., Abass A., *Countermeasures and Sanctions*, in Evans M.D. (ed), *International Law*, op. cited above, p. 554. On this, refer also to

measures, whereas UN non-armed measures might be adopted also in cases of ongoing armed conflict.

A potential point of convergence concerns the collective character of the measures: however, while UN measures are undoubtedly collective, the collective use of countermeasures remains disputed. Some authors regard UN measures as centralised efforts of «coordination to respond to common concerns», in contrast to countermeasures which are instead dependent on States' interests.[544] Yet, the crucial influence exerted by the UNSC permanent members through their veto power renders problematic to assume that the UN decision-making process reflects exclusively collective interests.

It is widely accepted that the UN Charter does not limit the adoption of countermeasures, as those are compatible with Article 2 (3) UN Charter requiring UN MS to settle international disputes by peaceful means as not endangering international peace, security and justice.[545]

Debates concerns whether States may adopt countermeasures both in cases of UNSC inaction and when the Council has acted under Chapter VII.[546] While it is generally recognised the right of States to act against breaches when the UNSC did not deliberate on the matter, it is doubtful whether

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White N.D., Abass A., *Countermeasures and Sanctions*, in Evans M.D. (ed), *International Law*, op. cited above, p. 554. Kochler H., *Sanctions and International Law*, op. cited above, p. 32 which denotes UN comprehensive measures against Iraq as «a form of collective punishment of the entire population of the country». Similarly, Mohamad R., *Unilateral Sanctions in International Law: A Quest for Legality*, in Marossi A.Z., Bassett M.R. (eds), *Economic Sanctions under International Law: Unilateralism, Multilateralism, Legitimacy, and Consequences*, op. cited above, p. 74. Interestingly, Gowlland-Debbas V., *UN Sanctions and International Law: An Overview*, in Gowlland-Debbas V. (ed), *United Nations Sanctions and International Law*, Kluwer Law International, 2001, pp. 1-28, p. 12 interprets some scholars' argument over the UN non-armed measures' "punishment" aim as meaning that such measures provoked «creation of irreversible damage to the target state concerned». For the second conception, among others, Gowlland-Debbas V., *UN Sanctions and International Law: An Overview*, in Gowlland-Debbas V. (ed), *United Nations Sanctions and International Law*, op. cited above, pp. 1-28, p. 7 and p. 9; White N.D., Abass A., *Countermeasures and Sanctions*, in Evans M.D. (ed), *International Law*, op. cited above, pp. 554-555; and Zoller E., *Peacetime Unilateral Remedies: An Analysis of Countermeasures*, op. cited above, pp. 106-107.

[544] Orakhelashvili A., *The Impact of Unilateral EU Economic Sanctions on the UN Collective Security Framework: The Cases of Iran and Syria*, in Marossi A.Z., Bassett M.R. (eds), *Economic Sanctions under International Law: Unilateralism, Multilateralism, Legitimacy, and Consequences*, op. cited above, p. 18.

[545] Article 2 (3), Chapter I, UN Charter. On this argument, Ronzitti N., *Sanctions as Instruments of Coercive Diplomacy: An International Law Perspective*, in Ronzitti N. (ed), *Coercive Diplomacy, Sanctions and International Law*, op. cited above, p. 12; and, Tomuschat C., *Article 2 (3)*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 181-199, pp. 196-197, para 41 which provides a detailed commentary of Article 2 (3) UN Charter. Indeed, as noted above, the adoption of countermeasures is subject to specific procedural requirements, as those established in Article 52 (1) ARSIWA, as well as conditions relating pending proceedings before courts or tribunals, as set out in Article 52 (3) (a) and (4) ARSIWA.

[546] *Inter alia*, Dupont P.-E., *Countermeasures and Collective Security: The Case of the EU Sanctions Against Iran*, Journal of Conflict & Security Law, Vol. 17, no. 3, 2012, pp. 301-336, pp. 332-334; Koskenniemi M., *Solidarity Measures: State Responsibility as New International Order?*, op. cited above, p. 339; Ronzitti N., *Sanctions as Instruments of Coercive Diplomacy: An International Perspective*, in Ronzitti N. (ed), *Coercive Diplomacy, Sanctions and International Law*, op. cited above, pp. 18-21; Simma B., *From Bilateralism to Community Interest in International Law*, op. cited above, p. 312; Tams C.J., *Enforcing Obligations Erga Omnes in International Law*, op. cited above, pp. 264-268; and, White N.D., Abass A., *Countermeasures and Sanctions*, in Evans M.D. (ed), *International Law*, op. cited above, pp. 547-548.

such possibility remains valid when the UNSC has acted,[547] as neither ARSIWA nor the UN Charter explicitly addresses this issue. Some scholars argue that, since Article 51 UN Charter requires States' self-defence measures to cease once the UNSC has adopted measures, the same rationale should apply to countermeasures, which are likewise instruments of self-help. However, part of the doctrine highlights the historical rationale behind the limitations of Article 51 UN Charter – namely, to restrict States' use of armed force – and argues that, since no equivalent provision exists for UN non-armed measures, applying the same analogy to countermeasures is problematic.[548] State practice shows that countermeasures often persist despite UNSC measures,[549] although some authors advocate for their termination in cases of UNSC action to preserve the «coherence of the Charter-based collective security system».[550]

A reform-oriented perspective contends that ARSIWA provisions – especially its limitations, such as the principle of proportionality and respect for human rights – should similarly apply to UN non-armed measures, as the two instruments are «functionally analogous».[551] This functional resemblance is further reflected in their shared goal of forcing compliance with the ICJ decisions. The Covenant of the League of Nations already addressed non-compliance enabling the Council, under Article 13 (4), to propose necessary actions which, when read in conjunction with other Covenant provisions, could also include armed measures.[552] Differently, the UN Charter explicitly prohibits the threat or use of force under Article 2 (4) and regulates non-compliance with ICJ judgments under Article 94, allowing the 'winning' State to recourse to the UNSC which may, if necessary, «make recommendations or decide upon measures to be taken» to obtain the effects of the judgment.[553] ARSIWA similarly enables the 'winner' State to enact countermeasures against a non-

[547] Tams C.J., *Enforcing Obligations Erga Omnes in International Law*, op. cited above, pp. 264-268. Similarly, Dupont P.-E., *Countermeasures and Collective Security: The Case of the EU Sanctions Against Iran*, op. cited above, pp. 332-334; and, Gazzini T., *The Normative Element Inherent in Economic Collective Enforcement Measures: United Nations and European Union Practice*, in Forlati Picchio L., Sicilianos L.-A. (eds), *Les sanctions économiques en droit international / Economic Sanctions in International Law*, op. cited above, pp. 279-308, pp. 291-292. Interestingly, Ronzitti N., *Sanctions as Instruments of Coercive Diplomacy: An International Perspective*, in Ronzitti N. (ed), *Coercive Diplomacy, Sanctions and International Law*, op. cited above, p. 20 argues that individual States might adopt unilateral measures when the UNSC is unable to enact its non-armed measures, but solely if they qualify as countermeasures. In turn, the UNSC would not have the power to recommend and bind individual States to terminate countermeasures «since the right to take countermeasures is derived by general international law and it is not made conditional upon a decision of the SC».

[548] Tams C.J., *Enforcing Obligations Erga Omnes in International Law*, op. cited above, p. 267 and pp. 300-301.

[549] *Ibid*., p. 267.

[550] Dupont P.-E., *Countermeasures and Collective Security: The Case of the EU Sanctions Against Iran*, op. cited above, p. 333 and, p. 336. Similarly, Ronzitti N., *Sanctions as Instruments of Coercive Diplomacy: An International Perspective*, in Ronzitti N. (ed), *Coercive Diplomacy, Sanctions and International Law*, op. cited above, p. 20.

[551] Gordon R., Smyth M., Cornell T., *Sanctions Law*, op. cited above, pp. 15-16. Similarly, Tzanakopoulos A., *Disobeying the Security Council: Countermeasures against Wrongful States*, op. cited above, p. 76.

[552] Articles 12 (1) and 13 (4) of the Covenant. In this regard, Ronzitti N., *Diritto internazionale*, op. cited above, p. 318.

[553] Article 94 (2) UN Charter. Refer also to Article 96 UN Charter. A comprehensive commentary on this Article is provided by Oellers-Frahm K., *Article 96*, in Simma B., Khan D-E., Nolte G., Paulus A., Wessendorf N. (eds), *The Charter of the United Nations: A Commentary*, op. cited above, pp. 1975-1990. Interestingly, it is debated whether the UNSC may

compliant State, reflecting their core objective of «induc[ing a] State to comply with its obligations» (Article 49 (1) ARSIWA).

Thus, ARSIWA countermeasures constitute a distinct legal category under international law, specifically defined in the modalities, limitations, and objectives. This distinguishes them from the broader and more heterogeneous concept of 'sanction' which, as noted above, is commonly employed to describe a wide amount of coercive non-armed measures but lacks a uniform legal framework regulating their lawfulness and employment. While ARSIWA remains a soft law instrument, it enjoys significant authority within the international community. Thus, debates regarding the precise qualification of countermeasures within existing hard-law categories of international law remain relevant. Yet, as presented in this section, countermeasures certainly cannot be assimilated to retorsions, treaty suspensions under VCLT, or measures implementing UNSC decisions, since each of these rely on distinct legal basis, purposes, decision-making processes, and requirements. Nonetheless, in a broader perspective, ARSIWA countermeasures could still fall within the working-definition of "sanctions", as they constitute coercive responses to internationally wrongful acts aimed at inducing compliance, while nevertheless pertaining a distinct legal category under international law – as displayed in the classification test developed in Chapter IV of this dissertation.

Despite the ongoing uncertainty of their precise categorisation, States frequently invoke the ARSIWA legal framework to justify coercive measures enacted against another State – also as third-party countermeasures –, potentially confirming the fundamental importance of this regime, or its internal weaknesses insofar as States may stretch its purposes to legitimise measures of different scope.

4.3. Limits and vulnerabilities of the instrument of countermeasures

The frequent employment of measures justified as countermeasures does not shield the instrument from criticism. Moreover, scholars notice that the ILC codification of State responsibility has not sufficed to induce States to comply with their international obligations, as instead wished.[554]

Concerns mainly focus on the risk of abuse, particularly aggravated by the existing inequalities between States, as highlighted also in the ILC ARSIWA commentary.[555] Tensions

take measures on any occasion of non-compliance, or whether this is possible solely in the event that such non-compliance would endanger international peace and security. On this regard, Ronzitti N., *Diritto internazionale*, op. cited above, p. 318.

[554] Nissel A., *The ILC Articles on State Responsibility: Between Self-Help and Solidarity*, op. cited above, p. 269 argues that more compliance did not occur because of ILC's «missed […] opportunity to include one of the strongest factors for compliance short of a police-force: legitimacy». A second argument by the same author on this matter relates to the fact that State responsibility is different from individual responsibility, since it is «intrinsically amorphous» and has different purposes, p. 370.

[555] ILC ARSIWA Commentary, Part III, Chapter II, para 2. Similarly, Koskenniemi M., *Solidarity Measures: State Responsibility as New International Order?*, op. cited above, p. 343; and, Ruys T., *Sanctions, Retorsions and*

between States might also escalate when they disagree over the (un)lawfulness of a State' conduct.[556] Third-party countermeasures add a further layer of risk, as their original justification – *i.e.* the violation of *erga omnes* obligations – might be opportunistically employed to justify political objectives.[557] In this regard, some warn that such measures might be (ab)used by «interested and powerful» States acting as «world police».[558] Nonetheless, as noted above, the increasing importance of third-party countermeasures is evident and acknowledged by many scholars, especially in light of the occurrence of blatant violations of international law and the paralysis of international organs.

From a more strictly-legal perspective, criticisms focus on the vagueness of certain provisions,[559] the lack of discussions on democracy and legitimation,[560] the failure to regulate other types of non-armed measures,[561] the lack of clarity and predictability,[562] and the high level of abstraction contraposed to a narrow definition of countermeasures.[563] Nonetheless, the importance of the ILC codification and its contribution to the development of international law is widely recognised and appreciated within the international community.[564]

From a legal point of view, it is also interesting to highlight Article 55 ARSIWA which establishes that the ARSIWA Articles do not apply whenever rules of international responsibility of States are regulated by *lex specialis* of international law. Indeed, treaties often regulate both reciprocal obligations and the legal consequences of their breach,[565] and ARSIWA – with Article 55 –

Countermeasures: Concepts and International Legal Framework, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, p. 33.

[556] Ruys T., *Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, p. 33 and p. 47.

[557] Spagnolo A., *Entering the Buffer Zone between Legality and Illegality: EU Autonomous Sanctions under International Law*, in Montaldo S., Costamagna F., Miglio A. (eds), *EU Law Enforcement: The Evolution of Sanctioning Powers*, op. cited above, p. 233. Similarly, Ruys T., *Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, p. 49.

[558] Koskenniemi M., *Solidarity Measures: State Responsibility as New International Order?*, op. cited above, p. 344 which explains how this conduct might lead «the law […to] become indissociable from Great Power policy». Similarly, Simma B., *From Bilateralism to Community Interest in International Law*, op. cited above, pp. 331-332 questions whether come claims «serve hegemonial aspirations or consolidate monopolies of power (however defined, be it economic, military or otherwise)».

[559] However, it is recognised that this vagueness is the result of various negotiations, questions and pressures by States within the drafting of the Articles. Among others, Tams C.J., *Enforcing Obligations Erga Omnes in International Law*, op. cited above, p. 200; and, White N.D., Abass A., *Countermeasures and Sanctions*, in Evans M.D. (ed), *International Law*, op. cited above, p. 548.

[560] Nissel A., *The ILC Articles on State Responsibility: Between Self-Help and Solidarity*, op. cited above, p. 356 and p. 371.

[561] White N.D., Abass A., *Countermeasures and Sanctions*, in Evans M.D. (ed), *International Law*, op. cited above, p. 543.

[562] Tams C.J., *Enforcing Obligations Erga Omnes in International Law*, op. cited above, p. 200.

[563] White N.D., Abass A., *Countermeasures and Sanctions*, in Evans M.D. (ed), *International Law*, op. cited above, p. 550.

[564] Tams C.J., *Enforcing Obligations Erga Omnes in International Law*, op. cited above, pp. 12-13. Similarly, White N.D., Abass A., *Countermeasures and Sanctions*, in Evans M.D. (ed), *International Law*, op. cited above, p. 540.

[565] The ILC ARSIWA Commentary, Article 55, para 4, specifies that in order to apply the principle of *lex specialis* it is not sufficient that the subject matter is regulated in the treaty concerned and in the ARSIWA' articles but, instead, the two

guarantees that States might derogate from its regime when they are party to a treaty governing the same matter, both entirely or partially.[566] This is the case, for instance, of States that are members of the European Union, whose obligations are governed by treaty-based provisions, or of the World Trade Organization which provides for a specific dispute resolution mechanism to which States should resort.[567]

5. European Union's restrictive measures

5.1. The legal framework

EU restrictive measures are crucial instruments of the Union's external action in Common Foreign and Security Policy (CFSP). Notably, CFSP does not fall within the three main types of EU competences – namely, exclusive competences, shared competences, and supporting competences – but is part of a category of "special competences" due to its «specific institutional features».[568]

Article 215 TFEU and Chapter 2 Title V TEU provide both the substantive and procedural legal framework of EU restrictive measures.[569] Notably, Article 215 TFEU regulates the EU's ability to enact restrictive measures, *i.e.* measures interrupting or reducing, in part or completely, economic and financial relations with third countries, natural or legal persons and groups, or non-State entities.[570] CFSP actions are guided by the principles established in Article 21 TEU, including democracy, rule of law, human rights, equality and solidarity, UN principles and international law.[571]

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provisions should be inconsistent or excluding one with the other. Therefore, «the question is essentially one interpretation».

[566] In this regard, ILC ARSIWA Commentary, Article 55, para 5 which specifies that Article 55 ARSIWA was designed to deal with both «"strong" forms of *lex specialis*» (*i.e.* self-contained regimes) and those «"weaker" such as specific treaty provisions on a single point».

[567] Refer to the ILC ARSIWA Commentary, Article 50 ARSIWA, para 10, which specifically mentions the case of the European Union, which has its own system of enforcement, and of the WTO's dispute settlement mechanism. Refer also to the ILC ARSIWA Commentary, at Part III, Chapter II, para 9; ILC ARSIWA Commentary, Article 55, para 3; and doctrinal contributions such as, among others, Gioia A., *Diritto internazionale*, op. cited above, p. 443; and Report of the Study Group of the International Law Commission (finalized by Koskenniemi M.), *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, op. cited above, p. 38 and pp. 65-82 which at pp. 30-65 analyses the meaning and functioning of *lex specialis*.

[568] EUR-Lex, *Division of Competences Within the European Union*, available at https://eur-lex.europa.eu/EN/legal-content/summary/division-of-competences-within-the-european-union.html, [last accessed on 16 March 2024]. Similarly, Wouters J., Hoffmeister F., De Baere G., Ramopoulos T., *The Law of EU External Relations: Cases, Materials, and Commentary on the EU as an International Legal Actor*, Oxford University Press, 2021, p. 360 which discuss how EU competence on CFSP is a «non-exclusive, sui generis» EU competence that runs in parallel with the EU MS' competences in the same area.

[569] Indeed, as noted above, Article 215 TFEU empowers the EU to adopt such measures against third countries, individuals and entities while Chapter 2 Title V TEU provides specific provisions on the CFSP.

[570] Article 215 (1) and (2), Title IV, Part Five, TFEU.

[571] Article 23 TEU establishes that CFSP' actions shall be guided by the principles established under Chapter 1 of Title V TEU and, thus, more precisely, under Article 21 TEU. Accordingly, Article 21 (1) TEU establishes that the EU action should be guided by the principles of «democracy, rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law», by developing relations and partnership with third countries sharing

Article 21 TEU likewise identifies the objectives of EU actions which include safeguard EU values; consolidate democracy; preserve peace; foster development; encourage integration; help sustainable development; assist populations in disasters; promote multilateralism.[572]

Following a decision, the Council adopts restrictive measures by a qualified majority, based on joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy (also "High Representative") and the Commission, and subsequently, inform the European Parliament (EP).[573] Once adopted, the regulation is binding on persons and entities within the EU. The implementation of the measures is a duty of the EU MS, but the Commission supervises and verifies the proper and timely implementation. The Council of the EU is, instead, in charge of deciding whether renew, amend or lift measures at regular intervals.

The legal framework is complemented by key EU documents: (i) the 2003 "Sanctions Guidelines" (most recently updated in 2018);[574] (ii) the 2004 "Basic Principles on the Use of Restrictive Measures (Sanctions)";[575] and (iii) the 2018 "EU Best Practices for the effective implementation of restrictive measures".[576]

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those principles and by promoting «multilateral solutions to common problems» especially within the UN framework. On the EU support to multilateralism refer also to Sections 5.2.and 6.2. of this Chapter.

[572] To be precise, Article 21 (2) TEU formulates the objectives of the EU common policies and actions establishing that the EU shall define and pursue those policies and actions in order to (a) safeguard EU values, fundamental interests, security, independence and integrity; (b) consolidate and support democracy, the rule of law, human rights and the principles of international law; (c) preserve peace, prevent conflicts and strengthen international security; (d) foster the sustainable economic, social and environmental development of developing countries, primarily aiming at eradicating poverty; (e) encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade; (f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development; (g) assist populations, countries and regions confronting natural or man-made disasters; and (h) promote an international system based on stronger multilateral cooperation and good global governance.

[573] Article 215 (1), Title IV, Part Five, TFEU. Article 24 TEU focuses on more procedural matters of CFSP by establishing the voting procedures. Firstly, indeed, it is necessary a decision by the Council within CFSP which, notably, is defined and implemented by the European Council and the Council of the European Union (Council) acting unanimously, unless in specific circumstances. Afterwards, it is required a proposal of the High Representative to the Council which, through its preparatory bodies (*i.e.* the Council working party for geographical region of the targeted country; the Foreign Relations Counsellors Working Party (RELEX); the Political and Security Committee (PSC), if required; and the Committee of Permanent Representative (Coreper II)) analyses and discusses the proposed measures. If the Council decides to proceed with the proposed measures, the decision is adopted by unanimity. Article 29 TEU empowers the Council to adopt decisions defining the EU's approach to a particular matter of a geographical or thematic nature, such as restrictive measures. After the Council decision, a joint proposal for a regulation is presented by the High Representative and the Commission to the Council which, after examinations of the Foreign Relations Counsellors Working Party (RELEX) and of the Committee of the Permanent Representatives of the Governments of the Member States to the European Union (COREPER), adopts it. Only at this stage of the process, the Council informs the EP of the adoption of the Council regulation on restrictive measures. The Council decision and the Council regulation are usually adopted together in order to ensure simultaneous effects.

[574] The Council of European Union, *Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy*, 15579/03, 3 December 2003. The 2018 update: The Council of the European Union, *Sanctions Guidelines – update*, 5664/18, 4 May 2018.

[575] Council of the European Union, *Basic principles on the Use of Restrictive Measures (Sanctions)*, 10198/1/04, 7 June 2004.

[576] Council of the European Union, *Restrictive measures (Sanctions) – Update of the EU Best Practices for the effective implementation of restrictive measures*, 8519/18, 4 May 2018.

The Sanctions Guidelines focus on principles, standard wording, and monitoring of EU restrictive measures.[577] Accordingly, these measures might implement UNSC Chapter VII resolutions; further restrain what the UNSC has provided; or, act autonomously, in case of UNSC inaction.[578] They aim to change policies or actions of the targeted country, government, entities, or individuals, in line with CFSP objectives,[579] but no economic motive should be present.[580] Measures should respect international law, «human rights and fundamental freedoms, in particular due process and the right to an effective remedy», proportionality,[581] and, international obligations especially

[577] Divided in three main sections – *i.e.* principles, standard wording for legal instruments, and monitoring and evaluation of restrictive measures – the "Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy" – provide common wording and definitions to specific terms involved in the enactment of restrictive measures, but do not address the political policy aspects which, instead are tackled by the 2004 Basic Principles. Whilst the first part also shortly provides for the criteria regulating the assessment of 'ownership' and 'control', the second part of the Sanctions Guidelines deals more specifically with standard wording for legal instruments both defining terms such as "technical assistance"; "financing and financial assistance"; "funds"; "freezing of funds"; "economic resources"; "freezing of economic resources"; and "dual use good". It also provides standard wordings for typologies of restrictions such as for arms embargoes; restrictions on equipment used for internal repression and other specific imports and exports; restriction on admission (visa or travel bans); financial restrictions and their various exemptions (also for humanitarian needs); and for additional elements such as non-liability clauses; no claims clause; jurisdiction clause; infringements and penalties; and expiration and review (The Council of European Union, *Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy*, cited above, paras 55a-55f, paras 59-93). Annexes to the Sanctions Guidelines deal with working methods for EU restrictive measures and with the list of equipment usable for internal repression (The Council of European Union, *Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy*, cited above, Annex I is at pp. 46-56 while Annex II is at pp. 57-59). At last, the Annex I provides some final elements concerning proposals for the measures and for listing; the deliberations of the working parties; and the review of the measures; processing requests for de-listing; outreach and communication; and templates as models (pp. 47-56).

[578] The Council of European Union, *Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy*, cited above, para 3 and paras 38-47. In case of impossibility of the UN adoption of measures, it is stated to «encourage broader support of the international community for [the enactment of EU] autonomous measures» (para 3). The EU restrictive measures taken outside the UN framework are interestingly denominated «EU autonomous sanctions» by the whole text of the Sanctions Guidelines, and by the Annex I too. According to this Annex, EU restrictive measures are essential EU foreign policy tools aimed at pursuing EU objectives in accordance with CFSP' principles. By aspiring at modifying a policy or activity in the targeted country (or part of it, government, entities or individuals), the EU restrictive measures are declared as «preventive, non-punitive, instruments which should allow the EU to respond swiftly to political challenges and developments». In this sense, the Sanctions Guidelines envision EU restrictive measures regimes as part of an «integrated and comprehensive policy approach» which would involve political dialogue, complementary efforts and other tools. Adverse consequences should be minimised, while the uniform and consistent interpretation and effective implementation of restrictive measures are elements perceived as fundamental to the measures' effectiveness in achieving the wished political objective (The Council of European Union, *Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy*, cited above, Annex I, p. 46).

[579] The Council of European Union, *Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy*, cited above, para 4 providing «a change in policy or activity by the target country, part of country, government, entities or individuals».

[580] The Council of European Union, *Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy*, cited above, para 5. Such objective must be clearly set forth in the introductory paragraphs of the Council' instrument, together with the overall EU strategy in that area, within which the objective itself must be consistent with (para 5). Similarly, also the EU restrictive measures' legal basis under EU law is required to be expressly identified in each measures' framework (para 8).

[581] The Council of European Union, *Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy*, cited above, para 9. At para 10 are specifically mentioned the EU obligations under Article 6 (3) TEU to respect fundamental rights, «as guaranteed by the European Convention on Human Rights and as they result from the constitutional traditions common to the Members States, as general principles

WTO ones.[582] The "targeted and differentiated approach" is endorsed,[583] while extraterritorial measures are condemned as violating international law.[584] The effectiveness of EU measures is linked to the adoption of similar measures by other countries,[585] with active and systematic communication promoted between EU, its MS, targeted countries, and population.[586] Review, monitoring and evaluation are fundamental, with RELEX's role and mandate defined,[587] and regular EU MS reporting required.[588]

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of Union law». A more detailed analysis of the EU relationship with international law is provided in this Chapter in Section 5.2.

[582] The Council of European Union, *Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy*, cited above, para 11. Recalling both GATT and GATS' provisions, the Sanctions Guidelines specify that possible justifications for EU restrictive measures inconsistent with WTO rules might arise from Articles XX and XXI GATT, and from Articles XIV and XVI bis GATS (para 11). Nonetheless, if conflict with EU and its MS' international obligations is still present, the Sanctions Guidelines suggest for a «common approach for dealing with such conflicts [to be] developed» (para 12). Articles XX and XXI GATT will be analysed in detail in Chapter III, Section 2.3.

[583] This is endorsed since measures specifically targeted to those responsible (and/or to those benefitting and supporting the contested action) are identified as more effective and as provoking less adverse consequences to those not responsible for those actions (paras 13-14). However, listing of targeted persons and entities must respect fundamental rights (especially due process rights, rights of defence, and the principle of effective judicial protection); must follow clear and tailored criteria; must possess accurate, up-to-date and defendable statements of reasons; must not target family members and under 18-children; and must rely on standardise and precise identifying information (paras 15-24). Appropriate exemptions – on a case-by-case basis – should be guaranteed in respect to particular basic needs of targeted persons, legal fees, extraordinary expenses, humanitarian needs or international obligations (paras 25-28). A case-by-case assessment is also to be made with respect to the EU competence, with the EU MS establishing provisions on applicable penalties (paras 48-50).

[584] On this regard, the jurisdiction of EU restrictive measures is limited to those «situations where the links exist with the EU», thereby refraining from extra-territorial measures which, accordingly, are in violation of international law and, thus, are expressly condemned by the EU (The Council of European Union, *Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy*, cited above, paras 51-52). Silingardi S., *The EU 11 and 12 Packages of Sanctions Against Russia: How Far is the EU Willing to Go Extraterritorially?*, Global Trade and Customs Journal, Vol. 19, no. 7-8, 2024, pp. 546-554, demonstrates instead how the EU recent measures possess extraterritorial application. On the position of the EU with regards to extraterritorial measures and on the adoption of the EU Blocking Statute specifically as an instrument to counter-react to this typology of measures (also called "secondary measures") refer to this Chapter' Section 6.2. Differently, the US approach and reliance on extraterritorial measures is analysed in Section 6.1. of this Chapter.

[585] The Sanctions Guidelines, moreover, link the effectiveness of EU restrictive measures to the adoption of similar measures by other countries and, thus, when these measures act outside the UN framework, the EU should both (i) «outreach, actively seek cooperation and if possible adoption of similar measures by relevant third countries» as to decrease substitution effects and strengthen the measures' impact, and (ii) systematically invite EU candidate countries to align (paras 56-57).

[586] The Council of European Union, *Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy*, cited above, paras 4 and 6.

[587] The Foreign Relations Counsellors Working Party "Sanctions formation" (RELEX/Sanctions) is established with specific mandate to exchange information and experiences on implementation; to contribute to develop best practices among EU MS in the implementation; to collect information in alleged circumvention; to assist evaluation of the results and difficulties in the implementation; to exchange opinions on methods and means to ensure efficiency of management of restrictive measures regimes; and to examine relevant technical issues concerning implementation (para 94). The Annex recalls also the central role of the European External Action Service (EEAS) in preparation, review, communication and outreach activities for restrictive measures' regimes, together with its commitment to closely cooperate with EU MS, EU delegations and the Commission (Annex I, p. 47).

[588] Accordingly, regular EU MS reporting on implementation and on taken enforcement measures are needed since EU level-monitoring enables the assessment on the measures' functioning and the basis for improvements and prolongation of measures (para 95). The importance of ensuring a proper implementation and a prompt and full enforcement of EU restrictive measures is contingent on, arguably, the effectiveness of those measures and the EU credibility as a whole (para 94).

The Basic Principles consists in 10 paragraphs. They underscore that EU restrictive measures are crucial in maintaining and restoring international peace and security, as mandated by UN Charter and CFSP.[589] While supporting UN measures, EU autonomous "sanctions" may be imposed to «fight terrorism[,…] the proliferation of weapons of mass destruction and […] to uphold respect for human rights, democracy, the rule of law and good governance».[590] These measures are part of «an integrated, comprehensive policy approach» including «political dialogue, incentives, conditionality» and, as a last resort, «the use of coercive measures in accordance with the UN Charter».[591] Targeted measures – such as arms embargoes, visa bans, and freezing funds – are the preferred instruments since they guarantee a maximum effect on the responsible actors and minimal adverse humanitarian impact.[592] These measures should adapt to «new security environment» targeting non-state actors,[593] be implemented flexibly and on a case-by-case basis, clearly states their objectives; undergo regularly reviews; be amended; and lifted when the objectives are met.[594] The document concludes by pledging EU further actions to develop «the instrument of sanctions [and,…] improve their implementation, both internally and within the UN».[595]

The Best Practices document, stemming from the RELEX mandate,[596] provides «non exhaustive *recommendations* of a general nature for effective implementation» of EU restrictive measures according to EU law and national legislation.[597] It outlines best practices for designation and identification of persons and entities subject to targeted measures; the financial restrictive measures; the prohibition on the provisions of goods; and the coordination and cooperation issue. *Inter alia*, guidance is provided on how to accurately list targeted entities and individuals and to deal

[589] Council of the European Union, *Basic principles on the Use of Restrictive Measures (Sanctions)*, cited above, para 1. Thus, continuous support of the UN, fulfilment of EU's obligations under the UN Charter, EU intensification of efforts within the UN, and dialogue with UN are essential to «coordinate […] actions on sanctions» as to ensure «full, effective and timely implementation» of those EU restrictive measures agreed by the UNSC (para 2).
[590] Council of the European Union, *Basic principles on the Use of Restrictive Measures (Sanctions)*, cited above, para 3.
[591] Council of the European Union, *Basic principles on the Use of Restrictive Measures (Sanctions)*, cited above, paras 4-5. A general overview of the term "economic coercion" and of the possible definitions of "economic coercive measures" was provided in Section 2 and 3, Chapter II. More specifically, the EU recently defined "economic coercion" within the Anti-Coercion Instrument, as presented in this Chapter in Section 6.2.
[592] Intended as humanitarian effects and unintended consequences for non-targeted actors or neighbouring States. Council of the European Union, *Basic principles on the Use of Restrictive Measures (Sanctions)*, cited above, para 6.
[593] This with renewed attention to always respecting human rights and the rule of law. Council of the European Union, *Basic principles on the Use of Restrictive Measures (Sanctions)*, cited above, para 7.
[594] Council of the European Union, *Basic principles on the Use of Restrictive Measures (Sanctions)*, cited above, paras 8-9.
[595] Council of the European Union, *Basic principles on the Use of Restrictive Measures (Sanctions)*, cited above, para 10.
[596] It stems from the Sanctions Guidelines' mandate to RELEX to develop best practices among EU MS concerning the implementation of restrictive measures. Council of the European Union, *Restrictive measures (Sanctions) – Update of the EU Best Practices for the effective implementation of restrictive measures*, cited above, para 1.
[597] Council of the European Union, *Restrictive measures (Sanctions) – Update of the EU Best Practices for the effective implementation of restrictive measures*, cited above, para 3. As not legally binding, the document clearly specifies that such recommendations «should not be read as recommending any action» incompatible with EU or national laws (para 3). These best practices are aimed at identifying key elements in the EU restrictive measures' implementation (para 4).

with claims;[598] how to domestically act in case of financial sanctions;[599] how to deal with authorisations and notifications duties;[600] and, how to better deal with national coordination, communication mechanisms, and information exchange.[601] At last, the Best Practices emphasise the need to evaluate the effectiveness of EU measures, gathering feedbacks, establishing appropriate national evaluation procedures, and exchanging the results with RELEX/Sanctions formation when relevant.[602]

Complementary non-binding documents – such as "guidance notes", "factsheets", and "frequently asked questions" – had been adopted by EU institutions on specific rounds of adoptions of measures with the aim to support, complement, clarify and add information on the content, exemptions and implementation of measures, offering practical guidance.[603]

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[598] Briefly, the first section provides suggestions to avoid erroneous identities in listings; to deal with claims alleging mistaken identities both in EU 'autonomous' restrictive measures and in EU restrictive measures adopted pursuant UNSC Resolutions; and to de-list persons and entities in both cases too. Council of the European Union, *Restrictive measures (Sanctions) – Update of the EU Best Practices for the effective implementation of restrictive measures*, cited above, paras 5-24.

[599] The second section, instead, concerns financial restrictive measures and analyses the EU law legal framework and the consequent EU MS needed actions in domestic law; the administrative freezing (adoptable as restrictive measure) from judicial freezing, seizure and confiscation (adoptable solely as a national enforcement measure or as penalties for infringing restrictive measures); their scope and jurisdiction, their application to economic operators and citizens, and the use of information by competent authorities; the freezing of funds and of economic resources, and the potential availability/transfer of those resources (both funds and economic resources) to a designated person; the concepts of ownership and control (and their related criteria); the designation and the freezing funds of legal entities; and the requests for exemptions with the fundamental rights and issues to consider when granting such exemptions. Council of the European Union, *Restrictive measures (Sanctions) – Update of the EU Best Practices for the effective implementation of restrictive measures*, cited above, paras 25-86.

[600] The third section regards the issue of prohibitions on the provisions of goods and, by dealing with authorisations regimes, it highlights the practice of informing the competent authorities and the Commission of rejected authorisations, even in the cases in which the regulation does not specifically provide for such notification obligation (accordingly, notification is crucial since it minimise the risks of distortions of competition within the internal market). Council of the European Union, *Restrictive measures (Sanctions) – Update of the EU Best Practices for the effective implementation of restrictive measures*, cited above, para 87.

[601] The fourth and last section – dealing with coordination and cooperation – focuses firstly on EU MS' national coordination and communication mechanisms between relevant governmental agencies, bodies and services of the area of competence of such restrictive measures which, accordingly, ensure a «intelligent-driven and risk-based approach» that could enhance the measures' effectiveness (Council of the European Union, *Restrictive measures (Sanctions) – Update of the EU Best Practices for the effective implementation of restrictive measures*, cited above, paras 88-89). Secondly, the section identifies that information should be exchanged also with other EU MS, the Commission, the EEAS, Europol, Eurojust, FAFT, and the Sanctions Committee established at UN level, also in a view of ensuring timely proposals for listing or de-listing (paras 90-91. On UN Sanction Committees refer to Section 3 of this Chapter). Analysis of financial accounts of designated persons and entities should be conducted at EU MS level and then shared with other States, IOs and relevant EU bodies when legally possible. Structured dialogue and cooperation with private organisations within the EU MS' jurisdiction (such as credit and financial institutions) are necessary to ensure effective implementation and optimisation of restrictive measures, and to facilitate the organisations' administrative burden. Financial organisations will also dialogue with the Commission and, if appropriate, with the EEAS and the Council, while specific recommendations are established for cases of terrorist financing. Public audience (*i.e.* economic operators, credit and financial institutions) should be aware of the existence of restrictive measures and of national measures, and capable of access to the up-to-date Commission' list of financial sanctions, *i.e.* the "electronic-Consolidated Targeted Financial Sanctions List (e-CTFSL) (refer to paras 92-94, and 96-99).

[602] Council of the European Union, *Restrictive measures (Sanctions) – Update of the EU Best Practices for the effective implementation of restrictive measures*, cited above, paras 100-102.

[603] *Inter alia*, Directorate-General for Financial Stability, Financial Services and Capital Markets Union, *Guidance Note – Implementation of Firewalls in Cases of EU Entities Owned or Controlled by a Designated Person or Entity*, 29

The so-described «sanctions revolution»[604] – marked by the unprecedented speed, support, and breadth of measures enacted against the Russian Federation following its 2022 aggression against Ukraine – has provoked significant developments in the EU's restrictive measures framework.[605]

November 2023; Directorate-General for Financial Stability, Financial Services and Capital Markets Union, *Price Cap Coalition Statements and Guidance*, 21 October 2024; European Commission, *Commission Guidance Note on the Implementation of Certain Provisions of Council Regulation (EU) No 401/2013*, C (2021) 3361 final, 11 May 2021; Directorate-General for Financial Stability, Financial Services and Capital Markets Union, *Sanctions: Commission Guidance Note on the Provision of Humanitarian aid in Compliance with EU Restrictive Measures*, C (2022) 4486 final, 30 June 2022; European Commission, *Frequently Asked Questions: Humanitarian Exemption in the EU Syria Sanctions Regime Following the February 2023 Earthquakes in Türkiye and Syria*, 2023; European Commission, *Commission Opinion of 8.6.2021 on Article 2(2) of Council Regulation (EU) No. 269/2014*, C (2021) 4223 final, 08 June 2021; and Directorate-General for Financial Stability, Financial Services and Capital Markets Union, *Commission Consolidated Version of the Frequently Asked Questions Concerning Sanctions Adopted Following Russia's Military Aggression Against Ukraine and Belarus' Involvement in it: On the Implementation of Council Regulation No 833/2014 and Council Regulation No 269/2014*, issued 22 June 2022 - last updated 05 November 2024. Importantly, these are aimed at supporting, explaining, advising and harmonising EU restrictive measures, as to give 'practical guidance' on compliance with these regimes but not substituting the relevant legal provisions. This is specified in the majority of the adopted guidance notes. As a way of example, European Commission, *Commission Guidance Note on the Implementation of Certain Provisions of Council Regulation (EU) No 401/2013*, cited above, specifically states that «This note has been conceived as a guidance document where the Commission sheds light on its current understanding of a number of provisions of the Regulation. The note neither aspires to cover all provisions in an exhaustive manner, nor does it create any legal obligations. The Commission oversees the application of Union law under the control of the Court of Justice of the European Union. Pursuant to the Treaties, only the Court of Justice of the European Union can provide legally binding interpretations of acts of the institutions of the Union». Similarly, the Directorate-General for Financial Stability, Financial Services and Capital Markets Union, *Commission Consolidated Version of the Frequently Asked Questions Concerning Sanctions Adopted Following Russia's Military Aggression against Ukraine and Belarus' Involvement in it: On the Implementation of Council Regulation No 833/2014 and Council Regulation No 269/2014*, cited above, answers to the question "What is the purpose of these Questions and Answers?" stating that «The adopted sanctions against Russia are unprecedented, have broad consequences and take immediate effect. These Q&A aim at supporting EU public buyers in their implementation, by explaining their logic and advising on application. However, the Q&A themselves are not legally binding and do not replace the relevant legal provisions» (last updated 12 May 2022).

[604] Portela C., Kluge J., *Slow-Acting Tools: Evaluating EU Sanctions Against Russia After the Invasion of Ukraine*, European Union Institute for Security Studies, Brief no. 11, 2022, p. 2.

[605] Over the years the EU has adopted several regimes of restrictive measures, involving nearly 40 states (see the updated EU Sanctions Map, available at https://www.sanctionsmap.eu/#/main, [last accessed on 12 March 2024]), with the most recent measures enacted against Russia following its aggression on Ukraine. These measures, building on those already impose after Russia's annexation of Crimea and Sevastopol in 2014, include as of the time of writing 14 packages after 2022. Starting with the first package enacted the day after the invasion, the EU added further measures throughout the years 2022 and 2024, also against Belarus and Iran for their involvement and their support of the Russian war of aggression. These restrictive measures – which involved both economic and financial measures, individual restrictions and diplomatic actions – mainly possessed the objective of hindering the Russian Federation's capacity to continue the aggression. However, certain measures also had the objective of condemning human rights violations in Russia. In total, over 2300 individuals and entities had been reached by EU restrictive measures as a consequence of the Russian Federation aggression of Ukraine (European Council - Council of the European Union, *EU Sanctions against Russia explained*, available at https://www.consilium.europa.eu/en/policies/sanctions-against-russia/sanctions-against-russia-explained/, [last accessed on 12 September 2024]). *Inter alia*, these involve bans on exports and imports of dual-use, arms and other defence-related goods; limitations to public financing trade and investments with Russia; restrictions on Russian media outlets; prohibitions of satisfying claims of affected contracts or transactions; restrictions on exports and imports of oil, steel, coal, iron, petroleum, diamonds, gold, raw materials, processed aluminium, and luxury goods; constraints to aviation and space industries; prohibition of financial transactions with Russia (even by banning, notably, the SWIFT system); limitations to maritime navigations and road transports; prohibition to provide services such as accounting, auditing, consulting, software, financial assistance, market research, and services on management, legal, architecture and engineering; restrictions on export of certain technologies such as radio communication, dual-use and advanced technologies, and sensitive military technologies (EU Sanctions Map, Section '*Russia'*, available at https://www.sanctionsmap.eu/#/main/details/26/?search=%7B%22value%22:%22%22,%22searchType%22:%7B%7D%7D, [last accessed on 12 March 2024]; and the related legal acts). In response, Russia implemented a number of measures against the EU (and other Western countries) including restrictions on international cooperation, imports and

These potentially permanent innovations,[606] accelerated by the urgency of responding to the Russian aggression, had already begun after Brexit.[607] Although neither Article 215 TFEU nor the decision-making process have been formally reformed, crucial introductions have directly affected the process, by altering the roles of the Commission and of the EU MS.

Specifically, scholars highlight the Commission's expanded role at the expense of the EU MS.[608] Accordingly, the Commission strengthened its role in the whole process of restrictive measures – though its participation in G7 meetings;[609] its monitoring of EU MS activities in cases of

exports and others (as established by Federal Law no. 127-FZ "On Retaliation Measures (Countermeasures) on Unfriendly Actions of the United States of America and Other Foreign Countries" of June 2018). *Inter alia*, refer also to prior legislation (*e.g.* remarkable Federal Law no. 281-FZ of December 2006 "On Special Economic Measures and Coercion Measures" recently amended in August 2023; and the Federal Law no. 390-FZ "On Security" of December 2010) and the extensive one after 2022 (*e.g.* Decree no. 79 "On Special Economic Measures in Connection with the Unfriendly Actions of the United States of America and Other Foreign Countries" of February 2022; Decree no. 81 "On Additional Temporary Measures of Economic Nature to Secure Financial Stability of the Russian Federation" of March 2022; etc). This reciprocation of unilateral measures has been labelled by some scholars as "new cold war" or "sanctions war". Chapter IV, Section 2, of this dissertation focuses and analyses the 'exchange' of unilateral coercive measures between Western States (and the EU) and the Russian Federation from 2014 until nowadays. The EU measures had been 'innovative' both in their amount, width and in third-countries participation, however, some issues – such as the 'comprehensive' and nationality-based nature of these measures; their humanitarian implications on the Russian population; the broadening of the designation criteria; and the legality of both certain measures (*e.g.* those prohibiting legal advisory consultancy, or those banning media outlets) and of the extensive guidelines provided by the Commission – have also been discussed by scholars in light of an unusual EU approach to restrictive measures. *Inter alia*, Meissner K., Graziani C., *The Transformation and Design of EU Restrictive Measures against Russia*, Journal of European Integration, Vol. 45, no. 3, 2023, pp. 377-394; and, Poli S., Finelli F., *Context Specific and Structural Changes in EU Restrictive Measures Adopted in Reaction to Russia's Aggression on Ukraine*, Eurojus, no. 3, 2023, pp. 19-49. More generally, on the legality of EU restrictive measures against the Russian Federation of 2022, among others, Alì A., *Assessing the Legality of the EU Sanctions Imposed on the Russian Federation from 2022*, in Kirkham K. (ed), *The Routledge Handbook on the Political Economy of Sanctions*, op. cited above, pp. 330-338; Silingardi S., *Sulla legittimità delle sanzioni unilaterali nei confronti della Russia a seguito dell'aggressione contro l'Ucraina*, Rivista di diritto internazionale, Vol. 115, no. 3, 2022, pp. 795-817; Silingardi S., *La liceità internazionale delle misure imposte dall'UE nei confronti della Federazione Russa anche alla luce dei nuovi obiettivi anti-elusione*, in Alì A. (ed), *Le sanzioni dell'UE nei confronti della Russia tra sicurezza internazionale e diritti umani*, op. cited above, pp. 17-53; and, Silingardi S., *The EU 11 and 12 Packages of Sanctions Against Russia: How Far is the EU Willing to Go Extraterritorially?*, op. cited above, pp. 546-554. On the elements of EU restrictive measures prior to 2022, Borlini L., Silingardi S., *Defining Elements and Emerging Legal Issues of EU "Sanctions"*, Italian Yearbook of International Law 2017, Vol. XXVII, 2018, pp. 33-52.

[606] On the potential use of these developments within the future regimes of restrictive measures, among others, Poli S., Finelli F., *Context Specific and Structural Changes in EU Restrictive Measures Adopted in Reaction to Russia's Aggression on Ukraine*, op. cited above, pp. 47-49.

[607] Portela C., *Sanctions and the Geopolitical Commission: The War over Ukraine and the Transformation of EU Governance*, European Papers, Vol. 8, no. 3, 2024, pp. 1124-1130, p. 1125 more specifically argues that this acceleration provoked the transformation of the Commission's role – now more preponderant – which however was already initiated by Brexit and by the consequent loss of specific and technical expertise on the sanctions apparatus brought by the UK to the EU table.

[608] States whose national interests have lost relevance within the design of measures and their costs and distributional consequences have increased. *Inter alia*, Meissner K., Graziani C., *The Transformation and Design of EU Restrictive Measures against Russia*, op. cited above, pp. 389-390 which also report staff members of the Council's working party RELEX supporting that the seriousness of the Russian's aggression «seems to have, at least to some extent, overshadowed national economic interests and domestic considerations».

[609] *Ibid*, p. 1126. In these fora, it was also frequent to discuss future restrictive measures to be adopted at EU level. Yet, this practice establishes an asymmetry between EU MS that are part of the G7 (France, Germany, and Italy) and those non-participants excluded from previous discussions at EU fora.

violations of restrictive measures, after these became EU crimes under Article 83 (1) TFEU;[610] the introduction of the EU whistleblowing tool enabling individuals to report possible violations directly to the Commission;[611] and, the creation of a "Special Envoy for the Implementation of EU Sanctions".[612] The EU MS's diminished role is also demonstrated by the employment of «calibrated derogations»,[613] enabling the EU to overcome its MS's "veto power" within the Council, guaranteeing the protection of specific national needs (*e.g.* energy-dependency).[614] Significant developments also

[610] Decision 2022/2332, and Directive 2024/1226 concerns the addition violations of restrictive measures within the EU crimes of Article 83 (1) TFEU. As a result, the Commission is constantly informed about (and evaluates) the activities of EU MS in the area of violations and establishes, if necessary, a network of experts with which to offer assistance to national authorities (Articles 16, 19 e 20 Directive 2024/1226). However, criticisms contest the lack of a proper impact assessment given the Commission's activation of the urgency procedure. In this sense, Poli S., Finelli F., *Context Specific and Structural Changes in EU Restrictive Measures Adopted in Reaction to Russia's Aggression on Ukraine*, op. cited above, p. 44; Silingardi S., *The EU 11 and 12 Packages of Sanctions Against Russia: How Far is the EU Willing to Go Extraterritorially?*, op. cited above, p. 547; Silingardi S., *La liceità internazionale delle misure imposte dall'UE nei confronti della Federazione Russa anche alla luce dei nuovi obiettivi anti-elusione*, in Alì A. (ed), *Le sanzioni dell'UE nei confronti della Russia tra sicurezza internazionale e diritti umani*, op. cited above, pp. 52-53; and, Portela C., *Sanctions and the Geopolitical Commission: The War over Ukraine and the Transformation of EU Governance*, op. cited above, p. 1127. Similarly, the European Economic and Social Committee (EESC) Opinion, "*Violation of Sanctions/EU Crimes*": Communication from the Commission to the European Parliament and the Council, towards a Directive on criminal penalties for the violation of the Union restrictive measures [COM(2022) 249 – final]; Proposal for a Council decision on adding the violation of Union restrictive measures to the areas of crime laid down in Article 83(1) of the treaty on the Functioning of the European Union [COM(2022) 247 – final]; Proposal for a Directive of the European Parliament and of the Council on the definition of criminal offences and penalties for the violation of Union restrictive measures [COM/2022/684 final]; SOC/739", Rapporteur: José Antonio Moreno Díaz, 22 March 2023, available at https://dmsearch.eesc.europa.eu/search/opinion, [last accessed on 14 March 2024]. Interestingly, in this opinion, the European Economic and Social Committee concludes that it «EESC regrets that the abovementioned decision was not subject to full democratic deliberation in the European Parliament's Committee on Civil Liberties, Justice and Home Affairs due to the activation of the urgency procedure. Similarly, the EESC remains concerned that the proposal for a Directive tabled by the Commission has not been preceded by an impact assessment. Moreover, the EESC regrets that the Commission's proposal for a Directive on the definition of criminal offences and penalties for the violation of sanctions does not mention the European Economic and Social Committee among the stakeholders consulted», para 1.2.

[611] The introduction of the EU whistleblowing tool – granting individuals the possibility to report possible violations directly to the Commission without having to rely on national authorities – affects EU MS' role and confirms once again the Commission's enhanced involvement. European Commission, *EU Sanctions Whistleblower Tool*, available at https://eusanctions.integrityline.com/frontpage, [last accessed on 04 April 2024]. On this, among others, Portela C., *Sanctions and the Geopolitical Commission: The War over Ukraine and the Transformation of EU Governance*, op. cited above, p. 1128.

[612] The "Special Envoy for the Implementation of EU Sanctions" was created by the Commission with the objective to «ensure continuous, high-level discussions with third countries to avoid evasion or […] circumvention» of the recent and unprecedented restrictive measures against Russia (European Commission Newsroom, *EU Appoints David O'Sullivan as International Special Envoy for the Implementation of EU Sanctions*, 13 December 2022, available at https://ec.europa.eu/newsroom/representations/items/770173, [last accessed on 14 March 2024]). According to some authors, this ratifies the Commission's increased involvement in the EU 'sanctioning' apparatus. In this sense, Portela C., *Sanctions and the Geopolitical Commission: The War over Ukraine and the Transformation of EU Governance*, op. cited above, p. 1128 which also discusses the new practice of the Commission to communicate the packages of restrictive measures. This, accordingly, reversed the «traditional roles» of the Commission and of the Council where the first focused on technical details and monitoring implementation while the second was the main actor in establishing a regime of restrictive measures.

[613] Poli S., Finelli F., *Context Specific and Structural Changes in EU Restrictive Measures Adopted in Reaction to Russia's Aggression on Ukraine*, op. cited above, p. 45.

[614] As mentioned above, CFSP requires the Council unanimity which, however, especially in certain sensitive issues, has been complicated to obtain.

concerned the EU's introduction of the "anti-circumvention tool", the "No-Russia" contractual clause, and the consequent enactment of extraterritorial sanctions.[615]

The EU legal framework on restrictive measures is thus designed by a combination of provisions and official documents, both in a general and case-specific level. Linguistically, EU treaties refer to these measures as "restrictive measures", but official documents and institutional discourse frequently name them as "sanctions". Whether they fall within the 'category' of "sanctions" under international law remains debated. Based on the three typologies of categorisation examined above – namely, purpose-oriented, actor-oriented, and typologies-oriented –, EU measures appear to constitute a "case" *per se*. As a matter of fact, they stem from CFSP decisions and align with CFSP objectives, aiming to modify the targeted country's policies or activities, but exclusively in accordance with common foreign and security objectives of the Council Decision.[616] Moreover, although the EU is an international entity to some extent recognisable as a socially-recognised organisation, its measures lack global applicability. Even though non-EU countries often align with EU measures – thereby enlarging their implementation and, thus, EU authority – they notably remain outside the EU's decision-making process, and such alignment remains voluntary.

The following section explores more in depth the three categories of EU restrictive measures – UN measures transposed into EU law, UN 'reinforced' measures, and EU autonomous measures – and their qualification under international law.

5.2. The categories and qualification of EU restrictive measures

As noted above, the EU panorama of restrictive measures is quite composite, as the EU may adopt or implement three typologies of restrictive measures: (i) UN non-armed measures transposed into EU

[615] Although the extraterritorial application of sanctioning measures does not constitute the topic of this dissertation, it is noteworthy to refer to the works of Silingardi S.: *inter alia*, Silingardi S., *Le sanzioni unilaterali e le sanzioni con applicazione extraterritoriale nel diritto internazionale*, op. cited above; Silingardi S., *Il problema dell'extraterritorialità delle sanzioni*, Quaderni di SIDIBlog 2021, Vol. 8, 2022, pp. 289-298; and, Silingardi S., *The EU 11 and 12 Packages of Sanctions Against Russia: How Far is the EU Willing to Go Extraterritorially?*, op. cited above, focusing specifically on EU's recent measures and their extraterritorial application, such as in Silingardi S., *La liceità internazionale delle misure imposte dall'UE nei confronti della Federazione Russa anche alla luce dei nuovi obiettivi anti-elusione*, in Alì A. (ed), *Le sanzioni dell'UE nei confronti della Russia tra sicurezza internazionale e diritti umani*, op. cited above, pp. 17-53.

[616] The Council of European Union, *Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy*, cited above, paras 2 and 4. As above mentioned, In furthering CFSP objectives, restrictive measures are frequently contended to aim at (a) safeguarding the Union's values, fundamental interests, security, independence and integrity; (b) consolidating and supporting democracy, the rule of law, human rights and the principles of international law; and, (c) preserving peace, prevent conflicts and strengthen international security. These objectives – frequently referred as the goals of restrictive measures – are part of the more numerous objectives of the Union's External Actions, as established by Article 21 (2) TEU. Moreover, Moreover, while certain EU restrictive measures may be considered "sanctions" under the typology-oriented approach – *i.e* diplomatic actions, arms embargoes, travel bans, asset freezes, imports and exports restrictions, services restrictions, and financial measures –, as noted above, this interpretation lacks a strictly-legal distinction and qualification of measures as such.

law;[617] (ii) 'reinforced' UN non-armed measures, composed of UN measures and additional EU provisions;[618] and (iii) 'autonomous' EU restrictive measures.[619]

The first two typologies aim at implementing – and, in the second case, reinforcing – UN non-armed measures, which EU MS are bound to apply and, in turn, so is the EU. The Sanctions Guidelines provide guidance on this process: fast implementation, required legislative procedure, mandatory nature of UNSC resolutions under international law, ensure EU-UN dialogue and reporting, and lifting of EU measures implementing UN measures once the UNSC so decides.[620] According to some authors, the EU implementation of UNSC measures into its legal order is «prime example of the europeanisation of public international law».[621] However, EU's implementation of UN measures has raised many legal challenges, especially concerning the ECJ's competence in the field. Most notably, the Kadi judgments represented a watershed in the EU-UN relationship regarding non-armed measures, as they effectively empowered the ECJ to judge the EU's implementation of UN measures and assess their compatibility with EU primary law.[622]

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[617] In this regard, notice the transposition into EU law of the UNSC non-armed measures against Afghanistan, Central African Republic, Iraq, Lebanon, Somalia, Syria, and Yemen.

[618] On this regard, refer to the EU restrictive measures enacted against the Democratic People's Republic of Korea (also "North Korea" or DPRK), Democratic Republic of Congo, Guinea-Bissau, Haiti, Iran for non-proliferation of weapons of mass destruction (WMD), Libya, Montenegro, Serbia, South Sudan, and Sudan. See also those restrictive measures enacted with regard to ISIL (Da'esh) and Al-Qaida (ISIL/Daesh and Al-Qaida).

[619] In this regard, the EU restrictive measures adopted against Belarus, Bosnia and Herzegovina, Burundi, China, Guatemala, Guinea, Haiti, Iran for the violation of human rights and support to the war in Ukraine, Lebanon, Libya, Mali, Moldova, Myanmar (Burma), Nicaragua, Niger, Russian Federation, Sudan, Syria, Tunisia, Türkiye, Ukraine, United States, Venezuela, and Zimbabwe. See also those restrictive measures enacted against the proliferation and the use of chemical weapons, against cyber-attacks threatening the EU and its MS, against serious human rights violations and abuses, and against terrorism (both specific measures and those directed against those who support, facilitate or enable violent actions by Hamas and the Palestinian Islamic Jihad).

[620] The Council of European Union, *Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy*, cited above, paras 38-47.

[621] Lavranos N., *UN Sanctions and Judicial Review*, in Wouters J., Nolkaemper A., de Wet E. (eds), *The Europeanisation of International Law: The Status of International Law in the EU and its Member States*, op. cited above, pp. 185-204, p. 185. The term "europeanisation" is analysed by Wouters J., Nolkaemper A., de Wet E., *Introduction: The 'Europeanisation' of International Law*, in Wouters J., Nolkaemper A., de Wet E. (eds), *The Europeanisation of International Law: The Status of International Law in the EU and its Member States*, op. cited above, pp. 1-13, which argue that «The processes through which an ever increasing body of international law becomes binding on the EU and through which distinct qualities and features are given to such international law within the EU, constitutes core facets of the phenomenon of 'europeanisation of international law'», thus, «To the extent that is binding upon the EU institutions, international law becomes part of the EU legal order and is therefore 'europeanised'» (p. 3). Different forms of 'europeanisation' of international law are identified at pp. 7-11: (i) europeanisation concerns the influence of EU law on international law (*i.e.* EU political dynamics that increasingly influences and shapes – directly or indirectly – the formation and implementation of international law and of the laws and policies of international organisations); (ii) europeaanisation concerns the different elements and features that international law acquires when it is implemented within the EU legal framework (*i.e.* the EU law itself determines how international law is to be applied, implemented end enforced within the EU MS).

[622] As mentioned above, the Court established that the prevalence of UN obligations (as per Article 103 of the UN Charter) does not automatically mean that EU acts are not reviewable by judicial organs. Among others, White N.D., Abass A., *Countermeasures and Sanctions*, in Evans M.D. (ed), *International Law*, op. cited above, p. 558; Eden P., *United Nations Targeted Sanctions, Human Rights and the Office of the Ombudsperson*, in Happold M., Eden P. (eds), *Economic Sanctions and International Law*, op. cited above, p. 156-161; and, Gioia A., *Diritto internazionale*, op. cited above, p. 468. Refer also to Klabbers J., *International Law*, op. cited above, pp. 195-196, highlighting the complex situation of the

The third typology of EU restrictive measures comprises "autonomous" measures, adopted when the EU acts outside the UN framework, generally in cases involving human rights[623] or when UNSC coordination was unfound. Unlike EU measures implementing UN resolutions – which are lawful measures of implementation –, autonomous measures raise questions over their precise legal classification. Although their legal basis is incardinated into the EU Treaties, part of the doctrine invokes the principle of *res inter alios acta*,[624] arguing that EU treaty rules cannot constitute a valid legal basis for third States (not EU MS) targeted by the measures.

Thus, the legal basis for EU autonomous measures must be sought in general international law, which has prompted frequent debate over their legality.[625] The absence of prior UN authorisation is often viewed as undermining their legitimacy, and certain categories of measures are considered to potentially be unlawful under international law. Indeed, while some measures – such as restrictions on admission into territory, limitations on diplomatic relations, or embargoes – fall with the ILC definition of retorsion and are therefore lawful measures under international law,[626] others extend beyond mere unfriendly conducts.[627] Notably, it is also debated whether EU measures violate the non-

EU MS after the Kadi judgments in so much as they had to both respect EU law and, thus, not give effect to the UNSC non-armed measures; and respect international law and, thus, under Article 25 UN Charter, give effect to those same UNSC non-armed measures.

[623] Immenkamp B., *EU Sanctions: A Key Foreign and Security Policy Instrument*, European Parliamentary Research Service (EPRS), April 2024, PE 760.416, p. 2. Similarly, Spagnolo A., *Entering the Buffer Zone between Legality and Illegality: EU Autonomous Sanctions under International Law*, in Montaldo S., Costamagna F., Miglio A. (eds), *EU Law Enforcement: The Evolution of Sanctioning Powers*, op. cited above, p. 221; and Tzanakopoulos A., *Sanctions Imposed Unilaterally by the European Union: Implications for the European Union's International Responsibility*, in Marossi A.Z., Bassett M.R. (eds), *Economic Sanctions under International Law: Unilateralism, Multilateralism, Legitimacy, and Consequences*, op. cited above, p. 149. Interestingly, the EU has recently introduced a specific framework for adopting restrictive measures in response to human rights violations: the EU Global Human Rights Sanctions Regime of 2020. On this framework and its legal qualification, *inter alia*, Silingardi S., *Sanctions for Human Rights and Democracy*, in Sossai M., Portela C., Charron A. (eds), *Elgar Encyclopedia of International Sanctions*, op. cited above, p. 267.

[624] Among others, Koskenniemi M., *International Law Aspects of the Common Foreign and Security Policy*, in Koskenniemi M. (ed), *International Law Aspects of the European Union*, Martinus Hijhoff Publishers, 1998, pp. 27-44, p. 39; Pellet A., Miron A., *Sanctions*, Max Planck Encyclopaedia of International Law, 2013, p. 64; and, Ruys T., *Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, p. 43.

[625] Interestingly, Tzanakopoulos A., *Sanctions Imposed Unilaterally by the European Union: Implications for the European Union's International Responsibility*, in Marossi A.Z., Bassett M.R. (eds), *Economic Sanctions under International Law: Unilateralism, Multilateralism, Legitimacy, and Consequences*, op. cited above, p. 152 argues that the EU has often based the decision over the adoption of measures on practical considerations, rather than legal ones, perhaps because it considered such measures as justifiable under general international law.

[626] *i.e.* unfriendly conduct not inconsistent with any international obligation of the State adopting it. Accordingly, certain measures might be lawful *per se* because they qualify as retorsions. *Inter alia*, Spagnolo A., *Entering the Buffer Zone between Legality and Illegality: EU Autonomous Sanctions under International Law*, in Montaldo S., Costamagna F., Miglio A. (eds), *EU Law Enforcement: The Evolution of Sanctioning Powers*, op. cited above, p. 226.

[627] Dupont P-E., *The Arbitration of Disputes Related to Foreign Investments Affected by Unilateral Sanctions*, in Marossi A.Z., Bassett M.R. (eds), *Economic Sanctions under International Law: Unilateralism, Multilateralism, Legitimacy, and Consequences*, op. cited above, pp. 197-217, pp. 208-209, for instance, argues that EU restrictive measures against Iran of 2012 cannot be qualified as retorsions, as defined by the ILC ARSIWA Commentary, but rather as countermeasures as per ARSIWA.

intervention principle,[628] or other international rules, such as GATT provisions and, if so, whether they might be justified under GATT as per Articles XX and XXI GATT, as further analysed below.[629]

The EU continuously specifies that its restrictive measures are in full conformity with international law, including human rights and fundamental freedoms.[630] This in turn raises the broader and longstanding debated on the relationship between EU law and international law. Notably, EU case law has occasionally refined the relationship,[631] but no explicit regulation of the EU-international law nexus is present within EU Treaties, despite reference to international law is present.[632] In the field of restrictive measures, Article 21 TEU and the Sanctions Guidelines formulate the respect of international law – especially human rights and fundamental freedoms,[633] and international obligations, such as those arising from WTO agreements.[634]

EU courts have examined the role and application of international law within the EU legal order, establishing both the legality of EU institutions to act based on instruments other than EU

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[628] The principle of non-intervention and its possible violations by unilateral coercive measures have been discussed in detail in Chapter I of this dissertation, Section 4.3.

[629] These GATT Articles and the GATT/WTO system will be presented in detail subsequently in Chapter III, Section 2.

[630] In this regard, Council of the European Union, *Basic Principles on the Use of Restrictive Measures (Sanctions)*, para 3, but also institutional EU websites presenting the measures such as, among others, European External Action Service (EEAS), *European Union Sanctions*, 07 October 2023, available at https://www.eeas.europa.eu/eeas/european-union-sanctions_en, [last accessed on 13 September 2024]; European Commission, *Sanctions (Restrictive Measures)*, available at https://finance.ec.europa.eu/eu-and-world/sanctions-restrictive-measures_en, [last accessed on 13 September 2024]; and European Council - Council of the European Union, *Why the EU Adopts Sanctions*, available at https://www.consilium.europa.eu/en/policies/why-sanctions/, [last accessed on 13 September 2024].

[631] Most notably, the remarkable *van Gend & Loos case* (1963) established that «the European Economic Community constitutes a new legal order of international law» (Judgment of the Court, 5 February 1963, Reference for a preliminary ruling under Article 177 of the EEC Treaty made by the Tariefcommissie, Amsterdam, on 16 August 1962 in the proceedings between N.V. Algemene Transport— en Expeditie Onderneming van Gend & Loos and Nederlandse administratie der belastingen (Netherlands Inland Revenue Administration), Case 26/62, para 3. This case is most notably known as "van Gend & Loos" case). The *Costa v Enel case* (1964) further confirmed EU law' primacy over national legal systems and its autonomous character (Judgment of the Court of 15 July 1964, Flaminio Costa v E.N.E.L., Reference for a preliminary ruling: Giudice conciliatore di Milano (Italy), Case 6/64 (also 'Costa v Enel' case)).

[632] Article 3 (5) TEU provides for the EU contribution to the «strict observance and the development of international law, including respect for the principles of the United Nations Charter». Article 21 (1) TEU establishes that the EU actions within international scene should be guided by several principles including the respect of UN Charter and international law, while paragraph (2) of the same Article envisages the consolidation and support of the principles of international law as one of core objectives of CFSP. The TFEU, instead, mentions international law with regard to the demarcation of borders (as per Article 77 (4) TFEU) and to humanitarian aid operations (as per Article 214 (2) TFEU) which should be conducted in accordance with international law' principles. Nonetheless, the fundamental provision of TFEU concerning the EU relationship with international law is Article 216 (2) TFEU, stating the binding nature on EU institutions and its MS of international agreements concluded by the EU. On the relationship between international agreements and EU law, among others, Epiney A., Hofstötter B., Wyssling M., *The Status of 'Europeanised' International Law in Austria, Switzerland and Liechtenstein*, in Wouters J., Nolkaemper A., de Wet E. (eds), *The Europeanisation of International Law: The Status of International Law in the EU and its Member States*, op. cited above, pp. 137-159; and Von Bogdandy A., Smrkolj M., *European Union Law and International Law*, Max Planck Encyclopedias of International Law [MPIL], February 2011, paras 6-22.

[633] The Council of European Union, *Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy*, cited above, paras 9-11. An analysis of the Sanctions Guidelines, together with the other two fundamental official documents on the matter (*i.e.* Basic Principles and Best Practice) has been conducted in this Chapter in Section 5.1.

[634] The Council of European Union, *Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy*, cited above, para 11.

treaties,[635] and the Court's admissibility to rule over acts of EU institutions legally based on extra-EU instruments.[636] Most notably, as already noted, the Kadi judgments brought this at the UN level, as the ECJ pronounced over EU restrictive measures implementing UN non-armed measures within the EU legal order.[637]

In practice, the CJEU's reliance on international law oscillates. It is reluctant when EU law's validity or autonomy is at stake, when international norms are indeterminate, and in politically controversial cases.[638] Yet, CJEU case law has more consistently engaged with international fundamental rights and freedoms norms,[639] which are increasingly recognised in EU Treaties,[640] and further consolidated in the EU Charter of Fundamental Rights. Customary international law norms and general principles of international law have been occasionally used by the ECJ as either limits, rules of interpretation, or gap-fillers when absent explicit EU provisions.[641] Although it is settled that

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[635] Among others, Judgment of the Court of 30 June 1993, *European Parliament v Council of the European Communities and Commission of the European Communities*, Joined Cases C-181/91 and C-248/91; and Judgment of the Court, 2 March 1994, *Parliament v Council*, Case C-316/91 within which this issue was reaffirmed and strengthened.

[636] Judgment of the Court, 2 March 1994, *Parliament v Council*, Case C-316/91, cited above, para 9 where it is stated that «an action by the Parliament against an act of an institution intended to have legal effects is admissible irrespective of whether the act was adopted by the institution pursuant to Treaty provisions».

[637] The Kadi judgments (*i.e.* the Judgment of the Court (Grand Chamber), *Kadi and Al Barakaat International Foundation v Council and Commission*, 3 September 2008, Joined Cases C-402/05 P and C-415/05 P, cited above) have been previously mentioned within the analysis of the UN framework of its non-armed measures. Interestingly, on this issue, Klabbers J., *International Law*, op. cited above, pp. 195-196, notices how such case «saddled the EU member states with an immense problem; under EU law, they could not give effect these sanctions; yet under international law (article 25 UN) they were bound to give effect to those same sanctions».

[638] Kassoti E., Butler G., *The Approach of the CJEU to International Law: Towards a Context-Specific Approach*, in Fahey E., Mancini I. (eds), *Understanding the EU as a Good Global Actor: Ambitions, Values and Metrics*, Edward Elgar Publishing, 2022, pp. 266-275. More precisely, CJEU is cautious in taking into account and rely on international law when the validity of EU law is at stake; when there is the need to preserve the EU essential features of an autonomous legal order in respect to international law (*i.e.* protecting the principle of autonomy of EU law); when the cases involve undetermined and complex international law concepts (*e.g.* when the status of international law norms is invoked); and when the political controversial nature of the dispute is particularly present.

[639] Among others, the Judgment of the Court (Grand Chamber), *Kadi and Al Barakaat International Foundation v Council and Commission*, 3 September 2008, Joined Cases C-402/05 P and C-415/05 P, cited above, para 361 which states that «the review by the Court of the validity of any Community measure in light of fundamental rights must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement». On fundamental rights and the EU-international law system refer to, among others, Callewaert J., *'Unionisation' and 'Conventionisation' of Fundamental Rights in Europe: The Interplay Between Union and Convention Law and its Impact on the Domestic Legal Systems of the Member States*, in Wouters J., Nolkaemper A., de Wet E. (eds), *The Europeanisation of International Law: The Status of International Law in the EU and its Member States*, op. cited above, pp. 109-135; and, Von Bogdandy A., Smrkolj M., *European Union Law and International Law*, op. cited above, paras 30-32. On the Kadi judgments, refer to Section 3.2.4. of this Chapter II.

[640] On the evolution of the protection of fundamental rights in the EU legal order, among others, Marzocchi O., *The Protection of Fundamental Rights in the EU: European Parliament Achievements During the 2014-2019 Legislative Term and Challenges for the Future*, European Parliament Briefing - Requested by the LIBE committee, PE 621.911, April 2019, which describes how the emergence of the issue of compatibility of EU law with human rights spurred many modifications and changes within EU law. An interesting issue also concerns the relationship between the protection of fundamental rights within the EU and other international law norms on the issue (such as the ECHR). On the relationship with the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) refer to the Preamble, Article 52 (3), and Article 53 of the Charter of Fundamental Rights of the European Union.

[641] Von Bogdandy A., Smrkolj M., *European Union Law and International Law*, op. cited above, para 23. Similarly, Kuijper P.J., *Customary International law, Decisions of International Organisations and Other Techniques for Ensuring*

the EU must respect international (customary) law «in the exercise of its powers»,[642] it remains debated whether customary law rules might be invoked to review the legality of EU acts, including its restrictive measures.[643] While some authors strongly argue that the CJEU should increase its reliance on and interpretation of international law,[644] others contend that the Court mainly uses international law to enforce EU MS obligations rather than to «submit measures of the EU institutions to scrutiny».[645]

Notably, the EU and US have distinct approaches to international law.[646] The EU is generally perceived as committed to multilateralism and unwilling to disrupt the unity of the international legal

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Respect for International Legal Rules in European Community Law, in Wouters J., Nolkaemper A., de Wet E. (eds), *The Europeanisation of International Law: The Status of International Law in the EU and its Member States*, op. cited above, pp. 87-106.

[642] Judgment of the Court of 24 November 1992, *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp.*, Reference for a preliminary ruling: Kriminal- og Skifteretten i Hjørring, Case C-286/90, para 9 in which the European Community' respect of international law in the exercise of its power is established «as a preliminary point». This case is also known as either 'Anklagemyndigheden v Peter Michael Poulsen and Diva' or as 'Poulsen and Diva Navigation' case. Also refer to Judgment of the Court, 16 June 1998, *A. Racke GmbH&Co. and Hauptzollamt Mainz*, Case C-162/96, paras 45-46 specifically mentioning the Poulsen and Diva Navigation case and adding that «it is therefore required to comply with the rules of customary international law when adopting a regulation suspending the trade concessions granted by, or by virtue of, an agreement which it has concluded with a non-member country», thus effectively rendering «the rules of customary international law […] binding upon the Community institutions and form[ing] part of the Community legal order». This latter case is also most notably known as "Racke" case.

[643] *Inter alia*, Canor I., *The Limits of Judicial Discretion in the European Court of Justice: Security and Foreign Affairs Issues*, Nomos Verlagsgesellschaft Baden-Baden, 1998, pp. 115-123; and Von Bogdandy A., Smrkolj M., *European Union Law and International Law*, op. cited above, p. 24. Similarly, Koskenniemi M., *International Law Aspects of the Common Foreign and Security Policy*, in Koskenniemi M. (ed), *International Law Aspects of the European Union*, op. cited above, p. 39, and pp. 41-42 which, at p. 39, argues that the State' obligations «under the UN Charter, the GATT/WTO and the customary international law relating to countermeasures and State responsibility are relevant for determining the legal status of its action». More generally, on whether EU MS are bound to customary international law created by the EU, Lowe V., *Can the European Community Bind the Member States on Questions of Customary International Law?*, in Koskenniemi M. (ed), *International Law Aspects of the European Union*, op. cited above, pp. 149-168. Despite this, many scholarly contributions on unilateral coercive measures debate on whether EU restrictive measures might be justified (and to what extent) under ARSIWA' rules, as it will be further analysed in the next paragraph of this section.

[644] Pauwelyn J., *Europe, America and the 'Unity' of International Law*, in Wouters J., Nolkaemper A., de Wet E. (eds), *The Europeanisation of International Law: The Status of International Law in the EU and its Member States*, op. cited above, pp. 205-225, pp. 208-213 where the author argues that the risk of inconsistent interpretations – seen, instead, as a potential «engine for reflection, refinement and further development of international law» (p. 211) – not only does not necessarily consist in a disruption of international law system but, additionally, it might also be avoided by referring to other courts' rulings, by seeking expert advice, and by domestic challenges. Similarly, Kassoti E., Butler G., *The Approach of the CJEU to International Law: Towards a Context-Specific Approach*, in Fahey E., Mancini I. (eds), *Understanding the EU as a Good Global Actor: Ambitions, Values and Metrics*, op. cited above, pp. 261-276, pp. 262-263 arguing that the Kadi judgment represent «rather than a unique case, […] 'the new normal'; the interplay between international and EU law […] [as] a common state of affairs that the CJEU has to deal with in practice» arguing for a context-specific approach. Currently, there are opposed views on the CJEU's approach to international law, with some authors interpreting the CJEU attitude towards international law as open and others as more reserved. The authors at p. 264, denominate these interpretations as "openness/hostility" dichotomy.

[645] Von Bogdandy A., Smrkolj M., *European Union Law and International Law*, op. cited above, para 39.

[646] Pauwelyn J., *Europe, America and the 'Unity' of International Law*, in Wouters J., Nolkaemper A., de Wet E. (eds), *The Europeanisation of International Law: The Status of International Law in the EU and its Member States*, op. cited above, pp. 206-207, pp. 214-215 and pp. 222-223 which distinguishes the approaches in «European idealism (normativism)» and in «American realism (transactionalism)» and, then, concludes that «in short, Europe and the United States play the same game, within the same framework and with the same reflexes. Differences in their position have to do more with relative strength and constitutional framework, than substantive trans-atlantic disagreements». Other authors debating the US-EU differences of approaches within international law are, *inter alia*, Posner E.A., *The Perils of Global*

system, whereas the US typically adopts a more unilateral approach, using international law instrumentally to protect its national security, and promote its hegemony and values globally.[647] Although the US contributed to the post-WWII international (and multilateral) order, it shifted towards unilateralism from the 60s onwards.[648] Despite both the US and EU relied on the WTO DSU

Legalism, The University of Chicago Press, 2009, pp. 226-227 discussing the US view of international law as an instrument and the EU opposition to consider international law in instrumental terms; and Pollack M.A., *Who Supports International Law, and Why?: The United States, the European Union, and the International Legal Order*, International Journal of Constitutional Law, Vol. 13, no. 4, 2015, pp. 873-900 which analyses the accuracy of these characterisations (considering as dependent variables: leadership, consent, compliance, and internalization; and as independent variables: international and domestic, and, political and legal/constitutional) by concluding that «the conventional wisdom about the nature of transatlantic differences in attitudes toward international, and the reasons for them» are, in fact, partially supported (p. 875 and p. 895). Accordingly, US constraints to supporting international law are found to be linked to consent (failure to sign or ratify multilateral treaties) and internalization (US courts and US Congress which are reluctant to enable domestic legal force to international law norms). On the other side, EU showed strong leadership in environmental and human rights issues at the international level, but less in other areas while their wide compliance with treaties obligations is assessed, EU courts were found to increasingly protecting EU autonomy of legal order (see also pp. 895-900 for the author' more detailed conclusions). For an historical overview of US and Europe's approaches to international law and, more specifically, to regionalism Orford A., *Regional Orders, Geopolitics, and the Future of International Law*, Current Legal Problems, Vol. 74, no. 1, 2021, pp. 149-194. For a specific analysis of US and EU approaches to international environmental issues, instead, Elsig M., Milewicz K., Stürchler N., *Who is in Love with Multilateralism? Treaty Commitment in the Post-Cold War Era*, European Union Politics, Vol. 12, no. 4, 2011, pp. 529-550.

[647] In this regard, Pauwelyn J., *Europe, America and the 'Unity' of International Law*, in Wouters J., Nolkaemper A., de Wet E. (eds), *The Europeanisation of International Law: The Status of International Law in the EU and its Member States*, op. cited above, p. 206. Similarly, Murphy J.F., *The United States and the Rule of Law in International Affairs*, Cambridge University Press, 2004, p. 354; Posner E.A., *The Perils of Global Legalism*, op. cited above, pp. 226-227; and, Pollack M.A., *Who Supports International Law, and Why?: The United States, the European Union, and the International Legal Order*, op. cited above, p. 874; Specifically on EU approach to international law, among others, Burke-White W.W., Slaughter A.-M., *The Future of International Law is Domestic (or, The European Way of Law)*, Harvard International Law Journal, Vol. 47, no. 2, 2006; and Elsig M., Milewicz K., Stürchler N., *Who is in Love with Multilateralism? Treaty Commitment in the Post-Cold War Era*, op. cited above, which focuses on mapping multilateralism since the Cold War and finding strong treaty ratification within the EU. Interestingly, Sadat L.N., *An American Vision for Global Justice: Taking the Rule of (International) Law Seriously*, Washington University Global Studies Law Review, Vol. 4, no. 2, 2005, pp. 329-343, pp. 330-331 argues that the US indifference for international law and international justice within its foreign policy concerns was historically witnessed in the shift from «the exercise of diplomacy to the projection of power». On the respective but complementary shift of US and EU approaches towards environmental protection and treaties Kelemen R. D., Vogel D., *Trading Places: The Role of the United States and the European Union in International Environmental Politics*, Comparative Political Studies, Vol. 43, no. 4, 2010, pp. 427-456, reporting how during the 1960s-1970s the US approach was the leading and strong supporter of these issues, while since the 1990s the dynamics shifted with the EU «emerging as a global environmental leader and the United States repeatedly opposing multilateral environmental agreements» (p. 427). Similarly, Velut J.-B., *Environmental Allies and Trade Competitors: A Comparative Analysis of US and EU Governance Models for the Trade-and-Climate Nexus*, in Fahey E., Mancini I. (eds), *Understanding the EU as a Good Global Actor: Ambitions, Values and Metrics*, op. cited above, pp. 74-90; while on US approach to international environmental issues refer to Murphy J.F., *The United States and the Rule of Law in International Affairs*, op. cited above, pp. 338-334.

[648] On this, among others, Murphy J.F., *The United States and the Rule of Law in International Affairs*, op. cited above, pp. 2-4 arguing that US influence over the GA during the 1960s and 1970s. Similarly, Sadat L.N., *An American Vision for Global Justice: Taking the Rule of (International) Law Seriously*, op. cited above, p. 331 highlighting the key US role in the establishment of the UN and in the promotion of the rule of law during and after WWII. On the US conception of international law as not a "real law", among others, *Ibid*. (Sadat L.N., *An American Vision for Global Justice: Taking the Rule of (International) Law Seriously*, op. cited above), pp. 330-332 discussing how international law is considered by American legal doctrine as not a "real law" since it lacks international legislature, courts with mandatory jurisdictions, and centrally-organised sanctions structure (p. 332); Posner E.A., *The Perils of Global Legalism*, op. cited above, pp. 28-34 analysing the "institutional weakness of international law"; Goldsmith J.L., Posner E.A., *The Limits of International Law*, Oxford University Press, 2005; and Murphy J.F., *The United States and the Rule of Law in International Affairs*, op. cited above, p. 12. On the US historical approach to international law as a "sole superpower" and its «schism» with other allies' views, Orford A., *Regional Orders, Geopolitics, and the Future of International Law*, op. cited above, pp. 170-179.

system,[649] the US trend towards unilateralism was reinforced by its blocking of the WTO Appellate Body in 2019.[650] Conversely, despite occasional fractures in the EU's support of multilateralism – such as the rise of sceptical political parties, [651] and (to a certain extent) the persistent adoption of unilateral restrictive measures – the EU has consistently remained committed to multilateralism, as demonstrated by its proposals to reform the WTO system and its role in creating the Multi-party interim appeal arbitration arrangement (MPIA) in response to the WTO AB's paralysis.[652]

The rise of Russia and China as new powers on the international scene has introduced alternative approaches to international law, promoting new readings of its principles,[653] and often opposing Western interpretations and Western States's role in shaping the international order.[654] These divergent approaches are reflected in how the US, the EU, Russia, and China perceive and employ unilateral coercive measures. The US justifies the imposition of these measures on the basis

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[649] The shared reliance of the US and EU on the WTO and DSU has been cited as a traditional 'counter-argument' proving the similarities of US and EU approaches. Nonetheless, this argument lost its significance especially after the US willingly blocked the WTO Appellate Body in 2019. *Inter alia*, Pauwelyn J., *Europe, America and the 'Unity' of International Law*, in Wouters J., Nolkaemper A., de Wet E. (eds), *The Europeanisation of International Law: The Status of International Law in the EU and its Member States*, op. cited above, pp. 215-216. On the WTO and DSB role in international law in the framework of the fragmentation of international law, Koskenniemi M., Leino P., *Fragmentation of International Law? Postmodern Anxieties*, Leiden Journal of International Law, Vol. 15, no. 3, 2002, pp. 553-579, pp. 571-574.

[650] Brief mention on the causes of the paralysis of the WTO Appellate Body is provided in Chapter III, Section 2.1. Nonetheless, US sceptical attitude towards the WTO did not occur abruptly in 2018/2019, since indications were present already in the earlier years. In this regard, Murphy J.F., *The United States and the Rule of Law in International Affairs*, op. cited above, pp. 49-52. On the Biden Administration' unchanged approach to the WTO paralysis and to the 2018' imposed tariffs, *inter alia*, Schoenbaum T.J., *The Biden Administration's Trade Policy: Promise and Reality*, German Law Journal, Vol. 24, 2023, pp. 102-124, pp. 114-115, and pp. 123-124 where the author confirm that the US approach continues to be contrary to multilateralism.

[651] In this regard, Orford A., *Regional Orders, Geopolitics, and the Future of International Law*, op. cited above, p. 179.

[652] EU intents to support multilateralism is evident and present in many official documents, statements and new instruments. As a way of example, refer to ACI Preamble paras 2, 12, 21; or President of the European Council (Michel C.) - Speech at the WTO Presidential Lecture, *Rebuilding Trust, Boosting Trade and Transforming our Multilateral Institutions*, 01 November 2024, where it was stated that «One thing is absolutely certain - no single country, not even the most powerful, can face all these challenges alone. We need cooperation and multilateralism more than ever». Brief mention of the EU-established Multi-Party Interim Appeal Arbitration Arrangement (MPIA) and of the countries taking part to the arrangement is provided in Section 2.1., Chapter III.

[653] Refer, for instance, to the Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law, 25 June 2016, establishing the States' full commitment to the principles of international law as reflected in the UN Charter, in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, and in the Five Principles of Peaceful Coexistence (see para 1 of the Declaration of June 2016). On this regard, among others, Orford A., *Regional Orders, Geopolitics, and the Future of International Law*, op. cited above, pp. 179-187. Similarly, Posner E.A., *The Perils of Global Legalism*, op. cited above, p. 228. On the Russian Federation approach, among others, Fulgenzi M., *La "guerra delle sanzioni": L'Unione Europea e la Federazione Russa nell'era dell'interdipendenza economica globale*, op. cited above, pp. 236-269. On China's approach, *inter alia*, Hanqin X., *Chinese Contemporary Perspectives on International Law*, Brill / Nijhoff, 2012, and Cheng C.-J. (ed), *A New Global Economic Order: New Challenges to International Trade Law*, Brill / Nijhoff, 2022.

[654] Indeed, different interpretations of the history of international law and of the creation of the international order often frame Western States as having acquired power through «imperialism, coercion, and unequal treaties». In this regard, Orford A., *Regional Orders, Geopolitics, and the Future of International Law*, op. cited above, p. 181. More in general, Casella P.B., *International Law, History and Culture*, Brill / Nijhoff, 2024, pp. 263-339 analyses the impact of colonialism on international law; and Anghie A., *Imperialism, Sovereignty and the Making of International Law*, Cambridge University Press, 2004.

of potentially any presidentially-declared national security concern or national emergency,[655] while the EU enact them based on the achievement of CFSP objectives.[656] Moreover, in the US system, the claim to protect of national security often suffice to disregard international law – *e.g.* with extraterritorial measures, or, more evidently, in the post-9/11 actions –[657] while the EU superseded the primacy of international law solely in cases of human rights violations.[658] The US frequent reliance on extraterritorial measures also strongly differ with the EU's approach, which instead

[655] An overview of the US legal framework for imposing unilateral 'sanctioning' measures is provided later in this Chapter, in Section 6.1. According to the International Emergency Economic Powers Act (IEEPA) – which is one of the most often used legal basis for the imposition of US measures – the US President may act against any «unusual and extraordinary threat» (whose source is in whole or substantial part outside to the US) to the US national security, foreign policy or economy after the President' declaration of a national emergency is adopted. Nonetheless, many scholars contest the vagueness of the terminology used, and the uncomplicated requirement of the declaration of a national emergency by the President, as later it will be further presented.

[656] Article 21 TEU defines CFSP objectives by establishing that the EU action should be guided by the principles of democracy, rule of law, universality, indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and the respect of the UN Charter and international law. EU policies should (a) safeguard its values, fundamental interests, security, independence and integrity; (b) consolidate and support democracy, the rule of law, human rights and the principles of international law; (c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders; (d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty; (e) encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade; (f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development; (g) assist populations, countries and regions confronting natural or man-made disasters; and (h) promote an international system based on stronger multilateral cooperation and good global governance. On the relationship between CFSP and international law, Koskenniemi M., *International Law Aspects of the Common Foreign and Security Policy*, in Koskenniemi M. (ed), *International Law Aspects of the European Union*, op. cited above, pp. 27-44.

[657] More generally, on the relationship between international law and US national law, Murphy J.F., *The United States and the Rule of Law in International Affairs*, op. cited above, pp. 74-116, while p. 351 and p. 358 confirms US violations of international law in case of concerns or threats to US national security. On the US justifications to violate international law, Posner E.A., *The Perils of Global Legalism*, op. cited above, pp. x-xi, arguing that US debates mainly focus on a cost-benefit assessment, with liberals arguing that the long-term costs of US violation of international law are high, while conservatives argue the contrary. Nonetheless, the author acknowledges that both groups support violating international law whenever US national interests are at stake (*i.e.* for liberals when international trade threatens environment and working conditions, while for conservatives when human rights treaties and international criminal law interfere with security). On US extraterritorial sanctions, Silingardi S., *Il problema dell'extraterritorialità delle sanzioni*, op. cited above, pp. 289-298.

[658] On the EU protection of human rights through the enactment restrictive measures and the relationship with international law, *inter alia*, Fulgenzi M., *La "guerra delle sanzioni": L'Unione Europea e la Federazione Russa nell'era dell'interdipendenza economica globale*, op. cited above, p. 295, pp. 302-313. More generally, on the relationship between international law, EU law and EU MS law refer above in this Section. On an historical account, analysing international law, EC law and national law, Bethlehem D., *International Law, European Community Law, National Law: Three Systems in Search of a Framework – Systemic Relativity in the Interaction of Law in the European Union*, in Koskenniemi M. (ed), *International Law Aspects of the European Union*, op. cited above, pp. 169-196. On the importance of human right protection for EU, *inter alia*, Posner E.A., *The Perils of Global Legalism*, op. cited above, p. 227. Interestingly, in the recent case Venezuela v Council the Court importantly established third states' standing to challenge EU restrictive measures before the CJEU but avoided reference to international law' concepts of legal persons and principle of comity, as instead presented as arguments by the parties. Refer to Judgment of the Court (Grand Chamber), 22 June 2021, Bolivarian Republic of Venezuela v Council of the European Union, Case C-872/19 P (also known as Venezuela v Council). On this case and the reluctance of the CJEU to pronounce over international law' concepts that are undetermined, Kassoti E., Butler G., *The Approach of the CJEU to International Law: Towards a Context-Specific Approach*, in Fahey E., Mancini I. (eds), *Understanding the EU as a Good Global Actor: Ambitions, Values and Metrics*, op. cited above, pp. 271-272.

consistently condemned such practice,[659] although recently having adopted measures falling within the realm of both "soft" and "hard" approaches to extraterritoriality.[660]

Russia and China similarly openly criticise extraterritorial measures as inconsistent with international law,[661] and view the adoption of unilateral coercive measures in general as unlawful under international law.[662] Despite occasionally adopting them with different declared justifications,[663] both these States claim that unilateral measures might jeopardize the objectives, purposes, integrity, and effectiveness of UNSC-imposed measures.[664] Of similar view are the Non-Aligned Movement (NAM) which frequently opposes coercive measures – whether UNSC-mandated or unilateral –[665] and the BRICS countries, which often reiterates the inconsistency of unilateral coercive measures with international law.[666]

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[659] The US reliance on extraterritorial measures (also called "secondary sanctions") is further analysed in this Chapter in Section 6.1.; while the EU approach to extraterritorial measures with its subsequent Blocking Statute are discussed more in detail in this Chapter in Section 6.2. Additionally, a brief mention on such extraterritorial measures and on their possible justification under WTO rules is provided in Chapter III, Section 2.3. A detailed analysis of the concepts of territoriality and extraterritoriality in international law is provided by Casella P.B., *International Law, History and Culture*, op. cited above, pp. 143-262.

[660] In this regard, more generally on extraterritorial measures, refer to Silingardi S., *Le sanzioni unilaterali e le sanzioni con applicazione extraterritoriale nel diritto internazionale*, op. cited above; while specifically on the EU recent extraterritorial measures, Silingardi S., *The EU 11 and 12 Packages of Sanctions Against Russia: How Far is the EU Willing to Go Extraterritorially?*, op. cited above, pp. 546-554; and, Silingardi S., *La liceità internazionale delle misure imposte dall'UE nei confronti della Federazione Russa anche alla luce dei nuovi obiettivi anti-elusione*, in Alì A. (ed), *Le sanzioni dell'UE nei confronti della Russia tra sicurezza internazionale e diritti umani*, op. cited above, pp. 35-48. In this latter contribution, at pp. 48-49, the author interestingly highlights the differences between EU and US approaches to extraterritorial sanctions: while the EU adopted these measures specifically with anti-circumvention aims (based on the principle of protection), the US solely sporadically mentions anti-circumvention objectives within their extraterritorial measures, aiming instead more frequently at foreign policy objectives.

[661] In this regard, refer to the Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law, 25 June 2016, para 4, where the Russian Federation and the People's Republic of China expressly condemn «extraterritorial application of national law by States not in conformity with international law as another example of violation of the principle of non-intervention in the internal affairs of States».

[662] The Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law, 25 June 2016, para 6.

[663] Most frequently, the imposition of unilateral restricting measures is justified as countermeasures in response to the illegal enactment of the previous measures of whom they were targets. These States' justifications and the criticisms to their arguments will be further analysed in Chapters II and III.

[664] The Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law, 25 June 2016, para 6.

[665] Among many contributions of the NAM, refer to the Statement by Mr. Mohammad Ghorbanpour (the representative of the Islamic Republic of Iran), on behalf of the Non-Aligned Movement, before the Sixth Committee of the 75th Session of the United Nations General Assembly - On Agenda item 85: Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization, New York, 23 October 2020; The Declaration of the NAM-G77 and China Joint Coordinating Committee Demanding the Exclusion of Cuba from the Unilateral List of Countries that Allegedly Sponsor Terrorism and the Lifting of all Unilateral Coercive Measures Against the Cuban People, New York, 14 June 2024.

[666] Notably, BRICS countries held a summit under the theme of "Strengthening Multilateralism for Just Global Development and Security". XVI BRICS Summit, Kazan Declaration: Strengthening Multilateralism for Just Global Development and Security, Kazan, Russian Federation, 23 October 2024, para 10 stating that «We are deeply concerned about the disruptive effect of unlawful unilateral coercive measures, including illegal sanctions, on the world economy, international trade, and the achievement of the sustainable development goals. Such measures undermine the UN Charter, the multilateral trading system, the sustainable development and environmental agreements. They also negatively impact economic growth, energy, health and food security exacerbating poverty and environmental challenges»; and para 22 where it is reiterated that «the unilateral coercive measures, inter-alia in the form of unilateral economic sanctions and

Assuming that EU restrictive measures are *prima facie* unlawful measures under international law, their wrongfulness might be precluded if they qualify as countermeasures. Notably, ARSIWA regulates countermeasures taken by States, thus, its applicability to the EU remains debated. It is however argued that the EU, as an entity composed of States, might indeed be classified as a "group of States" under Article 42 (b) ARSIWA, and therefore be entitled to adopt countermeasures aimed at protecting obligations *erga omnes* (*i.e.* of the international community) or *erga omnes partes* (*i.e.* of a group of States) under Articles 48 and 54 ARSIWA. In this regard, scholars also noticed that the EU tends to adopt restrictive measures solely when a broad international consensus is present, as to prevent possible disputes over their legality,[667] thereby also possibly suggesting their interpretation as third-party countermeasures.

A perhaps more appropriate legal framework is provided by the ILC Draft Articles on the Responsibility of International Organizations of 2011 (hereinafter, DARIO). The EU is often recognised as a *sui generis* international organisation,[668] yet it arguably fit within Article 2 DARIO's definition of an international organisation, being treaty-established and possessing its own international legal personality.[669] Under Article 22 DARIO, an international organisation might enact countermeasures against a responsible member State or international organisation; provided that the measures respect substantive and procedural conditions, are compatible with the organisation's rules, and no alternative means to induce compliance, cessation, and reparation are available.[670] As for

secondary sanctions that are contrary to international law, have far-reaching implications for the human rights, including the right to development, of the general population of targeted states, disproportionally affecting the poor and people in vulnerable situations. Therefore, we call for their elimination».

[667] Spagnolo A., *Entering the Buffer Zone between Legality and Illegality: EU Autonomous Sanctions under International Law*, in Montaldo S., Costamagna F., Miglio A. (eds), *EU Law Enforcement: The Evolution of Sanctioning Powers*, op. cited above, p. 232.

[668] On such matter, among others, Bordin F.L., *Is the European Union a Sui Generis International Organization?*, in Bordin F.L., Müller A.T., Pascual-Vives F. (eds), *The European Union and Customary International Law*, Cambridge University Press, 2022, pp. 48-65; and Klabbers J., *Sui Generis? The European Union as an International Organization*, in Patterson D., Södersten A. (eds), *A Companion to European Union Law and International Law*, Wiley & Sons, 2016, pp. 3-15.

[669] Article 2 (a) DARIO defines "international organisation" as «an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality». Among the scholars arguing that this definition also includes the EU – which, notably, usually deviates from the classical interpretation and classification of international organisation – is Möldner M., *Responsibility of International Organizations – Introducing the ILC's DARIO*, in von Bodgandy A., Wolfrum R. (eds), *Max Planck Yearbook of United Nations Law*, Vol. 16, Koninklije Brill, 2012, pp. 281-328, p. 289.

[670] Article 22 (1) and (2) DARIO more precisely grants this possibility when (a) they are taken in accordance with the substantive and procedural conditions required by international law; (b) they are compatible with the organization's rules; and (c) no alternative means to induce compliance, cessation of the breach and reparation are available. Article 22 (3) DARIO specifies that Countermeasures might not be taken in response to a breach of an international obligations unless they are provided by the rules of the organisation. The DARIO Commentary, at Article 22 (para 6), specifies that this provision reflects the fact that «given the obligations of close cooperation that generally exist between an international organization and its members, countermeasures are allowed only if the rules of the organization so provide. Should they do so, they will set forth the conditions that are required for that purpose».

ARSIWA countermeasures, the wrongfulness of DARIO countermeasures is precluded if the conditions are met, thus the adopted measures are lawful.[671]

Importantly, DARIO enables international organisations to enact countermeasures either against other international organisations (regulated in Articles 51-57 DARIO) or against a State which is its own member (Article 22 DARIO). This specification would exclude the possibility to invoke Article 22 DARIO to justify EU autonomous measures against non-member States, which instead are the typical targets of its restrictive measures. The ILC DARIO Commentary to Article 22 DARIO specifies that DARIO does not examine the conditions for lawful countermeasures enacted by an international organisation against a responsible State, suggesting instead the application – by analogy – of the conditions governing countermeasures «taken by a State against another State», as per Articles 49-54 ARSIWA.[672]

Thus, the question of whether EU autonomous restrictive measures qualify as countermeasures under international law remains contested and unanswered by the DARIO framework. In principle, the EU would be entitled to respond to breaches of obligations owed to the international community as a whole, as envisaged by ARSIWA and DARIO.[673] Despite neither the ILC or other international law instruments provides a definitive list of "general interests" objectives, some objectives of EU measures align with general interests, thereby supporting their characterisation as countermeasures in the general interest.[674] Obviously, EU measures could only qualify as countermeasures if they fully satisfy the substantive and procedural ILC requirements, failing which they risk remaining unlawful measures under international law, especially EU autonomous ones.[675]

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[671] Article 22 (1) DARIO.

[672] ILC DARIO Commentary, Article 22 DARIO, para 2, p. 115 more precisely provides that «The present draft articles do not examine the conditions for countermeasures to be lawful when they are taken by an injured international organization against a responsible State. Thus paragraph 1, while it refers to articles 51 to 57 insofar as countermeasures are taken against another international organization, only refers to international law for the conditions concerning countermeasures taken against States. However, one may apply by analogy the conditions that are set out for countermeasures taken by a State against another State in articles 49 to 54 on the responsibility of States for internationally wrongful acts. It is to be noted that the conditions for lawful countermeasures in articles 51 to 57 of the present draft articles reproduce to a large extent the conditions in the articles on responsibility of States for internationally wrongful acts».

[673] Tzanakopoulos A., *Sanctions Imposed Unilaterally by the European Union: Implications for the European Union's International Responsibility*, in Marossi A.Z., Bassett M.R. (eds), *Economic Sanctions under International Law: Unilateralism, Multilateralism, Legitimacy, and Consequences*, op. cited above, p. 157.

[674] In this regard, Spagnolo A., *Entering the Buffer Zone between Legality and Illegality: EU Autonomous Sanctions under International Law*, in Montaldo S., Costamagna F., Miglio A. (eds), *EU Law Enforcement: The Evolution of Sanctioning Powers*, op. cited above, pp. 235-236 argues that while the objectives of fighting against terrorism, WMD and the protection of human rights might fall under the notion of "general interests", differently can be said over the objectives of protection of democracy, rule of law and good governance, as stated by the Basic Principles of 2004 mentioned above. Of this advice, also Silingardi S., *Sanctions for Human Rights and Democracy*, in Sossai M., Portela C., Charron A. (eds), *Elgar Encyclopedia of International Sanctions*, op. cited above, p. 269.

[675] Tzanakopoulos A., *Sanctions Imposed Unilaterally by the European Union: Implications for the European Union's International Responsibility*, in Marossi A.Z., Bassett M.R. (eds), *Economic Sanctions under International Law: Unilateralism, Multilateralism, Legitimacy, and Consequences*, op. cited above, p. 157 and p. 160. In this sense, Dupont P-E., *The Arbitration of Disputes Related to Foreign Investments Affected by Unilateral Sanctions*, in Marossi A.Z.,

Interestingly, recent case law established that EU restrictive measures imposed against Venezuela did not constitute ARSIWA countermeasures because not intended to respond to an internationally wrongful act.[676] Nonetheless, the Court failed to establish the precise nature of EU restrictive measures within international law, thereby leaving the classificatory aspect of EU measures to be once again debated and analysed on a case-by-case basis.[677]

This debate gained renewed attention with the EU enactment of restrictive measures against Russia, with scholars diverging on whether they are justifiable as self-defence (under Article 51 UN Charter)[678] or as countermeasures.[679] As a matter of fact, the qualification of EU autonomous restrictive measures within the international legal framework is complex. Many of these measures might be qualifiable as acts of retorsion, since they consist in unfriendly but lawful acts, *e.g.* visa bans, suspensions of cooperation agreements, and also some trade restrictions. Others may, although controversially, be classified as third-party countermeasures, especially when they are framed to respond to human rights violations,[680] violations of territorial integrity of States, or protection of democratic values.

Beyond the existing legal categories recognised under international law, it could be argued that EU autonomous restrictive measures constitute a category *per se* under international law. These are indeed grounded on EU treaties, and are characterised by a detailed decision-making process, procedural and substantial requirements, judicial review before the CJEU, and case-by-case specifications. Being generally referred to as "sanctions" by EU institutions themselves, EU restrictive measures may indeed qualify as such under the working-definition of this dissertation, but

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Bassett M.R. (eds), *Economic Sanctions under International Law: Unilateralism, Multilateralism, Legitimacy, and Consequences*, op. cited above, pp. 209-210 which argues that EU restrictive measures against Iran in 2012 could potentially qualify as countermeasures but, in fact, are not since they lacked to comply with several procedural and substantial requirements of ARSIWA.

[676] Refer to the Judgment of the General Court (Grand Chamber), *Bolivarian Republic of Venezuela v. Council*, 13 September 2023, Case T-65/18, paras 90-94.

[677] An interesting analysis of the "missed opportunities" of this ruling is provided by Silingardi S., *Unilateral Sanctions Before the General Court: Venezuela v. Council*, op. cited above, pp. 1123-1142 which, at p. 1140, concludes that «the General Court adopted a pragmatic and restrained approach. Its primary objective was to resolve the dispute by reaching reasonable conclusions rather than actively contributing to promote an evolution of customary international law».

[678] Gioia A., *Diritto internazionale*, op. cited above, pp. 440-441 and pp. 449-455, argues that while the General Assembly did qualify such event as aggression, self-defence as per Article 51 UN Charter specifically refers to cases of armed attacks. Similarly, Tams C.J., *Enforcing Obligations Erga Omnes in International Law*, op. cited above, p. 300.

[679] A brief discussion on this double possible qualification of the measures enacted against the Russian Federation by many Western States in response to the aggression of Ukraine had been presented in paragraph 1.3. of this Chapter, and is further analysed in Chapter IV of this dissertation.

[680] Specifically on the classification of human rights sanctions as third-party countermeasures, Silingardi S., *Sanctions for Human Rights and Democracy*, in Sossai M., Portela C., Charron A. (eds), *Elgar Encyclopedia of International Sanctions*, op. cited above, which, at p. 269, discusses how solely serious human rights violations qualify as breaches of *erga omnes* obligations, while violations of democracy and the rule of law do not meet the threshold. Interestingly, the case Venezuela v. Council failed to pronounce on whether human rights violations, violations of democracy and of the rule of law are effectively *erga omnes* violations. In this sense, and analysing the case and missed opportunities, *inter alia*, Silingardi S., *Unilateral Sanctions Before the General Court: Venezuela v. Council*, op. cited above, pp. 1123-1142.

solely in those cases where – as noted above – they expressly constitute coercive responses to violations of international law, aiming to induce compliance with international law and its obligations. Nonetheless, the pursuit of CFSP objectives might be broader than responses to violations of international law,[681] while certain restrictive measures – such as diplomatic restrictive measures – might not possess the coercive character of "sanctions", serving rather as measures expressing discontent. Likewise, EU restrictive measures may pursue broader CFSP objectives – as set out in Article 21 TEU – extending beyond inducing compliance with international law. Thus, the classification of EU restrictive measures as compliance-inducing measures in the strict sense is not always possible, but rather depends on the specific objective pursued by the measure.

The presented UN non-armed measures, ARSIWA countermeasures, and EU restrictive measures represent three legal conceptualisations governing the adoption of measures targeting a State, an entity, or individuals. Each framework enables the UN, States, or the EU to impose a broad number of restrictions across areas such as finance, trade, diplomacy, travels, and assets.

The following section focuses on specific domestic and regional pieces of legislations enabling "unilateral sanctioning measures". Although these measures might pursue objectives similar to the instruments of international law discussed above, they are distinct in the approach as they are domestic (and EU) legal regulations designed to specifically target either a particular sector or a specific actor. This analysis will examine, in particular, the US framework on unilateral measures, and the EU Blocking Statute and Anti-Coercion Instrument.

[681] For instance, the CFSP objective of conflicts prevention – under Article 21 TEU – may lead to the adoption of preventive restrictive measures, thus enacted before a violation of international law has actually occurred. Similarly, counter-terrorism and nuclear non-proliferation restrictive measures are likewise likely to be adopted prior to, rather than in response to, the occurring of a breach of international law. In these cases, a case-by-case assessment is needed, since EU restrictive measures may pursue foreign and security objectives which – while certainly legitimate within the international legal order – do not necessarily constitute coercive reactions to violation of international law and its obligations, thereby not qualifying as "sanctions" under the working definition of this dissertation. More controversial is the case of restrictive measures enacted in pursuit to the CFSP objective of consolidation and support of democracy (as per Article 21 TEU). Such restrictive measures may not necessarily be enacted as responses to violation of international law obligations owed to the EU or the international community in a technical sense, yet the issue complicates by the ongoing scholarly debate as to whether it exists a "human right to democracy" under international law, starting from an analysis of Article 21 Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights. *Inter alia*, Moltchanova A., *Human Right to Democracy*, in Chatterjee D.K. (ed), *Encyclopedia of Global Justice*, Springer, 2011, pp. 494-495; Miller D., *Is There a Human Right to Democracy?*, CSSJ Working Papers Series, SJ032, April 2015; Charlesworth H., *Is There a Human Right to Democracy?*, in Holder C., Reidy D. (eds), *Human Rights: The Hard Questions*, Cambridge University Press, 2013, pp. 271-284; Besson S., *The Human Right to Democracy in International Law: Coming to Moral Terms with an Equivocal Legal Practice*, in von Arnauld A., von der Decken K., Susi M. (eds), *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric*, Cambridge University Press, 2020, pp. 481-490.

6. Unilateral 'sanctioning' measures

6.1. The United States framework for unilateral sanctions

The United States of America is one of the most prolific States in terms of the so-called "unilateral sanctions", namely measures restricting certain activities adopted autonomously by a State. Beyond unilateral measures, the US also implements UN non-armed measures pursuant to Section 5 of the United Nations Participation Act of 1945 (UNPA), yet many of its domestic measures implementing UN measures frequently introduce additional restrictions. Indeed, through the issuance of Executive Orders relying on domestic sanctioning regulations – such as the IIEPA – these measures often exceed those required by the UNSC.[682]

The US role as both a central actor in UNSC sanctions – given its permanent seat and veto power – and a prolific "unilateral sanctioning power" has generated significant criticisms. The problematic features of US influence on UNSC sanctioning activities mirror broader criticisms of the veto power, mainly concerning political assessment, the disproportionate influence of the few permanent members, and the risk to ground sanctioning policies on national interests rather than on UN's collective security and peace objectives. As for the US autonomous use of unilateral measures, scholars have highlighted the broad presidential discretionary power; the questionable legality of autonomous measures (especially "extraterritorial" ones) under international law; the potential violations of the principle of non-intervention; the limited effectiveness; and, their negative humanitarian impact.[683]

US unilateral measures originate either from the executive branch – via Executive Orders emanated by the US President – or from the legislative body, *i.e.* the Congress, through the enactment of specific legislations. The US Constitution grants the Congress the power to regulate commerce with foreign nations, as per Article 1 (8).[684] Executive Orders are usually based on specific statutes, assigning specific powers to the US President and to certain State offices and bureaus.

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[682] Collins-Chase E.J., *Sanctions Primer: How the United States Uses Restrictive Mechanisms to Advance Foreign Policy or National Security Objectives*, Congressional Research Service - CRS Report, R47829,06 November 2023, pp. 3-4.
[683] Among others, White N.D., *Autonomous and Collective Sanctions in the International Legal Order*, Italian Yearbook of International Law, Vol. 27, 2017, pp. 3-32, p. 21, 23, 26 and p. 31; and, Ruys T., *Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, p. 26. On the lawfulness of extraterritorial measures, notably, Silingardi S., *La liceità internazionale delle misure imposte dall'UE nei confronti della Federazione Russa anche alla luce dei nuovi obiettivi anti-elusione*, in Alì A. (ed), *Le sanzioni dell'UE nei confronti della Russia tra sicurezza internazionale e diritti umani*, op. cited above, pp. 17-53; Silingardi S., *Le sanzioni unilaterali e le sanzioni con applicazione extraterritoriale nel diritto internazionale*, op. cited above; and, Silingardi S., *The EU 11 and 12 Packages of Sanctions Against Russia: How Far is the EU Willing to Go Extraterritorially?*, op. cited above.
[684] US Constitution, Article 1, Section 8. This issue will also be discussed in Section 3.1., Chapter III, in connection with the reduction of the Congress role in US trade law due to consistent delegations to the executive branch over the years.

One of the most frequently used statute is the International Emergency Economic Powers Act (IEEPA).[685] Under IEEPA, the President may act against any «unusual and extraordinary threat» to the US national security, foreign policy, or economy – originating in whole or substantially outside to the US – following a declaration of a national emergency.[686] Actions might be investigating, regulating, and prohibiting financial transactions; property acquisitions; imports and exports; and, in situations of armed hostilities, confiscation of foreign properties.[687] Embargoes are tied to the existence of an armed conflict, while sanctioning activities may also address economic or industrial cyber-espionage.[688]

IEEPA criticisms involve the minimal threshold required for the President to declare a "national emergency" in response to the rather vague and widely-interpretable "unusual and extraordinary threat", which, arguably, could be (ab)used also for «spurious» national emergencies.[689] Moreover, such declarations rest within the President's sole discretion, whilst the Congress possesses a rather limited role.[690] Declared emergencies automatically expire after two years, unless renewed by the President with Congressional notification.[691] Despite this large discretionary power, the President is required to consult with the Congress regularly and «in every possible instance»,[692] and

[685] International Emergency Economic Powers Act (IEEPA).
[686] International Emergency Economic Powers Act (IEEPA), §1701.
[687] More precisely, the President may (a) investigate, regulate, or prohibit any transactions in foreign exchange, transfers of credit or payments between banking institutions, importing or exporting of currency or securities by any person subject to the US jurisdiction; (b) investigate, regulate, direct and compel, nullify, void, prevent or prohibit any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national has any interest subject to the US jurisdiction; (c) when the US is engaged in armed hostilities or has been attacked by a foreign country or foreign nationals, confiscate any property, subject to the US jurisdiction, of any foreign person, foreign organization, or foreign country that he determines has planned, authorized, aided, or engaged in such hostilities or attacks against the US. International Emergency Economic Powers Act (IEEPA), §1702 (a). In February 2026, the US Supreme Court specified that IEEPA does not authorise the adoption of tariffs: namely, Opinion of the Court - Supreme Court of the United States, *Learning Resources INC, v. Donald J. Trump and Donald J. Trump v. V.O.S. Selections INC*, 607 U.S. (2026), Nos. 24–1287 and 25–250, 20 February 2026.
[688] Embargoes are regulated by Section 1707 IEEPA, while Sections 1708 and 1709 IEEPA regulates economic or industrial espionage in cyberspace with respect to trade secrets or proprietary information owned by an US person and theft of trade secrets from an US person.
[689] Carter B.E., *International Economic Sanctions: Improving the Haphazard U.S. Legal Regime*, California Law Review, Vol. 75, no. 4, July 1987, pp. 1163-1278, p. 1239. Interestingly, the IEEPA had been enacted precisely to reduce the casual reliance to the "national emergency" justification. Similarly in the critiques, White N.D., *Autonomous and Collective Sanctions in the International Legal Order*, op. cited above, pp. 20-21. On the rather surprising, yet not «groundless» – as reported by the author at p. 209 –, declaration of national emergency regarding ICC-related actions, Silingardi S., *The U.S. Sanctions Against ICC Personnel: Just an Aberration Attributable to a Now-Defunct, Populist "Regime"?*, Diritto Penale Internazionale, Vol. 2, 2021, pp. 205-219, pp. 208-209.
[690] Carter B.E., *International Economic Sanctions: Improving the Haphazard U.S. Legal Regime*, op. cited above, p. 1235; and Claussen K., *Trade's Security Exceptionalism*, Standford Law Review, Vol. 72, 2020, pp. 1097-1164, p. 1130.
[691] National Emergencies Act (NEA), P.L. 94-412, 90 Stat. 1255, 50 U.S.C., Chapter 34, §1601-1651, §1691 (a), as recalled by International Emergency Economic Powers Act (IEEPA), §1706 (a) and (b).
[692] International Emergency Economic Powers Act (IEEPA), §1703 (a).

– as an oversight mechanism –immediately report to it on the actions taken, at least once every six months.[693]

IEEPA was enacted to replace the Trading with the Enemy Act (TWEA),[694] which did not guarantee Congressional review.[695] Nevertheless, TWEA remains the key US wartime sanctioning law, regulating international economic transactions – including payments, conveyance, transfer, assignment or delivery of property,[696] and importation –[697] against both enemies" and "allies of enemies".[698] Despite originally designed to act during wartimes, amendments first enlarged its scope of application to cover both times of war and presidentially-declared national emergencies,[699] and then in 1977 restored its exclusive wartime application.[700] Therefore, TWEA currently constitutes the US wartime sanctioning instrument, while IEEPA governs US peacetime sanctioning.[701]

The Export Control Reform Act (ECRA)[702] regulates the export of dual-use goods – defined as those items with both civilian, and military, terrorism, weapons of mass destruction, or law-enforcement-related applications.[703] Under ECRA, the President may regulate the export, reexport, and in-country transfer of such items; regulate activities involving nuclear devices, missiles, chemical and biological weapons; and secure cooperation with other governments and multilateral organisations to align control regimes consistent with US.[704]

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[693] International Emergency Economic Powers Act (IEEPA), §1703 (b) and (c).
[694] Trading with the Enemy (TWEA), 50 U.S.C., Chapter 53, §4301-4341. Interestingly, Claussen K., *Trade's Security Exceptionalism*, op. cited above, pp. 1115-1125 classifies TWEA and IEEPA (together with Section 232 of the US Trade Expansion Act of 1962 and Section 201 of the US Trade Act of 1974) as "hard security exceptions" in contraposition to "soft security exceptions" – such as Section 301 US Trade Act of 1974 and Section 338 of the US Tariff Act of 1930. According to the author, the main difference between the hard and soft character of these security exception relies on the event triggering the adoption of trade restricting measures: respectively, hard exceptions are enacted on the basis of dangers of national security or national emergencies while soft exceptions relate to other States' unfair conducts with respect to US economy and commerce. This author' classification together with a detailed analysis of both Section 232 US Trade Expansion Act and Section 301 Trade Act is provided in Section 2.3.1. of this Chapter.
[695] Carter B.E., *International Economic Sanctions: Improving the Haphazard U.S. Legal Regime*, op. cited above, p. 1230. A more general overview of the Congressional role and its potential review within trade decisions is discussed in Chapter III, Section 3.1.
[696] Trading with the Enemy (TWEA), §4305 (b).
[697] Trading with the Enemy (TWEA), §4311.
[698] These are identified by Section 4302 TWEA.
[699] Emergency Banking Relief Act, P.L. 73-1, 48 Stat. 1, 1933, Section 2 specifically providing for: «any other period of national emergency declared by the President».
[700] Amendments to the Trading with the Enemy (TWEA), P.L. 95-223, 1977.
[701] Claussen K., *Trade's Security Exceptionalism*, op. cited above, p. 1119.
[702] Export Control Reform Act (ECRA), Title XVII, Subtitle B of P.L. 115-232, 50 U.S.C., Chapter 58, §4801 – Subchapter I (§4811-4826) – Subchapter II (§4841-4843) – Subchapter III (§4851-4852), 2018.
[703] Defined in Section 4801 ECRA.
[704] Export Control Reform Act (ECRA), §4812 (b) more precisely provides for the President's authority to regulate the export, reexport and in-country transfer of items subject to the US jurisdiction of US persons and foreign persons; regulate the activities of nuclear explosive devices, missiles, chemical or biological weapons, whole plants for chemical weapons precursors, foreign maritime nuclear projects, and foreign military, security, and intelligence service; and secure the cooperation of other governments and multilateral organisations to impose control regimes consistent with the US ones.

The Countering America's Adversaries Through Sanctions Act (CAATSA)[705] counters «aggression by the Governments of Iran, the Russian Federation, and North Korea»,[706] through separate sections but with a common set of potential measures, such as properties blocking; exclusion from the US; prohibitions on transactions in property and interests; arms embargos; assets freezes; visa revocation; export and import restrictions; limitations to loans both though US financial institutions and international ones; restrictions of procurement; prohibitions of foreign-exchange and banking transactions; investments bans; and, measures targeting corporate and principal executive officers.[707]

The typology of US autonomous measures ranges between reducing diplomatic relations to restricting economic, trade, and financial transactions, limiting entry into the country, and curtailing foreign assistance or cultural, scientific, and sports exchanges. Beyond trade-specific laws, the Foreign Assistance Act (FAA);[708] the Immigration and Nationality Act (INA);[709] and, the Global Magnitsky Acts[710] likewise enables the US President to restrict foreign aid, limit entry into the US, and impose targeted measures on individuals involved in corruption or gross human rights abuses.

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[705] Countering America's Adversaries Through Sanctions Act (CAATSA), 2017 and amendments, P.L. 115-44, 22 U.S.C., §9401-9202.

[706] Countering America's Adversaries Through Sanctions Act (CAATSA), Preamble.

[707] Countering America's Adversaries Through Sanctions Act (CAATSA), Section 104 (c) (U.S.C. §9403), Section 105 (c) (U.S.C. §9404), Section 106 (b) (U.S.C. §9405), Section 107 (U.S.C. 9§406) regarding Iran. Section 222 (a) (U.S.C. §9522), Section 224 (b) (U.S.C. §9524), Section 11 (b) (U.S.C. §8910), Section 234 (b) (U.S.C. §9528), Section 235 (a) (U.S.C. §9529) regarding the Russian Federation. Lastly, Section 312 and 313 (U.S.C. §9221a), Section 315 (U.S.C. §1232c) concerning North Korea.

[708] The Foreign Assistance Act (FAA), 1961 and amendments, P.L. 87-195, 22 U.S.C., §2151-243li, authorises the President to withhold aid from foreign countries whenever it is determined a range of inadequate behaviours from that country such as, for instance, failure to take adequate steps to halt illicit drug production or trafficking (§2291e), aiding terrorist States (§2377) or providing them with military equipment (§2378).

[709] Immigration and Nationality Act (INA), 1952 and amendments, P.L. 82-414, 8 U.S.C., §1101-1537 enables the President to «suspend the entry of all aliens or any class of aliens as immigrants or non-immigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate» whenever he finds that such entry into the US would be detrimental to the US interests (Section 212 (f) or §1182).

[710] Firstly consisting in the "Sergei Magnitsky Rule of Law Accountability Act" of 2012 (Sergei Magnitsky Rule of Law Accountability Act, S.1039, 2012), then subsequently modified in the "Global Magnitsky Human Rights Accountability Act" of 2016 (GMA) (Global Magnitsky Human Rights Accountability Act (GMA), S.284, 2016), these landmark legislation regulates US 'sanctioning' measures against corruption and human rights violations in foreign countries. Interestingly, the 2012 Act focused specifically on the Russian Federation since it aimed at targeting «persons responsible for the detention, abuse or death of Sergei Magnitsky, for the conspiracy to defraud the Russian Federation of taxes on corporate profits through fraudulent transactions and lawsuits against Hermitage, and for other gross violations of human rights in the Russian Federation», as per the Preamble, Sergei Magnitsky Rule of Law Accountability Act, 2012. Sergei Magnitsky was a Ukrainian-born accountant who – after having uncovered a vast corruption scheme in Russia – was accused of tax evasion, imprisoned, tortured and then died in 2009 (in this regard, Congressional Research Service, *The Global Magnitsky Human Rights Accountability Act*, CRS In Focus, IF10576, 28 October 2020, p. 1). While the 2016 Act still maintained the purpose of tackling persons responsible for gross violations of human rights as the 2012 Act, its scope of application widened by potentially targeting any person irrespectively from their geographical location. The President may impose measures – such as the inadmissibility to the US and blocking of property (Section 3 (b) GMA) – on foreign persons responsible for gross violations of internationally recognized human rights, and for other purposes based on credible evidence (Preamble and Section 3 (a) GMA. Notably, the GMA does not provide any definition or identification of "credible evidence" thereby enabling the President to retain high discretionary power in the designation of the persons to sanction. This discretionary power is likewise available to the President with regards to the termination of such measures). On these important legislations, *inter alia*, Russell M., *Global Human Rights Sanctions Mapping Magnitsky*

As recalled above, determining the legal classification of these US measures and frameworks – as with other States's unilateral measures – under international law remains a case-by-case analysis: they constitute retorsions if merely unfriendly and lawful, or countermeasures if unlawful but abiding to ARSIWA. The same applies for their qualification as "sanctions" under the working-definition adopted in this dissertation: while these instruments generally present a coercive character, their 'trigger' may not always be represented by an internationally wrongful act, and their objective may not always be compliance with international law and its obligations – thereby potentially falling outside the working definition, regardless of their coercive nature. Nonetheless, both US institutions themselves and the international community generally label these frameworks as enabling sanctioning measures, likely due to their coercive character, and thus are generally treated as "sanctioning frameworks".

Sanctioning regimes are most commonly imposed through Presidential Executive Orders, as Congress typically struggles in enacting new legislation in a timely manner. Many US Departments are empowered to direct, oversee, and coordinate the enactment of measures. Most notably, the Department of the Treasury's Office of Foreign Assets Control (OFAC) has a crucial role in the administration and enforcement of many US 'sanctioning' regimes restricting economic, trade and financial transactions. Moreover, OFAC closely cooperates with the Department of State to identify possible violations, and with the Department of Justice to issue fines and criminal referrals.

The Department of State oversees visa restrictions, diplomatic measures, aids and arm-related controls through various offices and bureaus, including the Bureau of Defense Trade Control and the Office of Sanctions Coordination.[711] Export and import controls fall mainly under the Department of Commerce in coordination with the Bureau of Industry and Security (BIS), which develops policies of export control and issues licences in consultation with other Departments.[712]

Laws: The US, Canadian, UK And EU Approach, European Parliamentary Research Service (EPRS) Briefing, 2021, p. 2. Similarly, Silingardi S., *Sanctions for Human Rights and Democracy*, in Sossai M., Portela C., Charron A. (eds), *Elgar Encyclopedia of International Sanctions*, op. cited above, pp. 265-271; Portela C., *A Blacklist is (Almost) Born Building a Resilient EU Human Rights Sanctions Regime*, European Union Institute for Security Studies (EUISS), 2020, p. 2; Ruys T., *Reflections on the Global Magnitsky Act and the Use of Targeted Sanctions in the Fight against Grand Corruption*, Belgian Review of International Law, vol. 50, no. 2, 2017, pp. 492-512, p. 494; and, Congressional Research Service, *The Global Magnitsky Human Rights Accountability Act*, op. cited above, p. 1.

[711] Collins-Chase E.J., *Sanctions Primer: How the United States Uses Restrictive Mechanisms to Advance Foreign Policy or National Security Objectives*, op. cited above, provides for a detailed list of offices and bureaus closely involved with the Department of State.

[712] For instance, BIS issued the final rules on export controls enacted against the Russian Federation and Belarus as response to the Russia's 2022 aggression of Ukraine. In this sense, among others, the Department of Commerce (Bureau of Industry and Security) Final Rule, *Implementation of Additional Sanctions Against Russia and Belarus Under the Export Administration Regulations (EAR) and Refinements to Existing Controls*, 18 June 2024, Federal Register 51644, Vol. 89, No. 118, 15 CFR Parts 734, 740, 744, 746, and 774 [Docket No. 240610–0156] RIN 0694–AJ67, available at https://www.federalregister.gov/documents/2024/06/18/2024-13148/implementation-of-additional-sanctions-against-russia-and-belarus-under-the-export-administration, [last accessed on 16 September 2024].

The US frequently adopts secondary (or/and extraterritorial) sanctions,[713] despite criticism and opposition from the international community – including the EU, China, and Russia. Unlike "primary sanction", which apply solely to nationals or entities of the sanctioning State,[714] secondary sanctions target foreign persons or entities conducting business with the sanctioned State or individuals.[715] The extraterritorial nature of these measures lies in their ability to constrain companies and persons beyond the reach of the sanctioning State's jurisdiction and legislation, also consequent the lack of equivalent measures by third States.[716] Their 'force' is ensured by the US dominant position within the global financial system, which incentivise non-US persons to comply as to avoid

[713] There are two generations of US extraterritorial measures. The first comprehends those measures enacted from the 1980s until the 1990s with precise scope and enforcement. The second-generation measures focus on the financial sector but target widely areas outside of trade. Discussing in detail these generations is Sossai M., *Legality of Extraterritorial Sanctions*, in Asada M., *Economic Sanctions in International Law and Practice*, op. cited above, pp. 62-79, pp. 63-66. As mentioned above, it is present a fundamental distinction in terms of objectives and lawfulness under international law between secondary and extraterritorial sanctions, as explored by Silingardi S. in, *inter alia*, Silingardi S., *La liceità internazionale delle misure imposte dall'UE nei confronti della Federazione Russa anche alla luce dei nuovi obiettivi anti-elusione*, in Alì A. (ed), *Le sanzioni dell'UE nei confronti della Russia tra sicurezza internazionale e diritti umani*, op. cited above, pp. 32-33; Silingardi S., *Il problema dell'extraterritorialità delle sanzioni*, op. cited above, pp. 289-298; and, Silingardi S., *Unilateral Sanctions Before the General Court: Venezuela v. Council*, op. cited above, p. 1138. Interestingly on US extraterritorial measures, also Viterbo A., *Extraterritorial Sanctions and International Economic Law*, in European Central Bank (ECB), *Building Bridges: Central Banking Law in an Interconnected World*, op. cited above, pp. 159-163; and, Viterbo A., *The Extraterritorial Sanctions Policy of the United States and the (Ab)Use of the US Dollar as a Jurisdictional Link*, op. cited above, pp. 361-381.

[714] More precisely, they apply to entities and individuals located or national of the imposing state and, thus for instance, they limit transactions by persons in the sanctioning country (US, in this case) with sanctioned countries or person.

[715] On this regard, *inter alia*, Beaucillon C., *An Introduction to Unilateral and Extraterritorial Sanctions: Definitions, State of Practice and Contemporary Challenges*, in Beaucillon C. (ed), *Research Handbook on Unilateral and Extraterritorial Sanctions*, op. cited above, pp. 1-18, pp. 5-6; Gordon J., *Unilateral Sanctions: Creating Chaos at Bargain Rates*, in Subedi S.P. (ed), *Unilateral Sanctions in International Law*, op. cited above, pp. 87-105, pp. 91-92; Silingardi S., *Le sanzioni unilaterali e le sanzioni con applicazione extraterritoriale nel diritto internazionale*, op. cited above, pp. 54-55; and, Sossai M., *Legality of Extraterritorial Sanctions*, in Asada M., *Economic Sanctions in International Law and Practice*, op. cited above, p. 67. Interestingly, and slightly differently from this classification, refer to Schmidt J.*, The Legality of Unilateral Extra-territorial Sanctions under International Law*, op. cited above, p. 58 and p. 60, which instead considers unilateral sanctions – identified as those measures adopted by States, both individually and collectively, outside from the UN framework – as extra-territorial in nature. In turn, according to the author, unilateral extra-territorial sanctions are often part of sanctions regimes containing primary sanctions, by being specifically «designed to enhance the effectiveness of the [primary sanctions] by forcing others to contribute to the economic and financial isolation of the target of the primary sanctions» (p. 60). On various elements of secondary sanctions, refer to Ruys T., Ryngaert C., Rodríguez Silvestre F. (eds.), *The Cambridge Handbook of Secondary Sanctions and International Law*, op. cited above; and Silingardi S., *Secondary Sanctions, State Responsibility and Grave Breaches of Jus Cogens norms*, in Ruys T., Ryngaert C., Rodríguez Silvestre F. (eds.), *The Cambridge Handbook of Secondary Sanctions and International Law*, op. cited above, pp. 231-237 discussing also their «anti-circumvention» role.

[716] Sossai M., *Legality of Extraterritorial Sanctions*, in Asada M., *Economic Sanctions in International Law and Practice*, op. cited above, p. 63.

exclusion from US markets.[717] Key examples of US extraterritorial measures include the 1996 Helms-Burton Act[718] and the 1996 Iran and Libya Sanctions Act.[719]

Extraterritorial and secondary sanctions are highly controversial. Indeed, several US extraterritorial measures have been challenged before domestic courts and, occasionally, their enforcement has been suspended following pressure from third States.[720] Critics question their legitimacy under international law, their compatibility with the principles of non-intervention, sovereign equality and territoriality, as well as their human rights impact, and their efficacy. Conversely, the use of extraterritorial measures has been justified by reference to the active personality principle, the effects doctrine, the protective principle, and, Article XXI GATT,[721] despite many scholars disagree with these arguments.[722] The UN General Assembly has also expressed concern over the negative implications of unilateral 'sanctioning' measures, including those with

[717] The opportunistic reliance on the economic interdependence of states and on the dominance of the US in such sectors has been widely discussed. Many interesting concepts has been introduced, among which the famous one of "weaponised interdependence". In this latter sense, Drezner D.W., Farrell H., Newman A.L. (eds), *The Uses and Abuses of Weaponized Interdependence*, Brookings Institution Press, 2021. Silingardi S., *The EU 11 and 12 Packages of Sanctions Against Russia: How Far is the EU Willing to Go Extraterritorially?*, op. cited above, p. 554, highlights how the EU «is well aware that it lacks the same leverage on third countries as the US, with its access to the US financial system and the weaponization of the dollar, which remains crucial for numerous financial institutions worldwide». Similarly, Viterbo A., *The Extraterritorial Sanctions Policy of the United States and the (Ab)Use of the US Dollar as a Jurisdictional Link*, op. cited above, pp. 361-381.

[718] The Cuban Liberty and Democratic Solidarity Act (LIBERTAD), more famously known as Helms-Burton Act, P.L. 104-114, 110 Stat. 785, 22 U.S.C. §6021-6091. This act extended the territorial application of the initial embargo as to apply also to foreign companies trading with Cuba.

[719] Iran and Libya Sanctions Act, P.L. 104-172, 110 Stat. 1541, 50 U.S.C. §1701.

[720] Ruys T., *Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, p. 29. However, the suspension of the 1996 Helms-Burton Act was temporary since under the Trump Administration such suspension was not confirmed. On the enforcement of extraterritorial sanctions, interestingly, Viterbo A., *The Enforcement of Extraterritorial Sanctions: Asset Freezes and International Monetary Law*, in Ruys T., Ryngaert C., Rodríguez Silvestre F. (eds.), *The Cambridge Handbook of Secondary Sanctions and International Law*, op. cited above, pp. 287-304.

[721] The principle of active personality – *i.e.* the States ability to exercise jurisdictions over individuals in other countries to whom are nationals – has been, however, widely considered as contrary to international law on the grounds of the Barcelona Traction case. The effects doctrine – justifying extraterritorial reaches when there are direct, substantial, and reasonable effects within its territory – is instead contained within the 1996 Helms-Burton Act but has been criticised on many occasions by several scholars. The protective principle intends to protect States from acts affecting its security but occurring outside its territory and nationals. Lastly, the justification of Article XXI GATT will be analysed subsequently in Chapter III, Section 2.3. On the definitions of these principles, *inter alia*, Gallant K.S., *International Criminal Jurisdiction: Whose Law Must We Obey?*, Oxford University Press, 2022, pp. 409-440; Sossai M., *Legality of Extraterritorial Sanctions*, in Asada M., *Economic Sanctions in International Law and Practice*, op. cited above, p. 68; and, Zelger B., *EU Competition Law and Extraterritorial Jurisdiction – A Critical Analysis of the ECJ's judgment in Intel*, European Competition Journal, Vol. 16, 2020, pp. 613-627. On extraterritoriality and on the Helms-Burton Act' illegality under international law, refer to Lowenfeld A.F., *Unilateral Versus Collective Sanctions: An American's Perception*, in Gowlland-Debbas V. (ed), *United Nations Sanctions and International Law*, op. cited above, pp. 95-103. On these justifications, also Silingardi S., *The EU 11 and 12 Packages of Sanctions Against Russia: How Far is the EU Willing to Go Extraterritorially?*, op. cited above, p. 552; and, Silingardi S., *Il problema dell'extraterritorialità delle sanzioni*, op. cited above, pp. 289-298.

[722] For a brief overview, refer to Sossai M., *Legality of Extraterritorial Sanctions*, in Asada M., *Economic Sanctions in International Law and Practice*, op. cited above, p. 68; and Tilahun N., *Resisting (US) Sanctions: A Comparison of Special Purpose Vehicles, Blocking Statutes and Countermeasures*, Global Trade and Customs Journal, Vol. 17, no. 9, 2022, pp. 380-388, p. 383.

extraterritorial application.[723] The EU has consistently reaffirmed the non-extraterritorial nature of its restrictive measures,[724] and has long criticised extraterritorial applications of measures. Key EU legislation in this regard includes the 1996 Blocking Statute,[725] which counters foreign extraterritorial measures, as analysed in the following section together with the Anti-Coercion Instrument (ACI), designed instead to respond to economic coercion.

Overall, the US system of unilateral sanctions is composed by a series of legislative tools, commonly characterised by broad presidential discretion and strong coordination across multiple US departments. These measures encompass import and export restrictions, financial and trade controls, visa limitations, and extraterritorial sanctions, reflecting both the US global economic influence, and its ability to use economic coercion to advance national security and foreign policy objectives. While, similarly to other unilateral sanctions regimes, the US framework raises both legal, ethical, and humanitarian concerns, its extraterritorial reach has led to additional criticism and international tension.

The following section briefly examines the EU unilateral instruments: the Blocking Statute and the Anti-coercion Instrument, both aimed at safeguarding the EU and its MS from coercive economic measures.

6.2. EU unilateral instruments: the EU Blocking Statute and the Anti-Coercion Instrument

The EU unilateral instruments examined in this section are closely linked to – and, in certain cases, they expressly provide for – EU restrictive measures. Adopted to respond to specific actions by third states, they constitute a tailored approach to the general framework of EU restrictive measures analysed above, and may function as instruments within economic wars.

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[723] Interestingly, the UNGA 78th Session agenda contains item 28 concerning the "elimination of unilateral extraterritorial coercive economic measures as a means of political and economic compulsion". Also UN GA resolutions – such as the A/RES/51/22 of December 6, 1996 – calls for the «immediate repeal of unilateral extraterritorial laws that impose sanctions on companies and nationals of other States; […and] Calls upon all States not to recognize unilateral extraterritorial coercive economic measures or legislative acts imposed by any State» (paras 2-3).

[724] This has been stated in numerous occasions and documents, also within the UN GA. EU Statement, *UN General Assembly: Elimination of Unilateral Extraterritorial Coercive Measures as a Means of Political and Economic Compulsion*, 13 June 2024, available at https://www.eeas.europa.eu/delegations/un-new-york/eu-statement-%E2%80%93-un-general-assembly-elimination-unilateral-extraterritorial-coercive-measures-means_en?s=63, [last accessed on 14 September 2024]. Nonetheless, as mentioned above, recent EU restrictive measures against the Russian Federation do possess elements of extraterritoriality.

[725] Likewise, other States enacted "blocking statutes" in order to counter-react the effects of US extraterritorial measures within their territory. Among others, the United Kingdom enacted the Statutory Instrument no. 2449 of 1992 on The Protection of Trading Interests (US Cuban Assets Control Regulations) Order 1992 under the Protection of Trading Interests Act of 1980. On this, Azeredo da Silveira M., *Economic Sanctions and Contractual Disputes Between Private Operators*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, pp. 330-376, pp. 349-350. Similarly, also Canada, Mexico, Russia and China adopted blocking regulations. On this, Sossai M., *Legality of Extraterritorial Sanctions*, in Asada M., *Economic Sanctions in International Law and Practice*, op. cited above, p. 62; and, Tilahun N., *Resisting (US) Sanctions: A Comparison of Special Purpose Vehicles, Blocking Statutes and Countermeasures*, op. cited above, p. 383.

The first examined legislation is the EU Blocking Statute of 1996 (also "Statute"),[726] which enables the EU to counter-react the effects of extra-territorial laws and measures affecting international trade, movement of capital, and other commercial activities between the EU and third countries.[727] Although it does not specifically empower the EU to enact restrictive measures as per Article 215 TFEU, the Statute provides for economic measures of recovery, such as seizure and sale of assets.[728] Some authors have qualified such measures as ARSIWA countermeasures responding to illegal extraterritorial US measures enacted against Cuba, Iran and Libya.[729] Mostly, the Statute is understood as a "defensive instrument" aimed at shielding EU operators from extraterritorial sanctions, seemingly lacking the elements required to qualify as "sanction" under the working-definition of this dissertation. However, extraterritorial measures have frequently been contended to constitute violations of international law and its principles and, thus, potentially give rise to coercive responses aimed at inducing compliance, such as those arguably envisaged by the Statute itself.

The Statute prohibits EU persons[730] from complying, either directly or indirectly, actively or by deliberate omission, with «any requirement or prohibition, including requests of foreign courts»

[726] 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.

[727] Article 1 EU Blocking Statute. The Annex to the EU Blocking Statute provides that the possible damages to the EU interests involved the provisions on liabilities; the prohibition to load or unload from a vessel in any place in US or entering into a US port; the refusal to import and export goods from and into Cuba; the blocking of financial dealings involving Cuba; the provision of legal proceedings in the US against EU citizens or companies involved in trafficking (with the related compensation); the refusal of entry into US for persons trafficking including spouses, minor children and agents; fines; imprisonment in case of violation; forfeiture; limitation of imports and exports or procurement into and to US; prohibition of designation as primary dealer or repository of US funds; denial of access to loans from US financial institutions; and refusal of assistance by EXIM-Bank.

[728] Article 6 (4) EU Blocking Statute. Article 6 (4) EU Blocking Statute specifies that aside from other means available, the recovery might also take the form of seizure and sale of assets (including shares) held by those 'responsible' persons, entities or intermediary acting in the EU.

[729] In this regard, Sossai M., *Legality of Extraterritorial Sanctions*, in Asada M., *Economic Sanctions in International Law and Practice*, op. cited above, p. 62 and p. 69. Differently, Tilahun N., *Resisting (US) Sanctions: A Comparison of Special Purpose Vehicles, Blocking Statutes and Countermeasures*, op. cited above, p. 388 considers general blocking statutes as occupying «a middle ground» between SPVs and countermeasures. Silingardi S., *The EU 11 and 12 Packages of Sanctions Against Russia: How Far is the EU Willing to Go Extraterritorially?*, op. cited above, p. 553, focusing specifically on EU recent measures and their extraterritorial application, argues that ARSIWA countermeasures against these EU measures should be excluded as these latter «may fall within the realm of permissible collective countermeasures under Article 54 of ARSIWA» since their objective remains inducing compliance of third states with obligations deriving from severe breaches of peremptory norms by the Russian Federation.

[730] As per Article 11 EU Blocking Statute, the Statute applies to (1) natural persons resident in or national of EU MS; (2) any legal persons incorporated within the EU; (3) any natural or legal persons national of a MS established outside the EU, and shipping companies established outside the EU but controlled by nationals of a EU MS, if their vessels are registered in that EU MS (This category – mentioned by Article 11 (3) EU Blocking Statute – is specified in Article 1 (2) of the Council Regulation (ECC) no. 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries); (4) any other natural person being a resident in the EU unless is in the country of which is a national; (5) any other natural person within the EU including its territorial waters, air space, aircraft or vessel under the jurisdiction or control of a EU MS, acting in a professional capacity.

deriving from the listed extraterritorial law.[731] Authorisations for full or partial compliance might be granted when non-compliance would seriously damage their or EU interests.[732]

Although significant to the EU restrictive measures system, the Statute is often criticised for the burden it places on EU private actors,[733] and for its limited scope of application (namely, to specific categories of persons and companies, and to the listed Acts and Regulations).[734] In 2018, the Annex was updated[735] to include additional US 'sanctioning' laws.[736] The Commission has also proposed reforms,[737] to reinforce the Statute by focusing on non-trade related measures of retorsion; by including clearer mechanisms for the recovery of defendants' assets across the EU; by strengthening national measures to block recognition and enforcement of foreign judgments; by

[731] Article 5 EU Blocking Statute. Persons affected by such extraterritorial measures should inform the Commission within 30 days either directly or through EU MS (Article 2 EU Blocking Statute). Whenever the Commission is informed directly, it will immediately inform the EU MS competent authorities in which the person who gave the information is resident or incorporated. Judgments of courts or tribunals outside the EU giving effects directly or indirectly to the extraterritorial laws or measures shall not be recognised or be enforceable (Article 4 EU Blocking Statute). The concerned extraterritorial laws and measures are listed in the Annex of the Statute and, at the moment of the adoption, added laws were: the US National Defense Authorization Act for Fiscal Year 1993, Title XVII "Cuban Democracy Act 1992", Sections 1704 and 1706 (National Defense Authorization Act for Fiscal Year 1993, P.L. 102-484, October 1992, 106 Stat. 2315, H.R.5006); the US Cuban Liberty and Democratic Solidarity Act of 1996 (more famously known as Helms-Burton Act or LIBERTAD (The Cuban Liberty and Democratic Solidarity Act (LIBERTAD), op. cited above); the US Iran and Libya Sanctions Act of 1996 (Iran and Libya Sanctions Act, op. cited above); and the US Code of Federal Regulations, Ch. V, Part 515 - Cuban Assets Control Regulations, subpart B (Prohibitions), E (Licenses, Authorizations and Statements of Licensing Policy) and G (Penalties) (Code of Federal Regulations (CFR), Ch. V (7-1-95 edition), Part 515 — Cuban Assets Control Regulations, §515.101-212.901. Subpart B (Prohibitions) are §515.201-515.210; Subpart E (Licenses, Authorizations and Statements of Licensing Policy) are §515.501-515.591; and Subpart G (Penalties) is §515.701).

[732] Article 5 (2) EU Blocking Statute. These authorisations would be provided according to Articles 7 and 8 of the Statute.

[733] Lonardo L., Szép V., *The Use of Sanctions to Achieve EU Strategic Autonomy: Restrictive Measures, the Blocking Statute and the Anti-Coercion Instrument*, European Foreign Affairs Review, Vol. 28, no. 4, 2023, pp. 363-378, p. 370. Similarly, Tilahun N., *Resisting (US) Sanctions: A Comparison of Special Purpose Vehicles, Blocking Statutes and Countermeasures*, op. cited above, p. 386.

[734] Tilahun N., *Resisting (US) Sanctions: A Comparison of Special Purpose Vehicles, Blocking Statutes and Countermeasures*, op. cited above, p. 383.

[735] Commission Delegated Regulation (EU) 2018/1100 of 6 June 2018 amending the Annex to Council Regulation (EC) No 2271/96 protecting against the effects of extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, C/2018/3572.

[736] *i.e.* the Iran Freedom and Counter-Proliferation Act of 2012 (Iran Freedom and Counter-Proliferation Act of 2012, P.L. 112-239, 22 U.S.C. Chapter 95, §8801-8811); the National Defense Authorization Act for Fiscal Year 2012 (National Defense Authorization Act for Fiscal Year 2012, P.L. 112-81, 125 Stat. 1298, December 2011, H.R. 1540); and the Iran Threat Reduction and Syria Human Rights Act of 2012 (Iran Threat Reduction and Syria Human Rights Act of 2012, P.L. 112-158, 126 Stat. 1214, H.R. 1905, 22 U.S.C. Chapter 94, §8701-8795).

[737] Lonardo L., Szép V., *The Use of Sanctions to Achieve EU Strategic Autonomy: Restrictive Measures, the Blocking Statute and the Anti-Coercion Instrument*, op. cited above, p. 370 argue three different reasons for the Commission to seek amendments to the Blocking Statute: first, a political motivation as the EU attempts to reassert its strategic sovereignty; second, a policy reason since failing to be applied outside of the Cuban crisis, the Statute (and the EU) lost some credibility; and, third, an "unfair behaviour reason" since while sending states have no economic interest to stop such behaviour, the EU considers it unfair and seeks to cease it. Silingardi S., *Il Regolamento di blocco davanti alla Corte di giustizia*, Rivista di diritto internazionale, Vol. 115, no. 2, 2022, pp. 550-556 analyses the EU case *Bank Melli Iran c. Telekom Deutschland*, 21 December 2020, C-124/20 arguing, in the conclusions, that it will be unsurprising if the novel blocking statute will move fully (or for most of its parts) away from the 1996 Blocking Statute.

streamlining authorisations procedures; and, by guarantying EU involvement in foreign proceedings to support affected companies and individuals.[738]

Perhaps also due to the shortcomings of the Blocking Statute,[739] the EU developed a more general instrument to deter and respond to coercive economic conducts by third countries, culminated in the adoption of the Anti-Coercion Instrument (ACI).[740]

Nonetheless, similarities, and potential overlaps,[741] are present within the two legislations. While both instruments aim at countering third-country measures against the EU, their scope and logic differ significantly. The Blocking Statute strictly applies to natural or legal persons within the EU, whereas the ACI is directed to the whole EU and its MS.[742] Moreover, deterrence – absent from the Statute – is central to the ACI. Although neither instrument explicitly provides for restrictive measures under Article 215 TFEU, the ACI specifically sets forth Union Response Measures (URM), which closely resemble EU restrictive measures.

The ACI was developed within the Directorate-General for Trade (DG Trade), reflecting its trade-policy focus, whereas the Blocking Statute referred to Financial Stability, Financial Services and Capital Markets Union (DG FISMA) – recently very active in proposing new draft regulations on restrictive measures, including those recently adopted against Russia.[743] Like the Statute, however, also the ACI originated as a response to the US-EU trade tensions:[744] its adoption indeed was

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[738] 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*, COM/2021/32 final, 19 January 2021, Part 5, Key Action 14 on strengthen cooperation on sanctions, in particular with G-7 partners. In parallel, an expert group of EU MS representative on the issue of "sanctions and extraterritoriality" was set up by the Commission, mandated also to cover the issue of the technical implementation of EU restrictive measures and the Blocking Statute (Communication from the Commission, *The European Economic and Financial System: Fostering Openness, Strength and Resilience*, cited above, Part 5 on "Strengthening the implementation and enforcement of EU sanctions").

[739] On the claim that the ACI has perhaps being adopted as a consequence of the inadequacy of the Blocking Statute, *inter alia*, Tilahun N., *Resisting (US) Sanctions: A Comparison of Special Purpose Vehicles, Blocking Statutes and Countermeasures*, op. cited above, p. 384.

[740] Regulation (EU) 2023/2675 of the European Parliament and of the Council of 22 November 2023 on the protection of the Union and its Member States from economic coercion by third countries. Additional remarks on this instrument are also made in other Chapters of the dissertation, *inter alia*, Chapter III, Section 3.2.2. According to Silingardi S., *Il nuovo strumento anti-coercizione europeo e il futuro assetto dei rapporti tra l'Unione Europea e l'organizzazione mondiale del commercio*, Diritto del Commercio Internazionale, Fasc. 3, Anno XXXVIII, 2024, pp. 653-686, p. 679, this instrument constitutes the most aggressive recourse to unilateral measures developed after the WTO crisis.

[741] The risk of overlaps between the scope of applications of the Blocking Statute and the ACI has also been debated by the stakeholders' impact assessment of ACI. Likewise, some scholars discussed this potential overlapping and the risk of duplication. In this sense, Lonardo L., Szép V., *The Use of Sanctions to Achieve EU Strategic Autonomy: Restrictive Measures, the Blocking Statute and the Anti-Coercion Instrument*, op. cited above, pp. 370-371. The Commission, however, seemed to suggest that the Statute and the ACI are supposed to aim different types of coercion and, as such, to be relied upon in different situations. In this latter sense, Szép V., *The Legislative History of the EU's Anti-Coercion Instrument*, op. cited above, p. 133.

[742] Lonardo L., Szép V., *The Use of Sanctions to Achieve EU Strategic Autonomy: Restrictive Measures, the Blocking Statute and the Anti-Coercion Instrument*, op. cited above, p. 371.

[743] Szép V., *The Legislative History of the EU's Anti-Coercion Instrument*, op. cited above, p. 133.

[744] More precisely, the ACI originated as a response to the US-EU trade tensions under the first US Presidency of Trump Donald. The 2021 Joint Declaration of the Commission, Council and EP specified the need to create an instrument capable

significantly accelerated by China's trade restrictions against Lithuania in 2021 following the announcement of the opening of a Taiwanese representative office.[745] This episode, considered by the EP as an example of economic coercion, represented a potential situation in which the ACI could «help the EU to deal» with third-countries' trade restrictions aimed at forcing EU policy change.[746]

Economic coercion constitutes the core concept of the ACI,[747] which establishes a framework specifically to deter, obtain the cessation, and seek reparation from third-countries economic coercion whilst empowering the EU with a last-resort counteraction tool: the Union Response Measures (URM).[748] Although economic coercion lacks a uniform definition in international law,[749] Article 2 (1) ACI qualifies it as those third-countries' actions applying or threatening to apply «measures affecting trade or investments in order to prevent or obtain the cessation, modification or adoption of a particular act» by the EU or an EU MS, thus interfering with EU or its MS legitimate sovereign choices. The definition of economic coercion, and thus of ACI's scope of application, has been one

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to «dissuade or offset coercive actions by third countries and […] allow the expeditious adoption of countermeasures». In this regard, 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, 21 February 2021, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32021C0212%2801%29&qid=1710598410409, [last accessed on 16 March 2024].

[745] The Lithuanian President Nauseda Gitanas later specified that the denomination of the office with that name was a "mistake". On this, Sevastopulo D., Milne R., Hille K., Foy H., *US Wades into Spat Between China and Lithuania over Taiwanese Office*, The Financial Times, 20 January 2022, available at https://www.ft.com/content/e646155d-6d8c-482a-8dfb-e4ef7d081bd8, [last accessed on 18 March 2024]. Interestingly, Higgins A., *Lithuania vs. China: A Baltic Minnow Defies a Rising Superpower*, The New York Times, 08 October 2021, available at https://www.nytimes.com/2021/09/30/world/europe/lithuania-china-disputes.html, [last accessed on 18 March 2024], reports an overview of the relations between Lithuania and China also before the 2021 event. Similarly, Davidson H., *China Recalls Lithuania Ambassador in Taiwan Diplomatic Office Row*, The Guardian, 10 August 2021, available at https://www.theguardian.com/world/2021/aug/10/china-recalls-lithuania-ambassador-taiwan-diplomatic-office-row-beijing-tension-taipei, [last accessed on 16 March 2024]. China reduced its diplomatic relations and restricted trade with Lithuania. The EU initiated a WTO dispute complaint in January 2022 requesting consultations on China' trade restrictions against Lithuania, which, however, was then suspended in January 2024 at the EU's request. On this regard, WTO, *EU Initiates WTO Dispute Complaint Regarding Chinese Restrictions on Trade with Lithuania*, 31 January 2022, available at https://www.wto.org/english/news_e/news22_e/ds610rfc_31jan22_e.htm, [last accessed on 16 March 2024]; Gijs C., *EU Suspends WTO Dispute Against China's Trade Restrictions on Lithuania*, 27 January 2024, available at https://www.politico.eu/article/european-union-china-world-trade-organization-dispute-lithuania/, [last accessed on 16 March 2024].

[746] European Parliament, *Anti-coercion Instrument: The EU's New Weapon to Protect Trade: The Anti-coercion Instrument will be the EU's New Tool to Fight Economic Threats and Unfair Trade Restrictions by non-EU Countries*, 03 October 2023, available at https://www.europarl.europa.eu/topics/en/article/20230915STO05214/anti-coercion-instrument-the-eu-s-new-weapon-to-protect-trade, last accessed on 16 March 2024]. On China's economic coercion, Czapnik B., Mercurio B., *The Use of Trade Coercion and China's Model of 'Passive-Aggressive Legalism'*, Journal of International Economic Law, Vol. 26, no. 2, 2023, pp. 322-342.

[747] According to the Preamble, deterrence and counteraction of economic coercion – intensified by the intrinsic economic interdependence – is crucial to safeguard the rights and interests of the EU and its MS (paras 6 and 7). Mainly affecting trade and investments, measures of economic coercion are implemented to coerce the EU and its MS in order to obtain the cessation, modification or adoption of an act or a position, by targeting both foreign policy actions, the EU internal market and the EU as a whole (Preamble, paras 7, 9, and 10).

[748] Article 1 (2) ACI, according to Article 1 (1) ACI, the Regulations ensures an effective protection of the EU and its MS interests from a third-country economic coercion.

[749] For an interesting discussion on the issue, refer to Tzanakopoulos A., *The Right to be Free from Economic Coercion*, op. cited above, pp. 616-633. The meaning, definition, and usage of the term "economic coercion" in international law have been previously analysed in this dissertation in Chapter I, Sections 3 and 4.

of the most problematic and negotiated issues of the instrument.[750] Interestingly, the Preamble explicitly characterises coercion as prohibited, and as such, as a wrongful act under international law, which may entitle the EU to request reparation in accordance with ARSIWA.[751]

Under the ACI, the Commission and the Council determine the existence of economic coercion, on the basis of the criteria established by Article 2 (2) ACI.[752] Following an investigation conducted by the Commission – acting on its own initiative or upon request, an implementing act may be proposed to the Council, which acts by qualified majority.[753] Before submitting the proposal to the Council, the Commission must inform the EP,[754] and may invite the third country to submit its observations,[755] and, once the implementing act is adopted, both are to be again informed.[756]

The EU may also adopt URM against a third country which has been proven to exert economic coercion. Under Article 8 ACI, the Commission should adopt URM by implementing acts when prior action has failed to cease economic coercion and, where requested, obtain reparation; when protection of EU and its MS interests and rights is necessary; and when such action is in the EU interest.[757] The Commission selects the URM from Annex I in accordance with Article 11 ACI criteria:[758] the

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[750] Schaupp L., *The EU's Anti Coercion Instrument between EU Strategic Autonomy and Member State Sovereignty*, op. cited above, p. 6 and pp. 7-9 which, as mentioned above, reports that the most contested elements concerned the nature of the coercion, its impact on trade and investments, the concept of interference and the extent to which it constraints EU or its MS' sovereignty, and not the boundaries of the definition of economic coercion since it was pacific the need for a broad definition. Silingardi S., *Il nuovo strumento anti-coercizione europeo e il futuro assetto dei rapporti tra l'Unione Europea e l'organizzazione mondiale del commercio*, op. cited above, p. 673 discusses how the main consequence of the wide definition of economic coercion within ACI is to significantly extend the operative reach of ACI.

[751] Preamble ACI, paras 14 and 15.

[752] The Commission and the Council shall determine whether economic coercion had been put into place by a third country, taking into account the specific conditions established by Article 2 (2) ACI, *i.e.*: (a) the intensity, severity, frequency, duration, breadth and magnitude of the third-country measure, its impact on trade and investments and its pressure on the EU and its MS; (b) if it exists a pattern of interference aimed at preventing or obtaining an act of the EU, of a EU MS or of another third country; (c) the extent to which such third-country measure infringes a EU or a EU MS sovereignty area; (d) if the actions of the third country are taken on the grounds of an internationally-recognised legitimate concern; and (e) if, and how, the third country seriously attempted to settle the issue in good faith through international coordination or adjudication, either bilaterally or in an international forum, before enacting such measures.

[753] Article 5 (5) ACI. The procedure for examination, assessment, and determination of the economic coercive element of a third-country measure is established in Articles 4 and 5 ACI.

[754] Article 5 (4) ACI.

[755] Article 5 (3) ACI.

[756] Article 5 (8) and (9) ACI. Moreover, consultations with the third country after the adoption of an implementing act are regulated by Article 6 ACI.

[757] More specifically, Article 8 ACI regulates such response measures by firstly establishing that the Commission should adopt URM by means of implementing acts when (a) the actions taken under the previous Articles did not result, within a «reasonable period», in the cessation of the economic coercion and, when requested, in the reparation of the injury; (b) it is necessary to protect the interests and the rights of EU and its MS; and (c) it is in the EU interest as provided by Article 9 ACI. All these conditions must be present in order to enact URM, but the Article specifies that when there has been cessation of economic coercion but not full reparation of the injury, the Commission shall assess whether point (b) is met on all the circumstances of the case, based on the nature and the extent of the damage caused and on the general obligation to make full reparation under customary international law (Article 8 (1) ACI). Coordination between URM and other EU measures is to be ensured by the Commission (Article 8 (5) ACI), which should also notify the third country of the adopted measures, thereby communicating that such measures will apply unless economic coercion cease and reparation occurs, calling upon such country to immediately ceases the coercive behaviour (and, when appropriate and requested, to repair the injury), and offering negotiations for a solution (Article 8 (7) ACI).

[758] Article 8 (2) ACI.

measures should be proportionate, not exceed the level of injury, and take into account the gravity and economic impact of economic coercion, as well as the rights of EU and its MS. Their design should also be based on criteria of effectiveness; avoidance and minimisation of negative impacts on EU operators, investment environment, economic growth and employment policies; provide relief to EU actors; avoidance of disproportionate administrative costs; take into account the nature of the third-countries measures; and, comply with international law.[759]

URM may be adopted either as measures of general application or as measures applicable to natural or legal persons engaging in Article 207 TFEU activities linked to the third-country government.[760] Moreover, whenever the third-country measures constitute an internationally wrongful act, URM may consist in the EU's non-performance of its international obligations towards that country.[761] Annex I lists the possible URM, including imposition of customs duties, import and export restrictions, limits of participation to public procurement, restrictions on trade, services, foreign direct investments, intellectual property rights, banking, insurance, EU capital markets, and sanitary goods.[762]

The Commission must review economic coercion, the effectiveness of URM, and their impact on EU interests.[763] URM must be suspended when coercion is suspended, or when the third country executes an adjudicatory decision.[764] Termination shall occur when economic coercion ceases, a

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[759] Article 11 (2) ACI. Paragraph 23 of the Preamble of the ACI Regulation no. 2023/2567 mentions also other criteria such as, among others, the safeguarding of the investment environment and knowledge economy of the EU; the EU interests for upstream and downstream industries and the final consumers; and the non-interfering with administrative decisions based on scientific evidence. Moreover, precedence should be granted to those measures that would prevent a disproportionate impact on legal certainty and predictability to economic operators and on the administration of the national regulations, and on those which will affect procedures applied on an EU basis, based on secondary legislations or where extensive EU law exists. Additional criteria are specified in case the Commission adopts measures affecting access of foreign direct investment to the EU or trade in services whenever necessary. These criteria include considering the patterns of trade in services and investment in the targeted sector and the risk of avoidance by the targeted third country or person; the possible effective contribution of such measures in cessation of economic coercion and reparation; and the existence of alternative measures available and less restrictive on trade and service but similarly capable of obtaining the result of cessation and reparation. (Article 11 (4) ACI).

[760] As established under Article 8 (3) ACI. It is also specified that natural or legal persons may be engaging or might engage in those activities. Article 10 ACI specifies the conditions necessary to apply URM to natural and legal persons.

[761] Article 8 (4) ACI.

[762] As listed, URM might precisely consist in the imposition of new or increased customs duties; the introduction or increase of restrictions on the importation or exportation of goods; the introduction of restrictions on trade in goods both transiting or internal; the restriction to participate in procedures of public procurement; the imposition of measures affecting trade in service or access of foreign direct investment; the restriction on protection of intellectual property rights and their commercial exploitation; the restriction of banking, insurance, access to EU capital markets and other financial services activities; the introduction or increase of restrictions of the possibility to place chemicals, sanitary and phytosanitary goods on the EU market. As specified in each case, all these measures might amount, if necessary, to the non-performance of applicable international obligations.

[763] Article 12 (1) ACI.

[764] As per Article 12 (2) ACI, suspension of URM shall occur when the third country suspends economic coercion, and should last as long as the suspension of such coercion. Similarly, when a proceeding of adjudication has been initiated or it reached a decision, the Commission shall suspend the measures when the third country is executing the decision's implementation. Moreover, Article 12 (5) ACI specifies that in duly imperative grounds of urgency – such as, *e.g.* to avoid irreparable damage to the EU or its MS, or to continue ensuring consistency with EU obligations under international law

mutually-agreed solution has been reached, a binding third-party international decision so requires, or when it is appropriate for EU interests.[765]

The URM legal nature is contentious. Although the Regulation is legally grounded in Article 207 TFEU, and thus on the EU Common Commercial Policy, several aspects of URM resemble the restrictive measures adoptable under CFSP. Notably, the CCP does enable the enactment of trade measures – including tariff rates, agreements on trade and services, commercial aspects of intellectual property, foreign direct investment, uniformity in measures of liberalisation, export policy and measures to protect trade such as anti-subsidies and anti-dumping –[766] and the overlapping between CCP and CFSP is not new,[767] but it is novel the explicitness within the ACI.[768] According to Court Opinion no. 2/15, a measure restricting trade is a CCP measure when it specifically relates to trade by essentially promoting, facilitating or governing it, and where it has direct and immediate effects on trade. [769] On this basis, the classification of URM depends on whether they produce direct and immediate effects on trade, thereby being fully qualified as CCP measures.[770]

Although Article 207 (1) TFEU requires the CCP to be conducted in the context of the principles and the objectives of the Union's external action, this provision has typically been interpreted as imposing a general duty to consider EU external policies to obtain uniformity and coherence of EU actions, rather than as authorising trade restricting measures of CCP and CFSP dual-nature. The adoption of measures based on CCP but with a CFSP' soul risks unbalancing crucial allocations of power in the EU. Notably, these concerns are based on the different decision-making procedures governing CCP and CFSP, especially regarding the role of the Commission and EP. Interestingly, initial debates around URM mainly focused on the admissibility of empowering the

– the Commission shall adopt immediately applicable implementing acts suspending or amending the URM, remaining into force for a maximum of two months.

[765] Article 12 (4) ACI more precisely specifies that termination of URM shall occur when any of the following cases take place: (a) the economic coercion has ceased and, if previously requested, reparation has occurred; (b) the economic coercion has ceased but reparation has not occurred, unless it is still necessary to maintain URM; (c) it has been reached a mutually agreed solution; (d) termination of URM is required by a binding decision in international third-party adjudication; or when (e) it is appropriate according to the EU interests.

[766] These are listed in Article 207 (1) TFEU. The ability of the EU to enact measures under CCP is presented more in detail in the following Chapter.

[767] Eeckhout P., *EU External Relations Law*, Oxford University Press, 2011, p. 502 even defines export controls and economic sanctions as «specific trade policy *instruments* which are exclusively employed for foreign policy *objectives*».

[768] Schaupp L., *The EU's Anti Coercion Instrument between EU Strategic Autonomy and Member State Sovereignty*, op. cited above, p. 16. An analysis of the relationship between CCP and CFSP is provided by Ott A., Van der Loo G., *The Nexus Between the CCP and the CFSP: Achieving Foreign Policy Goals Through Trade Restrictions and Market Access*, in Blockmans S., Koutrakos P. (eds), *Research Handbook on the EU's Common Foreign and Security Policy*, op. cited above, pp. 230-253.

[769] Opinion 2/15 of the Court (Full Court) of May 16, 2017, para 36. An in-depth analysis of this issue is provided in Chapter III of this dissertation.

[770] In this regard, Schaupp L., *The EU's Anti Coercion Instrument between EU Strategic Autonomy and Member State Sovereignty*, op. cited above, p. 12.

Commission with such extensive powers,[771] rather than on the nature and typologies of measures to be permitted.

Interestingly, recital 13 of the ACI Preamble seems to parallel ARSIWA countermeasures with the URM, in those cases where the latter respond to an internationally wrongful act and, thus, when they comprise the non-performance of international obligations towards the third country. This parallel is also visible in relation to the request for reparation, which is an instance both granted within ARSIWA and ACI. This specification – although contained within the Preamble – is particularly significant as it may reinforce the interpretation of URM as instruments pursuing broader objectives – such as inducing compliance following a wrongful act, as ARSIWA countermeasures – rather than as measures with sole trade-related aims, as firstly suggested by the ACI's legal basis.

The ACI Preamble also recalls the EU's exclusive competence under CCP, and 'justifies' the creation of ACI by noting that EU MS cannot unilaterally counter third-countries economic coercion – whether through CCP measures or in general – thereby necessitating an EU-level instrument.[772] Moreover, concerns regarding the Commission's extensive role are addressed by the Preamble and Article 1 (5) ACI, which clarify that the Regulation does not affect EU-MS division of competences.[773]

Nevertheless, the Commission performs a crucial role, as it is empowered to determine and examine cases of economic coercion, including on its own initiative; to inform EU MS of the initiation and developments; to engage and negotiate with the third country; to cooperate with other affected countries; and to select, adopt, amend, suspend, and terminate URM. During the negotiations, EU MS recalled both the extensive Commission's role and the foreign policy aspect of ACI, with its anchoring to a tool of EU exclusive competence.[774] Eventually, EU MS ensured themselves a role through the Council's participation in determining cases of economic coercion and exercising implementing powers – thereby enabling the Council, for the first time, to adopt implementing acts in the area of trade and investment.[775]

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[771] Schaupp L., *The EU's Anti Coercion Instrument between EU Strategic Autonomy and Member State Sovereignty*, op. cited above, p. 9.

[772] Preamble ACI, para 10. In this sense, Silingardi S., *Il nuovo strumento anti-coercizione europeo e il futuro assetto dei rapporti tra l'Unione Europea e l'organizzazione mondiale del commercio*, op. cited above, p. 661, notices indeed that the capacity of an EU instrument is widely superior in economic terms not only from an EU MS individual tool, but also from the sum of all potential EU MS individual responses.

[773] Preamble ACI, para 10, argues that it is necessary an EU instrument capable of effectively counteracting economic coercion while not interfering with the EU-MS division of competences.

[774] Schaupp L., *The EU's Anti Coercion Instrument between EU Strategic Autonomy and Member State Sovereignty*, op. cited above, p. 9 and p. 17.

[775] Preamble ACI, para 18, specifies that the empowerment of implementing powers to the Council is limited to the circumstances arising from the economic coercion and does not establish a precedent. On the novelty of this power to the Council, among others, Schaupp L., *The EU's Anti Coercion Instrument between EU Strategic Autonomy and Member State Sovereignty*, op. cited above, p. 8 and p. 9.

The Council voting procedure, however, is by qualified majority, meaning that the dynamics and EU MS support may vary and remain contested. Some view the Commission's extensive role and the Council's quorum of qualified majority as a «relative loss of sovereignty»[776] for the Council and EU MS. Unlike CFSP, where the Council unanimity requirement guarantees uniform EU MS consensus, the ACI does not require unanimity, despite the URM's controversial nature tilting between CCP and CFSP. This enables the Commission, as some scholars note, to circumvent CFSP unanimity while still adopting measures resembling restrictive measures.[777] Despite CFSP unanimity[778] conventionally grants EU MS a significant role, the above-presented recent developments in adopting restrictive measures highlight a reduced EU MS influence and an enhanced Commission role, reflecting a trend also noted in the context of ACI.

Although ACI URM measures are not formally labelled as "restrictive measures", their resemblance to Article 215 TFEU measures is evident. Whether solely restrictive measures – as per Article 215 TFEU – or also URM might properly be labelled "sanctions" is debated. Restrictive measures are commonly referred to as sanctions also by EU institutions, whereas ACI measures are less frequently called in such terms. From the perspective of the working-definition of "sanctions", URM may indeed be labelled as sanctions in those cases where they coercively respond to unlawful economic coercion (*i.e.* coercion affecting State's reserved domain, thus constituting a violation of international law) with the aim of inducing compliance with international law and its obligations.

Nonetheless, perhaps also due to their CCP legal basis, URM are rarely labelled as "sanctions", being conversely more frequently framed as countermeasures within the ARSIWA framework. This qualification is confirmed not only the ACI Preamble, but also by similar procedural and substantive conditions of the two instruments.[779] Indeed, both require the existence of a prior wrongful act – in the case of URM, a prior case of economic coercion, recognised as a violation of international law by the Preamble –; notifications to 'responsible' third-state; compliance with principles of proportionality and temporality; objectives such as inducing compliance (or cease the behaviour); and, obtain reparation.[780]

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[776] Schaupp L., *The EU's Anti Coercion Instrument between EU Strategic Autonomy and Member State Sovereignty*, op. cited above, p. 15.

[777] Verellen T., *Imperial Presidency Versus Fragmented Executive? Unilateral Trade Measures and Executive Accountability in the European Union and the United States*, op. cited above, pp. 1138-1139. The same author, at p. 1145, suggests for a more central role of the European Parliament within the decision-making process of adopting unilateral trade measures.

[778] For "CFSP unanimity" it is intended the unanimity requirement governing the adoption of CFSP measures.

[779] In this regard, Ruys T., Rodríguez Silvestre F., *The Union Strikes Back – The Proposed EU 'Anti-Coercion Instrument' (ACI) Seen Through the Lens of International Law*, Grili Working Paper no. 8, December 2022, pp. 1-24, p. 14 which argue that «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».

[780] On some of these similarities, *Ibidem*, which at p. 15 conclude «the ACI presents a rare illustration of a legislative instrument that is closely tailored to meet the ARSIWA conditions for the adoption of countermeasures».

Nonetheless, important differences between the two instruments persist. ARSIWA countermeasures respond to breaches of obligations, while URM are triggered by episodes of economic coercion, which as mentioned above, do not possess a uniform definition and interpretation of its character of violation of international law. Furthermore, the applicability of the ARSIWA framework to international organisations is still a controversial issue, as above presented. Notwithstanding that URM might also be considered retorsions whenever they do not violate other international obligations, it remains controversial the ACI's compatibility and relationship with WTO law, as analysed in the following chapter.

Overall, the EU's approach to the global context remains directed towards multilateralism – as opposed to the US – yet its normative production reveals also an evolution towards a more unilateral approach. This is indeed confirmed by the expansion of the EU's portfolio of unilateral coercive instruments, as well as by the informal changes in the decision-making process, across both CFSP and CCP instruments.

7. Conclusive remarks

Sanctions constitute a central yet ambiguous concept in international law. Although frequently invoked in academic scholarship as well as institutional and political discourse, the term lacks a precise and universally accepted legal categorisation. Attempts to define measures as sanctions according to their purpose, the actor enacting them, or the area targeted undoubtedly provide helpful tools to systematise measures, but presents significant limitations. In practice, the blurring of the concept "sanction" and the wide amount of instruments at the disposal of States and entities to influence, pressure, or coerce others render it complex to identify clear boundaries around what may properly qualify as "sanction".

The historical evolution of the 'economic weapon' from the League of Nations Covenant to the UN Charter highlights the persistent willingness of the international community to possess non-armed coercive tools, while progressively refining the modalities of collective responses to threats or breaches of international peace and security. While Chapter VII UN Charter measures remain the main non-armed coercive instrument in the hands of an international organisation, the employment of veto powers and consequent UNSC inability to act provoke major tensions within the system and, as a result, unilateral actions by States. At the same time, the unilateral framework for coercive measures is solely partially developed. ARSIWA countermeasures respond to prior wrongful acts, but their declination in third-party countermeasures is continuously criticised, although increasingly accepted in light of the current world order. Regional organisations, such as the EU, and individual States possess likewise strong bodies of law regulating their 'sanctioning' activities, whose legal

qualifications under international law constitute a complex task which needs a case-by-case assessment.

Overall, this chapter, by exploring the concept of "sanction", presented the most employed instruments originally designed to coerce others and referred to as "sanctions". The developed working definition of "sanctions" demonstrates that the boundaries of the term – even when restricted to its majoritarian perspective and the key common elements of the instruments – remain controversial. UN non-armed measures and ARSIWA countermeasures most easily qualify as "sanctions" under the working definition, despite both effectively constituting two separate legal categories under international law. EU restrictive measures, despite being commonly referred to as "EU sanctions", represent the first stretching of the working definition, as the pursuit of CFSP objectives may significantly extend beyond the objective of inducing compliance with international law and its obligations. Similarly, US and EU unilateral measures dealt with in Section 6 of this Chapter solely occasionally may qualify as "sanctions" under the working definition, mainly being labelled as such by media and scholarly debate solely due to their coercive nature.

Certainly, the tendency to collapse all these instruments – presented in this Chapter – into the single category of "sanction" is understandable: occasionally, they all present elements of coercion, and the label serves the international community to distinguish measures originally meant to enforce and induce compliance with international law and its obligations, from other forms of pressures aimed at different objectives – despite frequently regrouping instruments with crucially different legal basis and intents. At the same time, however, this trend obscures the distinct regulatory framework governing each instrument, thereby potentially enabling manipulations of intents, requirements, accountability, and legal consequences.

This risk is particularly evident also in situation where measures not originally designed to coerce are nonetheless employed for that purpose. The following chapter will address this issue by focusing on a limited number of trade instruments, both at the WTO system, and at the domestic level, with specific reference to the US trade instruments and EU CCP tools.

Chapter III

Trade instruments implemented to coerce: shifting from specific trade objectives to coercive purposes

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1. Introduction

International trade and commercial policies are heavily regulated at all regulatory levels – international, regional and national –[781] rendering «few economic activities [to be] more regulated than international trade transactions».[782] Historically, the exchange of goods and services has promoted economic development and interconnections between nations, enriching States with more varied and diversified resources, and improving States' standard of living. Nevertheless, critics have highlighted the negative consequences of international trade, including environmental impact; economic dependence and vulnerability; loss of sovereignty in certain areas; exploitation of labour; and, undermining of domestic industries.

Trade restrictions encompass a broad spectrum of instruments – ranging from tariffs and quotas to embargoes and export controls – each governed by specific legal frameworks and originally conceived with specific purposes. These instruments include tariffs and trade barriers – generally meant to protect domestic industries and regulate trade flows –, export controls – typically implemented to regulate export and import of goods with specific critical aspects such as military equipment, or dual-use technologies – and, foreign aid – meant to support development elsewhere. Over time and despite their original purposes, these instruments had been implemented with a coercive intent: tariffs have been used as instruments of pressure or as leverage in international negotiations (namely, the US-China trade wars); export controls have been imposed to force behaviour change or 'punish' specific actions (for instance, the China-Lithuania case); and, foreign aid has been interrupted to influence behaviour (as the case of US-Nicaragua).[783]

As mentioned in the introduction to this dissertation, restrictions to trade may be divided between measures specifically designed to coerce another State, and measures of commercial policy nature whose original purpose is not coercion but could eventually be employed coercively. Chapter II presented the first typology of trade control measures, while this Chapter III focuses on trade control measures of a commercial policy nature. Indeed, the latter, while originally designed as tools

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[781] Herdegen M., *Principles of International Economic Law*, Oxford University Press, 2013, p. 13 reports how «in the modern world, most States have opted for limiting their freedom of economic choices in favour of trade liberalization on the global, regional and bilateral level». Interestingly, Claussen K., *Trade's Security Exceptionalism*, op. cited above, p. 1104, well represents the framework of international trade law by stating that the «twenty-first century trade law is a patchwork of domestic and international rules».

[782] Jackson J.H., *History of the General Agreement on Tariffs and Trade*, in Wolfrum R., Stoll P-T., Hestermeyer H.P. (eds), *WTO – Trade in Goods*, Max Planck Commentaries on World Trade Law, Vol. 5, Martinus Nijhoff Publishers, 2011, pp. 1-24, p. 2, para 1.

[783] The US-China trade wars and China-Lithuania case are presented in detail in the fourth Chapter of this dissertation. The US-Nicaragua event, instead, has been briefly explained in the previous Chapter in relation to the remarkable ICJ case, refer *supra* to Section 4.3, Chapter II.

to protect domestic industries, or address unfair trade practices, have increasingly been employed for strategic and coercive objectives, thereby extending beyond their original purely commercial aims.

Unilateral trade-restricting measures have been applied in both wartime and peacetime, for both coercive and non-coercive purposes. During WWI, States heavily relied on trade control measures to economically isolate the enemy, arguably performing a pivotal role in the war's outcome.[784] However, trade-restrictive measures did not cease with the end of WWI, as many protectionist measures were domestically enacted in the following years.[785] Many scholars agree that trade restrictions – and the resulting tensions – after WWI effectively constituted one of the causes for the outbreak of WWII.[786] Despite this, the WWII was likewise characterised by intensive use of unilateral trade-restricting measures. Unlike the post-WWI period, however, the post-WWII world opted to commit to international trade cooperation and free trade policies, in order to build an international architecture capable of preventing, among other objectives, the intensive use of protectionist measures.

The establishment of new international institutions regulating the economic and financial international structure was perceived as enhancing multilateralism and peace among States. Trade liberalisation and multilateralism were to be enshrined in an international trade organisation which, although with difficulties, concretised in the *de-facto* international organisation of GATT 1947. Nonetheless, the introduction of GATT, and its later evolution into the WTO, did not completely cease the States' unilateral introduction of measures restricting trade. Although the GATT and WTO systems prohibit reliance on certain unilateral trade-restricting measures, they also regulate specific trade-restricting measures and provide potential justifications for unilateral measures.

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[784] Mulder N., *The Economic Weapon*, op. cited above, p. 5 reports that, during WWI, 300·000-400·000 people in Central Europe and 500·000 in the Ottoman provinces of the Middle East died of blockade-induced starvation and illness. Also refer to p. 55, p. 80, and, p. 296.

[785] As a way of example, the 1930 US Hawley-Smoot Tariffs Act (19 USC Ch. 4: Tariff Act of 1930) – although mainly aimed at creating job places within the US and protecting the US agricultural markets due to early economic depression' consequences – enabled the US to raise tariffs which, nonetheless, were followed by several reciprocal retaliation tariffs by other States against the US. On this issue, among others, Brand R.A., *GATT and the Evolution of United States Trade Law*, Brooklyn Journal of International Law, Vol. 18, no. 1, 1992, pp. 101-142, p. 111; Goldsmith J.L., Posner E.A., *The Limits of International Law*, op. cited above, pp. 143-144; Irwin D.A., *Peddling Protectionism: Smoot-Hawley and the Great Depression*, Princeton University Press, 2011; Jacks D.S., Novy D., *Trade Blocs and Trade Wars during the Interwar Period*, Asian Economic Policy Review, Vol. 15, no. 1, 2019, pp. 119-136; Koyama I., *The Passage of the Smoot-Hawley Tariff Act: Why Did the President Sign the Bill?*, Journal of Policy History, Vol. 21, no. 2, 2009, pp. 163-186; Soprano R., *WTO Trade Remedies in International Law: Their Role and Place in a Fragmented International Legal System*, Routledge, 2019, p. 11; and, United States International Trade Commission, *The Economic Effects of Significant U.S. Import Restraints*, Sixth Update 2009, Investigation no. 332-335, Publication no. 4094, August 2009, pp. 59-123, p. 63.

[786] Soprano R., *WTO Trade Remedies in International Law: Their Role and Place in a Fragmented International Legal System*, op. cited above, p. 11. Similarly, Goldsmith J.L., Posner E.A., *The Limits of International Law*, op. cited above, p. 144; Krpec O., Hodulak V., *War and International Trade: Impact of Trade Disruption on International Trade Patterns and Economic Development*, Brazilian Journal of Political Economy, Vol. 39, no. 1, 2019, pp. 152-172.

This Chapter examines the legal framework governing trade-restricting measures from both multilateral and unilateral perspectives, analysing how measures designed to regulate commercial policies have progressively shifted toward coercive purposes. The Chapter proceeds in three principal sections. Section 2 focuses on the GATT/WTO system, providing an historical overview (section 2.1.) before exploring the GATT and DSU provisions regulating WTO MS' enactment of – or justification for – measures restricting trade (sections 2.2., 2.2.1, and 2.3., 2.3.1.), and their possible categorisations under international law (sections 2.2.2 and 2.3.2), concluding with a brief analysis of DSU exclusivity and the admissibility of non-WTO countermeasures (section 2.4) and some final remarks (section 2.5.). Section 3 examines commercial policy measures within US and EU frameworks, analysing US Sections 232 US Trade Expansion Act (1962) and 301 US Trade Act (1974) in section 3.1., alongside the EU Common Commercial Policy in section 3.2., its intersection with CFSP (section 3.2.1.), its recently enacted instruments (section 3.2.2.), with the 'systematisation' in the 2023 Economic Security Strategy and its evolution in the 2025 Doctrine (section 3.2.3.). Finally, Section 4 of this Chapter provides some conclusive remarks discussing the decreased role of multilateralism, as well as the reorientation of trade instruments towards coercive purposes.

Understanding the framework of trade-restricting instruments originally designed to facilitate or regulate economic activities but increasingly implemented as tools of coercion and foreign policy, is crucial to understand their relationship with the broader phenomenon of "economic wars" analysed in Chapter I and with 'sanctioning' measures explored in Chapter II. As States increasingly employ unilateral trade-restricting measures for strategic and coercive purposes, the international trade legal framework conceived on a multilateral approach is under the spotlight. From an international law perspective, it is crucial to analyse these instruments' original purpose and their current implementation,[787] as to comprehend whether this use complies with international law or whether it stretches its boundaries.

2. Measures restricting trade under the World Trade Organization law

First and foremost, it is necessary to distinguish two main categories of trade-restricting measures that the WTO entails. This distinction relies on their legal basis, but also on their relationship with the multilateral trading system.

The first category encompasses trade-restricting measures that are specifically regulated under the General Agreement on Tariffs and Trade (GATT) and the Understanding on Rules and Procedures

[787] Specific case studies explored in Chapter IV enable a factual analysis of the employment of both Chapters II and III instruments, examining States' current employment.

Governing the Settlement of Disputes (DSU). These measures are indeed part of the WTO law, being specifically designed to enable WTO MS to respond to specific economic events while remaining within the organisation's multilateral approach. Thus, this category includes tariff-based measures and trade remedies: anti-dumping, countervailing and safeguards measures; quantitative restrictions (Import and export restrictions under Article XI GATT); and DSU trade-restrictive measures – briefly explained in section 2.2. of this Chapter.

The second category refers to trade-restrictive measures unilaterally adopted by WTO MS, which are not explicitly regulated as trade remedies under WTO agreements, but may nonetheless be justified under GATT exceptions – in particular, Articles XX and XXI GATT, as explored in section 2.3. of this Chapter. In this sense, these measures' compatibility with WTO law does not depend on compliance with WTO frameworks and rules, but rather on their ability to satisfy the requirements set out in the relevant exception clauses of GATT.

For either category, neither the GATT nor the DSU provide explicit indications with regard to the legal nature of these measures and to their legal categorisation under international law, yet as explained in sections 2.2.2. and 2.3.2. of this Chapter, both have raised intensive doctrinal debate. Nonetheless, before exploring the measures restricting trade under the WTO, the following section presents a brief overview of the evolution of trade-restricting measures in the multilateral trade system.

2.1. The evolution of trade-restrictive measures in the multilateral trading system: from the historical foundations of international trade organisation to the crisis of the WTO

The adoption of the General Agreement on Tariffs and Trade in 1947 and the establishment of the World Trade Organization later in 1995 concretised the idea of free trade through common trade rules and the elimination of trade barriers. Conceptualised in renowned free trade theories[788] and deriving from the Bretton Woods Agreement of 1944,[789] the provisional multilateral trade agreement GATT (also '1947 agreement') is historically intertwined with the unsuccessful attempt to establish the International Trade Organisation (ITO).

[788] Free trade has been conceptualised by a number of renowned scholars such as Smith Adam, Hume David, Ricardo David, Hamilton Alexander, and List Driedrich, and by the free trade movement of the late 18th century. Refer, generally, to Smith A., *An Inquiry into the Nature and Causes of the Wealth of Nations*, 1776; Hume D., *On the Balance of Trade*, 1752; Ricardo D., *On the Principles of Political Economy and Taxation*, 1817; Hamilton A., *Report on the Subject of Manufactures*, 1791; and List F., *National System of Political Economy*, 1841. To be precise, Smith Adam advocated for opening markets due to each state's domestic interests (and of its companies) but did not openly support the elimination of barriers to trade.

[789] Notably, the Bretton Woods negotiations successfully established both the International Monetary Fund (IMF) to stabilise international financial markets and the World Bank (WB) to provide assistance to development-related issues.

Mainly spurred by the initiative of the US, the ITO and GATT reflected two key features of post-WWII US economic policy: the necessity of international economic institutions, and of regulation of reciprocal trade agreements.[790] Multilateral negotiations over the 1945 US draft for an international trade organisation[791] led to the US 1946 "Suggested Charter for an International Trade Organization of the United Nations",[792] and ultimately to the 1948 "Havana Charter of the International Trade Organization".[793]

The ITO Charter and GATT provisions were so closely intersected that amendments in one instrument automatically led to amendments in the other.[794] This interdependence has prompted scholarly debate on the relevance of ITO preparatory works when conducting historical interpretations of GATT provisions, despite it is generally accepted that it would be inadequate to

[790] Jackson J.H., *History of the General Agreement on Tariffs and Trade*, in Wolfrum R., Stoll P-T., Hestermeyer H.P. (eds), *WTO – Trade in Goods*, op. cited above, pp. 5-6, paras 13-19. Similarly, Picone P., Ligustro A., *Diritto dell'organizzazione mondiale del commercio*, CEDAM, 2002, p. 7. Additionally, Goldsmith J.L., Posner E.A., *The Limits of International Law*, op. cited above, pp. 144-145 discuss how the GATT' designers aimed at both solving the coordination problem and the multilateral cooperation problems (*i.e.* the n-player prisoner's dilemma). Remarkably, Irwin D.A., Mavroidis P.C., Sykes A.O., *The Genesis of GATT*, Cambridge University Press, 2008 provide a detailed an analysis of the genesis of the GATT and WTO system, beginning from post-WWI. For an historical analysis of the relationship of US trade law and GATT, Brand R.A., *GATT and the Evolution of United States Trade Law*, op. cited above, pp. 101-142.

[791] US Department of State, Proposals for Expansion of World trade and Employment: Developed by a Technical Staff within the Government of the United States in Preparation for an International. Conference on Trade and Employment and Presented for Consideration by the Peoples of the World, Publication no. 2411, November 1, 1945. This proposal stemmed from the US and UK discussions. A detailed analysis of the Anglo-American Negotiations is provided by Irwin D.A., Mavroidis P.C., Sykes A.O., *The Genesis of GATT*, op. cited above, pp. 22-72. Similarly, on the UK-US relations post WWII, Zeiler T.W., *Free Trade Free World, The Advent of GATT*, The University of North Carolina Press, 1999, pp. 20-40 and p. 59-61.

[792] Department of State, Suggested Charter for an International Trade Organization of the United Nations: An Elaboration of the United States Proposals for Expansion of World Trade and Employment prepared by a technical staff within the Government of the United States and presented as a basis for public discussion, Publication no. 2598, Commercial Policy Series 93, September 1946.

[793] United Nations Conference on Trade and Employment (held at Havana, Cuba, from November 21, 1947, To March 24, 1948), Final Act and Related Documents, Interim Commission for the International Trade Organization, April 1948 which contains the Havana Charter for an International Trade Organization, including Annexes at pp. 8-115. Between 1946 and 1948 there were held four conferences aimed at the drafting of such ITO Charter – three of which were meetings of the "Preparatory Committee", established with the UN resolution no. 1/13 on the Calling on an international conference on trade and employment, and the last was held in Havana (Cuba) from November 1947 to March 1948. Refer to United Nations Economic and Social Council, Resolution on the Calling of an International Conference on Trade and Employment, E/22/Rev. 1., 5 March 1946: Resolution of the Economic and Social Council of 18 February 1946, on the calling of an International Conference on Trade and Employment (Document E/22 of 16 February 1946), including the completion of paragraph 6 concerning the appointment of the members of the Preparatory Committee. This resolution was proposed by the United States specifically with the purpose of drafting a Charter for an international trade organization. On a specific reconstruction of these meetings and on the development of the project within these events, among others, Irwin D.A., Mavroidis P.C., Sykes A.O., *The Genesis of GATT*, op. cited above, pp. 77-132; Jackson J.H., *History of the General Agreement on Tariffs and Trade*, in Wolfrum R., Stoll P-T., Hestermeyer H.P. (eds), *WTO – Trade in Goods*, op. cited above, pp. 9-16, paras 20-41; and, Zeiler T.W., *Free Trade Free World, The Advent of GATT*, op. cited above, pp. 69-164.

[794] Jackson J.H., *History of the General Agreement on Tariffs and Trade*, in Wolfrum R., Stoll P-T., Hestermeyer H.P. (eds), *WTO – Trade in Goods*, op. cited above, p. 13, para 35. Similarly, Irwin D.A., Mavroidis P.C., Sykes A.O., *The Genesis of GATT*, op. cited above, pp. 102-103.

fully rely on those.[795] Notably, following the failure of the establishment of ITO[796] – due to the US refusal to submit it to the Congress in 1950 –[797] doubts arose over the future of the GATT project.[798]

Despite a further unsuccessful attempt to establish an international trade organisation – named "Organization for Trade Co-operation" (OTC) – in 1955,[799] GATT gradually evolved through negotiations and amendments.[800] With the ICITO acting as a quasi-secretariat, the GATT became a

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[795] The doctrinal debate presents different nuances of approach to the issue. Among others, Azaria D., *Trade Countermeasures in Response to Breaches of Obligations outside the WTO*, op. cited above, pp. 409-410, arguing that the negotiations of the Havana Charter are not preparatory works of GATT 1947. However, the author recognises that the revision of GATT' provisions in consistency with the Havana Charter and, as such, argues that these can be considered as «supplementary means of interpreting 1947 GATT only to the extent that there is an understanding that there would be no departure from the existing 1947 GATT». The author perspective is presented in respect to a part of the doctrine relying on historical interpretation to exclude countermeasures of general international law from the WTO system. This will be further explained and analysed in this Chapter, section 2.4. Differently, Jackson J.H., *History of the General Agreement on Tariffs and Trade*, in Wolfrum R., Stoll P-T., Hestermeyer H.P. (eds), *WTO – Trade in Goods*, op. cited above, pp. 13-15, paras 37-41, contests the view according which relevance of ITO' preparatory works can be assessed solely when a GATT provisions is notably deriving from a particular ITO drafted Article and, thus, if preparatory works did change such provisions into a different clause, such ITO clause would be irrelevant to the interpretation of GATT. Accordingly, since ITO preparatory works did also discuss GATT' provisions it can be concluded that «an interpretation has been made of the previously existing language that is highly relevant and reveals the intent of the draftsmen» (pp.13-14, para 38). Specific amendments of GATT' provisions to ensure conformity with ITO Charter would, accordingly, constitute an additional confirmation of such thesis – although specific cases are anyway acknowledged (see p. 14, para 39) – such as it would the fact that government representatives to the GATT were the same government representatives to the ITO (see pp. 14-15, para 41).

[796] At the conclusion of the Havana Conference, the Interim Commission for International Trade Organization (ICITO) was established through Resolution in order to administratively prepare the establishment of the ITO. United Nations Conference on Trade and Employment (held at Havana, Cuba, from November 21, 1947, To March 24, 1948), Final Act and Related Documents, Interim Commission for the International Trade Organization, April 1948.

[797] As a matter of fact, the establishment of ITO failed in 1950 when the US President Truman Harry S. declared that it would have not (re)submitted the ITO Charter to the Congress for the final approval. US Department of State, Press Release, 6 December 1950. This led also the UK and the other States to refrain from ratification, aside from Liberia. On the US responsibility over the ITO' failure, among others, Fandl K.J., *Is China's Rise the WTO's Demise?*, Georgetown Journal of International Law, Vol. 52, no. 3, 2021, pp. 575-638, p. 583; Van den Bossche P., Zdouc W., *The Law and Policy of the World Trade Organization: Text, Cases, and Materials*, Cambridge University Press, 2022, pp. 212-213; Picone P., Ligustro A., *Diritto dell'organizzazione mondiale del commercio*, op. cited above, pp. 8-9; and, Zeiler T.W., *Free Trade Free World, The Advent of GATT*, op. cited above, pp. 147-164. Similarly, Trebilcock M., Trachtman J., *International Trade Law*, Edward Elgar Publishing, 2011, p. 7 explain that the Congress of the United States of America opposed the creation of the abovementioned institution because «it would encroach excessively on domestic sovereignty».

[798] Whose negotiations, indeed, continued to took place throughout the previous years, since its role was meant to unfold within ITO. In this regard, Jackson J.H., *History of the General Agreement on Tariffs and Trade*, in Wolfrum R., Stoll P-T., Hestermeyer H.P. (eds), *WTO – Trade in Goods*, op. cited above, pp. 15-16, para 43. Interestingly, Goldsmith J.L., Posner E.A., *The Limits of International Law*, op. cited above, pp. 157-158 discuss how ITO was specifically designed to possess the «power to address problems of international trade as they arose, in the flexible way that the International Monetary Fund and the World Bank address problems of international finance and development». After ITO' failure, the GATT 1947' framework unsatisfyingly substituted it as the international trade forum but «as one would expect, states pragmatically ignored or violated those aspects of GATT that were not sustainable, while building on those aspects that were robust». In this sense, the authors conclude that GATT' wishes to generate collective goods (*e.g.* the ban on discrimination, or the multilateral «punishment» of violators States) failed and, as a result, States continue to bilaterally violate and enforce trade agreements.

[799] Failure of the establishment of OTC was again due to the US opposition. On this, among others, Picone P., Ligustro A., *Diritto dell'organizzazione mondiale del commercio*, op. cited above, p. 10; and, Jackson J.H., *History of the General Agreement on Tariffs and Trade*, in Wolfrum R., Stoll P-T., Hestermeyer H.P. (eds), *WTO – Trade in Goods*, op. cited above, pp. 16-17, paras 44-45 which also analyse potential reasons for the second US 'blockage".

[800] Mainly, the introduction of Part IV on "Trade and Development" in early 1965. To date, no other amendments had been introduced on GATT 1947. Certainly, GATT 1994 possess key introductions and innovations (which later are explained) but it did not modify further GATT 1947. In this regard, among others, Irwin D.A., Mavroidis P.C., Sykes

de facto international organisation for trade,[801] effectively substituting the abandoned idea of ITO, to manage and supervise «a new multilateral system of liberalised international trade».[802]

Over the years, the GATT system underwent significant developments. While the 1947 agreement initially comprised 23 major trading countries[803] and covered only trade in goods and tariffs, it soon became evident that other typologies of restrictions (*i.e.* non-tariff barriers) were jeopardising trade liberation.[804] Successive negotiating rounds progressively addressed these concerns: the first six and the Kennedy Round (1967) reduced tariffs on manufactured and agricultural goods; the Tokyo Round (1979) and the Uruguay Round (1994) focused on non-tariff barriers to trade, including anti-dumping measures; and, notably, the Doha Round (2008) targeted issues such as non-agricultural tariffs, trade and the environment, and the consensus-based principle among WTO MS to adopt new commitments.[805]

Importantly, the Uruguay Round responded to serious concerns over fundamental legal and institutional issues of GATT 1947 including its provisional nature; complex and fragmented amendment procedure;[806] presence of numerous stand-alone agreements nevertheless linked to GATT 1947; membership regulation; the 'contracting parties' status and the ambiguous regulation of their powers and decision-making process; absence of a dispute settlement procedure; as well as its relationship with States domestic law and IMF and WB.[807] Recognised as the «largest and most

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A.O., *The Genesis of GATT*, op. cited above, p. 103; and, Picone P., Ligustro A., *Diritto dell'organizzazione mondiale del commercio*, op. cited above, p. 15.

[801] Van den Bossche P., Zdouc W., *The Law and Policy of the World Trade Organization: Text, Cases, and Materials*, op. cited above, p. 213; Jackson J.H., *History of the General Agreement on Tariffs and Trade*, in Wolfrum R., Stoll P-T., Hestermeyer H.P. (eds), *WTO – Trade in Goods*, op. cited above, pp. 18-19, paras 48-51; and, Picone P., Ligustro A., *Diritto dell'organizzazione mondiale del commercio*, op. cited above, pp. 13-14.

[802] Trebilcock M., Trachtman J., *International Trade Law*, op. cited above, p. 7.

[803] As the 1947 GATT Preamble reads, the participating countries were «the Governments of the Commonwealth of Australia, the Kingdom of Belgium, the United States of Brazil, Burma, Canada, Ceylon, the Republic of Chile, the Republic of China, the Republic of Cuba, the Czechoslovak Republic, the French Republic, India, Lebanon, the Grand-Duchy of Luxemburg, the Kingdom of the Netherlands, New Zealand, the Kingdom of Norway, Pakistan, Southern Rhodesia, Syria, the Union of South Africa, the United Kingdom of Great Britain and Northern Ireland, and the United States of America». Refer to the General Agreement on Tariffs and Trade (GATT) of 1947.

[804] Jackson J.H., *History of the General Agreement on Tariffs and Trade*, in Wolfrum R., Stoll P-T., Hestermeyer H.P. (eds), *WTO – Trade in Goods*, op. cited above, p. 19, para 52.

[805] To be precise, other Conferences and meetings occurred throughout the years amending or introducing rules and eliminating tariffs and barriers. As a way of example, the Ministerial Conference in Bali in 2013 led to the Agreement on Trade Facilitation aimed at reducing border delays. Similarly, the Ministerial Conference in Nairobi in 2015 eliminated additional tariffs on IT products and abolished agricultural export subsidies. On this, WTO website, *Ministerial Conferences*, available at https://www.wto.org/english/thewto_e/minist_e/minist_e.htm, [last accessed on 26 August 2023. In this regard, the WTO website, *History of the Multilateral Trading System*, available at https://www.wto.org/english/thewto_e/history_e/history_e.htm, [last accessed on 18 August 2023].

[806] Mainly due to the long process of treaty acceptance process, the power-relations, the difficult collection of States' consensus, and the voluntary binding effect of amendments.

[807] In this regard, refer also to the 1986 Punta del Este Ministerial Declaration containing the wide and ambitious mandate for the Uruguay Round negotiations. For a precise analysis of these concerns, Jackson J.H., *History of the General Agreement on Tariffs and Trade*, in Wolfrum R., Stoll P-T., Hestermeyer H.P. (eds), *WTO – Trade in Goods*, op. cited above, pp. 20-22, paras 56-64. Overall, it is generally accepted that the Uruguay Round, although very pivotal in its amendments and introduction, did not fully adjust all the critical elements above presented. Accordingly, observers argue

complex of all the GATT trade rounds, and probably the largest and most complex economic multilateral treaty negotiation in history»,[808] the Uruguay Round led to the 1995 Marrakesh Agreement which officially established the WTO; expanded the scope of application by including services and intellectual properties as competent matters; and introduced novel procedures for dispute settlement and membership.[809]

Interestingly, the establishment of the WTO was not in the agenda, but it became an evident priority during the negotiations.[810] Created entirely as a new legal international institution (also due to the complexity of amending GATT 1947), the WTO replaced the GATT 1947.[811] Moreover, the introduction of the Understanding on Rules and Procedures Governing the Settlement of Disputes fundamentally reformed the GATT 1947' dispute settlement system.

Today, the WTO comprises 164 Member States and provides a comprehensive legal framework composed of a wide number of variegated agreements, mainly focusing both on trade liberalisation by eliminating tariffs and barriers to trade,[812] and on permissible trade restrictions, as presented afterwards. Notably, from December 2019, the WTO – more precisely, the WTO Appellate Body (AB) – entered a "paralysis", following the US refusal to appoint new members of the AB.[813]

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that the Uruguay Round was over 80% successful (see p. 23, para 65). Similarly, Picone P., Ligustro A., *Diritto dell'organizzazione mondiale del commercio*, op. cited above, pp. 10-23; and, Van den Bossche P., Zdouc W., *The Law and Policy of the World Trade Organization: Text, Cases, and Materials*, op. cited above, pp. 214-215.

[808] Jackson J.H., *History of the General Agreement on Tariffs and Trade*, in Wolfrum R., Stoll P-T., Hestermeyer H.P. (eds), *WTO – Trade in Goods*, op. cited above, p. 22, para 65. Similarly, Picone P., Ligustro A., *Diritto dell'organizzazione mondiale del commercio*, op. cited above, p. 25.

[809] In this regard, the WTO Agreements Series, *The WTO Agreements Series: Technical Barriers to Trade*, 2021, available at https://www.wto-ilibrary.org/content/series/25191012, [last accessed on 26 August 2023].

[810] Jackson J.H., *History of the General Agreement on Tariffs and Trade*, in Wolfrum R., Stoll P-T., Hestermeyer H.P. (eds), *WTO – Trade in Goods*, op. cited above, p. 23, para 66. In this regard, Van den Bossche P., Zdouc W., *The Law and Policy of the World Trade Organization: Text, Cases, and Materials*, op. cited above, p. 216 reporting also the discussions over the name of the organisation: while US agreed to the Canada's proposal of "World Trade Organization", the EU had proposed the name of "Multilateral Trade Organization" opting for a more technical name that would «appease the US and others opposed to an international organisation perceived as a threat to national sovereignty». The author then explains that the US final decision over the name was allegedly also due to preventing the EU satisfaction of having chosen the name, and to the complexity of the EU proposed name which would have «a hard time winning the hearts and minds of the American people».

[811] The GATT1947 was (formally and informally) withdrawn by the GATT contracting parties. In fact, currently, the GATT 1994 is part of WTO Agreement (as Annex) effectively constituting a legally distinct Agreement (which also includes GATT 1947' text). Jackson J.H., *History of the General Agreement on Tariffs and Trade*, in Wolfrum R., Stoll P-T., Hestermeyer H.P. (eds), *WTO – Trade in Goods*, op. cited above, p. 23, para 68. On the GATT 1994 and its incorporation, among others, Feichtner I., *Introductory Note GATT 1994*, in Wolfrum R., Stoll P-T., Hestermeyer H.P. (eds), *WTO – Trade in Goods*, op. cited above, pp. 25-41.

[812] Interestingly, according to the WTO website, the WTO's 164 members account for 98% of world trade while other 25 sovereign states are currently negotiating accession to the organisation. In this regard, WTO website, *WTO in Brief: How the WTO is organized*, available at https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr_e.htm, [last accessed on 26 August 2023].

[813] As explored by Silingardi S., *Farewell to the Appellate Body: Reflections on Economic Statecraft and International Trade*, Global Trade and Customs Journal, Vol. 20, no. 10, 2025, pp. 669-676, although it is generally recognised that the AB paralysis officially occurred in December 2019, the WTO crisis began years earlier. According to this author, the crisis is strictly linked to the difficulty of the WTO system to deal with novel dynamics of international trade which are increasingly intertwined with the notion (and matters) of sovereignty. In the author's words, «There are several distinct

This crisis, currently ongoing, has notably significantly weakened the effectiveness and, to some extent, the credibility of the WTO dispute settlement system, and of the WTO system overall.

At the same time, several States have increasingly resorted to unilateral trade measures outside the WTO framework, while also proposing amendments to the DSU and new arrangements. Most notably, the EU advanced both amendments – such as transitional rules; enhancing consultation and transparency; define municipal laws and measures; precise the 'necessary issues' to address; and introduce annual meetings between WTO MS and AB to discuss reports, approaches, issues, and trends –[814] and established a Multi-Party Interim Appeal Arbitration Arrangement (MPIA) which, effective from April 2020, reached now a participation of over 50 States, covering more than half of the world trade.[815] Deriving from a previous bilateral interim-appeal arrangements between the EU, Canada, and Norway, the MPIA ensures a two-level dispute settlement system with an established pool of appeal arbitrators.[816] Notably, in 2021, the EU amended its Enforcement Regulation – Regulation 654/2015 – mainly empowering the EU to act in cases a third country blocks settlements in WTO or bilateral disputes, and the EU Commission to act on the EU's behalf when responding to trade actions.[817]

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reasons that have contributed to the elimination of the AB. […] the AB's – and, more broadly, the WTO's – failure to adequately frame the evolving forms of economic sovereignty in today's international trade landscape» (p. 674).

[814] In this regard, very interestingly, the Communication from the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore, Mexico, Costa Rica and Montenegro to the General Council, Revision, 12-13 December 2018, WT/GC/W/752/Rev.2. (The communication, dated 10 December 2018, has being circulated at the request of the delegations of the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore, Mexico, Costa Rica and Montenegro), available at https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/GC/W752R2.pdf&Open=True [last accessed on 07 January 2027].

[815] In this regard, European Commission – Directorate-General for Trade and Economic Security, *Multilateral Trading Order Strengthened as UK Joins Interim Appeals System*, 26 June 2025, available at https://policy.trade.ec.europa.eu/news/multilateral-trading-order-strengthened-uk-joins-interim-appeals-system-2025-06-26_en#_ftn1 [last accessed on 07 January 2026]. The current list of MPIA parties (31, counting the EU and its 27 member states as one) includes; Australia; Benin; Brazil; Canada; China; Chile; Colombia; Costa Rica; Ecuador; European Union; Guatemala; Hong Kong, China; Iceland; Japan; Macao; Malaysia; Mexico; Montenegro; New Zealand; Nicaragua; Norway; Pakistan; Paraguay; Peru; Philippines; Singapore; Switzerland; Ukraine; United Kingdom; Uruguay; and, Viet Nam. Although some of these members are key actors in trade, it is notable the absence of the US and of other trade-crucial countries such as Turkey and South Korea.

[816] In this regard, *inter alia*, European Commission – Directorate-General for Trade and Economic Security, *WTO Dispute Settlement*, available at https://policy.trade.ec.europa.eu/enforcement-and-protection/dispute-settlement/wto-dispute-settlement_en, [last accessed on 07 January 2026].

[817] Regulation (EU) 2021/167 of the European Parliament and of the Council of 10 February 2021 amending Regulation (EU) No 654/2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules, OJ L 49, 12.2.2021; and, 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 and amending Council Regulation (EC) No 3286/94 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization, OJ L 189, 27.6.2014. Refer also to European Commission – Directorate-General for Trade and Economic Security, *WTO Dispute Settlement*, mentioned above.

Although the AB crisis constitutes a profound rupture in the multilateral approach to trade disputes, WTO law remains applicable, including its trade control measures governed by GATT and DSU, which are briefly addressed in the following section.

2.2. WTO-regulated trade control measures

2.2.1. Trade control measures under GATT and the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)

At the foundation of GATT laid a shared desire to cease protectionist policies deriving from the WWII. As mentioned above, this objective was pursued through enhanced cooperation and the development of a new modality of 'free' trade, regulated by rules and international institutions such as the GATT itself, the IMF and the WB. As a result, key founding principles of the GATT/WTO system include concepts of trade liberation, market access, non-discrimination, reciprocity, transparency, cooperation, and multilateralism.

Nevertheless, despite (partial)[818] multilateralism lays at the core of both GATT and WTO' declared objectives, forms of unilateralism and protectionism – occurring through «governmental interferences»[819] in specified areas – were guaranteed within the GATT order. Scholars interpreted this approach either as a compromise between free trade and protectionism – creating a «moderate form of multilateralism»[820] capable of protectionist policies which were necessary to prevent the economic collapse of GATT founding States, and to guarantee States' participation to the system – [821] or as a legal framework intended to prevent protectionist unilateral actions, by regulating specific permissible policy goals and conditions.[822] Both arguments are accurate, as an historical perspective

[818] According to Zeiler T.W., *Free Trade Free World, The Advent of GATT*, op. cited above, p. 196, «Unlike the ITO Charter, the malleable GATT did not pretend to embrace free trade multilateralism».

[819] Zleptnig S., *Non-Economic Objectives in WTO Law: Justification Provisions of GATT, GATS, SPS and TBT Agreements*, Martinus Nijhoff Publishers, 2010, p. 87. Similarly, Blenk M.J.K., *Uses and Misuses of International Economic Law: Private Standards and Trade in Goods in the WTO and the EU*, Mohr Siebeck, 2022, p. 293.

[820] Zeiler T.W., *Free Trade Free World, The Advent of GATT*, op. cited above, p. 196. At p. 5 the author argues that this approach adjusted «market capitalism (free trade) with regulatory demands (protectionism)». At p. 199, it better specifies that «GATT was the product of the clash between free trade and protectionism». Similarly, Blenk M.J.K., *Uses and Misuses of International Economic Law: Private Standards and Trade in Goods in the WTO and the EU*, op. cited above, p. 293.

[821] *Ibidem*. Similarly, do Amaral Júnior A., Kramer C., *WTO as a Self-Limited Regime: The Case of Article XX of GATT*, in do Amaral Júnior A., de Oliveira Sá Pires L.M., Lucena Carneiro C. (eds), *The WTO Dispute Settlement Mechanism*, Springer, 2019, pp. 69-82, p. 70; and, Blenk M.J.K., *Uses and Misuses of International Economic Law: Private Standards and Trade in Goods in the WTO and the EU*, op. cited above, p. 296 arguing that GATT exceptions were not established as a guarantee of a «particular theory of justice» but instead as a «result of efficient treaty bargaining between the […] drafters».

[822] This is contended especially with regards to Articles XX and XXI GATT which, arguably, were created to establish «a framework to prevent the excessive or protectionist use of unilateral exercises of the right to regulate». In this regard, Stoll P-T., *Saving the World Trade Order from the Bottom Up: A Role for Preferential Trade Agreements*, in Lewis M.K., Nakagawa J., Neuwirth R.J., Picker C.B., Stoll P-T. (eds), *A Post-WTO International Legal Order: Utopian, Dystopian and Other Scenarios*, Springer, 2020, pp. 259-276, p. 269-270. Similarly, Claussen K., *Trade's Security Exceptionalism*, op. cited above, p. 1134 which argues that «the original twenty-three contracting parties to GATT agreed to a baseline of

on the GATT adoption and negotiations effectively displays a constant balancing between WTO MS' interests and the organisation's aim to free trade.[823]

Within this framework, WTO MS may lawfully adopt trade-restrictive measures, derogating from the general rule of trade liberalisation underlying the WTO system, but being permissible and justifiable even if – in certain cases – they *prima facie* constitute a violation of GATT. These measures are commonly subdivided according to the typology of exception they refer to: namely, exceptions pursuing economic objectives – such as anti-dumping, countervailing duties, and safeguards – or exceptions aimed at protecting non-economic interests, such as those under Articles XX and XXI GATT.[824] These instruments differ in scope of application (thus, the values they aim to protect); duration (indefinite or temporary); and degree of permitted deviation from GATT (deviation from all GATT obligations or to specific obligations only).[825]

The analysis now turns to the main categories of trade control measures regulated under WTO law. Firstly, it briefly addresses tariff-based measures and trade remedies, which constitute the main economic exceptions mentioned above, while analysing core WTO principles on trade regulation. Secondly, non-economic exceptions – namely the general and security exceptions under Articles XX and XXI GATT – are examined in the dedicated Section 2.3. of this Chapter. Instead, this section also briefly presents two categories of measures that lie outside the economic/non-economic exceptions distinction, but nonetheless are crucial to delineate the WTO's toolbox of trade control instruments. In this regard, quantitative restrictions on imports and exports under Article XI GATT, generally prohibited but narrowly permissible, are examined first, followed by trade-restrictive measures arising in the context of the DSU, such as authorised suspensions of concessions or WTO obligations in cases of non-compliance with WTO rulings.

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tariff concessions and rules designed to prevent these concessions from being frustrated by individual members' inclination toward protectionist measures».

[823]Whilst this might be true from an historical perspective of GATT, some authors more generally argue that the strict division between protectionism and free trade is an «outdated frame». In this regard, Claussen K., *Trade's Security Exceptionalism*, op. cited above, p. 1153.

[824] Other denominations or categorisations are also present in the doctrine: "business", "non-business" and "institutional" exceptions (Mavroidis P.C., *The General Agreement on Tariffs and Trade: A Commentary*, Oxford University Press, 2005. In its Chapter III, the author specifically deals with this categorisation of the exceptions); "particular" and "universal" exceptions (Jackson J.H., *World Trade and the Law of GATT*, Bobbs-Merrill Co., 1969); or "temporary" and "permanent" exceptions (Hoekman B.M, Kostecki M.M., *The Political Economy of the World Trading System: The WTO and Beyond*, Oxford University Press, 2001).

[825] Van den Bossche P., Zdouc W., *The Law and Policy of the World Trade Organization: Text, Cases, and Materials*, op. cited above, p. 1002. The author notices, however, that commonly, though, they constitute exceptions enabling WTO MS to adopt measures inconsistent with WTO law in order to prioritise certain WTO MS' interests or values (both economic and societal) over WTO' fundamental values of trade liberation, market access, and non-discrimination.

i. Tariff-based measures and trade remedies: anti-dumping, countervailing and safeguards measures

GATT establishes crucial concepts regarding tariffs and trade-related measures. Notably, Article I GATT – denominated "General Most-Favoured-Nation Treatment" (MFN) – requires that any advantage granted to imports or exports of one WTO MS should be extended «immediately and unconditionally» to products alike of all WTO MS.[826] Article III GATT – "National Treatment" – prohibits WTO MS to treat imported goods less favourably than domestic goods through internal taxation.[827] Moreover, Article VIII GATT further limits import and exports fees and charges to approximate cost of services, preventing their employment as «indirect protection […] or [fiscal] taxation».[828]

Notwithstanding these general obligations regarding tariffs and fees, the GATT framework explicitly provides for specific exceptions in the form of so-called "trade remedies". Indeed, anti-dumping, countervailing, and safeguards measures enable WTO MS to counter the economic injuries arising from dumping strategies, subsidies, or unforeseen increases of tariffs.[829] Anti-dumping and countervailing measures respond to unfair trade actions – with countervailing measures being also potentially applied as responses to unlawful practices and measures, such as prohibited subsidies –, whereas safeguard measures apply where trade is compliant with WTO law but restrictions are needed to enable adjustments of domestic industries.[830]

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[826] Article I (1), GATT. This is provided with respect to customs duties and charges imposed on imports and exports (or on international transfer of payments for imports and exports) according to which «any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties». A comprehensive commentary on this Article is provided by Sacerdoti G., Castren K., *Article I GATT, Annexes A, B, C, D, E, F, G GATT, Enabling Clause, Preferential Tariff Treatments for Least-Developed Countries Waiver*, in Wolfrum R., Stoll P-T., Hestermeyer H.P. (eds), *WTO – Trade in Goods*, op. cited above, pp. 53-77. Similarly, Picone P., Ligustro A., *Diritto dell'organizzazione mondiale del commercio*, op. cited above, pp. 101-111. Interestingly, Irwin D.A., Mavroidis P.C., Sykes A.O., *The Genesis of GATT*, op. cited above, pp. 133-135 present an historical overview of the MFN beginning from the London Conference until the review session.

[827] Article III (2), GATT. More precisely, WTO MS cannot treat imported goods less favourably than domestic ones by subjecting them «directly or indirectly, to internal tazes or other internal charges of any kind». A comprehensive commentary on this Article is provided by Hestermeyer H.P., *Article III GATT*, in Wolfrum R., Stoll P-T., Hestermeyer H.P. (eds), *WTO – Trade in Goods*, op. cited above, pp. 116-165. In this regard, also Picone P., Ligustro A., *Diritto dell'organizzazione mondiale del commercio*, op. cited above, pp. 112-119.

[828] Article VIII (1) (a) GATT which, more precisely, specifies that they «shall not represent an indirect protection to domestic products or a taxation of imports or exports for fiscal purposes». Hartmann J., *Article VIII GATT*, in Wolfrum R., Stoll P-T., Hestermeyer H.P. (eds), *WTO – Trade in Goods*, op. cited above, pp. 281-295 provides an extensive commentary on this Article.

[829] Soprano R., *WTO Trade Remedies in International Law: Their Role and Place in a Fragmented International Legal System*, op. cited above, p. 1.

[830] Van den Bossche P., Zdouc W., *The Law and Policy of the World Trade Organization: Text, Cases, and Materials*, op. cited above, p. 1151. Similarly, Hoekman B.M., Mavroidis P.C., *Reassessing the Safeguards Mess*, in Baetens F., Van den Bogaert S. (eds), *The EU and the WTO: Ever the Twain Shall Meet*, Wolters Kluwer, 2023, pp. 117-132, p. 123; Lee Y-S., *Reclaiming Development in the World Trading System*, Cambridge University Press, 2006, p. 83; and, Picone P., Ligustro A., *Diritto dell'organizzazione mondiale del commercio*, op. cited above, p. 304.

Article VI GATT regulates anti-dumping measures and countervailing measures (including countervailing duties, hereinafter also "CVDs") as trade remedies against dumping and subsidisation.[831] This should be read in conjunction with the General Agreement on Tariffs and Trade (ADA)[832] and the Agreement on Subsidies and Countervailing Measures (SCMA)[833] which, as *leges speciales*, establish detailed substantive and procedural rules.[834] Reliance on anti-dumping measures was frequent also prior to GATT 1947, as demonstrated by the League of Nations and World Economic Conference Memoranda on Dumping of 1926 and 1927.[835]

Although these measures derogate from crucial WTO obligations – such as MFN and national treatment – they are expressly justified under GATT in specific circumstances.[836] Dumping, defined ex Article VI (1) GATT as the introduction of products into another State's commerce at less than their normal value,[837] is condemned since it causes or threatens material injury.[838] Accordingly, WTO MS may implement anti-dumping measures when three elements are present: (i) the existence of dumping (export price of product is lower than its normal value in exporter' domestic market); (ii) material injury (or threat of) to the competing domestic industry or material retardation of establishment of such industry; and, (iii) causality between the dumping behaviour and the injury or retardation.[839] The range of possible trade remedies – namely, anti-dumping duties, provisional

[831] Refer to Rubini L., *Article VI GATT: Anti-dumping and Countervailing Duties*, in Huyghebaert K., Kim J.W. (eds), *Commentaries on World Trade Law: Trade Remedies*, in Stoll P-T., Hestermeyer H.P. (eds), *Commentaries on World Trade Law: Fully Revised Second Edition*, Brill / Nijhoff, Vol. 3, 2024, pp. 1155-1183 for a detailed commentary on this Article. Although less recent, also refer to Adamantopoulos K., *Article VI GATT*, in Wolfrum R., Stoll P-T., Hestermeyer H.P. (eds), *WTO – Trade in Goods*, op. cited above, pp. 195-216; and Picone P., Ligustro A., *Diritto dell'organizzazione mondiale del commercio*, op. cited above, pp. 254-267. Interestingly, Irwin D.A., Mavroidis P.C., Sykes A.O., *The Genesis of GATT*, op. cited above, pp. 144-147 present an historical overview of anti-dumping and countervailing duties beginning from the London Conference until the review session.

[832] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, also "Anti-dumping Agreement" or "ADA". A comprehensive commentary on ADA is provided by Huyghebaert K., Kim J.W. (eds), *Commentaries on World Trade Law: Trade Remedies*, in Stoll P-T., Hestermeyer H.P. (eds), *Commentaries on World Trade Law: Fully Revised Second Edition*, op. cited above, pp. 3-401.

[833] Agreement On Subsidies and Countervailing Measures, also "SCMA" or "SCM Agreement". Huyghebaert K., Kim J.W. (eds), *Commentaries on World Trade Law: Trade Remedies*, in Stoll P-T., Hestermeyer H.P. (eds), *Commentaries on World Trade Law: Fully Revised Second Edition*, op. cited above, pp. 621-1151 provides a detailed commentary on SCMA.

[834] In this regard, Adamantopoulos K., *Article VI GATT*, in Wolfrum R., Stoll P-T., Hestermeyer H.P. (eds), *WTO – Trade in Goods*, op. cited above, pp. 198-200 which also analyses the event of conflict between Article VI GATT and these two Agreements, by concluding that the latter would indeed prevail since they constitute *leges specialis*. Also refer to Rubini L., *Article VI GATT: Anti-dumping and Countervailing Duties*, in Huyghebaert K., Kim J.W. (eds), *Commentaries on World Trade Law: Trade Remedies*, in Stoll P-T., Hestermeyer H.P. (eds), *Commentaries on World Trade Law: Fully Revised Second Edition*, op. cited above, p. 1161.

[835] Viner J., *Memorandum on Dumping*, Geneva: League of Nations, 1926; and Trendelenburg E., *Memorandum on the Legislation of Different States for the Prevention of Dumping, with Special Reference to Exchange Dumping*, Geneva: League of Nations, 1927.

[836] The same Article II (2) (b) GATT explicitly enables the imposition of anti-dumping and countervailing measures.

[837] Article VI (1) GATT.

[838] Article VI (1) GATT.

[839] Adamantopoulos K., *Article VI GATT*, in Wolfrum R., Stoll P-T., Hestermeyer H.P. (eds), *WTO – Trade in Goods*, op. cited above, pp. 203-209 provides for a detailed description of these requirements.

measures, and price undertakings – are provided by Article VI (2) GATT and further regulated by ADA.

Countervailing measures are authorised by Article VI (3) GATT and SCMA which provide for the imposition of CVDs measures – namely, definitive CVD, provisional measures, price undertaking, and WTO countermeasures as per DSU provisions – in cases of harmful subsidisation by countervailable subsidies. Countervailing duty measures apply to imports and, as additional tariffs, aim at counteracting foreign subsidies and their effects on the domestic industry.[840] WTO MS may adopt CVDs measures upon demonstrating (i) the existence of a countervailable subsidy; (ii) an injury; and (iii) the cause of injury to subsidised imports.[841]

Exemptions of certain products from anti-dumping and CVDs measures is provided when products are exempted or refunded from internal duties and taxes, or are destined for consumption in the origin or exporting country;[842] while it is prohibited the adoption of such measures to address the same situation of dumping and export subsidisation.[843] Additional substantive and procedural requirements are established by the respective agreements, including the non-discriminatory application of anti-dumping and CVDs measures.[844]

In light of Article VI GATT's circumvention, the 2001 WTO Ministerial Conference introduced key reforms, including the mandatory lesser duty rule; price undertakings framework for developing countries involved into negotiations; prohibition of zeroing strategies; methods of injuries calculations; refined concept of domestic industry; and, adoption of cost saving and swift control mechanisms.[845] Despite this, anti-dumping and CVDs measures remain subject to critics, with some authors advocating for the prohibition of anti-dumping measures and their replacement by safeguard measures.[846]

Safeguard measures are governed by Article XIX GATT – entitled "Emergency Action on Imports of Particular Products" –[847] and further regulated by the 1995 Agreement on Safeguards

[840] Articles 10, 16, 18 and 19 SCMA.
[841] Adamantopoulos K., *Article VI GATT*, in Wolfrum R., Stoll P-T., Hestermeyer H.P. (eds), *WTO – Trade in Goods*, op. cited above, p. 211.
[842] Article VI (4) GATT.
[843] Article VI (5) GATT.
[844] Articles 9.2 ADA and 19.3 SCMA.
[845] On this, Soprano R., *WTO Trade Remedies in International Law: Their Role and Place in a Fragmented International Legal System*, op. cited above, pp. 72-73 who, moreover, at pp. 68-72 discusses the history and the evolution of anti-dumping measures.
[846] Lee Y-S., *Reclaiming Development in the World Trading System*, op. cited above, p. 94. On the wide number of critics presented in relation to the anti-dumping measures and on the positive contribution of safeguards, Hoekman B.M., Mavroidis P.C., *Reassessing the Safeguards Mess*, in Baetens F., Van den Bogaert S. (eds), *The EU and the WTO: Ever the Twain Shall Meet*, op. cited above, p. 127.
[847] Refer to Geraets D., *Article XIX GATT: Emergency Action on Imports of a Particular Products*, in Huyghebaert K., Kim J.W. (eds), *Commentaries on World Trade Law: Trade Remedies*, in Stoll P-T., Hestermeyer H.P. (eds), *Commentaries on World Trade Law: Fully Revised Second Edition*, op. cited above, pp. 1184-1199 for a comprehensive and detailed commentary on SCMA. Although less recent, Bourgeois J.H.J., Wagner J.P., *Article XIX GATT*, in Wolfrum

(SA),[848] which establishes detailed rules for their application. Regarded as the historical successor of the "escape clause" contained in the 1942 US-Mexico Reciprocal Trade Agreement,[849] provisions similar to Article XIX GATT appeared in multiple bilateral trade agreements, with the formal incorporation into the GATT – and especially into the WTO system – significantly intensifying reliance on such clauses.

Notably, these measures may be applied solely if (i) a product is imported in increased quantities, absolute or relative to domestic production; (ii) causing or threatening serious injury to domestic industry producing like or directly competitive products;[850] and (iii) provided that a casual link between the two elements is present. Some scholars conclude that the emergency nature of safeguard measures may preclude WTO MS from relying on them whenever «the situation to be counteracted was long in the making».[851]

R., Stoll P-T., Hestermeyer H.P. (eds), *WTO – Trade in Goods*, op. cited above, pp. 444-454; and Picone P., Ligustro A., *Diritto dell'organizzazione mondiale del commercio*, op. cited above, pp. 304-321. Additionally, Irwin D.A., Mavroidis P.C., Sykes A.O., *The Genesis of GATT*, op. cited above, pp. 161-162 present an historical overview of safeguards beginning from the London Conference until the review session.

[848] WTO Agreement on Safeguards, 01 January 1995. Scholars debated on the relationship between GATT and the Agreement on Safeguards discussing whether such Agreement replaced Article XIX GATT or whether the two provisions should be read cumulatively. WTO Panels and the AB too ruled over the issue with different conclusions. In general terms, it is currently accepted that a cumulative approach is to be preferred. On this, Bourgeois J.H.J., Wagner J.P., *Article XIX GATT*, in Wolfrum R., Stoll P-T., Hestermeyer H.P. (eds), *WTO – Trade in Goods*, op. cited above, pp. 445-446, paras 1-2 and pp. 447-448, paras 5-6; and Geraets D., *Article XIX GATT: Emergency Action on Imports of a Particular Products*, in Huyghebaert K., Kim J.W. (eds), *Commentaries on World Trade Law: Trade Remedies*, in Stoll P-T., Hestermeyer H.P. (eds), *Commentaries on World Trade Law: Fully Revised Second Edition*, op. cited above, pp. 1187-1188, while at pp. 405-618 of the same commentaries is comprehensively provided a commentary on SA.

[849] United States of America and Mexico, Reciprocal Trade Agreement, signed at Washington, on 23 December 1942, no. 81. In this regard, refer to Article XI (1) of US Reciprocal Trade Agreement where it is stated that «If, as a result of unforeseen developments and of the concession granted on any article enumerated and described in the Schedules annexed to this Agreement, such article is being imported in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or similar articles, the Government of either country shall be free to with draw the concession, in whole or in part, or to modify it to the extent and for such time as may be necessary to prevent such injury. Accordingly, if the President of the United States of America finds as a fact that imports of any article enumerated and described in Schedule II or Schedule III are entering the United States of America under the circumstances specified in the preceding sentence, he shall determine whether the withdrawal, in whole or in part, of the concession with regard to the article, or any modification of the concession, by the imposition of quantitative regulations or otherwise, is necessary to prevent such injury, and he shall, if he finds that the public interest will be served thereby, proclaim such finding and determination, and on and after the effective date specified in such proclamation, and so long as such proclamation remains in effect, imports of the article into the United States of America shall be subject to the customs treatment so determined to be necessary to prevent such injury. Similarly, if the Government of the United Mexican States finds as a fact that any article enumerated and described in Schedule I is being imported into the United Mexican States under the circumstances specified, it may, if it finds that the public interest will be served thereby, withdraw in whole or in part the concession with regard to the article, or modify the concession by the imposition of quantitative regulations or otherwise, to the extent and for such time as may be necessary to prevent such injury». On the "escape clauses" and the evolution of safeguard measures, among others, Beshkar M., Bond E.W., *The Escape Clause in Trade Agreements*, in Bagwell K., Staiger R.W. (eds), *Handbook of Commercial Policy*, Vol. 1, Part A, North-Holland, 2016, pp. 69-106. Also refer to Brand R.A., *GATT and the Evolution of United States Trade Law*, op. cited above, pp. 116-117 and pp. 127-128, which dates back the precursor to the modern "escape clause" to the 1930s.

[850] Article 2 (1) WTO Agreement on Safeguards.

[851] Geraets D., *Article XIX GATT: Emergency Action on Imports of a Particular Products*, in Huyghebaert K., Kim J.W. (eds), *Commentaries on World Trade Law: Trade Remedies*, in Stoll P-T., Hestermeyer H.P. (eds), *Commentaries on World Trade Law: Fully Revised Second Edition*, op. cited above, pp. 1196-1197; and, Bourgeois J.H.J., Wagner J.P.,

Overall, anti-dumping, countervailing, and safeguards constitute trade (defence) instruments adoptable by States to protect domestic industries and address specific economic concerns. Despite being essentially contrary to crucial WTO provisions, these measures are expressly regulated and permitted with the WTO legal framework, provided that they comply with the established provisions. In turn, these instruments constitute lawful State behaviour when applied in accordance with the relevant WTO provisions.

Nevertheless, the use of these instruments has often been criticised as extending beyond lawful responses to unfair trade practices, by rather being used as protectionist[852] or political tools to advance national policy goals.[853] Furthermore, improper coercive goals have been argued both with regard to the use of anti-dumping measures (such as the China-Australia relations during the Covid-19 pandemic)[854] and safeguard measures (such as the 2018 US-China trade war).[855]

Beyond these trade (defence) measures, the WTO framework also governs quantitative forms of trade restrictions, including import and export restrictions, which are addressed by Article XI GATT.

ii. Import and export restrictions under Article XI GATT: quantitative restrictions

Article XI GATT, titled "General Elimination of Quantitative Restrictions", prohibits quantitative restrictive measures – *i.e.* measures limiting the quantity of a product –[856] such as quotas, import/export licences and others, excluding duties, taxes or other charges.[857] It broadly applies to non-tariff trade restrictions on imports, exports, or sales for export goods; export quotas; import/export licences; minimum import/export requirements; discretionary non-automatic licensing system; trade balancing requirements; and restrictions on ports entry.[858]

Article XIX GATT, in Wolfrum R., Stoll P-T., Hestermeyer H.P. (eds), *WTO – Trade in Goods*, op. cited above, p. 453, para 24.

[852] *Inter alia*, Comnenus G.A., P*rotectionism in the Era of Globalisation: The Misuse of Anti-dumping Instruments from an EU Perspective*, Doctoral Thesis – Tilburg University, 2020.

[853] Crochet V., Zhou W., *The Politization of Trade Defence Instruments*, CELIS Institute, March 2024. In addition, also Crochet V., *Trade Defence Instruments: A New Tool for the European Union's Extractivism*, European Journal of International Law, Vol. 33, no. 2, May 2022, pp. 381-410.

[854] Zhou W., *Rethinking Economic Coercion as Australia-China Relations Fracture*, East Asia Forum, 23 May 2020, available at https://eastasiaforum.org/2020/05/23/rethinking-economic-coercion-as-australia-china-relations-fracture/, [last accessed on 11 January 2026]; and Crochet V., Zhou W., *The Politization of Trade Defence Instruments*, op. cited above.

[855] Chapter IV of this dissertation analyses the US-China trade war also briefly exploring this argument.

[856] Van den Bossche P., Zdouc W., *The Law and Policy of the World Trade Organization: Text, Cases, and Materials*, op. cited above, p. 892.

[857] Article XI, GATT. For a detailed commentary on this Article refer to Wolfrum R., *Article XI GATT*, in Wolfrum R., Stoll P-T., Hestermeyer H.P. (eds), *WTO – Trade in Goods*, op. cited above, pp. 281-295. Also refer to Picone P., Ligustro A., *Diritto dell'organizzazione mondiale del commercio*, op. cited above, pp. 124-128; and, Irwin D.A., Mavroidis P.C., Sykes A.O., *The Genesis of GATT*, op. cited above, pp. 151-153 which present an historical overview of quantitative restrictions beginning from the London Conference until the review session.

[858] Van den Bossche P., Zdouc W., *The Law and Policy of the World Trade Organization: Text, Cases, and Materials*, op. cited above, p. 895; and, Wolfrum R., *Article XI GATT*, in Wolfrum R., Stoll P-T., Hestermeyer H.P. (eds), *WTO – Trade*

The prohibition of quantitative restrictions does not extend to specific cases listed both in Article XI (2) GATT,[859] and in subsequent GATT Articles.[860] No restricting measures should be discriminatory,[861] but exceptions are likewise granted.[862] Thus, exceptions enable WTO MS to adopt trade restrictive measures under specific circumstances – such as addressing critical shortages, protecting domestic industries, safeguarding balance of payments, assisting economic development, and reacting with emergency measures.

Several States implement quantitative restrictions – such as those prohibiting trade in nuclear materials, narcotic drugs, weapons, or measures protecting the environment – either individually or

in Goods, op. cited above, pp. 283-290. According to Wolfrum R., *Article XI GATT*, in Wolfrum R., Stoll P-T., Hestermeyer H.P. (eds), *WTO – Trade in Goods*, op. cited above, p. 283, this broad approach is necessary to enable the effective implementation of the GATT' objective to liberalise international trade. The broad scope of Article XI GATT has been confirmed also by WTO case law such as, among others, the Japan – Semi-Conductors case, *i.e.* Panel Report, Japan – Trade in Semi-Conductors, L/6309, 24 March 1988, which in para 106 states that «In this respect the Panel noted that Article XI:1, unlike other provisions of the General Agreement, did not refer to laws or regulations but more broadly to measures. This wording indicated clearly that any measure instituted or maintained by a contracting party which restricted the exportation or sale for export of products was covered by this provision, irrespective of the legal status of the measure». Wolfrum R., *Article XI GATT*, in Wolfrum R., Stoll P-T., Hestermeyer H.P. (eds), *WTO – Trade in Goods*, op. cited above, p. 283, para 1, discusses that this Article covers all non-tariff barriers and non-tariff restrictions to trade.

[859] As per Article XI (2) GATT, the prohibition of quantitative restrictions does not extend to those export-import restrictions adopted to (a) temporarily prevent or relieve critical shortages of foodstuff or other essential products; (b) apply of standards or regulations for the classification, grading or marketing of commodities in international trade; (c) enforce governmental measures on imported agricultural or fisheries products either to restrict the quantities or to remove a temporary surplus of the like-domestic products or, if there is no domestic production of such products, of the directly-substitutable products and to restrict quantities permitted to be produced of any animal product whose production is directly dependent (fully or mainly) on the imported product, if the domestic production is «relatively negligible» (Article XI (2) GATT). Over the years, WTO case law specified and defined some, or parts of, these exceptions. As a way of example, Reports of the Appellate Body, *China – Measures Related to the Exportation of Various Raw Materials*, AB-2011-5, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R, 30 January 2012, (also known as "China – Raw Materials") focused on the terms "temporarily applied", "essential products" and "prevent or relieve critical shortages", paras 6, 86, 119, 182, 185, 197, 206, 298, 308-312, 315-317, 322, 326, 328, 329, 332, 335. In this sense, Wolfrum R., *Article XI GATT*, in Wolfrum R., Stoll P-T., Hestermeyer H.P. (eds), *WTO – Trade in Goods*, op. cited above, pp. 290-293.

[860] In this regard, other possible exceptions enabling the adoption of measures restricting trade relate to the safeguard of the WTO MS' external financial position and its balance of payments, as per Article XII GATT (Refer to Horlick G.N., Dubeck E.C., *Article XII GATT*, in Wolfrum R., Stoll P-T., Hestermeyer H.P. (eds), *WTO – Trade in Goods*, op. cited above, pp. 296-316, for an extensive commentary on this Article); to subsidies as per Article XVI GATT (For a detailed commentary on this Article, Baetens F., Hestermeyer H.P., *Article XVI GATT*, in Wolfrum R., Stoll P-T., Hestermeyer H.P. (eds), *WTO – Trade in Goods*, op. cited above, pp. 365-385. Similarly, Picone P., Ligustro A., *Diritto dell'organizzazione mondiale del commercio*, op. cited above, pp. 234-254); to assist the WTO MS' economic development, especially of infant industries, as per Article XVIII GATT (refer to the commentary by Jessen A., *Article XVIII GATT*, in Wolfrum R., Stoll P-T., Hestermeyer H.P. (eds), *WTO – Trade in Goods*, op. cited above, pp. 401-443); and, to react with emergency actions on imports of particular products (also called "safeguard measures"), as per Article XIX GATT, as mentioned above.

[861] Article XIII GATT guarantees that no restricting measure should be discriminatory, and, in this sense, provides specific provisions to follow (Hestermeyer H.P., Weiss F., *Article XIII GATT*, in Wolfrum R., Stoll P-T., Hestermeyer H.P. (eds), *WTO – Trade in Goods*, op. cited above, pp. 317-341 provides a detailed commentary on this Article).

[862] Refer to Article XIV GATT. A comprehensive commentary on this Article is provided by Mitchell A.D., Sheargold E., *Article XIV GATT*, in Wolfrum R., Stoll P-T., Hestermeyer H.P. (eds), *WTO – Trade in Goods*, op. cited above, pp. 342-351.

pursuant to international obligations under non-WTO Conventions,[863] yet their use has been contested in a considerable number of WTO case law.[864]

Beyond the scope of Article XI GATT's measures, trade restrictions may comprise of tariff barriers (custom duties and charges), or non-tariff barriers, including technical barriers to trade, sanitary and phytosanitary measures, and others. Notably, while Article XI GATT covers measures restricting imports or exports regardless of their legal status,[865] other GATT provisions – such as Articles XX and XXI GATT – enable WTO MS to restrict trade through measures inconsistent *per se* with GATT but possibly justifiable under the Agreement. Measures in violations of WTO obligations might also be adopted under Articles 22 and 23 DSU, as further explored hereinafter.

iii. *DSU trade-restrictive measures*

A further significant set of provisions enabling WTO MS to enact unilateral measures are Article XXIII GATT, and the 'successive' Articles 22 and 23 DSU.[866]

Article XXIII GATT – titled "Nullification or Impairment" – allows a WTO MS to suspend the application of GATT concessions or obligations, after proper authorisation by the Contracting Parties (namely, WTO MS).[867] Originally, Article XXIII GATT was intended to apply in conjunction with Articles 93 and 94 of the Havana Charter, with the latter regulating dispute settlements and Article XXIII GATT providing its (provisional) governing principles.[868] Article XXIII GATT drafting history demonstrates the will of the parties to prevent the use of unilateral self-help measures (and their abuses), preferring instead an institutional enforcement of law.[869] However, its sporadic

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[863] *Inter alia*, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), 1973 and later amended. See for instance Articles III, IV, V, and VIII where trade of specimens is expressly prohibited.

[864] Refer to the WTO website which, at the 20 January 2026, individuates 182 cases concerning Article XI and XI (1) GATT.

[865] Van den Bossche P., Zdouc W., *The Law and Policy of the World Trade Organization: Text, Cases, and Materials*, op. cited above, p. 896.

[866] Interestingly, Mavroidis P.C., *Remedies in the WTO Legal System: Between a Rock and a Hard Place*, European Journal of International Law, Vol. 11, no. 4, 2000, pp. 763-813, p. 777 discusses that «the DSU constitutes an antidote to the procedural deficiencies of Articles XXII and XXIII of the GATT». It is generally accepted that Article 23 DSU superseded Article XXIII GATT. Among others, Stoll P-T., *Article XXIII GATT*, in Wolfrum R., Stoll P-T., Hestermeyer H.P. (eds), *WTO – Trade in Goods*, op. cited above, pp. 598-615, pp. 599-600, para 1 and paras 7 and 8 in which the author specifies that while paragraph (2) of the Article XXIII GATT was indeed superseded by the DSU, paragraph (1) did not and it still provides important specifications. Similarly, Picone P., Ligustro A., *Diritto dell'organizzazione mondiale del commercio*, op. cited above, pp. 576-577 which report three main differences significantly distinguishing Article 23 DSU from Article XXIII GATT: in fact, the DSU (i) is a "integrated" system both for *ratione materiae* and for *ratione personarum*; (ii) pursues defined purposes thereby ensuring the certainty of the law and the stability of trade relations; and (iii) guarantees the possibility to settle disputes.

[867] Stoll P-T., *Article XXIII GATT*, in Wolfrum R., Stoll P-T., Hestermeyer H.P. (eds), *WTO – Trade in Goods*, op. cited above, pp. 598-615 provides a detailed commentary of this Article. Also, Picone P., Ligustro A., *Diritto dell'organizzazione mondiale del commercio*, op. cited above, pp. 575-583.

[868] Stoll P-T., *Article XXIII GATT*, in Wolfrum R., Stoll P-T., Hestermeyer H.P. (eds), *WTO – Trade in Goods*, op. cited above, p. 600, para 3.

[869] Pons J.F., *Self-Help and the World Trade Organization*, in Mengozzi P. (ed), *International Trade Law on the 50th Anniversary of the Multilateral Trade System*, op. cited above, pp. 55-112, p. 67. Similarly, Hahn M.J., *Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception*, op. cited above, pp. 604-617 where the author also argues

invocation and the problematic consensus rule for the authorisation – requiring consensus of all the parties, including the party against which the measures would have been adopted – render this provision largely unused.[870]

Although similar to Article XXIII GATT in some elements, the 'successive' Article 23 DSU apported important specifications.[871] Despite requiring authorisation likewise – but, in this latter case, from the DSB –[872] the DSU specifies the temporary application of the measures; their typology; the principles and procedures to follow when deciding which concession or obligation to suspend; their surveillance and termination; and, compensation.

Often, these DSU measures of last resort – commonly denominated "WTO countermeasures" – apply the principle of *inadimplenti non est adimplendum*,[873] enabling a WTO MS to suspend concessions and obligations (after DSB authorisation) whenever another party fails to comply with its obligations. Under Article 23 DSU, whenever a WTO MS seek redress for violations of obligations, nullification or impairment of benefits under GATT, or impediments to the achievement of any WTO objective, it should (a) avoid unilateral determination, and be consistent with the Panel, AB, or WTO arbitration reports and findings; (b) rely on Article 21 DSU to determine a reasonable period of time for the WTO MS to implement recommendations and rulings; and, (c) abide by Article

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that the preparatory deliberations demonstrate that Article XXI GATT would not be excluded from review by the Contracting Parties as per Article XXIII GATT (see p. 611). Slightly differently, Stoll P-T., *Article XXIII GATT*, in Wolfrum R., Stoll P-T., Hestermeyer H.P. (eds), *WTO – Trade in Goods*, op. cited above, p. 600, para 2, argues that Article XXIII (1) GATT particularly aims at «remedying distortions of the competitive trade relations under the WTO rules, rather than taking a law enforcement stance along the lines of other international and national judicial systems».

[870] Among others, Carter B.E., *International Economic Sanctions: Improving the Haphazard U.S. Legal Regime*, op. cited above, p. 1211; Iacovides M.C., *The Law and Economics of WTO Law: A Comparison with EU Competition Law's 'More Economic Approach'*, Elgar International Economic Law, 2021, p. 214; Mavroidis P.C., *Dispute Settlement in the WTO: Mind Over Matter*, in Bagwell K., Staiger R.W. (eds), *Handbook of Commercial Policy*, op. cited above, pp. 343-344; Picone P., Ligustro A., *Diritto dell'organizzazione mondiale del commercio*, op. cited above, p. 576; Pons J.F., *Self-Help and the World Trade Organization*, in Mengozzi P. (ed), *International Trade Law on the 50th Anniversary of the Multilateral Trade System*, op. cited above, pp. 68-69; and, Venturini G., *Comments*, in Mengozzi P. (ed), *International Trade Law on the 50th Anniversary of the Multilateral Trade System*, op. cited above, pp. 145-151, p. 146. According to Stoll P-T., *Article XXIII GATT*, in Wolfrum R., Stoll P-T., Hestermeyer H.P. (eds), *WTO – Trade in Goods*, op. cited above, p. 601, paras 5 and 7, Article XXIII (1) GATT is anyway still relevant as it identifies and defines the claims and causes of action thereby determining the typology of disputes that may be presented as per Article 1 (1) DSU.

[871] The DSU is contained in the Marrakesh Agreement Establishing the World Trade Organization as an Annex (no. 2) and, as such, it is legally binding on the parties, despite its denomination as an "Understanding".

[872] Negotiations were conducted also on this matter with some parties more in favour of the "automaticity" of the procedure, and other supporting the "negative consensus" approach (*i.e.* solely based on will of the injured WTO MS). In this sense, Mavroidis P.C., *Dispute Settlement in the WTO: Mind Over Matter*, in Bagwell K., Staiger R.W. (eds), *Handbook of Commercial Policy*, op. cited above, pp. 343-344; and, Picone P., Ligustro A., *Diritto dell'organizzazione mondiale del commercio*, op. cited above, pp. 584-585.

[872] Ronzitti N., *Diritto internazionale*, op. cited above, p. 334. Similarly, Picone P., Ligustro A., *Diritto dell'organizzazione mondiale del commercio*, op. cited above, pp. 584-585; and, Pons J.F., *Self-Help and the World Trade Organization*, in Mengozzi P. (ed), *International Trade Law on the 50th Anniversary of the Multilateral Trade System*, op. cited above, pp. 67-69.

[873] Ronzitti N., *Diritto internazionale*, op. cited above, p. 334.

22 DSU to determine the level of suspension of concessions or obligations, and obtain DSB authorisation before suspending those.[874]

To be precise, Article 23 DSU precludes WTO MS from unilaterally determining self-help measures outside the DSU, yet technically it is Article 22 DSU, together with DSB authorisation, that governs the suspensions of concessions and obligations. Accordingly, suspensions may be adopted when recommendations and rulings are not implemented within a reasonable time[875] and must be temporary, lasting solely until the WTO-inconsistent measure is removed, the targeted WTO MS provides a solution, or a mutually satisfactory solution is reached.[876] The DSB supervises the measures, with compensation being voluntary and consistent with the covered agreements.[877] Specific procedures require due restraint by WTO MS and authorisation for measures against least-developed WTO MS.[878] At last, these measures may be contested though arbitration, whose awards are final and not appealable.[879]

It is argued that the WTO system bans unilateral self-help,[880] and, through Article 23 DSU, prohibits measures solely intended to inflict damage,[881] thereby forbidding "punitive" or "collective" measures within the system.[882] Notably, the power to determine a measure's WTO-consistency

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[874] Article 23 (1) and (2) DSU.

[875] Article 22 (1) DSU. Details over the assessment and the meaning of the "reasonable period of time" are present in Article 22 (2) DSU.

[876] Article 22 (8) DSU. In the case in which there is no common agreement on whether compliance has been achieved, a new WTO panel shall be instituted in order to issue a report on the matter which, if necessary, might be also appealed. In this sense, WTO case law where the need and the functioning of "compliance panel" were discussed (such as, among others, Report of the Appellate Body, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, AB-2008-5, WT/DS320/AB/R, 16 October 2008; Report of the Appellate Body, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute*, AB-2008-6, WT/DS321/AB/R, 16 October 2008; Reports of the Appellate Body, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Second Recourse to Article 21.5 of the DSU by Ecuador, AB-2008-8 and *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Recourse to Article 21.5 of the DSU by the United States, AB-2008-9, WT/DS27/AB/RW2/ECU, WT/DS27/AB/RW/USA, 26 November 2008). Also, Mavroidis P.C., *Dispute Settlement in the WTO: Mind Over Matter*, in Bagwell K., Staiger R.W. (eds), *Handbook of Commercial Policy*, op. cited above, p. 356 and Mavroidis P.C., *Remedies in the WTO Legal System: Between a Rock and a Hard Place*, op. cited above, pp. 795-799.

[877] Respectively, Articles 22 (8) DSU and 22 (1) DSU.

[878] Article 24 DSU.

[879] Refer to arbitration – as established by Article 22 (6) and (7) DSU and regulated by Article 25 DSU. On the non-appealability of awards, among others, Ronzitti N., *Diritto internazionale*, op. cited above, p. 334.

[880] Mavroidis P.C., *Dispute Settlement in the WTO: Mind Over Matter*, in Bagwell K., Staiger R.W. (eds), *Handbook of Commercial Policy*, op. cited above, p. 343; and, Yee S., *Unilateral Sanctions: Kind and Degree; Long-arm and Strongarm Jurisdiction; Real Intent and "Could-be" Intent*, Chinese Journal of International Law, Vol. 20, 2021, pp. 817-830, p. 825.

[881] Fulgenzi M., *La "guerra delle sanzioni": L'Unione Europea e la Federazione Russa nell'era dell'interdipendenza economica globale*, op. cited above, p. 548. Similarly, Soprano R., *WTO Trade Remedies in International Law: Their Role and Place in a Fragmented International Legal System*, op. cited above, pp. 26-27.

[882] *Inter alia*, Fulgenzi M., *La "guerra delle sanzioni": L'Unione Europea e la Federazione Russa nell'era dell'interdipendenza economica globale*, op. cited above, p. 548 and p. 600; Iacovides M.C., *The Law and Economics of WTO Law: A Comparison with EU Competition Law's 'More Economic Approach'*, op. cited above, pp. 236; Mavroidis P.C., *Remedies in the WTO Legal System: Between a Rock and a Hard Place*, op. cited above, p. 800; and, Pons J.F., *Self-Help and the World Trade Organization*, in Mengozzi P. (ed), *International Trade Law on the 50th Anniversary of the Multilateral Trade System*, op. cited above, p. 69 and p. 82.

pertains exclusively to the DSB, not to each WTO MS,[883] such as Article 23 DSU measures requires DSB authorisation. However, as already mentioned above, also WTO MS frequently adopt unilateral suspensions of concessions or obligations absent any DSB authorisation, either invoking as justifications Articles XX and XXI GATT or other international law instruments, such as also the debated third-party countermeasures for the protection of *erga omnes* obligations. Some scholars contend that DSB authorisation is imperative,[884] recalling proposals requiring UN authorisation for countermeasures taken by non-injured States.[885] Others invoke the "negative consensus" principle, according to which authorisation is deemed to be granted, unless the DSB unanimously rejects the request.[886] Nonetheless, achieving unanimous DSB rejection is difficult, mainly due to the large membership, and to the presence of the WTO MS willing to take countermeasures – whose sole opposition may block the decision to not-authorise, thereby autonomously establishing and authorising its own countermeasures –[887] let alone the challenges posed by the ongoing WTO crisis.

As noted above, the very creation of the WTO Dispute Settlement Body was specifically intended to provide a multilateral forum for resolving trade disputes and avoiding the recourse to unilateral trade measures – such as, most notably at that time, the US Section 301 of the Trade Act.[888] Yet, neither the DSB establishment nor the requirement of prior authorisation effectively prevented

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[883] This exclusive WTO competences in determining whether WTO inconsistency did arise has been, according to some authors, «the price to pay for obliging the United States to accept that it would use Section 301 not as instrument for self-help, but as instrument for representing "private" complaints before WTO where private parties have no standing». In this sense, Mavroidis P.C., *Dispute Settlement in the WTO: Mind Over Matter*, in Bagwell K., Staiger R.W. (eds), *Handbook of Commercial Policy*, op. cited above, pp. 333-377, p. 338 and p. 343.

[884] This position was supported also by some parties during the negotiations for the Uruguay Rounds according to which mandatory authorisation should be assured and «not be conceived as a mere formal step but rather as a true exercise of political discretion», differently from other parties which instead called for an automatic recognition of the possibility to resort to countermeasures after the verification of the non-fulfilment of the DSB' reports and findings. On this matter, Pons J.F., *Self-Help and the World Trade Organization*, in Mengozzi P. (ed), *International Trade Law on the 50th Anniversary of the Multilateral Trade System*, op. cited above, p. 74. For doctrinal reference on the need to ensure prior DSB authorisation, Bartels L., *Article XX of GATT and the Problem of Extraterritorial Jurisdiction: The Case of Trade Measures for the Protection of Human Rights*, Journal of World Trade, Vol. 36, no. 2, 2002, pp. 353-403, pp. 393-394, and p. 395. Further details on this issue are presented in the following sections of this Chapter.

[885] On this proposal, and on other alternatives, refer to Chapter II, Section 4.1.

[886] On the application of the negative consensus in WTO law, among others, Gioia A., *Diritto internazionale*, op. cited above, p. 443; Mavroidis P.C., *Dispute Settlement in the WTO: Mind Over Matter*, in Bagwell K., Staiger R.W. (eds), *Handbook of Commercial Policy*, op. cited above, pp. 343-344; Mavroidis P.C., *Remedies in the WTO Legal System: Between a Rock and a Hard Place*, op. cited above, p. 800; Picone P., Ligustro A., *Diritto dell'organizzazione mondiale del commercio*, op. cited above, pp. 584-585; and, Pons J.F., *Self-Help and the World Trade Organization*, in Mengozzi P. (ed), *International Trade Law on the 50th Anniversary of the Multilateral Trade System*, op. cited above, pp. 67-69.

[887] Mavroidis P.C., *Dispute Settlement in the WTO: Mind Over Matter*, in Bagwell K., Staiger R.W. (eds), *Handbook of Commercial Policy*, op. cited above, p. 348; also in Mavroidis P.C., *Remedies in the WTO Legal System: Between a Rock and a Hard Place*, op. cited above, p. 800. Gioia A., *Diritto internazionale*, op. cited above, p. 443 moreover notices that this approach enables the WTO MS which is willing to adopt countermeasures to authorise itself to enact the measures.

[888] Iacovides M.C., *The Law and Economics of WTO Law: A Comparison with EU Competition Law's 'More Economic Approach'*, op. cited above, pp. 214-215; Mavroidis P.C., *Dispute Settlement in the WTO: Mind Over Matter*, in Bagwell K., Staiger R.W. (eds), *Handbook of Commercial Policy*, op. cited above, p. 338, p. 341, and p. 374; and. Soprano R., *WTO Trade Remedies in International Law: Their Role and Place in a Fragmented International Legal System*, op. cited above, pp. 26-27.

States from adopting unilateral trade-restricting measures,[889] leading some authors to suggest an ad-hoc DSB revision procedure of States' measures, as to ensure a proper legally shared solution to politically sensitive questions.[890]

The persistent tension between WTO law and unilateral trade measures – together with States' continued reliance on unilateral measures – raises questions concerning the nature and legal categorisation of these measures under international law. Indeed, qualifying WTO measures as either 'sanctions', countermeasures, retorsions, reprisals, category *per se*, or otherwise, has crucial implications under international law, mainly in terms of legal basis, decision-making processes, lawful objectives, and termination procedures. The following section examines the main approaches and qualifications of WTO measures under international law.

2.2.2. The legal categorisation of WTO-regulated trade measures under international law

The legal categorisation of WTO trade-restricting measures – whether justified under GATT or DSU – has produced extensive doctrinal debate.

Some authors parallel anti-dumping, countervailing, and safeguard measures to countermeasures, since all enable States to unilaterally adopt trade-restrictive measures to protect their rights and interests.[891] Others argue that solely anti-dumping and countervailing measures are closely related to countermeasures since they respond to conduct recognised as "unfair",[892] whilst safeguard measures cannot be so characterised since they address fair trade practices.[893] These classifications have nevertheless been contested: anti-dumping and countervailing measures cannot be countermeasures since their aim is to neutralise the damaging effects of a practice on the national production, rather than responding to specific wrongful act;[894] while safeguards have at times been

[889] Reliance by States on unauthorised measures restricting trade spurred after the Tokyo Round of 1979 where some panel reports were not adopted, and countermeasures were enacted without prior authorisation. According to some authors, this occurred mainly as a consequence of the US reliance on the Section 301 (also called – at that time – the "Super 301"). In this sense, Mavroidis P.C., *Dispute Settlement in the WTO: Mind Over Matter*, in Bagwell K., Staiger R.W. (eds), *Handbook of Commercial Policy*, op. cited above, pp. 340-341.

[890] Fulgenzi M., *La "guerra delle sanzioni": L'Unione Europea e la Federazione Russa nell'era dell'interdipendenza economica globale*, op. cited above, p. 614. According to the author, this would also establish and consolidate precedents in case law which are generally recognised as stable interpretation of WTO rules.

[891] Soprano R., *WTO Trade Remedies in International Law: Their Role and Place in a Fragmented International Legal System*, op. cited above, p. 2.

[892] Mitchell A.D., *Proportionality and Remedies in WTO Disputes*, The European Journal of International Law, Vol. 17, no. 5, 2007, pp. 985-1008, p. 996. In this regard, also Van den Bossche P., Zdouc W., *The Law and Policy of the World Trade Organization: Text, Cases, and Materials*, op. cited above, p. 1151. Similarly, on the measures' response to unfair practices, Lee Y-S., *Reclaiming Development in the World Trading System*, op. cited above, p. 83, p. 87, and pp. 89-91.

[893] Lee Y-S., *Reclaiming Development in the World Trading System*, op. cited above, p. 83. Interestingly, Hoekman B.M., Mavroidis P.C., *Reassessing the Safeguards Mess*, in Baetens F., Van den Bogaert S. (eds), *The EU and the WTO: Ever the Twain Shall Meet*, op. cited above, p. 123 discuss how «in practice, the distinction between "fair" and "unfair" trade is more like a line in the sand than set in stone».

[894] Boisson de Charzournes L., *Les contre-mesures dans les relations internationals économiques*, A. Pedone Paris, 1992, p. 71.

(mis)used as reactions to prior wrongful acts, thereby resembling countermeasures rather than emergency import responses as instead envisaged under GATT.[895] Interestingly, in the WTO case US-Line Pipe of 2002,[896] the Appellate Body applied the same line of reasoning of countermeasures to safeguard measures, particularly with respect to the principle of proportionality and to measures adopted both in response to unfair practices, violation of treaties, or in the absence of any allegation of a violation or unfair practice.[897]

To be precise, ARSIWA countermeasures are specifically conceived as responses to internationally wrongful acts – intended as breaches of international obligations –[898] rather than to the less legally-precise concept of "unfairness",[899] which may or may not amount to such a breach. Beyond the nature of the triggering action, crucial differences between ARSIWA countermeasures and WTO-regulated measures arise also with regard to their lawfulness, objectives, and actors involved. As noted above, ARSIWA countermeasures are unlawful acts *per se* whose wrongfulness is precluded when ARSIWA conditions are met; they are aimed at inducing compliance – not punishment –; and may be adopted by an injured State (whilst the "collective" declination remains contested).[900] Differently, WTO-regulated measures are expressly provided by WTO law; they are mainly aimed at protecting domestic markets from detrimental consequences;[901] and enable WTO MS to respond to acts committed either by States or non-State actors (such as private firms).[902]

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[895] Pons J.F., *Self-Help and the World Trade Organization*, in Mengozzi P. (ed), *International Trade Law on the 50th Anniversary of the Multilateral Trade System*, op. cited above, p. 69.

[896] Report of the Appellate Body, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, AB-2001-9, WT/DS202/AB/R, 15 February 2002.

[897] Report of the Appellate Body, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, cited above, paras 256-257. Proportionality and countermeasures are also mentioned in paras 259-260.

[898] Briefly, Article 2 ARSIWA defines an internationally wrongful act as an action or omission attributable to the State and constituting a breach of its international obligations. The concept of internationally wrongful act has been analysed in Chapter II, Section 4.

[899] On the possible interpretation of the concept of 'fairness' in international trade, among others, Blenk M.J.K., *Uses and Misuses of International Economic Law: Private Standards and Trade in Goods in the WTO and the EU*, op. cited above, pp. 26-27; Brown A.G., Stern R.M., *Issues of Fairness in International Trade Agreements*, Research Paper for Research Seminar in International Economics, no. 554, September 2006; and, Soprano R., *WTO Trade Remedies in International Law: Their Role and Place in a Fragmented International Legal System*, op. cited above, pp. 46-47. Lee Y-S., *Reclaiming Development in the World Trading System*, op. cited above, pp. 83-85, instead, contests that the concept of "fair trade" entails some critical issues with regard to the perspective of development. Refer also to Hoekman B.M., Mavroidis P.C., *Reassessing the Safeguards Mess*, in Baetens F., Van den Bogaert S. (eds), *The EU and the WTO: Ever the Twain Shall Meet*, op. cited above, p. 123, discussing how the concept of "fairness" varies among lawyers and economists. Accordingly, "unfair" signifies that export prices are lower than those in the home market, either due to a private decision by exporting companies to price discriminate, or because of a subsidy. However, economists do not perceive dumping as unfair since price discrimination might also occur within a domestic market.

[900] This has been discussed also in Section 4, Chapter II.

[901] Soprano R., *WTO Trade Remedies in International Law: Their Role and Place in a Fragmented International Legal System*, op. cited above, p. 2 and p. 44.

[902] Differently from the instrument of countermeasures which, instead, focused solely on internationally wrongful acts of States. According to Soprano R., *WTO Trade Remedies in International Law: Their Role and Place in a Fragmented International Legal System*, op. cited above, p. 2 and p. 44 these measures enable WTO MS to (generally) react against «lawful but injurious actions». However, countervailing measures might also be responses to unlawful practices, such as

Another part of the doctrine has instead discussed whether such measures may be categorised as forms of self-help.[903] This view has been mainly criticised on the ground that these measures typically respond to conducts that, despite causing economic injuries, remains lawful under WTO law,[904] and mainly concerns fairness of trade, thereby complicating any link with self-help. Furthermore, resemblance have also been drawn between WTO-regulated measures and retorsions – *i.e.* unfriendly conduct not inconsistent with international law – as both may constitute «reactions against lawful but injurious acts».[905] Nevertheless, the fact that these instruments were conceived to function mainly as "defensive tools" to protect domestic economies from unfair trade practices, rather than as measures aimed at counteracting internationally wrongful acts, signifies that their (occasional) employment in the latter sense falls outside their original design and that classifying them as such on that ground alone would be a stretch.

Articles 22 and 23 DSU – which govern the commonly denominated "WTO countermeasures" – are generally regarded as *lex specialis* in the meaning of Article 55 ARSIWA. As noted above, Article 23 DSU – historically invoked mainly by the US – was designed to ensure the respect of the multilateral system expecting that a stronger WTO enforcement would reduce unilateral WTO MS actions.[906] In turn, some authors contend that Article 23 DSU is a «partial legalization or "internationalization"» of domestic unilateral measures for trade defence, such as it is Section 301 US Trade Act.[907] Arguably, the WTO's self-contained regime and the *lex specialis* nature of these Articles render the resulting measures (the "WTO countermeasures") fully lawful, both because WTO

in the case in which a WTO MS enables prohibited subsidies. Nonetheless, at p. 58, the author states that «More than the lawfulness of the actions, trade remedies' rules are concerned with their injuriousness» as «It is their adverse effect on the domestic industry of the importing State and not the lawfulness of the actions which gives the injured State the right to impose trade measures». Picone P., Ligustro A., *Diritto dell'organizzazione mondiale del commercio*, op. cited above, pp. 128-129 consider trade remedies (especially anti-dumping measures) as possible "reactions of the injured State",

[903] The concept of self-help has been used by some scholars to describe also the instrument of ARSIWA countermeasures. In this regard, refer to Section 4, Chapter II.

[904] Soprano R., *WTO Trade Remedies in International Law: Their Role and Place in a Fragmented International Legal System*, op. cited above, pp. 49-51 discusses that these measures are not *per se* prohibited by WTO law, aside from specific exceptions. In this sense, notwithstanding that – typically – measures of self-help are intended to presuppose a prior wrongful act, not 'solely' unfairness.

[905] *Ibid.*, p. 52.

[906] Pons J.F., *Self-Help and the World Trade Organization*, in Mengozzi P. (ed), *International Trade Law on the 50th Anniversary of the Multilateral Trade System*, op. cited above, p. 61. Similarly, Mavroidis P.C., *Dispute Settlement in the WTO: Mind Over Matter*, in Bagwell K., Staiger R.W. (eds), *Handbook of Commercial Policy*, op. cited above, pp. 340-341.

[907] Pons J.F., *Self-Help and the World Trade Organization*, in Mengozzi P. (ed), *International Trade Law on the 50th Anniversary of the Multilateral Trade System*, op. cited above, p. 77 more precisely argues that Article 23 DSU is a «partial legalization or "internationalization" of the application of unilateral measures by virtue of domestic instruments directed to the defence of trade interests». Similarly, Picone P., Ligustro A., *Diritto dell'organizzazione mondiale del commercio*, op. cited above, pp. 666-667; and, Mavroidis P.C., *Dispute Settlement in the WTO: Mind Over Matter*, in Bagwell K., Staiger R.W. (eds), *Handbook of Commercial Policy*, op. cited above, p. 364 which argues that Section 301 might have «in a way […] paved the way to multilateral dispute adjudication».

MS agreed between themselves over such *lex specialis*, and because their consent acts as a ground of precluding wrongfulness.[908]

Although commonly denominated "WTO countermeasures", crucial differences between Article 23 DSU measures and ARSIWA countermeasures exist. Article 23 DSU does provide for the State to unilaterally assess the facts justifying the use of its measures, unlike ARSIWA countermeasures.[909] Moreover, ARSIWA countermeasures require proportionality with the suffered injury, while WTO countermeasures require solely the equivalence between the suspension imposed and the nullification to redress.[910] Similarly to ARSIWA countermeasures, however, WTO countermeasures are unlawful acts *per se* whose lawfulness is granted under certain circumstances;[911] and, are temporary measures applicable until the inconsistent measures has been removed, thereby likewise aiming at inducing compliance – an objective that some scholars perceive as what renders Article 23 DSU measures proper "countermeasures".[912] The lack of punitive aims, instead, is often regarded as the main element distinguishing WTO countermeasures from reprisals.[913]

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[908] In this regard, Ruys T., *Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, pp. 43-44. On *lex specialis* and self-contained regimes, refer to the Report of the Study Group of the International Law Commission (finalized by Koskenniemi M.), *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, op. cited above, pp. 30-101.

[909] Pons J.F., *Self-Help and the World Trade Organization*, in Mengozzi P. (ed), *International Trade Law on the 50th Anniversary of the Multilateral Trade System*, op. cited above, p. 62.

[910] Refer to Article 51 ARSIWA and Article 22 (4) DSU respectively. On whether the term "equivalent" might be considered as "proportionate", Mavroidis P.C., *Remedies in the WTO Legal System: Between a Rock and a Hard Place*, op. cited above, p. 800 and p. 802 concluding that the term 'equivalent' is stricter than 'proportionate'. Similarly, Bonafè B.I., *L'autorizzazione ad adottare contromisure nel quadro dell'organizzazione mondiale del commercio: Il requisito delle «circostanze sufficientemente gravi»*, in Ligustro A., Sacerdoti G. (eds), *Problemi e tendenze del diritto internazionale dell'economia: Liber amicorum in onore di Paolo Picone*, Editoriale Scientifica, 2011, pp. 497-512, pp. 500-501 and pp. 511-512. Interestingly, however, Article 4 (10) and (11) of the abovementioned SCM Agreement refers to WTO countermeasures as "appropriate" then specifying, in the notes, that «This expression is not meant to allow countermeasures that are disproportionate in light of the fact that the subsidies dealt with under these provisions are prohibited». On this, refer to the discussion on whether WTO countermeasures have different requirements of proportionality according to the framework: *inter alia*, Mavroidis P.C., *Remedies in the WTO Legal System: Between a Rock and a Hard Place*, op. cited above, pp. 805-806; and, Di Comite V., *Sovvenzioni vietate e diritti compensativi illegittimi: Quali conseguenze per la violazione del diritto OMC?*, in Ligustro A., Sacerdoti G. (eds), *Problemi e tendenze del diritto internazionale dell'economia: Liber amicorum in onore di Paolo Picone*, op. cited above, pp. 525-550.

[911] In this regard, Mavroidis P.C., *Remedies in the WTO Legal System: Between a Rock and a Hard Place*, op. cited above, p. 800 states that compensation and suspension of concessions as per WTO rules «have a function very comparable to that of countermeasures in the ILC Draft Articles on State Responsibility: they constitute a procedural consequence of illegality aiming at providing the incentive to authors of the illegal act to comply with their international obligations. In fact, we can safely argue that compensation and suspension of concession is WTO parlance for countermeasures».

[912] Charnovitz S., *Rethinking WTO Trade Sanctions*, op. cited above, p. 793 argues that the aim of inducing compliance renders WTO actions proper "sanction", or – more technically – a countermeasure, p. 802. Similarly, Mavroidis P.C., *Remedies in the WTO Legal System: Between a Rock and a Hard Place*, op. cited above, p. 800.

[913] Pons J.F., *Self-Help and the World Trade Organization*, in Mengozzi P. (ed), *International Trade Law on the 50th Anniversary of the Multilateral Trade System*, op. cited above, p. 83. The author, however, acknowledges that the evolution of the instrument of reprisals tends to eliminate the punitive element of its intentions. Differently, Marceau G., Wyatt J., *Dispute Settlement Regimes Intermingled: Regional Trade Agreements and the WTO*, op. cited above, p. 74 argues how neither the WTO Panel or AB ever provided answer to the question of whether the WTO system might integrate and involve the general international law of reprisals.

Taken together, the features of Article 23 DSU measures suggest an *ad-hoc* instrument for WTO law enforcement, designed to ensure adherence to WTO obligations by centralising the decision-making process within the WTO, rather than through WTO MS unilateral actions. Nonetheless, as noted above, other avenues are available for WTO MS to adopt and justify unilateral trade-restricting measures – namely, the general and national security exceptions under Articles XX and XXI GATT, explored in the following section.

2.3. WTO-justifiable trade-restrictive measures

2.3.1. Justifications and exceptions for trade restrictive measures under WTO law

A further set of WTO law provisions on trade-restricting measures concerns those Articles that may justify WTO MS' measures by reference to non-economic values. In this regard, Articles XX and XXI GATT respectively provide for the general and security exception, allowing WTO MS – under specific conditions – to justify measures in violation of GATT.

i. General exceptions under Article XX GATT

Notably, Article XX GATT – entitled "General Exceptions" – enables WTO MS to adopt trade-restricting measures in order to protect certain listed national interests. Over time, it has become a «model provision»[914] for numerous regional and bilateral agreements (*inter alia*, the North American Free Trade Agreement, and TFEU),[915] and has generated extensive scholarly debate and DSB practice. Article XX GATT may be invoked solely when a WTO MS's measure is inconsistent with other GATT rules, and when its inconsistency can be justified under one of the Article's exceptions.[916]

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[914] Wolfrum R., *Article XX GATT: Introduction*, in Wolfrum R., Stoll P-T., Hestermeyer H.P. (eds), *WTO – Trade in Goods*, op. cited above, pp. 455-463, p. 456, para 3.

[915] Article 2101 (named "General Exceptions") NAFTA explicitly incorporates Article XX GATT by stating in para (1), among other provisions, that «GATT Article XX and its interpretative notes, or any equivalent provision of a successor agreement to which all Parties are party, are incorporated into and made part of this Agreement. The Parties understand that the measures referred to in GATT Article XX(b) include environmental measures necessary to protect human, animal or plant life or health, and that GATT Article XX(g) applies to measures relating to the conservation of living and non-living exhaustible natural resources». Differently, Article 36 TFEU does not explicitly refer to Article XX GATT, but scholars uniformly recognised that it largely relied on Article XX GATT' wording (and from Article XXI GATT too). Accordingly, Article 36 TFEU reads as follow: «The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States».

[916] In this regard, Feddersen C.T., *Focusing on Substantive Law in International Economic Relations: The Public Morals of GATT's Article XX(a) and Conventional Rules of Interpretation*, Minnesota Journal of Global Trade, Vol. 7, 1998, pp. 75-122, pp. 92-93; and, Van den Bossche P., Zdouc W., *The Law and Policy of the World Trade Organization: Text, Cases, and Materials*, op. cited above, p. 1004. Similarly, Thorstensen V., Costa Vieira A., *WTO Case Law on TBT and SPS: It is Time to Review Some Concepts*, in do Amaral Júnior A., de Oliveira Sá Pires L.M., Lucena Carneiro C. (eds), *The WTO Dispute Settlement Mechanism*, op. cited above, pp. 99-126, p. 112.

The respect of a two-tier test is necessary: compliance with the "Chapeau" of the Article, and the nexus between the measure and a listed exception.

The "Chapeau of Article XX GATT" – corresponding to the Article's introductory part – crucially establishes three fundamental standards of the measure's implementation:[917] among the countries where the same conditions prevail, there should be no (i) arbitrary or (ii) unjustifiable discrimination, nor constitute (iii) «disguised restriction on international trade».[918] The Chapeau serves to prevent the "abuse or misuse of the exceptions",[919] and cannot independently justify a measure,[920] nor does it require the WTO MS to anticipate and explicitly provide for the specific conditions.[921]

In US-Shrimp (also Shrimp-Turtle),[922] the Chapeau was conceived as a «balance of rights and obligations», guaranteeing WTO MS to invoke the Article's exceptions while also fulfilling their

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[917] Interestingly, the Chapeau is expressly addressed to the measures' application, and not to the measure at issue *per se*.

[918] Article XX GATT. For an extensive commentary on the Chapeau of Article XX GATT, among others, Wolfrum R., *Article XX GATT: Chapeau*, in Wolfrum R., Stoll P-T., Hestermeyer H.P. (eds), *WTO – Trade in Goods*, op. cited above, pp. 464-478. Consequently, a WTO MS could not enact measures which would either treat its trading partners in an arbitrary or unjustifiable discriminatory way (Report of the Appellate Body, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Recourse to Article 21.5 Of the DSU by Malaysia, AB-2001-4, WT/DS58/AB/RW, 22 October 2001, para 123), or be justified under Article XX GATT solely to be compliant with WTO but, in fact, «disguise to conceal the pursuit» of the measures' objectives (Report of the Panel, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R, 18 September 2000, (also known as "EC-Asbestos"), para 8.236, p. 449).

[919] Report of the Appellate Body, *United States – Standard for Reformulated and Conventional Gasoline*, AB-1996-1, WT/DS2/AB/R, 29 April 1996, p. 22 establishing that this guarantees the exceptions' possible invocation by not frustrating or defeating the legal obligations of the holder of that right. Accordingly, «The chapeau is animated by the principle that while the exceptions of Article XX may be invoked as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the *General Agreement*. If those exceptions are not to be abused or misused, in other words, the measures falling within the particular exceptions must be applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned». As a matter of fact, the introduction of the Chapeau derives from the initiative of the United Kingdom who proposed such clause during the drafting of the GATT precisely in an attempt to avoid possible misuse of the provisions. In this regard, Zleptnig S., *Non-Economic Objectives in WTO Law: Justification Provisions of GATT, GATS, SPS and TBT Agreements*, op. cited above, p. 104 and p. 116. Similarly, Irwin D.A., Mavroidis P.C., Sykes A.O., *The Genesis of GATT*, op. cited above, p. 163; and, Zeiler T.W., *Free Trade Free World, The Advent of GATT*, op. cited above, which provides a detailed description of the relations and negotiation between US and the United Kingdom on the GATT.

[920] Report of the Appellate Body, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, cited above, para 149. Accordingly, a measure cannot base its rationale or justification under the Chapeau. Accordingly, such Chapeau is «in fact, but one expression of the principle of good faith», controlling the exercise of rights by WTO MS (Report of the Appellate Body, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, cited above, para 158). Interestingly, this was the first time that the WTO Appellate Body recognised the doctrine of *abus de droit* conformably to public international law. In this sense, do Amaral Júnior A., Kramer C., *WTO as a Self-Limited Regime: The Case of Article XX of GATT*, in do Amaral Júnior A., de Oliveira Sá Pires L.M., Lucena Carneiro C. (eds), *The WTO Dispute Settlement Mechanism*, op. cited above, p. 79.

[921] It is not necessary to provide this information to every single WTO MS. In this regard, Report of the Appellate Body, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, AB-1998-4, WT/DS58/AB/R, 12 October 1998, para 149.

[922] Firstly, Report of the Appellate Body, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, AB-1998-4, WT/DS58/AB/R, 12 October 1998. Article XX of the GATT 1994 is dealt with in Section VI, *i.e.* paras 111- 186. Then, Report of the Appellate Body, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Recourse to Article 21.5 Of the DSU by Malaysia, AB-2001-4, WT/DS58/AB/RW, 22 October 2001. The Chapeau of Article XX GATT 1994 is being discussed in Part VI of the Report, *i.e.* paras 111-152.

duties to respect other WTO MS' substantive rights.[923] This conception has been debated within the doctrine: some agree – arguing that the Chapeau aims at establishing an equilibrium between a WTO MS right to enact restricting measures pursuing societal values or interests and the others WTO MS' right to trade –,[924] while others present scepticism concerning whether it is suitable to discuss about balance of equal rights – noting that one WTO MS may restrict trade under the provision, while the 'targeted' one does not possess corresponding rights under it, but rather a "mere" protection «from the abuse of rights».[925]

The second element of Article XX's two-tier test requires that the measures fall within one of the Article's listed exceptions, and the presence of a nexus.[926] Accordingly, nothing within GATT shall prevent WTO MS to adopt restricting measures whenever necessary to protect (a) public morals; (b) human, animal, or plant life or health; (c) relates to import/export of gold or silver; (d) necessary to secure compliance with GATT-consistent laws; (e) relates to products of prison labour; (f) protect national treasures; (g) conserve exhaustible natural resources; (h) pursue obligations of intergovernmental commodity agreements; (i) ensure essential quantities of materials for domestic industries; and, (j) acquire or distribute products in general or local short supply.[927] The list is

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[923] Report of the Appellate Body, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, cited above, para 156. Accordingly, such Chapeau is «in fact, but one expression of the principle of good faith», controlling the exercise of rights by WTO MS (Report of the Appellate Body, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, cited above, para 158). Interestingly, this was the first time that the WTO Appellate Body recognised the doctrine of *abus de droit* conformably to public international law. In this sense, do Amaral Júnior A., Kramer C., *WTO as a Self-Limited Regime: The Case of Article XX of GATT*, in do Amaral Júnior A., de Oliveira Sá Pires L.M., Lucena Carneiro C. (eds), *The WTO Dispute Settlement Mechanism*, op. cited above, p. 79.

[924] Van den Bossche P., Zdouc W., *The Law and Policy of the World Trade Organization: Text, Cases, and Materials*, op. cited above, p. 1063.

[925] Wolfrum R., *Article XX GATT: Chapeau*, in Wolfrum R., Stoll P-T., Hestermeyer H.P. (eds), *WTO – Trade in Goods*, op. cited above, p. 471, para 23 which at p. 473, para 28, concludes that «the application of a balancing test is not supported by the structure of the *Chapeau* of Art. XX as defined by the Appellate Body itself».

[926] Indeed, in order to be justified under Article XX GATT' exceptions, the measures in question must «address the particular interest specified in that paragraph [and have] a sufficient nexus between the measures and the interest protected». Report of the Appellate Body, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, AB-2005-1, WT/DS285/AB/R, 7 April 2005 (also known as "US – Gambling"), para. 292. Despite the case US – Gambling concerned Article XIV(a) of the GATS, it opened the possibility of such conclusion also to the GATT framework since both cases «contemplate a two-tier analysis» of the measures, para 292. However, Reports of the Appellate Body, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, AB-2014-1 - AB-2014-2, WT/DS400/AB/R - WT/DS401/AB/R, 22 May 2014, (known as "EC – Seal products"), para 5.169, p. 140, confirmed such possibility by upholding the same concept for Article XX GATT.

[927] More precisely, nothing within GATT shall prevent WTO MS to adopt restricting measures whenever (a) necessary to protect public morals; (b) necessary to protect human, animal, or plant life or health; (c) relating to the import or export of gold or silver; (d) necessary to secure compliance with laws consistent with GATT, including those on customs and monopolies enforcement, on protection of patents, trade marks and copyrights, and on the prevention of deceptive practices; (e) relating to the products of prison labour; (f) imposed to protect national treasures of artistic, historic or archaeological value; (g) relating to the conservation of exhaustible natural resources; (h) undertaken to pursue obligations under any intergovernmental commodity agreement; (i) necessary to ensure essential quantities of materials to a domestic processing industry in specific occasions; and (j) essential to acquire or distribute products in general or local short supply under specific conditions. For a detailed analysis of the exceptions of Article XX GATT and their related WTO case law, among others, Matz-Lück N., *Article XX lit. c GATT*, in Wolfrum R., Stoll P-T., Hestermeyer H.P. (eds), *WTO – Trade in Goods*, op. cited above, pp. 524-526 (see also the same author in the same collection in relation to *Article XX lit. f GATT* at pp. 540-543; *Article XX lit. g GATT* at pp. 544-559; *Article XX lit. h GATT* at pp. 560-563; *Article XX lit. i GATT* at pp.

exhaustive,[928] but not mutually exclusive, meaning that multiple exceptions might be invoked to justify a WTO-inconsistent measure.[929] The nexus between the measures and the protected interest should be sufficient,[930] with certain listed exceptions further defining the required link: some mentions a strict necessity nexus (*i.e.* "necessary to"), whereas others solely refer to a relationship (*i.e.* "relating to") with the value at hand.[931]

Despite the Chapeau was precisely designed to prevent abuses, the list of exceptions set room for misuse and circumvention,[932] making Article XX GATT one of the most disputed provisions in

564-566; and *Article XX lit. j GATT* at pp. 567-568); Reyes-Knoche S., Arend K., *Article XX lit. d GATT*, in Wolfrum R., Stoll P-T., Hestermeyer H.P. (eds), *WTO – Trade in Goods*, op. cited above, pp. 527-536; Stoll P-T., Strack R., *Article XX lit. b GATT*, in Wolfrum R., Stoll P-T., Hestermeyer H.P. (eds), *WTO – Trade in Goods*, op. cited above, pp. 497-523; Van den Bossche P., Zdouc W., *The Law and Policy of the World Trade Organization: Text, Cases, and Materials*, op. cited above, pp. 1016-1060; Wolfrum R., *Article XX lit. a GATT*, in Wolfrum R., Stoll P-T., Hestermeyer H.P. (eds), *WTO – Trade in Goods*, op. cited above, pp. 479-496; and, Wenzel T., *Article XX lit. e GATT*, in Wolfrum R., Stoll P-T., Hestermeyer H.P. (eds), *WTO – Trade in Goods*, op. cited above, pp. 537-539.

[928] Report by the Panel, *United States – Section 337 of the Tariff Act of 1930*, L/6439 - 36S/345, adopted on 7 November 1989, which called Article XX (d) GATT as a «limited and conditional exception» at para 5.9, p. 38. Also refer to Zleptnig S., *Non-Economic Objectives in WTO Law: Justification Provisions of GATT, GATS, SPS and TBT Agreements*, op. cited above, p. 106; and Van den Bossche P., Zdouc W., *The Law and Policy of the World Trade Organization: Text, Cases, and Materials*, op. cited above, pp. 1005-1006.

[929] Wolfrum T., *Article XX GATT: Introduction*, in Wolfrum R., Stoll P-T., Hestermeyer H.P. (eds), *WTO – Trade in Goods*, op. cited above, p. 457, para 7.

[930] As mentioned above, the measures must «address the particular interest specified in that paragraph [and have] a sufficient nexus between the measures and the interest protected». In this sense, Report of the Appellate Body, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, AB-2005-1, WT/DS285/AB/R, 7 April 2005 (also known as "US – Gambling"), para. 292. Despite the case US – Gambling concerned Article XIV(a) of the GATS, it opened the possibility of such conclusion also to the GATT framework since both cases «contemplate a two-tier analysis» of the measures, para 292. However, Reports of the Appellate Body, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, AB-2014-1 - AB-2014-2, WT/DS400/AB/R - WT/DS401/AB/R, 22 May 2014, (known as "EC – Seal products"), para 5.169, p. 140, confirmed such possibility by upholding the same concept for Article XX GATT.

[931] In general terms, the "necessity text" requires (i) the identification of the objective pursued by the measure; (ii) the establishment of whether such measure contributes to the achievement of the policy objective of the 'chosen' justification; (iii) the consideration of alternatives to the measure taken in order to establish whether there are alternative and less restrictive options providing equivalent capacity to achieve the objective pursued; and (iv) the 'weighing and balancing' of the involved interests. Differently the "related test" refers to the link between the measure at hand and the aim which, however, does not have to be necessarily strictly closed but rather constitute a "primary aim" of the measure or a "reasonable relationship" between the measure and the objective. In this sense, do Amaral Júnior A., Kramer C., *WTO as a Self-Limited Regime: The Case of Article XX of GATT*, in do Amaral Júnior A., de Oliveira Sá Pires L.M., Lucena Carneiro C. (eds), *The WTO Dispute Settlement Mechanism*, op. cited above, pp. 71-78; Van den Bossche P., Zdouc W., *The Law and Policy of the World Trade Organization: Text, Cases, and Materials*, op. cited above, pp. 1016-1060; Wolfrum T., *Article XX GATT: Introduction*, in Wolfrum R., Stoll P-T., Hestermeyer H.P. (eds), *WTO – Trade in Goods*, op. cited above, pp. 458-463, paras 10-23; and, Zleptnig S., *Non-Economic Objectives in WTO Law: Justification Provisions of GATT, GATS, SPS and TBT Agreements*, op. cited above, pp. 128-181 which, moreover, at pp. 229-271 describes both the "necessity" and "relating to" test in Article XX GATT with a view on main WTO case law.

[932] It is indisputable that exceptions to general rules might be (ab)used by States as loopholes or ways of circumventing treaty obligations. In the case of the WTO, such abuse might more widely endanger the IO's main objective of trade liberation and elimination of trade barriers, according to Zleptnig S., *Non-Economic Objectives in WTO Law: Justification Provisions of GATT, GATS, SPS and TBT Agreements*, op. cited above, p. 96. While, theoretically, trade liberalisation enables better and cheaper products and services and, as such, facilitates the promotion and protection of values such as public health, protection of environment and public morals (in this regard, Van den Bossche P., Zdouc W., *The Law and Policy of the World Trade Organization: Text, Cases, and Materials*, op. cited above, p. 1002), Article XX GATT' exceptions are frequently used by WTO MS to justify measures restricting trade. Although the list of exceptions is exhaustive, the vagueness of the terms and their open-to-interpretation character may entail many possible distinct interpretations, which might be additionally challenging for a legal system applying on a global basis as the WTO,

the WTO framework. The WTO Appellate Body has generally adopted a broad reading of the exceptions,[933] although some scholars would have expected a narrower interpretation[934] according to the principle of *singularia non sunt extendenda*.[935] When occurred, however, strict interpretations had been criticised for posing danger to the environment and human health;[936] hampering sovereignty in crucial State' sectors;[937] and, boosting markets integration and free trade at the expenses of crucial social objectives.[938]

Although the exceptions of Article XX GATT preserve aspects of national sovereignty,[939] the provision is mainly envisioned as a «*balancing* provision» between trade liberation (with market access, and non-discrimination) and societal values.[940] Some authors argue that updates or additional exceptions may be necessary to reflect the current global panorama, since Article XX has remained

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according to Feddersen C.T., *Focusing on Substantive Law in International Economic Relations: The Public Morals of GATT's Article XX(a) and Conventional Rules of Interpretation*, op. cited above, p. 75-78; and Zleptnig S., *Non-Economic Objectives in WTO Law: Justification Provisions of GATT, GATS, SPS and TBT Agreements*, op. cited above, p. 5.

[933] Part of the doctrine agrees with a broad interpretation of Article XX GATT. Among others, Feddersen C.T., *Focusing on Substantive Law in International Economic Relations: The Public Morals of GATT's Article XX(a) and Conventional Rules of Interpretation*, op. cited above, p. 96.

[934] Klabbers J., *Jurisprudence in International Trade Law: Article XX of GATT*, Journal of World Trade, Vol. 26, No. 2, 1992, pp. 64-94, p. 88. Similarly, Blenk M.J.K., *Uses and Misuses of International Economic Law: Private Standards and Trade in Goods in the WTO and the EU*, op. cited above, p. 328. Others, instead, argue that since neither Article XX GATT nor the Vienna Convention on the Law of Treaties comprise a specific provision on the need of exceptions to be interpreted narrowly, it arises the question on whether such presumption is «truly appropriate when interpreting Article XX» GATT. In this regard, Feddersen C.T., *Focusing on Substantive Law in International Economic Relations: The Public Morals of GATT's Article XX(a) and Conventional Rules of Interpretation*, op. cited above, pp. 94-96. Also, Koskenniemi M., Leino P., *Fragmentation of International Law? Postmodern Anxieties*, op. cited above, p. 573.

[935] Van den Bossche P., Zdouc W., *The Law and Policy of the World Trade Organization: Text, Cases, and Materials*, op. cited above, p. 1005. The principle *singularia non sunt extendenda* notably holds that exceptions must be interpreted strictly as to preserve the functioning and the effectiveness of the general rule they are derogating to. Similarly, Hahn M.J., *Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception*, op. cited above, p. 579 with regard to Article XXI GATT.

[936] Zleptnig S., *Non-Economic Objectives in WTO Law: Justification Provisions of GATT, GATS, SPS and TBT Agreements*, op. cited above, p. 15 citing a statement of the International Forum on Globalization. Similarly, Van den Bossche P., Zdouc W., *The Law and Policy of the World Trade Organization: Text, Cases, and Materials*, op. cited above, p. 1072 reporting the case of environmental activists contesting WTO rules as undermining the necessary legislation on environment.

[937] do Amaral Júnior A., Kramer C., *WTO as a Self-Limited Regime: The Case of Article XX of GATT*, in do Amaral Júnior A., de Oliveira Sá Pires L.M., Lucena Carneiro C. (eds), *The WTO Dispute Settlement Mechanism*, op. cited above, p. 71.

[938] Zleptnig S., *Non-Economic Objectives in WTO Law: Justification Provisions of GATT, GATS, SPS and TBT Agreements*, op. cited above, p. 15.

[939] Jackson J.H., *The World Trading System: Law and Policy of International Economic Relations*, The MIT Press, Cambridge, 1997, p. 233. Similarly, do Amaral Júnior A., Kramer C., *WTO as a Self-Limited Regime: The Case of Article XX of GATT*, in do Amaral Júnior A., de Oliveira Sá Pires L.M., Lucena Carneiro C. (eds), *The WTO Dispute Settlement Mechanism*, op. cited above, p. 71; and, Feddersen C.T., *Focusing on Substantive Law in International Economic Relations: The Public Morals of GATT's Article XX(a) and Conventional Rules of Interpretation*, op. cited above, p. 77.

[940] Van den Bossche P., Zdouc W., *The Law and Policy of the World Trade Organization: Text, Cases, and Materials*, op. cited above, p. 1005.

mainly in its original form.[941] Others instead expect the exceptions to evolve through future evolutionary interpretations.[942]

Article XX has a broad scope of application, potentially justifying violations of any GATT obligations, rather than solely of specific provisions.[943] Its applicability to justify measures inconsistent with other WTO agreements is debated,[944] but it is generally accepted solely when those

[941] The revisions should consider today's global challenges, compared to the post-WWII in which GATT was developed, since aside for a minor amendment in 1955, the Article remains unchanged. Among others, Schütze R., '*Re-constituting' the Internal Market: Towards a Common Law of International Trade*, Yearbook of European Law, Vol. 39, no. 1, 2020, pp. 250-292, p. 272. Also, Manzini P., *Environmental Exceptions of Art. XX GATT 1994 Revisited in the Light of the Rules of Interpretation of General International Law*, in Mengozzi P. (ed), *International Trade Law on the 50th Anniversary of the Multilateral Trade System*, op. cited above, pp. 811-848, p. 816; and, Marceau G., *The World Trade Organization and Export Restrictions*, in Matsushita M., Schoenbaum T. (eds), *Emerging Issues in Sustainable Development: International Trade Law and Policy Relating to Natural Resources, Energy and the Environment*, Springer, 2016, pp. 99-137, pp. 120-121. Similarly, Zleptnig S., *Non-Economic Objectives in WTO Law: Justification Provisions of GATT, GATS, SPS and TBT Agreements*, op. cited above, pp. 104-105 which, moreover, notices that the fact that Article XX GATT' non-economic exceptions had been reaffirmed in the context of GATS may be analysed as «a signal that the WTO membership considered the approach in Art XX GATT to be appropriate and up to the challenges of the contemporary world». Others, instead, such as Fernández-Pons X., Lembo C., *The Case EC-Seal Products: The WTO Dispute Settlement System before a "Trilemma" Between Free Trade, Animal Welfare, and Rights of Indigenous Peoples*, in do Amaral Júnior A., de Oliveira Sá Pires L.M., Lucena Carneiro C. (eds), *The WTO Dispute Settlement Mechanism*, op. cited above, pp. 305-319, argue that the existing exceptions might become «"umbrella" that shelters legitimate interests not easily covered […], operating like a useful bridge or link to try to conciliate the trade obligations of the WTO with other values or social concerns». Discussing this issue, Picone P., Ligustro A., *Diritto dell'organizzazione mondiale del commercio*, op. cited above, pp. 322-325.

[942] Helmernes S.T., *The Evolutionary Treaty Interpretation by the WTO Appellate Body*, in Abi-Saab G., Keith K., Marceau G., Marquet C. (eds), *Evolutionary Interpretation and International Law*, Hart Publishing, 2019, pp. 207-219, p. 219. On the AB' use of evolutionary interpretations and on the criticisms of this practice, De Andrade M.C., *Evolutionary Interpretation and the Appellate Body's Existential Crisis*, in Abi-Saab G., Keith K., Marceau G., Marquet C. (eds), *Evolutionary Interpretation and International Law*, op. cited above, pp. 229-240; Grigorova J., *Energy Trade in the WTO, Yesterday, Today and Tomorrow: The Role of Evolutionary Interpretation*, in Abi-Saab G., Keith K., Marceau G., Marquet C. (eds), *Evolutionary Interpretation and International Law*, op. cited above, pp. 241-250; and, Van den Bossche P., *Is There Evolution in the Evolutionary Interpretation of WTO Law?*, in Abi-Saab G., Keith K., Marceau G., Marquet C. (eds), *Evolutionary Interpretation and International Law*, op. cited above, pp. 221-228.

[943] Qin J.Y., *Reforming WTO Discipline on Export Duties: Sovereignty Over Natural Resources, Economic Development and Environmental Protection*, in Matsushita M., Schoenbaum T. (eds), *Emerging Issues in Sustainable Development: International Trade Law and Policy Relating to Natural Resources, Energy and the Environment*, op. cited above, pp. 139-182, p. 148; and Van den Bossche P., Zdouc W., *The Law and Policy of the World Trade Organization: Text, Cases, and Materials*, op. cited above, p. 1006.

[944] The WTO Appellate Body too was questioned regarding this issue. In this regard, among others, the case law Reports of the Appellate Body, *China – Measures Related to the Exportation of Various Raw Materials*, (China-Raw Materials), cited above, where this was not granted (see para 362 (c)) and *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications And Audiovisual Entertainment Products*, AB-2009-3, WT/DS363/AB/R, 21 December 2009, (also known as "China – Publications and Audiovisual Products") where, instead, Article XX GATT' justifications were identified as available (see para 415 (a)). In this regard, Liu J., *Legal System of Natural Resources Protection in China: GATT 20 and China's Export Limits on Resources*, in Matsushita M., Schoenbaum T. (eds), *Emerging Issues in Sustainable Development: International Trade Law and Policy Relating to Natural Resources, Energy and the Environment*, op. cited above, pp. 27-40, p. 36-40; and, Van den Bossche P., Zdouc W., *The Law and Policy of the World Trade Organization: Text, Cases, and Materials*, op. cited above, pp. 1008-1010.

agreements «*explicitly* […] or *implicitly* […] incorporate»[945] Article XX – on the grounds of a case-by-case assessment, rather than constituting a general rule.[946]

Article XX does not specify particular types of measures, yet it cannot justify measures which might «undermine the WTO multilateral trading system».[947] A major debate concerns whether non-economic exceptions (namely, Articles XX and XXI GATT) may justify extraterritorial measures – namely those measures pursuing non-economic objectives outside the adopting WTO MS territory, thus, involving other WTO MS territories and non-domestic non-economic interests.[948] Notably, Article XX does not address this issue explicitly, and WTO case law did not provide a clear-cut

[945] Van den Bossche P., Zdouc W., *The Law and Policy of the World Trade Organization: Text, Cases, and Materials*, op. cited above, p. 1010. Interestingly, in the case Reports of the Appellate Body, *China – Measures Related to the Exportation of Various Raw Materials*, AB-2011-5, WT/DS394/AB/R - WT/DS395/AB/R - WT/DS398/AB/R, 30 January 2012, (also "China-Raw materials), the Appellate Body established – at paras 303 and 304 – that since Paragraph 11.3 of China's Accession Protocol does not expressly refer (*i.e.* there is no "textual reference", as specified at para 306) to Article XX GATT (or any other GATT provisions, aside from Article VIII GATT) there is no basis to determine the applicability of Article XX GATT to justify export duties inconsistent with Paragraph 11.3. Also refer to para 307.

[946] Lai H., *The Climate-Trade Conundrum: A Critical Analysis of the WTO's Jurisprudence on Subsidies to Renewable Energy*, in Matsushita M., Schoenbaum T. (eds), *Emerging Issues in Sustainable Development: International Trade Law and Policy Relating to Natural Resources, Energy and the Environment*, op. cited above, pp. 297-319, p. 314.

[947] Report of the Appellate Body, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, cited above, para 116.

[948] *Inter alia*, Bartels L., *Article XX of GATT and the Problem of Extraterritorial Jurisdiction: The Case of Trade Measures for the Protection of Human Rights*, op. cited above, pp. 353-403; Manzini P., *Environmental Exceptions of Art. XX GATT 1994 Revisited in the Light of the Rules of Interpretation of General International Law*, in Mengozzi P. (ed), *International Trade Law on the 50th Anniversary of the Multilateral Trade System*, op. cited above, pp. 834-838; Mavroidis P.C., *Reaching Out for Green Policies – National Environmental Policies in the WTO Legal Order*, in Wouters J., Marx A., Geraets D., Natens B. (eds), *Global Governance through Trade: EU Policies and Approaches*, Edward Elgar Publishing, 2015, pp. 303-328, p. 314; Silingardi S., *I trattati commerciali*, in Crespi Reghizzi Z., Vellano M. (eds), *I trattati internazionali alla prova del conflitto russo-ucraino*, op. cited above, pp. 97-98; Picone P., Ligustro A., *Diritto dell'organizzazione mondiale del commercio*, op. cited above, pp. 331-333; Van den Bossche P., Zdouc W., *The Law and Policy of the World Trade Organization: Text, Cases, and Materials*, op. cited above, p. 1011-1012; and, Zleptnig S., *Non-Economic Objectives in WTO Law: Justification Provisions of GATT, GATS, SPS and TBT Agreements*, op. cited above, pp. 297-327. Interestingly, extraterritorial measures have been attempted to be justified also under Article XXI GATT. In this sense, Mitchell A.D., *Sanctions and the World Trade Organization*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, pp. 283-303, pp. 300-301.

answer.[949] The drafting history of Article XX offers little interpretative guidance,[950] whereas scholarly debate remains divided. Some scholars argue that solely the exception on prison labour – *i.e.* Article XX (e) – involves trade-restrictive measures on products processed in other States,[951] implying that all the other exceptions are limited to domestic concerns.[952] On the opposite, others contend that the extraterritorial scope of Article XX (e) indicates that the other exceptions likewise allow for extraterritorial application.[953] At last, it is also argued that limiting the exceptions to domestic concerns only – especially protection of life, health, and environment – may be complex to reconcile with historical perspectives[954] and increasingly obsolete in light of global challenges, such as climate change.[955]

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[949] Indeed, some case law upheld such possibility and others strongly disagreed. This two-fold approach is also notable in different pronunciations on the same facts. This is indeed the case of US-Shrimp were US measures (with extraterritorial features) were firstly found incompatible with Article XX GATT and then compatible by the Appellate Body. In 1998, the Panel of US-Shrimp, at para 7.62, found the measures at hand – contested by India, Pakistan and Thailand of being also extraterritorial – to be outside the scope of measures permitted under the Chapeau of Article XX GATT. In this, the extraterritoriality of the measures has not been the key element for the Panel' decision over their incompatibility with Article XX GATT, stating indeed – at para 7.51 – «we note that we are not basing our finding on an extra-jurisdictional application of US law. Many domestic governmental measures can have an effect outside the jurisdiction of the government which takes them». Differently, in 2001, the Appellate Body, in para 153 (b), upheld that the measures at hand are justified under Article XX GATT, as long as they satisfy Article XX GATT' criteria. However, while already the Panel of 1998 did not fully address the issue of extraterritoriality of WTO measures in a complete manner, the Appellate Body in 2001 avoid dealing with the specific issue even more focusing instead mainly on the specific measures at hand. According to Fernández-Pons X., Lembo C., *The Case EC-Seal Products: The WTO Dispute Settlement System before a "Trilemma" Between Free Trade, Animal Welfare, and Rights of Indigenous Peoples*, in do Amaral Júnior A., de Oliveira Sá Pires L.M., Lucena Carneiro C. (eds), *The WTO Dispute Settlement Mechanism*, op. cited above, p. 317, the AB avoided discussing the issue of extraterritoriality because such question was raised by third parties to the proceedings which, notably, as developing countries are generally more sceptical over such matter. Differently, Mavroidis P.C., *Reaching Out for Green Policies – National Environmental Policies in the WTO Legal Order*, in Wouters J., Marx A., Geraets D., Natens B. (eds), *Global Governance through Trade: EU Policies and Approaches*, op. cited above, pp. 326-327 argues that the absence of WTO DSB' rulings on the matter is, instead, due to the absence of specific claims to this effect by the complaints. Thus, the different WTO panels refrained to deal with extraterritorial issues, since they «are not keen to address issues that have not been explicitly referred to them; nor are they likely to tinker light-heartedly with domestic policies, especially if they are considered 'sensitive' issues in the form of important societal choices». On the WTO case law on extraterritoriality, also Bartels L., *Article XX of GATT and the Problem of Extraterritorial Jurisdiction: The Case of Trade Measures for the Protection of Human Rights*, op. cited above, pp. 386-391; and, Ryngaert C., Koekkoek M., *Extraterritorial Regulation of Natural Resources: A Functional Approach*, in Wouters J., Marx A., Geraets D., Natens B. (eds), *Global Governance through Trade: EU Policies and Approaches*, op. cited above, pp. 245-271, p. 259.

[950] Bartels L., *Article XX of GATT and the Problem of Extraterritorial Jurisdiction: The Case of Trade Measures for the Protection of Human Rights*, op. cited above, p. 359.

[951] Feddersen C.T., *Focusing on Substantive Law in International Economic Relations: The Public Morals of GATT's Article XX(a) and Conventional Rules of Interpretation*, op. cited above, p. 109.

[952] Zleptnig S., *Non-Economic Objectives in WTO Law: Justification Provisions of GATT, GATS, SPS and TBT Agreements*, op. cited above, p. 319.

[953] Bartels L., *Article XX of GATT and the Problem of Extraterritorial Jurisdiction: The Case of Trade Measures for the Protection of Human Rights*, op. cited above, pp. 355-356 and p. 358 which previously present the perspective that reads Article XX (e) GATT as referring to products produced by means of forced labour and, thus, supports that Article XX (a) GATT should allow a WTO MS to ban imports of products produced in a way that violates human rights laws, in so much as protecting «the public morals of the importing Member»; and secondly, support the view of extending the extraterritorial scope of Article XX (e) GATT to the other provisions of Article XX GATT.

[954] This is indeed supported by the presence of a substantive number of international agreements prior to the GATT dealing with the same matters of the mentioned exceptions. Refer to the literature of the following footnote.

[955] It is argued that the global nature of climate change' impact increasingly blurs the distinction between foreign and domestic concerns. In this regard, Charnovitz S., *Exploring the Environmental Exceptions in GATT Article XX*, Journal

While Article XX GATT focuses on general exceptions aimed at protecting non-economic values closely linked to societal and moral interests, Article XXI GATT likewise introduce non-economic exceptions, but focuses specifically on national security interests, as discussed in the following section.

ii. Security exceptions under Article XXI GATT

Although early GATT drafts envisioned a single provision encompassing both general and security exceptions, the final version divided them into Articles XX and XXI GATT.[956] Article XXI GATT – entitled "Security Exceptions" – safeguards WTO MS' security interests, balancing their broad (and unilateral) discretion in national security matters with specific requirements.[957] Often denominated "sovereignty safeguard principle",[958] this provision is argued to guarantee effectiveness of international law,[959] and reflect the self-protection principle by enabling derogations from international obligations for security prerogatives.[960]

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of World Trade, Vol. 25, 1991, pp. 37-55, p. 52. Nevertheless, the author acknowledges that in the case of lawful applications of Article XX GATT' exceptions to foreign concerns, limitations would anyway be necessary as not to jeopardise the trading system. On this, refer also to p. 53. Similarly, Mavroidis P.C., *Reaching Out for Green Policies – National Environmental Policies in the WTO Legal Order*, in Wouters J., Marx A., Geraets D., Natens B. (eds), *Global Governance through Trade: EU Policies and Approaches*, op. cited above, p. 314 argues that to being capable of protecting foreign animal life, WTO MS «must show a nexus with their own jurisdiction (for example, that a change in the ecological equilibrium affects all nations)». Interestingly, the EU recently introduced instrument of CBAM – briefly mentioned also in Sections 5 and 6.2., Chapter II – would arguably be justified by Article XX GATT' exceptions. In this sense, Smulders B., *WTO Law's Balance Between Trade and Global Climate and Environmental Interests: The Case of the European Union and Some Aspects of its Green Deal*, in Baetens F., Van den Bogaert S. (eds), *The EU and the WTO: Ever the Twain Shall Meet*, op. cited above, pp. 167-183, pp. 177-178 and p. 179.

[956] Zleptnig S., *Non-Economic Objectives in WTO Law: Justification Provisions of GATT, GATS, SPS and TBT Agreements*, op. cited above, p. 103. On the negotiation history of Article XXI GATT, also refer to the Report of the Panel, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R, 5 April 2019, (also known as "Russia-Traffic in Transit"), Section 7.5.3.1.2 (paras 7.83-7.100). Additionally, Hestermeyer H.P., *Article XXI GATT*, in Wolfrum R., Stoll P-T., Hestermeyer H.P. (eds), *WTO – Trade in Goods*, op. cited above, pp. 574-576, paras 8-9. The "one-single provision" envisaged that also the security exception would have been subject to the Chapeau of Article XX GATT. Interestingly, Irwin D.A., Mavroidis P.C., Sykes A.O., *The Genesis of GATT*, op. cited above, pp. 162-164 providing an historical overview beginning from the London Conference until the review session. Already present in the 1945 US Proposals for Expansion of World Trade and Employment, the provision of a security exception within GATT witnessed negotiations but no major amendments. Minor amendments occurred in the Havana Conference, where the provisions were split into Article 99 Havana Charter (containing Article XXI (a) and (b) GATT) and Article 86 (containing Article XXI (b) GATT). Nonetheless, Hestermeyer H.P., *Article XXI GATT*, in Wolfrum R., Stoll P-T., Hestermeyer H.P. (eds), *WTO – Trade in Goods*, op. cited above, pp. 574-577, paras 6-12 explains how these amendments are relevant solely in the view of their use as supplementary means of interpretation under the VCLT.

[957] Hahn M.J., *Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception*, op. cited above, pp. 596-597. This is argued to have been necessary to preserve the WTO legal order by Hestermeyer H.P., *Article XXI GATT*, in Wolfrum R., Stoll P-T., Hestermeyer H.P. (eds), *WTO – Trade in Goods*, op. cited above, p. 572, para 4.

[958] Mitchell A.D., *Sanctions and the World Trade Organization*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, p. 285. Similarly, Hahn M.J., *Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception*, op. cited above, p. 560; and Hestermeyer H.P., *Article XXI GATT*, in Wolfrum R., Stoll P-T., Hestermeyer H.P. (eds), *WTO – Trade in Goods*, op. cited above, p. 572, para 4.

[959] Hahn M.J., *Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception*, op. cited above, p. 560.

[960] Mitchell A.D., *Sanctions and the World Trade Organization*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, p. 285. For a wider analysis of the use of exceptions ('exceptionalism') in matters of trade and security, Claussen K., *Trade's Security Exceptionalism*, op. cited above.

Prior to more recent years, Article XXI GATT was rarely invoked. This restraint has been attributed to the breadth and sensitivity of the concepts involved; the availability of other GATT exceptions; the wide WTO MS discretion; concerns over abuse and increased trade tensions; a preference for negotiations and consultations; and, the substantially different international relations landscape.[961] Nevertheless, security exceptions are widespread in many international law treaties,[962] reflecting the longstanding practice of States to restrict trade on national security grounds. Often occurring to protect domestic production, advance foreign policy objectives, or restrict imports/exports with unfriendly States (*e.g.* military products),[963] it is generally accepted that Article XXI GATT excludes purely protectionist measures.[964]

Similarly to Article XX GATT, Article XXI enables priority of non-economic values over trade liberalisation, market access, and non-discrimination,[965] but it does so through broader and less stringent conditions. Article XXI GATT provides that nothing in the GATT shall be interpreted as (a) requiring disclosure of information contrary to WTO MS' essential security interests; (b) preventing any action necessary to protect those interests in relation to (i) fissionable materials or derived materials, (ii) traffic in arms, ammunition and implements of war, and those (iii) taken in time of war or other emergency in international relations; or (c) preventing any action pursuant to UN obligations for the maintenance of international peace and security.[966] Unlike Article XX, Article

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[961] Liang Y., Peng Z., *Empirical Evolution of the WTO Security Exceptions Clause and China's Discourse*, in Zhang L., Tan X. (eds), *A Chinese Perspective on WTO Reform*, Springer, 2023, pp. 188-233, pp. 201-202. Similarly, Hestermeyer H.P., *Article XXI GATT*, in Wolfrum R., Stoll P-T., Hestermeyer H.P. (eds), *WTO – Trade in Goods*, op. cited above, p. 574, para 5; and, Ruys T., *Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, p. 31.

[962] As a matter of fact, security exceptions are present in multilateral agreements (*e.g.* the Rome Statute of the International Criminal Court – Article 72 on the protection of national security information, Rome Statute of the International Criminal Court), in preferential trade agreements (*e.g.* the North American Free Trade Agreement – Article 607 on national security measures; and, Article 2102 on National Security, North American Free Trade Agreement (NAFTA)), and in the other core WTO agreements, such as GATS and TRIPS (Article XIV bis, General Agreement on Trade in Services (GATS); and, Article 73, Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) on security exceptions).

[963] Hestermeyer H.P., *Article XXI GATT*, in Wolfrum R., Stoll P-T., Hestermeyer H.P. (eds), *WTO – Trade in Goods*, op. cited above, p. 571, para 1; and, Van den Bossche P., Zdouc W., *The Law and Policy of the World Trade Organization: Text, Cases, and Materials*, op. cited above, pp. 1089-1090.

[964] Hahn M.J., *Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception*, op. cited above, p. 582. Similarly, Ruys T., *Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, p. 31.

[965] Van den Bossche P., Zdouc W., *The Law and Policy of the World Trade Organization: Text, Cases, and Materials*, op. cited above, p. 1110.

[966] More precisely, the provision states that: «Nothing in this Agreement shall be construed (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests (i) relating to fissionable materials or the materials from which they are derived; (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment; (iii) taken in time of war or other emergency in international relations; or (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security». A comprehensive commentary on Article XXI GATT is provided by, among others, Hestermeyer H.P., *Article XXI GATT*, in Wolfrum R., Stoll P-T., Hestermeyer H.P. (eds), *WTO – Trade in Goods*, op. cited above, pp. 569-593 which, however, by dating back to 2011

XXI lacks a "chapeau". The introductory part of paragraph (b) is sometimes mentioned as "chapeau",[967] or "partial chapeau", since it applies solely to the cases listed in that subsection and not all actions justifiable under Article XXI.[968]

The opening sentence of the Article – *i.e.* «nothing in the GATT shall be construed» – enables derogation from the totality of GATT provisions, when the conditions of the subsequent paragraphs are fulfilled. Subsections (a) and (b) thus constitute the security exceptions *stricto sensu*, whereas subsection (c) partially governs the relationship between GATT and the UN Charter.[969]

Until 2019, Article XXI (b) generated extensive scholarly debate but limited WTO case law. Early GATT panels approached the provision as self-judging – meaning that WTO MS hold the role of assessing which actions were necessary to protect their essential security – while warning over its abuse.[970] The 2019 Russia - Traffic in Transit panel marked a landmark moment by conducting the

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lacks the most recent jurisprudence on the Article (*i.e.* the prominent Russia – Traffic in Transit case of 2019, which will be analysed shortly after in this Section of this Chapter). Similarly, Picone P., Ligustro A., *Diritto dell'organizzazione mondiale del commercio*, op. cited above, pp. 335-348, published instead in 2002.

[967] This part states that WTO MS may take any action considered necessary for the protection of its essential security interests, before listing the possible cases. Among others, Report of the Panel, *Russia – Measures Concerning Traffic in Transit*, cited above, paras 7.62, 7.63, 7.67 and 7.82 in which the Panel concludes that «the adjectival clause "which it considers" in the chapeau of Article XXI(b) does not qualify the determination of the circumstances in subparagraph (iii). Rather, for action to fall within the scope of Article XXI(b), it must objectively be found to meet the requirements in one of the enumerated subparagraphs of that provision». Also refer to Van den Bossche P., Zdouc W., *The Law and Policy of the World Trade Organization: Text, Cases, and Materials*, op. cited above, p. 1096.

[968] Hahn M.J., *Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception*, op. cited above, pp. 590-591 argue that the fact that no conditions are mentioned in subsection (a) of Article XXI GATT – as it is instead in paragraph (b) of the same Article – signifies that the precise exceptions listed under (i) and (ii) were meant to restrict the broad discretion granted by the introductory sentence. Accordingly, this is logical since «the *prima facie* GATT violations addressed in article XXI(a) are of less importance for the functioning of the GATT system and thus were put in the unfettered discretion of the Contracting Party acting for security purposes. The contrary is true for the primary obligations from which escape is possible under article XXI(b)(iii)».

[969] Article XXI (a) GATT provides a WTO MS' defence against the obligation to disclose information when this information is of essential security interests. Rarely invoked as justification of measures restricting trade, this exception has generally been interpreted broadly. In this regard, Van den Bossche P., Zdouc W., *The Law and Policy of the World Trade Organization: Text, Cases, and Materials*, op. cited above, p. 1099. Similarly in the rare invocation by WTO MS, subsection (c) of Article XXI GATT guarantees to WTO MS the lawful possibility to enact measures adopted by the UNSC as, per instance, those enacted under Chapter VII of the UN Charter (Articles 39-51). These measures have been analysed previously in this Chapter, in Section 1.2.2. On Article XXI, subsection (c), among others, Hahn M.J., *Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception*, op. cited above, pp. 582-584; and, Mitchell A.D., *Sanctions and the World Trade Organization*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, pp. 286-292. Also subsection (b) of Article XXI GATT was similarly rarely invoked until most recently when many disputes were raised in front of the WTO. In this regard, Van den Bossche P., Zdouc W., *The Law and Policy of the World Trade Organization: Text, Cases, and Materials*, op. cited above, p. 1090. Interestingly, Ruys T., *Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, p. 31 argues that the rare invocation of Article XXI (b) GATT is partly due to the fact that many unilateral trade measures do, in fact, target non-WTO MS and due to the WTO MS disincentive to «test the scope and fragility of the WTO system».

[970] Indeed, Article XXI (b) GATT was solely debated within GATT as early as 1949 (GD/4, *Article XXI – United States Exports Restrictions* (also known as "US Export Restrictions (Czechoslovakia)"), 1949. Refer to the documents: BISD IIS/28 (08/06/1949); GATT/CP.3/SR.22 (08/06/1949); and GATT/CP.3/SR.22/Corr.1 (n.a.)), and later in 1985 (Report by the Panel, *United States – Trade Measures Affecting Nicaragua*, L/6053, 13 October 1986. This case is part of the disputes concerning the US trade embargo on Nicaragua in 1985 which, most notably, brought to the ICJ' ruling on that matter. On the ICJ ruling and its significance – especially for the evolution and the interpretation of the principle of non-intervention – refer also to Chapter I, Section 4.3.). In this report, however, the Panel concluded that it could not examine

first detailed interpretation of Article XXI (b) GATT.[971] It circumscribed "other emergency in international relations" to an «objective state of affairs»,[972] and linked "essential security interest" to the «quintessential functions of the state», *i.e.* territorial and population protection, and maintenance of law and public order –[973] requiring good faith, plausibility, connection between interests and the adopted measures,[974] and a «sufficient level of articulation» on the essential security interests involved in the specific case.[975]

The Russia – Traffic in Transit Panel further concluded, drawing on Article XX case law, that Article XXI may justify not only measures violating GATT, but also breaches of the Russian Federation obligations under its Accession Protocol.[976] It also clarified that, unlike Article XX approach, the assessment of whether measures are covered by Article XXI (b) does not require prior determination of their WTO-inconsistency.[977] The Panel confirmed its jurisdiction to review security

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the validity and motivations of the Article's invocation since such «provision left it to each contracting party to judge what actions it considered necessary for the protection of its essential security interests» (Report by the Panel, *United States – Trade Measures Affecting Nicaragua*, L/6053, 13 October 1986, para 1.2, and also paras 1.3, 1.4, 5.2, 5.3). Nonetheless, already the 1985 Panel recognised that the achievement of GATT' crucial aims could not be possible unless the WTO MS relying on Article XXI GATT' justification would «carefully weigh[…] its security needs against the need to maintain stable trade relations», as to avoid excessive invocations outside the Article' provisions (Report by the Panel, *United States – Trade Measures Affecting Nicaragua*, op. cited above, respectively, para 5.16 and para 5.17).

[971] Report of the Panel, *Russia – Measures Concerning Traffic in Transit*, cited above. Also known as "Russia-Traffic in Transit", the Report of the Panel (WT/DS512/R) was adopted on 05 April 2019.

[972] *Ibid*., para 7.77, referring to «a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state» giving rise to WTO MS' concerns on defence, military, or of maintenance of law and public order.

[973] As per *Ibid*., para 7.130., essential security interests were found to constitute «those interests relating to the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally».

[974] In this regard, it is required the WTO MS qualification and definition, acting in good faith, ex *Ibid*., paras 7.131 and 7.132. On the notion of good faith within Article XXI GATT prior to the Russia – Traffic in Transit case, refer to the analysis of Hahn M.J., *Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception*, op. cited above, pp. 600-601. Furthermore, together with the obligation of good faith, the WTO MS should also «meet a minimum requirement of plausibility» and connection between the "essential security interests" and the enacted measures in question, as per Report of the Panel, *Russia – Measures Concerning Traffic in Transit*, cited above, para 7.138.

[975] This observation is connected to the Panel's acknowledgment that reliance on Article XXI GATT and WTO MS' discretion may enable circumvention of GATT obligations. The Panel, thus, requested the existence of a «sufficient level of articulation» on the essential security interests involved in the specific case. In this regard, *Ibid*., paras 7.134 and 7.135.

[976] *Ibid*., section 7.6.4. Also, paras 7.230 and 7.231 where explicit reference is made to the case of China's Accession Protocol and its interpretation under Article XX GATT. See also para 7.232. Interestingly, a detailed analysis of this case with regard to the specific commercial treaties and the international framework, refer to Silingardi S., *I trattati commerciali*, in Crespi Reghizzi Z., Vellano M. (eds), *I trattati internazionali alla prova del conflitto russo-ucraino*, op. cited above, pp. 86-98, which analyses the impact of war on commercial treaties beginning from the Crimea invasion and, more generally, the issue of commercial treaties in times of war. In this regard, more extensively, refer also to Silingardi S., *Gli effetti giuridici della guerra sui rapporti economici e commerciali*, Giappichelli Editore, 2012.

[977] *Ibid*., para 7.108 which, in this regard, provides that the evaluation of whether measures are covered by Article XXI (b) GATT «does not necessitate a prior determination that they would be WTO-inconsistent if they had been taken in normal times, *i.e.* if they were not taken in time of war or other emergency in international relations».

matters –[978] an issue previously raised in relation to the adoption of the 1996 US Helms-Burton Act,[979] where the US similarly argued that the measures concerned security rather than trade,[980] but where the Panel's jurisdiction ultimately lapsed without a ruling on the merits.[981] Despite the qualification of measures as either security or trade-related remains to be assessed on a case-by-case basis, the Russia - Traffic in Transit panel succeeded in addressing this question, whereas the US-Helms-Burton panel did not even have the opportunity to debate.

Subsequent to this landmark case, Article XXI has been invoked in numerous disputes, most notably, in connection with the US tariffs on steel and aluminium imports.[982] In US - Steel and Aluminium Product case[983] China challenged US import duties imposed in 2018 as violations of GATT obligations,[984] while the US defended them under Article XXI, asserting its discretion to

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[978] Curiously, one initial issue of the Russia - Traffic in Transit concerned the understanding of whether such dispute was in fact a trade dispute – as argued by Ukraine – or a dispute involving security matters which are outside WTO' jurisdiction but justifiable under Article XXI GATT – as, instead, contended by the Russian Federation. In this case, the Panel indeed concluded that it had jurisdiction in reviewing Article XXI GATT (*Ibid*., para 8.1) and, accordingly so, it proceeded in the analysis.

[979] US Cuban Liberty and Democratic Solidarity Act of 1996 (more famously known as Helms-Burton Act, or LIBERTAD), cited above. Some aspects of this Act have been already addressed in Section 6.1., Chapter II.

[980] In fact, although the EU (at that time, the EC) considered such Act to be inconsistent with many US obligations under the WTO (refer to both *United States – The Cuban Liberty and Democratic Solidarity Act*, Request for Consultations by the European Communities, WT/DS38/1 G/L/71 S/L/21 ORGANIZATION 13 May 1996; and *United States – The Cuban Liberty and Democratic Solidarity Act*, Request for the Establishment of a Panel by the European Communities, WT/DS38/2, 8 October 1996, pp. 2-3), the US argued that the Act did not fall within the WTO law' scope of application – and thus, of any WTO panel – since it mainly dealt with security issues with «incidental trade […] effects» rather than trade matters *per se*. In this sense, Dispute Settlement Body, *Minutes of Meeting* of 16 October 1996, in the Centre William Rappard, WT/DSB/M/24 26 November 1996, p. 7. Within this meeting, the Chairman drew attention to the EC communication with regard to its Request for the Establishment of a Panel (as per WT/DS38/2, of 8 October 1996). In this context, the US representatives declared themselves «surprised and concerned to find its tactical and foreign differences over Cuba raised before a multilateral trade forum» due to «the foreign policy and security concerns underpinning decades of US relations with Cuba, and in the light of the common interests shared with its European friends with regard to Cuba», thereby asking the EC to «reconsider whether to press their grievances over the US policy with regard to Cuba before the WTO» also due to the «the minimal trade and investment effects of the Libertad Act on overall European interests», p. 7. On this dispute, refer also to Viterbo A., *Extraterritorial Sanctions and International Economic Law*, in European Central Bank (ECB), *Building Bridges: Central Banking Law in an Interconnected World*, op. cited above, pp. 166-167.

[981] Although a Panel was created, the EC then requested its suspension in the frame of negotiations for a mutually agreed solution which, in the end, was not reached, such as it did not occur the resumption of the Panel whose jurisdiction lapsed in April 1998. Respectively, refer to, Communication by the DSB Chairman, *United States – The Cuban Liberty and Democratic Solidarity Act*, Constitution of the Panel Established at the Request of the European Communities, WT/DS38/3, 20 February 1997; Communication from the Chairman of the Panel, *United States – The Cuban Liberty and Democratic Solidarity Act*, WT/DS38/5, 25 April 1997; and, Note by the Secretariat, *United States – The Cuban Liberty and Democratic Solidarity Act*, Lapse of the Authority for Establishment of the Panel, WT/DS38/6, 24 April 1998.

[982] This event will be analysed in detail in the next Chapter of this dissertation, Chapter IV, Section 3.

[983] *United States – Certain Measures on Steel and Aluminium Products*, DS544, (known as "US – Steel and Aluminium Product").

[984] Request for Consultations by China, *United States – Certain Measures on Steel and Aluminium Products*, WT/DS544/1 - G/L/1222 - G/SG/D50/1, 9 April 2018. Refer also to the Corrigendum, Demande de consultations présentée par la Chine, *États-Unis – Certaines mesures visant les produits en acier et en aluminium*, Corrigendum, WT/DS544/1/Corr.1 - G/L/1222/Corr.1 - G/SG/D50/1/Corr.1, 15 juin 2018; and the Request for the establishment of a panel by China, *United States – Certain Measures on Steel and Aluminium Products*, WT/DS544/8, 19 October 2018. Requests to join consultation in the case were presented by India, Thailand, the Russian Federation, the EU, and Hong Kong. In this regard, respectively, Communication from India, Request to join consultations, *United States – Certain Measures on Steel and Aluminium Products*, WT/DS544/3, 18 April 2018; Communication from Thailand, Request to join consultations, *United*

determine essential security interests.[985] After significant delays,[986] the Panel issued its report in December 2022, rejecting the US claim of "self-judging"/"non-justiciability" and finding its measures unjustifiable under Article XXI.[987] The US appealed arguing that national security matters are political and not subject to WTO review,[988] yet, notably, the appeal cannot be heard due to the AB paralysis.[989] The broader "US - Steel and Aluminium Product saga" includes related complaints,

*States – Certain Measures on Steel and Aluminium Product*s, WT/DS544/5, 19 April 2018; Communication from the Russian Federation, Request to join consultations, *United States – Certain Measures on Steel and Aluminium Products*, WT/DS544/4, 19 April 2018; and, Communication présentée par la Fédération de Russie, Demande de participation aux consultations, *États-Unis – Certaines mesures visant les produits en acier et en aluminium*, Corrigendum, WT/DS544/4/Corr.1, 15 juin 2018; Communication from the European Union, Request to join consultations, *United States – Certain Measures on Steel and Aluminium Products*, WT/DS544/7, 23 April 2018; and, Communication from the Hong Kong, China, Request to join consultations, *United States – Certain Measures on Steel and Aluminium Products*, WT/DS544/6, 23 April 2018.

[985] In this regard, the US counterargument invoked Article XXI GATT arguing that it reflects how every WTO MS «retains the authority to determine for itself those matters that it considers necessary to the protection of its essential security interests» (Communication from the United States, *United States – Certain Measures on Steel and Aluminium Products*, WT/DS544/2, 17 April 2018).

[986] The Panel delayed its report multiple times for the complexity of the issue, for the busy schedule of the appointed panellists, and for the Covid pandemic. In this sense, respectively, Communication from the Panel, *United States – Certain Measures on Steel and Aluminium Products*, WT/DS544/10, 10 September 2019; and, Communication from the Panel, *United States – Certain Measures on Steel and Aluminium Products*, WT/DS544/11, 8 February 2021; Communication from the Panel, *United States - Certain Measures on Steel and Aluminium Products*, WT/DS544/12, 10 December 2021; Communication from the Panel, *United States – Certain Measures on Steel and Aluminium Products*, WT/DS544/13, 4 July 2022.

[987] Report of the Panel, *United States – Certain Measures on Steel and Aluminium Products*, WT/DS544/R, 9 December 2022. Respectively, para 7.128; and, Section 7.8.4 and para 7.149. Interestingly but unsurprisingly, within such report, parts of the Panel' finding and conclusions in the Russia - Traffic in Transit were mentioned. The findings and the conclusions of the Panel in Russia - Traffic in Transit were also mentioned in a WTO case pertaining the TRIPS Agreement. In this sense, Report of the Panel, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*, WT/DS567/R, 16 June 2020, paras 7.12, 7.230-7231, 7.238, 7.241, 7.243-7.244, 7.246-7.347, 7.249-2.252, 7.255, and 7.280-7.281. In para 7.241, the Panel importantly states that «the wording of Article 73(b)(iii) of the TRIPS Agreement is identical to that of Article XXI(b)(iii) of the GATT 1994, which was first interpreted by the panel in Russia – Traffic in Transit. 752 The panel's interpretation of Article XXI(b)(iii) in that dispute gave rise to an analytical framework that can guide the assessment of whether a respondent has properly invoked Article XXI(b)(iii) of the GATT 1994, or, for the purposes of this dispute, Article 73(b)(iii) of the TRIPS Agreement». Much debate over Article XXI GATT pertains the self-judging nature (or not) of this provision. Among others, Mitchell A.D., *Sanctions and the World Trade Organization*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, pp. 292-298; Pons J.F., *Self-Help and the World Trade Organization*, in Mengozzi P. (ed), *International Trade Law on the 50th Anniversary of the Multilateral Trade System*, op. cited above, pp. 55-112; Ruys T., *Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, pp.30-31; and, Tech O-C., *An Instrument of Extortion?: The National Security Exception under Art. XXI GATT*, Völkerrechtsblog, 31 January 2024, available at https://voelkerrechtsblog.org/an-instrument-of-extortion/, [last accessed on 28 October 2024]. Recent developments in case law, however, seems to have ruled the non-self-judging character of the provision.

[988] The appeal was formalised one month later. In this instance, the US formally argued that «issues of national security are political matters not susceptible to review or capable of resolution by WTO dispute settlement», as reflected by Article XXI GATT and, as such, «bringing issues of national security into the WTO is not only incompatible with the purpose of the WTO, a trade organization, but will not advance WTO Members' shared interests in the WTO as a forum for discussion and negotiation». In this sense, Notification of an appeal by the United States under Article 16 of the understanding on rules and procedures governing the settlement of disputes (DSU), *United States – Certain Measures on Steel and Aluminium Products*, WT/DS544/14, 30 January 2023.

[989] On the WTO crisis and AB's paralysis, refer to *supra*, section 2.1., of this Chapter III.

such as the US's "China - Additional Duties on Certain Products",[990] which will be further examined in Chapter IV of this dissertation.

Given the rising geopolitical tensions, the limited WTO case law, and the AB's paralysis, the use of Article XXI's security justification for trade-restrictive measures is likely to increase. Some scholars argue that WTO case law failed to develop a robust structure of international rules dealing with the security-trade nexus, leading some to describe it as a "broken interface".[991] Concerns over abuses[992] have prompted proposals for institutional reforms – such as a WTO "assessment mechanism", a domestic administrative procedure,[993] and, a WTO "National Security Committee" – [994] or best-practice guidelines;[995] while others challenge the compatibility of such measures with core GATT/WTO aims, and warn that Article XXI may be exploited for advancing economic and strategic interests leveraging on dominant position in the international scenario.[996]

The evolving landscape and the growing reliance on national security justifications – although often outside the WTO framework – raise crucial questions over the qualification and classification of those measures justifiable under Articles XX and XXI GATT. The following section, therefore, examines the legal classification of unilateral trade-restrictive measures that WTO MS seek to justify under these GATT provisions.

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[990] Among others, *China – Additional Duties on Certain Products from the United States*, DS558. Particularly to China, the US compliant "China - Additional Duties on Certain Products" precisely contested China's imposition of additional duties against the US through, among others, the Ministry of Commerce of China (MOFCOM)' notice on "Publicly Soliciting Opinions on US Imported Steel and Aluminum Products 232 Measures and Chinese Countermeasures" of March 2018. Other complaints were initiated by the US against certain countries' imposition of additional duties on certain products from the US; among those which will be further presented later, *European Union – Additional Duties on Certain Products from the United States*, DS559; *Mexico – Additional Duties on Certain Products from the United States*, DS560; *Turkey – Additional Duties on Certain Products from the United States*, DS561; *Russian Federation – Additional Duties on Certain Products from the United States*, DS566; and, others.

[991] Cohen H.G., *Toward Best Practices for Trade-Security Measures*, Journal of International Economic Law, Vol. 27, 2024, pp. 93-113, p. 95 more specifically argues that this «interface [*i.e.* the relationship between security and trade] at the WTO [is] broken».

[992] Mitchell A.D., *Sanctions and the World Trade Organization*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, pp. 285-286 curiously reports how Article XXI GATT has been described as possessing «the 'greatest practical importance so far, and … the greatest potential for future use and abuse'». Similarly, Hestermeyer H.P., *Article XXI GATT*, in Wolfrum R., Stoll P-T., Hestermeyer H.P. (eds), *WTO – Trade in Goods*, op. cited above, p. 572, para 3, arguing that a unilateral interpretation of Article XXI GATT could potentially undermine the GATT order.

[993] Liang Y., Peng Z., *Empirical Evolution of the WTO Security Exceptions Clause and China's Discourse*, in Zhang L., Tan X. (eds), *A Chinese Perspective on WTO Reform*, op. cited above, pp. 208-209.

[994] Lester S., Manak I., *A Proposal for a Committee on National Security at the WTO*, Duke Journal of Comparative & International Law, Vol. 30, 2020, pp. 267-281, pp. 273-280. Koskenniemi M., Leino P., *Fragmentation of International Law? Postmodern Anxieties*, op. cited above, p. 574 even hint to the creation of «sufficiently powerful institutions» to deal with non-economic concerns.

[995] Accordingly, this set of best practices should govern the reliance on the security justifications for trade measures, and the relationship and intersection of Articles XX and XXI GATT. In this regard, Cohen H.G., *Toward Best Practices for Trade-Security Measures*, op. cited above, pp. 98-99, pp. 101-102, pp. 104-113.

[996] Fulgenzi M., *La "guerra delle sanzioni": L'Unione Europea e la Federazione Russa nell'era dell'interdipendenza economica globale*, op. cited above, p. 173.

2.3.2. The legal categorisation of unilateral trade restrictive measures justifiable under Articles XX and XXI GATT

Before engaging with the doctrinal debate on the legal qualification of measures justifiable under Articles XX and XXI GATT, a preliminary distinction must be drawn between legally qualifying WTO-regulated measures and WTO-justifiable measures. The legal classification of WTO-regulated measures – such as the above-analysed anti-dumping, countervailing, safeguards and Article 23 DSU measures – differs substantially from that of measures justifiable under Articles XX and XXI GATT.

As a matter of fact, WTO-regulated measures are specifically governed by WTO provisions that regulate both their substantive and procedural aspects. Despite WTO law does not expressly qualify their legal nature, their regulatory framework – including their aims – is expressly defined within the WTO agreements. Differently, measures justifiable under Articles XX and XXI GATT are treaty-contained exceptions that, ex-post (Article XX) or ex-ante (Article XXI),[997] justify or authorise derogations from WTO obligations. Significantly, however, these provisions do not provide for specific tools to be adopted in defined circumstances – as is the case for WTO-regulated measures – rather they provide for "conditional authorisations" enabling WTO MS to derogate from WTO obligations when the conditions of the exceptions are met.

In this regard, Articles XX and XXI GATT provide grounds to justify trade control measures without specifying their precise nature. Some elements are, nonetheless, provided: aside from the measures' inconsistency with GATT obligations, Article XX subjects the measures to the chapeau's limits – *i.e.* prohibiting arbitrary, unjustifiable discriminatory, and disguised restrictions on trade – whereas Article XXI GATT contains no similar constraints, instead allowing «any action» a WTO MS «considers necessary» to protect its essential security interests. WTO case law provided limited guidance, requiring a 'plausible connection' between the measures and the alleged essential security interests.[998]

Undoubtedly, measures inconsistent with WTO obligations – even if potentially justifiable under Articles XX and XXI GATT – cannot qualify as acts of retorsions,[999] which are unfriendly but lawful conducts under international law. In US - Import Measures on Certain Products from the

[997] Article XX reads «Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: […]», thus the listed exceptions apply to measures which are a *prima facie* inconsistent with WTO law. Differently, Article XXI reads «Nothing in this Agreement shall be construed […] to prevent any contracting party from taking any action which it considers necessary for […]», thereby permitting WTO MS to act with measures whenever they "consider necessary" – thus, also before determining WTO inconsistency.
[998] Report of the Panel, *Russia – Measures Concerning Traffic in Transit*, op. cited above, para 7.138.
[999] In this regard, Schmidt J., *The Legality of Unilateral Extra-territorial Sanctions under International Law*, op. cited above, pp. 71-73.

European Communities, it was stated that «in WTO, countermeasures, retaliations and reprisals are strictly regulated and can take place only within the framework of the WTO/DSU».[1000] This reflects the view of the WTO as a self-contained regime which, thus, excludes any recourse to retorsions and countermeasures under general international law in response to violations of WTO agreements.[1001]

On a theoretical level, however, countermeasures under ARSIWA and measures justifiable under Articles XX and XXI GATT display both overlaps and significant differences. Both regimes engage with proportionality: however, Article 51 ARSIWA expressly requires proportionality to the injury suffered,[1002] whereas Article XX GATT provides solely for a general constraint and Article XXI contains no explicit requirement – with WTO case law referring only to a «minimum requirement of plausibility».[1003] Furthermore, while the exceptions under Articles XX and XXI GATT are centred on specific grounds and apply exclusively to trade measures with limited constraints under Article XX' chapeau;[1004] ARSIWA countermeasures are specifically aimed at inducing compliance – regardless of whether specific States interests are protected (*e.g.* public morals, plant life, or security interests) –, may extend beyond trade to other economic areas, and are subject to narrower – including the existence of an internationally wrongful act, respect for human rights, temporality.[1005]

Overall, measures that may find justification under Articles XX and XXI GATT occupy a distinct legal category, thereby not being fully qualifiable as retorsions, ARSIWA countermeasures, or 'sanctions' under the working-definition. Rather they are frameable as domestic measures justified by GATT exceptions – *i.e.* unilateral in the enactment but bound by WTO specific provisions and ex-post or ex-ante authorisations – as the classification test developed in Chapter IV graphically highlights. The following section briefly focuses on whether non-WTO countermeasures may be accommodated within the WTO system, or whether the DSU exclusivity precludes such possibility.

2.4. DSU exclusivity and the controversy over non-WTO countermeasures

Notably, the WTO dispute settlement system is widely regarded as self-contained, with its exclusivity anchored in Article 23 (1) DSU. The fact that DSU is to be read as an exclusive regime for dispute

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[1000] Report of the Panel, *United States – Import Measures on Certain Products from the European Communities*, WT/DS165/R, 17 July 2000, para 6.23, nota 100, p. 24.
[1001] Report of the Panel, *United States – Sections 301-310 of the Trade Act of 1974* (also known as "US-Section 301"), WT/DS152/R, 22 December 1999.
[1002] Section 4, Chapter II, analysed the proportionality requirement of ARSIWA countermeasures.
[1003] Report of the Panel, *Russia – Measures Concerning Traffic in Transit*, op. cited above, para 7.138.
[1004] Differently, the purpose of WTO countermeasures (*i.e.* countermeasures as per Article 23 DSU) is in fact to induce compliance, as for the ARSIWA ones, but the same cannot be said for the measures justifiable under Articles XX and XXI GATT in which such mention is absent. Interestingly, Charnovitz S., *Rethinking WTO Trade Sanctions*, op. cited above, p. 793 argues that this element renders WTO actions proper "sanctions", or – more technically – countermeasures, p. 802.
[1005] In this regard, refer to Section 4, Chapter II, where the characteristics and legal framework of ARSIWA countermeasures have been analysed.

settlement in trade was confirmed by the case US-Section 301, where the Panel interpreted Article 23 (1) DSU as prescribing a «general duty of dual nature» on WTO MS: to seek redress exclusively through the DSU for WTO inconsistencies;[1006] and to abide by DSU rules and procedures.[1007] As noted above, Articles 22 and 23 DSU operate as *lex specialis* within the meaning of Article 55 ARSIWA, thereby excluding reliance on customary international law of countermeasures for unilateral responses to breaches of WTO obligations.[1008]

However, controversy persists as to whether Article 23 (1) DSU is limited to redress violations of obligations under the covered agreements, or whether it also extends to countermeasures responding to breaches of non-WTO obligations (hereinafter, "non-WTO countermeasures"). It is, thus, questioned whether WTO law may justify unilateral trade measures adopted in response to non-WTO breaches and, thus, preclude their wrongfulness.[1009] Neither WTO case law nor State' practice provide clear guidance, whereas doctrinal debate remains divided into two main perspectives.[1010]

[1006] This, in «exclusion of any other system, in particular [the] system of unilateral enforcement of WTO rights and obligations», according to Report of the Panel, *United States – Sections 301-310 of the Trade Act of 1974*, cited above, para 7.43.

[1007] *Ibid*., para 7.43.

[1008] Taira S., *WTO Dispute Settlement and Trade Sanctions as Permissible Third-Party Countermeasures under Customary International Law*, International Community Law Review, Vol. 26, 2024, pp. 151-186, p. 170. Similarly, Azaria D., *Trade Countermeasures in Response to Breaches of Obligations outside the WTO*, op. cited above, p. 409. Other authors more drastically deduce that the character of the WTO countermeasures to be an example of *lex specialis* indicates that «WTO law departs from customary international law rather than being explained by it»: in this sense, Iacovides M.C., *The Law and Economics of WTO Law: A Comparison with EU Competition Law's 'More Economic Approach'*, op. cited above, p. 252. As mentioned above, the DSU is generally recognised as special rule of international law in the meaning of Article 55 ARSIWA which, notably, establishes that ARSIWA' articles «do not apply where and to the extent that the conditions for existence of an internationally wrongful act of the content or implementation of the international responsibility of a State are governed» by such *lex specialis* (Article 55 ARSIWA). Scholarly debates inquire whether WTO law is a fully self-sufficient *lex specialis* solely affected by general international law to coherently apply the frameworks, or whether WTO law always includes all the general international law provisions. In this regard, Marceau G., Wyatt J., *Dispute Settlement Regimes Intermingled: Regional Trade Agreements and the WTO*, op. cited above, p. 74. Interestingly, the ILC ARSIWA Commentary, Article 55, para 5 clearly specifies that Article 55 ARSIWA was designed to deal with both «"strong" forms of *lex specialis*» (*i.e.* self-contained regimes) and those «"weaker" such as specific treaty provisions on a single point».

[1009] Azaria D., *Trade Countermeasures in Response to Breaches of Obligations outside the WTO*, op. cited above, p. 396.

[1010] Perhaps more clearcutting, part of the doctrine also argues that Articles XX and XXI GATT are for many reasons «more lenient and attractive» than customary international law provisions on necessity defence and, thus, the discussions on the inclusion or not of necessity under customary international law is «of little practical relevance». Of this view, Hestermeyer H.P., *Article XXI GATT*, in Wolfrum R., Stoll P-T., Hestermeyer H.P. (eds), *WTO – Trade in Goods*, op. cited above, p. 592, para 41. On the concept of necessity in international law and its interconnection with WTO law, among others, Woldeab Andemariam S., *The Concept of Necessity in International Law and the World Trade Organization*, Brill / Nijhoff, 2024.

Briefly, one interpretation – relying on the wording of Article 23(1) DSU and the WTO's character of self-contained regime –[1011] contends that non-WTO countermeasures are excluded,[1012] with some scholars consider them permissible solely when authorised by the DSB or justified under Articles XX and XXI GATT.[1013] In this perspective, WTO silence is read as excluding customary

[1011] Accordingly, Article 23 (1) DSU, by explicitly mentioning «[under/of] the covered agreements», reflects the WTO MS' attitude against unilateral trade measures. Thus, according to some authors, WTO law would exclude unilateral determinations of breaches and countermeasures outside the WTO as Article 23 DSU envisage the WTO regime as a self-contained one, or according to others, directly prohibit unilateral trade measures *per se*, irrespectively of the breach they are responding to. Respectively, Report of the Study Group of the International Law Commission (finalized by Koskenniemi M.), *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, op. cited above, p. 71; and, Marceau G., Wyatt J., *Dispute Settlement Regimes Intermingled: Regional Trade Agreements and the WTO*, op. cited above, p. 76. Slightly similar, Watson J., *The World Trade Organisations and Unilateral Sanctions: Prohibited or Possible?*, in Subedi S.P. (ed), *Unilateral Sanctions in International Law*, op. cited above, pp. 185-206, p. 206 argues that «unilateral economic sanctions are in themselves non-permissible in the WTO according to the DSU», but that some flexibility is guaranteed by Articles XX and XXI GATT under specific circumstances. Nonetheless, the argument according to which the WTO is a self-contained regime and, thus, excludes the application of general public international law, is contested by some authors as not sufficient to provide an answer to the issue, aside from being also refuted by WTO case law. In this regard, Ruys T., *Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, p. 44. Similarly, Hahn M.J., *Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception*, op. cited above, p. 599 which at pp. 598-599 provides an analysis of whether the WTO can be considered as a self-contained regime and the impact on the application of general international law in the system; and, among others, the abovementioned Shrimps – Turtles case (*i.e.* Report of the Appellate Body, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, AB-1998-4, WT/DS58/AB/R, 12 October 1998 and, Report of the Appellate Body, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Recourse to Article 21.5 Of the DSU by Malaysia, AB-2001-4, WT/DS58/AB/RW, 22 October 2001).

[1012] In this sense, the absence of any reference – within Articles XX and XXI GATT and Article 23 DSU – to the possibly of adopting countermeasures in response to non-WTO violations could mean that solely those Articles might justify violations of GATT without need for further justifications deriving from customary international law. Some authors argue that the WTO structure *per se* (and the "totality" of GATT itself) excludes the application of countermeasures of general international law, also due to the WTO Agreements' characterisation of *leges speciales* which, accordingly, contracted out the general customary international law. In this regard, Marceau G., Wyatt J., *Dispute Settlement Regimes Intermingled: Regional Trade Agreements and the WTO*, op. cited above, pp. 76-77. Moreover, according to the authors, at p. 74, the opinion that any countermeasures taken in response to any breach of obligations – irrespectively of a reference to WTO law – is justifiable by the exceptions granted by WTO law (because WTO law would include general international law on countermeasures) is a very «stringent imposition» on the WTO legal system, perhaps even contrary to the GATT drafters' intentions. Refer also, among others, Hestermeyer H.P., *Article XXI GATT*, in Wolfrum R., Stoll P-T., Hestermeyer H.P. (eds), *WTO – Trade in Goods*, op. cited above, p. 591, para 41 and note 143. Slightly different, Picone P., Ligustro A., *Diritto dell'organizzazione mondiale del commercio*, op. cited above, pp. 667-668 argue that the self-contained nature of WTO is to be understood not as an absolute exclusion for WTO MS to self-defence (*autotutela*) under general international law but, rather, as a conditioned exclusion in the sense that exclusion applies whenever the existence and functioning of the mechanism constitutes a valid substitute to the instruments of self-defence (thus, it would not work in case of "structural failure" of the system).

[1013] Boisson de Charzournes L., *Les contre-mesures dans les relations internationals économiques*, op. cited above, pp. 184-185, by qualifying the GATT system as not fully auto-sufficient, argues that while (as per Article 23 (2) DSU) breaches of WTO obligations are specifically delimited and regulated, Article XX and XXI GATT enable the justification of measures taken in response to violations of international law not covered by the GATT. Focusing on Article XXI GATT, some scholars highlight that such Article excludes the use of other unilateral measures of self-enforcement of international law (in this regard, Hahn M.J., *Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception*, op. cited above, pp. 603-604. The author also states that Article XXI GATT is a reference to the law of reprisals, at p. 593. Similarly, Picone P., Ligustro A., *Diritto dell'organizzazione mondiale del commercio*, op. cited above, p. 673). Other authors, instead, focus more strictly on the DSU authorisation' requirement by arguing that measures in response to the violation of non-WTO obligations are *prima facie* excluded by the possible justifications of Article XX GATT, unless a specific authorisation under the GATT has been issued (Bartels L., *Article XX of GATT and the Problem of Extraterritorial Jurisdiction: The Case of Trade Measures for the Protection of Human Rights*, op. cited above, pp. 393-394, p. 395). In turn, countermeasures are available solely when they are multilaterally authorised by the WTO (Mavroidis P.C., *Remedies in the WTO Legal System: Between a Rock and a Hard Place*, op. cited above, p. 766. Similarly, Bartels L., *Article XX of*

countermeasures from the WTO system. The opposing view holds that such silence cannot amount to an exclusion,[1014] with both Article 23 DSU and Article XXI GATT not overlapping with and, thus, not excluding customary international law on countermeasures.[1015] Excluding non-WTO

GATT and the Problem of Extraterritorial Jurisdiction: The Case of Trade Measures for the Protection of Human Rights, op. cited above, pp. 393-394, p. 395, and p. 402), and as it is prohibited for WTO MS to take countermeasures outside the WTO system to protect their WTO rights, the adoption of measures aimed at protecting other non-WTO rights should be likewise prohibited. In this latter regard, Bartels L., *Article XX of GATT and the Problem of Extraterritorial Jurisdiction: The Case of Trade Measures for the Protection of Human Rights*, op. cited above, p. 396 and p. 402. The author then identifies a possible exception enabling such measures if authorised by an agreement – which, however, should not modify the rights and obligations of third parties violating the *pacta tertiis rule*. Solely in this case, accordingly, measures might be enacted as countermeasures protecting non-WTO rights and effectively being justifiable under Article XX GATT, provided their compliance with the Article' provisions. See pp. 402-403. Curiously, the author, although publishing the article in 2002, discusses how a hypothetical paralysis of the WTO system (effectively then occurred years later) would not only lead to the enactment of multiple countermeasures outside of the WTO framework but also, possibly, constitute a sufficient justification to their adoption (pp. 393-394, and pp. 395-396). Similarly, Picone P., Ligustro A., *Diritto dell'organizzazione mondiale del commercio*, op. cited above, pp. 667-668. Accordingly, solely those non-WTO countermeasures which are both WTO consistent and justifiable under the Articles XX and XXI GATT (*e.g.*, those countermeasures adopted in response to breaches of specific international law' obligations, such as human, animal, plant life or health as per Article XX GATT) might be included within the WTO framework. Of this regard, Bartels L., *Article XX of GATT and the Problem of Extraterritorial Jurisdiction: The Case of Trade Measures for the Protection of Human Rights*, op. cited above, pp. 394-396; Ehrenberg D., *The Labor Link: Applying the International Trading System to Enforce Violations of Forced and Child Labor*, Yale Journal of International Law, Vol. 20, no. 6, 1995, pp. 361-471, pp. 394-395; and, Soprano R., *WTO Trade Remedies in International Law: Their Role and Place in a Fragmented International Legal System*, op. cited above, p. 59. However, critics to this approach argue that the «restrictive thresholds of necessity in GATT Article XX (a)-(b) and of proportionality in that Article's chapeau make such an option unwelcoming». In this regard, Azaria D., *Trade Countermeasures in Response to Breaches of Obligations outside the WTO*, op. cited above, p. 393. Moreover, extending the WTO bodies' jurisdictions would create many overlaps and clashes with tribunals and implementation organs, according to Koskenniemi M., Leino P., *Fragmentation of International Law? Postmodern Anxieties*, op. cited above, p. 574. Overall, according to this strand of doctrine, countermeasures in response to non-WTO breaches could not be included within the WTO system since Article 23 DSU expressly or implicitly prohibits such unilateral responses, and since any WTO countermeasures should anyway be either authorised by the DSB or justified by Articles XX and XXI GATT' exceptions. For a summary of these «opposing theories» (and of the «affirmative» ones too), Taira S., *WTO Dispute Settlement and Trade Sanctions as Permissible Third-Party Countermeasures under Customary International Law*, op. cited above.

[1014] Accordingly, GATT' silence over the issue does not signify the non-recognition and exclusion of this possibility. Of this view, Azaria D., *Trade Countermeasures in Response to Breaches of Obligations outside the WTO*, op. cited above, p. 402; Pons J.F., *Self-Help and the World Trade Organization*, in Mengozzi P. (ed), *International Trade Law on the 50th Anniversary of the Multilateral Trade System*, op. cited above, p. 98; Ruys T., *Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework*, in van den Herik L. (ed), *Research Handbook on UN Sanctions and International Law*, op. cited above, p. 44; and, Taira S., *WTO Dispute Settlement and Trade Sanctions as Permissible Third-Party Countermeasures under Customary International Law*, op. cited above, p. 181. As some authors report, the ICJ itself in its Namibia Case ruled that «the silence of a treaty as to the existence of such a right cannot be interpreted as implying the exclusion of a right which has its source outside of the treaty, in general international law, and is dependent on the occurrence of circumstances which are not normally envisaged when a treaty is concluded». Refer to ICJ Reports, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, para 96. In this regard, Azaria D., *Trade Countermeasures in Response to Breaches of Obligations outside the WTO*, op. cited above, p. 402; and, Pons J.F., *Self-Help and the World Trade Organization*, in Mengozzi P. (ed), *International Trade Law on the 50th Anniversary of the Multilateral Trade System*, op. cited above, p. 98.

[1015] Azaria D., *Trade Countermeasures in Response to Breaches of Obligations outside the WTO*, op. cited above, p. 409 contends that although no express mention of the possibility of non-WTO measures is present within DSU provisions, DSU' countermeasures against WTO-breaches are not found to overlap with the countermeasures' functions under customary international law. Consequently, Article 23 DSU too does not exclude the application of customary international law on countermeasures against non-WTO breaches, according to Taira S., *WTO Dispute Settlement and Trade Sanctions as Permissible Third-Party Countermeasures under Customary International Law*, op. cited above, p. 185. Also GATT' security exception is found not to overlap with (or being the cause of the exclusion of) non-WTO countermeasures as they present essentially different characteristics. Differences between the instrument of

countermeasures from the WTO system may potentially undermine the willingness of States to rely on WTO dispute settlement and the integrity of enforcement of international law; weaken the capacity of small States to enforce international obligations; encourage States to rely on other unilateral tools; and aggravate international relations.[1016] This interpretation, though criticised,[1017] further notes that

countermeasures by ARSIWA and Articles XX and XXI GATT will be later presented. On the non-overlap of non-WTO countermeasures and Article XXI GATT, Azaria D., *Trade Countermeasures in Response to Breaches of Obligations outside the WTO*, op. cited above, p. 399 and p. 402; and, Hahn M.J., *Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception*, op. cited above, pp. 602-603. Differently, Hestermeyer H.P., *Article XXI GATT*, in Wolfrum R., Stoll P-T., Hestermeyer H.P. (eds), *WTO – Trade in Goods*, op. cited above, pp. 591-592, para 41, argues that both Articles XX and XXI GATT do, in fact, overlap to some extent with the necessity defence under customary international law. Specifically to Article XXI GATT case it is argued that the wording of Article XXI (b) (iii) GATT of «emergency in international relations» to refer to concepts of general international law and, as such, to cover cases where measures are enacted under such international law, thereby possibly refer to the law of reprisals (in this regard, Hahn M.J., *Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception*, op. cited above, p. 593 and p. 597. The author at p. 594, interestingly, argues that such possibility is compatible with GATT solely whenever the targeted State has committed an «international delict, *i.e.* either a violation of a treaty or a customary law obligation». Accordingly, this limitation is reconciled with the Article XXI GATT' purpose). In this regard, Article XXI GATT would effectively enable the States' use of ARSIWA' countermeasures, since Article XXI GATT' measures would respond to international wrongful acts and thus allow States to «take effective counter-measures in security matters» (Ibid., p. 594 and p. 597. To be precise, the author does not specifically refer to the ARSIWA' provisions, having wrote such contribution in Spring 1991. Nonetheless, the author specifically writes: «the thrust of the security exception is to allow reaction to internationally wrongful acts in times of "international crisis" through economic means unrestrained by non-discrimination principles»). By contesting the argument according to which Article XXI GATT would exclude the possibility for States to enact countermeasures under general international law against non-WTO breaches, some authors debate how such view would imply the WTO MS' renounce to their ability and power to enact countermeasures under general international law (the reference is to Pons J.F., *Self-Help and the World Trade Organization*, in Mengozzi P. (ed), *International Trade Law on the 50th Anniversary of the Multilateral Trade System*, op. cited above, p. 97 and p. 112). However, accordingly, this is argued to be unlikely, as the GATT' security exception «does not seem […] sufficient to replace the operability of general international law» (*Ibid*., p. 97. Similarly, Hahn M.J., *Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception*, op. cited above, p. 599 arguing that Article XX GATT' function is «to limit the jurisdiction of the General Agreement in extraordinary time. [Thus,] This systemic self-restraint excludes an understanding of article XXI(b)(iii) as an exhaustive provision which would have left no room for the application of general international law»). The same activity of justifying an Article XXI GATT' measure as countermeasure under general international law is unnecessary, since already the GATT itself recognises its lawfulness inasmuch as it relates to one of the Article' exceptions, as discussed by Pons J.F., *Self-Help and the World Trade Organization*, in Mengozzi P. (ed), *International Trade Law on the 50th Anniversary of the Multilateral Trade System*, op. cited above, p. 97. Also given that countermeasures as per general international law might justify by itself the suspension of WTO obligations, the WTO does not hinder the implementation of general international law on countermeasures against an internationally wrongful act «alien to the system», according to *Ibid*., p. 99. Similarly, Venturini G., *Comments*, in Mengozzi P. (ed), *International Trade Law on the 50th Anniversary of the Multilateral Trade System*, op. cited above, p. 147.

[1016] Azaria D., *Trade Countermeasures in Response to Breaches of Obligations outside the WTO*, op. cited above, p. 399 and p. 406. Instead, the risk of unpredictability and politicisation of trade would be prevented by the strict provisions of countermeasures under customary international law and by the scrutiny of the WTO DSB, thereby avoiding an excessive expansion of the possible uses and interpretations of the GATT' exceptions (*Ibid*., pp. 396-398, pp. 412-415). Additionally, others discuss that the non-acceptance of customary international law of countermeasures as applicable law within the WTO might lead to the situation in which «a measure that is lawful in the macrocosm of the international legal system will end up being unlawful in the microcosm of the WTO». In this latter sense, Taira S., *WTO Dispute Settlement and Trade Sanctions as Permissible Third-Party Countermeasures under Customary International Law*, op. cited above, p. 185. To be precise, the author concludes this argument with reference to third-party countermeasures.

[1017] Critics to this approach argue that it misses the distinction between treaties that grant the right to take action in specific conditions, and those that instead establish the parties' freedom to enact measures in response to violation of obligations (Bartels L., *Article XX of GATT and the Problem of Extraterritorial Jurisdiction: The Case of Trade Measures for the Protection of Human Rights*, op. cited above, p. 396 which for this latter case presents the Article XIV of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). This Article, denominated "Effect on domestic legislation and international conventions", at para 1, guarantees that «The provisions of the present Convention shall in no way affect the right of Parties to adopt: (a) stricter domestic measures regarding the conditions for trade, taking, possession or transport of specimens of species included in Appendices I, II and III, or the complete prohibition thereof;

customary international law on countermeasures constitutes secondary norm applicable by WTO panels and AB, as in fact it occurred in certain cases.[1018]

Aside from this theoretical debate, both EU and US instruments have occasionally disputed DSU exclusivity and highlighted the WTO tensions. In this respect, one of EU proposals in response to the AB's blockage concerned the adoption of trade measures based on Article 207 TFEU as countermeasures under customary international law for WTO breaches where a party obstructs and fails to cooperate in dispute settlement procedures.[1019] Being criticised,[1020] the final Regulation did

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or (b) domestic measures restricting or prohibiting trade, taking, possession or transport of species not included in Appendix I, II or III»). Moreover, critics also rely on a historical perspective highlighting how Article 86 of the Havana Charter of the International Trade Organisation (ITO) – denominated "Relations with the United Nations – specifically required UN authorisation for unilateral measures on political matters, thereby seeming to confirm that the drafters' intentions were not those of granting such unilateral right to adopt measures outside of the UN and, thus, without WTO authorisation (Refer to *Ibid*., pp. 397-398. To be precise, Article 86 (3) of the Havana Charter of the International Trade Organisation (ITO) reads as follow: «The Members recognize that the Organization should not attempt to take action which would involve passing judgment in any way on essentially political matters. Accordingly, and in order to avoid conflict of responsibility between the United Nations and the Organization with respect to such matters, any measure taken by a Member directly in connection with a political matter brought before the United Nations in accordance with the provisions of Chapters IV or VI of the United Nations Charter shall be deemed to fall within the scope of the United Nations, and shall not be subject to the provisions of this Charter»). On the contrary, *inter alia*, Azaria D., *Trade Countermeasures in Response to Breaches of Obligations outside the WTO*, op. cited above, pp. 409-410. Critics to this approach are present also in Hahn M.J., *Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception*, op. cited above, pp. 612-614, these strongly disagree with such approach by, firstly, emphasizing how the negotiations of the Havana Charter are not preparatory works of the GATT and, secondly, that no negotiations were effectively conducted on its Article 86, thereby rendering impossible to perform an analysis on the States' intentions. In any case, the interpretation of Article 86 as enabling unilateral measures solely after UN authorisation does not consider the now-known veto problem of the UNSC (perhaps because the negotiations of the Havana Charter occurred in 1948 which were also the initial years of the UN and UNSC' functioning) which would paralyse any possibility of States to react to breaches of obligations, according to Azaria D., *Trade Countermeasures in Response to Breaches of Obligations outside the WTO*, op. cited above, p. 410. In this sense, it is argued – *Ibid*., p. 394 and pp. 397-399 – that such historical claim should not so «easily presume» the WTO MS' intentions to prohibit countermeasures for non-WTO breaches, as this might «undermine the enforcement and normative integrity of international law outside the WTO» which, instead, would be enabled and strengthened by recognising non-WTO countermeasures also within the system of WTO.

[1018] Among others, the mentioned above WTO case law of US-Line Pipe of 2002 (*i.e.* Report of the Appellate Body, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, AB-2001-9, WT/DS202/AB/R, 15 February 2002), para 259, where the rules of general international law on state responsibility are recalled. Similarly, refer also to the previous WTO case US - Cotton Yarn of 2001 (*i.e.* Report of the Appellate Body, *United States – Transitional Safeguard Measures on Combed Cotton Yarn from Pakistan*, AB-2001-3, WT/DS192/AB/R, 8 October 2001), para 120, specifically mentioning the rules of general international law on state responsibility too. In this regard, Taira S., *WTO Dispute Settlement and Trade Sanctions as Permissible Third-Party Countermeasures under Customary International Law*, op. cited above, p. 185. Moreover, especially recent States' practice – constituted by heavy reliance on measures restricting trade absent a WTO authorisation (undoubtedly also due to its paralysis) – might support the view that prior DSB authorisation is not an essential issue for WTO MS which might prefer a 'negative consensus' approach, and that trade measures in response of breaches of non-WTO obligations are generally accepted, although, curiously, sometimes justified under the Articles XX and XXI GATT.

[1019] European Commission, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 654/2014 of the European Parliament and of the Council concerning the exercise of the Union's rights for the application and enforcement of international trade rules, COM/2019/623 final, 12.12.2019 more precisely mentioned those cases where a party is responsible and «fails to cooperate in good faith in the dispute settlement procedures, thereby preventing the injured party from completing [the] procedures».

[1020] Critics to this proposal mainly focused on possible increases of unpredictability and on the jeopardization of multilateralism. In this regard, Azaria D., *Trade Countermeasures in Response to Breaches of Obligations outside the WTO*, op. cited above, p. 393. In general, the EU has continuously show support to multilateralism and multilateral solutions, as highlighted also in Sections 1.5. and 6.2. of Chapter II.

not mention countermeasures or customary international law, instead enabling suspensions of concessions and obligations when binding dispute settlement is unavailable.[1021]

The Anti-Coercion Instrument – analysed in detail in Chapter II of this dissertation – was adopted to enable «the expeditious adoption of countermeasures»,[1022] seemingly justifying the enactment of its response measures (URM) on the basis of ARSIWA –[1023] in so much as it is argued that WTO-inconsistent URM would be rendered lawful under Articles 22 and 49 ARSIWA.[1024] While the ACI Preamble acknowledges consistency with international law and support for the WTO and its dispute settlement system, the instrument does not expressly deal with WTO violations, being rather aimed at deterring and countering economic coercion.[1025] Although it is also acknowledged that certain third-country measures may simultaneously constitute economic coercion and breaches of WTO Agreements,[1026] it is likewise specified that ACI is directed at addressing coercive behaviours

[1021] The EU it is now enabled to «expeditiously suspend concessions or other obligations under international trade agreements, including regional or bilateral agreements, if effective recourse to binding dispute settlement is not possible because the third country does not cooperate in making such recourse possible», according to Regulation (EU) 2021/167 of the European Parliament and of the Council of 10 February 2021 amending Regulation (EU) No 654/2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules, February 2021, Preamble, para 6.

[1022] 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, cited above.

[1023] Of this opinion is Furculita C., *Does EU's Anti-coercion Instrument Violate Art. 23 of the DSU?*, op. cited above. On the relationship between ACI and the instrument of countermeasures, refer also to Section 6.2., Chapter II. Accordingly, URM shall adhere with ARSIWA' provisions, according to Nguyen A., *The Anti-Coercion Instrument – The Practical Repercussions of the ACI's Entry into Force (Part II)*, op. cited above.

[1024] Nguyen A., *The Anti-Coercion Instrument – The Practical Repercussions of the ACI's Entry into Force (Part II)*, op. cited above. This is so because when a URM is adopted, the determination of the existence of economic coercion by the Commission and Council would have been already assessed, thereby assuming that such measure are countermeasures against an internationally wrongful act (*i.e.* economic coercion) committed by a third state. Notably, as also mentioned in the Annex I of the ACI, URM can consist in the non-performance of applicable international obligations against the country found to implement economic coercion against the EU and its MS. This non-performance would *per se* consistent with Article 49 (2) ARSIWA, specifically establishing that «countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State». As the ACI preamble specifies, the URM might also constitute non-performance of international obligations «insofar as the economic coercion by the third country constitutes an internationally wrongful act» (Preamble ACI, para 13).

[1025] ACI Preamble, para 12, indeed states that «any action undertaken by the Union on the basis of this Regulation should be consistent with international law, including customary international law. Among [which], the Agreement establishing the World Trade Organization (WTO) is the cornerstone of the rules-based multilateral trading system» and, as such, the EU should «continue to support that system, with the WTO at its core, and to use its dispute settlement system where appropriate». Article 1 (2) ACI instead helps clarifying that the ACI does not necessarily deal with cases of violations of WTO, being instead more generally aimed at deterring and counteracting – as a last resort – economic coercion with the adoption of URM.

[1026] European Commission, *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 {COM(2021) 775 final} - {SEC(2021) 418 final} - {SWD(2021) 372 final}, Commission Staff Working Document, SWD(2021) 371 final, 08 December 2021 p. 23 and p. 43.

not governed by WTO law,[1027] thereby seeking to defend EU rights against coercive interference rather than to respond to WTO violations.[1028]

Debate persists regarding whether ACI measures may be challenged before the WTO DSB, and whether they are compatible with DSU. The Commission maintains that WTO litigation might arise solely when an EU countermeasure breaches WTO agreements,[1029] arguing that coercion in breach of customary international law is not a possible claim to be submitted to the WTO DSB.[1030] The fact that the ACI enables unilateral determinations of coercion and non-performance of WTO obligations potentially circumvent Article 23 DSU procedural provisions which, indeed, prohibits unilateral determinations.[1031] Moreover, *prima facie*, ACI constitutes also violation of the principle of exclusivity of the WTO DSB, as established under Article 23 DSU.[1032] It seems thus reasonable to argue that any potential URM consisting in non-performance of a WTO obligation might be contested within the DSB – whose compulsory and exclusive jurisdiction (as per Article 23 DSU) fall upon the EU and its MS.[1033] In this sense, it is interesting to note that the EU did not mention Articles XX and

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[1027] European Commission, *Questions and Answers Regarding the Anti-Coercion Instrument*, available at https://policy.trade.ec.europa.eu/enforcement-and-protection/protecting-against-coercion/qa-regarding-anti-coercion-instrument_en, [last accessed on 27 October 2024]. Similarly, European Commission, *Impact Assessment Report*, p. 23.

[1028] In this sense, the European Commission, *Questions and answers regarding the Anti-Coercion Instrument*, cited above, specifies that ACI does not respond to WTO-breaches (but rather to breaches of international law) with the imposition of WTO countermeasures (*i.e.* countermeasures that respond to breaches of WTO rules). The European Commission, *Impact Assessment Report*, p. 23 instead precises that the purpose of ACI, thus, «is the EU's defence not against the infringements of its rights under the WTO Agreement, but of its right, distinct under international law, that third countries do not coercively interfere in the EU's internal or external affairs».

[1029] European Commission, *Impact Assessment Report*, p. 41 continues that WTO Agreements cannot be invoked to oppose these countermeasures in so far as they are compatible with customary international law.

[1030] European Commission, *Impact Assessment Report*, p. 79. Thus, the WTO system is not an «effective and suitable forum for debates about the disrespect of non-WTO rules of international customary law» which, instead, the ACI aims to target (*Ibid*., p. 43). This, in turn, will not affect or challenge the «multilateralism in trade [since] trade rules do not cover [the] exact question» raised by the ACI (*Ibidem*). The importance for the EU to support multilateralism has been analysed also in relation with its approach to international law and the US one. In this regard, refer to Sections 5 and 6.2., Chapter II of this dissertation.

[1030] European Commission, *Impact Assessment Report*, p. 79.

[1031] As a matter of fact, while Article 23 (2) DSU specifically establishes that WTO MS shall not make unilateral determinations over the occurrence or not of a violation, within ACI the Commission and the Council do determine unilaterally whether coercion has occurred (Article 2 ACI).

[1032] As mentioned above, Article 23 (1) DSU prescribes the DSB' exclusivity of jurisdiction – excluding other systems of «unilateral enforcement of WTO rights and obligations» (Report of the Panel, United States – Sections 301-310 of the Trade Act of 1974, cited above, para 7.43) – and compliance with its procedures and rules. ACI' potential enforcement of (also) WTO rights and obligations in a different forum than the DSB could, according to some authors, consist in a «circumvention of procedural obligations under Art. 23 DSU». In this latter sense, Nguyen A., *The Anti-Coercion Instrument – The Practical Repercussions of the ACI's Entry into Force (Part II)*, op. cited above. On the potential violation of the principle of DSU exclusivity, also Silingardi S., *Il nuovo strumento anti-coercizione europeo e il futuro assetto dei rapporti tra l'Unione Europea e l'organizzazione mondiale del commercio*, op. cited above, p. 667 which, interestingly, at pp. 668-669 also suggests that the EU choice to suspend the Panel regarding the China-Lithuania case – explored in detail in Chapter IV of this dissertation – is attributable to the "worries" of the EU that an "unfavourable" precedent on the compatibility of ACI with WTO law could have been ruled.

[1033] Notably, this is not pacific within doctrinal debate. Furculita C., *Does EU's Anti-coercion Instrument Violate Art. 23 of the DSU?*, op. cited above, contends that Article 23 (1) DSU would not be applicable to the ACI, unless the EU URM would be aimed at seeking redress for a WTO violation, despite, in such a case, prior DSB' authorisation could be required. Nguyen A., *The Anti-Coercion Instrument – The Practical Repercussions of the ACI's Entry into Force (Part II)*, op. cited

XXI GATT as possible justifications of ACI's URM, but rather referred to the framework of general international law, more precisely recalling the ARSIWA framework.[1034] Nonetheless, also this choice does not seem to prevent the mandatory path of WTO DSB since, as established Article 50 (2) (a) ARSIWA, a State enacting countermeasures should anyway fulfil its obligation under any dispute settlement procedure.[1035] Overall, ACI is read also as a response to the WTO crisis – and especially of its AB paralysis –[1036] and it is thus argued that the compatibility of ACI (or better, of URM) with WTO law remains a case-by-case assessment.[1037]

Notably, no URM measures have yet been adopted and, thus, litigated within the WTO system. On the contrary, numerous WTO complaints and panel reports have addressed measures adopted under US Sections 232 US Trade Expansion Act and 301 US Trade Act, challenging their compatibility with WTO law and DSU. Section 232 measures were widely contested in 2018,[1038] with – as noted above – China arguing that they amounted to safeguard measures adopted without complying with the relevant procedures,[1039] and the US defending these by invoking Article XXI

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above instead discusses that – although the EU could always justify URM as countermeasures under customary international law and, thus, not as WTO-related measures – this argument is perceived as partially unconvincing due to the EU non-exemption of its procedural WTO obligations under Article 23 DSU. Additionally, while it would be possible to argue that the cases of economic coercion tackled by ACI might 'supersede' or not consist in WTO violations, the Annex I ACI specifically mentions the non-performance of EU obligations in every listed measure, thus also potentially implying the EU (and its MS) WTO obligations.

[1034] In this respect, Silingardi S., *Il nuovo strumento anti-coercizione europeo e il futuro assetto dei rapporti tra l'Unione Europea e l'organizzazione mondiale del commercio*, op. cited above, pp. 670-673 which highlights the fact that the EU's distinction between WTO violations and violations of international law (conceived as "most important") seems «excessive» and potentially undermines the integrity of the multilateral trade system. Accordingly, this EU choice reflects the fact the organisation's desire to link ACI to general international law rather than to the WTO law system (p. 674) which nonetheless, as noted by the author, provokes serious compatibility issues also with regard to Article 50 (2) (a) ARSIWA.

[1035] Article 50 (2) (a) ARSIWA established that «A State taking countermeasures is not relieved from fulfilling its obligations: (a) under any dispute settlement procedure applicable between it and the responsible State». In this respect, Silingardi S., *Il nuovo strumento anti-coercizione europeo e il futuro assetto dei rapporti tra l'Unione Europea e l'organizzazione mondiale del commercio*, op. cited above, pp. 674-675.

[1036] Interestingly, Silingardi S., *Farewell to the Appellate Body: Reflections on Economic Statecraft and International Trade*, op. cited above, p. 672, suggests that ACI's adoption is «understandable, even if it contravenes various aspects of WTO rules», as it has become evident the «inadequacy of responses based on existing international trade rules and the guarantees offered by the DSS». Also, op. cited above, pp. 683-684, and p. 677 where the author notices a "conditional derogation" (lit. «deroga condizionata»).

[1037] Nguyen A., *The Anti-Coercion Instrument – The Practical Repercussions of the ACI's Entry into Force (Part II)*, op. cited above argues that ACI' compatibility with DSU' provisions depend on whether the issue at hand relates to and affects WTO matters.

[1038] Solely between April and August 2018, Section 232 US Trade Expansion Act had been challenged within the WTO by Canada, China, the EU, India, Mexico, Norway, Russian Federation, Switzerland, and Turkey, with some of these States also introducing trade restrictions in response to the US's firstly introduced ones. A description of this dispute, the parties involved, and the WTO case laws will be analysed further in this dissertation in Chapter IV.

[1039] Request for Consultations by China, *United States – Certain Measures on Steel and Aluminium Products*, WT/DS544/1, G/L/1222, G/SG/D50/1, 9 April 2018, part B. China contested Section 232' measures as inconsistent with (i) Articles XIX:1(a), XIX:2 of the GATT 1994 and Articles 2.1, 2.2, 4.1, 4.2, 5.1, 7, 11.1(a), 12.1, 12.2 and 12.3 of the Agreement on Safeguards; (ii) Article II:1(a) and (b) of the GATT 1994; (iii) Article I:1 of the GATT 1994; and (iv) Article X:3(a) of the GATT 1994.

GATT.[1040] Section 301 measures – originally adopted to ensure compliance with multilateral rules – [1041] have been likewise subject of extensive WTO disputes, being applied both as WTO-authorised countermeasures,[1042] or – as frequently claimed by the US – as measures justifiable under GATT exceptions.[1043] Whether these Sections qualify as countermeasures depends on a case-by-case basis, and on their compliance with ARSIWA provisions,[1044] as shown within the selected case studies and

[1040] The US invoked Article XXI GATT as justification for its Section 232' measures, by specifying that such measures were tariffs on products that threaten to impair the US national security and, thus, not safeguard measures which, instead, possess a different legal basis in the US framework (*i.e.* Section 201 of the Trade Act of 1974). In this regard, Communication from the United States, *United States – Certain Measures on Steel and Aluminium Products*, WT/DS544/2, 17 April 2018. The doctrine divides over the possibility to justify national security measures as per Section 232 US Trade Expansion Act under Article XXI GATT. In this sense, also refer to Chapter III of this dissertation. Interestingly, Qureshi A.H., *A Public International Law Perspective of Section 232 of the U.S. Trade Expansion Act*, Kansas Journal of Law & Public Policy, Vol. XXX, no. 3, 2021, pp. 433-452, p. 450, argues that the concept of national security of Section 232 is inconsistent with Article XXI GATT. Additionally, Hoekman B.M., Mavroidis P.C., *Reassessing the Safeguards Mess*, in Baetens F., Van den Bogaert S. (eds), *The EU and the WTO: Ever the Twain Shall Meet*, op. cited above, p. 125 analyse that prior to the Trump administration the US constantly invoked Section 201 of the US Trade Act of 1974 whenever it initiated an investigation to impose safeguard measures, instead – as with Trump Administration – Section 232 US Trade Expansion Act. According to these authors, the change might be explained as that «US authorities anticipated that if they had acted within the four corners of Section 201 and invoked only Article XIX of GATT and the Safeguards Agreement of the WTO and were consequently challenged before a WTO panel, they would suffer yet another defeat». Differently, invoking the GATT' provision of national security as defence could have tilted «the balance in [US] favour since WTO panels have consistently applied a deferential standard in disputes where a respondent invoked national security». Thus, at p. 126, justifying the steel and aluminium measures under Article XXI GATT was «quite likely, a conscious attempt by the Trump Administration to benefit from a deferential standard of review». Nonetheless, safeguard measures in response to the US adoption of Section 232 measures on steel and aluminium were adopted by the EU. After a WTO complaint by Turkey, the European Commission was found to have «acted inconsistently with Article XIX:1(a) of the GATT 1994 by imposing the definitive safeguard without establishing that the increase in imports took place "as a result of" the unforeseen developments» (Report of the Panel, *European Union – Safeguard Measures on Certain Steel Products* (DS595), WT/DS595/R, 29 April 2022, para 7.154). Discussing this latter event, Geraets D., *Article XIX GATT: Emergency Action on Imports of a Particular Products*, in Huyghebaert K., Kim J.W. (eds), *Commentaries on World Trade Law: Trade Remedies*, in Stoll P-T., Hestermeyer H.P. (eds), *Commentaries on World Trade Law: Fully Revised Second Edition*, op. cited above, pp 1198-1199. On the US's reliance on Section 201 Trade Act 1974 in 2018, Claussen K., *Trade's Security Exceptionalism*, op. cited above, p. 1115 and p. 1145; and Schoenbaum T.J., *The Biden Administration's Trade Policy: Promise and Reality*, op. cited above, pp. 112-114.

[1041] This was often mentioned in relation to the weaknesses of the GATT 1947. It is noteworthy the statement of the US President Bush in May 1989 where he argued that «While the lack of effective multilateral rules and enforcement mechanisms has forced us to resort to Section 301, we look forward to the day when such actions will be unnecessary» (Statement on United States Action Against Foreign Trade Barriers, of May 26, 1989). In this regard, Pons J.F., *Self-Help and the World Trade Organization*, in Mengozzi P. (ed), *International Trade Law on the 50th Anniversary of the Multilateral Trade System*, op. cited above, p. 61.

[1042] Thus, in response to a party' non-compliance with a panel' ruling. As mentioned above, some authors contend – indeed – that the DSU provisions on countermeasures might possibly be view as «a partial legalization or "internationalization" of the application of unilateral measures by virtue of domestic instruments directed to the defence of trade interests, like Section 301 of the US Trade Act». In this regard, Pons J.F., *Self-Help and the World Trade Organization*, in Mengozzi P. (ed), *International Trade Law on the 50th Anniversary of the Multilateral Trade System*, op. cited above, p. 70 and 77.

[1043] For instance, in the case *United States – Tariff Measures on Certain Goods from China*, WT/DS543/R 15, Report of the Panel, 15 September 2020 the US argues that the measures at hand are justified under Article XX (a) GATT, *i.e.* the exception of public morals. In this sense, the Integrated Executive Summary of the Arguments of the United States, Annex B-2, in Report of the Panel, *United States – Tariffs Measures on Certain Goods from China*, Addendum, WT/DS543/R/Add.1, 15 September 2020, part V, paras 33-46.

[1044] In certain cases, these Sections measures failed to be recognised as proper ARSIWA countermeasures since a prior internationally wrongful act was not demonstrated. It is generally accepted that a legislation cannot be *per se* violate WTO law and, in particular, Article 23 DSU, unless a domestic law imposes a mandatory behaviour inconsistent with WTO rules. Accordingly, also these Sections cannot be considered inconsistent *per se* with WTO since US competent authorities do possess discretionary power. On this, refer to Pons J.F., *Self-Help and the World Trade Organization*, in Mengozzi P.

illustrative example explored in Chapter IV of this dissertation, together with the developed classification test.

2.5. Final remarks on the shift towards economic coercion of WTO-regulated and WTO-justifiable measures

Having clarified the legal basis, objectives, scope of application, and original design of WTO-regulated and WTO-justifiable measures, this section briefly examines their implementation with coercive purposes. As frequently noted in this dissertation, States increasingly resort to economic coercion in international relations, including through trade instruments not originally designed for this purpose and governed by WTO law.

Measures adopted pursuant to Article 23 DSU may properly qualify as coercive by design, since they consist of instruments of law enforcement, which, as explored in Chapter II of this dissertation, may also render those measures classifiable as "sanctions" according to part of the doctrine. Nonetheless, the coercive character of Article 23 DSU measures is notably constrained by procedural and substantial requirements, as they are instruments specifically authorised by an institutional multilateral body. Differently, WTO-regulated measures and WTO-justifiable measures do not possess such coercive nature by design, but are increasingly employed (also) as such.

As a matter of fact, anti-dumping, countervailing, and safeguard measures were designed to address unfair trade practices and market disruptions, with the fundamental objective of protecting domestic industries and restoring competitive conditions, rather than coercing other States to modify their behaviour. Nevertheless, State practice shows their progressive employment as political tools to advance national policy goals,[1045] thereby blurring the distinction between trade defence tools and trade measures of economic coercion. As WTO-regulated trade defence instruments, also GATT justifications of Articles XX and XXI GATT were not designed to justify measures that pursue coercive objectives – inasmuch as neither expressly nor implicitly do they mention coercion as an objective – yet are increasingly being invoked as justifications of those, especially the security exception.[1046]

Thus, instances of allegedly coercive measures have arisen in the context of anti-dumping and safeguard measures as well as under Articles XX and XXI GATT exceptions being invoked outside their original design. The WTO AB paralysis significantly limits the possibility of obtaining binding

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(ed), *International Trade Law on the 50th Anniversary of the Multilateral Trade System*, op. cited above, pp. 78-79, and, p. 106.

[1045] Crochet V., Zhou W., *The Politization of Trade Defence Instruments*, op. cited above. In addition, also Crochet V., *Trade Defence Instruments: A New Tool for the European Union's Extractivism*, op. cited above, pp. 381-410.

[1046] Potentially, the absence of precise definitions together with broad WTO MS discretion and diverse interpretative approaches has facilitated States' increasing reliance on these Articles to justify coercive trade-restrictive measures.

panel reports on the compatibility of such coercive uses and practices with WTO law. Against this background, Chapter IV of this thesis examines selected cases involving trade-restricting measures, with the aim of also analysing the presence of coercive purposes, the legal framing of the measures concerned, and whether they reflect coercion embedded by design, or, rather, a stretching of trade instruments towards coercive purposes and beyond their original designed function.

Before turning to Chapter IV, the following section analyses US and EU commercial policies, with particular attention to US Sections 232 and 301; and the EU Common Commercial Policy (CCP). By discussing their legal basis, objectives, scope of application, and discretionary powers, this section provides a necessary framing to assess whether their application aligns with their original design or, instead, reflects a shift towards coercive purposes.

3. Commercial policy measures

3.1. US Section 232 (US Trade Expansion Act) and Section 301 (US Trade Act): from trade instruments to coercive applications

Article I of the US Constitution serves as the cornerstone of US Trade law, granting Congress the power to «lay and collect Taxes, Duties, Imposts and Excise [; and, to] regulate Commerce with foreign Nations» (Article I (8)). Historically, Congress performed this power consistently, until the beginning of late nineteenth century, when trade powers began to be delegate to the President.[1047] The McKinley Tariff Act of 1890 marked an early step,[1048] followed by the Reciprocal Trade Agreements Act (RTAA) of 1934 which fundamentally empowered the President to negotiate trade agreements with foreign States and establish trade tariffs with limited *ex-post* congressional approval.[1049] Post WWII, amendments to RTAA expanded Presidential authority from exclusively bilateral to multilateral trade negotiations too.[1050]

[1047] Claussen K., *Trade's Security Exceptionalism*, op. cited above, p. 1101 and p. 1110. Similarly, Brand R.A., *GATT and the Evolution of United States Trade Law*, op. cited above, pp. 106-109.

[1048] Tariff Act, Chap. 1244, 1890 (also "McKinley Tariff"). In this regard, *inter alia*, Skrabec Q.R., *William McKinley: Apostle of Protectionism*, Algora Publishing, 2008.

[1049] Claussen K., *Trade's Security Exceptionalism*, op. cited above, p. 1101, p. 1110, pp. 1112 which, at p. 1131, concludes that «since the late 1980s, little legislative action has been undertaken to significantly alter the disciplines that oversee executive application of the powerful exceptional delegations». Similarly, on the Congress' delegation of trade powers to the executives, Schnietz K.E., *The Institutional Foundation of U.S. Trade Policy: Revisiting Explanations for the 1934 Reciprocal Trade Agreements Act*, Journal of Policy History, Vol. 12, no. 4, 2000, pp. 417-444; United States International Trade Commission, *The Economic Effects of Significant U.S. Import Restraints*, cited above, p. 65; Brand R.A., *GATT and the Evolution of United States Trade Law*, op. cited above, pp. 111-112; and Berglund A., *The Reciprocal Trade Agreements Act of 1934*, The American Economic Review, Vol. 25, no. 3, 1935, pp. 411-425 which positively assesses RTAA as «show[ing] some appreciation of the role that foreign commerce plays in the country's economic life and the implications of that role», p. 411.

[1050] Brand R.A., *GATT and the Evolution of United States Trade Law*, op. cited above, pp. 102-103. Similarly, Claussen K., *Trade's Security Exceptionalism*, op. cited above, p. 1112; and, United States International Trade Commission, *The Economic Effects of Significant U.S. Import Restraints*, cited above, p. 65.

The US Trade Expansion Act (1962)[1051] further deepened executive powers and established the Special Trade Representative for Trade Negotiations. Officially created in 1963 by President Kennedy, the Special Trade Representative Office (STR) was crucial in the US representation during the GATT Kennedy Round.[1052] Over time, STR responsibilities substantially extended, particularly under Section 141 of the 1974 Trade Act,[1053] which formally integrated STR into the President's executive office; granted it the authority to handle trade agreements programs; and rendered it accountable to both the President and Congress.[1054] In 1979 and 1980, the Reorganization Plan no. 3 and Executive Order no. 12188 renamed the office as Office of the United States Trade Representative (USTR) and expanded its competences.[1055] Further amendments extended USTR implementation duties under Section 301 Trade Act (1974), and its authority to conduct GATT/WTO negotiations.[1056]

The USTR plays a central role under both Section 301 Trade Act and Section 232 Trade Expansion Act (1962). While both provisions – though of the 60s and 70s – remain fundamental for the US's enactment of trade restrictions, since they enable the US President to restrict trade by reflecting ideas of economic security.[1057] Notably, the differ in scope: Section 232 addresses dangers to national security or national emergencies, whereas Section 301 targets other States' unfair conducts threatening or discriminating US trade affairs.[1058]

[1051] Trade Expansion Act of 1962, P.L. 87-794, with amendments (amended Through P.L. 100-418; Enacted August 23, 1988), October 11, 1962, 76 Stat. 872, 19 U.S.C., §1862.

[1052] Office of the United States Trade Representative - Executive Office of the President, *History of the United States Trade Representative*, available at https://ustr.gov/about-us/history, [last accessed on 05 November 2024].

[1053] Trade Act of 1974, P.L. 93-618, amended through P.L. 118-31 (of December 22, 2023), 19 U.S.C. Chapter 12, §2101-2497b.

[1054] Office of the United States Trade Representative - Executive Office of the President, *History of the United States Trade Representative*, cited above.

[1055] Reorganization Plan no. 3 of 1979, 44 F.R. 69273, 93 Stat. 1381, as amended Pub. L. 97–195, §1(c)(6), June 16, 1982, 96 Stat. 115; Pub. L. 97–377, title I, §122, Dec. 21, 1982, 96 Stat. 1913; Pub. L. 117–328, div. BB, title VI, §604, Dec. 29, 2022, 136 Stat. 5566; and Executive Order no. 12188, International Trade Functions, January 02, 1980. In this regard, Office of the United States Trade Representative - Executive Office of the President, *History of the United States Trade Representative*, cited above.

[1056] Office of the United States Trade Representative - Executive Office of the President, *History of the United States Trade Representative*, cited above.

[1057] Among others, Benson E., Mouradian C., Palazzi A.L., *Defensive U.S. Measures for Economic Security. Toward a U.S. Economic Security Strategy: Twenty-First-Century Guidance for Domestic and International Policymaking*, Center for Strategic and International Studies (CSIS), 2024, pp. 16-20; and, Claussen K., *Trade's Security Exceptionalism*, op. cited above, pp. 1116. The concept of economic security is briefly analysed in this dissertation, in Section 2.3.2, Chapter III.

[1058] In this regard, Claussen K., *Trade's Security Exceptionalism*, op. cited above, pp. 1115-1116 interestingly subdivides the US exceptions to trade liberalisation in "hard security exceptions" when they regard express security matters, and in "soft security exceptions" when they regard functional security matters. According to the author, hard security exceptions are Section 232 US Trade Expansion Act of 1962 but also TWEA and IEEPA and Section 201 of the Trade Act of 1974 (*i.e.* the provision on safeguards). Differently, soft security exceptions are Section 301 US Trade Act of 1974 and Section 338 of the Tariff Act of 1930. TWEA and IEEPA had been analysed previously in this dissertation in Section 6.1., Chapter II.

i. Section 232 US Trade Expansion Act (1962)

The US Trade Expansion Act of 1962,[1059] particularly Section 232, enables the President to impose tariffs or quotas to protect national security. Although the Trade Expansion Act was fundamental to create the USTR, its Section 232 was rarely used[1060] until 2018 when it was employed to impose steel and aluminium imports, triggering the "trade war" with China.[1061]

Section 232, entitled "safeguarding national security", enables the Department of Commerce – upon request of any department head, agency, interested party, or by *motu proprio* – to investigate and determine whether imports threaten national security,[1062] informing and (if needed) consulting the Secretary of Defense.[1063] The Bureau of Industry and Security (BIS) of the Department of Commerce conducts the investigations, which may include public hearings, submissions of information and advice from interested parties, and consultation with other US officers.[1064]

Within 270 days, the Secretary reports findings and recommendations of action or inaction to the President, who within 90 days, decides whether and how to act – both in nature and duration.[1065] The President must notify the Congress within 30 days from action, and submit annual reports on the implementation.[1066] Presidential actions may consists in negotiations of agreements limiting imports or exports, or, if these are deemed ineffective in eliminating national security' threats, in other

[1059] Trade Expansion Act of 1962, P.L. 87-794, with amendments (amended Through P.L. 100-418; Enacted August 23, 1988), October 11, 1962, 76 Stat. 872, 19 U.S.C., §1862.
[1060] Congressional Research Service, *Section 232 of the Trade Expansion Act of 1962*, CRS In Focus, IF10667, April 2022, p. 2 reports that before the Trump administration' reliance on Section 232 US Trade Expansion Act of 1962, a US President last imposed measures restricting trade under such Section in 1986. Similarly, Claussen K., *Trade's Security Exceptionalism*, op. cited above, pp. 1120; and, Qureshi A.H., *A Public International Law Perspective of Section 232 of the U.S. Trade Expansion Act*, op. cited above, p. 466.
[1061] The US-China trade war is analysed in detail in Chapter IV, Section 3.
[1062] As per Section 232 (b) US Trade Expansion Act. Section 232 US Trade Expansion Act of 1962 is 19 U.S.C., §1351.
[1063] Section 232 (b) (2) (A) (i) US Trade Expansion Act specified that the Secretary of Defense might be consulted throughout the investigations for methodological and policy questions, and – if so requested – might provide an assessment of the defense requirements (Section 232 (b) (2) (B) US Trade Expansion Act).
[1064] Section 232 (b) (2) (A) (ii) and (iii) US Trade Expansion Act.
[1065] No later than 270 days from the initiation of the investigation, the Secretary should submit to the President a report on the findings concerning the effects of the good' imports in such quantities and its recommendations for action or inaction (Section 232 (b) (3) (A) US Trade Expansion Act). Specifically, if a threat to impairment of national security has been found by the Secretary, it should be specified and advised in the report to the President (Section 232 (b) (3) (A)) which – if not involving classified or proprietary information – should also be published in the Federal Register (Section 232 (b) (3) (B)). Within 90 days from the receiving of the report, the President shall (i) determine whether he/she concurs with the report' findings; and (ii) if it does so, determine the nature and the duration of the action to be taken – at the discretion of the President – to adjust the imports as to not threaten to impar national security (Section 232 (c) (1) (A)). Such action shall be taken within 15 days from the day the President determined the need to take such action (Section 232 (c) (1) (B)).
[1066] No later than 30 days after the determination of the action, the President shall submit to the Congress a written statement on the reasons for acting (Section 232 (c) (2) US Trade Expansion Act). Similarly, the President shall also submit an annual report on the operation of the Act' provisions to the Congress (Section 232 (d^1) (2)).

measures at its discretion,[1067] including tariffs, quotas, or other actions unlimited in time, against (or excluding) specific countries or products.[1068]

Section 232 does not provide a definition of "national security",[1069] but enumerates a non-exhaustive list of elements to consider during the determination, subdivided into national defense matters and economic welfare considerations.[1070] These include, *inter alia*, domestic production capacity for national defence; domestic industries capacity; availability of resources (human, products, raw materials, others); industry growth; import levels; capacity to meet national security requirements; economic welfare; foreign competition impact; and, potential disruptions such as unemployment, revenues decrease, investment loss, and others.[1071] Adjustments to petroleum imports or its products may be blocked by the a "disapproval resolution", *i.e.* a joint resolution of either House of Congress;[1072] while sanctions for violating national security export controls are provided under Section 233 of the Act.[1073]

As introduced earlier, Section 232, largely unused for decades, was invoked by the Trump Administration in 2018. Eight investigations into steel and aluminium imports concluded that such imports imposed a threat to impar US national security and, thus, action was recommended, thereby leading to the imposition of tariffs of 25% and 10% and to the beginning of the US-China "trade war".[1074] Additional Section 232 investigations were conducted under the Trump Presidency on automobiles and automotive, uranium ore, and titanium sponge products; yet, despite national security threats were found, no Section 232 measures were ultimately adopted.[1075]

[1067] Section 232 (c) (3) (A) US Trade Expansion Act specifies that other actions might be taken as the President deems necessary.
[1068] Congressional Research Service, *Section 232 of the Trade Expansion Act of 1962*, op. cited above, p. 1.
[1069] Likewise, also the implementing regulation (15 CFR §705.4) does not provide definition of the concept.
[1070] Qureshi A.H., *A Public International Law Perspective of Section 232 of the U.S. Trade Expansion Act*, op. cited above, p. 448.
[1071] As specified by Section 232 (d[1]) US Trade Expansion Act, in terms of national security and imports, both the President and the Secretary should take into account (a) the domestic production needed for projected national defense requirements; (b) the capacity of domestic industries to meet such requirements; (c) existing and anticipated availabilities of the human resources, products, raw materials, and other supplies and services essential to the national defense; (d) the requirements of growth of such industries, supplies and services including the investment, exploration, and development necessary to assure growth; (e) the importation of goods in terms of their quantities, availabilities, character, and use by affected industries; (f) the US capacity to meet national security requirements; (g) the recognition of the close relation of the US economic welfare to the US national security; (h) the impact of foreign competition on the economic welfare of individual domestic industries; and any substantial unemployment, decrease in government' revenues, loss of skills or investment, or other serious effects resulting from the displacement of any domestic products by excessive imports as to effectively determine whether the internal economy' weakening may impair the State' national security.
[1072] Section 232 (f) (1) and (2) (B) US Trade Expansion Act.
[1073] Section 232 US Trade Expansion Act of 1962 is 19 U.S.C., §1864.
[1074] The US-China trade war, including its evolution, the measures adopted, and their legal classification is, as mentioned above, presented in detail in Chapter IV, Section 3.
[1075] For a precise analysis of these investigations, among others, Congressional Research Service, *Section 232 of the Trade Expansion Act of 1962*, CRS Report, R45249, May 2021, pp. 16-21.

The subsequent Biden Administration maintained several Section 232 measures in force, while launching a new investigation concerning neodymium magnets, and negotiating arrangements with selected trading parties.[1076] Under the second Trump Presidency, Section 232 continued to constitute a crucial trade policy instrument, again employed to increase tariffs on steel and aluminium to 50%,[1077] as well as to impose tariffs on other imports including, *inter alia*, semiconductors.[1078]

Disputes concerning the compatibility of Section 232 measures with GATT obligations have been brought before WTO bodies, especially in connection with the 2018 trade war, as further presented in Chapter VI of this dissertation.[1079] Interestingly, and as noted above, the US has mainly justified its Section 232 measures by invoking Article XXI GATT security exception.[1080]

ii. Section 301 US Trade Act (1974)

The United States Trade Act (1974),[1081] which includes Section 301, aims to promote US economic growth, reduce trade barriers, establish fairness in trade, protect domestic industries, stimulate US markets, and provide access to foreign and developing-countries' markets.[1082] Located in Title III ("Relief from Unfair Trade Practice"),[1083] Section 301 grants the USTR the power to determine and act when US rights under trade agreements are denied; and when foreign acts, policies, or practices

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[1076] On this, *inter alia*, Schoenbaum T.J., *The Biden Administration's Trade Policy: Promise and Reality*, op. cited above, pp. 102-124. Some renegotiations of the previously imposed tariffs did occur under the Biden Administration (such as with the EU, UK and Japan), others instead were completely removed but, according to the author, this behaviour may be interpreted as merely «a largely symbolic gesture», pp. 110-111.

[1077] White House – Fact Sheet, *Fact Sheet: President Donald J. Trump Increases Section 232 Tariffs on Steel and Aluminium*, 03 June 2025.

[1078] White House – Fact Sheet, *Fact Sheet: President Donald J. Trump Takes Action on Certain Advanced Computing Chips to Protect America's Economic and National Security*, 14 January 2026.

[1079] Section 3, and specifically, section 3.3., of Chapter VI will present the most relevant GATT/WTO related case law, together with a discussion over the legal classification of both US and Chinese measures employed in the "trade war" *par excellence*.

[1080] Reference to the US justification of Section 232 US Trade Expansion Act as a security exception falling under Article XXI GATT, and of China's understanding of the Section as enabling safeguard measures are briefly presented in Section 3.3., Chapiter IV.

[1081] Trade Act of 1974, P.L. 93-618, amended through P.L. 118-31 (of December 22, 2023), 19 U.S.C. Chapter 12, §2101-2497b.

[1082] More precisely, the Act aims at (a) fostering US economic growth and full employment and strengthening economic relations between US and foreign countries «through open and nondiscriminatory world trade»; (b) harmonizing, reducing, and eliminating barriers to trade assuring «substantially equivalent competitive opportunities for the [US] commerce»; (c) establishing fairness and equity in international trade relations; (d) providing adequate procedures to safeguard US industries and labour from «unfair or injurious import competition» and assisting industries, firm, workers and communities to «adjust to changes in international trade flows»; (e) stimulating market opportunities for US commerce in nonmarket economies; and, (f) providing fair and reasonable access to products of less developed countries in the US. In this regard, Trade Act of 1974, op. cited above, §2102.

[1083] Section 301 of US Trade Act of 1974, op. cited above, is §2411. Title III of Trade Act is §2411-2420.Title III includes from Section 301 to Section 310. Often all these sections are collectively referred to as "Section 301". Sometimes also named (and subdivided in) "Super 301" and "Special 301" – after the amendments brought upon by the Omnibus Trade and Competitiveness Act of 1988 (Omnibus Trade and Competitiveness Act of 1988, P.L. 100-418, Stat. 102 Stat. 1107) –, these denominations respectively refer to the USTR more detailed investigation of a State's trade practices, and to the USTR identification and listing of countries denying US intellectual property rights. In this sense, among others, Meinderts T., *The Power of Section 301: The Reagan Tariffs in an Age of Economic Globalization*, Globalizations, Vol. 17, no. 4, 2019, pp. 746-758, pp. 747-748.

violate or deny US rights under trade agreements, or are unjustifiable and burden or restrict US commerce.[1084] "Commerce" is broadly defined by the Act as including services associated with trade, and, US foreign direct investments with implications for trade in goods and services.[1085]

Notably, Section 301 authorises measures including suspension of trade benefits; import restrictions; and, entering binding agreements requiring foreign countries to eliminate the targeted act, policy, or practice, or provide compensation.[1086] The USTR should take mandatory actions – unless a WTO dispute settlement body ruled in favour of the foreign country's practice; or the USTR determines that satisfactory actions have been adopted by the foreign country, or that these actions would harm US interests –[1087] while discretion is possible, after presidential direction, when the foreign practice is unreasonable or discriminatory to US commerce.[1088]

The measures must affect foreign goods equivalently to the burden imposed on US commerce.[1089] The USTR implements and monitors compliance, with the authority to impose further actions;[1090] modify and terminate the existing measures – under specific Presidential direction – when

[1084] Section 301 (a) (1) US Trade Act precisely provides that whenever the USTR determines that (a) the US rights under any trade agreement are being denied; or (b) an act, policy or practice of a foreign country is either (i) in violation, or is inconsistent with, or it denies the benefits of the US under any trade agreement or (ii) unjustifiable and burdens or restricts US commerce, it shall take action.

[1085] Section 301 (d) (1) US Trade Act specifies that "commerce" includes – but is not limited to – services (including transfers of information) associated with international trade; and, foreign direct investment by US persons with implications for trade in goods and service.

[1086] Section 301 (c) (1) US Trade Act more precisely provides that possible actions under Section 301 are (1) suspension, withdrawal, or prevention of the application of, benefits of trade agreement with a foreign country; (2) imposition of duties or other import restrictions on goods or services of a foreign country; (3) withdrawal, limitation, or suspension of the duty-free treatment; (4) entering into binding agreements committing a foreign country to (a) elimination, or phase out, the act, policy or practice that is the subject of the action; (b) elimination of any burden or restriction on US commerce resulting from that foreign country' action; or (c) compensation of the US with trade benefits.

[1087] The USTR is required to take action in any of the cases mentioned above unless (a) the WTO dispute settlement body adopted a report or a ruling concluding that that foreign country's conduct (i) does not deny the US rights under a trade agreement, or (ii) is not a violation of (or is not inconsistent with) US rights, or does not deny, nullify or impair US benefits under any trade agreement; or (b) the USTR determines that (i) the foreign country is taking measures in a satisfactory manner to grant US rights, (ii) the foreign country binds itself to cease the conduct or finds a solution to unburden US commerce, (iii) the foreign country agrees to provide compensatory trade benefits to the US, (iv) taking action would have an adverse impact on US economy, or (v) seriously harm US national security, according to Section 301 (a) (2) (A) and (B), US Trade Act.

[1088] According to Section 301 (b), US Trade Act, the USTR has discretion on whether to take action solely subsequently «specific direction, if any, of the President» in those cases where (a) the foreign country' act, policy, or practice is unreasonable or discriminatory and burdens or restricts US commerce, and (b) US actions are appropriate.

[1089] Section (a) (2) (B) (3), US Trade Act specifies that Section 301 measures must affect goods or services of the foreign country in an amount equivalent in value to the burden or restriction being imposed by that country on US commerce.

[1090] This, if the USTR assesses that the targeted foreign country is not satisfactorily implementing, ex Section 306 (b) (1) US Trade Act.

a WTO ruling is favourable to the foreign country, the burden has increased or decreased, or the measures become inappropriate; [1091] and reinstate measures after effectiveness reviews.[1092]

The adoption of Section 301 measures begins with the USTR initiating an investigation (upon petition or *motu proprio*) and requesting consultation with the foreign country.[1093] If these reveal denial of US rights and no mutually-acceptable resolution, the USTR may act.[1094] Determinations are based on the petition (if applicable), investigations, consultations, and advice from the Section 301 Committee, with possible public hearings –[1095] also seeking advice from private sectors representatives, unless urgent.[1096]. Notably, Section 301 solely requires a certain level of credible injury, not evidence of substantial, serious or material injury.[1097]

Despite the USTR's central role in Section 301 decision-making process and implementation, the Congress retains limited supervisory functions. The USTR should report to Congress on decisions not to investigate;[1098] consultation delays;[1099] inability to resolve issues through formal dispute settlement;[1100] actions taken;[1101] and, modifications or terminations of measures.[1102] However, as established in *INS v. Chadha*, the Congress cannot override USTR actions by its own legislation, since one-house vetoes are invalid as they are subject to bicameralism and presentment requirements under Article I Constitution.[1103] In turn, Congressional reclamation of its trade authority – as

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[1091] As provided by Section 307 (a) (1) US Trade Act, modifications and terminations of the measures are a responsibility of USTR, as a result of the specific direction of the President, whenever (a) the WTO DSB determines that the US rights are not being denied, or that such acts are not a violation of (or is not inconsistent with) US rights, or does not deny, nullify or impair US benefits under any trade agreement; (b) the burden or restrictions on US commerce has increased or decreased; or (c) such measures are no longer appropriate.

[1092] Reinstatement of previously terminated measures is possible under request and after an USTR review on the effectiveness and on the effects, according to Section 307 (c) (3) US Trade Act.

[1093] The process of adoption of measures as per Section 301 is regulated from Section 302 to Section 309 US Trade Act. Sections 302 and 303 respectively provides for the investigation initiatives and the consultation requests.

[1094] Section 304 US Trade Act refers to the case that, on the basis of the investigation and of the consultations, the USTR determines that the US rights are being denied, that such foreign actions exits and no mutually acceptable resolution has been reached, actions might be taken.

[1095] More precisely, under Sections 302 (a) (4) and 304 (b) (1) (A) US Trade Act, the USTR determination of the alleged conduct is made on the basis of the petition (if the investigation was not made motu proprio), investigation, consultations and advice of the Section 301 Committee. The public hearing that might be held, instead, must be received upon written request.

[1096] Section 305 (b) (2) (A) (i) US Trade Act specifies that the USTR might seek advice to advisory representatives of the private sector but, if the procedure is urgent, it might directly determine if the alleged conduct is unfair and violates US rights prior to such advice.

[1097] Schwarzenberg A.B., *Section 301 of the Trade Act of 1974*, Congressional Research Service - CRS Report, R46604, November 2020, p. 6.

[1098] *i.e.* the reasons for not initiating an investigation, and the US economic interests that would be negatively affected by such investigation), ex Section 302 (b) (2) (C) US Trade Act.

[1099] *i.e.* the motivations for delays in the consultation process, under Section 303 (b) (2) (B) US Trade Act.

[1100] Section 304 (a) (4) US Trade Act.

[1101] Together with the panels' legislative (and measures) proposal with respect to the domestic industries affected by export targeting, ex Section 305 (b) (1) (C) and (b) (2) (B) US Trade Act.

[1102] This applies to any action taken under Section 301 and must also include the underlying reasons, under Section 307 (b) US Trade Act.

[1103] US Supreme Court, *INS v. Chadha*, 462 U.S. 919, no. 80-1832, 1983.

originally granted under Article I (8) Constitution but largely delegated to the executive – would require presidential support, and not solely Congress' discretion.[1104]

It is, thus, argued that congressional review under Section 301 – such as under Section 232 mentioned above – is comprehensively unsatisfactory: despite Section 301 requires USTR reporting to Congress, the latter cannot override USTR actions; similarly, under Section 232, despite agency recommendations, the President may disregard those and impose tariffs unilaterally. Notwithstanding consistent scholarly criticisms, no congressional oversight mechanism has been introduced, leaving these provisions under presidential control and discretion.[1105] The US architecture of trade law is thus characterised by broad presidential discretion and limited congressional oversight,[1106] combined with constrained judicial review, as courts may intervene solely in cases of procedural irregularities, unconstitutionality, or excessive Congressional delegation.[1107]

A potential forum for reviewing Section 301 (and Section 232) measures is the GATT/WTO system. Prior to the WTO's establishment, Section 301 was employed to pressure countries into eliminating trade barriers and opening markets to US exports, thereby enhancing trade liberalisation,[1108] and the respect of multilateral rules, functioning as a unilateral precursors to WTO countermeasures under Article 23 DSU.[1109] However, today, Section 301 measures do not promote

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[1104] Claussen K., *Trade's Security Exceptionalism*, op. cited above, pp. 1161-1162 which also notices that the argument defending legislative vetoes for these reasons is more reasonable when dealing with trade, and particularly with tariffs, but less sharable when dealing with matters such as immigration law, as it indeed is the subject of the case INS v. Chadha. *Ibid*., pp. 1114-1115, the author argues that overall, despite the progressive reduction of the Congress role in US trade law, the Congress and the executive branch importantly contributed to the development of free trade rules into international agreements, although always guaranteeing exceptions to trade liberalisation, such as Sections 232 US Trade Expansion Act and Section 301 US Trade Act.

[1105] *Ibid*., p. 1129 and p. 1162.

[1106] Scholarly debate identifies both benefits and risks of this architecture: benefits include the achievement of foreign policy objectives in a timely manner; avoidance of a paralysed and inflexible Congress; and guarantees of a certain degree of flexibility to the measures; while risks concern the wide Presidential discretionary power; immediate and vast implications for international markets; and lack of a proper legislative and judicial review.

[1107] *Ibid*., pp. 1129-1130. Similarly, Schoenbaum T.J., *The Biden Administration's Trade Policy: Promise and Reality*, op. cited above, p. 109.

[1108] Congressional Research Service, *Section 301 of the Trade Act of 1974: Origin, Evolution and Use*, cited above, p. 2. Moreover, Claussen K., *Trade's Security Exceptionalism*, op. cited above, p. 1145 claims that reliance on Section 301 was «a threat that could be used with the carrot of an open market to "pry open foreign markets and thus further liberalize trade"». Similarly, Meinderts T., *The Power of Section 301: The Reagan Tariffs in an Age of Economic Globalization*, op. cited above, p. 746.

[1109] This argument has been presented above in Section 2.4, Chapter III. As reported in a footnote above, the US President Bush statement of May 1989 clearly support this interpretation by stating that «While the lack of effective multilateral rules and enforcement mechanisms has forced us to resort to Section 301, we look forward to the day when such actions will be unnecessary». On the relationship between Section 301 US Trade Act and the GATT/WTO system also refer to the Section above and scholars such as, among others, Claussen K., *Trade's Security Exceptionalism*, op. cited above, p. 1124 and p. 1145; Mavroidis P.C., *Dispute Settlement in the WTO: Mind Over Matter*, in Bagwell K., Staiger R.W. (eds), *Handbook of Commercial Policy*, op. cited above, p. 364; Picone P., Ligustro A., *Diritto dell'organizzazione mondiale del commercio*, op. cited above, pp. 666-667; and, Pons J.F., *Self-Help and the World Trade Organization*, in Mengozzi P. (ed), *International Trade Law on the 50th Anniversary of the Multilateral Trade System*, op. cited above, p. 61 and p. 77.

multilateralism but instead oppose trade liberalisation and threaten the multilateral system itself.[1110] This perception matches critics on Trump's use of Section 301, although scholars note earlier protectionist application such as the 1987 Reagan tariffs.[1111] The WTO dispute settlement mechanism significantly reduced Section 301's use,[1112] until Trump Administration revived it unilaterally, outside the WTO framework, and with punitive objectives to «promote a free fair and reciprocal trade»,[1113] especially due to China's perceived unfair practices and WTO weaknesses.[1114]

Section 301's WTO compatibility has been contested mainly with reference to Article XXI GATT (essential security exception) and Article 23 (1) DSU (requiring adherence to DSU procedures).[1115] The remarkable EU's challenge (1998) resulted in a 1999 panel report finding Sections 301-310 as consistent with US WTO obligations.[1116] A new wave of WTO-compatibility cases arose with the 2018 US-China trade war – which Chapter IV explores further – including the remarkable 2020 WTO Panel report finding Section 301 measures as inconsistent with several WTO articles,[1117] and concluding that the US failed to demonstrate the measures' justification under Article XX (a) GATT –[1118] an exception that could have lawfully justify the trade-restricting measures.

Quite recently, Section 301 significantly influenced the EU legislation of ACI. Both instruments address third-country measures perceived as unfair (Section 301) or coercive (ACI); share broad executive discretion; provide extensive typologies of measures; and do not specifically require prior WTO consultation. Furthermore, China's trade practices constitute the core concern of both instruments, driving Trump's use of Section 301 and accelerating ACI's adoption following

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[1110] Claussen K., *Trade's Security Exceptionalism*, op. cited above, pp. 1148-1150 which then refutes some of the most common critics over the 2018 Trump tariffs, such as their illegality, their novelty, and the President' abuse of power and authority. On the perception of Section 301 US Trade Act as a unilateral instrument jeopardising multilateralism, *inter alia*, Schoenbaum T.J., *The Biden Administration's Trade Policy: Promise and Reality*, op. cited above, p. 103.

[1111] On this, Meinderts T., *The Power of Section 301: The Reagan Tariffs in an Age of Economic Globalization*, op. cited above, pp. 746-747 and pp. 751-755.

[1112] Since 1974, there have been 130 cases of investigations under Section 301 US Trade Act of which 35 since the establishment of the WTO in 1995, as reported by Schwarzenberg A.B., *Section 301 of the Trade Act of 1974*, cited above, p. 26. According to Schoenbaum T.J., *The Biden Administration's Trade Policy: Promise and Reality*, op. cited above, p. 108, from 2001 to 2017 only four investigations under Section 301 occurred, but all of them were fully compliant with WTO rules. Refer also to Congressional Research Service, *Section 301 of the Trade Act of 1974: Origin, Evolution and Use*, op. cited above, p. 2, which reports that, through the various amendments to the text, the Section became more directed at combatting perceived unfair trade practices.

[1113] This has been argued by the Trump administration itself; *inter alia*, White House – Fact Sheet, *President Donald J. Trump is Promoting Free, Fair, and Reciprocal Trade*, 30 January 2018.

[1114] According to the Fact sheet, *Ibid*., the 'novel' use of Section 301 by the Trump administration was specifically meant to respond to the more active role of China in trade practices – described as unfair – and to the weaknesses of the WTO dispute settlement system. Similarly, Congressional Research Service, *Section 301 of the Trade Act of 1974: Origin, Evolution and Use*, op. cited above, p. 1.

[1115] These Articles have been discussed more in detail in the Chapter III of this dissertation. Article XXI GATT is analysed in Chapter III, Section 2.3.; while Article 23 DSU is analysed in Chapter III, Section 2.2.

[1116] Report of the Panel, *United States – Sections 301-310 of the Trade Act of 1974*, adopted on 22 December 1999, WT/DS152/R. Refer to part VIII (Conclusions).

[1117] Report of the Panel, *United States – Tariff Measures on Certain Goods from China*, adopted on 15 September 2020, WT/DS543/R, part 8 (Conclusions).

[1118] *Ibid*., part 8 (Conclusions), 8.1. (d).

China's restrictions against Lithuania.[1119] However, crucial differences are present: ACI is novel and unused, whereas Section 301 exists and has been extensively applied since 1974; ACI relies on its newly-defined concept of economic coercion while Section 301 focuses on unfairness and commercial impact; and, economic operators participate directly in Section 301 investigations, but are merely consulted under ACI.[1120]

Despite different usages, both instruments face similar criticisms. Debates over rebalancing the powers between US Congress and executive in Section 301 parallel contestations for greater parliamentary involvement within ACI. Similarly, WTO-compatibility questions affect both instruments – Section 301 through case law, whereas ACI through scholarly debate – but the US-created WTO AB impasse potentially guarantees a "free-from-WTO-limitations" use for both tools. Furthermore, both are contested for extending their purposes to foreign policy concerns: Section 301 has been criticised for adopting a "punitive" foreign policy approach rather than addressing domestic economic concerns, while ACI notably intersects EU Common Commercial Policy with CFSP.

Sections 232 and 301 exemplify how instruments originally designed to address national security concerns and unfair trade practices have evolved into broad executive tools employed to advance strategic economic and foreign policy objectives. Both provisions have been characterised by scholars as implementing economic coercion through their measures, as Chapter IV will explore in depth through selected case studies and one illustrative example. The shifting of purposes – from protecting domestic industries to pursuing economically coercive goals – parallel developments occurred within the EU's trade toolbox. The EU has indeed similarly responded to the evolving global trade dynamics by adopting CCP measures increasingly intersecting with CFSP, as evidenced by ACI. The following section analyses the EU framework of Common Commercial Policy, addressing its scope and decision-making procedure, its relationship with CFSP and the challenge of distinguishing CCP from CFSP measures, recently adopted instruments, and the shift towards employing trade policy for coercive foreign policy objectives.

[1119] The EU instrument of ACI, together with its adopting motivations, has been analysed in Chapter II, Section 6.2.
[1120] As a matter of fact, ACI's attention to the economic operators' interests is taken into account – under, for instance, the Preamble (paras 9, 10, and 16), Article 7 (7) (b), and Article 9 (2) (b) – but they are not directly involved into the decision-making procedure.

3.2. EU Common Commercial Policy (CCP): interaction with CFSP measures and the geoeconomic turn

The EU Common Commercial Policy, one of the EU's most developed and significant external policies, is an exclusive EU competence under Article 3 (1) TFEU.[1121] The Lisbon Treaty fundamentally developed CCP, broadening its scope and enhancing parliamentary involvement.[1122]

Articles 206 and 207 TFEU govern EU trade policy:[1123] Article 206 commits the EU to harmonious development of world trade and progressive lowering and abolition of trade restrictions, whereas Article 207 establishes that CCP shall be based on uniform principles in accordance with EU external action principles, the decision-making process, and negotiations rules on trade agreements.[1124]

CCP instruments are adopted by the EP and Council, acting «jointly and on equal footing»,[1125] through the ordinary legislative procedure by means of regulations.[1126] EU MS participate in the

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[1121] As enshrined by Article 2 (1), Title I, Part One, TFEU, exclusive competence means that the EU itself is the sole actor empowered to legislate and adopt binding acts concerning that area, thus, in this case, common commercial matters. Thus, EU MS might act likewise solely if so empowered by the EU, or for the implementation of EU' acts, as specified by Article 2 (1) TFEU.

[1122] Previous important elements – such as the EU exclusive competence – were instead established already after the achievement of the custom union at the end of 1960s. Refer to Ott A., Van der Loo G., *The Nexus Between the CCP and the CFSP: Achieving Foreign Policy Goals Through Trade Restrictions and Market Access*, in Blockmans S., Koutrakos P. (eds), *Research Handbook on the EU's Common Foreign and Security Policy*, op. cited above, p. 232. These authors interestingly recall that the Lisbon Treaty, aside from broadening the CCP' scope of application, also fundamentally contributed to the «parliamentarization and politicization of EU trade policy», shifting the CCP from «the bureaucratic safe haven governed by European Commission trade specialists and national ministries in the 133 Committee (now Trade Policy Committee) to being opened up to the political scrutiny rights of the European Parliament».

[1123] The provisions under Title II of Part V of the TFEU – entitled "Common Commercial Policy" – regulate EU trade policy outside the EU with its two Articles 206 and 207 TFEU.

[1124] To be precise, Article 206 TFEU guarantees the EU's contribution to the «harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers». Article 207 TFEU, instead, specifically establishes rules on EU common commercial policy: according to its paragraph (1), the EU CCP shall be based on uniform principles and shall be conducted in accordance with the principles and objectives of its external action; as provided by its paragraph (2) CCP measures are adopted by the EP and the Council acting by means of regulations in accordance with the ordinary legislative procedure; while paragraphs (3), (4) and (5) deal with the negotiation rules on agreements with third countries or international organisations.

[1125] European Parliament, *Overview "The Ordinary Legislative Procedure"*, available at https://www.europarl.europa.eu/olp/en/ordinary-legislative-procedure/overview, [last accessed on 14 March 2024].

[1126] The ordinary legislative procedure – regulated by Articles 289 and 294 TFEU – initiates with the Commission submitting a proposal (for a regulation, a directive or a decision) to the EP and to the Council. Composed of three reading sessions, the first reading has no time limits and comprises the EP adopting its position by a simple majority (*i.e.* majority of the votes cast) and communicating it to the Council, which shall then either approve or not the EP's position. If the first EP position is approved by the Council, the act is adopted in the wording of such EP position. If, instead, the EP position is not approved by the Council, the Council should adopt its position and refer it to the EP. This would start the second reading, in which – within three months from the communication – the EP, acting by absolute majority of its Members, might (a) approves the Council's position or not take a decision, and thus the act is adopted with the Council' wordings; (b) rejects the Council's position, and thus the act is not adopted; (c) proposes to amend the Council's position, and thus the amended text shall be forwarded to both the Council and the Commission which then will deliver an opinion on it. Within three months from the EP' amended text, the Council acts by a qualified majority and it either (a) approve all the amendments, and thus the act is adopted; or (b) does not approve all the amendments, and thus the Council President in agreement with the EP President convene a meeting of the so-called "Conciliation Committee" within six weeks. Curiously, the Council's unanimity is required for those amendments for which the Commission delivered a negative

decision-making process through the Council of the European Union, which generally acts by qualified majority rather than unanimity, thereby not guaranteeing the presence of unanimous EU MS consensus.[1127]

Although CCP measures are commonly understood as protecting EU companies from unfair third-country practices through anti-dumping, anti-subsidy, and safeguard measures,[1128], Article 207 TFEU enumerates a considerably broader number of measures, including tariff modifications; tariff and trade agreements on goods and services; commercial aspects of intellectual property; foreign direct investment; uniformity liberalisation measures; export policies, and trade protection measures (such as those to be taken in cases of dumping and subsidies).[1129]

3.2.1. Distinguishing CCP from CFSP measures: decision-making procedures and the determination of a legal basis

Although both CCP and CFSP target external trade, they differ fundamentally. As already analysed, CCP is an exclusive EU competence, while CFSP classifies as "special competence" due to its «specific institutional features».[1130] Both decision-making processes begin with a Commission (including the High Representative for CFSP), but CCP equally involves the EP and Council, whereas CFSP grants an active role to the Council (and, to a certain extent, the European Council) with the

opinion. The Conciliation Committee is composed in an equal number by the Council' members (or their representatives) and EP representative members. Within six weeks of being convened, the Conciliation Committee shall reach an agreement on a joint text on the basis of the EP' and Council' second reading positions. Such agreement on a joint text has to be reached by a qualified majority of the Council's members or representatives and by a majority of the EP' representative members. The Commission takes part to the Conciliation Committee meetings and should take all necessary initiatives as to reconcile the EP and Council positions. If approval of a joint text is not reached within six weeks from the Conciliation Committee' establishment, the act is not adopted. Instead, if a joint text is approved, both the EP (acting by majority of the votes cast) and the Council (acting by qualified majority) have a period of six weeks beginning from the approval within which adopting the act in accordance with the previously-approved joint text. This is recognised as the third reading. If the institutions do not adopt their respective acts, then the proposed act is deemed not to have been adopted. Extensions of the periods are possible at the EP or Council' initiative: the three months period of the second reading might be extended maximum of one additional month while the six weeks period of the Conciliation Committee and of the third reading might be extended maximum of two more weeks. Special provisions are then provided for those cases established by the Treaties in which a legislative act is submitted to the ordinary legislative procedure on the initiative of a group of EU MS, on a recommendation by the European Central Bank, or at the request of the Court of Justice.

[1127] As exclusive responsibility of the EU, its MS and their national governments have a limited role within CCP. The Council of the European Union is composed of representatives of the EU MS' governments and generally acts on a qualified majority, except in the specific circumstances. Interestingly, Article 207 (6) TFEU specifies that the competences conferred in the area of CCP should not alter the delimitation of competences between EU and its MS and should not lead to the harmonisation of the EU MS' legislative and regulatory provisions.

[1128] *Inter alia*, Titievskaia J., *EU Trade Policy: Frequently Asked Question*s, European Parliamentary Research Service (EPRS), PE 642.229, October 2019. Similarly, Ministero degli Affari Esteri e della Cooperazione Internazionale, *Politica Commerciale Comune*, available at https://www.esteri.it/it/politica-estera-e-cooperazione-allo-sviluppo/politica_europea/politica-commerciale-internazionale/, [last accessed on 20 June 2024].

[1129] Article 207 (1) TFEU.

[1130] In this regard, EUR-Lex, *Division of Competences Within the European Union*, cited above. Refer to Chapter II, Section 5, of this dissertation where it has been analysed the EU Common Foreign and Security Policy (CFSP), together with the legal framework of EU restrictive measures.

EP merely informed post-adoption of the decision.[1131] Moreover, the Council votes by qualified majority in CCP but by unanimity in CFSP, reflecting different degrees of necessary EU MS support.[1132]

Interestingly, the two external policies are institutionally governed by distinct actors: CCP is managed by the European Commission and its Directorate-General for Trade (DG TRADE) with the EP's Committee on International Trade (INTA) role; whereas CFSP remains largely intergovernmental, led by the European Council and the Council, and supported by the High Representative together with the European External Action Service (EEAS), with the EP exercising solely a limited role. Only recently, EU institutions have begun to view CCP and CFSP as policies necessitating coordination and a common strategic framework. This reorientation has become especially evident with the 2023 EU Economic Security Strategy and its evolution in the 2025 Economic Security Doctrine, which frame trade and security objectives together under the umbrella.[1133]

Notwithstanding these distinctions, their shared ability to restrict trade occasionally complicates the determination of whether certain trade-restrictive measures are strictly trade or foreign policy measures.[1134] Both CCP and CFSP pursue common objectives under Article 21 (2) TEU, including – notably – safeguarding EU values, interests, security, independence and integrity; supporting democracy, rule of law, human rights and principles of international law; preserving peace, preventing conflicts and strengthening international security; enhancing sustainable economic, social and environmental development; abolition of trade restrictions; preserving environment and

[1131] Part of the doctrine argues the necessity of a proper involvement of the Parliament in CFSP procedures. Among others, Papadopoulos M.C., *Do the Decision-Making Mechanisms in the EU Undermine Member States' National Interest: A Case Study of the Sanctions Regime*, Emory International Law Review, Vol. 31, no. 4, 2017, pp. 553-584, p. 582. Interestingly, prior to the Lisbon Treaty, as reported by Ott A., Van der Loo G., *The Nexus Between the CCP and the CFSP: Achieving Foreign Policy Goals Through Trade Restrictions and Market Access*, in Blockmans S., Koutrakos P. (eds), *Research Handbook on the EU's Common Foreign and Security Policy*, op. cited above, pp. 232-233, the CCP procedure too did not envisage a political scrutiny from the EP, which was solely informed on the conclusion of trade agreements.

[1132] Undoubtedly, State support is crucial within CFSP as unanimity is required. Aside from the Council's requirement of unanimity within CFSP decisions which, as mentioned above, constitutes an important element enabling EU MS' participation and weight within the procedure, a further area guaranteeing the EU MS' role in the CFSP decision-making procedure is the provision on abstention. Accordingly, Article 31 (1) TFEU ensures the possibility for EU MS to abstain and, in turn, to not being bound by the CFSP decision. However, such EU MS should anyway refrain from acting in ways likely to compromise such CFSP decision, thereby limiting the EU MS' potential actions even when abstaining. Article 31 (1) TEU specifies that in case of abstention, the EU MS is not obliged to apply the decision, but it has to accept that the decision commits the Union and, in a spirit of mutual solidarity, it shall «refrain from any action likely to conflict with or impede Union action based on that decision and the other Member States shall respect its position».

[1133] The 2023 Strategy and 2025 Doctrine are analysed in Section 3.2.3. of this Chapter. Interestingly, the official website of the Directorate-General for Trade now states that it «develops and carries out the Commission's policies on trade and economic security» within its responsibilities. In this sense, European Commission - Directorate-General for Trade website, *Trade and Economic Security*, available at https://commission.europa.eu/about/departments-and-executive-agencies/trade-and-economic-security_en, [last accessed on 11 February 2026].

[1134] Among others, Eeckhout P., *EU External Relations Law*, op. cited above, p. 502.

global natural resources; assisting populations, States and regions facing disasters; and promoting multilateral cooperation and good global governance.[1135]

Consistency between EU external policies must be guaranteed under Article 21 (3) TEU,[1136] yet overlaps between CCP and CFSP remain rather recurrent. The Court of Justice has addressed this overlap: Centro-Com (1997) established that measures restricting exports cannot be excluded from CCP merely because they have foreign policy and security objectives;[1137] while Opinion 2/15 (2017) clarified that an EU act falls within CCP when it «relates specifically to such trade in that it is essentially intended to promote, facilitate or govern such trade and has direct and immediate effects on it».[1138]

Applying this approach, measures regulating commercial relations between the EU and third countries fall within CCP, even when politically motivated; whereas trade-restrictive measures mainly designed to respond to third countries' conducts by means of economic pressure qualify as CFSP measures. This reflects the "centre of gravity" test, which establishes that when a measure presents two purposes (or components), its legal basis must be the «main or predominant [one], whereas the other is merely incidental».[1139] Grounding a measure on two legal basis is possible solely

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[1135] Article 21 TEU' principles were added to the CCP by the Lisbon Treaty. In this regard, Ott A., Van der Loo G., *The Nexus Between the CCP and the CFSP: Achieving Foreign Policy Goals Through Trade Restrictions and Market Access*, in Blockmans S., Koutrakos P. (eds), *Research Handbook on the EU's Common Foreign and Security Policy*, op. cited above, p. 233.

[1136] Article 21 (3) TEU mandates that the Council and the Commission, assisted by the High Representative, ensure consistency between the various areas and policies within EU external action – comprising CCP and CFSP.

[1137] Centro-com case, C-124/95, *The Queen, ex parte Centro-Com v HM Treasury and Bank of England*, 1997, para 26 more precisely provided that EU MS «cannot treat national measures whose effect is to prevent or restrict the export of certain products» as not being CCP measures on the basis that they have foreign and security objectives.

[1138] Opinion 2/15 of the Court (Full Court) of May 16, 2017, ECLI:EU:C:2017:376, para 36. In the same paragraph, the Court set forth that the mere fact that an EU act has certain implications for trade with third countries is not sufficient to classify that act as belonging to falling within CCP. In para 43, the Court then specifies that those measures aimed at protecting trade falls within Article 207 (1) TFEU and, thus, are of exclusive competence of the EU as established by Article 3 (1) (e) TFEU. On this Opinion, refer also to Segura-Serrano A., *The Recurrent Crisis of the European Union's Common Commercial Policy: Opinion 2/15*, European Papers, Vol. 2, no. 3, 2017, pp. 829-843.

[1139] Many case law rulings pronounced in this regard. *Inter alia*, most recently, Case C-180/20 Commission v Council (CEPA) at para 34 stating that «if examination of a European Union measure reveals that it pursues a twofold purpose or that it comprises two components and if one of these is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the measure must be founded on a single legal basis, namely, that required by the main or predominant purpose or component». Similarly, Case C-263/14, *Parliament v Council* (Tanzania Agreement), para 44; and, Case 178/03 (Commission v Parliament and Council), para 42. This latter case (C-178/03) explicitly mentions the "centre of gravity" test at para 40 stating that «the applicant and the defendants do not deny that the contested regulation contains elements both of a commercial nature and of an environmental nature. However, they differ as to the centre of gravity of the regulation. Whilst the Commission maintains that, although the contested regulation does have beneficial effects on human health and the environment, its main objective is to govern trade in hazardous chemicals, the Parliament and the Council, and all the interveners, contend, on the other hand, that the latter aspect is incidental, the primary aim of the contested regulation being to lay down rules and procedures conducive to ensuring a high level of protection of human health and the environment». Most of the cases report that the choice of legal basis for an EU measure must be based on «objective factors amenable to judicial review, which include the aim and content of that measure», without specifying the relation between the two issues. The Case C-72/15, *Rosneft*, para 147, notably ruled that «there is a reasonable relationship between the content of the contested acts and the objective pursued by them»; yet, the most recent case C-180/20 (2021) explicitly specified that There is no hierarchy between the aim or the content of the measures, as «it does not follow from the case-law of the Court that one of those criteria prevails over the other. Indeed, it is by

when the measure components are «inextricably linked without one being incidental to the other»,[1140] provided that the two legal basis procedures are compatible with each other.[1141]

However, given the CCP and CFSP's fundamentally different decision-making procedures – particularly regarding Council voting quorum and EP involvement – trade-restricting measures situated at the CCP-CFSP intersection cannot rely on a dual legal basis, and thus must be classified exclusively as either CCP or CFSP acts, depending on their predominant purpose.[1142] While theoretically useful, identifying the "primary" objective proves complex to implement in practice, particularly due to the complexity of global geopolitical contexts where a single measure may pursue multiple core objectives simultaneously. This assessment further complicates with instruments like ACI: formally based on CCP, yet designed to respond to acts of third countries through coercion – a logic traditionally associated with CFSP – thereby rendering the CCP-CFSP intersection undeniable and legally controversial.

3.2.2. Recent EU unilateral trade instruments and the shift towards coercive trade policy

In recent years, the EU has been particularly active in its trade activity under both CCP and CFSP. Beyond the 2022 restrictive measures against the Russian Federation (CFSP) and ACI (CCP),[1143] the EU adopted a number of different instruments tackling trade: amendments to anti-dumping and anti-subsidy framework (2017 and 2018);[1144] updates to foreign direct investment (FDI) screening (2020);[1145] broadening of Enforcement Regulation scope of application (2021);[1146] Foreign Subsidies

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having regard to all the objectively identifiable factors pertaining to one or to the other of those criteria that, in each specific case, the field covered by the act must be determined» (para 33).

[1140] Similarly, this is well settled in case law. *Inter alia*, Case C-180/20, *Commission v Council* (CEPA), para 34; Case C-263/14, *Parliament v Council* (Tanzania Agreement), para 44; and, Case 178/03, *Commission v Parliament and Council*, para 43.

[1141] In this regard, refer to Case C-180/20, *Commission v Council* (CEPA), para 34, stating that «The use of two legal bases is not possible, however, where the procedures laid down for each legal basis are incompatible with one another»; and, C-155/07, *Parliament v Council*, para 37, establishing that «the Court has previously held, in particular in paragraphs 17 to 21 of the judgment in Titanium dioxide, that recourse to a dual legal basis is not possible where the procedures laid down for each legal basis are incompatible with each other».

[1142] On the differences between CCP and CFSP, refer *supra*. It is here noteworthy to mention the non-affectation clause (also "reciprocal non-encroachment clause") contained in Article 40 TEU stipulating that CFSP implementation shall not affect other EU' policies procedural and institutional rules contained in the TFEU, and vice versa, thereby clearly delimiting CFSP and non-CFSP legal basis. In this regard, Article 40 TEU; Kellerbauer M., Klamert M., Tomkin J. (eds), *Article 40 TEU*, in Kellerbauer M., Klamert M., Tomkin J. (eds), *The EU Treaties and Charter of Fundamental Rights: A Commentary*, 2nd Edition, Oxford University Press, 2024, pp. 329-334; and, C-263/14, *Parliament v Council*, para 42.

[1143] Both these instruments have been explored, respectively, in Chapter II. EU restrictive measures are analysed in Chapter II, Section 5; while EU's ACI is explored in Chapter II, Section 6.2.

[1144] Anti-dumping measures, originally set forth in Regulation (EU) 2016/1036 on protection against dumped imports from non-EU countries, were updated three times through (a) Regulation (EU) 2017/2321; (b) Regulation (EU) 2018/825; and (c) Delegated Regulation (EU) 2020/1173. Similarly, anti-subsidies measures, originally regulated by Regulation (EU) 2016/1037 on protection against subsidised imports from non-EU countries, has been amended three times by (a) Regulation (EU) 2017/2321; (b) by Regulation (EU) 2018/82; and (c) by Delegated Regulation (EU) 2020/1173.

[1145] Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the Union.

[1146] Accordingly, the scope of application was broadened due to the inactivity of the Dispute Settlement Body of the World Trade Organization (WTO). The Enforcement Regulation is Regulation (EU) 654/2014 concerning the exercise of the

Regulation (FSR, 2022);[1147] creation of International Procurement Instrument (IPI, 2022);[1148] Carbon Border Adjustment Mechanism (CBAM, 2023);[1149] and Deforestation-free Products Regulation (EUDR, 2023).[1150]

This proliferation demonstrates the EU strong unilateral approach to trade instruments,[1151] deriving from increasing geopolitical tensions; crisis concerns; continuous intersections between security, foreign policy, and trade; EU strategic autonomy goals; and, WTO AB paralysis. Criticisms address EU-MS tensions in terms of competences;[1152] the WTO-compatibility of these instruments; and their potentially coercive nature. *Inter alia*, as mentioned above, while ACI's declared main objective is deterrence,[1153] URM certainly constitute an instrument of coercion. Similarly, CBAM is

Union's rights for the application and enforcement of international trade rules. It was then amended by Regulation (EU) 2021/167.

[1147] Regulation (EU) 2022/2650 on foreign subsidies distorting the internal market.

[1148] Regulation (EU) 2022/1031 on the International Procurement Instrument – IPI.

[1149] Regulation (EU) 2023/956 establishing a carbon border adjustment mechanism.

[1150] Regulation (EU) 2023/1115 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010.

[1151] In this regard, Verellen T., Hofer A., *The Unilateral Turn in EU Trade and Investment Policy*, European Foreign Affairs Review, Vol. 28, Special Issue, 2023, pp. 1-14 call it "EU unilateral turn" such as, likewise, De Ville F., Happersberger S., Kalimo H., *The Unilateral Turn in EU Trade Policy? The Origins and Characteristics of the EU's New Trade Instruments*, European Foreign Affairs Review, Vol. 28, Special Issue, 2023, pp. 15-34.

[1152] Critics on the reshaping of competences and on the wide role of the commission are numerous. Among others, Casolari F., *Supranational Security and National Security in Light of the EU Strategic Autonomy Doctrine: The EU-Member States Security Nexus Revisited*, European Foreign Affairs Review, Vol. 28, 4, 2023, pp. 323-340, p. 333, p. 335 and p. 339; Crochet V., Zhou W., *The Politization of Trade Defence Instruments*, op. cited above, p. 2; Haroche P., *A 'Geopolitical Commission': Supranationalism Meets Global Power Competition*, Journal of Common Market Studies, Vol. 61, no. 2, 2023, pp. 970-987, p. 971 and 984; Lei Z., *The European Union's Economic and Trade Legislation: New Developments and Implications for China*, China International Studies, Vol. 100, 2023, pp. 113-141, p. 130; Matthijs M., Meunier S., *Europe's Geoeconomic Revolution: How the EU Learned to Wield Its Real Power*, Foreign Affairs, Vol. 102, no. 5, 2023, pp. 168-179, pp. 176-179; Schaupp L., *The EU's Anti Coercion Instrument between EU Strategic Autonomy and Member State Sovereignty*, op. cited above, p. 15; and, Verellen T., *Imperial Presidency Versus Fragmented Executive? Unilateral Trade Measures and Executive Accountability in the European Union and the United States*, op. cited above, pp. 1138-1139. On the contrary, Portela C., *Sanctions and the Geopolitical Commission: The War over Ukraine and the Transformation of EU Governance*, op. cited above, p. 1129 also presents some positive consequences of the growing centrality of the Commission. Accordingly, this incentivises more attention on the field and effectively unified EU MS and enhanced their support to common EU' actions. However, also negative sides are highlighted by the author such as, among others, the issue of democracy scrutiny when urgent procedures are implemented.

[1153] In this regard, Silingardi S., *Il nuovo strumento anti-coercizione europeo e il futuro assetto dei rapporti tra l'Unione Europea e l'organizzazione mondiale del commercio*, op. cited above, p. 685 supports the ACI's defensive nature, rather than offensive, also analysing (at pp. 660-661) the ACI's logic of game theory applied to economic coercion. Accordingly, both the targeted country and the imposing entity are conceived as single rational actors. In turn, this means that the controversial behaviour is not deterred by a punishment but rather by a threat.

criticised to burden and coerce vulnerable countries,[1154] functioning as extraterritorial trade-restricting measures.[1155]

Paralleling the US experience, EU trade measures originally designed to protect EU industries and markets have increasingly shifted towards coercive foreign policy objectives. While trade-foreign policy intersections are not novel within the EU system, the EU "geoeconomic turn" since 2017 led to the adoption of unilateral instruments aimed at protecting EU autonomy, also through the pursuit of geopolitical and security objectives through commercial policies.[1156] The ACI exemplifies this

[1154] The CBAM is contested not only to be unethical and unfair in burdening more vulnerable countries, but also to be unjust in a distributive perspective and to «coerce» vulnerable countries into these injustices. In this regard, Corvino F., *The Compound Injustice of the EU Carbon Border Adjustment Mechanism (CBAM)*, op. cited above, p. 9, and p. 12. Similarly, Eicke L., Weko S., Apergi M., Marian A., *Pulling Up the Carbon Ladder? Decarbonization, Dependence, and Third-Country Risks from the European Carbon Border a-Adjustment Mechanism*, Energy Research & Social Science, Vol. 80, 2021; Gläser A., Putaturo C., *World's Poorest Should Not Pay for Climate Action While EU Industry Pollutes for Free*, Euractiv, 14 March 2022, available at https://www.euractiv.com/section/energy-environment/opinion/worlds-poorest-should-not-pay-for-climate-action-while-eu-industry-pollutes-for-free/, [last accessed on 23 September 2024]; Magacho G., Espagne E., Godin A., *Impacts of CBAM on EU Trade Partners: Consequences for Developing Countries*, Agence française de développement Éditions AFS), Working Paper No. 238, March 2022; Pandey P., *Dilemma of CBAM: What is it, Criticisms and How Will it Impact Businesses and Carbon Markets*, EKI, December 2023; Perdana S., Vielle M., *Making the EU Carbon Border Adjustment Mechanism Acceptable and Climate Friendly for Least Developed Countries*, Energy Policy, Vol. 170, November 2022; and, Smith I.D., Overland I., Szulecki K., *The EU's CBAM and its 'Significant Others': Three Perspectives on the Political Fallout from Europe's Unilateral Climate Policy Initiative*, JCMS: Journal of Common Market Studies, Vol. 62, no. 2, 2023, pp. 603-618. On positive sides of CBAM, among others, Maat E.P., *The Carbon Border Adjustment Mechanism and the Challenge of Being a 'Good? Climate and Trade Actor*, in Fahey E., Mancini I. (eds), *Understanding the EU as a Good Global Actor: Ambitions, Values and Metrics*, op. cited above, pp. 141-157.

[1155] In this regard, scholars contend that by targeting emissions occurred outside the EU territory, CBAM effectively enables the enactment of extraterritorial measures whose lawfulness is however controversial under international law. On the extraterritorial nature of CBAM, *inter alia*, Maat E.P., *The Carbon Border Adjustment Mechanism and the Challenge of Being a 'Good? Climate and Trade Actor*, in Fahey E., Mancini I. (eds), *Understanding the EU as a Good Global Actor: Ambitions, Values and Metrics*, op. cited above, pp. 141-157. According to Corvino F., *The Compound Injustice of the EU Carbon Border Adjustment Mechanism (CBAM),* op. cited above, p. 16, the imposition of tariffs through CBAM would very similarly act as «trade sanction» (and, thus, as an instrument of pressure against third countries) but «without the punitive aspects» of it. Similarly, the BRICS Summit of October 2024 – *i.e.* XVI BRICS Summit, Kazan Declaration: Strengthening Multilateralism for Just Global Development and Security, Kazan, Russian Federation, 23 October 2024 – specifically refers to the use of carbon border adjustments mechanisms (CBAMs) at para 83, by stating that their rejection to «unilateral, punitive and discriminatory protectionist measures, that are not in line with international law, under the pretext of environmental concerns, such as unilateral and discriminatory carbon border adjustment mechanisms (CBAMs), due diligence requirements, taxes and other measures and reconfirm our full support for the call in COP28 related to avoidance of unilateral trade measures based on climate or environment. We also oppose unilateral protectionist measures, which deliberately disrupt the global supply and production chains and distort competition». On the debate within international law concerning the lawfulness of extraterritorial measures also refer to Chapter II, Section 6.1 dealing with the US reliance on extraterritorial measures, also called "secondary sanctions"; the subsequent Section 6.2. on the EU approach to extraterritorial measures with its subsequent Blocking Statute; and Section 2.3., Chapter III, where a brief mention on such extraterritorial measures and on their possible justification under WTO rules is provided.

[1156] *Inter alia*, Bauerle Danzman S., Meunier S., *The EU's Geoeconomic Turn: From Policy Laggard to Institutional Innovator*, JCMS: Journal of Common Market Studies, Vol. 62, no. 4, 2024, pp. 1097-1115. At pp. 1103-1106, the authors explore the EU "geoeconomic tools" – including FDI Screening Regulation, FSR, ACI, IPI, CBAM, etc – posing them all under the label of "sanctions". On the EU geoeconomic turn, refer also to Herranz-Surrallés A., *The Geoeconomic Turn of the Single European Market? Conceptual Challenges and Empirical Trends*, JCSM: Journal of Common Market Studies, Vol. 62, no. 4, 2024, pp. 919-937; Veselinovič, J., *From 'Strategic Indispensability' to 'Comprehensive Offers': Mapping Proposals for the EU's Offensive Geoeconomic Turn*, The International Spectator, Vol. 60, no. 3, 2025, pp. 80-100; and, Weinhardt C., De Ville F., *The Geoeconomic Turn in EU Trade and Investment Policy: Implications for Developing Countries*, Politics and Governance, Vol. 12, 2024, pp. 1-17.

development: rooted in CCP, it brings the «foreign policy issue of coercion into the realm of trade policy».[1157] Consequently, ACI was examined in Chapter II of this thesis together with inherently coercive measures, rather than in this Chapter dedicated to CCP measures and their original "market protection" objectives.

Unlike the US, which continues to rely on decades-old instruments – namely, Sections 232 and 301 – to implement trade coercion, the EU case comprises the adoption of new trade instruments explicitly intersecting commercial and coercive/foreign policy objectives. Before analysing practical cases of trade instruments with coercive purposes in Chapter IV, it is provided a brief examination of the EU Security Strategy (2023) and its evolution into the Economic Security Doctrine (2025), which establish an explicit framework for the strategic employment of existing EU trade instruments for "economic security" purposes.

3.2.3. The EU Economic Security Strategy and its update to the Economic Security Doctrine: coordinating trade instruments for strategic objectives

In June 2023, the Commission and the High Representative presented the EU's first Economic Security Strategy –[1158] a strategy developed in response to vulnerabilities and risks exposed by the pandemic, Russia's aggression against Ukraine, hostile economic actions, cyber-attacks, foreign interferences, and rising geopolitical tensions.[1159] It aims to provide a framework for assessing and managing rapidly evolving economic security risks (also merging with national security concerns) while maintaining global openness and technological development.[1160]

Built on three priorities – (i) promoting EU competitiveness; (ii) protecting EU from economic security risks; and, (iii) partnering with countries sharing economic security concerns and interests – [1161] the strategy identifies four main risks: (i) resilience of supply chains; (ii) physical and cyber security of critical infrastructure; (iii) technology security and technology leakage; and, (iv)

[1157] Freudlsperger C., Meunier S., *When Foreign Policy Becomes Trade Policy: The EU's Anti-Coercion Instrument*, JCMS: Journal of Common Market Studies, Vol. 62, no. 4, 2024, pp. 1063-1079. The authors argue that ACI «takes a classic instrument of the EU's CFSP, namely, the imposition of economic sanctions [under Article 29 of the Treaty on the EU (TEU)], and links it to the EU's exclusive competence (Article 3 TFEU) over the CCP. Whilst hitherto the EU needed to rely on the CFSP to adopt economic sanctions, in effect, it can now also do so under the CCP» (p. 1065), thereby «bringing the bulk of economic sanctions under the umbrella of Article 207 TFEU – and thus majority voting in the Council» (p. 1076). Accordingly, this development constitutes constitute "foreign policy becoming trade policy" which, within ACI, was arguably «an unintended consequence both of external pressures to institutionalise the trade-security nexus and of the EU's uneven internal competence base» (p. 1075).

[1158] European Commission, High Representative of the Union for Foreign Affairs and Security Policy, *Joint Communication to the European Parliament, the European Council and the Council on "European Economic Security Strategy"*, JOIN(2023) 20 final, 20 June 2023.

[1159] *Ibid*., p. 1.

[1160] *Ibid*., p. 2. Also, p. 3, accordingly, «this means investing in EU competitiveness, diversifying supply chains, and responding to practices such as economic coercion».

[1161] *Ibid*., pp. 2-3.

weaponization of economic dependencies or economic coercion.[1162] The strategy emphasises rigorous use of trade defense instruments, coordinated actions on dual-use export controls, multilateral cooperation,[1163] WTO reform, and key instruments including NextGeneration EU, Cohesion Funds, Critical Raw Materials Act, European Chips Act, ACI, FDI Screening regulation, and, Foreign Subsidies Regulation.[1164]

Although representing a crucial step towards EU trade-security coordination, the 2023 Strategy attracted many criticisms: diverse EU MS economic priorities and risk thresholds created gaps and weakened EU collective security; addressed solely short-term crisis and trade tensions; did not resolve over-reliance on critical dependencies (which, actually, increased);[1165] the three pillars involved multiple policies fields, fragmenting policymaking at both national and EU level;[1166] it mainly concerned reacting (focusing on the "protect" pillar, *i.e.* defensive instruments, rather than on "promote" and "partner" pillars);[1167] increased protectionism;[1168] crucial gaps regarding failure to address extraterritoriality issues, or creating mechanisms to share economic harm/coercion costs (now borne by EU MS, constituencies, and companies);[1169] and, absence of a precise definition of "economic security".[1170]

[1162] *Ibid*., pp. 4-6. Accordingly, these risks may even threaten national security under certain circumstances: as reported, «this could be the case, most notably, with dual use technology leakage, foreign direct investment threatening security and public order; dual use exports or outbound investment in a narrow set of advanced technologies that could enhance military and intelligence capacities of actors who may use these capabilities to threaten international peace and security; and the secure treatment of sensitive information» (*Ibid*., p. 5). It is essential to address weaponisation of economic dependencies and economic coercion, since strategic dependencies may give rise to economic security risks and be exacerbated by third-countries policies and practices (*Ibid*., p. 7).

[1163] Accordingly, EU economic security is ensured by multilateral cooperation and rules-based frameworks, such as G20, UN, Multilateral Development Banks, and WTO – of which the EU continues its efforts to reform. In this regard, *Ibid*., p. 13.

[1164] *Ibid*., pp. 6-11. On the EU Trade Agenda with regard to State Owned Enterprises and subsidies, refer to Boschiero N., Silingardi S., *The EU Trade Agenda – Rules on State Intervention in the Market*, German Law Journal, Vol. 24, no. 1, 2023, pp. 151-178; and, Borlini L., Silingardi S., *The Foundations of International Economic Order in the Age of State Capitalism*, in Delimatis P., Dimitropoulos G., Gourgourinis A. (eds), *State Capitalism and Investment Law*, Hart Publishing, 2023, pp. 17-41.

[1165] Szczepański M., *New EU Economic Security Doctrine*, European Parliamentary Research Service (EPRS) Briefing, PE 772.915, June 2025, p. 4 reporting that «empirical research shows the EU's dependencies have actually grown».

[1166] *Ibidem*.

[1167] *Ibid*., p. 6. Refer also to Fasulo F., Italia R., Prina Cerai A., Favarotto L., *The EU's Road to Economic Security: De-Risking, Strategic Investments and Critical Partnerships*, ISPI Policy Paper, September 2025, p. 124; and, Okano-Heijmans M., Ferreira Gomes A., *The European Union is Unwisely Defensive in its Economic Security*, Clingendael, 26 June 2023.

[1168] Szczepański M., *New EU Economic Security Doctrine*, op. cited above, p. 3.

[1169] *Ibid*., p. 2.

[1170] The Strategy, indeed, solely relies on the listed risk pillars and priorities, without clearly delimiting the concept. In this sense, scholars identified the use of "economic security" as an «umbrella term for a collection of instruments». On this, Chimits F., McCaffrey C., Mejino Lopez J., Poitiers N.F., Vicard V., Wibaux P., *European Economic Security: Current Practices and Further Development*, In-Depth Analysis requested by the INTA Committee, European Parliament, PE 754.449, April 2024, which also discuss definitions of economic security. Similarly, on definitions and core issues of economic security, Pisani-Ferry J., Weder di Mauro B., Zettelmeyer J. (eds), *Europe's Economic Security*, Paris Report 2, CEPR in collaboration with Bruegel, 2024.

These criticisms, together with an increasingly confrontational geopolitical environment, paved the way for updates[1171] and, later, the development of a new EU Economic Security Doctrine in December 2025.[1172] Despite acknowledging the 2023 Strategy's importance, the 2025 document signals «a paradigm shift, moving from a reactive posture towards a more proactive and systematic deployment of [EU's] toolbox».[1173]

The 2025 call to action includes improving information gathering, monitoring, analysis, and threats anticipation; deterring weaponisation of EU dependencies; reducing EU exposure to third countries; and, preventing efforts to undermine EU derisking actions.[1174] Six high-risk areas are identified: (i) strengthening supply chain resilience and counteracting high-risk dependencies in critical goods and services; (ii) attracting value-added inbound investment; (iii) supporting a vibrant defence, space industrial base, and other high-risk industrial sectors; (iv) developing and maintaining leadership across critical technologies; (v) preventing access to sensitive information and data; (vi) preventing and mitigating disruptions to EU critical infrastructure.[1175]

Existing EU instruments are organised into a non-exhaustive list of six categories with defined objectives to advance EU's economic security: trade and competition, resilience/cyber-security, security and public order, anti-coercion and restrictive measures, funding and restrictions, and, selected sectoral initiatives. Most interestingly to the purpose of this dissertation, trade and competition tools (anti-subsidies, anti-dumping, safeguard measures, etc) should be employed to gradually reduce EU exposure to risks by diversification and trade agreements, strategic use of customs, and addressing foreign subsidies distortions both within the single market and through subsidies and dumped imports; security and public order instruments (FDI regulation, dual-export controls, etc) should reduce EU excessive exposure to risks in order to ensure societal functioning, and support actions to develop EU positioning in critical technologies and industries while preventing the undermining of derisking objectives; and, anti-coercion and restrictive measures (ACI,

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[1171] *Inter alia*, European Commission, *Recommendation on Critical Technology Areas for the EU's Economic Security for Further Risk Assessment with Member States*, 03 October 2023, C(2023) 6689 final; European Commission, *Communication from the Commission to the European Parliament and the Council - Advancing European Economic Security: An Introduction to Five New Initiatives*, 24 January 2024, COM(2024) 22 final. On a detailed analysis of updates: Chimits F., McCaffrey C., Mejino Lopez J., Poitiers N.F., Vicard V., Wibaux P., *European Economic Security: Current Practices and Further Development*, op. cited above; García-Bercero I., Poitiers N., *From Strategy to Doctrine: The Next Steps for European Economic Security*, Policy Brief 32/2025, Bruegel, December 2025; Benson E., Steinberg F., Alvarez-Aragones P., *The European Union's Economic Security Strategy Update*, CSIS, January 2024.

[1172] European Commission, *Joint Communication to the European Parliament and the Council - Strengthening EU Economic Security*, JOIN(2025) 977 final, 03 December 2025. Refer also to European Commission – Speech, *Remarks by Executive Vice-President Séjourné and Commissioner Šefčovič on the Economic Security Package*, 03 December 2025, Brussels, SPEECH/25/2909.

[1173] European Commission, *Joint Communication to the European Parliament and the Council - Strengthening EU Economic Security*, cited above, p. 1.

[1174] *Ibid*., pp. 1-2.

[1175] *Ibid*., pp. 5-12.

sanctions/restrictive measures, and Blocking Statute)[1176] aim at deterring and dealing with third countries coercion while shielding EU business from extraterritorial measures and triggering behavioural change.[1177]

Crucially, the document acknowledges the weaponisation of EU economies and dependencies for coercive purposes, recognising also that economic instruments are often employed to «pursue […] strategic and geopolitical objectives».[1178] It declares EU economic security as «intrinsically linked with» CFSP which will be employed «more systematically to support the stated objectives»,[1179] thereby formalising the CCP-CFSP nexus under the same objective and umbrella of EU economic security. While reaffirming commitment to open and rules-based trade relations and international cooperation, the Doctrine fundamentally reorients EU trade instruments from purely commercial protection to strategic instruments pursuing geopolitical and security purposes.[1180]

The Doctrine has been criticised for focusing on medium-term, rather than also short-term dependencies; prioritising industry and high tech sectors over financial and digital ones; failing to address and restore ACI's credibility deficit given its non-employment despite triggering conditions; and, lacking of an accompanying "new doctrine of political security".[1181] Additional concerns include its emphasis on resilience and risk calculation; its nature as a mechanism of «coordination effort» rather than a legal text;[1182] weak coordination system; and failure to identify EU chokepoints and reverse dependencies.[1183] Both the 2023 Strategy and the 2025 Doctrine are instruments that orientate priorities, intentions, and approaches while coordinating existing tools; yet, they remain classifiable

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[1176] *Ibid*., p. 3. Interestingly, the document literally reports «sanctions/restrictive measures». In this regard, refer to the discussion held in Chapter II of this dissertation on the term "sanction" and the possible inclusion of EU restrictive measures within this concept.

[1177] *Ibidem*.

[1178] *Ibid*., p. 1. At p. 6, the document lists some of the EU high-risk dependencies that can be weaponised for coercion purposes: *inter alia*, in critical raw materials, mainstream semiconductors, advanced materials, energy products, threats of disabling certain services.

[1179] *Ibid*., p. 2.

[1180] In this regard, the document (*Ibid*., p. 17) expressly assesses that the instruments in the EU hands must «now be used strategically», thereby acting with a «more proactive, strategic and coordinated use of all available tools to build a strong, secure and resilient economy for the long term, and to operate effectively in the new geopolitical and geoeconomic conditions shaping global trade». On this matter, also the Commissioner Šefčovič's speech of the 3rd December 2025 which repeated that «even a champion of open trade knows that openness without security becomes vulnerability»; and «To conclude, let me reiterate that Europe will continue to champion open trade and global investment – but our openness must be backed by security. That is why you will see more strategic and assertive use of our existing tools, the development of new ones where needed, and stronger capacity to collect and share economic intelligence». Refer to European Commission – Speech, *Remarks by Executive Vice-President Séjourné and Commissioner Šefčovič on the Economic Security Package*, cited above.

[1181] Bertoldi M., Buti M., *What the EU's Updated Economic Security Doctrine Still Lacks*, IEP Bocconi, 09 December 2025, available athttps://iep.unibocconi.eu/what-eus-updated-economic-security-doctrine-still-lacks, [last accessed on 02 February 2026]. On ACI's lack of credibility, also García-Bercero I., Poitiers N., *From Strategy to Doctrine: The Next Steps for European Economic Security*, op. cited above, p. 9.

[1182] Benson E., Steinberg F., *Unveiling the European Union's Major Economic Security Update: Is a True Geopolitical Commission Emerging?*, CSIS, 4 December 2025.

[1183] García-Bercero I., Poitiers N., *From Strategy to Doctrine: The Next Steps for European Economic Security*, op. cited above, pp. 9-10.

as policy discourse, notwithstanding their mentioning of formal legal instruments such as, inter alia, the Critical Raw Materials Act; the European Chips Act; the ACI; the FDI Screening Regulation; the Foreign Subsidies Regulation; sanctions/restrictive measures; and, the Blocking Statute.

Nonetheless, the 2025 EU Economic Security Doctrine constituted a landmark update of the 2023 Strategy. Interestingly – despite the term "doctrine" appearing in Commission speeches and doctrinal debates rather than in the Communication itself – the terminological choice of terms is significant. The shift from "strategy" – defined, in business English as «the way in which a business, government, or other organisation carefully plans its actions over a period of time to improve its position and achieve what it wants» –[1184] to "doctrine" – defined in business English as «a principle or set of principles that are followed by a particular group or in a particular situation» –[1185] reflects the transformation from identifying risks and planning to respond to establishing a new "clear-sighted" guidance on when and how to employ existing EU tools strategically.[1186]

4. Conclusive remarks

A variety of instruments is employed by States and international entities to control international trade. While the objectives of trade-restricting measures frequently employed nowadays are not always clear and entirely disclosed, the nature, historical evolution, and legal provisions governing each instrument provide crucial elements on their original design, purpose and potential application.

This Chapter has explored the international legal framework of trade restrictions – constituted by GATT provisions – alongside the unilateral capacity of the US and EU to impose trade-restrictive measures under their commercial policies. As presented, trade measures of commercial nature have become part of the frequent tools employed by States to coerce others, resulting in a substantial overlap between proper "sanctioning" measures – examined in Chapter II – and trade policy measures analysed herein. This overlap demonstrates a shift in trade-restricting measures designed to regulate commercial policies and protect domestic industries towards their employment for strategic and coercive purposes.

[1184] Cambridge Dictionary, *Strategy*, online version, last accessed on 05 February 2026.
[1185] Cambridge Dictionary, *Doctrine*, online version, last accessed on 05 February 2026.
[1186] *Inter alia*, European Commission – Speech, *Speech by Commissioner Šefčovič at the EU Ambassadors Conference 2025*, 05 February 2025, Brussels, SPEECH/25/422, stating that «we must be clear-sighted on when and how we use the tools at our disposal. The upcoming Economic Security Doctrine will reflect on this». Similarly, Szczepański M., *New EU Economic Security Doctrine*, op. cited above, p. 2 reporting that «Implementing and refining the existing instruments is to be accompanied by a wider reflection on how and when to deploy them strategically in a clear-sighted manner. In other words, the doctrine will aim to ensure the coherent and coordinated use of existing tools, to best pursue the EU's objectives and interests. […] he 2023 economic security strategy remains the key document on which the new policy will be based, and the doctrine will be about the practicalities of its implementation».

This development strongly differs from the multilateral WTO approach to trade, potentially undermining also key international law principles.[1187] The historical evolution of WTO law demonstrates that trade-restricting measures have long been part of international debates, being controversial especially regarding their unilateral adoption by States. While the GATT framework specifically provides for a multilateral approach to trade issues, with requirements and dedicated dispute settlement mechanism, trade-restricting measures employed outside this framework have persistently occurred and have recently increased substantially at the global level. The WTO AB paralysis, together with the growing recourse to Articles XX and XXI GATT exceptions, reflects the deepening crisis of international trade law and the strategic employment of unilateral measures for objectives extending beyond domestic protection and trade liberalisation originally envisaged by WTO law.

Similarly, domestic instruments originally conceived to regulate trade and protect domestic industries are increasingly being employed with coercive and strategic purposes, as the case studies and the illustrative example explored in Chapter IV of this dissertation will further demonstrate. The Trump Administration's use of Sections 232 and 301, alongside the EU Economic Security Strategy and its evolution into Doctrine, illustrates the shift of trade instruments towards strategic and "geoeconomic" objectives. Notably, however, the US case constitutes mainly a factual shift in the employment of existing instruments, whereas the EU case represents a normative adjustment and reorientation with the adoption of novel instruments at EU level.

Chapter IV explores States' practice regarding the employment of unilateral trade-restricting measures with coercive and strategic purposes through two selected case studies and one illustrative example: namely, the Western States-Russian Federation "sanctions war"; the US-China "trade war"; and, the China-Lithuania dispute. In each event it is firstly addressed the factual employment of the trade-restricting measures at issue, before applying the developed classification test to discuss and determine the measures' most plausible legal classification and qualification under international law. Together, these case studies and example highlight the coordinated and overlapping use of trade 'sanctions' and trade-restricting measures with multiple objectives, thereby presenting and discussing their framing within the broader concept of "economic wars" and the complexity of classifying the analysed measures under existing categories of international law.

[1187] As explored in Chapters I and II, the employment of trade measures with coercive purposes extends the discussion to many principles of international law, such as sovereign equality, non-intervention principles, the concept of economic coercion, use of force, and economic wars.

Chapter IV

Economic (trade) wars in action: past and present economic trade conflicts

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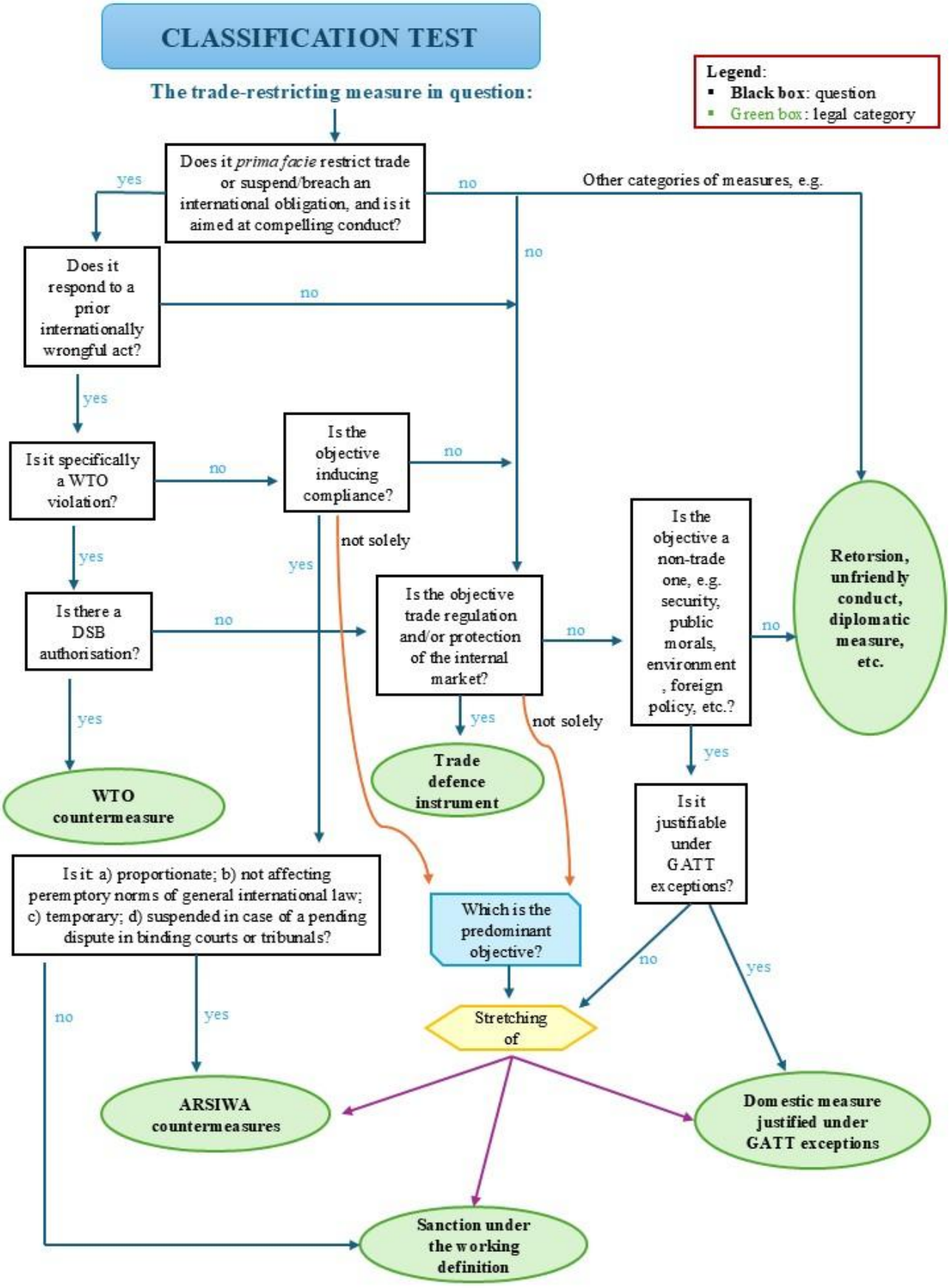
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1. Introduction

This final chapter brings together the conceptual and legal elements explored in previous chapters of the dissertation, focusing on State practice in the employment of trade-restricting measures within economic (trade) conflicts. It adopts a fact-based approach to examine how the enacted measures may be classified in accordance with the legal instruments and their legal frameworks previously analysed.

To this end, an analytical "classification test" has been developed on the basis of the considerations and conclusions discussed in the preceding chapters. A graphic representation of the test is provided in the following page, while a brief legend and a list of its limitations are discussed in the Annex to this dissertation. The text proceeds sequentially – through a series of questions admitting yes, no, not solely answers – and is grounded in States' official declarations, declared goals and justifications advanced by the adopting States, the legal basis of the measures concerned, and the domestic legal frameworks invoked.


CLASSIFICATION TEST
The trade-restricting measure in question:
Legend:
Black box: question
Green box: legal category
Does it prima facie restrict trade or suspend/breach an international obligation, and is it aimed at compelling conduct?
yes
no
Other categories of measures, e.g.
Does it respond to a prior internationally wrongful act?
no
yes
Is it specifically a WTO violation?
no
Is the objective inducing compliance?
no
yes
not solely
Is there a DSB authorisation?
no
Is the objective trade regulation and/or protection of the internal market?
no
Is the objective a non-trade one, e.g. security, public morals, environment, foreign policy, etc.?
no
Retorsion, unfriendly conduct, diplomatic measure, etc.
yes
yes
not solely
yes
WTO countermeasure
Trade defence instrument
Is it justifiable under GATT exceptions?
yes
Is it: a) proportionate; b) not affecting peremptory norms of general international law; c) temporary; d) suspended in case of a pending dispute in binding courts or tribunals?
Which is the predominant objective?
no
yes
no
yes
Stretching of
ARSIWA countermeasures
Domestic measure justified under GATT exceptions
Sanction under the working definition

The backbone questions of the test – provided in the black boxes – concern those crucial elements of international law that distinguish the legal classification of trade-restricting measures: namely, the restriction of trade or suspension/breach of an international obligation with coercive intent, the presence of a prior internationally wrongful act, whether the violation is specifically a WTO law violation, the objective(s) pursued, and adherence to specific international legal frameworks (ARSIWA and GATT). The legal categories – identified by the green boxes – are existing categories of international law, with the exception of "sanction" under the working definition and domestic measures justified under GATT, which constitute dissertation-specific groups developed for the purpose of this dissertation.[1188]

The central node of the predominant objective redirects the assessment toward the stretching of existing categories. Depending on which objective predominates, the measure might qualify either as a "stretching" of ARSIWA countermeasure – where the ARSIWA conditions are met –, of 'sanction' under the working definition – if the ARSIWA requirements are not met –, or of domestic measure justifiable under GATT exceptions. Although placed within a box directing to green classification boxes, the "stretching of" does not constitute a legal category *per se*: it rather denotes an imperfect application of existing categories of international law, presenting their crucial elements without satisfying all of their conditions. In this sense, the notion of "stretching" functions as an analytical descriptor rather than as a substantive classification, thus it neither constitutes a classificatory outcome nor corresponds to a recognised category of international law.

The presence of multiple objectives is not always the sole trigger of "stretching". For compliance-inducement measures, the non-exclusivity of the inducement objective produces the stretching, together with the satisfaction or non-satisfaction of the ARSIWA requirements, determining toward which category the measure tilts. In the case of domestic measures justifiable under GATT exceptions, stretching might arise from the presence of co-existing objectives and from the imperfect satisfaction of the GATT exceptions.[1189]

[1188] These two groups respectively identify: coercive non-armed measures, individual or collective, adopted by a State or an international organisation against another entity either (i) as international law enforcement through the UN system; or (ii) in response to violations of international law, with the aim of compelling compliance; and measures justified under Articles XX and XXI GATT exceptions, analysed as "WTO-justifiable trade restrictive measures" in Chapter III, Section 2.3.

[1189] As a way of example, the stretching of an ARSIWA countermeasure may occur where all the ARSIWA requirements are met, yet the measure simultaneously pursues compliance and geopolitical or economic objectives. The stretching of the 'category' of sanction under the working definition might parallelly arise when ARSIWA requirements are not satisfied, and the compliance objective is accompanied by objectives of foreign policies, or geopolitical aims. Lastly, the stretching of domestic measures under GATT exceptions may occur when a measure pursues non-trade objectives in principle justifiable under Articles XX or XXI GATT, yet the presence of multiple other objectives and the imperfect satisfaction of the exceptions' conditions prevent the "pure" classification as such.

The test does not aim to perfectly classify the measure under examination, but rather to provide its most plausible legal qualification. The concept of "stretching" is thus meant not to indicate the lawfulness or unlawfulness of the measure under the existing categories, but rather to acknowledge that current trade-restricting measures – and the legal justifications that States invoke – do not always perfectly fit the traditional legal classifications of international law. In these cases, measures are best described as "stretching" of existing categories, thereby identifying the category toward which the measure most plausibly tends (and, thus, is stretched as) and the degree of the tension between the measure's actual characteristics and its legal qualification by States and scholarly debate.

As previously mentioned, the Annex provides a comprehensive list and explanation of the definitions involved and the limitations of this "classification test". Nonetheless, the main constraints are worth mentioning at this stage: the test is strictly confined to trade-restrictive measures; it is a dissertation-specific analytical instrument rather than a novel legal classification mechanism; it relies on official declarations and stated justifications whose interpretation limits the precision of classification; two of its "category" nodes do not correspond to formally recognised categories of international law; and, it does not fully cover multilateral measures. In this regard, although multilateral measures have been analysed in this dissertation, this test has been developed specifically to assess the classification of the measures adopted in the selected cases explored in this Chapter, which – as presented below – mainly concern unilateral trade-restricting measures. Nonetheless, certain collective and multilateral measures are also discussed and subjected to the classification test. In the first case study – *i.e.* the "sanctions war" – the analysis considers the classification of certain measures as third-party countermeasures: namely, unilateral measures enacted collectively by a group of States not directly injured. Their classification follows the analytical path of the classification test corresponding to the ARSIWA countermeasures. Similarly, the second case study – *i.e.* the "trade war" – examines whether certain unilateral measures might have been adopted within a multilateral institutional system and thus be classified as "WTO countermeasure", which the classification test also considers.

Following this introduction, Section 2 addresses the "sanctions war" *par excellence*, namely that between Western States and the Russian Federation. It briefly outlines the measures adopted by the parties both in response to the 2014 annexation of Crimea (section 2.1.) and their significant expansion following the 2022 aggression against Ukraine (section 2.2.), and then focuses on their legal qualification under international law (section 2.3.), with particular attention to their link with the traditional 'sanctioning' measures analysed in Chapter II of this dissertation through the classification test developed in this Chapter.

Similarly, Section 3 analyses the US-China trade war, which is widely considered as the landmark trade conflict of recent decades. The adopted measures are briefly presented, beginning with the imposition of 2018 tariffs (section 3.1.), and through the 2020 Phase One Agreement and the Biden Administration until today (section 3.2.). Afterwards, their potential legal qualification is once again assessed through the developed classification test (section 3.3.), particularly by referring to the trade instruments for domestic purposes analysed in Chapter III of this dissertation, but also considering the potential "sanctioning" intent of the measures at hand.

Although both sanction and trade wars are analysed in their different temporal evolutions – respectively 2014 and 2022; and, 2018 and after 2020 – the Chapter deliberately provides solely a brief and selective overview of the factual events and measures. This is due to both spatial constraints, and the widespread familiarity of these disputes within scholarly literature. For similar reasons, solely the most significant WTO cases of each 'economic war' are briefly presented, respectively in Sections 2.3. and 3.3.

A further factual example is presented in Section 4, namely the 2021 'trade dispute' between China and Lithuania. This section provides a brief analysis of the events and of the measures' classification through the classification test, together with some concluding remarks on the employment of trade restrictions as instruments of formal and informal coercion. It is also discussed whether the factual cases presented may qualify as forms of "economic wars" or as singular cases of economic coercion, as presented in Chapter I. Finally, building on these cases, the section demonstrates how trade law instruments are increasingly being employed to pursue geopolitical and security objectives, within the increasingly explicit intertwined relationship between trade, geopolitical interests, and security aims.

The chapter concludes in Section 5 by highlighting the erosion of both multilateralism and the traditional distinctions between existing legal categories of trade-restricting measures, together with their increasing re-orientation towards geopolitical, foreign policies, and security objectives.

2. The 'sanctions war' *par excellence*: Western States v. the Russian Federation

Media and scholarly debate frequently refer to the economic conflict between Western States and the Russian Federation as a "sanctions war", especially after the Russian aggression against Ukraine in 2022.[1190] However, the reciprocal exchange of economic trade-restrictive measures between these

[1190] Notably, this event has also been named as the "Second Cold War" (or Cold War II, or New Cold War). However, various typologies of conflict are given this name: *inter alia* – aside from the sanctions war between Western States and the Russian Federation – the war against terrorism, the technological battle, and the US-China trade war. Among others, discussing different 'conflicts' as the new cold war: Brands H., Gallis J.L., *The New Cold War: America, China, and the Echoes of History*, Foreign Affairs, Vol. 100, no. 6, November/December 2021, pp. 10-21; Buzan B., *Will the 'Global War on Terrorism' be the New Cold War?*, International Affairs, Vol. 82, no. 6, November 2006, pp. 1001-1118; Gopinath

actors has been occurring since 2014, following the Russian annexation of Crimea. Since then, both parties adopted sanctions and "counter-sanctions" as tools to coerce each other. This section briefly analyses the sanctions regimes adopted in 2014 and 2022, with the aim to understand how the enacted instruments may be classified under international law.

2.1. Measures following the 2014 annexation of Crimea

Following the destitution of the Ukrainian President Viktor Yanukovych in February 2014,[1191] Crimea – a predominantly Russophone region of Ukraine – declared independence and held a controversial referendum on accession to the Russian Federation, resulting in its effective annexation in March 2014.[1192] This event was widely condemned as unlawful and as a violation of Ukrainian territorial integrity both by States and by the UNGA itself.[1193]

In response, numerous Western States and regional organisations, such as the EU, began adopting sanctions against the Russian Federation. The EU adopted a restrictive measures regime as soon as March 2014, followed by extensions and additions throughout 2015, 2016, 2017, 2018, 2019, 2020, 2021, and 2022.[1194] The US instead mainly imposed sanctioning measures through Executive

G., Gourinchas P-O., Presbitero A.F., Topalova P., *Changing Global Linkages: A New Cold War?*, Journal of International Economics, Vol. 153, 2025; Charap S., Shapiro J., *Consequences of a New Cold War*, Survival, Vol. 57, no. 2, 2015, pp. 37-46; Hung H., *Clash of Empires: From 'Chimerica' to the 'New Cold War'*, Cambridge University Press, 2022; and, Takach G.S., *Cold War 2.0: Artificial Intelligence in the New Battle Between China, Russia, and America*, Pegasus Books, 2024.

[1191] A transitional de-facto government – composed of ultra-nationalistic, anti-Russian, and filo-European forces – was established after the destitution of Yanukovych. One of its first decisions was to prevent the employment of the Russian language within the Ukrainian territory. The Republic of Crimea, a Russophone region, strongly dissented, thereby unilaterally declaring its independence from Ukraine and holding a referendum, with the support of the Russian Federation, on its adhesion to Russia. In this regard, Fulgenzi M., *La "guerra delle sanzioni": L'Unione Europea e la Federazione Russa nell'era dell'interdipendenza economica globale*, op. cited above, pp. 44-47.

[1192] In the months after the Crimean annexation, numerous military activities – attributed to the Russian support of separatist militia – and further referenda in the regions of Donetsk and Lugansk occurred. On this, in detail, Fulgenzi M., *La "guerra delle sanzioni": L'Unione Europea e la Federazione Russa nell'era dell'interdipendenza economica globale*, op. cited above, pp. 44-50. This book extensively focuses on the 2014 sanction regimes and the developments until 2021, the year of publication.

[1193] Refer to UNGA, Resolution 68/262, *Territorial Integrity of Ukrain*e, on 27 March 2014, underscoring that «the referendum held in the Autonomous Republic of Crimea and the city of Sevastopol on 16 March 2014, having no validity, cannot form the basis for any alteration of the status of the Autonomous Republic of Crimea or of the city of Sevastopol» (para 5).

[1194] The first set of restrictive measures was adopted on the 17 March against 21 Russian and Ukrainian officials, followed by the addition of 12 individuals on the 20 March with travel bans and asset freezes, and other additional measures in the following months. These measures involved targeted measures, financial restrictions, and, export and import controls. In 2015, the EU extended existing individual restrictive measures, asset freezes and travel bans, together with those measures directed at the misappropriation of Ukrainian State funds, and additional prohibitions on imports, investment, tourism services, exports of goods and technologies, financial, energy, and defence sectors, and dual-use goods. The measures have then been extended year by year, with some occasional addition of individuals, entities, or goods. In this regard, European Council - Council of the European Union, *Timeline – EU Sanctions Against Russia*, last reviewed 23 February 2026, available at https://www.consilium.europa.eu/en/policies/sanctions-against-russia/timeline-sanctions-against-russia/, [last accessed on 26 February 2026].

Orders under the IEEPA, establishing targeted and sectoral sanctions.[1195] Other States – *inter alia*, United Kingdom, Canada, Australia, and Japan – equally adopted sanctioning measures under their domestic legal frameworks.[1196]

Mainly, the measures targeted individuals and entities considered responsible for undermining Ukraine's territorial integrity. The measures, thus, were justified as responses to violations of international law, specifically the territorial integrity of Ukraine and the prohibition of use of force under Article 2 (4) UN Charter. They consisted of asset freezes, travel bans, export and import bans on arms trade, export controls on dual-use goods and sensitive energy technologies, and others.

Over time, these measures have been renewed and amended. Novel specific legislations have been also introduced, such as the 2017 US Countering America's Adversaries Through Sanctions Act (CAATSA) specifically meant to «counter aggression by the Governments of Iran, the Russian Federation, and North Korea».[1197] Russia, on the other hand, responded to these measures by imposing its own "sanctioning" measures against several Western countries,[1198] including food imports embargo and travel bans, often amended over the subsequent years.[1199]

[1195] Refer to Executive Orders n. 13600 (06 March 2014); 13661 (17 March 2016); 13662 (20 March 2014); and, 13685 (19 December 2014). Within the subsequent years, additional sanctions have been adopted through Executive Orders n. 13849 (20 September 2018) – under the CAATSA framework –; and, 13883 (03 August 2019). In this regard, U.S. Office of Foreign Assets Control, *Ukraine/Russia – Related Sanctions*, available at https://ofac.treasury.gov/sanctions-programs-and-country-information/ukraine-russia-related-sanctions, [last accessed on 27 February 2026]. Mainly, these sanctions concerned travel bans, property blocking; new investments; imports and exports of certain goods, services, and technologies; prohibitions of providing loans or credits, transactions, transfers of credits, purchasing equity and debt instruments.

[1196] As a way of example, refer to Mills C., *Russian Sanctions Prior to the Invasion of Ukraine*, UK Parliament - House of Commons Library, Research Briefing, no. 9797, 15 May 2023 concerning UK's sanctions; Government of Canada, *Canadian Sanctions Related to Russia*, available at https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/russia-russie.aspx?lang=eng, [last accessed on 02 March 2026] listing all Canadian sanctions to Russia (both 2014's and 2022's ongoing); Australian Government, *Russia Sanctions Framework*, available at https://www.dfat.gov.au/international-relations/security/sanctions/sanctions-regimes/russia-sanctions-framework, [last accessed on 02 March 2026] concerning Australia's sanctions of 2014 and 2022's-ongoing; and, Ministry of Foreign Affairs of Japan - Press Releases, *Statement by the Minister for Foreign Affairs of Japan on the Sanctions Against Russia over the Situation in Ukraine*, 29 April 2014, available at https://www.mofa.go.jp/press/release/press4e_000281.html, [last accessed on 02 March 2026], on Japan's individual sanctions (visa suspensions and freezing of negotiations). Refer also to the Global Sanctions Database for a detailed list: *i.e.* Felbermayr G., Kirilakha A., Syropoulos C., Yalcin E., Yotov Y.V., *The Global Sanctions Data Base*, European Economic Review, Vol. 129, 2020; and, Yalcin E., Felbermayr G., Kariem H., Kirilakha A., Kwon O., Syropoulos C., Yotov Y.V., *The Global Sanctions Data Base - Release 4: The Heterogeneous Effects of the Sanctions on Russia*, The World Economy, 2025.

[1197] In this sense, Preamble of CAATSA. On this Act, refer also to Section 6.1., Chapter II of this dissertation.

[1198] The Global Sanctions Database – *i.e.* Felbermayr G., Kirilakha A., Syropoulos C., Yalcin E., Yotov Y.V., *The Global Sanctions Data Base*, op. cited above; and, Yalcin E., Felbermayr G., Kariem H., Kirilakha A., Kwon O., Syropoulos C., Yotov Y.V., *The Global Sanctions Data Base - Release 4: The Heterogeneous Effects of the Sanctions on Russia*, op. cited above – includes Russia's 'counter-sanctions' adopted in 2014 against the following countries: Australia, Canada, EU, Norway, Ukraine, and US.

[1199] The food import embargo was established by Presidential Decree, "On the Application of Certain Special Economic Measures to Ensure the Security of the Russian Federation", 6th August 2014. On a list of Russian measures and some of their updates, refer to TASS, *Russia's Counter-Sanctions: What you Need to Know*, 30 June 2017. Enacted in 2018, but likewise important, is the Federal Law no. 127-FZ "On Retaliation Measures (Countermeasures) on Unfriendly Actions of the United States of America and Other Foreign Countries" (June 2018) imposing restrictions on international cooperation, imports and exports and others.

2.2. The expansion of sanctions in response to the 2022 aggression against Ukraine

On 24 February 2022, the Russian Federation launched an aggression against Ukraine. Notably, the reaction of the international community was both immediate and extensive, leading many Western States to impose a wide number of sanctioning measures against Russia. Unlike the 2014 measures, which were mainly targeted and sectoral, the 2022 sanctions were broader and more systematic, reflecting an unprecedented level of coordination among Western States.[1200] Mainly, the 2022 Western States' justifications mirror those of 2014, but the large-scale military aggression further reinforced their arguments of measures in response to severe violations of international law – namely, the prohibition of the use of force under Article 2 (4) UN Charter – with the UNGA itself characterising Russia's conduct as constituting aggression within the meaning of Resolution 3314 (XXIX).[1201]

The EU has enacted, at the time of writing, 19 sanctioning "packages" and related restrictive measures, and is currently discussing the 20th package.[1202] Similarly, the US has expanded its sanctions through IEEPA and CAATSA, strongly reinforcing its 2014 measures.[1203] Many other States have likewise enacted measures, such as the United Kingdom, Canada, Australia, Japan, New Zealand, South Korea, Singapore, and Taiwan.[1204]

[1200] The 2022-onward measures built upon the 2014 measures, but were widely extended across the economic and financial sectors of the Russian Federation. Most notably, these measures targeted Russia's financial system – imposing asset freezes, exclusion from SWIFT, restrictions on Russian Central Bank transactions, and on secondary-market transactions and equity investments –; restricted import and export of specific goods, technologies, critical dual-use goods, semiconductors, aerospace components, energy products, crude and petroleum products, oil and gas; banned Russian aircraft from entering airspaces, and prohibited display of state-owned media; as well as imposed individual measures on governmental officials and entities. They also concerned Belarus, due to its involvement in the Russian aggression.

[1201] In this regard, UNGA Resolution A/RES-11/1 of 2 March 2022 "Aggression against Ukraine", which reports, at para 2, that the General Assembly «*Deplores in the strongest terms* the aggression by the Russian Federation against Ukraine in violation of Article 2 (4) of the Charter». Interestingly, Silingardi S., *Secondary Sanctions, State Responsibility and Grave Breaches of Jus Cogens norms*, in Ruys T., Ryngaert C., Rodríguez Silvestre F. (eds.), *The Cambridge Handbook of Secondary Sanctions and International Law*, op. cited above, p. 218 suggests that «the determination by the UNGA is arguably authoritative enough to fill the gap left by the absence of a UNSC qualification». The UNGA definition of aggression has been briefly discussed in this dissertation in the footnotes of Chapter I, Sections 2.1. and 4.2., and of Chapter II, Section 3.2.

[1202] The first package was enacted the 23 February 2022; while the 19th on the 23 October 2025. On a brief overview of the packages and additional measures, European Council - Council of the European Union, *Timeline – EU Sanctions Against Russia*, last reviewed 23 February 2026, cited above.

[1203] Refer to Executive Orders 14065 (21 February 2022) prohibiting new investments in the Covered regions; imports and exports (also re-exports, sale, supply) of goods, services, technologies; financing or approving and facilitating transactions; blocking of properties; contributing to funds, goods, services of persons blocked. In detail, Congressional Research Service, *Russia's Invasion of Ukraine: Overview of U.S. and International Sanctions and Other Responses*, CRS In Focus, IN11869, 04 March 2022; and, Congressional Research Service, *Russia's Invasion of Ukraine: New Financial and Trade Sanctions*, CRS In Focus, IN11871, 04 March 2022.

[1204] As a way of example, Mills C., *Sanctions Against Russia (February 2022 to January 2025)*, UK Parliament - House of Commons Library, Research Briefing, no. 9481, 21 January 2025 dealing with UK' sanctions; Government of Canada, *Canadian Sanctions Related to Russia*, cited above, concerning Canada's measures; Australian Government, *Russia Sanctions Framework*, cited above, concerning Australia; Eiji K., Kie M., *Outline of Economic Sanctions Against Russia Resulting from the Situation in Ukraine*, Economic Security & International Trade Legal Update, 10 March 2022, pp. 1-10 on Japan's measures; New Zealand, *Russia Sanctions Act 2022*, no. 6, 11 March 2022, and, New Zealand Foreign

Russia, once again, responded to these measures with its own "counter-sanctions" against several Western countries,[1205] contending the unlawfulness of unilateral sanctioning measures under international law and their incompatibility with WTO obligations.[1206]

Affairs & Trade, *Overview of Sanctions Against Russia*, available at https://www.mfat.govt.nz/en/countries-and-regions/europe/ukraine/russian-invasion-of-ukraine/sanctions/overview-of-sanctions-against-russia, [last accessed on 02 March 2026]; UN Trade & Development – Investment Policy Hub, *Republic of Korea Adopted a Series of Sanctions Against the Russian Federation*, 07 March 2022, available at https://investmentpolicy.unctad.org/investment-policy-monitor/measures/3851/korea-republic-of-adopted-a-series-of-sanctions-against-the-russian-federation, [last accessed on 02 March 2026] regarding South Korea; Ministry of Foreign Affairs – Singapore, *Sanctions and Restrictions Against Russia in Response to its Invasion of Ukraine*, 05 March 2022, available at https://www.mfa.gov.sg/newsroom/press-statements-transcripts-and-photos/20220305-sanctions-05-mar-2022/, [last accessed on 02 March 2026] with regard to Singapore; and, Ministry of Foreign Affairs – Taiwan, *The Republic of China (Taiwan) Government Strongly Condemns Russia's Invasion of Ukraine in Violation of the UN Charter, Joins International Economic Sanctions Against Russia*, 25 February 2022, no. 038, available at https://en.mofa.gov.tw/News_Content.aspx?n=1328&s=97420, [last accessed on 02 March 2026], concerning Taiwan's measures.

[1205] The Global Sanctions Database – *i.e.* Felbermayr G., Kirilakha A., Syropoulos C., Yalcin E., Yotov Y.V., *The Global Sanctions Data Base*, op. cited above; and, Yalcin E., Felbermayr G., Kariem H., Kirilakha A., Kwon O., Syropoulos C., Yotov Y.V., *The Global Sanctions Data Base - Release 4: The Heterogeneous Effects of the Sanctions on Russia*, op. cited above – lists Russian's 'counter-sanctions' enacted in 2022 and subsequent years against the following countries: Australia, Bulgaria, EU, EEU, New Zealand, Poland, UK, US, Estonia, Latvia, and Lithuania. Many Presidential Decree were enacted introducing, *inter alia*, foreign currency controls; lists of "unfriendly States"; export and import bans on specific goods (raw materials, instruments of telecommunications, pharmaceutical and medical products, equipment and machinery for different purposes such as turbines, mining tools, rail and aircraft parts, etc); restrictions on specific transactions (*e.g.* those affecting foreign persons resulting in ownership transfers of securities or real estates); and, suspensions of IP rights from unfriendly countries. Among others, Decree no. 79 "On Special Economic Measures in Connection with the Unfriendly Actions of the United States of America and Other Foreign Countries" of February 2022; Decree no. 81 "On Additional Temporary Measures of Economic Nature to Secure Financial Stability of the Russian Federation" of March 2022; Decree no. 95 "On the Temporary Procedure for the Fulfilment of Obligations to Certain Foreign Creditors" of March 2022; Decree no. 100 "On the Application of Special Economic Measures in the Sphere of Foreign Economic Activity" of March 2022; Decree no. 126 amending Decrees no. 79 and 81 (March 2022); Decree no. 254"On Retaliatory Measures in Response to Unfriendly Actions of Certain Foreign States and International Organization" of May 2022; Decree no. 520 "Restrictions on Transactions with Shares of Certain Russian Companies" of August 2022; Decree no. 618 "Special procedure for transactions with shares and participatory interests" of September 2022; etc. *Inter alia*, prior legislation had been updated in recent years, such as the remarkable Federal Law no. 281-FZ of December 2006 "On Special Economic Measures and Coercion Measures" – amended in August 2023. Importantly, also Federal Law No. 30-FZ of March 4, 2022 "On Amendments to the Federal Law "On Measures to Influence Persons Involved in Violations of Fundamental Human Rights and Freedoms, Rights and Freedoms of Citizens of the Russian Federation"" including lists of individuals subject to ban of entry, seizure of assets and other; and, Federal Law No. 46-FZ of March 8, 2022, "On Amendments to Certain Legislative Acts of the Russian Federation", introducing the possibility to suspend IP rights. Most recently, in 2025, additional Presidential Decrees were enacted to amend or adjust the sanctioning framework, such as Decree no. 615 "Amendment to earlier counter-sanctions decrees (including Decree No. 723 of 2023)" of September 2025; and, Decree no. 693 "On Certain Particularities of the Sale of Property in Federal Ownership" of September 2025. *Inter alia*, the website Morgan Lewis, available at https://www.morganlewis.com/, lists the Russian Decrees and their updates; such as does the website Global Sanctions and Export Controls Blog, by Baker McKenzie, available at https://sanctionsnews.bakermckenzie.com/. Refer also to KIAP Alerts, *UPD: Overview of Key Measures to Respond to Sanctions Imposed by Unfriendly Countries*, 26 March 2023; GW-Graf von Westphalen, *Measures Adopted by Russia in Response to Sanctions*, updated by March 2022. The list of "unfriendly countries" – *i.e.* «foreign States and territories involved in unfriendly activity towards Russia, Russian companies and citizens» – includes Albania, Andorra, Australia, Canada, members of the European Union, Iceland, Japan, Liechtenstein, Micronesia, Monaco, Montenegro, New Zealand, North Macedonia, Norway, Singapore, San Marino, South Korea, Switzerland, Taiwan (the Republic of China), Ukraine, the United Kingdom, including Jersey, Anguilla, British Virgin Islands and Gibraltar, and the United States of America (as per the Government Directive no. 430-r of 5 March 2022, available at government.ru).

[1206] *Inter alia*, and most recently, refer to the Statement by Deputy Foreign Minister of the Russian Federation Dmitry Lyubinsky at the International Conference on Humanitarian Action, *Remedy and Responsibility in Unilateral Sanctions Environment*, Geneva, 09 April 2026.

2.3. Sanctions or other measures?: the legal qualification of Western sanctions and Russian counter-sanctions

From the point of view of international law, various critics were raised over this "sanctions war". *Inter alia*, concerns regarded the lawfulness of unilateral actions outside the UN framework, the measures' humanitarian impact, their limited effectiveness, economic and financial fragmentation, their impact on developing countries, and compliance with the WTO law.

Perhaps due both to the WTO AB's crisis,[1207] and to the use of GATT's national security "shield" of Article XXI,[1208] few concrete instances concerning the trade measures adopted after 2022 have been raised before the WTO dispute settlement system. Factually, the number of WTO disputes involving the Russian Federation was significantly higher in the period 2014-2021 than in 2022-2026. During the 2014-2021 period, the Russian Federation was an active participant within the WTO system, similarly to other States, both as complainant and respondent. The disputes involved a wide range of WTO issues, including anti-dumping, safeguards, SPS, TBT, tariffs, and traffic restrictions (*e.g.* the notable case Russia-Traffic in Transit of 2019 analysed in Chapter III, Section 2.3., of this dissertation).[1209] This activity might demonstrate the consolidation of Russia's participation in the WTO (following its accession in 2012), and the increasing trade tensions developing after the 2014

[1207] Notably, the AB "paralysis" follows the US refusal, from December 2019, to appoint new members of the AB. As a result, the effectiveness and credibility of the WTO decreased, while States and entities increasingly resorted to unilateral measures outside the WTO framework and proposed amendments to the DSU and WTO system. *Inter alia*, it was established the Multi-Party Interim Appeal Arbitration Arrangement (MPIA), effective from April 2020. On the crisis and this arrangement, refer to *supra*, Chapter III, Section 2.1.

[1208] As explored in Chapter III, Section 2.3., Article XXI GATT envisages that nothing in the GATT shall be interpreted as (a) requiring disclosure of information contrary to WTO MS' essential security interests; (b) preventing any action necessary to protect those interests in relation to (i) fissionable materials or derived materials, (ii) traffic in arms, ammunition and implements of war, and those (iii) taken in time of war or other emergency in international relations; or (c) preventing any action pursuant to UN obligations for the maintenance of international peace and security. Until 2019, Article XXI GATT generated limited WTO case law, yet the landmark 2019 Russia-Traffic in Transit case firstly interpreted crucial parts of the Article. Interestingly, Silingardi S., *I trattati commerciali*, in Crespi Reghizzi Z., Vellano M. (eds), *I trattati internazionali alla prova del conflitto russo-ucraino*, op. cited above, pp. 97-98, finds certain Western States' measures as justifiable under Article XXI GATT, alongside also as third-party countermeasures.

[1209] In this regard, within the period 2014-2021, WTO cases involving the Russian Federation had been the following: *European Union and its Member States – Certain Measures Relating to the Energy Sector* (DS476) on subsidies and countervailing measures; *Ukraine – Anti-Dumping Measures on Ammonium Nitrate (*DS493) on antidumping; *European Union – Anti-Dumping Measures on Certain Cold-Rolled Flat Steel Products from Russia* (DS521) on antidumping; *Ukraine – Measures relating to Trade in Goods and Services* (DS525) on technical barriers to trade (TBT), import licensing, etc; *United States – Certain Measures on Steel and Aluminium Products* (DS554) on safeguards; *United States – Anti-Dumping Measures on Carbon-Quality Steel from Russia* (DS586) on antidumping; *Russia – Tariff Treatment of Certain Agricultural and Manufacturing Products* (DS485) on tariffs; *Russia – Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy* (DS479) on antidumping; *Russian Federation – Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union* (DS475) on Sanitary and Phytosanitary Measures (SPS); *Russia – Measures Affecting the Importation of Railway Equipment and Parts Thereof* (DS499) on TBT; *Russia – Measures Concerning Traffic in Transit* (DS512) notably on restrictions on traffic in transit, as explored in-depth in Chapter III of this dissertation, Section 2.3.1.; *Russia – Measures Concerning the Importation and Transit of Certain Ukrainian Products* (DS532) on TBT; *Russian Federation – Additional Duties on Certain Products from the United States* (DS566) on additional duties; and, *Russian Federation – Certain Measures Concerning Domestic and Foreign Products and Services* (DS604) on price preferences.

annexation of Crimea. By contrast, the period 2022-2026 shows a limited amount of WTO disputes involving the Russian Federation.[1210] The reduction in WTO disputes does not reflect a factual decrease of trade tensions involving Russia, but rather is consequent to the AB's paralysis, and to the increasing reliance on unilateral trade restrictions outside the WTO framework.

Politically, both parties have advanced legal justifications for their respective measures: Western States have framed their measures as responses to Russia's blatant violations of the prohibition of the use of force and of Ukraine's territorial integrity acting – lacking UN-coordinated action and sanctions due to the Russian veto power – through their domestic 'sanctioning' legal frameworks, such as the EU through CFSP procedures, and the US through IEEPA and related legislation. On the contrary, Russia – constantly declaring itself against the reliance on unilateral sanctions – justified its measures as countermeasures under international law, invoking its status as injured State lawfully responding to another State's internationally wrongful act.

The different interpretations of international law advanced by Western States and Russia (together with China) play a crucial role in this context, especially regarding unilateral sanctions and the principle of non-intervention. As briefly discussed in Chapter II, Section 5, both Russia and China openly contest the use of unilateral sanctioning measures as a violation of international law, especially those with extraterritorial application. It has also recently been argued that Russia's interpretation of non-intervention resembles the Schmitt's concept of *Großraum*: what occurs within Russia's *Großraum* is not unlawful intervention in Ukrainian territory, since that territory is understood by Russia as part of its own geographical unit, as defined by military, cultural, linguistic and trade relations.[1211]

[1210] In the period 2022-2026 (as for the time of writing, *i.e.* February 2026), cases involving the Russian Federation were the following: *Russian Federation – Measures Concerning the Exportation of Wood Products* (DS608) on tariffs on exports of wood products; and, European Union and its *Member States – Carbon Border Adjustment Mechanism* (DS639) on CBAM, as briefly presented in Chapter III, Section 3.2.2., of this dissertation.

[1211] In this regard, Arvidsson M., Noll G., *Carl Schmitt in Russia and China: A Revival for Großraum Analytics in International Law*, in Klamberg M., Svanberg K., Rönnelid L. (eds), *Reconstructing Power and Hegemony in Public International Law*, op. cited above, pp. 441-458. The authors analyse both Russian and Chinese actions. Regarding Russian's activities, the scholars consider Putin's 24 February 2022 speech and its following actions, concluding that «"non-intervention" in Putin's vocabulary refers to the Schmittian *Großraum* analytics» (p. 448), to be understood as «not only a claim to power by military force, but also builds on dominance on matters cultural, linguistic, and – not the least – commercial relations of trade and trade routes, technology developments, concessions, and straight down to raw extraction and exploitation» (p. 445). In this sense, accordingly, «The meaning and applicability of the non-intervention principle, as it known in mainstream contemporary international law, thus changes in the Schmitt-Putin *Großraum* version from referring to sovereign *State* territory to preferring to the much more extensive geographical unit of the *Großraum*» (p. 446). China, instead, is not argued to receive the *Großraum* doctrine, but instead to sometimes «overlap with Schmittian logics and critiques of liberal international law» (p. 456). Russian and Chinese approaches reinforce each other (p. 452), yet their Joint Declarations do not constitute «coherent ideology» (p. 455) although recalling the «Schmittian idea of non-intervention in the internal affairs as well as in the *Großraume* – the "adjacent regions" – of historically important regional powers» (p. 450, refer also to p. 449 and p. 456). With regard to Russia's justifications for its aggression against Ukraine, *inter alia*, Cavandoli S., Wilson G., *Distorting Fundamental Norms of International Law to Resurrect the Soviet Union: The International Law Context of Russia's Invasion of Ukraine*, Netherlands International Law Review, Vol. 69, 2022, pp.

This Section – and the corresponding analyses in the subsequent case studies – examines the justifications provided by both parties. This choice, however, does not imply either endorsing these justifications or considering them as equally valid under international law. Notably, the qualification and interpretation of facts are crucial elements for the application of any legal framework, and each State's narrative representation of those facts inevitably complicates an objective factual assessment. In this specific case, however, the presence of differing and competing narratives does not result in a legal equivalence between the parties' justifications.

The symmetrical employment of each State's justification is thus purely methodological and adopted solely to apply the classification test, notwithstanding its limitations as discussed in the Annex. In this regard, examining both parties' arguments in parallel serves an analytical function but does not correspond to a reflection of their respective legal validity: fundamentally, the two justifications remain asymmetrical in substance since their validity depends on each party's conformity – or lack of – with international law, which is likewise asymmetrical. Indeed, Russia's conduct is – as also widely recognised by scholars and the international community alike – unlawful under international law, since it violated fundamental international law norms, including the prohibition of the use of force and of territorial integrity.

Thus, the methodological choice to apply the same classificatory test to both parties' claims should be read as a tool for consistency of analysis, and not as an implicit assessment of equality between an unlawful use of force and the measure adopted in response to it. Against this background, the following analysis and sections examine both parties' justifications in order to apply and discuss the classification test and investigate the measures' classification.

Following each party's justification, thus, both the 2014 and 2022 respective measures are, in principle, ARSIWA countermeasures or, in the case of Western States, third-party countermeasures. This is indeed consistent with both sides of the economic conflict: Western States perceive Russian actions as constituting violations of Ukraine's territorial integrity and declare compliance-inducing objectives for their measures, while Russia conceives Western economic measures as violations of the prohibition of unilateral sanctions and the principle of non-intervention aiming to compel Western States to comply with international law. Specifically to third-party countermeasures – assuming their admissibility under ARSIWA –[1212] their employment should respond to a violation of *erga omnes*

383-410. Refer also to Giblin J., Chub O., Butchard P., Senatorova O. (eds), *International Law After the Ukraine War*, Routledge, 2026.

[1212] Scholarly debate is divided over the admissibility of third-party countermeasures, although recent events and contributions appear to support it. In general terms, while some maintain that countermeasures are available solely to injured States and that the reference of Article 54 ARSIWA to "lawful measures" specifically excludes countermeasures – which are unlawful *per se* –, others support the possibility and lawfulness of third-party countermeasures in response to violations of *erga omnes partes* or *erga omnes* obligations. On the discussion regarding the admissibility of third-party countermeasures under ARSIWA and the recent interpretations, refer to Chapter II, Section 4.1.

partes or *erga omnes* obligations, categories which are generally considered to include the prohibition of the use of force,[1213] thus satisfying also this additional requirement for Western States.

This would signify that both parties' measures respond to a previous internationally wrongful act – to be self-assessed – and are aimed at inducing compliance. In theory, this assessment would provide a reciprocal legal justification for the measures adopted by both parties, especially as each party invokes its own interpretation of international law to support its actions. However, the paradox is evident since this approach means relying on different and contrasting interpretations of international law invoked by the parties involved.[1214]

From a legal standpoint, if the measures adopted by Western States were to be qualified as third-party countermeasures and those by Russia as countermeasures – as each party respectively claim –, this classification would bind them to the ARSIWA framework.[1215] Accordingly, countermeasures should be proportionate to the «injury suffered», taking into consideration both the «gravity» of the internationally wrongful act and the rights involved;[1216] they cannot affect crucial international principles, including human rights and peremptory norms of general international law, as provided by Article 50 ARSIWA; they must be temporary and suspended in cases of pending disputes. A significant part of the international community, however, questioned the proportionality

[1213] In this regard, *inter alia*, Urs P., *The Articulation of Obligations Erga Omnes and Erga Omnes Partes by the International Court of Justice: Coherence or Confusion?*, International and Comparative Law Quarterly, Vol. 74, no. 2, 2025, pp. 257-286; and, Carli W., *Obligations Erga Omnes, Norms of Jus Cogens and Legal Consequences for "Other States" in the ICJ Palestine Advisory Opinion*, Blog of the European Journal of International Law (EJIL: Talk!), 26 August 2024.

[1214] This situation reflects the decentralised nature of the international legal framework and the lack of uniform and binding definitions of key concepts of international law – such as "sanctions" and "coercion" – which remain solely partially defined or regulated. Moreover, the ongoing UN crisis and its inability to address recent critical events enabled States to individually invoke unilateral interpretations of legal concepts to justify their actions.

[1215] To be precise, as discussed by Silingardi S., *Secondary Sanctions, State Responsibility and Grave Breaches of Jus Cogens norms*, in Ruys T., Ryngaert C., Rodríguez Silvestre F. (eds.), *The Cambridge Handbook of Secondary Sanctions and International Law*, op. cited above, p. 230, it is debated whether ARSIWA conditions are applicable also to third-party countermeasures or solely to «bilateral countermeasures».

[1216] Article 51 ARSIWA, which interestingly links proportionality not to the goal pursued or to the achievement of the objective, but rather to the injury suffered and to the gravity of the internationally wrongful act.

of both Western and Russian adopted measures,[1217] as well as their impact on human rights,[1218] thereby challenging their qualification as lawful third-party countermeasures or countermeasures.

The objective of the measures represents a further controversial element: while some strictly invoke compliance-inducing objectives (such as the involved parties), part of the doctrine argues for the presence of other typologies of objectives – including regime change, punishment, foreign policy and security interests, or signalling goals.[1219] The presence of multiple objectives – or, the non-exclusivity – raises doubts as to whether the measures might be classified as "pure" countermeasures in the ARSIWA sense, which, together with the contested achievement of the abovementioned requirements, prevent the classification of the measures as ARSIWA third-party countermeasures and countermeasures.

Given the failure to satisfy the ARSIWA conditions, the classification test redirects toward 'sanction' within the working definition developed in Chapter III: *i.e.* coercive measures that respond to a prior violation of international law with the objective of inducing compliance.[1220] Once again,

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[1217] *Inter alia*, Hofer A., *The EU's 'Massive and Targeted' Sanctions in Response to Russian Aggression, a Contradiction in Terms*, Cambridge Yearbook of European Legal Studies, Vol. 25, 2023, pp. 19-39, finding EU restrictive measures against Russia as disproportionate (*e.g.*, p. 38, and p. 39). Accordingly, «a disproportionate sanction would be an international wrongful act—even if it does not breach an obligation the sender owes the target» (p. 25), thus Russian counter-measures might be justified also under this motivation. The author also notices that, according to the ARSIWA Commentary, the proportionality of third-party countermeasures «should be considered as a whole, not individually» (p. 26). Of the opposite view is Silingardi S., *Secondary Sanctions, State Responsibility and Grave Breaches of Jus Cogens norms*, in Ruys T., Ryngaert C., Rodríguez Silvestre F. (eds.), *The Cambridge Handbook of Secondary Sanctions and International Law*, op. cited above, p. 232, which instead explicitly inquires – with reference to Western States measures – «How then can one argue that sanctions adopted against such conduct are disproportionate?», thereby adding that the severity of the Russian breach not only justified the measures adopted by non-injured States, but also those extraterritorial sanctions «which are necessary for the execution of those mandatory sanctions». On this latter conclusion, also, *Ibid*., pp. 236-237, where the author also specified potential abuses of secondary sanctions.

[1218] Among others, Hofer A., *The EU's 'Massive and Targeted' Sanctions in Response to Russian Aggression, a Contradiction in Terms*, op. cited above, pp. 32-34.

[1219] *Inter alia*, McDaniel C., Ghei N., *Economic Sanctions as a Foreign Policy Instrument: The Case of Russia*, Policy Brief – Mercatus Center, George Mason University, August 2022; Baker S., *Punishing Putin: Inside the Global Economic War to Bring Down Russia*, Scribner, 2024; Hofer A., *The EU's 'Massive and Targeted' Sanctions in Response to Russian Aggression, a Contradiction in Terms*, op. cited above, p. 28; Meissner K., Graziani C., *The Transformation and Design of EU Restrictive Measures Against Russia*, op. cited above, p. 391; Silingardi S., *Sulla legittimità delle sanzioni unilaterali nei confronti della Russia a seguito dell'aggressione contro l'Ucraina*, op. cited above, pp. 807-808; and, Bret C., *European Action Against Russia: What Does the Future Hold for the Sanction Strategy?*, Blog Post of Notre Europe – Institut Jacques Delors, 10 November 2022.

[1220] Briefly, as analysed in Chapter II, Section 1, for the purpose of this dissertation, and notwithstanding the above, "sanctions" are identified as coercive non-armed measures, individual or collective, adopted by a State or an international organisation against another entity either (i) as international law enforcement through the UN system; or (ii) in response to violations of international law, with the aim of compelling compliance with international law and its obligations. Measures recognised as "sanctions" may thus be categorised into two types: first, measures aimed at international law enforcement, and, second, measures designed to induce compliance after a violation of international law. The first category is represented by UN non-armed measures under Chapter VII of the UN Charter, which serve as institutionalised coercive tools aimed at maintaining and restoring international peace and security. They are measures coercive in nature and intended to render States compliant, both preventively (*e.g.* prior to specific violations, such as in cases of "threats to the peace", as further explained afterwards) and reactively. The second category includes measures that respond to violations of international law. This encompasses not only UN non-armed measures that respond to prior violations, but also ARSIWA countermeasures, including third-party countermeasures. Finally, unilateral States measures may qualify

this qualification is consistent with both parties' justifications: both measures are coercive, respond to a claimed prior internationally wrongful act, and are aimed – at least predominantly – toward inducing compliance. As mentioned above, however, this equal classification does not constitute a legal assessment of the legality of the conduct of both parties.

This qualification is further supported by the legal basis invoked by the States themselves: as mentioned, Western States relied on domestic sanctioning legislation – CFSP framework for the EU, IEEPA for the US – while Russia enacted its measures through decrees and federal laws expressly framed as "counter-sanctions". In this regard, reliance on 'sanctioning' instruments and sanctioning language may reflect the parties' acknowledgement that the measures fall outside the ARSIWA framework and are better qualified under the wider 'category' of "sanctions". Likewise, both media and scholarly debate predominantly classify the measures as "sanctions", frequently referring to Western and Russian sanctions and counter-sanctions.

The co-existence of multiple objectives – inducing compliance, regime change, foreign policy, security, geopolitical, and also punishment – complicates the qualification. Notwithstanding that the lack of the objective of inducing compliance would undoubtedly prevent their classification as both countermeasures and 'sanctions' under the working definition of this dissertation, the presence of additional objectives does not, *per se*, completely prevent the classification of the measures as such. As mentioned above, the ARSIWA framework is not the most appropriate for the classification due to the controversial satisfaction of all of its requirements. Differently, additional objectives do not prevent the classification as "sanctions", but rather redirect it toward a "stretched" application of that category, within which the compliance-inducement objective remains the predominant, although not exclusive, purpose.

Overall, while the goal of the measures constitutes an important factor in delineating their legal nature, this approach remains controversial: declared goals might strategically conceal different purposes,[1221] and the co-existence of objectives renders any 'single' classification intrinsically partial. The predominance of one objective may help the qualification, yet it remains imperfect and necessarily involves a degree of interpretation that, *per se*, limits the precision of the classification. Nevertheless, rejecting any legal classification on the grounds of the co-existence of multiple

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as "sanctions" under this category when their legal framework specifically assigns them a coercive intent aimed at inducing compliance with international law, rather than solely pursuing foreign policy or economic objectives.

[1221] This issue is also partially addressed in Chapter II, Section 2 (i), where the purpose-oriented approach to define measures as sanctions is explored. Indeed, while the purpose-oriented approach qualifies measures according to their aims, these objectives – which, concerning the term "sanction", include coercion, deterrence, punishment, signalling disapproval, limitation of harm or risks, prevention, reputational damage, obtaining domestic advantages, or even reshaping geopolitical structures – are not uniformly agreed within the international community. Together with the lack of a uniform consensus on which purposes render a measure effectively a "sanction", this approach also suffers the risk of declared goals which, instead, strategically conceal different purposes.

objectives would render unclassifiable almost any economic measure currently enacted by States and entities. Thus, despite complicating the assessment, the co-existence of multiple objectives does not prevent the legal classification entirely, and the predominant criteria provide a sufficient basis to qualify the "stretched" category of the measures under examination.

The best legal qualification of the measures in this section is thus that of "stretched sanctions" under the working definition developed in this dissertation. This is so because the alternative classifications are not fully convincing: the ARSIWA framework cannot be satisfied due to their controversial proportionality and human rights concerns; while the framing of these as domestic measures justifiable under GATT exceptions fails to consider the predominance of the compliance-inducement objective.

However, to be precise, some instruments employed within this context cannot be framed as proper – or as stretched – sanctioning tools, even if they may achieve comparable effects. A State's decision, for instance, to modify its commercial partners in strategic sectors, such as natural gas supply, constitutes in essence the renegotiation or termination of contractual and commercial contracts between parties, and is therefore better understood as a legitimate commercial decision rather than as a coercive measure. As such, although such choices might be politically unfriendly towards the targeted State and may produce significant economic consequences, they do not reach the threshold of coercive or "sanctioning" measures *stricto sensu*.[1222] Their inclusion within the broader "sanctions" narrative is, thus, imprecise, even if their practical impact may be similar if not equal to that of 'sanctioning' instruments.

The blurring of sanctioning tools and trade instruments is frequent in numerous current economic conflicts. While the Western States-Russia sanctions war here presented occurred through "sanctioning instruments" – whose legal frameworks and problematic declinations have been analysed in Chapter II of this dissertation – the following Section explores a different dimension of

[1222] An example is the modification of supply of natural gas by the EU following the Russian aggression against Ukraine in 2022. In political discourse, this shift has been presented as EU's sanctioning activity: *e.g.*, Consiglio Europeo, *Guerra di aggressione della Russia nei confronti dell'Ucraina: il quattordicesimo pacchetto globale di sanzioni dell'UE combatte l'elusione e adotta misure in materia di energia*, 24 June 2024, available at https://www.consilium.europa.eu/it/press/press-releases/2024/06/24/russia-s-war-of-aggression-against-ukraine-comprehensive-eu-s-14th-package-of-sanctions-cracks-down-on-circumvention-and-adopts-energy-measures/, [last accessed on 05 March 2026]; Euronews, *L'Ue approva nuove sanzioni contro la Russia: per la prima volta prendono di mira il gas russo*, 20 June 2024, available at https://it.euronews.com/my-europe/2024/06/20/lue-approva-nuove-sanzioni-contro-la-russia-per-la-prima-volta-prendono-di-mira-il-gas-rus, [last accessed on 07 August 2024]; EuropaToday, *L'Ue per la prima volta sanziona il gas russo: cosa cambia per Putin*, 21 June 2024, available at https://europa.today.it/unione-europea/europa-sanziona-gas-russo-cosa-succede.html, [last accessed on 07 August 2024]. However, from a legal and contractual perspective, this is understood as a commercial and contractual choice concerning long-term energy supply, rather than as a "sanction" *stricto sensu*: refer to Polettini F., *Clausola "Take or Pay" e cause di forza maggiore*, in Rivista Energia, 03 November 2022, available at https://www.rivistaenergia.it/2022/11/clausola-take-or-pay-e-cause-di-forza-maggiore/, [last accessed on 07 August 2024]; and, Clò A., *Il difficile rebus dei contratti che ancora legano l'Europa al gas russo*, in Rivista Energia, 06 December 2023, available at https://www.rivistaenergia.it/2023/12/il-difficile-rebus-dei-contratti-che-ancora-legano-leuropa-al-gas-russo/, [last accessed on 07 August 2024].

coercive measures restricting trade: trade instruments originally aimed at protecting domestic industries employed with coercive objectives, as explored in Chapter III of this dissertation.

The "trade war" *par excellence*, namely the 2018 US-China exchange of trade-restricting measures, precisely reflects this scenario with, furthermore and differently from the "sanctions war", interesting WTO cases and panel reports pronouncing on the lawfulness of certain adopted measures.

3. The 'trade war' *par excellence*: United States v. the People's Republic of China

The "trade war" *par excellence – i.e.* the economic conflict between the US and China – began in 2018 and is still ongoing. The measures adopted by the two States are largely reciprocal and mainly consist of the imposition of tariffs on a wide range of goods. Unlike the measures discussed in the previous section, these measures have not been officially framed as "sanctions" or coercive responses to internationally wrongful acts; rather they have been justified as trade policy instruments. This Section briefly analyses the measures adopted by both States from 2018 until today, without constituting an exhaustive chronology of the tariff increases, but rather aiming to trace the progressive transformation of the employment of these instruments from trade regulation to a broader economic and geopolitical strategy. This dimension is indeed essential to subsequently explore the measures' legal nature and classification from an international law perspective.

3.1. The imposition of tariffs in 2018

Between March and July 2018, the US President Donald Trump imposed tariffs under Sections 301 and 232,[1223] prompting several States to retaliate with additional duties: *inter alia*, China mostly targeted agricultural and industrial goods, while Mexico and Canada imposed tariffs on US

[1223] In March 2018, the US President Donald Trump imposed tariffs on steel (25%) and aluminium (10%) imports under Section 232 Trade Expansion Act of 1962, following investigations that found such imports threatened to impair US national security. In this regard, US Department of Commerce – Bureau of Industry and Security Office of Technology Evaluation, *The Effect of Imports of Steel on the National Security - An Investigation Conducted Under Section 232 of the Trade Expansion Act of 1962, As Amended*, 11 January 2018. Although the March 2018' measures targeted numerous countries – including Argentina, Canada, the EU, and South Korea – they mostly impacted on China, being the world's largest producer of steel and aluminium. The day before introducing the tariffs, the US granted exemptions until the 1st of May 2018 to Argentina, Australia, Brazil, EU, Mexico, and South Korea, as to provide these trading partners with the possibility to negotiate the US's security concerns. A further extension of 30 additional days occurred at the end of April 2018, with agreements between the US and Argentina, Australia, Brazil, and South Korea effectively being concluded. No agreement was reached with the EU, Canada, and Mexico, which thus from the 1st of June 2018 were subject to the mentioned above tariffs. On EU's first responses, refer to Harte R.E.N., *US Tariffs: EU Response and Fears of a Trade War*, European Parliamentary Research Service (EPRS), PE 623.554, 21 June 2018. In July 2018, following the USTR investigation under Section 301 Trade Act, the US introduced a set of tariffs specifically against China (known as "List 1"), prompting reciprocal measures. In this regard, USTR – Fact Sheet, *Section 301 Fact Sheet*, 2018, available at https://ustr.gov/sites/default/files/USTR%20301%20Fact%20Sheet.pdf, [last accessed on 05 March 2026].

[1223] USTR – Press Release, *USTR Finalizes Second Tranche of Tariffs on Chinese Products in Response to China's Unfair Trade Practices*, 07 August 2018, available at https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/august/ustr-finalizes-second-tranche, [last accessed on 05 March 2026], containing – at the end – the comprehensive list of Chinese goods and products subject to tariffs from August 2018.

agricultural, industrial, and manufactured exports.[1224] This is generally recognised as the beginning of the US-China trade war, which escalated in August and September 2018 as both US and China imposed additional measures.[1225] A temporary suspension of the trade war occurred in December 2018,[1226] but negotiations were unsuccessful and reciprocal tariffs between the two countries were again imposed.[1227] The notable agreement "Phase One Trade Deal" was reached in January 2020, temporarily suspending some measures.[1228]

At this stage of the trade conflict, the US relied mainly on Sections 301 and 232 justifying its measures as necessary responses to unfair foreign trade practices and national security threats. The 2018 US measures, mostly enacted through Presidential proclamations, framed imports as «weaking [US] internal economy» thereby threatening national security.[1229] Subsequent 2019 and 2020

[1224] Harte R.E.N., *US Tariffs: EU Response and Fears of a Trade War*, op. cited above, p. 2.

[1225] US tariffs – based on Section 301 and ranging from 10% to 25% – covered a wide range of goods (including, chemicals, textiles materials, machineries, agricultural equipment, semiconductors, vehicles and motors, electrical products, and railway parts – enumerated in List 2 of August, and List 3 of September) In this regard, USTR – Press Release, *USTR Finalizes Second Tranche of Tariffs on Chinese Products in Response to China's Unfair Trade Practices*, August 07, 2018, available at https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/august/ustr-finalizes-second-tranche, [last accessed on 05 March 2026], containing – at the end – the comprehensive list of Chinese goods and products subject to tariffs from August 2018. China responded with 25% tariffs mainly on agricultural products, automobiles, aquatic, and chemicals: *Inter alia*, Mullen A., *Explainer: US-China Trade War Timeline: Key Dates and Events Since July 2018*, SCMP, August 2021; Teekah E., *U.S. – China Trade War*, Encyclopedia Britannica, last accessed on 05 March 2026.

[1226] This occurred when China agreed to increase purchases of US agricultural, energy, industrial goods, while the US maintained 10% tariffs on selected goods rather than raising to 25% as planned for January 2019. This "agreement" took place at the G20 Summit in Buenos Aires. *Inter alia*, World Economic Forum, *The US-China Trade War Reaches a Ceasefire After Trump-Xi Summit*, 03 December 2018; EY, *US Announces Temporary Pause on Planned Increase of List 3 Tariffs on China Origin Goods; Duties Remain in Force and Key Issues Remain Unresolved*, 03 December 2018. At the same time, the parties committed to negotiating agreements mainly on technological products and services (*Ibidem*).

[1227] Indeed, in May 2019, the US increased tariffs from 10% to 25% on Chinese imports of consumer goods (known as "List 4"), prompting again additional Chinese measures. In this regard, USTR – Press Release, *Statement by U.S. Trade Representative Robert Lighthizer on Section 301 Action*, 10 May 2019, available at https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/may/statement-us-trade-representative, [last accessed on 05 March 2026].

[1228] This agreement – mainly focusing on intellectual property, technological transfer, agriculture, financial services, and expanding trade – provided for the US to reduce certain tariff rates by half, and for China to significantly increase its purchases of US exports over a two-year period, strengthen IP protection, and expand market access to financial services firms. *Inter alia*, USTR, *United States-China Phase One Trade Agreement: Rebalancing United States-China Trade*, available at https://ustr.gov/phase-one, [last accessed on 05 March 2026]; Sutter K.M., *Section 301 and China: The U.S.-China Phase One Trade Deal*, Congressional Research Service - CRS In Focus, IF12125, updated 5 March 2026. However, ultimately, China failed to meet the established purchasing targets. To be precise, experts immediately questioned the feasibility of China to meet the purchasing targets, but the outbreak of COVID pandemic further impacted on the likelihood of fulfilling the commitment. *Inter alia*, Bown C.P., *US-China Phase One Tracker: China's Purchases of US Goods*, PIIE, 19 July 2022; Bown C.P., *Unappreciated Hazards of the US-China Phase One Deal*, PIIE, 21 January 2020; Bown C.P., *The US-China Trade War and Phase One Agreement*, Journal of Policy Modeling, Vol. 43, no. 4, July-August 2021, pp. 805-843. Yet, China did successfully implement partial reforms regarding IP protection and openness of financial markets, as reported by International Monetary Fund - IMF Country Report, *People's Republic of China: Selected Issues*, IMF Country Report no. 22/22, 20 December 2021, pp. 71-74.

[1229] Proclamation 9705, *Adjusting Imports of Steel Into the United States*, 08 March 2018; and, Proclamation 9710, *Adjusting Imports of Aluminum Into the United States*, 22 March 2018, opening to negotiations with countries: «I further determined that any country with which we have a security relationship is welcome to discuss with the United States alternative ways to address the threatened impairment of the national security caused by imports from that country, and noted that, should the United States and any such country arrive at a satisfactory alternative means to address the threat to the national security such that I determine that imports from that country no longer threaten to impair the national

measures similarly invoked domestic market 'stabilisation' needs connected to US national security,[1230] such as the 2021-2024 extensions and novel measures under Sections 301 and 232.[1231] The strategic function of 2018 measures has been emphasised in the USTR statutory four-year review, which concluded that US tariffs effectively (i) encouraged China to eliminate certain technology transfer-related acts, policies, and practices; (ii) reduced US exposure to such practices; and, (iii) incentivised importers to find alternative sources; thereby, overall, «not only provid[ing] leverage and appropriate incentives […], but also support[ing] more diverse and resilient supply chains» for the US.[1232] Tariff increases on strategic sectors were suggested as to support domestic production, decrease reliance on China, and provide additional leverage,[1233] thereby also countering China's distortion of global markets and its dominance in strategic industries – such as solar products and semiconductors – which accordingly directly burdens US commerce.[1234]

China, instead, relied on the Import and Export Tariff Regulations of the People's Republic of China,[1235] justifying its retaliatory tariffs – mainly reactive and proportionate to the US ones – on the basis of the GATT-inconsistencies of US measures, framing its response measures as lawful countermeasures under international law.

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security, I may remove or modify the restriction on aluminum articles imports from that country and, if necessary, adjust the tariff as it applies to other countries as the national security interests of the United States require» (para 3).

[1230] *Inter alia*, Proclamation 9894, *Adjusting Imports of Steel into the United States*, 19 May 2019; and, Proclamation 9980, *Adjusting Imports of Derivative Aluminum Articles and Derivative Steel Articles Into the United States*, 24 January 2020. Nonetheless, improvements in the domestic industry's capacity are acknowledged.

[1231] *Inter alia*, White House – Fact Sheet, *Biden-Harris Administration Announces New Actions to Protect American Consumers, Workers, and Businesses by Cracking Down on De Minimis Shipments with Unsafe, Unfairly Traded Products*, 13 September 2024, reporting «This exponential increase in de minimis shipments makes it more challenging to enforce U.S. trade laws, health and safety requirements, intellectual property rights, consumer protection rules, and to block illicit synthetic drugs […]».

[1232] Office of the United States Trade Representative (USTR), *Four-Year Review of Actions Taken in the Section 301 Investigation: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, cited above, para IV, A, p. 84. On the role of Section 301 as "leverage" is specifically provided a section of the Review, *i.e.* "Section 301 Tariffs Resulted in an Economic and Trade Agreement Addressing Certain Acts, Policies, and Practices", p. 10.

[1233] *Ibid*., para IV, A, p. 86, where the review explicitly concludes that Section 301 tariffs increases on solar products and semiconductors «will help support domestic production in this strategic sector, decreasing reliance on China and providing additional leverage on China to eliminate the investigated technology transfer-related acts, policies, and practices».

[1234] More precisely, *Ibid*., pp. 85-86, China is argued to have «targeted the semiconductor sector for dominance» and having distorted global markets with over-production of steel and aluminum. On China's dominance in strategic economic sectors, directly linked to the burdening of US commerce, refer to *Ibid*., p. 85, according to which «China continues to use technology transfer-related acts, policies, and practices, among other tools, to dominate certain strategic sectors of the economy, thus continuing to burden U.S. commerce».

[1235] Prior to 2018, China's use of economic coercion mainly involved informal and indirect measures, such as suspending purchases of goods and services, withholding investments, restricting the operations of foreign companies within its markets, and government-backed consumer boycotts. *Inter alia*, Medeiros E.S., Polk A., *China's New Economic Weapons*, The Washington Quarterly, Vol. 48, no. 1, Spring 2025, pp. 99-123, p. 99; and, Bogdanova I., Wang A., *China's Use of Export Restrictions and WTO Law: Heading Toward "Weaponization" of Exports"*, in Gao H. Raess D., Zeng K. (eds), *China and the WTO: A Twenty-Year Assessment*, Cambridge University Press, 2023, pp. 160-180, p. 168.

3.2. After the Phase One Deal of 2020 and the 2025 developments

Following the Phase One Deal and through the Biden Administration, most 2018 tariffs remained in force with also new measures introduced.[1236] A crucial transformation, however, occurred with the establishment of the second Trump Administration, which significantly escalated the conflict by expanding both tariffs and targets,[1237] and the legal basis of the measures adopted. Together with tariff increases under Sections 232 and 301, the US also adopted several other measures specifically aimed at China, including stricter export controls, sanctions, and investment screenings.[1238] In addition to mentioned Sections – together with safeguard measures under Section 201 Trade Act –,

[1236] During period of the Biden Administration, indeed, new investigations into Chinese trade practices and on Phase One's implementation were also conducted. In May 2022, the USTR initiated the statutory four-year review process on US tariffs which, concluded in May 2024, confirmed the need to continue most measures and introduced updates on timings, tariff rates, exclusion proposals, and modifications of the measures' coverage, together with novel targeted products in strategic sectors. In this sense, Office of the United States Trade Representative (USTR), *USTR Finalizes Action on China Tariffs Following Statutory Four-Year Review*, Press Release, 13 September 2024, available at https://ustr.gov/about-us/policy-offices/press-office/press-releases/2024/september/ustr-finalizes-action-china-tariffs-following-statutory-four-year-review, [last accessed on 20 September 2024]; and, Office of the United States Trade Representative (USTR), *Four-Year Review of Actions Taken in the Section 301 Investigation: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 14 May 2024, available at https://ustr.gov/sites/default/files/05.14.2024%20Four%20Year%20Review%20of%20China%20Tech%20Transfer%20Section%20301%20(Final).pdf, [last accessed on 10 March 2026]. In September 2024, under Section 301, most 2018 measures were extended and raised of an additional 25% (and, in some cases, 100%) on selected goods, including EVs/batteries, medical products, ship-to-shore cranes, semiconductors, solar cells, steel, and aluminium, as reported by Sutter K.M., *Section 301 and China: The U.S.-China Phase One Trade Deal*, op. cited above, p. 2; Lobosco K., *Biden Finalizes Increases to Some of Trump's China Tariffs*, CNN, 13 September 2024.

[1237] Notably, as early as January, additional tariffs were imposed under Section 301 on Chinese technology products, including telecommunications equipment, 5G infrastructure, consumer electronics, and, semiconductors. In the subsequent months, further measures under Section 232 targeted electric vehicles and critical components, rare earth metals and critical minerals, solar panels, textiles, agricultural products, chemicals and pharmaceuticals goods, steel and aluminium products, furniture and household goods, automobiles and auto parts, digital electronic devices, and industrial machinery. In this regard, Huld A., *Breaking Down the US-China Trade Tariffs: What's in Effect Now*, China Briefing, 13 March 2026, which also reports that China imposed additional tariffs on a range of US exports, including LNG, auto parts, chemicals, electronics, medical devices, textiles, dairy and vegetable products, and agricultural machinery.

[1238] *Inter alia*, these measures included the imposition of stricter export controls; the listing of several Chinese companies (most notably Huawei) on the US Entity List as specified by US Department of Commerce – Bureau of Industry and Security, *Addition of Huawei Non-U.S. Affiliates to the Entity List, the Removal of Temporary General License, and Amendments to General Prohibition Three (Foreign-Produced Direct Product Rule)*, 20 August 2020.; the ban on the Chinese application TikTok; the exclusion of specific imports on the basis of human rights, *e.g.* under the UFLPA (adopted in 2021, the US Uyghur Forced Labor Prevention Act (UFLPA), established that goods mined, produced, or manufactured wholly or in part in the Xinjiang Uyghur Autonomous Region (XUAR) of China or by an entity on the UFLPA Entity List are subject to import under Section 307 of the Tariff Act of 1930 (19 U.S.C. § 1307)); the adoption of sanctioning measures, especially in relation to human rights violations, mainly through the Magnitsky Human Rights Accountability Act and against Chinese governmental entities and individuals considered responsible of serious human rights abuses against minorities in the Xinjiang Uyghur Autonomous Region (XUAR) refer, *inter alia*, US Department of the Treasury – Press Releases, *Treasury Sanctions Chinese Entity and Officials Pursuant to Global Magnitsky Human Rights Accountability Act*, 09 July 2020; and, the establishment of investment screenings, through for instance, the Outbound Investment Security Program, led by the US Department of the Treasury, is implementing the Executive Order no. 14105, *Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern*, 9 August 2023. On export controls, specifically to the case of semiconductors, refer to Sutter K.M., U*.S. Export Controls and China: Advanced Semiconductors*, Congressional Research Service - CRS Report, R48642, 19 September 2025. Executive Order, *Executive Order on Addressing the Threat Posed by TikTok*, 6 August 2020. On this, *inter alia*, Benson P.J., Brannon V.C., Lampe J.R., *Regulation of TikTok Under the Protecting Americans from Foreign Adversary Controlled Applications Act: Analysis of Selected Legal Issues*, Congressional Research Service - CRS Legal Sidebar, LSB11127, 09 May 2024.

US tariffs from 2025 were enacted, for the first time,[1239] also under the International Emergency Economic Powers Act (IEEPA) of 1977 which, as explored in Chapter II, is widely recognised as a "sanctioning" instrument.[1240]

Tariffs under IEEPA were justified as necessary measures to act against a double national emergency, namely «the extraordinary threat posed by illegal aliens and drugs, including deadly fentanyl»[1241] and the «large and persistent annual U.S. goods trade deficits» arguably reflecting «asymmetries in trade relationships that have contributed to the atrophy of domestic production capacity, especially that of the U.S. manufacturing and defense-industrial base».[1242] After China's intention to retaliate, US tariffs were once more increased to 125%,[1243] which China retaliated with tariffs, export controls and restrictions on critical materials, and listing new US companies within the "unreliable entity list".[1244]

Tariffs increases continued also in early 2026, through both Sections 301 and 232.[1245] In February 2026, the US Supreme Court ruled that «IEEPA does not authorize the President to impose

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[1239] This was indeed the first case of an US President invoking IEEPA to impose tariffs, according to the opinion authored by Roberts C.J., within the Supreme Court case of February 2026 – Opinion of the Court - Supreme Court of the United States, *Learning Resources INC, v. Donald J. Trump and Donald J. Trump v. V.O.S. Selections INC*, 607 U.S. (2026), Nos. 24–1287 and 25–250, 20 February 2026 – reporting that «It is also telling that in IEEPA's "half century of existence," no President has invoked the statute to impose any tariffs—let alone tariffs of this magnitude and scope. National Federation of Independent Business, 595 U. S., at 119.3 Presidents have, by contrast, regularly invoked IEEPA for other purposes. […] At the same time, they have invoked other statutes—but never IEEPA—to impose tariffs, on products ranging from car tires to washing machines», pp. 10-11. Alì A., *National Security and Trade Wars: Legal Implications for Multilateralism*, Italian Yearbook of International Law, Vol. 29, 2020, pp. 77-90, p. 81 points out that, in 2019, the US President already threated to adopt measures against China under IEEPA, although, in the end, it did not occur.

[1240] As explored, IEEPA grants power to the President to act against any «unusual and extraordinary threat» to the US national security, foreign policy, or economy – originating in whole or substantially outside to the US – following a declaration of a national emergency: International Emergency Economic Powers Act (IEEPA), §1701.

[1241] It is specified that China failed to act against drugs trade, according to the White House – Fact Sheet, *President Donald J. Trump Imposes Tariffs on Imports from Canada, Mexico and China*, 01 February 2025, which imposed, in February 2025, 10% tariffs on US imports from China (and 25% from Canada and Mexico) under IEEPA.

[1242] Notably, on the 2nd of April 2025 – the newly created US "Liberation Day" – the US President declared a national emergency under IEEPA emerging from the reported statement, thereby imposing a 10% global rate and specific tariffs depending on the country of origin under the Executive Order 14257, *Regulating Imports with a Reciprocal Tariff to Rectify Trade Practices that Contribute to Large and Persistent Annual United States Goods Trade Deficits*, 2 April 2025, Section 1. In the subsequent months, selected countries were granted temporary suspensions, exemptions, temporary reductions, amendments, or concluded agreements: A precise overview of US acts and actions is provided in Hammond K.E., Burkhart W.F., *Presidential 2025 Tariff Actions: Timeline and Status*, Congressional Research Service – CRS Report, R48549, 12 January 2026, which also lists tariff-related agreements reached from May 2025 until December 2025.

[1243] To be precise, as soon as April 8th, US tariffs were increased to 84% and, on April 9, to 125% as a consequence of China's declaration of its intention to retaliate. Respectively, Executive Order 14259, *Amendment to Reciprocal Tariffs and Updated Duties as Applied to Low-Value Imports from the People's Republic of China*, 8 April 2025; and, Executive Order, *Modifying Reciprocal Tariff Rates to Reflect Trading Partner Retaliation and Alignment*, 9 April 2025.

[1244] *Ibidem*.

[1245] As soon as early January, US tariffs of 25% were imposed on semiconductors, semiconductor manufacturing equipment, and derivative products under Section 232. Refer to Proclamations, *Adjusting Imports of Semiconductors, Semiconductor Manufacturing Equipment, And Their Derivative Products into the United States*, 14 January 2026. In March 2026, two novel USTR investigations under Section 301 were initiated concerning «structural excess capacity and production in manufacturing sectors» and failures to act against forced labour: Respectively, Office of the United States Trade Representative (USTR), *USTR Initiates Section 301 Investigations Relating to Structural Excess Capacity and*

tariffs».[1246] As a result, tariffs imposed under IEEPA were lifted,[1247] and novel tariffs were adopted under Section 122 Trade Act of 1974 –[1248] a Section that had never before been invoked to impose tariffs.[1249]

By 2025, the geopolitical intent of US measures had become explicit, although sporadic mentioning of asymmetries in trade, manufacturing and domestic capacity also occurred.[1250] Executive orders and official documents justified and framed these measures as necessary to, *inter alia*, «strengthen [US] international economic position»;[1251] increase US «competitive edge»;[1252] and,

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Production in Manufacturing Sectors, 11 March 2026, investigating China, the European Union, Singapore, Switzerland, Norway, Indonesia, Malaysia, Cambodia, Thailand, Korea, Vietnam, Taiwan, Bangladesh, Mexico, Japan, and India; and, Office of the United States Trade Representative (USTR), *USTR Initiates 60 Section 301 Investigations Relating to Failures to Take Action on Forced Labor*, 12 March 2026, investigating 60 economies, namely: Algeria; Angola; Argentina; Australia; The Bahamas; Bahrain; Bangladesh; Brazil; Cambodia; Canada; Chile; People's Republic of China; Colombia; Costa Rica; Dominican Republic; Ecuador; Egypt; El Salvador; European Union; Guatemala; Guyana; Honduras; Hong Kong, China; India; Indonesia; Iraq; Israel; Japan; Jordan; Kazakhstan; Kuwait; Libya; Malaysia; Mexico; Morocco; New Zealand; Nicaragua; Nigeria; Norway; Oman; Pakistan; Peru; Philippines; Qatar; Russia; Saudi Arabia; Singapore; South Africa; South Korea; Sri Lanka; Switzerland; Taiwan; Thailand; Trinidad and Tobago; Türkiye; United Arab Emirates; United Kingdom; Uruguay; Venezuela; and, Vietnam.

[1245] Interestingly, Medeiros E.S., Polk A., *China's New Economic Weapons*, op. cited above, pp. 101-104 divide China's development of its legal framework on coercion in three core moments: first, the first Trump administration and the 2018 tariffs; second, US and EU actions against Xinjiang and in relation to Hong Kong; and, third, the 2022 Russian aggression of Ukraine and Wester sanctions together with US export controls on semiconductors.

[1246] Opinion of the Court - Supreme Court of the United States, *Learning Resources INC, v. Donald J. Trump and Donald J. Trump v. V.O.S. Selections INC*, 607 U.S. (2026), Nos. 24–1287 and 25–250, 20 February 2026. Disagreeing with this judgment, aside from three dissenting judges, is, *inter alia*, Lighthizer R.E., *The New Trade Order: Restoring Balance to a Broken Global Economy*, Foreign Affairs, Vol. 105, no. 3, May/June 2026, pp. 57-69, p. 66.

[1247] Executive Order, *Ending Certain Tariff Actions*, 20 February 2026.

[1248] Proclamation no. 11012, *Imposing a Temporary Import Surcharge to Address Fundamental International Payments Problems*, 20 February 2026, imposing a 10% global tariff for 150 days. Briefly, Section 122 of the Trade Act of 1974 (19 U.S.C. 2132) grants the power to the President to proclaim – for a maximum of 150 days – «whenever fundamental international payments problems require special import measures to restrict imports (1) to deal with large and serious United States balance-of-payments deficits (2) to prevent an imminent and significant depreciation of the dollar in foreign exchange markets, or (3) to cooperate with other countries in correcting an international balance-of-payments disequilibrium», a (a) temporary import surcharge not exceeding 15 % ad valorem in the form of duties; (b) temporary limitations through quotas on US imports; and (c) both options (a) and (b).

[1249] It is indeed already discussed whether this Section may authorise the imposition of tariffs following "trade deficits" – as declared within Proclamation no. 11012, *Imposing a Temporary Import Surcharge to Address Fundamental International Payments Problems*, 20 February 2026. The Section 122 indeed refers to "balance of payments deficits" which, it is argued, is not a synonymous of trade deficits. In this regard, Zirpoli C.T., *Congressional and Presidential Authority to Impose Import Tariffs*, Congressional Research Service – CRS Report, R48435, 23 April 2025; and Zirpoli C.T., *Supreme Court Rules Against Tariffs Imposed Under the International Emergency Economic Powers Act (IEEPA)*, Congressional Research Service - CRS Legal Sidebar, LSB11398, 23 February 2026.

[1250] *Inter alia*, refer to Executive Order 14257, *Regulating Imports With a Reciprocal Tariff To Rectify Trade Practices That Contribute to Large and Persistent Annual United States Goods Trade Deficits*, 02 April 2025. While the underlying intent of both 2018 and 2025 US measures appears similarly oriented towards enhancing US power relations, the relied justifications seem to change: the 2018 measures remain more formally linked to an economic ratio, whereas the 2025 increases explicitly refer to the advancement of geopolitical interests.

[1251] White House – Fact Sheet, *President Donald J. Trump Declares National Emergency to Increase our Competitive Edge, Protect our Sovereignty, and Strengthen our National and Economic Security*, 02 April 2025, reporting that «Today, President Donald J. Trump declared that foreign trade and economic practices have created a national emergency, and his order imposes responsive tariffs to strengthen the international economic position of the United States and protect American workers». As mentioned, in this case, the US relied on both IEEPA and Section 232.

[1252] White House – Fact Sheet, *President Donald J. Trump Declares National Emergency to Increase our Competitive Edge, Protect our Sovereignty, and Strengthen our National and Economic Security*, 02 April 2025, reporting «Reciprocal trade is America First trade because *it increases our competitive edge*. […] These tariffs […] provide our foreign trading

enhance its leverage in trade negotiations.[1253] Tariffs were adopted on national security grounds, including the necessity to «address unusual and extraordinary threats to the national security, foreign policy, and economy»,[1254] as well as to ensure «economic resilience».[1255] It is also explicitly recognised the punitive aim of 2018 measures,[1256] and the sanctioning intent through reliance on IEEPA.[1257] These declared objectives, notably, extend beyond those originally designed for trade policy instruments under Sections 301 and 232: rather than instruments of domestic market regulation, they were employed and justified as tools to enhance US economic power and dominance, enable strong bargaining leverages, and, even, impose punitive actions. In this perspective, tariffs are not merely protective tools, but the best instruments capable of reshaping and creating a «new global trade order», aimed at providing economic and national security, and ensuring economic growth.[1258]

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partners with an opportunity to rebalance their trade relationships with the United States». On the US-China conflict over technological innovations*, inter alia*, Sullivan J., *The Tech High Ground: What it Will Take to Gain the Advantage Over China*, Foreign Affairs, Vol. 105, no. 3, May/June 2026, pp. 70-85.

[1253] Refer to the *supra* footnote; and, Executive Order no 14298, *Modifying Reciprocal Tariff Rates To Reflect Discussions With the People's Republic of China*, 12 May 2025, providing that «Since I signed Executive Order 14266, the United States has entered into discussions with the PRC to address the lack of trade reciprocity in our economic relationship and our resulting national and economic security concerns». As a matter of fact, suspensions of US tariffs occurred in relation to concluded agreements or in the presence of «"sincere intentions"» to address US «national and economic security concerns»; in this sense, Executive Order 14316, *Extending the Modification of the Reciprocal Tariff Rates*, 07 July 2025, and, similarly, Executive Order 14326, *Further Modifying the Reciprocal Tariff Rates*, 31 July 2025 reporting «For example, some trading partners have agreed to, or are on the verge of agreeing to, meaningful trade and security commitments with the United States, thus signalling their sincere intentions to permanently remedy the trade barriers that have contributed to the national emergency declared in Executive Order 14257, and to align with the United States on economic and national security matters. Other trading partners, despite having engaged in negotiations, have offered terms that, in my judgment, do not sufficiently address imbalances in our trading relationship or have failed to align sufficiently with the United States on economic and national-security matters. There are also some trading partners that have failed to engage in negotiations with the United States or to take adequate steps to align sufficiently with the United States on economic and national security matters».

[1254] Executive Order 14289, *Addressing Certain Tariffs on Imported Articles*, 29 April 2025.

[1255] Executive Order 14272, *Ensuring National Security and Economic Resilience Through Section 232 Actions on Processed Critical Minerals and Derivative Products*, 15 April 2025.

[1256] The White House – Fact Sheet, *President Donald J. Trump Issues Directive to Prevent the Unfair Exploitation of American Innovation*, 21 February 2025, specifically reports that «President Trump demonstrated in his first term that punitive measures like tariffs strengthened the U.S. economy and brought back American industry».

[1257] The sanctioning intent of many Executive Orders is evidenced also by other characteristics. Inter alia, Silingardi S., *Giurisdizione extraterritoriale e coercizione economica negli orders di Trump contro i programmi di diversità, equità e inclusione*, Rivista di diritto internazionale, Vol. 118, no. 4, 2025, pp. 1141-1149, pp. 1145-1146, although dealing with those EOs eliminating DEI programs, argues that these are clearly coercive instruments, as they leverage commercial relationships to compel public and private entities – also foreign ones – to a particular behaviour under the fear that – if not compliant – they would lose access to the US market.

[1258] This perspective is explicitly provided by Lighthizer R.E., the US Trade Representative from 2017 to 2021, in Lighthizer R.E., *The New Trade Order: Restoring Balance to a Broken Global Economy*, op. cited above, pp. 66-68, who identifies free trade as having produced deeply negative consequences for the US: *inter alia*, wealth transfers overseas, slower economic growth, loss of jobs, stagnated wages, and, broader psychological and social decline. The WTO judicial system is likewise criticised as having «transformed the trade body into a tribunal that often created new obligations for members» (p. 59) and functioned as a disincentive for negotiations since «Why negotiate when you can sue?» (p. 64). According to the author, the proposed alternative – *i.e.* the new global trade order – would be agreed to by US's «major liberal democratic trading partners and enshrined in international agreements and U.S. law» (p. 66), thereby maximising trade benefits for all the participants and penalising «predatory and distortive practices, such as China's» (p. 67). It accordingly would better distribute resources across the global economy, create shared benefits, and ensure predictability, as argued at p. 69.

At the same time, China continued to justify its measures as lawful responses to US violation of WTO law, yet while its 2018 approach was largely reactive and proportionate, it progressively became proactive and enhanced by novel crucial legislation ensuring a stronger domestic legal framework on both tariffs, trade-restricting, and sanctioning measures.[1259] Alongside the Import and Export Tariff Regulations of the People's Republic of China mentioned above, tariffs were later systematised in April 2024 through the adoption of the Tariff Law of the People's Republic of China, which specifically regulates retaliatory tariffs under the reciprocity principle.[1260] Trade restricting measures, more broadly, rely on a set of domestic legislations including the 1994 Foreign Trade Law (revised in late 2025), the 1987 Customs Law (amended in 2021), and the 2020 Export Control Law,[1261] together with the 2020 Provisions on the Unreliable Entity List (UEL) and the 2024 Dual-Use Item Export Control Regulation.[1262] China also developed a broader legal basis for "counter-sanctions": the 2021 Anti-Foreign Sanction Law (AFSL) specifically provides a legal basis for Chinese sanctioning activities;[1263] while the 2021 Blocking Rules – similar to the EU Blocking Statute

[1259] Interestingly, Medeiros E.S., Polk A., *China's New Economic Weapons*, op. cited above, pp. 101-104 divide China's development of its legal framework on coercion in three core moments: first, the first Trump administration and the 2018 tariffs; second, US and EU actions against Xinjiang and in relation to Hong Kong; and, third, the 2022 Russian aggression of Ukraine and Wester sanctions together with US export controls on semiconductors.

[1260] Huld A., *China's New Tariff Law: Consolidating and Codifying Existing Tariff Regulations*, China Briefing, 13 May 2024; and, Zhang L., *China: New Tariff Law Enacted*, Library of Congress, 2024. Accordingly, the "Tariff Law" empowered China to enact countermeasures in response to violations of MFN and tariff preferences, based on the reciprocity principle (Article 17); and in response to "prohibitive, restricting, tariff-increasing, or other measures affecting normal trade against China" (Article 18) (Reference for the translation of the mentioned Articles: CPO & Partners, Presidential Order of the People's Republic of China no. 23, April 2024).

[1261] Tietje C., Yun Z., *Legality in Times of Illegality: China and EU's Path in How to React to Trump's Tariff Sword*, Transnational Economic Law Research Center, no. 66, April 2025, p. 3-4, and pp. 6-7. The 2020 Export Control Law instead established a unified export control system – also concerning dual-use goods – and three categories of control measures: (i) dual-use items export license, (ii) management of end-users and end-uses, and, (iii) the Export Control List.

[1262] Within the UEL, foreign enterprises, organisations, and individuals may be listed when they conduct economic activities endangering national sovereignty, security and development, or applying discriminatory measures in violations of trade principles. *Ibid*., p. 5, report that Article 2 of the Provisions provides that «the UEL may list foreign enterprises, organizations, or individuals if they conduct international economic activities that will: 1) "endanger China's national sovereignty, security or development interests", or 2) "suspend normal transactions with, or apply discriminatory measures against Chinese entities which violates normal market transaction principles and causes serious damage to the legitimate interests of Chinese entities"». The listing corresponds to being restricted or prohibited to engage with China-related imports and exports; to invest, enter, and reside into China; to be subject to fines; and other necessary measures (*Ibid*., p. 6). Firstly used in 2023, the first companies listed referred to US firms involved in arms sales to Taiwan (*i.e.* Lockheed Martin Corporation and Raytheon Missiles & Defense. On this, *inter alia*, Medeiros E.S., Polk A., *China's New Economic Weapons*, op. cited above, p. 105), yet from the end of 2024 and the beginning of 2025 the listings of companies within the UEL begun to concern also companies such as PVH Group (*i.e.* the US parent company of Calvin Klein and Tommy Hilfiger) as a consequence of removing Xinjiang cotton from their supply chain (to comply with US domestic laws, *i.e.* US UFLPA). For a full list and comment on UEL listed companies, refer to *Ibid*., pp. 104-109.

[1263] Accordingly, sanctions may be individual and extendable to spouses and immediate family members of the sanctioned person (Articles 4 and 5), or directed to organisations (Article 6). Sanctions might consist of denial of visa issuance, denial of entry, deportation, prohibition or restriction to conduct transactions, to cooperate or engage in other activities with Chinese individuals or organizations, and other necessary measures (Article 6). Accordingly, sanctioned individuals and organizations cannot operate transactions with organizations and individuals on the territory of China, and as a result, Chinese entities and individuals cannot engage in exporting to sanctioned persons and entities (Article 6). According to some scholars, ASFL (through Articles 4 and 15 forbidding individuals and organisations outside Chinese territory to conduct activities against China's national security) effectively enables China to adopt extraterritorial sanctions. In this

– specifically aims to protect Chinese companies from extraterritorial measures. AFSL has been extensively employed to justify also previously-enacted Chinese sanctions, whereas the Blocking Rules has not been used to date.[1264]

Overall, the 2018 US-China trade war has persisted until nowadays, although with significant evolution in both parties' approaches and legal instruments employed. The US increasingly made explicit its strategic and geopolitical interests, relying on traditional trade regulations instruments beyond their designed aims, and on proper sanctioning legal tools. China, instead, shifted from a predominantly reactive and proportionate approach to a more proactive one, expanding and strengthening its domestic legal framework to provide an explicit legal basis for its retaliatory and coercive actions in trade. The transition from reciprocal tariff increases to a broader range of measures combining tariffs, trade-restricting measures such as export controls, and proper sanctioning measures indicates the blurring of boundaries between trade policy instruments and sanctioning instruments – a blurring that directly impacts on the measures' legal classification under international law. The following Section analyses the most relevant WTO disputes and the legal qualification of US and Chinese instruments, with a view to clarifying whether they fall within the existing categories of international law analysed in Chapters II and III of this dissertation.

3.3. The legal qualification of US and Chinese measures: trade-restricting measures, sanctions, countermeasures or trade instruments re-oriented towards sanctioning objectives?

As mentioned, the US-China trade war has been characterised by the reliance – of both parties – on a variety of instruments, based on diverse legal basis and domestic provisions. Over the years, both parties – but more extensively China – and other targeted States have raised the question of compatibility of these measures with the WTO system and its GATT rules.

In 2018, several States initiated WTO proceedings challenging US tariffs. While many States contended that these tariffs violated GATT rules by unfairly restricting trade, the US defended its measures by invoking both the general exceptions under Article XX GATT and the security exception

regard, Bogdanova I., Wang A., *China's Use of Export Restrictions and WTO Law: Heading Toward "Weaponization" of Exports"*, in Gao H. Raess D., Zeng K. (eds), *China and the WTO: A Twenty-Year Assessment*, op. cited above, p. 173. According to Medeiros E.S., Polk A., *China's New Economic Weapons*, op. cited above, p. 114 also the 2020 Export Control Law regulates and claims extraterritorial jurisdiction (also, p. 118).

[1264] While China continues to declare its opposition to unilateral sanctions, these novel laws – together with the 2020 Unreliable Entity List – effectively empower it with a comprehensive legal framework on "sanctions". To be precise, however, China maintains that these measures' nature consists of lawful countermeasures, as they act solely in response to prior foreign restricting measures.

under Article XXI GATT.[1265] Most notably, the United States – Certain Measures on Steel and Aluminum Products case was filed by China in April 2018, challenging US tariffs based on Section 232 Trade Expansion Act.[1266] China contended that US tariffs constituted, in fact, safeguard measures inconsistent with the WTO safeguards framework and in violation of Article I GATT (MFN), while the US invoked «its essential security interests» under Article XXI GATT.[1267] Interestingly, in 2022, the Panel found that US measures were not taken within the meaning of Article XXI GATT, and were inconsistent with Article I GATT.[1268] The US appealed, but the ongoing paralysis of the WTO AB – which began in 2019 – prevented a final ruling.

In April 2018, China also challenged US Section 301 Trade Act as the legal basis for tariffs in United States – Tariff Measures on Certain Goods.[1269] China claimed inconsistency of Section 301 with Articles I and II GATT and Article 23 DSU, while the US asserted its measures to be justified by Article XX (a) GATT (*i.e.* public morals exception) and that parties reached a mutually satisfactory solution.[1270] The Panel found US tariffs as inconsistent with Articles I and II GATT, that no mutually satisfactory solution has been reached, and that the US has not met the burden to demonstrate its measures' justification under Article XX (a) GATT.[1271] The US appealed, yet the AB's crisis again prevented a final decision.

Likewise, the US presented complaints against China's tariffs, such as China – Additional Duties on Certain Products from the United States,[1272] arguing inconsistency with Articles I and II GATT while China, on the other hand, invoked Article XIX GATT on safeguards. The Panel found

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[1265] Briefly, as mentioned above, Article XX GATT, entitled "General Exceptions", enables WTO MS to adopt trade-restricting measures in order to protect an exhaustive list of national interests – *i.e.* protection of (a) public morals; (b) human, animal, or plant life or health; (c) relates to import/export of gold or silver; (d) necessary to secure compliance with GATT-consistent laws; (e) relates to products of prison labour; (f) protect national treasures; (g) conserve exhaustible natural resources; (h) pursue obligations of intergovernmental commodity agreements; (i) ensure essential quantities of materials for domestic industries; and, (j) acquire or distribute products in general or local short supply– after having adhere to the Chapeau. Article XXI GATT, instead, entitled "Security Exceptions", establishes that nothing in the GATT shall be interpreted as (a) requiring disclosure of information contrary to WTO MS' essential security interests; (b) preventing any action necessary to protect those interests in relation to (i) fissionable materials or derived materials, (ii) traffic in arms, ammunition and implements of war, and those (iii) taken in time of war or other emergency in international relations; or (c) preventing any action pursuant to UN obligations for the maintenance of international peace and security – lacking a preceding Chapeau. An analysis of these provisions is provided in Chapter III, Section 2.3.

[1266] *United States – Certain Measures on Steel and Aluminum Products* (DS544).

[1267] Report of the Panel, *United States – Certain Measures on Steel and Aluminum Products* (DS544) - WT/DS544/R, 9 December 2022, para 3.3, p. 34. Refer to paras 3.1-3.2 for China's claims, pp. 33-34.

[1268] Accordingly, *Ibid*., para 8.1.(e), p. 84, «Regarding Article XXI of the GATT 1994, the Panel does not find that the measures at issue were "taken in time of war or other emergency in international relations" within the meaning of Article XXI(b)(iii) of the GATT 1994. The Panel therefore finds that the inconsistencies of the measures at issue with Articles I:1 and II:1 of the GATT 1994 are not justified under Article XXI(b)(iii) of the GATT 1994».

[1269] *United States – Tariff Measures on Certain Goods* (DS543).

[1270] Report of the Panel, *United States – Tariff Measures on Certain Goods* (DS543), WT/DS543/R, 15 September 2020, paras 7.73-7.74, pp. 29-30.

[1271] *Ibid*., para 8.1, p. 65.

[1272] *China – Additional Duties on Certain Products from the United States* (DS558).

Article XIX inapplicable and Chinese measures as inconsistent with Articles I and II GATT,[1273] yet once again the appeal to the AB fell into the void.

Similarly, during the period 2020-2025, China filed WTO complaints concerning US tariffs, especially on those affecting semiconductors,[1274] goods originating in China,[1275] and country-specific additional tariffs.[1276] The US, instead, did not initiate WTO complaints against China during this period. Yet, the continuing WTO AB paralysis means that, once Chinese complaints reach the Panel report stage, any appeal will fall into the void, thereby preventing final rulings. Moreover, mainly due to the US non-participation in the MPIA system, neither China nor other States have obviously raised complaints over US tariffs within that forum.

Formally, the measures adopted are trade policy instruments – such as those explored in Chapter III of this dissertation. As mentioned, GATT provisions regulate tariff-based measures, trade remedies, and import restrictions by, *inter alia*, prohibiting discriminatory use (Article XIII), establishing the general Most-Favoured-Nation Treatment (MFN) (Article I), and the National Treatment principle (Article III). Measures such as anti-dumping and countervailing – which derogate from MFN and National Treatment principles – are permitted but as regulated and under specific circumstances, namely in cases of dumping and subsidisation. Safeguards too may be implemented but solely in specific and emergency cases. As mentioned above, the WTO panel report – although not final due to pending appeals – has found both US and Chinese measures to be inconsistent with GATT provisions, including their justifications under Articles XX and XXI GATT.

The following analysis assesses the legal qualification of both US and Chinese measures across domestic law, WTO law, and international law, in order to understand whether they may be properly characterised as trade policy instruments, sanctions, countermeasures, or trade instruments reoriented to sanctioning objectives.

US measures, at the domestic level, relied mainly on Sections 301 and 232, both of which, as explored in Chapter III, originally constitute trade policy instruments aimed at regulating and protecting the domestic market: Section 301 empowers the US to enact measures to protect US trade

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[1273] Report of the Panel, *China – Additional Duties on Certain Products from the United States* (DS558), WT/ DS558/R, 16 August 2023, paras 8.1-8.3, pp. 52-53.
[1274] *United States – Measures on Certain Semiconductor and other Products, and Related Services and Technologies* (DS615), consultation requested on 12 December 2022.
[1275] *United States – Additional Tariff Measures on Goods from China* (DS633), consultation requested 4 February 2025. Similarly, although specifically concerning the US Inflation Reduction Act (IRA), the case file by China "*United States – Certain Tax Credits Under the Inflation Reduction Act* (DS623)", with consultation requested on 26 March 2024, within which China contests discrimination against the importation of goods of Chinese origin. The US Inflation Reduction Act (IRA) provoked several contestations even within the EU: *inter alia*, Stokes B., *EU-US Relations after the Inflation Reduction Act, and the Challenges Ahead*, European Parliamentary Research Service (EPRS), PE 759.588, February 2024.
[1276] *United States – Universal and Country-specific Additional Duties on Imports from China* (DS638), consultation requested 04 April 2025.

from unfair trade practices unjustifiably burdening or restricting US commerce; whereas Section 232 specifically refers to national security protection.[1277] As mentioned, most recently, also IEEPA – a legal framework specifically created to respond to extraordinary threats to US national security, foreign policy, or economy – has been used to enact tariffs, yet later blocked by the Supreme Court ruling of February 2026.[1278]

Formally, therefore, US measures are domestic trade policy instruments, grounded on legislation originally designed for internal market regulation. However, their declared objectives extend significantly beyond those for which these instruments were originally designed for. As mentioned above, 2018 measures mostly referred to national security concerns and unfair trade practices, although the 2024 USTR statutory four-year review effectively highlighted the strategic function of 2018 measures. 2025 measures, instead, became increasingly explicit in their sanctioning and geopolitical intents, openly mentioning the objectives of strengthening US economic and competitive position and its leverage in negotiations. Although retrospectively, in 2025 it was also explicitly recognised the punitive aim of 2018 measures.[1279]

At the WTO level, as briefly reported above, US measures have been found inconsistent with GATT obligations by WTO panels. The invocation of Articles XX and XXI GATT has similarly been rejected and, anyway, remains highly contested. As a matter of fact, the measures' explicit foreign policy and punitive orientation further complicate their WTO-compatibility, since neither Article XX nor Article XXI arguably may be stretched to encompass measures mainly motivated by geopolitical and strategic competition and punitive aims.[1280]

[1277] Section 301 US Trade Act (1974) – located under Title III denominated "Relief from Unfair Trade Practice" – authorises measures including suspension of trade benefits; import restrictions; and, entering binding agreements requiring foreign countries to eliminate the targeted act, policy, or practice, or provide compensation, after proper investigations. Similarly, Section 232 US Trade Expansion Act (1962), rarely used until 2018, is entitled "safeguarding national security" and specifically enables the President – after investigations – to negotiate agreements limiting imports or exports or to enact measures at its discretion including tariffs, quotas, or other actions unlimited in time, against (or excluding) specific countries or products. An overview of these Sections is provided in Chapter III, Section 3.1., of this dissertation.

[1278] The International Emergency Economic Powers Act (IEEPA) is one of the most frequently used Statutes to enact 'sanctioning' measures. Under IEEPA, the President may act against any «unusual and extraordinary threat» to the US national security, foreign policy, or economy – originating in whole or substantially outside to the US – following a declaration of a national emergency. Actions might be investigating, regulating, and prohibiting financial transactions; property acquisitions; imports and exports; and, in situations of armed hostilities, confiscation of foreign properties. This framework has been briefly presented in Chapter II, Section 6.1., of this dissertation.

[1279] White House – Fact Sheet, *President Donald J. Trump Issues Directive to Prevent the Unfair Exploitation of American Innovation*, 21 February 2025, specifically reports that «President Trump demonstrated in his first term that punitive measures like tariffs strengthened the U.S. economy and brought back American industry».

[1280] As explored in Chapter III, Article XX Chapeau establishes that measures could not be arbitrary and discriminatory in their application, as they cannot be disguised restrictions on international trade; aside from having to fall within one of the Article's listed exceptions. Article XXI instead guarantees protection of a State' essential security interests taken in time of war or other emergency in international relation; but – as specified in Russia-Traffic in Transit – the emergency must constitute an «objective state of affairs», "essential security interest" should be linked to quintessential States functions (*i.e.* protection of territory and population protection, and maintenance of law and public order), and their invocation should be subject to good faith, minimum requirement of plausibility, sufficient articulation, and connection

Under international law, US measures do not respond to a prior internationally wrongful act attributable to China, thereby rendering their legal classification as either ARSIWA countermeasures or as sanctions under the working definition unfeasible due to the absence of their essential prerequisite. The presence of non-trade objectives redirects the classification toward domestic measures justifiable under GATT exceptions, yet their explicit strategic and punitive orientation renders this qualification imperfect as discussed above.

Thus, the best legal classification of US measures is that of stretched domestic trade policy measures, strongly reoriented towards strategic, geopolitical, and foreign policy objectives (and particularly aimed at strategically addressing economic competition with China).[1281] They constitute "stretched" measures since, first, while formally grounded in Sections 301 and 232, their objectives are outside the regulatory logic for which those Sections were designed; and, second, their explicit strategic and punitive orientation renders them an imperfect application of domestic measures possibly justifiable under GATT exceptions. As mentioned, the absence of a prior internationally wrongful act renders inapplicable their classification as either ARSIWA countermeasures or sanctions under the working definition. The "stretched" qualification thus well highlights both their formal domestic legal basis and their substantive reorientation toward objectives exceeding that basis and the GATT-exceptions provisions.

Chinese measures, at the domestic level, were grounded on a combination of trade policy and sanctioning instruments, evolving from largely reactive and proportionate measures to US actions in 2018-2019, toward a more proactive and asymmetrical approach, targeting specific economic vulnerabilities.[1282] Measures such as export controls on critical materials – often applied broadly –

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between interests and the adopted measures. Refer to, Report of the Panel, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R, 5 April 2019, cited above, para 7.77, referring to «a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state» giving rise to WTO MS' concerns on defence, military, or of maintenance of law and public order. Also, *Ibid*., para 7.130-7.138. Highlighting the potential inapplicability of the WTO's legal framework to the US 2018 tariffs, *inter alia*, Adinolfi G., *Le misure USA per la protezione dei mercati nazionali dell'acciaio e dell'alluminio: Un nuovo capitolo della crisi dell'Organizzazione Mondiale del Commercio?*, SIDIBlog, 13 April 2018.

[1281] *Inter alia*, Ekelund N.H., Fjellner L., Engelbrejt K., *The Changing Character of U.S.-China Economic Relations: From Competition to Geopolitical Rivalry, 2018–23*, Asia Policy, Vol. 21, no. 1, January 2026, pp. 127-153; Heath T.R., *U.S. Strategic Competition with China*, RAND Report, June 2021; Stango A., *The Geopolitical Competition Between China and the U.S. in New Technologies*, LUISS Working Paper Series, SOG-WP12/2024, May 2024; Kubo F., *Reading the Trump Administration's China Policy*, Asia-Pacific Review, Vol. 26, no. 1, 2019, pp. 58-76; Winkler S.C., *Strategic Competition and US-China Relations: A Conceptual Analysis*, The Chinese Journal of International Politics, Vol. 16, no. 3, 2023, pp. 333-356, which interestingly conducts an historical analysis of the concept "strategic competition" and of its usage across different US administrations. Similarly, Wyne A., *The Evolving Geopolitics of Economic Interdependence between the United States and China: Reflections on a Deteriorating Great-Power Relationship*, Asia Policy, Vol. 17, no. 3, 2022, pp. 81-105. Refer also to Vellano M., *Politica commerciale comune dell'UE e guerre commerciali*, Enciclopedia Treccani, 2019; and, Adinolfi G., *Le misure USA per la protezione dei mercati nazionali dell'acciaio e dell'alluminio: Un nuovo capitolo della crisi dell'Organizzazione Mondiale del Commercio?*, op. cited above.

[1282] Medeiros E.S., Polk A., *China's New Economic Weapons*, op. cited above, p. 116 and p. 119. Similarly, Bogdanova I., Wang A., *China's Use of Export Restrictions and WTO Law: Heading Toward "Weaponization" of Exports"*, in Gao H. Raess D., Zeng K. (eds), *China and the WTO: A Twenty-Year Assessment*, op. cited above, p. 168; Gómez-Hernández

and instruments under UEL and AFSL suggest not only a proactive stance but also potentially punitive and strategic aims.[1283] This reflects that China's approach not only seeks to respond to foreign countries' measures, but also to systematise its reliance and strategic use of economic coercion in the pursuit of foreign policy objectives[1284] including economic security, technological advantage, and geopolitical influence.[1285]

At the WTO law level, Chinese counter-tariffs were explicitly presented as responses to allegedly WTO-inconsistent US measures. However, as explored in Chapter III of this dissertation, WTO law provides for a specific legal instrument when a WTO MS fail to comply with its obligations – namely, WTO countermeasures ex Article 23 DSU – but their adoption requires DSB authorisation, which in this case was not granted. It is acknowledged that the AB paralysis also impacts on the functioning of the DSB, yet – from a formal legal perspective – the absence of a DSB authorisation precludes the classification of Chinese measures as WTO countermeasures.[1286]

U., *The European Union and China's Geoeconomic Tools in a Multipolar World*, Global Policy, Vol. 15, no. S8, 2024, pp. 30-36, p. 34; and, Zhou W., Jiang H., Chen Z., *Trade vs. Security: Recent Developments of Global Trade Rules and China's Policy and Regulatory Responses from Defensive to Proactive*, World Trade Review, Vol. 22, 2023, pp. 193-211, p. 195, and p. 205. Extensively, on China's sanctioning activities, Poh A., *Sanctions with Chinese Characteristics: Rhetoric and Restraints in China's Diplomacy*, Amsterdam University Press, 2021.

[1283] It is argued that Chinese export controls and restrictions on critical materials show China's pursuit of foreign policy objectives, as they apply to all countries and aim to protect China's crucial technologies and supply chains. In this regard, *Ibid*., pp. 117-118. Over the years, China has restricted numerous rare earth materials: *inter alia*, Shivaprasad A., Lv A., Jackson L., *What are the Five Critical Metal Exports Restricted by China?*, Reuters, February 2024; Reuters, *China Expands Rare Earths Restrictions, Targets Defense and Chips Users*, 10 October 2025. On the US/Western and China/BRICS "geopolitical battle" for control over critical mineral supply chains, refer to, *inter alia*, Vivoda V., Matthews R., McGregor N., *A Critical Minerals Perspectives on the Emergence of Geopolitical Trade Blocs*, Resources Policy, Vol. 48, February 2024. On the "punitive intent", *inter alia*, Medeiros E.S., Polk A., *China's New Economic Weapons*, op. cited above, p. 118. The authors, at p. pp. 116-117, notice China's reliance on its tools to «maximize [its] ability to control the application of a penalty and to save room for negotiation».

[1284] In this regard, *inter alia*, Bogdanova I., Wang A., *China's Use of Export Restrictions and WTO Law: Heading Toward "Weaponization" of Exports"*, in Gao H. Raess D., Zeng K. (eds), *China and the WTO: A Twenty-Year Assessment*, op. cited above, p. 173; Medeiros E.S., Polk A., *China's New Economic Weapons*, op. cited above, pp. 101-104; Law E., *Beijing Sets Out Foreign Policy Principles in New Law*, The Straits Times, 21 November 2024.

[1285] *Inter alia*, Medeiros E.S., Polk A., *China's New Economic Weapons*, op. cited above, p. 118; Bogdanova I., Wang A., *China's Use of Export Restrictions and WTO Law: Heading Toward "Weaponization" of Exports"*, in Gao H. Raess D., Zeng K. (eds), *China and the WTO: A Twenty-Year Assessment*, op. cited above, pp. 173-174, and p. 176; Cha V.D., *Collective Resilience: Deterring China's Weaponization of Economic Interdependence*, International Security, Vol. 48, no. 1, 2023, pp. 91-124; Rolf S., Schindler S., *The US-China Rivalry and the Emergence of State Platform Capitalism*, EPA: Economy and Space, Vol. 55, no. 5, 2023, pp. 1255-1280. Interestingly, refer to China Analysis, *China Foreign Policy: Principles, Strategy, and Global Role*, available at https://chinanalysis.com/china-foreign-policy/, [last accessed on 16 March 2026], arguing that the 21st century shift within Chinese foreign policy means that «Under Xi Jinping, foreign policy is more closely integrated with domestic goals such as technological self-reliance, economic security, and political stability». Bogdanova I., Wang A., *China's Use of Export Restrictions and WTO Law: Heading Toward "Weaponization" of Exports"*, in Gao H. Raess D., Zeng K. (eds), *China and the WTO: A Twenty-Year Assessment*, op. cited above, p. 167, also notice environmental objectives within Chinese actions on export controls, despite also pointing out strategic and geopolitical use.

[1286] As discussed in Chapter III, it is evident that the current WTO paralysis may explain and, to a certain extent, 'morally' justify WTO MS's recourse to unilateral measures. However, from a perspective strictly focused on the legal qualification of measures, Chinese unilateral measures – although arguably understandable in light of the WTO paralysis and the practical unfeasibility of obtaining DSB authorisation – cannot be qualified as WTO countermeasures *stricto sensu*, since they lack DSB authorisation ex Article 23 DSU. Arguing the opposite, and taking the debate to a logical extreme, would mean that also other institutional 'crisis' might legally qualify certain measures – external to the system – as instead part

Under international law, Chinese response measures appear *prima facie* justifiable under the ARSIWA framework, insofar as they constitute responses to a prior US internationally wrongful act. Nonetheless, the contested US breach is mainly a WTO violation and, thus, Article 55 ARSIWA – establishing that ARSIWA Articles do not apply whenever rules of international responsibility of States are regulated by *lex specialis* of international law, as discussed in Chapter II – would preclude the application of the ARSIWA framework as remedy of WTO violations. The ARSIWA framework is thus excluded as a basis for classifying Chinese measures in response to US WTO breaches.

Even assuming that ARSIWA countermeasures are available instruments to respond to WTO violations – as supported by part of the doctrine –,[1287] Chinese measures anyway resist this classification: indeed, they lack the requirements of temporality and proportionality, having continued and intensified throughout the years; they were not suspended despite pending WTO proceedings; and, their objectives – while partially compliance-inducing – are increasingly strategic, foreign policy and geopolitical.

Having excluded WTO and ARSIWA countermeasures, the partial compliance-inducing objective inevitably directs the classification toward 'sanctions' under the working definition. At the same time, the presence of multiple non-trade objectives complicates the assessment of a clearly predominant objective. If the compliance-inducement predominates, the measures qualify as stretched sanctions; if non-trade objectives predominate, they constitute stretched domestic measures justified under GATT exceptions.

The best legal qualification of Chinese measures is that of stretched measures occupying a hybrid position between sanctions under the working definition and WTO-justifiable domestic measures, reoriented towards strategic and geopolitical objectives. They are "stretched" since they are formally both domestic trade measures and 'sanctioning' instruments, yet both are being employed beyond their original design and logic, stretching both the compliance objective of sanctions and the GATT framework of WTO-justifiable measures. The alternative classifications are, as mentioned above, unconvincing: WTO countermeasures are excluded for the absence of DSB authorisation; while ARSIWA countermeasures are precluded by Article 55 ARSIWA and, if not, by the non-satisfaction of their requirements.

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of that system. Indeed, if the absence of authorisation could be excused by an institutional paralysis and lead anyway to that measures' qualification as such, then – by analogy – also third-party countermeasures (which are, in fact, unilateral measures taken collectively in the general interests) might be framed as UN sanctions whenever they involve UN MS, even lacking a prior UNSC adoption due to the exercise of veto powers. Undoubtedly, this line of reasoning is both exaggerated, artificial and conceptually forced. Yet, although within both WTO and UN contexts the inaction of the relevant organ may explain recourse to unilateral measures, it is generally agreed that inaction cannot amount to a legal recognition and justification of unilateral measures.

[1287] On DSU exclusivity and the controversy over non-WTO countermeasures, refer to Chapter III, Section 2.4.

In conclusion, the US-China trade war illustrates the shift in the employment of trade instruments from instruments of internal market regulation to strategic tools adopted to pursue geopolitical and foreign policy interests. Thus, this renders their legal classification within existing categories of international law increasingly complex, as such measures do not properly fall within either the WTO framework or other traditional typologies of sanctions or countermeasures, and solely partially align with their original domestic legal characterisation. Their stretched character thus denotes an imperfect application of existing categories of international law, presenting their crucial elements without satisfying all of their conditions. Much of their ambiguity derives from their declared objectives, which in both cases increasingly moved away from 'traditional' trade regulation towards explicitly strategic and geopolitical aims.

In turn, this reorientation reflects an ongoing deeper transformation of international economic law – and the wider international legal order – within which trade, security, and strategic competition are becoming increasingly entangled, particularly in the desire to control critical strategic goods and services and to ensure economic dominance and advantages. The following section explores this transformation, by analysing the China-Lithuania dispute, the employment of trade restrictions as instruments of economic coercion – distinguishing between instances of formal and informal employment –, and the link between trade, and wider geopolitical and security interests.

4. Trade restrictions as means of formal and informal economic coercion in the pursuit of geopolitical and security interests

As explored in Chapter I, Section 3, economic coercion refers to a State's action to compel another State to undertake or refrain from a specific action through economic pressure. Under this perspective, both the Western States-Russia sanctions war and US-China trade war constitute examples of how restrictions on trade are adopted to economically coerce other States. Both are examples of "formal economic coercion", since coercion was conducted through trade-restricting measures adopted under codified instruments legally based on domestic legislation. These conflicts may also be narratively framed as "economic wars" as they involved economically coercive measures within a "warfare model" with escalation, reciprocity, and strategic confrontations over time, as explored in Chapter I, Sections 2 and 3.2.

Other employments of economic coercion may occur through "informal" uses, as happened between China and Lithuania in 2021. In July 2021, the Lithuanian Foreign Ministry announced the opening of a "Taiwanese representative office" in Vilnius. Notably, China – through its One-China policy – perceives Taiwan as a Chinese province and, thus, opposes the establishment of representative offices bearing the name of "Taiwan", while accepting the practice of using "Taipei"

to avoid suggesting independent statehood or sovereignty. In August, and without any formal announcement, Lithuanian exports to China faced substantial disruptions: goods were blocked or delayed at customs; Lithuanian firms in pharmaceutical, electronics, and food sectors were declined customs clearances for shipments; imports from EU MS that contained Lithuanian components were blocked or rejected; and multinational companies were allegedly pressured to sever their ties with Lithuania or either lose access to China's market.[1288] Diplomatic relations were also reduced, with China recalling its ambassador, and Lithuania doing the same in December of that year together with a diplomatic boycott of the Beijing Winter Olympics citing China's human rights abuses – as later also joined by other States, including the US, Australia, UK, Canada, Belgium, Denmark, and Estonia.[1289]

China continuously denied claims that it was targeting Lithuanian goods and services in response to the Taiwanese office's announcement, yet some of China's 'unofficial' trade restrictions continue nowadays although trade partially resumed and diplomatic contacts between the States are also taking place.[1290] Support to Lithuania came from both the US and the EU, but no trade restrictions or sanctions were adopted by these two States against China in relation to this specific event.[1291] Notably, in January 2022, the EU initiated a WTO dispute complaint requesting consultations on China's trade restrictions against Lithuania, subsequently suspended in January 2024 and terminated in December 2025 at the EU's request.[1292] Interestingly, it has been suggested that this EU choice was driven by concerns over potential unfavourable WTO rulings on the compatibility of ACI,[1293]

[1288] *Inter alia*, Blockmans S., *Lithuania, China and the EU Lawfare to Counter Economic Coercion: Breaking Bad?*, CEPS Policy Insights, no. 2021-20, December 2021; Zeneli V., *Lithuania's Policy on China: An Unlikely EU Trailblazer*, in Zeneli V., Fehér Z. (eds), *Is Europe Waking Up to the China Challenge? How Geopolitics are Reshaping EU and Transatlantic Strategy*, Atlantic Council, 10 November 2025; and, Yuen Yee W., *China-Lithuania Tensions Boil Over Taiwan*, Jamestown Foreign Policy, Vol. 22, no. 2, 28 January 2022.

[1289] Westendarp L., *Who's Boycotting the Winter Olympics?*, POLITICO, 20 January 2022.

[1290] Interestingly, this also occurred after the Lithuanian President Nauseda Gitanas later specified that the denomination of the office with that name was a "mistake". In this regard, LRT, *Allowing Taiwan to Open Office Under its Name was a Mistake – Lithuanian President*, 04 January 2022, available at https://www.lrt.lt/en/news-in-english/19/1580082/allowing-taiwan-to-open-office-under-its-name-was-a-mistake-lithuanian-president, [last accessed on 20 March 2026]. In August 2022, it was reported that Chinese authorities had stopped approving new export permits for Lithuanian food exports to China, according to GMF, *Chinese Government Disrupts Trade with Lithuania Over its Closer Ties with Taiwan*, in the "Authoritarian Interference Tracker", available at https://securingdemocracy.gmfus.org/toolbox/authoritarian-interference-tracker/?fwp_country=lithuania&fwp_threat_actor=china, [last accessed on 23 March 2026]. Regarding recent talks, Reuters, *China Open to Talks with Lithuania After Apparent Change in Taiwan Stance*, 06 February 2026.

[1291] Zeneli V., *Lithuania's Policy on China: An Unlikely EU Trailblazer*, in Zeneli V., Fehér Z. (eds), *Is Europe Waking Up to the China Challenge? How Geopolitics are Reshaping EU and Transatlantic Strategy*, op. cited above, reports that the US helped Lithuania to diversify markets and mitigate supply chain disruptions, enabling Lithuania to reorient its trade with exports to the Indo-Pacific.

[1292] The case is *China – Measures Concerning Trade in Goods*, DS610, within which the EU contested violations of Articles II, VIII, XI, XVI, XVII GATT. On the EU's termination of the dispute, refer to Communication from the European Union, *China – Measures concerning Trade in Goods*, Suspension of Panel work, WT/DS610/14, 01 December 2025.

[1293] In this regard, Silingardi S., *Il nuovo strumento anti-coercizione europeo e il futuro assetto dei rapporti tra l'Unione Europea e l'organizzazione mondiale del commercio*, op. cited above, pp. 668-669, suggesting that the EU's choice to

the instrument whose adoption was itself accelerated by this specific China-Lithuania dispute and which, as explored in Chapter II Section 6.2., specifically provides a legal framework to counter economic coercion directed against the EU or its MS.[1294]

In this case, China's trade restrictions – differently from the cases above – were not formalised or publicly declared, but rather were adopted through administrative practices and informal channels of pressure, thereby effectively informally coercing another State into refraining from a specific behaviour.[1295] The relevance of the China-Lithuania dispute precisely consists in this informality, rendering it perhaps the most evident example of 'informal coercion'.[1296] This informality, in turn, renders any precise legal classification of the adopted measures extremely difficult, if not unfeasible, and undermines the applicability of the 'classification test' developed in this Chapter. Without any legislative reference, official motivation, justification, or declared objective, assessing how these measures might be qualified under international law is a task even more controversial and uncertain compared to the cases previously analysed.

Following the classification test, Chinese measures are unlawful and coercive in character, as the timing of the trade restrictions strongly suggests their intention to induce Lithuania to reverse its decision to establish a "Taiwanese representative office". Nonetheless, Lithuania undoubtedly had not committed any prior internationally wrongful act – nor a specific WTO violation – and the measures' objectives cannot reasonably be framed as inducing compliance with breached international obligations, nor as trade regulation or protection of internal markets. Thus, Chinese measures cannot be classified as ARSIWA countermeasures, WTO countermeasures, or sanctions within the working definition developed in this dissertation. The measures, however, certainly pursue

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suspend this specific Panel might be read as the EU worrying over a potential "unfavourable" precedent regarding the ACI-WTO compatibility.

[1294] The European Parliament explicitly considered this episode as economic coercion, representing a potential situation in which the ACI could «help the EU to deal» with third-countries' trade restrictions aimed at forcing EU policy change: refer to European Parliament, *Anti-coercion Instrument: The EU's New Weapon to Protect Trade: The Anti-coercion Instrument will be the EU's New Tool to Fight Economic Threats and Unfair Trade Restrictions by non-EU Countries*, 03 October 2023, cited above.

[1295] As mentioned above, this was not the first time that China relied on "informal coercion". In this regard, and for a detailed analysis, refer to Poh A., *Sanctions with Chinese Characteristics: Rhetoric and Restraints in China's Diplomacy*, op. cited above, which at p. 262 concludes that «Chinese leaders might have been seeking to instil fear and to manipulate the cost-benefit calculus of these targets, with the hope of prompting anticipatory accommodation from its targets.[…] Under such circumstances, China's potential targets might be prompted to align their behaviour with China's interests, even in the absence of actual sanctions. This would be an ideal scenario for Chinese decision-makers, as they could achieve favourable political outcomes without having to deviate from their sanctions rhetoric through the blatant use of unilateral sanctions».

[1296] Additional reasons underline the significance of this case. Beyond its role in accelerating the adoption of ACI, the dispute raises further questions including – although outside the scope of this dissertation – the debated lawfulness under international law of the practice of exerting pressure upon multilateral companies to induce them to sever commercial relations with a targeted countries, and, second, the controversial and unresolved issue of Taiwan's status under international law.

non-trade objectives – perhaps falling within the domain of geopolitical pressure –[1297] yet it would be difficult to situate them within the scope of Articles XX or XXI GATT exceptions which, as mentioned above, concern different matters. Given the inapplicability of any GATT exceptions, they would ultimately be redirected towards a stretching – whether ARSIWA countermeasures, sanctions under the working definition, or domestic measures justified under GATT exceptions. However, the informality of the measures renders it almost unfeasible to establish their link – even a stretched one – with any existing category of measure under international law.

The category of retorsions cannot, *per se*, resolve the classification either: while the informality and absence of any declared legal basis partially align with the unregulated character of retorsions under international law, retorsions are by definition unfriendly but lawful acts that do not breach international obligations. It seems, thus, that Chinese measures are part of a hybrid 'category' simultaneously presenting characteristics of multiple existing categories: retorsions because of their informality, stretched WTO-justifiable measures because they pursue non-trade objectives, "unfriendly" sanctions under the working definition because they coercively respond to a prior "unfriendly" behaviour (rather than to an internationally wrongful act), and, if meeting the requirements, even "unfriendly" ARSIWA countermeasures because they are unlawful in nature and respond to prior "unfriendly" conduct.

Thus, the China-Lithuania case highlights a further instance of trade control measures which resists even the "stretched" classification of existing categories of international law, let alone their qualification within their original design. In turn, while the "sanctions war" and "trade war" analysed above demonstrated a reorientation of trade control instruments which nonetheless could be classified – however imperfectly – as "stretched" cases of existing categories of international law, the China-Lithuania case indicates a hybrid category outside the existing categories of international law.

The best legal qualification of Chinese measures in the China-Lithuania dispute is therefore that of informal coercive measures constituting a hybrid category, thereby being outside the existing categories of international law. This classification, although imprecise from the standpoint of existing instruments of international law, is the most convincing. The alternative classifications, indeed, cannot fit – even if stretched – the measures under examination: ARSIWA countermeasures and sanctions are inapplicable due to the key absence of a prior internationally wrongful act; WTO-justified domestic measures are equally inapplicable since the explicit geopolitical objective fall outside both the general and security GATT exceptions; and retorsions, while partially feasible, do

[1297] Interestingly, Andrijauskas K., Boruta R., *China's Economic Pressure Campaign against Lithuania: The Novelties and Limits of Chinese Economic Statecraft and Coercion*, The International Spectator, Vol. 60, no. 2, 2025, pp. 38-55 frames Chinese measures against Lithuania as "punitive".

not recognise the unlawful dimension that the measures under examination undeniably possess. Even the "stretched" interpretation of these categories – which proved sufficient in the previous case studies – cannot sufficiently produce a legal classification, both due to the measures' informality and the absence of a declared (let alone predominant) objective.

Although tensions between China and Lithuania also took place before the announcement of the Taiwanese office's opening,[1298] this case also does not fit within the narrative label of "economic war", as it remained an isolated instance of economic coercion operating outside a "warfare model" where measures are reciprocal, prolonged, and strategically articulated in a confrontation between States. Nonetheless, both the economic wars mentioned above – *i.e.* Western States-Russia sanctions war and US-China trade war – and this isolated case of informal economic coercion demonstrate a common pattern: the adoption of trade-restricting measures merging economic, security, and political objectives. This reflects the increasing employment of measures regulating trade as strategic tools to influence or coerce other States.

Trade has thus become a key tool of geopolitical (or 'geoeconomic') strategy,[1299] since States increasingly leverage trade – through control over access to markets, supply chains, critical raw materials and core technologies – in order to pursue a variety of interests and objectives including more favourable trade agreements, dominance in strategic economic and technological sectors, and economic advantages.

Trade has also become increasingly entangled with security, with States adopting several trade-restricting measures justified on national security grounds.[1300] Although – notably –

[1298] *Inter alia*, Yuen Yee W., *China-Lithuania Tensions Boil Over Taiwan*, Jamestown Foreign Policy, Vol. 22, no. 2, 28 January 2022, reports the following events: in 2019 Chinese diplomats organised a counter-protest against a manifestation in Vilnius in support of Hong Kong's pro-democracy movement; in September 2021 Lithuanian defense ministry advised consumers to not purchase Chinese smartphones due to a dormant censorship feature; in May 2021 Lithuania left the "17+1 economic cooperation forum" between China and Central and Eastern European Countries. Similarly, Zeneli V., *Lithuania's Policy on China: An Unlikely EU Trailblazer*, in Zeneli V., Fehér Z. (eds), *Is Europe Waking Up to the China Challenge? How Geopolitics are Reshaping EU and Transatlantic Strategy*, op. cited above, which also reports the 2018 Lithuanian alignment with Trump's restrictions against Huawei.

[1299] In this context, the concept of "geo-economics" is often recalled to describe «the use of economic tools to advance geopolitical objectives» or, more broadly, «the interplay of international economics, geopolitics and strategy», as per Schneider-Petsinger M., *Geoeconomics Explained*, Chatham House, 26 November 2020. Notably, geoeconomics is not a legal term or category, but rather an «emerging subfield of political economy», as argued by Mohr C., Trebesch C., *Geoeconomics*, KIEL Working Paper, no. 2279, January 2025, p.4. According to these authors, sanctions are «the best-known geoeconomic policy tool» (p. 5), but so are embargoes, blockades, tariffs and trade agreements, exports and investment controls, sabotage, espionage and cyberattacks, and, foreign aid (pp. 5-8). *Inter alia*, similarly, Gómez-Hernández U., *The European Union and China's Geoeconomic Tools in a Multipolar World*, op. cited above, which at p. 34 lists EU's and China's "geoeconomic tools".

[1300] Interestingly, the link between trade and security has been also confirmed within the US Memorandum "America Frist Trade Policy" of January 2025, according to which «trade policy as a critical component to national security», thereby aiming to guarantee «a robust and reinvigorated trade policy that promotes investment and productivity, enhances our Nation's industrial and technological advantages, defends our economic and national security, and – above all – benefits American workers, manufacturers, farmers, ranchers, entrepreneurs, and businesses» (White House – Memorandum, *America First Trade Policy*, 20 January 2025). As explored in Chapter II, the link between trade and security has also been consolidated within the EU, in its Economic Security Strategy (2023) and Doctrine (2025).

international law does not provide a uniform definition of "national security", it is generally agreed that, post-WWII, the concept was strictly linked to military and defence-related matters.[1301] Over the years, however, "national security" has increasingly expanded to include also economic concerns and necessities. As explored in Chapter III of this dissertation, the WTO panel in Russia-Traffic in Transit established – with reference to Article XXI GATT's security exception – the need for an "objective state of affairs", yet the determination of what precisely constitutes "essential security interests" remains subject to States' discretion and good faith.[1302] The panel also highlighted that the security exception was designed to «separate military and serious security-related conflicts from economic and trade disputes», including protectionism disguised as security matters.[1303] However, the lack of a definition of "national security" and the discretionary power of States to assess what constitutes "essential security interests" leave a wide interpretative space to States which, indeed, increasingly rely on the GATT security exception – despite the WTO AB paralysis and the broader crisis affecting multilateralism –[1304] to justify measures that are, mainly, oriented towards "economic security" objectives,[1305] or even geopolitical and power-based interests.

Although the WTO remains the core of the international trading system established in the post-WWII, the fragmentation of multilateralism has contributed to the tendency of States to "weaponise" economic trade relations for their own economic and political purposes,[1306] together with the proliferation of unilateral trade-restricting measures. States increasingly bypass and stretch

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[1301] *Inter alia*, Zhou W., Jiang H., Chen Z., *Trade vs. Security: Recent Developments of Global Trade Rules and China's Policy and Regulatory Responses from Defensive to Proactive*, op. cited above, p. 195.

[1302] In this regard, Report of the Panel, *Russia – Measures Concerning Traffic in Transit*, cited above. Refer to Chapter III of this dissertation, Section 2.3.1.

[1303] Report of the Panel, *Russia – Measures Concerning Traffic in Transit*, cited above, para 7.81.

[1304] According to Alì A., *National Security and Trade Wars: Legal Implications for Multilateralism*, op. cited above, p. 89, reliance on national security justifications is linked to the crisis of multilateralism, as «The danger associated with the use of national security clauses or the tendency to focus on the essential interests of state security is an obvious unbalancing of the international order based on multilateral commitments».

[1305] The concept of "economic security", strictly linked to (and, perhaps, overlapping with) the concept of "national security", is controversial. According to OECD, *Economic Security in a Changing World: New Approaches to Economic Challenges*, OECD Publishing, 11 September 2025, «Economic security refers to a nation's ability to protect and sustain its economic stability and growth by strengthening its resilience against external and internal threats» (p. 8). Accordingly, at p. 8, «It encompasses the capacity to safeguard key economic assets, maintain critical infrastructure and ensure access to essential resources such as energy, food and technology. The main dimensions of economic security include the protection of strategic industries and supply chains and maintaining trade and investment flows. It also covers cybersecurity. In essence, economic security is integral to national security, as a strong and stable economy underpins a nation's overall ability to defend and advance its interests in a rapidly changing global environment». On economic security, refer also to the EU Economic Security Strategy (2023) and Doctrine (2025), explored within Chapter II of this dissertation.

[1306] On the concept of "weaponisation of interdependence" (or weaponised interdependence), notably, Drezner D.W., Farrell H., Newman A. L., *The Uses and Abuses of Weaponized Interdependence*, op. cited above, which define this concept as «the condition under which an actor can exploit its position in an embedded network to gain a bargaining advantage over others in a contained system». Factually, according to Wyne A., *The Evolving Geopolitics of Economic Interdependence between the United States and China: Reflections on a Deteriorating Great-Power Relationship*, Asia Policy, Vol. 17, no. 3, 2022, pp. 81-105, p. 92, both US and China «increasingly […] see interdependence not as a source of stability but as a vector of vulnerability».

formal legal frameworks – both of international law, *e.g.* through the extensive invocations of Article XXI GATT security exception, and of domestic laws, *e.g.* through instruments such as US Sections 232 and 301 – in order to act freely and under more discretion towards their strategic, geopolitical, economic, and security interests.[1307]

5. Conclusive remarks

The economic wars of the 21st century demonstrate a major transformation of both international relations and international economic law. Aside from the notable progressive erosion of multilateralism,[1308] the blurring of existing legal categories governing trade instruments emerges as a trend. States increasingly rely on unilateral measures originally conceived as either sanctions or trade-regulation tools, frequently combining them for purposes differing from their original design.

The blurring is evident across all three examined episodes. States employed multiple measures – *inter alia*, tariffs, export controls, trade and financial restrictions, anti-dumping and safeguards, etc – whose precise legal classification within existing categories proved complex to determine. The formal domestic legal basis alone does not determine the legal classification, rather additional factors are essential: the nature of the measures as restriction of trade or suspension/breach of an international obligation with coercive intent, the existence of a prior internationally wrongful act, the stated (and not stated) objectives and related justifications, and the extent to which requirements of applicable legal frameworks are satisfied (namely, ARSIWA and WTO). As shown, the co-existence of multiple goals and the failure to satisfy specific requirements redirect the classification toward the "predominance" question and, ultimately, toward the stretched understanding of existing legal categories.

International economic law is not *per se* absent of categories classifying and regulating measures, rather it is increasingly category-strained. None of the examined measures, indeed,

[1307] As note by Alì A., *National Security and Trade Wars: Legal Implications for Multilateralism*, op. cited above, p. 89, «the political security narrative risks to nullify any other rule at international level».

[1308] Slightly outside the purposes of the dissertation, it is however noted that both States openly sceptical of multilateralism – such as the US – and entities committed to multilateralism – such as the EU – have increasingly adopted unilateral measures. The "sanctions war" and the "trade war" both clearly indicate a shift away from multilateral and centralised response: UN inaction prompted coordinated – yet formally unilateral – measures by Western States against Russia; while the WTO system was effectively bypassed by both the US and China. A further signal of the multilateralism crisis is the decreasing recourse to the WTO dispute settlement mechanism: while in 2018 the imposed tariffs prompted multiple instances to the DSB, the 2025 tariff escalation and the 2022 broad sanctioning regimes generated comparably few instances. Undoubtedly, the WTO AB paralysis constitutes a key contributing element, yet the reduction of instances also reflects the decreased trust in multilateral solutions and an increased preference for decentralised forms of 'enforcement' and 'dispute resolution' – *i.e.*, unilateral action. The progressively weakening of the multilateral system of trade regulation developed post-WWII under GATT/WTO is also enhanced by the explicit strategic relationship between trade, geopolitics, and security. *Inter alia*, Adekola T.A., *US-China Trade War and the WTO Dispute Settlement Mechanism*, Journal of International Trade Law and Policy, Vol. 18, no. 3, 2019, pp. 125-135.

qualifies as a 'pure' instrument of any existing legal category.[1309] The link between trade, security, and geopolitics has become so closely entangled that existing legal categories of international law are stretched to their extreme,[1310] and certain measures are best understood as hybrid forms of multiple categories. Existing legal categories do not entirely suffice to precisely classify current cases of reciprocal trade-restricting measures and are therefore applied in an increasingly elastic manner, through progressive stretching; while certain measures even signal the gradual emergence of intermediate categories situated between – and only partially falling within – existing categories, such as ARSIWA countermeasures, trade policy instruments, and 'sanctions'.

Today, whatever their formal label and typology, trade-restricting measures share a common characteristic: despite their different original design, they are not solely understood as either the regulation of trade or the sanctioning of violations of international law, but rather are increasingly employed to modify the targeted State's behaviour as to pursue a broad range of objectives, including geopolitics, security, and foreign policy.

[1309] As discussed, the "sanctions war" is characterised by measures stretched as 'sanctions' under the working definition, whose qualification as ARSIWA third-party countermeasures remains contested on grounds of proportionality and human rights impact. The "trade war" consists of measures that, at both the US and Chinese levels, are stretched cases of domestic trade policy instruments with non-trade objectives reoriented toward strategic and geopolitical objectives – with Chinese measures additionally classifiable, at least partially, also as stretched sanctions under the working definition. Lastly, the China-Lithuania dispute presented measures that resist even a stretched classification of existing categories of international law, pointing towards a hybrid category presenting elements of retorsions, WTO-justifiable measures, and 'sanctions' or ARSIWA countermeasures.

[1310] This increasingly intertwined link and the increasing employment of trade-restricting measures as instruments of geopolitical strategy, foreign policy, and security pressure for normative developments within international law. Key concepts closely interconnected with economic conflicts – including the legal definition and scope of "sanctions", the relationship between economic coercion and non-intervention, the definition of "national security" or of "essential security interests", the admissibility of unilateral measures and third-party countermeasures, etc – would require clarification, as it did occur, as a way of example, with the ACI's definition of economic coercion, *i.e.* the first definition of such concept within a binding international legal instrument, although strictly applicable to the EU.

Conclusions

This dissertation has sought to clarify the international legal framework governing the so-called "economic wars", with particular attention to trade control measures most frequently employed in such contexts. The numerous ongoing economic confrontations and the increasing recourse to various trade-restricting instruments raise fundamental legal questions – both as to the existing legal framework governing economic confrontations and as to the legal classification of the specific measures adopted within them.

The dissertation approached its central research question – "what constitutes an economic war today?" – through three correlated inquiries: (i) In the absence of a formal definition of "economic war" in international law, which related concepts are relevant, and to what extent are they recognised or regulated within the existing international legal framework?; (ii) Which trade instruments are employed to conduct 'economic wars', and how can they be legally distinguished?; (iii) Which trade control instruments, and on what legal basis, have States and other actors adopted in recent key cases of economic confrontations? The four Chapters addressed these questions in sequence.

Against this background, the dissertation argues that "economic war" is best understood not as an autonomous legal category, but as a strategic conflictual context in which trade-restricting measures are reciprocally and consistently employed with coercive, strategic, security, or economic objectives. Its legal relevance does not derive from the emergence of a new category of international law, but from the way in which existing legal categories (including sanctions, countermeasures, trade control measures, and others) are progressively stretched, overlapped, and reoriented in the contemporary State practice. In order to reach this conclusion, the present dissertation is structured as follows.

The conclusion that "economic war" is not, in itself, a legal concept implies that the dissertation title contains a term that lies outside the formal vocabulary of international law. Nevertheless, the employment of the term "economic war" within the title functions as a descriptive element for the strategic and conflictual context within which economically coercive and restricting measures are employed reciprocally and consistently over time. In this sense, the acknowledgement that "economic war" is not, *per se*, a legal concept suggests that the analysis should rather focus on the specific trade control instruments and their respective legal frameworks, as addressed in the central chapters of the dissertation. The term however remains useful, precisely because of its descriptive force rather than legal function, being able to capture a recognisable pattern of strategic States' conduct, where instruments of trade control are employed strategically and reciprocally to pursue multiple coercive, security, strategic, and economic objectives.

The first Chapter examined the concept and legal significance of "economic war" from the perspective of international law, tracing its historical origins, identifying economic coercion as its core element, and analysing the possible thresholds applicable to both the phenomenon and economic coercion. The analysis demonstrated that neither "economic war" nor economic coercion is governed by a comprehensive and uniform international law framework. As it is understood today, "economic war" designates a form of conflict conducted mainly through economic means. It is not a legal term *per se*, but rather a narrative label for a phenomenon whose constitutive feature is the reciprocal and strategic employment of economic coercion by States, including through trade-restricting instruments.

The second and third Chapters explored the instruments most frequently employed in economic wars by analysing their respective legal frameworks. Chapter II examined trade instruments specifically designed to economically coerce other States, entities, and individuals, discussing the definitional ambiguity surrounding the term "sanction" and presenting the legal framework applicable to the most significant coercive instruments. As demonstrated, international law regulates economically coercive measures both at the multilateral level – through the UN non-armed measures framework – and at the unilateral level – through the ARSIWA framework – although both are subject to strict circumstances and requirements. Domestic and regional instruments to coerce were also briefly presented, highlighting that – notwithstanding the contestation of unilateral sanctioning actions by a significant number of States and doctrine – their legal framework is considerably composite.

Chapter III discussed trade instruments originally designed with specific trade objectives yet increasingly implemented with coercive and strategic purposes. Through an analysis of the WTO framework – including its trade control measures and the available exceptions – and an overview of selected regional and domestic commercial policy measures, the Chapter demonstrated that the shifting from measures designed and traditionally employed to regulate and protect domestic markets towards a strategic and coercive employment is evident both normatively, as illustrated by the EU case, and factually, as illustrated mainly by the US case.

The fourth and final Chapter examined factual instances of economic (trade) wars, analysing in turn the "sanctions war" and the "trade war", with reference also to cases of informal coercion, and focusing on the intertwined relationship between trade, geopolitics, and security. The analysed case studies and illustrative example demonstrated the deepening crisis of multilateralism and the progressive erosion of existing legal categories governing trade instruments. Often employed cumulatively, these instruments increasingly merge objectives that have traditionally been legally

distinct: sanctioning violations of international law, regulating trade, modifying the targeted State's behaviour, and pursuing geopolitical, security, and foreign policy interests.

Taken together, the chapters outline some descriptive conclusions: the structural absence of a uniform legal framework regulating economic confrontations, alongside the reorientation of existing legal categories of measures. On the one hand, Chapter I highlighted that the rules of international law governing the use of force, non-intervention, and self-defence were originally designed for a context in which conflicts were predominantly military. Thus, the increasing reliance on economic instruments as alternatives to armed force occurs within a largely unregulated legal panorama, in which also the precise boundaries and thresholds between economic coercion and other concepts of international law remain uncertain. On the other hand, Chapters II, III, and IV reveal a transformation – occurring both normatively and factually – in the design and employment of trade restricting measures in 'economic wars', as these instruments are increasingly conceived and employed to strategically pursue geopolitical and security interests, thereby progressively shifting away from their original design.

The absence of a dedicated framework for economic confrontations is complemented by the crisis of multilateralism which, in turn, has weakened collective institutional mechanisms and enhanced unilateral approaches. Although multilateral mechanisms formally persist, their functioning is constrained: UN non-armed measures are subject to veto powers, and the AB's crisis precludes final and binding resolutions to international trade disputes. As a result, States are left with increasingly limited recourse to multilateral institutional channels, and with simultaneously stronger reasons to act unilaterally. However, unilateral actions remain highly contested under international law, which – outside the notable 'exception' of ARSIWA countermeasures being, nonetheless, subject to strict substantial and procedural circumstances – does not fully regulate unilateral economic coercion.

Moreover, those existing categories regulating unilateral actions under international law do not perfectly fit today's frequent employment of trade control measures. They are stretched to include – only partially and imprecisely – measures that resist precise qualification, reflecting both the insufficiency of international law in regulating unilateral State action and the States' ability to adapt available instruments to serve their current strategic interests, at the cost of legal precision and accountability. Likewise, the growing recourse to narrative labels – such as 'economic wars' or 'sanctions' – to describe phenomena which, at their core, concern crucial principles of international law is not solely rhetorical convenience, but rather a sign of the absence of uniform definitions, agreed thresholds, and binding legal frameworks capable of governing economic confrontations with

adequate precision. The merging of narrative vocabulary with legal discourse renders increasingly difficult to identify, classify, and enforce the boundaries of permissible States' behaviour.

To be precise, as highlighted in the general introduction, this dissertation has not sought to advance a critique of powers or of the international law-making system. Its objective has been, rather, to provide a comprehensive account of how economic wars are conducted through trade control instruments, and to map and clarify their legal classification within the existing categories of international law. In this respect, the formulation of a working definition of 'sanction' and the development of a classification test constitute methodological contributions aimed at systematising the legal qualification of trade-restricting measures. Grounded on majoritarian doctrinal scholarship, they do not aim to establish novel categories or methodological frameworks, but nonetheless provide greater analytical and conceptual precision within a field of study characterised by wide terminological ambiguity and overlap of legal regimes and categories.

In light of this, the dissertation – mainly descriptive and analytical, rather than evaluative – does not contest States' abilities to rely on economic coercion with strategic purposes *per se*, but rather highlights the progressive erosion of the existing legal categories, and the absence of a legal framework or multilateral institutional mechanism capable of governing economic confrontations. Equally, the dissertation has not sought to offer a comprehensive solution to what is, essentially, a structural challenge. Regulating States' conduct in economic wars ultimately depends solely on political consensus among States, which, notably, is currently highly fragmented – as reflected (and reinforced) by current economic confrontations.

What constitutes an economic war today is, finally, a question that international law can answer solely imperfectly. Economic wars are not identified by single elements – such as, reciprocity, duration, economic coercion – but rather by the strategic and conflictual context within which economically coercive and restricting measures are employed reciprocally and consistently over time. Notably, such measures are not a novelty of today's conflicts: initially conceived as collective instruments designed to cease armed conflicts – as envisaged by the League of Nations Covenant – their objectives gradually expanded after 1945 to include a broader range of breaches of international law such as, *inter alia*, human rights violations. A strategic and geopolitical character was nonetheless already present – for instance, in those measures aimed at inducing authoritarian regimes toward democracy –, yet they remained formally linked to objectives collectively recognised as core international law principles, *i.e.* the protection of human rights, the promotion of democratic governance, and compliance with international law.

Today, economic conflicts retain some of these features – as shown by measures responding to Russia's unlawful use of force – however, economic instruments are increasingly and explicitly

employed in pursuit of purely strategic national and economic interests, such as securing supply chains or obtaining technological and economic advantages, as shown by the US-China 'trade war'. Moreover, this shift occurs not solely through instruments specifically designed to coerce, but also through instruments originally designed for the regulation of trade yet progressively 'reoriented' towards coercive and strategic purposes.

Contemporary economic wars and the current employment of trade control instruments expose the limits of existing international law and its legal categories. From a normative point of view, stronger multilateral coordination and institutional dialogue remain desirable to update, restore, and strengthen multilateral fora, establish clearer thresholds for the lawful use of economic coercion, and ensure an effective judicial mechanism for its misuses. A possible direction for future research lies in the development of a tailored international legal framework capable of governing economic confrontations, thereby establishing clearer thresholds for economic coercion, holding violations accountable, and preserving the rules-based international order against the normalisation of economic confrontations as a means to pursue strategic coercive objectives. Codifying economic coercion, narrowing Article XXI GATT security exceptions, updating the law of countermeasures to also frame 'novel' instruments, and guaranteeing the functioning of a binding dispute settlement body for trade disputes could represent useful future normative developments for international law, if not treaty-based, at least soft law-based.

As global trade relations continue to evolve through the weaponisation of interdependence, and the role of economic instruments in international relations becomes ever more crucial, the legal questions and controversial issues partially discussed in this dissertation are likely to grow in both complexity and importance. Investigating the legal boundaries of stretched categories is essential to determine the extent to which existing legal categories can accommodate today's frequent employment of trade-restricting measures. While the employment of unilateral instruments – once contested, such as third-party countermeasures – to respond to severe violations of international law has emerged as reasonable in the absence of a functioning collective response system, the stretching of domestic trade-regulation instruments to serve interests aimed solely at obtaining national and economic advantages requires thoughtful examination, especially given that the justifications invoked in their support are advanced before a system which is currently structurally unable to pronounce on such claims with final and binding force.

Although economic measures have always been employed (also) strategically, the categories of international law governing economic actions were conceived in a fundamentally different world. Today, trade policy has become a preferred political instrument to achieve foreign policy, security, economic and geopolitical interests; existing categories of international law are stretched beyond their

original design; and, the international law enforcement measures and mechanisms are jeopardised by the same political fragmentation that also drives economic confrontation. In turn, this raises significant implications, such as the unfeasibility of categories and debates built on a trade-security divide; and, the difficulty of enforcement mechanisms – if functioning – in assessing the clear boundaries of 'stretched measures'. International legal scholarship should thus explore different understandings of traditional legal categories and assess more precisely their boundaries, acknowledging that the framework designed for a different world cannot fully and adequately regulate the current way of conducting economic wars through instruments of trade control.

Annex

Legend of the classification test:

The black boxes represent the questions structuring the sequential logic of the classification test. Following each "yes", "no", "not solely" answer, the test leads either to a further question box, or to a green box containing a legal classification within an existing category of international law. The light blue box – corresponding to the node of "predominant objective" – likewise constitutes a question box, yet one whose answers do not follow the standard "yes/no/not solely" format: regardless of the answer given, the outcome is the same, namely the stretching of existing categories of international law. The predominant objective, nonetheless, determines the direction of that stretching – tilting the classification toward one category or another. For reasons of space and feasibility, this determination is not specified within the test but rather is addressed within each case study and illustrative example in their corresponding sections of Chapter IV, *i.e.* Sections 2.3., 3.3., and 4. On the broader issue of co-existence of multiple objectives, reference is made to Section 2.3. of Chapter IV, where the issue is briefly addressed; and to Section 2, Chapter II, where the purpose of measures is explored as a defining element of the concept of "sanction".

As for the content of the boxes, the following definitions and clarifications are due:

- The terms "retorsions, unfriendly conduct, diplomatic measures, etc" – although within a green box signifying a legal category – do not constitute a single, unequivocal legal category of international law, but rather a grouping of legally distinct instruments sharing the common feature of inherent lawfulness. It is also acknowledged that these categories might occasionally possess a coercive character. The classification of "non coercive measures" as retorsions, unfriendly conduct, or diplomatic measures does not signify *per se* that these measures might not possess at all the objective of compelling another state to undertake or refrain from a specific action, but rather that they are restrictive economic measures not necessarily reaching the threshold of unlawfulness of coercion, such as some unfriendly actions or retorsions. Nonetheless, their inclusion as a node of classification is 'justified' as a catch-all category including measures that, having failed to satisfy the inherent conditions of coerciveness and unlawfulness in nature, remain lawful under international law and thus resist their classification within the "categories" of sanctions, countermeasures, WTO countermeasures, and, WTO-justified measures. To be precise, as explored in Chapter II, Section 2 (ii), retorsions (according to the ILC ARSIWA Commentary, para 3, pp. 497-498), consist of «"unfriendly" conduct[s] which is not inconsistent with any international obligation of the State engaging in it even though it may be a response to an

internationally wrongful act». Typically, these might include the prohibition or limitations of diplomatic relations, the withdrawal of voluntary aid programmes, and even embargoes. However, as long as such actions are not inconsistent with the State's international obligations, and regardless of their motivation, these measures are not unlawful *per se*, and thus cannot be considered as ARSIWA countermeasures. Similarly, the broader label "unfriendly conduct" encompasses those States' behaviour that, while hostile and politically adversarial in nature, does not engage in international responsibility, such as public declarations of disagreement, suspension of agreements, etc. Diplomatic measures refer more precisely to those instruments such as the recall of ambassadors, declaration of persona *non grata*, etc.

- An internationally wrongful act consists, as established by Article 2 ARSIWA, of an action or omission attributable to the State and constituting a breach of its international obligations – as analysed in Chapter II, Section 4.
- A "WTO violation" refers to a breach, by a WTO MS, of an obligation assumed under the WTO covered agreements.
- The "DSB authorisation" refers to the procedural requirement – established under Article 23 DSU, analysed in Chapter III, section 2.2. (iii), of this dissertation – for a WTO MS to obtain the Dispute Settlement Body (DSB) authorisation in order to enact "WTO countermeasures". As highlighted above, Article 23 DSU is essential because it prohibits self-help determinations outside the DSU, yet technically it is Article 22 DSU, together with DSB authorisation, that governs the suspension of concessions and obligations.
- WTO countermeasures are analysed in Chapter III, section 2.2. (iii), as "DSU trade-restrictive measures". They refer to Articles 22 and 23 DSU which respectively enable a WTO MS to suspend concessions and obligations (after DSB authorisation) whenever another party fails to comply with its obligations, and prohibits self-help determinations outside the DSU. Refer also to Article 3 DSU, para 7, establishing that «The last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis the other Member, subject to authorization by the DSB of such measures».
- The proportionality test, the absence of affecting peremptory norms of general international law, including human rights, the temporality, and the suspension in case of pending disputes in binding courts or tribunals, all refer to the ARSIWA framework (Articles 49-54 ARSIWA), as explored in Chapter II, Section 4. Accordingly, as per Article 51 ARSIWA, countermeasures should be proportionate to the «injury suffered», taking into consideration both the «gravity» of the internationally wrongful act and the rights involved. Countermeasures should not affect – as per

Article 50 ARSIWA – «(a) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations; (b) obligations for the protection of fundamental human rights; (c) obligations of a humanitarian character prohibiting reprisals; (d) other obligations under peremptory norms of general international law». The countermeasures' temporality is provided by Article 49 (3) ARSIWA establishing the necessity to take countermeasures «in such a way to permit the resumption of performance of the obligations», and by Article 53 ARSIWA which establishes the termination of countermeasures as soon as compliance occurred. Moreover, Article 52 ARSIWA establishes that countermeasures should be suspended whenever the internationally wrongful act has terminated and whenever the dispute is pending before a binding court, yet at para 4, specifies that suspension of countermeasures when these events occur is not due if the responsible State does not rely on good faith in dispute settlement procedures.

- The notion of "stretching" – although placed within a yellow box directing to green classification boxes – does not constitute a legal category *per se*: it rather denotes an imperfect application of existing categories of international law, presenting their crucial elements without satisfying all of their conditions. In this sense, the notion of "stretching" functions as an analytical descriptor rather than as a substantive classification, thus it neither amounts to a classificatory outcome nor corresponds to a recognised category of international law.
- The working definition of 'sanction', developed in Chapter II, Section 1, of this dissertation, acknowledges that the concept of "sanction" lacks a precise legal meaning under international law. Nonetheless, for the purpose of this dissertation – and in accordance with the majoritarian doctrinal scholarship – "sanctions" under the working definition are identified as coercive non-armed measures, individual or collective, adopted by a State or an international organisation against another entity either (i) as international law enforcement through the UN system; or (ii) in response to violations of international law, with the aim of compelling compliance with international law and its obligations. Sanctions may thus be categorised into two types: first, centralised measures aimed at international law enforcement, and, second, measures designed to induce compliance after a violation of international law. While both categories share a coercive and non-punitive nature, the first category operates through the centralised UN system also prior to specific violations (*e.g.* in case of "threats to the peace"); while the second includes UN measures responding to breaches of international law and decentralised measures exclusively responding to prior violations of international law. Importantly, this notion functions as an analytical category, and not as an autonomous legal category.
- "Trade defence measures" are part of the "WTO-regulated trade control measures" analysed in Chapter III, Section 2.2., and consist of anti-dumping, countervailing and safeguards measures

which, nonetheless, fall outside the scope of this dissertation – as specified within the general introduction.

- "Domestic measures justified under GATT exceptions" refers to the "WTO-justifiable trade-restrictive measures" analysed in Chapter III, Section 2.3. They refer to the notable exceptions of Articles XX and XXI GATT, respectively providing general exceptions and security exceptions. Article XX GATT, after its Chapeau, provides the following exhaustive list of exceptions: protect (a) public morals; (b) human, animal, or plant life or health; (c) relates to import/export of gold or silver; (d) necessary to secure compliance with GATT-consistent laws; (e) relates to products of prison labour; (f) protect national treasures; (g) conserve exhaustible natural resources; (h) pursue obligations of intergovernmental commodity agreements; (i) ensure essential quantities of materials for domestic industries; and, (j) acquire or distribute products in general or local short supply. Article XXI GATT, instead, provides that nothing in the GATT shall be interpreted as (a) requiring disclosure of information contrary to WTO MS' essential security interests; (b) preventing any action necessary to protect those interests in relation to (i) fissionable materials or derived materials, (ii) traffic in arms, ammunition and implements of war, and those (iii) taken in time of war or other emergency in international relations; or (c) preventing any action pursuant to UN obligations for the maintenance of international peace and security.

Limitations of the classification test:

The classification test developed in this dissertation constitutes an analytical instrument designed to 'systematise' the legal classification of trade-restricting measures in accordance with the legal frameworks of the instruments examined throughout the dissertation, the prevailing doctrinal positions, and the formulated working definition of 'sanctions'. As such, the test does not constitute a proposal for the emergence of novel categories or classification mechanisms, and its scope and applicability are subject to several limitations hereinafter presented.

- The test is strictly confined to trade-restricting measures, thereby not concerning the broader amount of economically coercive instruments available to States and entities under international law.
- It remains a dissertation-specific analytical instrument designed to assist the legal classification of measures in accordance with the prevailing doctrinal position. It does not constitute a novel legal classification mechanism, such as the mentioned legal categories (and their 'stretching') do not constitute novel legal categories under international law.

- The classification tool relies on official declarations, stated justifications, and invoked legal basis. As noted within Chapter IV, their mentioning and analysis do not signify endorsement or consideration of their equal legal validity; and the necessary degree of interpretation and translation limit the precision of the classification.
- Two "category" nodes of the test – *i.e.* "sanction under the working definition" and "domestic measures justified under GATT exceptions" – do not correspond to existing, unique, and formally recognised categories of international law instruments. They rather constitute dissertation-specific analytical groups developed for classification purposes.
- The test does not fully cover multilateral measures, being designed mainly to assess the classification of unilateral trade-restricting measures. Certain multilateral measures – such as third-party countermeasures within the "sanctions war" and WTO countermeasures within the "trade war" – are nonetheless investigated under the test where relevant. EU restrictive measures are not specifically examined through the classification test. Although they constitute a significant part of the Western States measures analysed within the 'sanctions war', the measures were examined "collectively" rather than on a State-by-State or entity-by-entity basis, for reasons of space and feasibility. Nonetheless, EU restrictive measures could theoretically be subjected to the test, with due regard to the *sui generis* legal nature of the EU.
- The node of "retorsions, unfriendly conduct, diplomatic measures, etc" is underdeveloped within the test, and the dissertation as a whole. Their inclusion serves to broadly distinguish the measures that "restrict trade or suspend/breach of international obligation with coercive intent" from those lawful in nature and often not coercive, although overlaps are present.
- The classification test is strongly undermined in cases where measures are adopted through informal channels without any declared legal basis, official justifications, or stated objectives.

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