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'To deter and counteract economic coercion': the puzzle of countermeasures in the European Union's Anti-Coercion Instrument

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ABSTRACT

This article considers the question of countermeasures in the European Union's (EU) Anti-Coercion Instrument, adopted in December 2023 with the aim of deterring and counteracting economic coercion by Third States. In the sweep of cases under the ACI, measures adopted by the EU will be implemented by all of its Member States, including non-injured Member States. This raises the problem of the legal basis for the conduct of these non-injured Member States, where that conduct is inconsistent with those States' obligations to the Third State. After addressing the questions of the apportionment of obligations and attribution, we consider four potential legal bases that might justify such action: (i) countermeasures in the general interest; (ii) proxy countermeasures; (iii) a functional justification; and (iv) a justification flowing from the EU's special character. We argue that none of these legal bases can justify certain of the measures anticipated by the ACI. In conclusion, if the EU does wish to press its legal claim to act collectively in response to the coercion of individual Member States, we consider the optimal way for the law to develop.

INTRODUCTION

On 27 December 2023, the European Union's (EU) Anti-Coercion Instrument (ACI) entered into force.[1] In the European Commission's own explanation:

> The ACI is first and foremost designed to act as a deterrent against economic coercion. Where coercion still happens, the tool provides a structure to respond in a well-calibrated way to stop the coercion. It gives the EU a wide range of possible countermeasures when a country refuses to remove the coercion. These include the imposition of tariffs, restrictions on trade in services and trade-related aspects of intellectual property rights, and restrictions on access to foreign direct investment and public procurement.

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[1] 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 (hereinafter ACI).

The ACI's legislative history highlighted a context of 'rising geopolitical tensions, weakened international cooperation and increasingly weaponised trade and investment'.[2] Debate in the European Parliament referred to China's cutting of trade relations with Lithuania in response to the latter's relations with Taiwan, President Erdoğan of Turkey calling for 'sweeping boycotts of French goods', and a 'rise in politically motivated export bans of key critical raw materials'.[3] The tenor of the debate is captured in the words of Marie-Pierre Vedrenne, MEP:

> They raise tariffs, they block our imports, they threaten us, they ban our exports, they try to blackmail us in order to impose their own political vision. 'They' are third countries that use pressure and deliberately employ economic coercion to divide us.[4]

The ACI has yet to be used by the EU, although some Member States are reported to have considered it in response to the imposition of trade tariffs by the USA in July 2025.[5] In the scholarship, so far, the ACI has been assessed as a component of the EU's ambition for strategic autonomy[6] and as an element of renewed intersections between trade and foreign policy.[7] Work in economics has also started to assess the potential effects of the ACI, as well as other trade policy instruments.[8] The ACI also raises several questions of international law, some of which have already received attention in the literature.[9] These include the definition of economic coercion and whether it is prohibited by international law,[10] how such coercion relates to the prohibition on intervention,[11] and how the measures taken under the ACI interact with trade law, in particular the prohibition on certain unilateral action in Article 23 of the World Trade Organization's (WTO) Dispute Settlement Understanding (DSU).[12]

We leave these questions aside and instead turn to a related but distinct issue: the legal framework for the taking of countermeasures under the ACI and its compatibility with international law. In particular, we focus on assessing the legal position of Member States in implementing the countermeasures adopted by the EU pursuant to the ACI. As a starting point, and assuming that

[2] European Commission, 'Questions and Answers: Commission proposal for an Anti-Coercion Instrument' 8 December 2021. On the legislative history, see Viktor Szép, 'The Legislative History of the EU's Anti-Coercion Instrument' (2024) 25 ERA Forum 127.

[3] European Parliament, Verbatim Report of Proceedings, 2 October 2023, Statement of Anna-Michelle Asimakopoulou on behalf of the PPE Group. See also, eg, Statement of Bernd Lange; Statement of Markéta Gregorová; Statement of Marek Belka.

[4] European Parliament, Verbatim Report of Proceedings, 2 October 2023, Statement of Marie-Pierre Vedrenne (authors' translation).

[5] Andrew Bounds, 'Germany and France Push EU to Prepare Trade Reprisals Against US' *Financial Times* (London, 23 July 2025) <https://on.ft.com/4f95xQa> accessed 17 October 2025.

[6] See eg, Luigi Lonardo and Viktor Szép, 'The Use of Sanctions to Achieve EU Strategic Autonomy: Restrictive Measures, the Blocking Statute and the Anti-Coercion Instrument' (2023) 28 European Foreign Affairs Review 363; Anh Nguyen, 'Questioning the EU Anti-Coercion Instrument—Conflating the Curtailment of 'Strategic Autonomy' with the Erosion of Sovereignty?' (*EJIL:Talk!*, 10 October 2023) <https://www.ejiltalk.org/questioning-the-eu-anti-coercion-instrument-conflating-the-curtailment-of-strategic-autonomy-with-the-erosion-of-sovereignty/> accessed 17 October 2025.

[7] Christian Freudlsperger and Sophie Meunier, 'When Foreign Policy Becomes Trade Policy: The EU's Anti-Coercion Instrument' (2024) 66 Journal of Common Market Studies 1063; Nina Hart, 'European Sovereignty and Development of the International Legal Order: The EU's Economic Security and Anti-Coercion Instrument' (2024) 13 *Cambridge International Law Journal* 83.

[8] Yvonne Wolfmayr and others, 'Trade and Welfare Effects of New Trade Policy Instruments' WIFO Studies (2024).

[9] See eg, Tom Ruys and Felipe Silvestre, 'L'Union contre-attaque—la proposition d'Instrument anti-coercition (IAC) de l'UE vue sous l'angle du droit international' (2021) 67 Annuaire français de droit international 143; Tom Ruys and Felipe Silvestre, 'Economic Statecraft: A Closer Look inside the European Union's Expanding Toolbox' (2023) 51 Georgia Journal of International & Comparative Law 648; Wolfgang Weiß and Cornelia Furculiță, *Open Strategic Autonomy in EU Trade Policy: Assessing the Turn to Stronger Enforcement and More Robust Interest Representation* (CUP 2024) 198–243.

[10] See eg, Mohamed Helal, 'On Coercion in International Law' (2019) 52 *N.Y.U. Journal of International Law & Politics* 1; Antonios Tzanakopoulos, 'The Right to be Free from Economic Coercion' (2015) 4 Cambridge Journal of International & Comparative Law 616. See also Eva Nanopoulos, 'The Antimonies of "Peaceful" Economic Sanctions' (YJIL Online, 28 June 2023) <https://yjil.yale.edu/posts/2023-06-28-the-antinomies-of-peaceful-economic-sanctions> accessed 17 October 2025.

[11] See eg, Marko Milanovic, 'Revisiting Coercion as an Element of Prohibited Intervention in International Law' (2023) 117 American Journal of International Law 601; Marco Roscini, *International Law and the Principle of Non-Intervention: History, Theory, and Interactions with Other Principles* (OUP 2024).

[12] See eg, Chien-Huei Wu, 'The EU's Proposed Anti-coercion Instrument: Legality and Effectiveness' (2023) 57 Journal of World Trade 297; Freya Baetens and Marco Bronckers, 'The EU's Anti-Coercion Instrument: A Big Stick for Big Targets' (*EJIL:Talk!*, 19 January 2022) <https://www.ejiltalk.org/the-eus-anti-coercion-instrument-a-big-stick-for-big-targets/> accessed 17 October 2025.

economic coercion can amount to a violation of the prohibition on intervention, there is no doubt that the State injured by this breach of international law—the coerced Member State—is entitled to take countermeasures against the responsible Third State.[13] But the distribution of competence between the Union and its Member States affects the potential exercise of this right by the injured Member State, at least in respect of economic measures falling within the exclusive competence of the EU.[14] The ACI sidesteps this difficulty by 'multilateralizing' the adoption and implementation of the countermeasure. Indeed, the ACI involves the multilateralization of the countermeasure in two connected ways: the countermeasure will be decided by an entity which is not *itself* injured by the breach (the EU), and will likely be implemented by the other Member States, which are also not themselves injured by the breach. There is thus a puzzle here: the ACI appears to assume that in response to the unlawful coercion of a single Member State—an injured State in international law terms[15]—the EU itself may adopt a countermeasure that is then implemented by the national authorities of all other Member States. The ACI envisages a multilateral response by the EU, and its Member States, to Third State conduct that violates an obligation owed, bilaterally, to a single Member State of the Union.

In this article, we consider whether there is a legal basis for the taking of countermeasures by non-injured Member States under the ACI. To do so, we structure the article as follows. We begin with a brief overview of the ACI and set out two hypothetical measures, one in relation to investment law and one in relation to trade law, that might be taken thereunder. Next, we consider two preliminary questions in the law of state responsibility that are essential to the legal evaluation of ACI-countermeasures: (i) who bears the obligations affected by the countermeasure in question, and, in the case of mixed agreements to which both the EU and its Member States are parties, the effect, if any, of the so-called 'apportionment' of obligations as between them and (ii) the question of attribution of conduct where a Member State acts to implement a measure adopted by the EU under the ACI. In our view, the countermeasure will be both attributable to, and affect obligations owed by, the Member States to the Third State. The Member States remain responsible for their conduct and, consequently, require a legal basis to preclude the wrongfulness of that conduct vis-à-vis the Third State.

Thereafter, having addressed the rare situation where the EU would merely be acting as a decision-making authority for measures implemented in the injured State *only*, we turn to the core case in which the measure is implemented by a non-injured State. It sketches four potential legal bases to justify such conduct of a non-injured Member State in implementing a countermeasure against the Third State taken pursuant to the ACI. First, we ask whether such conduct might be justified as a countermeasure in the general interest taken in response to the breach of an *erga omnes* obligation by the Third State. Secondly, we consider the idea that the conduct might be justified as a proxy countermeasure taken at the request and on behalf of the injured Member State. Thirdly, we ask whether the idea of a transfer of authority to the EU—or whether the EU might be seen as acting lawfully as a substitute for its Member States—might justify the conduct. Fourthly, we consider whether some aspect of the distinctive or special constitutional arrangements or status of the EU might provide a justification. Ultimately, we conclude that none of these arguments is entirely convincing.

The issues raised by the ACI are connected to a wave of recent practice and work concerning countermeasures in the law of international responsibility.[16] The ACI is relevant to the classical question of countermeasures in the general interest, often termed collective, solidarity, or

[13] ASR with Commentaries, Responsibility of States for Internationally Wrongful Acts (2001), art 22 <https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf> accessed 19 October 2025 [hereinafter ASR].

[14] See art 3, 207, Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU).

[15] art 42 ASR.

[16] See eg, Martin Dawidowicz, *Third-Party Countermeasures in International Law* (CUP 2017).

third-party countermeasures,[17] as well as more recent assertions that there may be other ways in which States can collaborate in the taking of these measures.[18] The instrument is also interesting insofar as it connects to a foundational question about the character of EU law and its relationship to international law, particularly in how the EU's internal law interacts with the rights of Third States and the attempts by the EU to shape international law in ways that accommodate its peculiar features.[19] Moreover, recent geopolitical events are likely to strengthen the policy imperatives driving the adoption of the ACI and the need to respond collectively to putative breaches of international law.

THE ACI AND TWO POSSIBLE MEASURES

This section first provides a brief overview of the workings of the ACI, with a focus on the aspects relevant to this article, before setting out two potential EU response measures to unlawful economic coercion that will structure the analysis to come.

Brief overview of the ACI

Article 1(1) of the ACI provides:

> This Regulation applies in cases of economic coercion by a third country. It lays down rules and procedures to ensure the effective protection of the interests of the Union and its Member States from economic coercion by a third country.

Article 2 seeks to define economic coercion and provides the Commission and Council with a set of factors to be taken into account in making such a determination.[20] The ACI then sets out a series of steps in relation to examining Third State measures,[21] determining that the measures meet the definition of economic coercion,[22] engaging with the Third State,[23] and consulting with other affected States.[24] As an aside, it is fair to say that it is rare to see such an explicit and public exposition of the procedural and substantive aspects of unilateral measures of this kind.

Two aspects of the ACI are particularly relevant for our purposes. First, pursuant to Article 2(1), the ACI is applicable to two main scenarios of economic coercion: (i) when the coercion is directed against a Member State of the EU and (ii) when it is directed against the EU itself. Measures of coercion against the EU raise important issues, including what obligations owed to the EU would be breached by such acts of coercion and countermeasures adopted by an international organization (IO) against Third States. We leave these questions aside.[25] In this article, we focus on the first scenario: where a Third State coerces a single Member State of the Union, for it is in this connection that the central puzzle of countermeasures under the ACI arises.

[17] In our view, the term countermeasures in the general interest best captures the concept, but we accept that terminology varies widely in the literature and practice.

[18] Miles Jackson and Federica Paddeu, 'The Countermeasures of Others: When Can States Collaborate in the Taking of Countermeasures' (2024) 118 American Journal of International Law 231; Miles Jackson and Federica Paddeu, 'Assistance to a Countermeasure in International Law' (*EJIL:Talk!*, 17 July 2024) <https://www.ejiltalk.org/assistance-to-a-countermeasure-in-international-law/> accessed 17 October 2025.

[19] On which see, Paolo Palchetti, 'Unique, Special, or Simply a *Primus Inter Pares*? The European Union in International Law' (2018) 29 European Journal of International Law 1409.

[20] art 2 ACI. See further, Weiß and Furculiță (n 9) 200–205.

[21] art 4 ACI.

[22] art 5 ACI.

[23] art 6 ACI.

[24] art 7 ACI.

[25] See Ruys and Silvestre (2021) (n 9) 159–163; Frédéric Dopagne, *Les contre-mesures des organisations internationals* (Anthemis 2010).

Of course, it is possible to deny that any such division is possible, and indeed, the Preamble to the ACI notes that when the unlawful coercion is directed against a Member State only, the coercion 'affects the Union's internal market and the Union as a whole'.[26] As a matter of fact, this may well be the case: it is likely that the unlawful economic coercion of a Member State will affect the Union and its internal market. However, that there is an effect in practice on the internal market is not the same as saying there is a legal injury to the Union.[27] The violation of a Member State's right of non-intervention by means of economic coercion is not, automatically, also a violation of the obligations owed by the Third State to the EU. Indeed, the coercion—say, by way of a demand[28]—may be explicitly aimed at coercing one particular State to act, rather than the EU as a whole and/or other Member States. The two main scenarios—coercion of the EU, and coercion of a Member State—remain legally distinct even if, in practice, the negative effects of coercion in either scenario might be felt by both actors.[29]

Secondly, there is the provision in Article 8 on Union response measures. Article 8(1), in essence, imposes a duty on the Commission to adopt response measures where the economic coercion has not ceased, and where the adoption of such measures is necessary to protect the rights of the EU and its Member States and is in the EU's interest. As to the measures themselves, Annex I sets out an array of options, which includes the imposition of new or increased customs duties, import/export restrictions, other restrictions on trade in goods and services, limitations on participation in tender procedures in the area of public procurement, and measures affecting the access of foreign direct investment to the Union.[30] In each case, the Annex specifies that the measure 'may amount, as necessary, to the non-performance of applicable international obligations'.[31]

In respect of measures involving non-performance of obligations, the ACI specifically raises the notion of countermeasures under the law of State responsibility.[32] The Preamble notes the customary character of Articles 22 and 49–53 of the ILC's Articles on State Responsibility (ASR), setting out the basic principle that countermeasures may justify conduct inconsistent with a State's international obligations, and the substantive and procedural requirements for the taking of countermeasures. It is also notable that the conditions and process set out for the adoption of response measures under the ACI mirror the regime on countermeasures in the ASR.

Two possible measures

As we noted above, no measure has yet been taken under the ACI. Here, we provide two examples of possible response measures to inform the analysis to come. The first relates to trade and the second to investment. In each case, the measure is adopted in response to the unlawful economic coercion by a Third State against Member State A—the injured State.[33] After following the procedures set out in the ACI, the Commission adopts the following measures, which must be implemented by all Member States of the Union:

[26] ACI Preamble, para 10.

[27] cf Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens* (Bruylant 1998) 400–401.

[28] See Milanovic (n 11).

[29] See similarly Ruys and Silvestre (2021) (n 9) 160, and further 'The legal framework for countermeasures under the ACI' section below.

[30] Annex I ACI.

[31] Annex I ACI. See also art 8(4): 'Insofar as the third-country measure constitutes an internationally wrongful act, Union response measures may consist of measures that amount to the non-performance of international obligations towards the third country.'

[32] ACI Preamble, para 13. Interestingly, it does not mention the analogous provisions in the ARIO, which would be relevant to the EU as an international organization.

[33] Again—we leave aside questions about the existence and scope of such a prohibition.

- The first response measure entails the imposition of new customs duties against the Third State. This is a measure anticipated in Annex I, paragraph 1 of the ACI. The customs authorities of all Member States are required to take a set of administrative decisions to implement this measure, and are required to collect the customs duties applied in relation to the Third State. Member State B implements the measure, thus collecting duties on goods from the responsible Third State—duties that are inconsistent with its WTO obligations owed to the Third State. We term this the Trade Measure.
- The second response measure entails the withdrawal of licenses to operate possessed by companies of the Third State. This is a measure anticipated in Annex I, paragraph 6 of the ACI. In implementation of this measure, the national authorities of Member State B are required to withdraw existing licenses to operate from companies of the Third State, in a manner inconsistent with obligations under a bilateral investment treaty between Member State B and that Third State. We term this the Investment Measure.[34]

In each case, it is the Commission that adopts the response measure by way of an act which is directly applicable in each Member State of the Union,[35] including State B. The authorities of each Member State are bound under EU law to implement the measure.

THE QUESTION OF PRIMARY OBLIGATIONS AND ATTRIBUTION OF CONDUCT

When Member State B, or other non-injured Member States in the same position as Member State B, implement the Trade or Investment Measures adopted by the EU under the ACI, are they acting inconsistently with their obligations owed to the Third State? In short, does their implementing conduct require justification? Two preliminary questions arise. The first concerns the primary obligations potentially infringed by Member State B and the idea of the 'apportionment of obligations' between the EU and its Member States. The second concerns whether conduct taken in compliance with a binding obligation under EU law is attributable to Member State B. For ease of analysis, given the complexity of the issues discussed, we focus here on a single Member State—Member State B. Our analysis is, however, applicable to all other Member States of the EU that are in the same legal position as Member State B.

Primary obligations and their potential apportionment

On this first initial question, the two response measures reflect different scenarios. The Trade Measure concerns a scenario where the obligation arises under a treaty to which both the EU and all its Member States are party (a mixed agreement).[36] The Investment Measure, by contrast, concerns a scenario where the obligation arises under a bilateral treaty with the Third State to which only Member State B is a party. No possible apportionment of obligations between Member State B and the EU thus arises in relation to the Investment Measure.[37] Only Member State B is bound by the obligations it has assumed.

[34] Another example may be measure that excludes companies from the Third State from participating in tender processes, which would violate certain BITs that provide pre-investment protections.

[35] art 8 ACI.

[36] Marrakesh Agreement establishing the World Trade Organization, 1867 U.N.T.S. 154. We leave aside situations where the EU only is a party to the treaty, on which see the *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission* (2015) ITLOS, Advisory Opinion, Case No 21, paras 168–174. We also note that some more recent mixed agreements include an explicit 'fulfilment of obligations' clause, which more clearly delineates a division of obligations.

[37] This will be the usual case in the context of investment law. In the event that the issue arises under a mixed investment agreement, absent agreement to the contrary, analysis of the situation would follow our assessment of the apportionment of obligations in connection with the Trade Measure. For wider discussion, see Philipp Stegmann, *Responsibility of the EU and the Member States Under EU International Investment Protection Agreements: Between Traditional Rules, Proceduralisation and Federalisation* (Springer 2019) 79–138; Freya Baetens, Gerard Kreijen and Andrea Varga, 'Determining International Responsibility Under the New Extra-EU Investment Agreements: What Foreign Investors in the EU Should Know' (2014) 47 Virginia Journal of International Law 1203.

In relation to the Trade Measure, the question is more complex. Who bears the obligation under the WTO Agreement which is breached by the Measure: the EU or its Member States? Should the obligation arise for the EU only, then when Member State B implements the measure, it would not be acting inconsistently with obligations it owes to the Third State and, consequently, it would not need to rely on the defence of countermeasures to justify its conduct. In this respect, during the drafting of the Articles on the Responsibility of International Organizations (ARIO) by the ILC, the European Commission took the view that within areas of the European Community's exclusive competence, relevant primary obligations arising under mixed agreements are apportioned to the EU only.[38] Moreover, it took the view that this apportionment of obligations 'is entirely determined by the rules of the organization',[39] giving the following example:

> Member State customs authorities follow a policy of tariff classification which is alleged to be contrary to the trade provisions of an agreement that has been concluded by the EC and its member States together. The question of apportionment of the obligation and of responsibility would have to be decided in favour of the EC, since trade policy is an exclusive competence of the EC which has been wholly transferred by the member States to it. It would seem to be impossible in such a situation to say that the action by member States' customs authorities should nonetheless lead to the attribution of the conduct to the member States, *since they are not the carriers of the obligation any longer*.[40]

Talmon noted at the time that this proposition was not in conformity with international law;[41] the same is true today. Absent acceptance by the relevant third parties, either through a declaration or a specific provision in the agreement,[42] as a matter of principle, both the Member States and the EU remain bound by the obligations they have assumed under mixed agreements of this kind.[43] Just as neither a State[44] nor an international organization[45] can invoke its own internal law or rules to justify a failure to perform its obligations under a treaty, so can neither invoke any internal allocations of competence to deny the very existence of any such obligations against a Third State.[46] To take a contrary view would subject the Third State's rights to both uncertainties in the internal allocation of competence,[47] as well as potential variation over time, insofar as the allocations of competence in the rules of the organization may change.[48]

[38] Responsibility of International Organisations, Comments and observations received from international organisations, UN Doc A/CN.4/545, YILC 2004, vol II(1), 26, para 4.

[39] ibid 26, para 2.

[40] ibid 26, para 4.

[41] Stefan Talmon, 'The Responsibility of International Organizations: Does the European Community Require Special Treatment' in Ragazzi (ed), *International Responsibility Today: Essays in Honour of Oscar Schachter* (Brill 2005) 405, 415.

[42] See Talmon (n 41) 417–419; Gracia Marín Durán, 'Untangling the International Responsibility of the European Union and Its Member States in the World Trade Organization Post-Lisbon: A Competence/Remedy Model' (2017) 28 European Journal of International Law 697, 703. See also Thomas Roe and Matthew Happold, 'Contracting Parties' International Responsibility for Breaches of Part III of the ECT' in Thomas Roe and Matthew Happold (eds), *Settlement of Investment Disputes under the Energy Charter Treaty* (CUP 2011) 175.

[43] See Talmon (n 41), 416; Durán (n 42), 703; Eva Steinberger, 'The WTO Treaty as a Mixed Agreement: Problems with the EC's and the EC Member States' Membership of the WTO' (2006) 17 European Journal of International Law 837, 857. For a wider discussion, see Nataša Nedeski, 'Shared Obligations and the Responsibility of an International Organization and Its Member States—The Case of EU Mixed Agreements' (2021) 18 International Organizations Law Review 139.

[44] Vienna Convention on the Law of Treaties (1969) 1155 UNTS 331, art 27; art 3 ASR.

[45] art 27 ARIO.

[46] Durán (n 42) 703.

[47] Durán notes that in the EU context this problem has been mitigated since the entry into force of the Treaty of Lisbon given that 'the Union has acquired exclusive external competence for virtually all matters presently regulated by WTO law' – Durán (n 42) 703. See also Palchetti (n 19) 1418.

[48] Talmon (n 41) 416. See, for example, in relation to the EU-Singapore free trade agreements, CJEU, Opinion 2/15, ECLI:EU:C:2017:376; Christine Sim, 'Attributing Responsibility to International Organisations: Lessons from the EU–Singapore Investment Protection Agreement' (2018) 3 European Investment Law and Arbitration Review 20.

With respect to obligations under the WTO, a treaty to which both the EU and its Member States are parties, after a careful overview of dispute settlement practice within the WTO, Durán concludes that 'WTO panels have consistently taken the position that transfers of external powers under EU law do not affect the validity of WTO obligations for EU member states.'[49] This conclusion is not surprising. Member States of the EU, as parties to the WTO Agreement, are bound by the obligations they have assumed thereunder. By implication, the implementation of the Trade Measure adopted by the EU by Member State B would be incompatible with Member State B's own obligations under the WTO towards the responsible Third State.

Attribution of conduct

The second preliminary issue is more complex and relates to the longstanding question about the application of international law rules on attribution of conduct for the purpose of responsibility in the EU context. To reiterate, in each of our two hypothetical scenarios, it is the EU that decides upon and adopts the relevant measure—the increase in customs duties and the revocation of licenses against the Third State. In each case, it is the national authorities in Member State B (as well as all other Member States) that implement the measure—that is, collecting the increased customs duty or revoking a licence to operate.

At first glance, it might seem as though the attribution question is relatively straightforward. On the one hand, the conduct of the European Commission in adopting the measure under the ACI is attributable to the EU under the core rule in Article 6(1) ARIO—the Commission is an organ of the EU.[50] On the other hand, the measures are implemented by organs of each Member State, and thus attributable to them in accordance with the core rule in Article 4 ASR. However, the EU has maintained the position that in areas of exclusive competence, the conduct of national authorities taken in implementing EU law should be attributed to the EU exclusively.[51] It grounds this position, in part, on what it understands to be a 'distinctive feature' of European Union law: 'that it is automatically applicable in the Member States without separate ratification acts being necessary'.[52] To emphasize, this is a claim in two parts: that the conduct of the Member State is attributable to the EU and that the conduct is *exclusively* attributed to the EU, such that the Member State drops out of the picture.

To begin, it may be noted that this argument only has potential purchase where the EU is (also) bound by the relevant primary obligation. In no circumstances could this attribution analysis apply where the EU is not so bound, as in our Investment Measure. To recall, in that context, the measure affected a bilateral obligation between Member State B and the Third State. It cannot be the case that Member State B bears the obligation but not the conduct, and the EU takes the conduct but bears no obligation. This would create a responsibility gap by 'exempting EU members from the normal application of the rules of state responsibility' to the detriment of the Third State.[53] As Kuijper and Paasivirta note, in this instance, 'without doubt responsibility will fall on the Member States alone'.[54]

[49] Durán (n 42) 720.

[50] Pursuant to art 6(1) ARIO: 'The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization.'

[51] YILC 2004, vol II(1) (n 38), 29, para 5.

[52] ibid, para 2.

[53] Fernando Bordin, 'Is the European Union a *Sui Generis* International Organization? The Challenge of Arguing for Special Treatment in Customary Law' in Fernando Bordin and others (eds), *The European Union and Customary International Law* (CUP 2022) 60. See also Paolo Palchetti and Luca Pantaleo, 'The Withdrawal of the EU and the Member States from the Energy Charter Treaty: Who Will Bear International Responsibility for Breaches of the Treaty?' (2023), para 14.

[54] Pieter Kuijper and Esa Paasivirta, 'EU International Responsibility and its Attribution: From the Inside Looking Out' in Malcom Evans and Panos Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives* (Hart 2013) 36.

It is thus in relation to the Trade Measure that the question arises: does international law provide for exclusive attribution of the measure implemented by Member State B to the EU? The EU's claim of exclusive attribution in these instances might be supported on four bases—none of which, however, is entirely convincing. First, it might be argued that a Member State's organ, when implementing a binding decision of the EU, is actually an 'organ' of the EU in the sense of the core rule in Article 6 ARIO.[55] Although they are themselves sympathetic to such an approach, Kuijper and Paasivirta noted even in 2004 that this idea had 'so far encountered much resistance among practitioners and in the doctrine',[56] and was rejected by the ILC. That conclusion holds today. Article 6 ARIO does not provide a basis for exclusive attribution of the conduct of Member State organs to the EU.

Secondly, rather than Article 6 ARIO, it might be argued that in these circumstances the national authorities of a Member State should be understood as having been 'placed at the disposal' of the EU and acting 'under its effective control', thus leading to attribution under Article 7 ARIO.[57] There are two difficulties with this argument for present purposes. On the one hand, as to the application of Article 7 in the first place, under the orthodox approach, the kind of control exercised by the EU over Member States in these cases does not amount to 'effective control' as required by the rule. As explained by the ILC, the criterion for attribution in this provision relies 'on the factual control that is exercised over the specific conduct taken by the organ or agent placed at the receiving organization's disposal'.[58] In other words, factual control entails that, when implementing a binding act of the EU, the Member State acts 'in conjunction with the machinery of [the EU] and under its exclusive direction and control'.[59] Such a scenario is extraordinarily rare in practice—States rarely 'relinquish control over their organs' so as to fall within the terms of Article 7.[60] Indeed, the cases we are concerned with in the EU context do not meet the threshold of Article 7 ARIO: the State organs remain embedded in the institutional structure of their home State, and their implementation of a measure taken by an IO reflects the IO's 'normative control' (by way of legal obligation) over the State in question and not its effective control.[61] Normative control is generally taken to be insufficient to meet the standard of effective control.[62]

On the other hand, even if the requirements of Article 7 were met, it is not clear that any such attribution would be *exclusive* to the EU. This is what matters for our analysis. The Commentary to ARIO identifies one situation in which attribution is exclusive to the IO—where a State organ has been 'fully seconded' to the IO.[63] The ILC treats such a 'fully seconded' organ simply as an organ of the receiving entity—attribution thus takes place under the core rule in Article 6 ARIO. As already noted, this is not the situation here: in this case, there is, at most, normative control

[55] For discussion, see Pieter Kuijpers and Esa Paasivirta, 'Further Exploring International Responsibility: The European Community and the ILC's Project on Responsibility of International Organizations' (2004) 1 International Organizations Law Review 111, 126.

[56] ibid 126.

[57] art 7 ARIO.

[58] ARIO Art 7 Commentary, para 4. On effective control as factual control see: Pierre Klein, 'The Attribution of Acts to International Organizations' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of State Responsibility* (OUP 2010, 300. Christian Tomuschat, 'Attribution of International Responsibility: Direction and Control' in Malcom Evans and Panos Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives* (Hart 2013), 15.

[59] Palchetti (n 53), para 7.

[60] Francesco Messineo, 'Multiple Attribution of Conduct' in André Nollkaemper and Ilias Plakokefalos (eds), *Principles of Shared Responsibility* (CUP 2014), 94.

[61] ibid 88. This point is further confirmed by the ILC's inclusion of 'normative control' by way of a binding decision within the provision on derivative responsibility in art 15 ARIO. Derivative responsibility depends on the State being responsible for its conduct.

[62] Antonios Tzanakopoulos, *Disobeying the Security Council* (OUP 2011) 40 and more wider discussion 17–53; Durán (n 42) 705; Andrès Delgado Casteleiro, *The International Responsibility of the European Union: From Competence to Normative Control* (CUP 2016) 53, 227–228. It may be difficult to draw a clear line in practice between the two standards of factual and normative control. This said, the idea that normative control should be sufficient for attribution is not unappealing in principle, especially if understood as giving rise to dual rather than exclusive attribution.

[63] ARIO art 7 Commentary, para 1.

by the IO over a Member State's organ.[64] It has been said that Article 7 is aimed at identifying the responsible actor on an exclusive basis,[65] such that when Article 7 applies, attribution of the relevant conduct is exclusive to the IO. But the ILC was explicit on this point: Article 7 only dealt with attribution *to* the IO such that 'the possibility of a double attribution was therefore not excluded'.[66] In this respect, the core rule in Article 4 ASR—that the conduct of State organs is attributable to the State—continues to apply alongside that in Article 7 ARIO.[67]

This position—that conduct of a Member State in the implementation of obligatory measures imposed by an IO remains attributable to the Member State—also has appeal in principle and practice.[68] To use examples from other contexts: when a State arrests and detains a foreign leader pursuant to an obligation owed under the Rome Statute, it is scarcely credible for it to evade the question of immunity owed to that State by claiming that, in legal terms, the act was attributable to the ICC and the State was not itself actually acting at all. No Third State would accept such a claim. Similarly, when a European State freezes the assets of an individual pursuant to a binding Security Council resolution and is subject to challenge before the European Court of Human Rights, it can hardly claim that, in legal terms, it was not acting at all and that the individual must take up their claim with the United Nations.[69]

Thus, the first two potential bases of exclusive attribution to the EU are not convincing. Article 6 does not apply. Article 7 probably does not apply, but even if it did, there is no good reason to treat attribution under this provision as exclusive. A third basis may be that the EU can simply be understood to 'acknowledge and adopt' the national authorities' conduct in each and every case, and thus be responsible for the conduct under Article 9 ARIO. Even if this appears slightly artificial, it may be practically viable,[70] particularly given that the EU, relatively unusually in these joint responsibility contexts, generally wants to take responsibility for the conduct.[71] The issue, however, is not whether the EU can take the conduct, but rather whether it can do so exclusively. In this respect, the acknowledgement and adoption of the conduct by an IO does not, of itself, displace the attribution of the same conduct to the organ's own State.[72] As noted by its Drafting Committee, the ILC had 'agreed that [Article 9] did not exclude the possibility that conduct was attributable to another international organization or another State under generally applicable rules'.[73] Consequently, the core rule in Article 4 ASR continues to apply: this was conduct of a State organ, whether or not it is *also* attributable to the EU as a result of its acknowledgement and adoption. Moreover, to suggest that acknowledgement and adoption by the EU necessarily displaces attribution to the Member State runs into the problem of opposability,[74] as discussed below in relation to a special rule of attribution.

Fourthly, and lastly, it may be asserted that a special rule of exclusive attribution applies in this context, as anticipated in principle at least by Article 64 ARIO.[75] Pursuant to this argument, a

[64] Tzanakopoulos (n 62) 35.
[65] Pierre d'Argent, 'State Organs Placed at the Disposal of the UN, Effective Control, Wrongful Abstention and Dual Attribution of Conduct' (2014) 1 Questions of International Law 17.
[66] YILC (2004) Vol 1, 137, para 15.
[67] See further Tzanakopoulos (n 62), 36.
[68] See further Stephan Wittich, 'International Investment Law' in André Nollkaemper and Ilias Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (CUP 2017) 839.
[69] See *Bosphorus v Ireland*, Application No. 45036/98, Grand Chamber, European Court of Human Rights, Judgment of 30 June 2005, ECHR 2005-VI, [2005] ECHR 440, paras 137 and 152.
[70] Durán (n 42) 706–707.
[71] See Eeckhout Piet, 'The EU and its Member States in the WTO: Issues of Responsibility' in Lorand Bartels and Federico Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (OUP 2006) 456; Baetens, Kreijen and Varga (n 37) 1243–1244.
[72] Tzanakopoulos (n 62), 44; d'Argent (n 65). Contra: Pieter Kuijper, 'Introduction to the Symposium on Responsibility of International Organizations and of (Member) States: Attributed or Direct Responsibility or Both?' (2010) 7 *International Organizations Law Review* 9, 19.
[73] Rodríguez Cedeño (speaking as Chairperson of the Drafting Committee), 2810th meeting, 3 June 2004, *ILC Yearbook* 2004, vol I, 138, para 24.
[74] Roe and Happold (n 42) 174–175.
[75] art 55 ARIO.

special rule of attribution within the EU would require that 'the conduct of an organ of a Member State is to be attributed exclusively to the EU when the organ in question implements a binding act of the EU'.[76] Accepting such a rule would entail that a Member State would be 'exonerated from responsibility in relation to acts implementing EU acts by alleging that such conduct is to be attributed exclusively to the EU'.[77] Extensive scholarship interrogates the specialness of the EU as an international organization,[78] an argument to which we return in 'The special characteristics of the EU' section below.

For present purposes, the key issue is whether any such special rule is opposable to a Third State.[79] In this respect, it is not possible to make a general claim.[80] Parties to a particular treaty may, of course, agree to the application of this special rule among themselves.[81] In WTO practice, for instance, it is not clear that either Third States or WTO panels have consistently accepted exclusive attribution of the conduct of Member States to the EU,[82] whether on the basis of a competence model[83] or one refined to focus on which actor has the legal power to provide juridical restitution.[84] There is a risk in drawing too strong a legal inference from a Third State's choice of respondent in the context of WTO dispute settlement, given that it may make practical sense to simply proceed against the EU alone and that this is a situation in which the EU is keen to assert its own responsibility, such that an accountability gap does not arise.[85]

More widely, the point of principle is this: the opposability of such a special rule arises only with the consent of the Third State.[86] Absent such specific acceptance, the conduct of each of their organs remains attributable to Member States even when they act to implement binding EU measures.[87] The core rule that the conduct of a State's organs is attributable to it under Article 4 ASR continues to apply, and is not displaced by the possible parallel or dual attribution of the Member State's conduct to the EU.

Conclusion on preliminary issues

To recall, we assume that the Trade Measure and Investment Measure meet the material conditions for constituting a breach of the relevant primary obligation. By way of preliminary conclusion, Member State B's implementation of each Measure would be *prima facie* inconsistent with the obligations that the Member State *itself* owes to the Third State. For the Trade Measure, as to the apportionment of obligations, this is because obligations under the WTO Agreement, to which both the EU and Member States are parties, are owed by *both* entities and not just by the EU. In respect of the Investment Measure, this is because the obligation is owed by Member State B against the responsible Third State only—no apportionment of obligations question arises.

On the issue of attribution, in our view, absent agreement to the contrary in the specific case, the conduct of a Member State implementing measures adopted under the ACI would

[76] Palchetti (n 53) para 10.
[77] Palchetti (n 53) para 10.
[78] See eg, Talmon (n 41); Palchetti (n 19); Bordin (n 53); Esa Paasivirta, 'The Responsibility of Member States of International Organizations? A Special Case for the European Union' (2015) 12 *International Organizations Law Review* 448.
[79] See more widely Eirik Bjorge, 'Opposability and Non-Opposability in International Law' (2021) British Yearbook of International Law 1. See also Wittich (n 68) 840–841 (also challenging whether internal rules of an international organization can appropriately be described as lex specialis for the purposes of ARIO art 64). Roe and Happold (n 42) 173–175.
[80] See similarly Roe and Happold (n 42) 175–176.
[81] See eg, art 3.5(2) Investment Protection Agreement between the EU and Singapore. See art 3.5(4) and Sim (n 48) 28–32.
[82] Durán (n 42) 719–721.
[83] See Kuijpers and Passivirta (n 54) 54–55.
[84] See Durán (n 42) 721–727.
[85] Andrés Delgado Casteleiro and Joris Larik, 'The "Odd Couple": Responsibility of the EU at the WTO' in Malcom Evans and Panos Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives* (Hart 2013) 233, 254–255.
[86] cf Paasivirta (n 78) 464.
[87] Giorgio Gaja, 'The Co-Respondent Mechanisms According to the Draft Agreement for the Accession of the EU to the ECHR' ESIL Reflections, vol 2(1) (2013): 'the fact that the State organ implements an obligation under international law or under EU law does not affect the attribution of conduct to that State'.

remain attributable to each Member State. This is because potential attribution to the EU either under Article 7 or 9 does not displace attribution to the Member State; because the threshold for exclusive attribution to the EU under Article 6, or potentially Article 7, is not met in fact; and/or because special rules of exclusive attribution to the EU will not be opposable to Third States absent specific acceptance by that Third State. The implementation of the Trade Measure and Investment Measure is thus attributable to Member State B, and is likely to breach obligations that Member State B owes to the Third State. Member State B, which implements such measures, without being injured by the Third State's economic coercion, will therefore require a legal justification for this conduct. We address this question in more detail below.

THE LEGAL FRAMEWORK FOR COUNTERMEASURES UNDER THE ACI

To reiterate, as specified at the outset, we assume that the conduct implementing the Trade Measure and the Investment Measure is attributable and contrary to Member State B's own obligations towards the Third State under international law. In this section, we consider the mechanism for the taking of countermeasures envisaged by the ACI. We first consider the situation where the EU merely acts as a decision-making authority for the taking of countermeasures by the injured Member State *only*. Here, we see no legal problem arising.

However, given the practical reality of the internal market and the EU's economic integration, in most cases this question will not be resolved quite as easily. In the sweep of cases, the taking of countermeasures under the ACI will likely involve adoption by the EU and then implementation by all Member States—both the injured State and all other Member States. We refer to this as the 'multilateralization' of the implementation of countermeasures. This feature raises the question of the potential legal basis for such action by non-injured Member States, including our Member State B: what might provide a legal justification for conduct inconsistent with Member State B's obligations towards the Third State? We consider four potential legal bases for Member State B's conduct: (i) countermeasures in the general interest; (ii) proxy countermeasures; (iii) a functional justification; and (iv) a justification flowing from the EU's special character. We argue that none of these options provides a compelling legal basis.

The EU as a substitute decision-making authority

In most relevant situations, owing to the transfer of exclusive competence in the areas of trade and investment, an injured Member State of the EU would not be able to decide upon and take countermeasures in this area against a responsible Third State. However, absent clear evidence to the contrary, it would be hard to conclude from this transfer of exclusive competence that Member States have waived their right to take countermeasures in this sphere.[88]

In our view, and leaving aside the multilateralization problem discussed below, there does not seem to be any reason of principle preventing an injured State from empowering an international organization with authority to make a decision on whether to adopt a measure, which is then implemented by the injured State itself and *only* by that injured State.[89] In relation to the ACI, this might involve a response measure that imposes a special tax on the Third State in relation to

[88] Responsibility of International Organisations Responsibility, Sixth Report of the Special Rapporteur (Gaja), UN Doc A/CN.4/588), YILC 2008, vol 1, 29, para 62.

[89] Claus-Dieter Ehlermann, 'Communautés Européennes et Sanctions Internationales—Une Réponse à J. Verhoeven' (1984-1985) 18 Revue belge de droit international 96, 106. See also Ruys and Silvestre (n 9) 162: 'Le fait que l'adoption de ces contre-mesures soit « collectivisée » ou « mise en commun » au niveau de l'UE ne constitue, dans ce scénario, qu'un changement de forme.'

services provided in the injured Member State only. After all, the distribution of decision-making authority with respect to foreign relations in general, and countermeasures in particular, within a State is a matter that falls within its internal jurisdiction. Whether the decision is made by the executive branch, its legislative branch, or some other body is ultimately a matter for the State to determine.

An example may be drawn from the discussion at the ILC during the drafting of ARIO. Imagine a group of States establishes a technical transport organization with exclusive competence regarding overflight rights.[90] A Member State of the organization is injured by a Third State's wrongful act, and at its request, the organization takes the decision to prohibit that wrongdoing State from exercising overflight in relation to the injured State. The decision is then implemented by the injured State. It is hard to see that any problem arises here. On the one hand, to prohibit such action would be to deny Member State A its primary unilateral remedy for wrongful conduct under international law, at least within that particular sphere of activity. On the other hand, no additional infringement of the Third State's rights or interests arises; the injured State is simply doing what it is entitled to do under international law, by means of a decision of the IO.

By way of caveat, two points should be emphasized here. First, in this scenario, it is only the decisional authority with respect to the adoption of the measure that has been transferred to the IO. The relevant measure is still implemented by the injured Member State itself such that, on the model of attribution set out earlier, the injured Member State remains responsible for the conduct of its organs in implementing the measure decided upon by the IO. Secondly, we leave aside the legal position of the IO itself in these circumstances, in particular whether the decision might infringe the IO's own obligations. Whether an IO itself can take a countermeasure on behalf of its members—thus precluding the wrongfulness of its own conduct that would otherwise breach its own obligations towards the Third State—is a question that has received relatively little attention in scholarship in practice.[91] A roughly analogous issue was discussed during the drafting of the ARIO, but the provision at issue—Draft Article 57—was not included in the final text.[92] We leave this problem aside.

The multilateralization of countermeasures

The previous sub-section suggested that there would be no legal obstacle to an injured Member State transferring its decision-making authority with respect to countermeasures to the EU, so long as the measure is then implemented by the injured Member State *only*. What the ACI proposes, however, is not simply that the EU decides on the taking of the measure on behalf of an injured State, with the measure then being implemented by the injured State alone. Rather, in the core case, the ACI contemplates the implementation of the measure across and by *all* Member States. That is, it is not simply a matter of substitution in the exercise of decision-making authority in relation to the measure. The ACI also envisages an expansion in the implementation of the measure. In this core case, each of the other 26 (non-injured) Member States of the EU—including our hypothetical Member State B—would be required to act in the implementation of the measure decided upon by the EU, an action that would, in many cases, entail an infringement of their obligations towards the Third State. While the right to take countermeasures in these cases belongs to the injured State only, the implementation of the measure would fall, instead, on a much wider number of States—none of which is, on their own, entitled to take countermeasures against the

[90] See YILC 2008, vol 1 (n 88), 36, para 34 (Nolte).

[91] For a wider discussion, see Dopagne (n 25); Klara Gratinger, 'Institutional Countermeasures: The Legality of Collective Countermeasures Taken by International Organisations Based on Their Member States' Rights' (LLM thesis, Lund, 2025).

[92] For discussion at the ILC of Draft art 57, which was not in the end included in ARIO, see YILC 2008, vol 1 (n 88) 36, para 34 (Nolte); 39, para 55 (Hmoud); 40, para 4 (Pellet); 45, para 35 (Fomba); 45, para 40 (Al-Marri); 46, para 44 (Wisnumurti); 47, para 51 (Kolodkin); 52–53, para 42 (Vasciannie).

responsible Third State. Differently put, while the right of reaction is individual, its exercise and implementation are multilateralized by the ACI.

Interestingly, this problem of the multilateralization of such a measure was identified in an analogous context during the drafting of ARIO.[93] During the drafting of the ARIO, Special Rapporteur Gaja proposed in Draft Article 57(2):

> Where an injured State or international organization has transferred competence over certain matters to a regional economic integration organization of which it is a member, the organization, when so requested by the injured member, may take on its behalf countermeasures affecting those matters against a responsible international organization.[94]

When this proposal was being discussed in the Commission, Hmoud captured the essence of the multilateralization problem in the following terms:

> [S]ince competence had been delegated by the member to the organization, the latter should act only within the confines of the member's original competence, having regard also to the extent of the countermeasures that the member would have been able to take had it acted by itself and not through the international organization. That principle meant that the organization could avail itself only of such countermeasures as could have been taken by the member. For instance, the organization could not take countermeasures that involved the whole organization vis-à-vis the injuring entity, because the member, not the organization, was the injured party. He therefore suggested that the phrase "only to the extent that such measures would have been lawfully possible for the member had it taken those measures itself" should be added at the end of draft article 57, paragraph 2.[95]

In our view, this is the crucial issue. To recall our scenario: Member State A is injured by the Third State's unlawful economic coercion; the EU adopts a countermeasure, which is then implemented by Member State B (and all other Member States). The ACI assumes that, by virtue of the exclusive competence of the EU and mechanism of the implementation of its measures, Member State B has a legal basis for action. In the sub-sections that follow, we assess four potential justifications for this assumption.

Erga omnes obligations and countermeasures in the general interest

A first option is that Member State B's non-compliance with trade or investment obligations to the Third State, resulting from the implementation of Measures under the ACI, is justified as a countermeasure in the general interest. That is, it is justified as a countermeasure taken by a State other than an injured State when the act of the responsible State violates an obligation *erga omnes*. The most plausible version of this argument arises if three conditions obtain. First, the Trade and Investment Measures, involving non-compliance with obligations to the Third State, are only taken under the ACI when the Third State's economic coercion breaches the prohibition on intervention.[96] Secondly, the prohibition on intervention is accepted as generating obligations *erga omnes*, such that all other States in the international community would have a legal interest in compliance with this obligation.[97] Thirdly, countermeasures in the general interest are permissible in international law.

[93] To be clear, Draft art 57 concerned potential measures taken *against* an IO.
[94] YILC 2008, vol 1 (n 88), 30, para 66.
[95] YILC 2008, vol 1 (n 88) 39, para 55 (Hmoud).
[96] See also Weiß and Furculita (n 9) 206–216; Ruys and Silvestre (2021) (n 9) 148–155.
[97] ASR art 48.

We start with the first and third conditions, before turning to the second, which presents serious difficulties. With respect to the first condition, it is not implausible to argue that, in certain circumstances, economic coercion breaches the prohibition on intervention,[98] even if there are complex aspects of this argument.[99] We need not pursue these further here. As to the third condition—the permissibility of countermeasures in the general interest—as is well-known, States in the Sixth Committee were dissatisfied with the ILC's proposal to include a provision on such countermeasures.[100] The dissatisfaction stemmed from both policy reasons, in particular concerns about the potential abuse of this form of countermeasures, and legal ones: there were questions about the strength of the 'limited and rather embryonic' practice on general interest countermeasures up to that point.[101] All that States could agree to was a without-prejudice clause, now in Article 54 ASR, and to leave the matter for further development. As we have noted elsewhere,[102] the practice of States in respect of these countermeasures is by now considerable, and is relatively widespread.

Nonetheless, evidence of *opinio juris* remains scant.[103] For the most part, States taking restrictive measures against perceived violators of fundamental rules of the legal order do not expressly rely on the notion of countermeasures to justify their measures.[104] For some scholars, this is not, as such, problematic, since States' *opinio juris* can be inferred from their conduct.[105] As Dawidowicz explains, a variety of points support this inference: the rule in question is a permissive one, the practice is consistent and regular and evidences no '*opinio non juris*', and the notion of 'third-party countermeasures' (in his terminology) is the only way to explain the legality of the relevant conduct.[106] This approach is, however, in tension with the ILC's Conclusions on the Identification of Customary International Law, widely endorsed by States in the UNGA Sixth Committee, which is cautious on establishing *opinio juris* by inference.[107] For indeed, the general proposition must surely be that, as held by the ICJ in *Nicaragua*, legal views should not be ascribed to States which they do not themselves formulate.[108] To argue that the only way legally to explain the practice is by means of the concept of countermeasures overlooks the fact that a State might have assessed its conduct to be permissible in light of its existent commitments or accepted the risk that it might be unlawful. Likewise, the (relative) absence of protest to these measures by other States may evidence *opinio juris* only in specific circumstances.[109]

Moreover, it is noteworthy that EU Member States hold divergent views on the permissibility of general interest countermeasures.[110] At one end of the spectrum, France has expressly rejected

[98] See art 3(2), UNGA Resolution 2625 (XXV), 24 October 1970 – Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States: '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.' For wider discussion, see Milanovic; Weiß and Furculita (n 9) 208-216.

[99] See Tzanakopoulos (n 10).

[100] For a synthesis of States' views in the Sixth Committee, see James Crawford, Fourth Report on State Responsibility, ILC Yearbook 2001, vol II(1), 17–18.

[101] ASR art 54 Commentary, para 3.

[102] Jackson and Paddeu (n 18).

[103] See Alexandra Hofer, 'Third-Party Countermeasures: Making Custom Out of Ambiguous Practice?' (2025) 74 International and Comparative Law Quarterly 287.

[104] See Pierre Bodeau-Livinec, 'Circumstances Precluding Wrongfulness' in Serena Forlati, Makane Mbengue and Brian McGarry (eds), *The Gabčíkovo-Nagymaros Judgment and Its Contribution to the Development of International Law* (Brill 2020) 138; Ruys and Silvestre (n 9) 162.

[105] Christian Tams, *Enforcing Obligations* Erga Omnes *in International Law* (CUP 2009) 238–239.

[106] Dawidowicz (n 16) 252–254.

[107] ILC, Draft conclusions on identification of customary international law, with commentaries, YILC 2018, vol II(2), Commentary to Conclusion 3, para. 7.

[108] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America) (1986) ICJ Rep 14, 127*, para 266.

[109] ILC, Draft Conclusions (n 107) Conclusion 6 and commentary thereto, para 3.

[110] See Ruys and Silvestre (n 9) 667–668.

the permissibility of these measures.[111] At the other end, Estonia,[112] Ireland,[113] Italy,[114] and Poland,[115] have expressly endorsed the customary status of this entitlement. For Denmark[116] and the Netherlands,[117] instead, the legal permissibility of these measures remains open. It would be curious for the ACI to be founded on this basis, given the lack of consensus among its Member States on a fundamental issue of international responsibility. Moreover, for this reason of preceding (and longstanding) disagreement, as well as the absence of any explicit statements to that effect in the context of the ACI, it does not seem right to read the adoption of this instrument—adopted by the Council 'as a point without discussion'[118]—as indicative of support of all Member States for the permissibility of general interest countermeasures.[119]

Nonetheless, subject to these caveats and contingent on how the ACI is applied in practice, it is not implausible to suggest that the first and third conditions could be met. A real issue, however, arises with respect to the second condition: the character of the prohibition on intervention as an *erga omnes* rule. In this respect, there is no persuasive evidence in contemporary international law that the prohibition of intervention generates obligations owed *erga omnes*. In a recent comprehensive study, Roscini concludes that '[t]he *erga omnes* character of the principle of non-intervention, therefore, appears to be presently limited to the pillar that prohibits the most serious form of intervention: that involving the use of armed force.'[120] He argues that '[o]nly the narrower prohibition of armed intervention, however, is an obligation *erga omnes*, and only those armed interventions qualifying as acts of aggression constitute *jus cogens* violations.'[121] By implication, economic coercion, to the extent that it violates the obligation of non-intervention, would not amount to the breach of an *erga omnes* obligation.

In light of this, we do not think that the doctrine of countermeasures in the general interest provides a convincing legal basis for a Member State's Trade or Investment Measures inconsistent with obligations owed to the Third State.

Proxy countermeasures

The second possible basis is that other Member States, including Member State B, may take a countermeasure at the request and on behalf of the injured Member State. In this case, the requested State would benefit from the countermeasures defence of the injured State in order to justify the breach of its own obligations towards the responsible Third State. This is a scenario we

[111] French Ministry of Defence, *National Position of France (2019)*, Cyberlaw (September 2019) <https://cyberlaw.ccdcoe.org/wiki/National_position_of_France_(2019)> accessed 17 October 2025: 'Under international law, such counter-measures must be taken by France in its capacity as victim. Collective counter-measures are not authorised, which rules out the possibility of France taking such measures in response to an infringement of another State's rights.'

[112] *National Position of Estonia (2019)*, Cyberlaw, May 2019 <https://cyberlaw.ccdcoe.org/wiki/National_position_of_Estonia_(2019)> accessed 17 October 2025; *National Position of Estonia (2021)* Cyberlaw, (August 2021) <https://cyberlaw.ccdcoe.org/wiki/National_position_of_Estonia_(2021) > accessed 17 October 2025.

[113] Irish Department of Foreign Affairs, *National Position of Ireland (2023)*, Cyberlaw (July 2023), para 26 <https://cyberlaw.ccdcoe.org/wiki/National_position_of_Ireland_(2023)> accessed 17 October 2025.

[114] International Law Commission, Peremptory Norms of General International Law (*jus cogens*): Comments and Observations received from Governments, A/CN.4/748 (2022), 86 (Italy).

[115] Ministry of Foreign Affairs of Poland, *National Position of the Republic of Poland* (2022), para II(9) <https://cyberlaw.ccdcoe.org/wiki/Countermeasures#Poland_(2022)> accessed 17 October 2025.

[116] Danish Government, *National Position of Denmark* (4 July 2023) 8–9 <https://cyberlaw.ccdcoe.org/wiki/Countermeasures#Denmark_(2023)> accessed 17 October 2025.

[117] International Law Commission, Peremptory Norms of General International Law (*jus cogens*): Comments and Observations received from Governments, A/CN.4/748 (2022) 87–88.

[118] Council of the European Union, Press Release: Trade: Council adopts a regulation to protect the EU from third-country economic coercion (23 October 2023) <https://www.consilium.europa.eu/en/press/press-releases/2023/10/23/trade-council-adopts-a-regulation-to-protect-the-eu-from-third-country-economic-coercion/> accessed 17 October 2025.

[119] Suggesting caution in this respect, see ILC, Draft Conclusions (n 107), Commentary to Conclusion 12, para 6.

[120] Roscini (n 11) 124. For discussion, the ICJ's recent approach to *erga omnes* obligations, see Federica Paddeu and Miles Jackson, 'State Responsibility in the ICJ's Advisory Opinion on Climate Change' (*EJIL:Talk!*, 25 July 2025) <https://www.ejiltalk.org/state-responsibility-in-the-icjs-advisory-opinion-on-climate-change/> accessed 17 October 2025.

[121] Roscini (n 11) 143. See also Ruys and Silvestre (n 9) 163.

have elsewhere labelled 'proxy countermeasures',[122] insofar as the requested party would be acting as proxy for the injured Member State in the taking of a countermeasure. On this model, even if the measures are coordinated through the EU under the ACI, the legal entitlement for Member State B arises on the basis that it is acting on behalf of the injured State.

At the outset, it is worth clarifying that the situation envisaged here is different from that of countermeasures in the general interest. In the case of countermeasures in the general interest, each State has an entitlement to take countermeasures against the responsible State. This entitlement arises from the fact that the prior breach by the responsible State concerns an obligation *erga omnes* in respect of which all States have a legal interest. Accordingly, when a State which is not injured by the breach, in the sense of ARS Article 42, takes a countermeasure against the responsible State, it does so on the basis of its own entitlement recognized by the international legal order. In the 'proxy' scenario, by contrast, the State taking the countermeasure does not have its own legal entitlement to take the countermeasure. The prior breach by the responsible State affects an obligation which is owed bilaterally only as between the injured State and the responsible State—in our example, only between Member State A and the Third State. In these circumstances, only Member State A would be entitled to take a countermeasure against the Third State,[123] and Member State B would have no legal entitlement of its own to take a countermeasure against the responsible State.

The idea that an injured State may request another State to take a countermeasure on its behalf against the responsible State, where the prior breach affects an obligation that is owed bilaterally between the injured and responsible State, is a relatively novel one. While the idea has arisen primarily in connection with the application of international law in cyberspace in the last few years, it could apply in international law more generally. However, international law does not currently permit this possibility. Aside from certain legal positions of States on the application of international law to cyberspace,[124] the idea of proxy countermeasures is not supported by practice or by the work of the ILC. It also cannot be sustained by analogy to notions of collective self-defence or cooperation with private entities in the taking of countermeasures, or by other legal doctrines presently recognized in international law.[125] In light of this, a Member State of the EU would have no legal basis for taking a measure inconsistent with its obligations towards a Third State as a proxy for the State injured by the unlawful coercion of that Third State. In our hypothetical scenario, Member State B's implementation of the countermeasure adopted under the ACI would thus be impermissible.

A functional justification

In our view, then, neither of the first two options—countermeasures in the general interest and proxy countermeasures—provides a justification for Member State B's conduct. A third option for the permissibility of the conduct of Member State B under the ACI relies on the functional justification offered by Nolte in his discussion of draft Article 57(2) proposed by Special Rapporteur Gaja during the ILC's work on the ARIO. In challenging this provision's limitation to regional economic integration organizations (REIOs), Nolte had queried whether:

[122] Jackson and Paddeu (n 18) 259–268; Miles Jackson and Federica Paddeu, 'Proxy Countermeasures in International Law' (*EJIL:Talk!*, 5 July 2024) <https://www.ejiltalk.org/proxy-countermeasures-in-international-law/> accessed 17 October 2025.

[123] Similarly, Ehlermann (n 89) 104.

[124] See eg, Ministry of Foreign Affairs of Costa Rica, 'National Position of Costa Rica (2023)' (*Cyberlaw* July 2023) para 15 <https://cyberlaw.ccdcoe.org/wiki/National_position_of_Costa_Rica_(2023)> accessed 17 October 2025: 'countermeasures may be taken by the injured State, ie, the State specifically affected by the breach, as well as third States in response to violations of obligations of an *erga omnes* nature or upon request by the injured State'.

[125] Jackson and Paddeu (n 18). See also, Jackson and Paddeu (n 122).

> those member States had thereby deprived themselves of the right to take unilateral measures, then why should the fact that they had delegated their power to a technical organization result in neither the member States nor the organization being able to take countermeasures in the area of transport?[126]

Nolte's query may be drawn out further to provide a functional justification for the ACI. As we have noted already, it would be unreasonable to assume that Member States of the EU have waived their right to take countermeasures in areas of its exclusive competence, and given the practical realities of the EU legal order, measures in these areas adopted by the EU must be implemented across the internal market. A functional imperative demands that it be permissible to implement such countermeasures in line with the legal processes and rules of the EU, including its divisions of competence. While this may entail an expansion of the entitlement to implement the countermeasure to all Member States, it might be argued that the requirement of proportionality can stand in to mitigate this expansion. In this respect, in the related context of countermeasures by an IO, Special Rapporteur Gaja drew attention to the demands of proportionality, noting that this requirement would be of 'particular significance when countermeasures are taken by an international organization, given the potential involvement of all its members'.[127] Similarly, writing in 1984, Ehlermann had argued that proportionality merits 'particular attention' in these instances, concluding that:

> It is thus by the rigorous respect for the principle of proportionality that I propose to make up for the partial and relative character of the title held by the international organisation [to take countermeasures], and not by the absolute denial of that title.[128]

Moreover, the ACI itself also emphasizes the requirement of proportionality, both in the preamble and in Article 11(1).[129]

In our view, however, these arguments are not entirely convincing, and cannot make up for the absence of legal entitlement of Member State B and others in an equivalent legal position. Taking proportionality first, the argument is question-begging. Proportionality is a limit on the exercise of an existing entitlement to take countermeasures[130]; it cannot, itself, create that entitlement where it does not already exist. Moreover, to accept this view would be akin to accepting that any State may take a countermeasure against another State, whether or not the former was injured by a wrongful act of the latter, so long as the measure was proportionate, either alone or when assessed in combination with any measure taken by the injured State. Such a conclusion is not consistent with international law.

Secondly, the functional argument, namely that the transfer of exclusive competence to the EU would leave the Member State unable to take countermeasures, is a consequence of the way in which the EU Member States have decided to allocate and divide competences within the Organization. But it is not clear that these decisions, which are internal to the organization and its Member States, should be opposable to, or affect the rights of, Third States.[131] Why should a Third State have to accept the non-performance of obligations owed to it by a State against which it has committed no wrongful act? In sum, a functional justification of this kind cannot overcome the lack of legal basis for the conduct of non-injured Member State B. This is the case even if a

[126] YILC 2008, vol 1 (n 88) 36, para 34 (Nolte); see also YILC 2008, vol 1, 40, para 8 (Pellet) and 41, para 10 (Pellet).
[127] YILC 2008, vol 1 (n 88) para 54.
[128] Ehlermann (n 89) 108 (authors' translation).
[129] Preamble, paras 11, 13, 25; art 11(1). As the ACI itself notes, proportionality is in any event required for the taking of lawful countermeasures under international law—see art 51 ASR.
[130] art 51 ASR.
[131] cf Klein (n 27) 400–401.

proportionality would prevent those countermeasures from having 'an excessively destructive impact'.[132]

The special characteristics of the EU

One final option to justify the measures relies on the special characteristics of the EU as an international organization. The EU's claim to special status comes in (at least) two forms.[133] The first is that, as a result of its constitutional structure, the EU is itself a special kind of international organization. Indeed, it is one that exercises forms of governmental authority alongside its Member States in relation to the same territory and polity. The second is that the EU belongs to, indeed spearheaded the development of, a category of international organization: a regional economic integration organization.[134]

Two arguments might flow from this special status that are relevant for our purposes. First, it might be argued that, as a result of this special status, special rules of international law are applicable in the dealings between the EU and Third States.[135] On this view, Third States must accept the distribution of competence among EU Member States, including in the area of State responsibility (and the law of countermeasures). In this respect, Paasivirta has argued that 'if the treaty partners of the EU accept such a division of competence at the time of the EU's adherence to a treaty, they should respect it as regards the implementation of the treaty, including issues of international responsibility.'[136] Paasivirta, echoing Ehlermann writing three decades prior,[137] underpins this claim with the principle of good faith,[138] and premises the argument on the principle that Third State interests must be adequately protected.[139] On this basis, Third States might be taken to have accepted the competence of the EU to adopt countermeasures against them, and of Member State B to implement them.

Secondly, it might be argued that as a result of the EU's constitutional structure and its internal market, the coercion of Member State A necessarily affects the interests of all Member States.[140] As noted previously, the Preamble to the ACI asserts: 'The economic coercion of a Member State by a third country affects the Union's internal market and the Union as a whole.'[141] To this might be added the necessity of defending individual Member States from coercion by powerful Third States, and the constitutional difficulties created by the internal EU law of doing so effectively.[142] It might also be noted that the ACI constitutes clear and effective signalling in advance as to the EU's proposed approach, and builds in careful procedural requirements and substantive limits.

It is easy to see the appeal of these arguments, attuned as they are to the factual reality of the EU's legal order and the functional difficulties that order creates for Member States wishing to take countermeasures in the areas of trade and investment, on the one hand, and the real threat of economic coercion by powerful Third States, on the other. The difficulty, however, remains one of legal basis. First, the claim upon which both of these arguments rest, the special character of the EU as an international organization, has yet to be accepted as a matter of international law. As argued by Bordin:

[132] Comment of Belgium, Official Records of the General Assembly, Sixty-second Session, Sixth Committee, 21st meeting (A/C.6/62/SR.21), para 92 cited in Gaja 6th Report, para 54.
[133] See eg, Talmon (n 41); Palchetti (n 19); Bordin (n 53); Paasivirta (n 78).
[134] Bordin (n 53).
[135] Palchetti (n 19) 1416.
[136] Paasivirta (n 78) 464.
[137] Ehlermann (n 89) 107.
[138] Paasivirta (n 78) 464.
[139] ibid 464.
[140] See similarly Klein (n 27) 400–401.
[141] Preamble para 10.
[142] Preamble para 10.

> the *sui generis* status of the EU cannot be substantiated by the possession of unique institutional features alone. Validation for it must come from outside the EU: from the normative attitude of third parties or from systemic considerations stemming from public international law itself.[143]

Stressing a similar point, Palchetti has also argued that 'the attitude of third subjects towards the recognition of the EU's special features constitutes the central element for assessing the existence of a special regime at the international level' applicable to the relations between the EU and third parties.[144] At present, even though there is some distinctive treatment of the EU relatively to other IOs, there is little evidence that States have accepted or treat the EU as a *sui generis* entity under international law in the context of the law of international responsibility.[145]

Secondly, Paasivirta's argument—that good faith requires the EU's treaty partners to accept its division of competences, including in the implementation of the treaty[146]—is not apposite to the ACI. On one hand, it can do no work in the investment scenario we described above. To recall, the investment scenario entailed a (*prima facie*) violation of a BIT sought to be justified as a countermeasure. In this context, the premise of Paasivirta's argument—that there was acceptance of a certain division of competence at the time of adherence—does not apply. The EU simply is not a party to the relevant treaty. No argument based on good faith bites here. On the other hand, as to the trade scenario, a different problem arises. The ACI is simply not conceived of as a means for the implementation of the treaty concerned—here, the WTO Agreement. Rather, it is concerned with responding to wrongful economic coercion, most likely characterized as a breach of the prohibition on intervention. Of course, it may be the case that the coercive measures taken by the Third State also constitute a parallel infringement of WTO obligations. But that is a separate point. The ACI is not a measure taken 'as regards the implementation of' the WTO treaty, in Paasivirta's terms.[147] It is taken in response to a distinct breach of international law by the Third State, and seeks to induce the Third State to cease its wrongful actions constituting that breach. It is not clear how the principle of good faith could apply here.

Thirdly, the same fundamental problem arises in relation to the wider argument concerning the potential recognition of REIOs as a distinct category of international organization. At present, international law does not distinguish between types of international organizations, at least for the purposes of the rules on international responsibility.[148] The matter was raised—at the prompting of the EU—during the drafting of the ARIO, including in the context of the proposed draft Article 57 already discussed. But as noted, in the light of disagreements, the ILC opted against distinguishing among different international organizations. In this context, ILC member Vasciannie noted in 2007 that 'there was next to no practice in the area of responsibility, suggesting that there should be one set of rules for one class of organizations and a different set for others.'[149] The same is true today.

Finally, the problem of legal basis cannot be avoided by reframing the argument to emphasize that the EU's economic integration will, in many cases, mean that, as a matter of fact, coercion of a single Member State will impact the Union. The Preamble of the ACI does gesture in this

[143] Bordin (n 53) 51.
[144] Palchetti (n 19) 1416.
[145] Bordin (n 53) 51. See further Palchetti (n 19) 1416–1420 on the prospects and limits of such recognition.
[146] Paasivirta (n 78) 464.
[147] See also Ehlermann (n 89) 107, noting that the acceptance by the Third State of reprisals is 'the logical consequence of the conclusion of an agreement with the organisation.'
[148] See eg, Bordin (n 53) 61–63; Niels Blokker, 'Preparing Articles on Responsibility of International Organizations: Does the International Law Commission Take International Organizations Seriously? A Mid-Term Review' in Jan Klabbers and Åsa Wallendahl (eds), *Research Handbook on the Law of International Organizations* (Edward Elgar 2011) 335. See also Joe Verhoeven, 'Communautés Européennes et Sanctions Internationales' (1984-1985) 18 *Revue belge de droit international* 79, 94.
[149] YILC 2007, vol I, 137, para 4.

direction by asserting that '[t]he economic coercion of a Member State by a third country affects the Union's internal market and the Union as a whole.'[150] Though that may be true, factual effects, even of some significance, do not equate to legal injury: violation of a Member State's right of non-intervention by means of economic coercion does not entail a violation of other Member States' right of non-intervention, or the EU's equivalent right if and to the extent that it is applicable, even where they are affected by the breach.[151] After all, a breach of international law occurs only where the act of a State 'is inconsistent with' one of its obligations.[152] Harmful consequences alone do not amount to a breach of international law in the absence of such an obligation.

CONCLUSION

Nothing in the two years since the adoption of the ACI can have assuaged the Commission's fears of 'rising geopolitical tensions, weakened international cooperation and increasingly weaponized trade and investment.'[153] The EU and its Member States have been on the receiving end of explicit threats to their territorial sovereignty,[154] promises of retaliation in response to possible taxes on digital services,[155] and a wealth of threatened and actual tariffs. Moreover, the adoption of the ACI indicates dissatisfaction with the existing bilateral and institutional frameworks for responding to wrongdoing, particularly by powerful States.[156] It indicates a desire of the EU to act collectively, including in the vindication of the rights of its individual member States.

For an organization whose self-understanding centres on legality, however, the challenge is to respond in a manner consistent with law, both internal and international.[157] In our view, the ACI anticipates conduct that, in certain cases, will lack a legal basis in international law. Neither functional necessity nor strict adherence to proportionality can make up for this legal basis. The same is true for the instrument's careful procedural conditions and transparent articulation of applicable standards. In the final analysis, international law does not provide the justification that the Member States will need for certain conduct undertaken when implementing a countermeasure under the ACI.

This is not to say that the law cannot change—international law is a flexible system that will be shaped by practice as it shifts in the light of changing policy demands. In this respect, one question is whether there is an optimal way for the law to develop in the light of its existing principles and structures. In our view, there is—it lies in the first option discussed above. International law already has a coherent mechanism for the multilateralization of permissible responses to wrongdoing: the recognition that certain obligations are owed *erga omnes* or *erga omnes partes*. If the EU—and its Member States—wish to expand the range of situations which justify a multilateral response, they should press the argument that certain forms of economic coercion violate the prohibition on intervention and that the prohibition of intervention entails an obligation owed *erga omnes*. This would also be consistent with longstanding demands from many States in

[150] ACI Preamble, para 10.
[151] See further Verhoeven (148) 87–89.
[152] art 12 ASR.
[153] European Commission, 'Questions and Answers: Commission proposal for an Anti-Coercion Instrument' 8 December 2021.
[154] See James Politi and Richard Milne, 'Donald Trump Says US Must Gain Control of Greenland' *Financial Times* (London, 28 March 2025) <https://www.ft.com/content/d6954f86-9e82-4505-b1c3-151aa8c6057f> accessed 20 October 2025.
[155] See Aime Williams, 'Donald Trump Threatens Retaliation Over Taxes that 'discriminate' Against US Tech' *Financial Times* (London, 26 August 2025) <https://www.ft.com/content/ff8d27d5-f95a-4554-ae5f-1ce6bad68826> accessed 20 October 2025; Barbara Moens, Andy Bounds and Laura Dubois, 'EU Stands Its Ground on Digital Rules Despite Trump Warning' *Financial Times* (London, 26 August 2025) <https://www.ft.com/content/0915db7b-6c7c-44c5-8be4-ff1f8a7d9c71> accessed 20 October 2025.
[156] See Ferdi de Ville, Simon Happersberger and Harri Kalimo, 'The Unilateral Turn in EU Trade Policy? The Origins and Characteristics of the EU's New Trade Instruments' (2023) 28 European Foreign Affairs Review 15.
[157] See also Ruys and Silvestre (n 9) 668–669 on the EU's dilemmas.

the Global South that the legal order take more seriously forms of economic coercion.[158] On this basis, and assuming the permissibility of countermeasures in the general interest in response to violations of an *erga omnes* obligation, all Member States would be entitled to respond with a countermeasure.

This solution would cohere with the structure of international responsibility and build on existing practice. It relies on no special pleading for the EU or its Member States, no novel claim to legal basis, and no departure from the ordinary rules of responsibility and attribution. Of course, difficult issues would remain, including around defining exactly which forms and scale of economic coercion breach the principle of non-intervention. That aside, the ACI might entail a valuable mechanism for the institutionalization and multilateralization of response measures to the most serious forms of coercion of individual States. Indeed, one of the main challenges in taking countermeasures in the general interest is precisely that of coordinating compliance with the relevant substantive and procedural requirements, most importantly the requirement of proportionality.[159] An institutionalized response, channelled through the ACI, could go some way towards ensuring that the chosen measures remain within the bounds of permissibility under international law.

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[158] For discussion, see Aslı Bâli, 'Weapons Against the Weak: International Law and the Political Economy of Coercion' (2024) Yale Journal of International Law 1, and more widely Dire Tladi, 'The Duty Not to Intervene in Matters within Domestic Jurisdiction' in Jorge Viñuales (ed), *The UN Friendly Relations Declaration at 50: An Assessment of the Fundamental Principles of International Law* (CUP 2020) 87.

[159] For an adaptation of the requirements of countermeasures to countermeasures in the general interest, and its challenges, see Dawidowicz (n 16).

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