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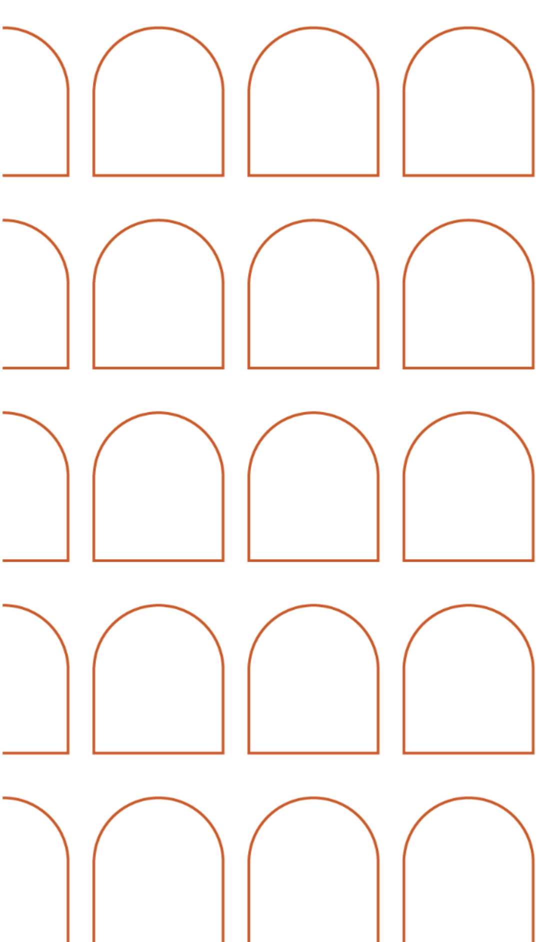

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The EU's Anti Coercion Instrument between EU Strategic Autonomy and Member State Sovereignty

Lukas Schaupp

European University Institute
Department of Law

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Abstract

The article reviews the dynamics that shaped the EU's novel Anti-Coercion Instrument in the context of the Union's aspirations for greater strategic autonomy. During the negotiations of the instrument, intended to deter and counteract economic coercion by third countries, tensions arose over the question of the appropriate level of supranationalization of competence for an instrument situated at the crossroads of the Union's trade and foreign policy. This article sheds light on the compromise that conciliated the diverging positions of the European Parliament and the Commission on the one, and the Council and the Member States on the other side. To this end, it conducts a legal analysis of the most contested points during the legislative process. This includes the question of who gets to determine the existence of economic coercion as well as the range of potential countermeasures. It finds that although it was undisputedly based on the Common Commercial Policy of the EU, the Member States, aware of the significant proximity to foreign policy issues, negotiated significant intergovernmental involvement into the instrument. The article puts forth the argument that this was not the result of legal necessity, but of deliberate political choice. The Regulation displays an inherent tension between EU strategic autonomy and Member State sovereignty, as the analysis of the legal, institutional, and political dimension of the different negotiation positions regarding the new regulation show. The conclusion emphasizes the necessity for a political compromise, in which the degree to which the EU should assume an enhanced geopolitical role is settled. Such a compromise could prevent future legal instruments from being shaped primarily by institutional balance considerations rather than their functionality in view to the Union's external environment.

Keywords

EU – Anti Coercion Instrument – Economic Coercion – Trade Policy – EU External Economic Relations Law – Geopoliticization – Common Commercial Policy – Supranationalization – Foreign Policy

Lukas Schaupp

Ph.D. researcher, European University Institute (EUI), lukas.schaupp@eui.eu. The author would like to thank the members of the EUI International Economic Law and Policy Working Group for their useful comments. The author further wishes to express gratitude to all those who agreed to discuss the Anti-Coercion Instrument during a research visit at the European Parliament Research Service in September 2023.

1. Introduction

The adoption of Regulation (EU) 2023/2675 on the protection of the Union and its Member States from economic coercion by third countries referred to as the Anti-Coercion Instrument (ACI) marks the latest addition to the EU's autonomous trade measures. It further reinforces the 'unilateral turn'[1] in the Union's trade and investment policy. The idea for such an instrument originated in the context of EU-US trade tensions under the Trump administration. Following the review of the EU Enforcement Regulation,[2] the European Commission, the Council and the Parliament collectively expressed their ambition to develop an instrument to deter and counteract coercive actions by third countries, in compliance with international and WTO law.[3] The primary concept of the ACI is to enable the EU to take response measures if it or one of its Member States falls victim to unlawful economic coercion by third countries. Consequently, this new legal instrument adopted under the broader umbrella of strategic autonomy goes further than the previously revised Enforcement Regulation, as it provides a framework for unilateral EU action to address coercive measures by third countries.[4] In theory, the ACI follows a simple logic of deterrence and where necessary, ultimately, punishment. Following an examination of third country measures, it is now possible to formally determine such acts as constituting economic coercion.[5] In such cases, the European Commission explores options with the third country concerned to settle the case in an amicable manner.[6] In cases where this does not succeed, the ACI lists a range of countermeasures, referred to as 'Union Response Measures' (URMs),[7] which the Union may adopt to retaliate and to encourage the cessation of the coercion.

Following the Commission's initial proposal for an ACI in December 2021,[8] it appeared as if the calls for the EU to adapt to the increasing geopoliticization of trade had been answered.[9] In fact, it was viewed as a tool that could 'potentially lead to a further pushing of the boundaries of the EU's exclusive Common Commercial Policy (CCP) competence to the detriment of the more intergovernmental Common Foreign and Security Policy (CFSP)',[10] *de facto* providing

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[1] T. Verellen & A. Hofer, *The Unilateral Turn in EU Trade and Investment Policy*, 28(SI), Eur. Foreign Aff. Rev. pp. 1-14 (2023), https://doi.org/10.54648/eerr2023011.

[2] Regulation (EU) 2021/167 of the European Parliament and of the Council of 10 February 2021 amending Regulation (EU) No 654/2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules, OJ L 49, 12.2.2021.

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

[4] A. Steinbach, *The EU's Turn to "Strategic Autonomy": Leeway for Policy Action and Points of Conflict*, Eur. J. Int. Law, (2023, advanced access chad048), https://doi.org/10.1093/ejil/chad048.

[5] 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, OJ L, 07.12.2023, Art. 5

[6] Ibid, Art. 6.

[7] Ibid, Annex I.

[8] Proposal for a Regulation of the European Union and of the Council on the protection of the Union and Its Member States from Coercion by Third Countries (Anti-Coercion Instrument), Doc. COM(2021) 775 final, 8 December 2021.

[9] S. Meunier & K. Nicolaïdis, *The Geopoliticization of European Trade and Investment Policy*, 57/S1, J. Common Mark. Stud. pp. 103-113, https://doi.org/10.1111/jcms.12932.

[10] T. Verellen & A. Hofer (n. 1), p. 9.

the supranational level with executive powers relating to foreign policy it previously lacked. This article contends that with the conclusion of negotiations and the forthcoming entry into force in December 2023, a more complex picture of the instrument emerges. Based on decisive changes made to the Commission's initial proposal, advocated for by the Council and the Member States, it suggests that the final compromise on the ACI incorporates strong elements of a foreign policy rationale, instead of bypassing CFSP decision-making.[11] Expanding upon the legal analysis that the changes made to the instrument are not mandated by the Union's legal framework, but a product of EU internal institutional and political quarrels, this article concludes with a normative argument. It claims that the Member States' sovereignty can no longer cut against strategic autonomy the way it currently does, if the EU intends to develop into a more strategic geopolitical player.

The article is structured as follows. The next section provides an overview of the shifting geopolitical landscape, arguing that the ACI allows for interesting insights to where Europe is moving in terms of increased strategic autonomy. Section three will unveil and discuss the legal dimension of the two key battlegrounds, where the Council and the Member States pushed for more intergovernmental involvement during the interinstitutional negotiations: first, the authority to trigger the instrument and, second, the determination of the EU's arsenal of Union response measures. Section four argues that a comprehensive understanding of the ACI's outcome requires an examination not solely of its legal dimension but also the critical influence of political and institutional factors, leading to the finding that a feared loss of Member State sovereignty motivated the watering down of the initial proposal. It will present the argument that the balance between Member State sovereignty and EU strategic autonomy necessitates clarification, a need highlighted by the dynamics observed during the negotiations of the instrument. Section five concludes on the future of the ACI, as well as on the broader implications for the relationship between Member State sovereignty and EU strategic autonomy.

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[11] For a recent discussion in the proximity of CFSP and Trade sanctions in the context of EU strategic autonomy, *see*: L. Lonardo & V. Szép, *The Use of Sanctions to Achieve EU Strategic Autonomy: Restrictive Measures, the Blocking Statute and the Anti-Coercion Instrument*, 28(4), Eur. Foreign Aff. Rev. pp. 363 – 378 (2023).

2. Setting the Scene: The ACI in a Shifting Geopolitical Landscape

This section briefly outlines some of the core developments that caused the ACI's emergence, describing the instrument as a strategic response to a changing geopolitical landscape. Historically, the EU has a long been an advocate for rules-based trade, incentivized mainly by economic growth and job creation within the Union. However, more recently, there has been a noticeable acceleration in the incorporation of non-trade objectives into the Union's trade policy, a trend that became particularly evident with the latest revision of the trade strategy.[12] Recent years witnessed the EU and its Member States becoming targets of deliberate economic coercion, [13] a term insufficiently defined under international law.[14] Originally conceived as a means to address concerns related to U.S. trade policies under the Trump administration, which promoted an 'America First' economic policy while attacking the rules-based trade dispute settlement by the WTO,[15] the ACI quickly evolved to counter the coercive actions of the People's Republic of China. China attempted to force a change in the policies of an EU Member State, Lithuania, after it had announced to improve its relations with Taiwan in 2021. In addition to downgrading bilateral relations and recalling its ambassador from Vilnius, China attempted to force a change of behavior by restricting trade with Lithuania. Companies in the Baltic state soon started to experience difficulties in their business relations to China, for example when filing customs paperwork and with shipments not being cleared by authorities.[16]

Despite the fact that the EU requested a WTO panel to challenge these measures by China,[17] this development underlined the need for a legal instrument complementing the traditional approach. The reasons for this are twofold. First, the timeline of legal recourse through the WTO is lengthy, as it is uncertain when and if the dispute settlement will produce any tangible results, making it an unsuitable deterrent. Second, the general inadequacy of the WTO, that deals primarily with the WTO-(in)consistency of measures, and not the infringement of international customary law through coercive acts. Although it appears likely that China's economic coercion against Lithuania was also in breach of WTO rules, economic coercion may take a much broader form than what was covered by the existing rules. What this means can be outlined by a recent example of a subtle but decisive move concerning the market access of the U.S. tech giant Apple in China. In what can be seen as a further escalation between the U.S. and China, the company's devices were banned for Chinese government officials, making

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[12] European Commission, *Communication on Trade Policy Review – An Open, Sustainable and Assertive Trade Policy*, COM(2021).

[13] J. Hackenbroich, *Defending Europe's Economic Sovereignty: New Ways to Resist Economic Coercion*, European Council on Foreign Relations (20 Oct. 2020), https://ecfr.eu/publication/defending_europe_economic_sovereignty_new_ways_to_resist_economic_coercion/ (accessed 17 October 2023).

[14] M. Milanovic, *Revisiting Coercion as an Element of Prohibited Intervention in International Law*, AJIL (Forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4504816.

[15] C. Bown, *Trump Ended WTO Dispute Settlement. Trade Remedies Are Needed to Fix It*, 21(3), World Trade Rev. pp. 312-329 (2022), https://doi.org/10.1017/S1474745622000039.

[16] A. Banka, *Super Atlanticist in the EU? Vilnius Between Washington and Brussels*, 28(2) Eur. Foreign Aff. Rev. pp. 165-184 (2023), https://doi.org/10.54648/eerr2023009.

[17] *EU Initiates WTO Dispute Complaint Regarding Chinese Restrictions on Trade With Lithuania,* WTO (31 Jan. 2022), https://www.wto.org/english/news_e/news22_e/ds610rfc_31jan22_e.htm.

the company the latest victims of geopolitical tensions.[18] Imagining a similar conflict involving EU businesses as a response to the strategic choices of the bloc, as seen in the Lithuania example, seems at least conceivable.

Another noticeable trend reflected in the ACI is the growing weaponization of economic interdependence. This trend was starkly illustrated by the weaponization of energy trade following Russia's invasion on Ukraine, as Russian controlled gas storages across Europe were suspiciously depleted in the lead-up to the war. In combination with the Kremlin's continuous threat to completely stop supplies to Europe in the first months of the war, this showed the potential of economic coercion in the energy sector and beyond.[19] While Russia has largely become isolated from most EU economies, and thus maintains a limited potential for economic coercion in the foreseeable future, the incident reinforced the enduring nature of the phenomenon. This highlights that economic coercion has now become a standard strategy for many of the EU's competitors. Recent export controls on certain raw materials by China hint towards the fact that Russia's exploitation of EU energy dependencies was likely not the last time that Europe's demand for commodities could turn out to be the bloc's Achilles heel.[20]

Following the above, it is argued, that the ACI is the clearest manifestation of a shift towards more strategic autonomy in the EU's trade policy to date. Strategic autonomy, recently defined in the context of EU external relations law as 'Striving for multilateral solutions, while being able to take lawful action alone to safeguard the Union's values, fundamental interests, security, independence and integrity',[21] arguably becomes nowhere as evident as in the ACI. Unlike other recently adopted autonomous trade measures by the EU, the instrument represents more than just a heightened level of assertiveness and ambition in international trade. This becomes clear when looking at two other autonomous legal instruments, recently adopted and with significant impact on the trade relations between the Union and third countries. Both the foreign subsidies regulation and the international procurement instrument aim to level the playing field vis-à-vis third countries,[22] resembling a traditional objective of the EU's trade policy. While the approach may have changed from bilateral or multilateral approaches to unilateral ones,[23] this intention to engage with trading partners on equal footing does not constitute a shift in the underlying policy objective. The case of the ACI is fundamentally different, as its underlying objective distinctly mirrors the evolving geopolitical landscape of recent years. The ACI is thus not a unilateral legal instrument designed to engage

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[18] *Smartphones/China: Homegrown Rivals Eye Apple's Market Share*, Financial Times (22 September 2023), https://www.ft.com/content/faf1e353-74be-4eb6-b4fc-43fa09f2a497.

[19] Although this was by no means the first time the Russian Federation used energy dependence as a foreign policy tool – *see e.g.:* R. Newnham, *Oil, Carrots and Sticks: Russia's Energy Resources as a Foreign Policy Tool*, 2(2) J. Eurasian Stud. 134–142 (2011).

[20] *China Imposes Export Curbs on Graphite*, Financial Times (20 October 2023), https://www.ft.com/content/8af8c05c-8e54-40e9-9051-5a0b2b036c32.

[21] See F. Hoffmeister, *Strategic autonomy in the European Union's external relations law*, 60(3) Common Mark. Law Rev., pp. 667 – 700 (2023), https://doi-org.eui.idm.oclc.org/10.54648/cola2023048.

[22] Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market OJ L 330, 23.12.2022 *and* Regulation (EU) 2022/1031 of the European Parliament and of the Council of 23 June 2022 on the International Procurement Instrument OJ L 173, 30.06.2022.

[23] S. Meunier, *The End of Naivety: Assertiveness and New Instruments in EU Trade and Investment Policy,* (European University Institute 2022).

with questions of international trade, but rather a trade instrument designed to engage with geopolitical tensions and disputes, increasingly fought through economic means. It is, at its core, a mechanism to address state-to-state economic coercion, and the question of EU sovereignty in contemporary geopolitics.[24] Consequently, the instrument's ability to effectively meet this ambition offers valuable insights in the EU's capacity to effectively be the lever through which the sovereign choices of the Member States – and the Union as a whole – may be protected.

3. Legal issues during the interinstitutional negotiations of the ACI

After the previous sections introduced the objectives and the background against which the ACI was developed, this section will dive into the details of the instrument's functionality. It will present the two primary areas of disagreement during the interinstitutional negotiations, with the Council on one side,[25] and the Parliament,[26] broadly aiming to preserve the functionality envisioned by the Commission on the other side.[27] It will unveil that while the push for more intergovernmental involvement in the determination of third country coercion was successful,[28] the range of URMs was largely unchanged throughout the legislative process.[29] This makes the ACI the most horizontally comprehensive trade instrument at the Union's disposal to date. The Commission's initial proposal, published in December 2021, adopted a two-step logic, which the instrument still employs. Given that economic coercion lacks a precise definition in international law, the first step was to establish whether an action by a third country constituted economic coercion.[30] This was also the most contested part of the instrument during the interinstitutional negotiations,[31] because it defines the scope within which the instrument may be applied. After this initial designation, the second step foreseen by the ACI regulation is the adoption of Union response measures,[32] for cases in which a third country does not cease the economic coercion upon the EU's request.[33] In contrast to the first step, questions did not arise regarding the process of selecting the URMs.[34] Instead, the focus was on examining the spectrum of countermeasures that could conceivably come under the applicable scope of

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[24] The ACI's mission is to deter economic coercion by enabling the EU to respond to third countries' attempts to exert economic leverage, coercing a member state or the entire bloc into altering their *sovereign* policy choices. *See* Regulation (EU) 2023/2675 (n. 5), Preamble recital 7.

[25] Council of the European Union, *Mandate for negotiations with the European Parliament on the Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union and its Member States from economic coercion by third countries*, Interinstitutional File 2021/0406 (COD).

[26] European Parliament, *Report on the proposal for a regulation of the European Parliament and of the Council on the protection of the Union and its Member States from economic coercion by third countries*, A9-0246/2022.

[27] European Commission, *Proposal for a Regulation of the European Parliament and of the Council on the Protection of the Union and Its Member States from Economic Coercion by Third Countries*, COM (2021) 775 final (2021).

[28] Regulation (EU) 2023/2675 (n. 5), Art. 5.

[29] Compare European Commission (n. 27) Annex I and ACI Regulation (n. 5) Annex I.

[30] Regulation (EU) 2023/2675 (n. 5), Arts. 2, 4 and 5.

[31] Council of the European Union (n. 25), Arts. 3 and 4.

[32] Regulation (EU) 2023/2675 (n. 5), Art. 8.

[33] Ibid, Art. 6.

[34] This decision is taken by a Commission implementing act, which was undisputed throughout the negotiation process. *See* ACI Regulation (n. 5) Art. 8(1) *and* Council of the European Union (n. 25) Art. 7(1).

Union's CCP under Article 207 TFEU. The purpose of unpacking these two areas of contestation is to provide the foundation of the article's main argument of Member State sovereignty cutting against the EU's ambition for greater strategic autonomy, which will be developed in the subsequent chapters.

3.1. Determining Third-country Economic Coercion

The most significant change to the ACI during the negotiations occurred in the question of who gets to determine whether a third country's action constitutes a measure of economic coercion. The question did not revolve so much around defining narrow boundaries, as there was consensus that only a broad conception of economic coercion could encompass all potential coercive measures.[35] It provides the EU with significant leeway to consider different factors, such as the nature of the coercion, its impact on trade or investment, whether the third country is engaged in a pattern of interference and the extent to which it encroaches upon EU or Member State sovereignty.[36] Simultaneously, it is precisely this discretion that would have equipped the Commission with significant executive powers, as the initial proposal envisioned this determination being made through a Commission decision.[37] In contrast, the Member States and the Council scored a victory during the negotiations,[38] as the ACI regulation requires a Council implementing act, based on a proposal by the Commission that formulates how the conditions for economic coercion are fulfilled.[39]

For the practice of the ACI, this means that the Council decides on the use of the instrument, acting by a qualified majority vote (QMV). This requires a majority of a minimum of 55% of Council members (at least fifteen) representing Member States comprising at least 65% of the Union's population is needed to determine economic coercion by a third country.[40] The Council may further amend the implementing act proposals prior to deciding on them, consolidating executive authority within the intergovernmental framework,[41] despite the instrument being based on the CCP, an exclusive competence of the EU. Although such exclusivity does not inherently contradict the participation of the Council, which is part of the Union's institutional setup, exclusive competences are the domain where supranational decision-making seems most logical. Nevertheless, the Council contended that the new instrument might yield consequences of such gravity for the external relations with a third country that Member States should be engaged at every phase of the process.[42]

From a legal perspective, implementing acts taken by the Council are possible, although the exception. According to Article 291(2) TFEU '[…] acts shall confer implementing powers on

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[35] Regulation (EU) 2023/2675 (n. 5), Art. 2.

[36] Ibid, Art. 2(2).

[37] European Commission (n. 27), Art. 4.

[38] The Council's negotiation mandate included Council implementing acts as mode of decision making in this first step. *See* Council of the European Union (n. 25) Art. 4(1).

[39] Regulation (EU) 2023/2675 (n. 5), Art. 5.

[40] Art. 16(4) and (5) TEU.

[41] Regulation (EU) 2023/2675 (n. 5), Art. 5(5).

[42] Ibid, Preamble recital 18.

the *Commission*, or, in *duly justified specific cases* and in the *cases provided for in Articles 24 and 26* of the Treaty on European Union, on the *Council*' (emphasis added). This means, that in addition to the CFSP (Articles 24 and 26 TEU), implementing powers for the Council need to be duly justified, as the norm in all other areas, including the CCP, would be that the Commission takes the implementing act.[43] Implementing acts by the Council are, outside of the CCP, not a new development. So far, they have predominantly been used in areas where legal acts are in the overriding financial and budgetary interest of the Member States,[44] and do not require more than a detailed statement of reasons why implementing powers are to be conferred to the Council.[45] The *Fenix International* judgment recently confirmed this, as the Court deemed it appropriate to delegate implementing powers to the Council in consideration of their potential budgetary impact on the Member States.[46] Although the ACI explicitly does not intend to set a precedent,[47] it is the first time the Council enjoys implementing powers under the CCP.

Consequently, both the initial and final decision-making mechanisms in the ACI are legally viable options. In terms of institutional competence, it raises the question of how the Commission's power of external representation and the Council's CFSP policy-making power relate to each other in the case of the ACI. While the Commission is, according to Article 17(1) TEU, responsible to promote the general interests of the Union, and its external representation (with the exemption of the CFSP), Article 16(6) TEU provides that it is the Foreign Affairs Council which defines the external strategic priorities. Article 26(2) TEU further states that the Council frames and implements the decisions in the area of the CFSP. The Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security policy, must further cooperate and ensure consistency between the different areas of the Union's external action, including both the CCP and the CFSP,[48] although there is no set framework for translating this into practical implementation. Put simply, the result of having economic coercion determined by the Council, rather than the Commission, is the result of a political compromise, as there was no predetermined legal path to approach the issue. This makes the decision-making process of the instrument the product of a deliberate choice by the co-legislators, the European Parliament and the Council, including the Member States.

This absence of a predefined framework made the Council's involvement, considering the ACI's impact on Union's relations with third countries and institutional factors, a matter of institutional balance. It appears clear that the Member States perceived the initial Commission

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[43] Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers 2011 [OJ L 55]. Art. 2 (2).

[44] Examples include the Recovery and Resilience Facility (Regulation (EU) 2021/241) as well as the Rule of Law Mechanism (Regulation (EU) 2020/2092), where the Council adopts the implementing act "in view of the financial effects of the measures" (recital 20). The Court did not challenge this reasoning reviewing the latter *see*: Cases C-156/21 and C-157/21.

[45] Case C-440/14 P - *National Iranian Oil Company v Council* ECLI:EU:C:2016:128. Paras. 49 and 50.

[46] Case C-695/20 *Fenix International* ECLI:EU:C:2023:127. Para. 39.

[47] Regulation (EU) 2023/2675 (n. 5), Preamble recital 18.

[48] Article 21(3) TEU and 26(2) TEU.

proposal as institutionally unbalanced.[49] The proposal would have positioned the Council on par with the European Parliament,[50] meaning that information would be received only after decisions were made and participating solely in the selection of an appropriate URM through the comitology procedure.[51] It is, however, important to point out that various models for increasing Council involvement would have been feasible. These ranged from mandatory consultations between the Commission and the Council at an earlier stage,[52] to the current outcome of granting full implementing powers to the Council, representing the most comprehensive approach.

In conclusion, the result can be explained by the proximity of the ACI to CFSP issues, which likely led the Council and the Member States to throw their weight in the negations behind demands for direct involvement. In practice, it extends the scope of the Council taking implementing acts to the area of trade and investment for the first time. These choices were driven by institutional considerations rather than legal obligations, as demonstrated by this analysis, and should be seen as a political compromise rather than the Commission's endorsement of the most effective regulatory design. While it may appear arbitrary, a similar pattern can be observed in other areas of EU law, such as agreements between the Parliament and the Council regarding the use of delegated or implementing acts, where political considerations frequently outweigh clear normative criteria.[53] It appears that such agreements are at times necessary to secure Council approval when a compromise is otherwise unachievable, as was the case for the ACI. However, focusing so strongly on the EU's internal institutional balance during the negotiations for an instrument that aims to preserve sovereignty in an external context raises questions, which will be discussed in section four, after introducing the range of the Union's potential response measures.

3.2. Union Response Measures

This subsection will explore the extent of potential Union response measures outlined by the ACI, delving into the second area of contention where the debate centered on whether the supranational level should indeed be endowed with such extensive powers. In contrast to the determination of economic coercion, the final compromise retained most of the initially foreseen URMs.[54] This seems to have been the rationale of the political compromise: Creating an instrument that is highly comprehensive in theory yet making its practical application subject to intensive scrutiny by the Member States. The fact that measures falling under the CCP

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[49] Council of the European Union (n. 25) Art. 4.

[50] European Commission (n. 27), Art. 4.

[51] The Comitology practice involves Member States' involvement in decision-making through a committee structure where they can provide input and vote on the adoption of implementing acts proposed by the European Commission using QMV. *See* Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers 2011 [OJ L 55].

[52] The post-Brexit agreement between the EU and the UK followed a similar logic, providing that the Commission must 'fully inform' the Council and must take 'utmost account of the views expressed' before taking any measures that would alter the relationship to the UK. *See* Council Decision (EU) 2021/689 of 29 April 2021.

[53] B. Smulders & K. Eisele, *Reflections on the Institutional Balance, the Community Method and the Interplay between Jurisdictions after Lisbon*, 31(1), Yearbook of European Law, pp. 112-127 (2012).

[54] Compare European Commission (n. 27) Annex I *and* ACI Regulation (n. 5) Annex I.

cannot legally be enacted autonomously at the national level, raises the question why the Member States initially contested some of the URMs.[55] This section will consequently introduce the spectrum of countermeasures, exploring their scope and legality, aiming to discern whether the contention arose from political or legal considerations. As a disclaimer, it is crucial to note that this article does not delve into the legality of the instrument itself under international economic law.[56] The reasons for this are twofold. In view to the dysfunctional current state of the WTO, briefly outlined above, it appears unlikely that an appellate body award would become a practical barrier to the ACI's use any time soon.[57] Although compliance of the instrument with Article 23 of the WTO's Dispute Settlement Understanding is certainly not guaranteed, this is consequently unlikely to create an obstacle.[58] Moreover, the legality of the instrument appears to depend to a significant extent on its use, meaning that an arbitrary application of the ACI is likely to breach the EU's international obligations. However, this does not necessarily provide conclusive insights into the inherent legality of the instrument itself.

The adoption of response measure pursuant to Article 8 of the Regulation are the 'stick' through which the instrument intends to develop the aspired deterrent effect.[59] They are listed in Annex I of the ACI Regulation and depicted in the table below. Where the URMs relate to areas covered by international agreements or other concessions, the Union's response may also include the non-performance of these applicable international obligations.[60] This means that two categories of measures exist: those that consist of the non-performance of an international obligation, and those that are self-standing measures.[61] Taken together, these measures underline the unilateral nature of the instrument. They constitute an integrated approach for responding to third country economic coercion by creating a one-stop-shop for a range of sanctions from which the Commission can design a response to interference with the sovereign decisions of the EU and its Member States.[62]

[55] Council of the European Union (n. 25) Annex I.

[56] For this discussion see e.g., C. Wu, *The EU's Proposed Anti-coercion Instrument: Legality and Effectiveness*, 57, J. World Trade. pp. 297-316 (2023).

[57] In the event of a legal challenge to the ACI, the Court of Justice of the EU seems to be the more probable venue for such challenges. The Court clarified under which conditions third countries have standing to legally challenge restrictive measures by the EU. A similar recourse could arise for third countries targeted by the ACI. *See:* Case C-872/19 P - *Venezuela v Council (Affectation d'un État tiers)* ECLI:EU:C:2021:507.

[58] Annex 2 of the WTO Agreement, the *Understanding on rules and procedures governing the settlement of disputes*, states that 'When Members seek the redress of a violation […] under the covered agreements […] they shall have recourse to, and abide by, the rules and procedures of this Understanding', *prima facie* ruling out responses outside of the WTO for issues covered by the agreement.

[59] Regulation (EU) 2023/2675 (n. 5), Art. 1(2).

[60] Ibid, Art. 8(4).

[61] Ibid, Annex I.

[62] Ibid, Art. 11.

1.	Imposition of new or increased customs duties, including those beyond most-favored-nation levels
2.	Introduction or increase of import/export restrictions or payment restrictions on goods
3.	Introduction of trade restrictions affecting transiting or internal measures for goods
4.	Measures impacting participation in public procurement, including exclusion of goods, services, or suppliers and score adjustments of a tender resulting from its evaluation
5.	Measures affecting trade in services
6.	Measures affecting foreign direct investment access to the Union
7.	Restrictions on intellectual property rights or their commercial exploitation for third-country nationals
8.	Restrictions on banking, insurance, capital market access, and other financial services
9.	Introduction or increase of restrictions on goods under Union chemical regulations
10.	Introduction or increase of restrictions on goods under Union sanitary and phytosanitary (SPS) regulations

Table 1 - Range of potential Union Response Measures under the Anti-Coercion Instrument pursuant to Annex I of Regulation (EU) 2023/2675 (n. 5).

These URMs may be applied as measures of general application, for example, if all exports to a third country become subject to restrictions or can target specific natural or legal persons.[63] Article 10 defines the criteria for a natural or legal person being considered connected to a third country's government.[64] This connection can be established if the government has significant ownership or control over it, if it benefits from government-granted exclusive rights or operates in a sector with limited competition due to government actions, as well as if the legal or natural person acts on behalf of or under the direction of the third country's government. By doing so, the ACI accounts for a wide set of potential actors that it can cover. The example of China illustrates the importance of this broad approach, as the intertwined nature of the economy, the administration and the Chinese Communist Party render it difficult to address bilateral issues through established fora such as the WTO.[65] In principle, therefore, all conceivable types of actors can be subject to URMs.

This raises the question of whether this broad, horizontal approach is covered by the EU's mandate. In order to determine the legality of these measures, it is important to recall the scope of the CCP under Article 207 TFEU. This is fairly straightforward for some of the URMs, as they are expressively mentioned by the first paragraph of Article 207 TFEU. This applies to tariffs, agreements relating to trade in goods and services, the commercial aspects of intellectual property (IP), foreign direct investment (FDI), uniformity in measures of liberalization, export restrictions and measures of trade defense (such as anti-subsidies and anti-dumping).[66] For other measures, the Court of Justice established that an EU act falls under

[63] Ibid, Art. 8(3).

[64] Ibid, Art. 10.

[65] M. Wu, *The "China, Inc." Challenge to Global Trade Governance*, 57/2, Harv.Int'l L.J. pp. 1001-1063 (2016).

[66] Article 207(1) TFEU.

the common commercial policy if 'it relates specifically to such trade in that it is essentially intended to promote, facilitate or govern such trade and has direct and immediate effects on it'.[67] It is thus necessary to establish the direct and immediate effects for measures that are not expressively provided for by the treaties. For the URMs under Annex I of the ACI, this means that those relating to tariffs and customs duties, trade in goods and services (including financial services), import and export restrictions, FDI, as well as trade-related aspects of IP are directly covered by Article 207(1). For the latter, the Court of Justice confirmed in *Opinion 2/15 Singapore* that 'in the light of the key role […] that the protection of intellectual property rights plays in trade in goods and services […] (*these*) provisions […] are such as to have direct and immediate effects on trade' (brackets added).[68] The same opinion by the Court also broadened the CCP to encompass flanking disciplines of trade, such as procurement,[69] while chemicals and SPS form part of international agreements that the EU is party to on basis of its competence in trade.[70] Response measures in this area would thus always relate to the suspension of commitments by the EU under international agreements.

However, not all response measure foreseen by the Commission's initial proposal made it into the final version of the ACI. The proposed draft included the 'imposition of restriction on Union-funded research programs'[71] as well as the right for 'Union natural or legal persons affected by the third country's measures […] to recover […] any damage caused to them by the measures of economic coercion'[72] As for the former, there may be room for debate regarding whether access to research programs has a direct and immediate effects on trade, and consequently whether it aligns with the legal threshold established by the case law cited earlier. While a definitive answer to this question remains elusive, it is important to note that the exclusion of these provisions from the scope of the ACI is unlikely to have a substantial impact, as such possibilities already exist under existing legislation governing the Union's research programs.[73]

Unlike this relatively minor restriction on the range of countermeasures, the removal of the option to pursue damages through a private law claim appears more substantial,[74] as it would have introduced an additional layer of private enforcement to the instrument. A similar, yet perhaps underenforced, claim already exists in EU law under the Blocking Statute, whereby

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[67] Opinion 2/15 *Singapore* ECLI:EU:C:2017:376. Para. 36 and the case-law cited therein.

[68] ibid. Para. 127.

[69] M. Cremona, *Defining the Scope of the Common Commercial Policy*, In 'Law and Practice of the Common Commercial Policy', edited by M. Hahn and G. Van Der Loo, pp. 47-70, Leiden, Netherlands: Brill | Nijhoff, (2020).

[70] See the *WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)* and the *Rotterdam Convention on the prior informed consent procedure for certain hazardous chemicals and pesticides in international trade*.

[71] European Commission (n. 27), Annex I (f).

[72] Ibid. Article 8(1)(b).

[73] Article 22(5) of Regulation (EU) 2021/695 of the European Parliament and of the Council of 28 April 2021 establishing Horizon Europe – the Framework Programme for Research and Innovation, OJ L 170, 12.05.2021, stating that '*the work programme may limit participation in actions under the Horizon Europe programme when there is a justified need to safeguard the EU's strategic assets*'.

[74] European Commission (n. 27), Art. 8(1)(b).

companies may seek recovery for damages caused by the extra-territorial application of laws.[75] The discarded passage in the ACI would have even gone a step further, considering that the Council implementing act (as discussed in the previous section) would have laid a solid designation for private operators pursuing damages claims, likely establishing a clear addressee for potential claimants.[76] Such an approach would have added more punch to the enforcement of the instrument through the involvement of private operators and their substantial capabilities.[77] Additionally, it would have provided a means for these operators, who would likely incur significant economic burdens in situations warranting the ACI's activation, to receive partial compensation for their losses, which they cannot pursue vis-à-vis the domestic legislator.[78] It appears that uncertainties about how this would work in practice, for example regarding the calculation of damages, including the need for a national court to establish the degree of liability of a specific actor, caused the Council to reject the proposal in the end.

While private enforcement was omitted, the regulation does introduce a genuine innovation in EU trade law which has the potential to enhance the effectiveness of the instrument. According to Article 11(4), the Commission may, if necessary, select response measures impacting foreign direct investment access to the Union and services trade that apply to legal entities in the Union owned or controlled by third-country individuals, when necessary. This means, that URMs may also be applied on an intra-EU basis, creating opportunities to target those services that define modern economies under the Union's CCP if the providers originate from a foreign country. Examining the implications of this provision for a digital service provider like *TikTok* during an EU-China escalation involving the ACI highlights the substantial potential impact. The company is registered in Dublin, Ireland, from where it provides its digital services to users in the EU. This intra-EU trade, which is usually covered by the laws governing the internal market, can now be restricted as part of a response measure to economic coercion by the ACI. The same applies to *Netflix*, a U.S. company with its European headquarter located in the Netherlands, as well as other large foreign service providers, such as *Facebook*, thereby leveraging the access to the roughly 450 million potential consumers within the EU.

In summary, the response measures foreseen by the instrument represent a comprehensive approach, likely exhausting the limits of possible measures under the CCP. This flexibility acknowledges the inherent complexity of economic sanctions, which inadvertently affect the sanctioning party. The rationale behind this appears to be based on the principle that a broader selection of countermeasures enhances the capacity to tailor responses to unforeseen scenarios, all the while minimizing costs through the sensible selection of measures. This resembles the logic of Section 301 of the 1974 U.S. Trade Act, the primary enforcement tool

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[75] Council Regulation (EU) 2271/96 of 22 November protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, OJ L 309, 29.11.1996. Article 6.

[76] The Commission would have made a designation with regard to the natural or legal person found guilty of economic coercion. *See* European Commission (n. 27), Art. 8(1)(b).

[77] A. O. Sykes, *Public versus Private Enforcement of International Economic Law: Standing and Remedy*, 34/2, J. Leg. Stud. pp. 631-666 (2005), https://doi.org/10.1086/431781.

[78] Joined Cases C-120/06 P and C-121/06 P *FIAMM and Others v Council and Commission* ECLI:EU:C:2008:476. Para. 121 and the case-law cited therein.

of the United States, which provides the executive with a broad range of discretion when selecting measures.[79] In this context, enhanced enforcement through economic operators could have amplified the impact and further encouraged industry participation in the targeted selection of measures, similar to the American model. The absence of this direct participation is now compensated through selecting the URMs in a way that considers the interests of economic operators in the Union,[80] which comes at considerable administrative expense, and lacks the incentive of potential compensation for businesses. Nonetheless, the ability to apply countermeasures, if required, to intra-EU situations constitutes a notable step forward.[81] Ultimately, it will depend on the selection and combination of the URMs, but also on the ability to trigger these measures, if appropriate, as discussed in the previous chapter. If this is the case, the ACI holds the potential to play a significant role in safeguarding the Union's interests and economic stability while fostering compliance with international law and principles.

4. Trapped between EU Strategic Autonomy and Member State Sovereignty?

After the pervious sections discussed the legal and political aspects of the negotiations of the ACI, this section develops the argument that the relationship between Member States sovereignty and EU strategic autonomy requires clarification. The analysis of the previous section reveals a lack of consensus among the European institutions regarding the proper level of supranational competence essential for safeguarding the sovereignty of the Union and its Member States against economic coercion. While it appears that there was widespread consensus on the need and objective of an instrument in reaction to the wider geopolitical environment, as described in section two, a clear divergence emerges on the means of implementation, particularly regarding the leadership role – whether it should be the Commission or the Member States in the driver's seat. This tension between the national and supranational level became apparent in the discussion above, both in relation to the decision-making process and, to a lesser extent, regarding the selection of the URMs. The argument will be structured around three dimensions that significantly impacted the ACI: the institutional dimension, the legal dimension, and lastly, the political dimensions that unfolded throughout the negotiations.

On an institutional level, the controversy can be understood as centering around the question of which institutional actor should be granted the executive powers that come with the new instrument. A prevalent phenomenon within the EU is the dynamic that the Member States on the one hand, and the Commission and the Parliament on the other, are mainly informed by maintaining or increasing their own competence, within the relatively broad discretion that the treaties provide.[82] In practice, the Commission leans towards using a legal basis that involves qualified majority voting within the Council or the exercise of exclusive competences.[83] The

[79] J. Catalfamo, *Toward a Rebalanced Section 301 Authority: Reconsidering the Separation of Powers in International Trade*, 90/2, Geo. Wash. L. Rev. pp. 536-568 (2022).

[80] Regulation (EU) 2023/2675 (n. 5), Art. 11.

[81] Ibid, 11(4).

[82] *See* R. Barents, *The Internal Market Unlimited: Some Observations on the Legal Basis of Community Legislation*, 30/1, Common Mark. Law Rev., pp. 85-109 (1993).

[83] *See* P. Leino-Sandberg, *The Institutional Politics of Objective Choice: Competence as a Framework for Argumentation*, in 'The Division of Competences between the EU and the Member States, reflections on the Past,

same holds true for both the Council and the Parliament, which defend and extend their institutional role to the strongest extent possible.[84] According to this account, it might be reasonable to assume that the negotiating parties viewed the trade-off between Member State sovereignty and EU strategic autonomy as a zero-sum game. This implies that a gain in competence for the supranational level, through increased involvement of the Parliament and additional executive powers for the Commission is perceived as a relative loss of sovereignty by the Member States and the Council respectively.

This bargaining and rivalry between the institutions are not novel in the EU's evolution. In fact, this interaction of formal rules with informal practices represents the very dynamic from which compromises emerge. Although these agreements often create incomplete solutions, this incompletion generates a subsequent demand to address these initial shortcomings. Arguably, it is precisely this demand for reforming the still incomplete institutions that propels deeper integration and drives the process of European integration.[85] Put simply, one could argue that this is how the EU's *sui generis* legal and institutional system works. This, however, risks being an over-simplification in the area of external relations. Whereas the extent to which EU competence cuts against that of the Member States is a recurring issue across all policy fields, two factors render this problematic in the field of external relations: the involvement of third countries and the simultaneous coexistence of Member States' sovereignty alongside the EU's limited external powers.[86]

These specific circumstances in the external relations sphere lead to the legal dimension of the argument. Although the issue of inter-institutional conflicts over specific executive competence is also evident within the domain of the EU's CFSP, it is less pronounced due to its intergovernmental nature, where the Council holds comprehensive powers. Article 26(2) of the TEU stipulates that the Council serves as the central decision-making body in the CFSP, and is, jointly with the High Representative, responsible for defining and implementing the Union's actions within this area. In combination with unanimity as the general voting rule, as foreseen by Article 31(1) TEU, this leaves the decision-making in this area firmly in the hands of the Council, ultimately depending on the political will of the Member States.[87] In this context, it is important to recall that the ACI's objective, as outlined in recital 7 of the preamble, is to safeguard the sovereignty of both the EU and its Member States in the face of external threats through trade and investment measures:

'[…] it is essential that the Union possess an appropriate instrument to deter and counteract economic coercion by third countries in order to safeguard *its rights and interests* and *those of*

Present and the Future', edited by S. Garben and I. Govaere, pp. 210-231, Oxford: Modern Studies in European Law, Hart publishing (2017).

[84] For example through litigation concerning institutional competences in the area of external action by the Union, *see* Case C-130/10 - *European Parliament v Council of the European Union* ECLI:EU:C:2012:472.

[85] E. Jones, R. Kelemen & S. Meunier, *Failing Forward? Crises and Patterns of European Integration*, 28(10), J. Eur. Public Policy, pp. 1519-1536 (2021).

[86] *See* M. Cremona, *EU External Relations: Unity and Conferral of Powers*, in 'The Question of Competence in the European Union', edited by L. Azoulai, pp. 65-85, Oxford University Press (2017).

[87] *See* S. Marquardt, *The institutional framework, legal instruments and decision-making procedures*, in 'Research Handbook on the EU's Common Foreign and Security Policy' edited by S. Blockmans and P. Koutrakos, pp. 22-43, Edward Elgar (2018).

its Member States. This is particularly the case where *third countries interfere* in the *legitimate sovereign choices of the Union or a Member State* by applying or threatening to apply *measures affecting trade or investment*' (emphasis added).[88]

This underscores the intrinsic connection between the foreign and the trade policy aspects of the instrument, providing a key to understanding the instrument's outcomes. The practical shortcomings that come with the unanimity requirement in mind,[89] the CCP legal basis was never disputed during the negotiations of the ACI, despite this strong link. From a legal perspective, this is justifiable, as the discussion on whether the response measures fall under the CCP in the previous section has shown. Under settled EU case-law, the choice of legal basis must 'rest on objective factors amenable to judicial review, which include the aim and content of that measure'.[90] For an instrument with a strong foreign policy link, that relies on trade measures as a mean to achieve these, this initially allows room for debate regarding the correct choice of legal basis. Usually, under EU law, measures that simultaneously pursue multiple objectives, provided they are not incidental to one another, would rely on the various corresponding legal bases.[91] This recourse to a dual legal basis is, however, not possible where different procedures apply for each legal basis,[92] as is the case in the areas of the CFSP and the CCP. This means that there is no room to argue for a CFSP legal basis, due to the URMs falling clearly in the scope of the CCP, despite the outspoken proximity.

The Common Commercial Policy under Article 207 TFEU consequently constitutes the correct choice of legal basis, despite the large overlap in foreign and trade policy objectives, as the treaties do not offer a specific legal framework for hybrid trade and foreign policy tools. The different goals are visible in the preamble of the ACI. While it highlights various foreign policy objectives, including upholding and promoting Union values and interests, adhering to the principles of international law, promoting multilateral solutions, and safeguarding Union values and interests,[93] it is formally a pure trade instrument, addressing threats exercised through economic means. This is in line with the Treaty of Lisbon, which promotes trade tools as a means for achieving and supporting foreign policy objectives.[94] Despite this nexus between the CFSP and the CCP being not new nor unique to the ACI,[95] it is to this date nowhere as explicit as in the present case. Understanding this proximity between the CCP and the CFSP

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[88] Regulation (EU) 2023/2675 (n. 5), preamble, recital 7.

[89] For example, they unanimity requirement stalled movement on major issues such as Russia sanctions. *See: EU's unanimity rules are here for now, despite chatter*, Politico (20 September 2022), https://www.politico.eu/article/eu-unanimity-rules-are-here-for-now-despite-chatter/.

[90] Case C-244/17 - *Commission v Council (Agreement with Kazakhstan)* ECLI:EU:C:2018:662. Para. 36 and the case-law cited therein.

[91] Case C-130/10 - *European Parliament v Council of the European Union* ECLI:EU:C:2012:472 (n 82). Paras. 43-45 and the case-law cited therein.

[92] Ibid. Para. 45 and the case-law cited therein.

[93] Regulation (EU) 2023/2675 (n. 5), preamble, recitals 1-5.

[94] Article 207(1) TFEU states that 'The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action' while Article 21 TEU mandates the EU to pursue other external action aims through EU trade policy.

[95] *See* A. Ott & G. Van der Loo, *The nexus between the CCP and the CFSP: achieving foreign policy goals through trade restrictions and market access*, in 'Research Handbook on the EU's Common Foreign and Security Policy' edited by S. Blockmans and P. Koutrakos, pp. 230-253, Edward Elgar (2018).

necessitates to see the legal debate in the light of the political dimension that ultimately shaped the ACI.

The political dimension contrasts the consensus on basing the instrument on the Union's CCP. It appears that the Member States, and with them the Council, quickly recalled this substantive proximity to foreign policy during the negotiations on the ACI. When looking at the changes brought during the negotiations, it becomes evident that the Member States attempted to make up for the ground they felt was lost by anchoring such a potent foreign policy tool on exclusive Union trade competence. This ultimately resulted in the Council playing a major role in deciding on the presence of economic coercion, with the European Commission sharing the implementing powers alongside enhanced Member State participation in determining the Union's response measures.

These reasons for this political push for influence can be subdivided into internal ones, grounded within the Union institutional and legal dimension on one hand and external factors on the other. Viewed exclusively from the EU internal perspective, concerning the distribution of competence between the national and the supranational level, this push for additional involvement at the operationalization stage of the instrument may even be beneficial for restoring the original balance of competences. In that logic, the instruments nature of being neither fish or fowl justifies a zero-sum approach, where a perceived gain of powers under the CCP comes at the direct expense of the foreign policy powers, justifying a push by the Member States for further involvement. However, the political dimension seems to have significantly shaped the ultimate structure of the ACI also due to external factors. This perspective takes into account the impact of the instrument on the EU's relations with the outside world. It appears that beyond the usual worries over sovereignty and competence, at least some of the Member States were also grappling with a touch of the fear of the unknown. This holds especially true, but is not limited to, certain capabilities of the ACI that constitute genuine legal innovation.

Examples for this can be found in several EU countries, such as the Czech Republic and Sweden, which held the Council presidency during crucial ACI negotiations, alongside Ireland, Germany, and the Nordic countries, which continuously voiced reservations over the potential of the ACI to escalate trade policies and trigger tit-for-tat retaliation.[96] The novelty of the instrument in terms of its broad cross-sector applicability sparked the fear of a too-frequent utilization of the instrument in areas that previously were outside the reach of the EU. However, the above discussed division of competence between the EU and the Member States in trade matters means that national capitals were not competent to enact such measures either, as the following example shows. When considering the controversy surrounding chemicals, IP, and SPS, response measures under the ACI, which require the suspension of international agreements, this is something that the Member States cannot enforce outside the framework of the EU.[97] Put simply, the EU did not diminish the authority of Member States through

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[96] *See* W. Hummer, *„Trade Enforcement Regulation", „Anti-Coercion Instrument" Und „Single Market Emergency Instrument": Reaktionen Der Europäischen Union Auf Handelspolitische Herausforderungen*, 46(1), integration, pp. 67-74 (2023).

[97] The Council initially aimed to remove these from the ACI. *Compare* Council of the European Union (n. 25), Annex I and ACI Regulation (n. 5) Annex I.

increased integration or supranationalization, for in this domain, if Brussels lacks the capacity to enact these measures, so do the Member States. As a result, while non-performance of obligations is permissible under international law under certain circumstances, the suspension of these obligations within EU law has so far lacked a legal framework.[98] Naturally, this placed the EU at a competitive disadvantage vis-à-vis third countries, which would have been embraced by the Council's initiatives to prevent a stronger supranational bundling of competences.

Overall, this interaction has significantly changed the functionality of the instrument in the case of the ACI. While this does not mean that the instrument is of no use, it raises a crucial question: what is the relationship between the sovereignty of the Member States and the ever-increasing push for more autonomy by the supranational level? The above analysis shows that the legal interpretation of the founding Treaties can only make a limited contribution to answering this. With some Member States expressing concern that the European level's ambition to become more 'geopolitical' encroaches upon the core state powers of national governments, and simultaneously recognizing that certain ongoing crises demand a more integrated approach, a clear path forward for striking a balance between these opposing forces is currently absent.[99] Currently this tension implies that during the negotiation of the ACI, as well as potential future legal instruments, the institutions are not primarily guided by strategic considerations regarding the role of Europe in the world. Instead, they are, to a large degree, driven by internal political and institutional rationales. Ending this harmful dynamic, requires a real discussion on the political level of what Europeans want the EU to be in the field of external relations – a forum for intergovernmental decisions, or a more autonomous player equipped with real powers, through which EU Member States leverage greater influence in the world.

5. Concluding remarks

The complex dynamics between the European Union and its Member States, marked by a delicate balance of sovereignty and strategic autonomy, and most importantly, creating legislative output decisively shaped by the internal dimension, require action. As the increasingly geopoliticized world shows, the question arises whether the EU can truly become a geopolitical player while Member States grapple with ceding some sovereignty to Brussels. This article offers two key conclusions. The first regards the ACI itself. The use of unilateral measures and the establishment of rules for economic coercion mark a critical step to allow the EU an effective response to recent trends in international economic relations, despite some missed opportunities discussed in this article. For the ACI's actual impact in a specific case of economic coercion, its initial use will be key, as it will both test the instruments legality under international law and offer insides about the aspired deterrence effect. A successful implementation of this hybrid trade and foreign policy instrument could, in a positive scenario,

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[98] With reference to customary international law, if the actions taken by a third country qualify as an internationally wrongful act, the EU may adopt response measures that imply the non-performance of international obligations towards that third country under the ACI. *See* ACI Regulation (n. 5), preamble, recitals 13.

[99] M. Jäger, *Defense and Deterrence Against Geo-Economic Coercion - What Germany and the EU Can Learn from China and the United States*, German Council on Foreign Relations (16 Mar. 2022), https://dgap.org/en/research/publications/defense-and-deterrence-against-geo-economic-coercion (accessed 22 November 2023).

even establish a promising precedent for a new, somewhat more supranational, decision-making approach in the realm of foreign policy. Conversely, a failure could undermine the development of a more geopolitically influential EU. The second conclusion is of a broader nature. The EU institutions need to resolve the tension between strategic autonomy and national sovereignty. This holds especially true in fields where the national level retains significant competence. Further bypassing the question of foreign policy by basing powerful legal instruments on norms that provide the Union with more competence, whilst pushing for decisive intergovernmental influence, is unlikely to produce functional legislative outcomes in the long term. This requires a different, legally enshrined political consensus, as the Treaties do not contain a superior legal norm that can untangle the situation. It is thus an inherently political question. The ongoing debate around EU enlargement and the need for prior institutional reform provide an opportunity to do so, as the recent report of the Franco-German working group on EU institutional reform has shown.[100] The prospect of achieving a political consensus will ultimately decide whether the EU can secure a genuine mandate to pursue greater strategic autonomy. Otherwise, the longstanding debate on legal competence, strongly influenced by institutional and political factors, will persist in shaping the EU's external relations toolbox, as observed in the case of the ACI.

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[100] *See* Report of the Franco-German Working Group on Institutional Reform, *Sailing on High Seas: Reforming and Enlarging the EU for the 21st Century*, 18 September 2023, https://www.auswaertiges-amt.de/blob/2617206/4d0e0010ffcd8c0079e21329bbbb3332/230919-rfaa-deu-fra-bericht-data.pdf.