THE IDENTIFICATION OF UNILATERAL ECONOMIC COERCION UNDER THE PRINCIPLE OF NON-INTERVENTION

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ABSTRACT

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The principle of non-intervention is widely acknowledged as a fundamental rule of customary international law. Yet the principle's contours remain ill-defined. Particularly, it is unclear when unilateral economic measures may constitute 'coercion' and thus violate the principle. This thesis seeks to address this problem. Through a detailed examination of the conception of the notion of economic coercion in practice, it demonstrates that, while unilateral economic coercion is universally recognised as prohibited under the non-intervention principle, the precise scope of this concept is unclear under *lex lata*. While non-WEOG states have advocated an expansive definition of economic coercion encompassing almost all types of economic measures, WEOG states have been reluctant to characterise economic measures as coercive, favouring a flexible definition of economic coercion to maintain their freedom to influence the policy choices of other states. Given the uncertainty reflected in practice, the thesis proceeds to establish an analytical framework to provide further guidance on the identification of economic coercion. It identifies five groups of different approaches proposed by international lawyers for determining non-forcible coercion and highlights the weaknesses of each approach. It also resorts to domestic legal regulation of coercive economic pressure to shed light on the concept of economic coercion in international law. By doing so, it observes similarities in the historical development of both regimes and identifies certain common regulatory trends. Drawing on both domestic and international legal doctrines, the thesis proposes a three-step method to identify economic coercion under the non-intervention principle. Essentially, an economic measure constitutes coercion either because (1) it falls within a specific type of measures universally recognised as coercive or (2) it breaches international obligations of the sender state towards the target state and (3) has such significant effects that the latter has no reasonable alternatives to resist.

[29,841 words]

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TABLE OF ABBREVIATIONS

African Journal of International and Comparative Law	AJICL
American Journal of International Law	AJIL
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British Yearbook of International Law	BYIL
Cambridge Journal of International & Comparative Law	CJICL
Cambridge University Press	CUP
Chinese Journal of International Law	CJIL
Cuban Foreign Ministry	CFM
Digest of United States Practice in International Law	DUSPIL
Duke Journal of Comparative & International Law	DJCIL
European External Action Service	EEAS
European Journal of International Law	EJIL
Fordham International Law Journal	FILJ
Georgia Journal of International and Comparative Law	GJICL
Global Journal of Human Social Science	GJHSS
Harvard International Law Journal	HILJ
Harvard Law Review	HLR
Intercultural Human Rights Law Review	IHRLR
International and Comparative Law Quarterly	ICLQ
International Economic Law and Policy Blog	IELPB
International Law Commission	ILC
International Law Report	ILR
International Law Studies	ILS
Iowa Law Review	Iowa LR
Joint Comprehensive Plan of Action	JCPOA
Journal of Conflict and Security Law	JCSL
Journal of International Law and Economics	JILE
Journal of World Trade	JWT
Law Quarterly Review	LQR
Leiden Journal of International Law	LJIL
Max Planck Encyclopedia of Public International Law	MPEPIL
McGill Law Journal	MLJ
Michigan Journal of International Law	MJIL
Michigan Law Review	MLR
Ministry of Foreign Affairs of the Republic of Lithuania	MFARL
New York University Journal of International Law & Politics	NYUJILP
Nordic Journal of International Law	NJIL
Office of the United Nations High Commissioner for Human Rights	OHCHR

Opinions of the Supreme People's Court on Several Issues concerning the Implementation of the General Principles of the Civil Law of the People's Republic of China (For Trial Implementation) 1988 (PRC) (in Chinese)	PRC Supreme Court Opinion
Oxford University Comparative Law Forum	OUCLF
Oxford University Press	OUP
Peking University Law Journal	PULJ
Peking University Press	Peking UP
People's Republic of China	PRC
Permanent Mission of the People's Republic of China to the UN	PMPRC
Princeton University Press	PUP
Ronald Reagan Presidential Library & Museum	RRPLM
South African Yearbook of International Law	SAYIL
Statute of the International Court of Justice	ICJ Statute
Texas International Law Journal	TILJ
Texas Law Review	TLR
The Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 22 USC §§ 6021–6091 (1996)	Helms-Burton Act
The Law & Practice of International Courts and Tribunals	LPICT
The Modern Law Review	Mod LR
The New York Times	NYT
The North Carolina Law Review	NCLR
The University of Toronto Law Journal	UTLJ
The Yale Law Journal	YLJ
Thomson Reuters Practical Law	TRPL
Tulane Law Review	Tul LR
UNGA Res 2625(XXV), 'Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations' (24 October 1970) UN Doc A/RES/2625(XXV) annex	Friendly Relations Declaration
Union of Soviet Socialist Republics	USSR
United Arab Emirates	UAE
United Nations General Assembly	UNGA
University of Pennsylvania Law Review	UPLR
Vanderbilt Journal of Transnational Law	VJTL
Virginia journal of international law	VJIL
Washington and Lee Law Review	WLLR
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1 INTRODUCTION

1.1 *Nicaragua*, the Non-intervention Principle and Economic Coercion

The employment of unilateral economic measures and attempts to influence the influence the behaviours of one state by another has been prevalent in diplomacy. The earliest instances of such measures may be traced back to the Athenian import ban against Megara in the fifth century BC.[1] During the interwar period economic measures have steadily evolved into a popular instrument of 'coercive diplomacy', and their use has surged further since the end of the Cold War, with frequent occurrences in present times.[2] Significant cases of economic measures range from China's national boycott against Japan in the early twentieth century,[3] the 1973 Arab oil embargo against a number of western states,[4] to the US comprehensive embargo against Cuba,[5] and the various sanctions recently taken against Russia's invasion in Ukraine.[6]

However, the scope and content of the cardinal rule that governs such practice, the principle of non-intervention, is notoriously ill-defined.[7] In the leading case on the

1 BE Carter, 'Economic Sanctions', *MPEPIL* (2011) [7].

2 See generally in N Mulder, *The Economic Weapon* (2022), especially 1–21.

3 See generally in CL Bouve (1934) 28 AJIL 22.

4 See generally in I Shihata (1974) 68 AJIL 591.

5 See generally in ND White, *El Bloqueo* (2016).

6 See generally in <https://www.reuters.com/graphics/UKRAINE-CRISIS/SANCTIONS/byvrjenzmve/>.

7 See eg M Jamnejad and M Wood (2009) 22 LJIL 345; AV Lowe in *Memory Akehurst* (1994) 67; T Ruys in *UN Sanctions Handbook* (2017) 27; N Ronzitti in *Coercive Diplomacy* (2016) 4.

principle, the *Nicaragua* case, the ICJ affirmed its customary law status[8] and provided a general formulation of the principle:

> …the principle forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State.[9]

It is clear that the ICJ stated that there are two elements for a violation of non-intervention principle: the first is about the means, i.e. the use of coercive measures; the second is about object of the means, i.e. the interference in 'matters in which each State is permitted, by the principle of State sovereignty, to decide freely', or *domaine réservé*, to put it simply.[10] This two-element test appears to have been widely accepted as the authoritative definition of prohibited intervention,[11] and will be taken as the basic underlying framework for the analysis in this thesis. However, the precise scope of both constituents was left unanswered by the Court. In particular, the contours of the element of coercion remain disputed. Besides 'particular obvious' forms of coercion, i.e. military

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8 *Nicaragua* [1986] ICJ Rep 106 [202].

9 ibid 108 [205].

10 There have been debates about whether *domaine réservé* and 'matters in which each State is permitted, by the principle of State sovereignty, to decide freely' are identical concepts, but it seems now generally accepted that they are interchangeable. See VS Mani, *Basic Principles* (1993) 62–4; G Agrangio-Ruiz (1977) 157 Recueil des Cours 272; K Ziegler, 'Domaine Réservé', *MPEPIL* (2013) [1]; M Kohen (2012) 25 LJIL 159; W Ossoff (2021) 62 HILJ 305–8.

11 M Helal (2019) 52 NYUJILP 60–64; P Kunig, 'Intervention, Prohibition of', *MPEPIL* (2009) [2]–[6].

actions and support for subversive or terrorist armed activities, *Nicaragua* said little about whether and to what extent non-forcible measures, such as those of an economic character, would constitute prohibited coercion. There has also been no consensus on this issue in academic literature. Some simply deny the possibility of economic measures constituting coercion;[12] others acknowledge that economic measures can violate the non-intervention principle but fail to agree on the conditions for such violation.[13] Ultimately, the definition of economic coercion remains one of 'the most unclear areas' of international law today.[14]

The aim of this thesis is to address such controversy and add clarity to the notion of economic coercion under the non-intervention principle. To this end, it primarily seeks to answer two sub-questions: (1) whether unilateral economic measures can ever be considered as coercion, i.e. whether coercion under the non-intervention principle is limited to forcible measures; (2) if economic pressure may amount to coercion, how we may assess whether a given unilateral economic measure constitutes coercion. It is hoped that this research will advance the understanding of the non-intervention principle, elucidate the contours of economic coercion, and provide legal practitioners and policymakers with a more perspicuous analytical framework to assess the legality of unilateral economic measures.

1.2 Definition and Scope

Although the two elements of prohibited intervention are conceptually separable, they are intricately related, and one may touch upon certain aspects of the element of *domaine*

12 See eg S Watts in *Cyber War* (2015) 260; O Pomson (2022) 99 ILS 209–11.

13 See eg LF Damrosch (1989) 83 AJIL 4–6; Helal (n 11) 70–81; UN Doc A/48/535 (1993) 1 [2(a)].

14 C Cameron (1991) 13 MJIL 253; Ruys (n 7) 27.

réservé at various points during the analysis of the element of coercion. Therefore, before delving into substantive discussions on what constitutes (economic) coercion, it is necessary to provide, at least preliminarily, a working definition of *domaine réservé*. There have been lengthy debates over the definition and scope of *domaine réservé* in the context of the non-intervention principle. Some suggest that there exists certain 'fundamental rights' of states which by their very nature fall within the scope of *domaine réservé* protected from external intervention.[15] However, it has been convincingly argued that even 'rudimentary' rights inherently possessed by virtue of statehood may be derogated through a state's 'suicide' or through collective countermeasures; hence, there is no fundamental right which forms an 'irreducible core of sovereignty' that a state cannot freely dispose of.[16] Accordingly, it is impossible to draw a pre-determined list of matters which automatically fall under the *domaine réservé* of a state.[17] The scope of *domaine réservé* can thus only be defined, as indicated in *Nationality Decrees*,[18] in a negative and relative manner as matters for which a state has not undertaken any international obligations (so that it can freely decide).[19] This definition does not mean that affairs protected against external intervention must be those completely immune from international legal regulation; all it requires is that

15 For the historical development and implications of the fundamental rights doctrine, see generally in RJ Alfaro (1959) 97 Recueil des Cours 95–115; A Orakhelashvili in *Economic Sanctions and International Law* (2016) 14–20; SC Neff (2015) 4 CJICL 483–500.

16 A Tzanakopoulos (2015) 4 CJICL 630–33.

17 N Aloupi (2015) 4 CJICL 574; Neff (n 15) 500.

18 *Nationality Decrees* [1923] PCIJ Rep Ser B No 4, 24.

19 Ziegler (n 10) [2]; Kunig (n 11) [3]; Tzanakopoulos (n 16) 623.

the target state is not obligated by international law to conduct what the intervening state has demanded.[20]

Another clarification should be made on what exactly the *domaine réservé* element entails: it may entail an objective test about whether the intervening state does intervene in another state's *domaine réservé*, i.e. whether the intervening act has any *effect* on forcing the target to comply with a demand that it is not obligated to fulfil, or a subjective test about whether the intervening state has an *intent* to compel the target to comply with the demand. This author submits that the latter understanding should be preferred. For one, this approach seems to have been widely presumed in scholarship and case law. In *Nicaragua*, the ICJ explicitly conducted an investigation on intervening intent in its application of the non-intervention principle, referring to the fact that 'the United States *intended*…to coerce the Government of Nicaragua' in respect of matters its *domaine réservé*, and holding that a measure constitutes illegal intervention when it is taken '*with a view* to the coercion of another State'.[21] The Friendly Relations Declaration similarly prohibits the use of unilateral measures 'to coerce another State *in order to* obtain from it the subordination of the exercise of its sovereign rights'.[22] Scholars also suggest that the *domaine réservé* element requires the intervening state to have 'an *intention* to change the policy of the target state',[23] or the measure to 'be *designed to* influence outcomes in, or conduct with

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20 For instance, while the use of force in international relations is undoubtedly regulated by international law, it does not mean that pressuring a state to suspend hostilities in an armed conflict will never intervene in its *domaine réservé*. When, for example, that state is using force for lawful self-defence, the demand for ceasefire constitutes interference in the *domaine réservé* of that state.

21 *Nicaragua* (n 8) 124 [241] (emphasis added).

22 UN Doc A/RES/2625(XXV) (1970) annex principle (c), sentence 2 (emphasis added).

23 Jamnejad and Wood (n 7) 371.

respect to, a matter reserved to a target State'.[24] For another, all measures used to pressure another state will have at least some impact on the target state's decision-making regarding some aspects of its *domaine réservé*. For example, an economic measure employed solely to compel another state to fulfil its human rights obligations will almost inevitably affect the domestic public opinion of that state and in turn the people's choice of government (manifested by a different voting figure or even the rise of rebellion), a decision generally considered to fall within a state's *domaine réservé*.[25] However, it is completely absurd to assert that, even without any intent to this effect, such a measure has interfered in the target state's *domaine réservé* and will breach the non-intervention principle if it also satisfies the coercion element. As a result, if the *domaine réservé* element is understood solely as an objective inquiry, it would not serve as a meaningful qualification of unlawful intervention. Instead, it is the wrongful *intent* to intrude in another state's *domaine réservé* that better captures the component of illegal intervention.

There are also certain clarifications about the scope of the thesis. Firstly, this thesis only concerns the legal assessment of *unilateral* economic measures. It thus precludes measures taken under the Security Council's Chapter VII mandate which are 'collective' and not 'unilateral' by nature, [26] though economic measures that go beyond the scope of its Security Council authorisations will still be considered. In the same vein, the thesis will not touch upon the non-intervention obligation of the UN towards its member states, which, despite great similarity in content, is distinct from the non-intervention obligation among

24 MN Schmitt, *Tallinn Manual 2.0* (2017) 319.

25 *Nicaragua* (n 8) 108 [205], 131 [258].

26 DH Joyner in *Coercive Diplomacy* (2016) 190–91.

individual states.[27] The thesis will also not discuss economic measures taken under the authorisation of regional treaty arrangements as between the member states of such arrangements. These are also 'collective' in the relations among those member states.

Secondly, this thesis only discusses the coerciveness of unilateral *economic* measures. It is intended to cover only those unilateral measure that are economic – as contrasted with diplomatic or military – in nature, although the term 'economic' may not have a clear-cut definition.[28] For the sake of convenience, this thesis mainly touches upon 4 types of the most common economic measures: trade measures, including import controls, export controls, total embargoes and boycotts; freezes of foreign assets; financial restrictions; denial/withdrawal of economic assistance.[29] It is expected that the conclusions reached will be applicable to all other types of economic measures not mentioned. Admittedly, different forms of non-forcible coercive measures (including economic, political, cyber, etc.) are often discussed together, and it is unfeasible to propose a definition of coercion which is only applicable in a particular context if one intends to produce an internally coherent interpretation of the non-intervention principle. Consequently, although the focus of this thesis is on identifying coercion of an economic nature and studies primarily the practice and theories of economic coercion, it may also mention theories on other forms of non-forcible coercion when necessary.

Lastly, some key terminology requires clarification. The terms '(economic) coercion' and '(economic) coercive measures' are used interchangeably to describe

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27 *Nicaragua* (n 8) 106 [202]; D McGoldrick in *Memory Akehurst* (1994) 87.

28 AF Lowenfeld, *International Economic Law* (2008) 850.

29 Carter (n 1) [5]–[6]; AV Lowe and A Tzanakopoulos, 'Economic Warfare', *MPEPIL* (2013) [36]; Helal (n 11) 99–103.

measures that fulfil the coercion requirement under the non-intervention principle. The term '(unilateral) economic measure', by contrast, indicates a neutral legal characterisation of the measure, with no reference to its coerciveness under the non-intervention principle or its legality under any other rules of international law. 'Sanctions' or 'economic sanctions' refer to measures adopted as responses to illegality, either unilaterally or collectively,[30] but do not specify the legality of such measures. Additionally, the term 'countermeasures' refers to measures taken to induce legal compliance but also violate international law themselves in the first instance (even though they are justified as reactions to illegality).[31] This is to be contrasted with 'retorsions', which covers unfriendly but lawful acts regardless of their underlying motivation.[32]

1.3 Structure of the Work

After this brief introduction, the thesis is divided into two parts. Chapter 2 conducts a detailed examination of state practice and *opinio juris* regarding the non-intervention principle and the concept of economic coercion. It finds that although states have generally acknowledged that unilateral economic measures may violate the non-intervention principle, they have not reached a consensus on the precise scope of illegal economic coercion. Consequently, the investigation of state practice and *opinio juris* is not very helpful for distinguishing lawful economic pressure from unlawful economic coercion. Moving beyond such controversies, chapter 3 relies on doctrines presented by international

30 A Miron and A Tzanakopoulos, *Unilateral Coercive Measures* (2022) 3–4.

31 ARSIWA Commentary 128 [3].

32 ibid. It should however be noted that, the legality of retorsions under one specific rule, the non-intervention principle, is not presumed in this thesis – indeed, whether a 'retorsion' which violates no other international obligation can constitute illegal coercion is one of the central issues of this thesis.

lawyers as well as the experiences of domestic legal regulation of coercive economic pressure to construct a conceptual framework which provides guidance for the determination of economic coercion. It then tests the framework against the practice and legal positions of states analysed in chapter 2 and evaluates the framework's internal coherence and soundness. Chapter 4 concludes.

2 THE CONCEPTION OF ECONOMIC COERCION IN STATE PRACTICE

This chapter examines when economic measures are considered as illegal coercion under the non-intervention principle, and whether such conditions for determining coercion constitute 'general practice accepted as law' and hence a standard firmly established as customary international law.[33] Before diving into substantive analysis, two preliminary points will be addressed.

First, it is necessary to categorise, even if in a preliminary manner, different groups of states when assessing their practice. Such categorisation might affect the composition of different interest groups of states and accordingly the identification of customary international law. Although universal acceptance is not required for a rule to enter the sphere of customary international law, [34] the rule must receive 'widespread', 'representative', 'extensive' and 'virtually uniform' acceptance from the international community,[35] i.e. a general consensus from a substantial part of states.[36] Therefore, the objection from a relatively few number of states will generally not disrupt the emergence of a new customary rule if the vast majority of the international community accepts the rule, but may block the emergence of such a rule if they are categorised as constituting the majority of a distinct interest group.[37] Drawing an analogy from categorising western developed states with a market economy as a distinct group in identifying customary rules

33 ICJ Statute, art 38(1)(b).

34 UN Doc A/73/10 (2018) 139.

35 *North Sea* [1969] ICJ Rep 42–43 [73]–[74].

36 UN Doc A/CN.4/672 (2014) 46 [64].

37 AV Lowe, *International Law* (2007) 37; UN Doc A/CN.4/672 (2014) 37 [54].

on expropriation,[38] this chapter will consider the Western European and Other States Group (WEOG) plus those EU member states not belonging to WEOG for the purposes of UN equitable geographical representation, as a distinct group. This is because the states mentioned are traditionally regarded as 'sender states' and are indeed economically capable of imposing economic coercion. This constitutes them thus as a group of states whose legal positions deserve particular attention. The same is true for states that have traditionally suffered from economic pressure from the west, such as Cuba, Iran, North Korea, and Russia. This chapter will also attach importance to the practice of emerging great economic powers such as China.

Second, the methodology of extracting *opinio juris* from ambiguous materials should be clarified. It is widely acknowledged that one of the everlasting challenges to international lawyers in the identification of customary law is to infer the underlying legal positions behind vague statements, conduct or even silence.[39] It is beyond the scope of this study to give a comprehensive account of these complex theoretical questions; what suffices is to provide a working method to make sense of equivocal materials. Two particular situations are considered. First, regarding silence towards other states' practice, this study presumes the following: when reaction is called for by the circumstances, i.e. the practice of other states affects the interest of a 'receiving state', and that state, having knowledge of the relevant practice of other states, has remained silent over a sufficient period of time, such 'qualified silence' constitutes acquiescence in the legality of the

38 *Texaco* (1978) 17 ILM 28–30; BM Clagett (1984) 25 VJIL 89.

39 See eg OC Tassinis (2020) 31 EJIL 242–44; DA Lewis, NK Modirzadeh and G Blum, *Quantum of Silence* (2019) 1–2.

relevant practice.[40] Nevertheless, such a presumption is rebuttable if one can provide compelling evidence that the silence or inaction is out of non-legal reasons.[41] Second, resolutions and declarations of international organisations, which constitute one of the most important forms of evidence for *opinio juris* in the study, will be examined in terms of their 'content and the conditions of [their] adoption' with 'all due caution' to deduce *opinio juris* from them.[42] I will only regard a law-declaring resolution, even if adopted with consensus or with no votes against, as a rebuttable presumption and go on to consider what states actually mean when they vote for such resolutions.[43]

The analysis in this chapter is divided into two sections. Section 2.1 examines the content of different normative international instruments concerning economic coercion and states' positions with respect to these instruments. This will allow the elaboration of the states' general understanding of the relevant rules. Section 2.2 analyses specific instances of unilateral economic measures applied by states and the reaction of other states towards such measures, which will assist in understanding states' perception of the contours of the rule on economic coercion in specific cases.

40 *Gulf of Maine* [1984] ICJ Rep 305 [130]; UN Doc A/CN.4/682 (2015) 105–06 [22]–[25].

41 *Lotus* [1927] PCIJ Ser A No 10, 28; *Asylum* [1950] ICJ Rep 277.

42 *Nuclear Weapons* [1996] ICJ Rep 255 [70]; *Nicaragua* (n 8) 99 [188].

43 ILA Statement 58; UN Doc A/CN.4/682 (2015) 116 [47].

2.1 General Positions of States Expressed at the International Level

2.1.1 The ILC Draft Declaration on the Rights and Duties of States

Under the mandate of UNGA Resolution 178(II), the International Law Commission (ILC) drafted a Declaration on the Rights and Duties of States and submitted it to the GA in 1949.[44] Article 3 of the Draft Declaration reads:

> Every State has the duty to refrain from intervention in the internal or external affairs of any other State.[45]

This text does not make it clear whether illegal intervention extends to the exertion of economic pressure. The discussion of this article within the Commission suggests that the members were quite divided. One member of the Commission, Mr. Yepes of Colombia, did submit a proposal on non-intervention that adopted the formulation in article 15 of the OAS Charter which prohibited non-forcible intervention.[46] Three members, Mr. François of the Netherlands, Mr. Koretsky of the USSR, Mr. Amado of Brazil, expressly supported his idea that economic pressure might constitute unlawful intervention, while three other members, Mr. Brierly of the UK, Mr. Scelle of France, and Mr. Spiropoulos of Greece, insisted that only the use or threat of armed force constituted illegal intervention.[47] The rest

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44 [1949] (I)(II) YILC 286–88.

45 ibid 287.

46 [1949] (I)(I) YILC 90. Article 15 of OAS Charter reads 'prohibits not only armed force but also *any other form of interference* or attempted threat against the personality of the State or against its political, economic and cultural elements' (emphasis added).

47 ibid 90–93.

of the members did not provide a clear position on this point.[48] Eventually, the proposal of Mr. Yepes was rejected by a vote of 9 to 1.[49]

Similar proposals which would have rendered economic coercion illegal were submitted by the ROC, Argentina, and Cuba in the Sixth Committee of the UNGA.[50] Dominica, by contrast, doubted that such a rule had gone beyond the Inter-American context and had entered the sphere of general international law.[51] Other states, though not directly commenting on the legal status of non-intervention and economic coercion, expressed both hesitation and caution in accepting at this stage that all rules contained in the Draft of the ILC reflected positive law.[52] In the end, the GA postponed consideration of the Declaration indefinitely in Resolution 596(VI). It may therefore be concluded that the prohibition of economic coercion under the non-intervention principle had not been generally accepted at that time, i.e. 1949.[53]

2.1.2 Declaration on the Inadmissibility of Intervention (GA Res 2131 (XX))

Some 15 years later, on 21 December 1965, the GA adopted Resolution 2131 (XX) with 109 votes in favour, none against, and 1 abstention.[54] The following paragraph of the Declaration has been frequently referred to as one of the authoritative starting points for

48 ibid 90–93.

49 ibid 93.

50 UN Doc A/C.6/SR.171 (1949) 188 (ROC); A/C.6/SR.172 (1949) 199 (Argentina); A/C.6/SR.173 (1949) 202 (Cuba).

51 UN Doc A/C.6/SR.173 (1949) 207 (Dominica).

52 UN Doc A/C.6/SR.168 (1949) 167 (US); A/C.6/SR.169 (1949) 173 (Greece); A/C.6/SR.172 (1949) 196–7 (France); A/C.6/SR.172 (1949) 197–8 (UK).

53 H Kelsen (1950) 44 AJIL 268.

54 UN Doc A/PV.1408 (1965) 9.

considering the content of the non-intervention principle and the legality of economic coercion:[55]

> 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 or to secure from it advantages of any kind. Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist, or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.[56]

The above text expressly differs from the wording of the ILC Draft Declaration and prohibits economic coercion under the non-intervention principle. The voting figures also indicated a nearly universal consensus. However, an affirmative vote may well be 'an indication of a political desideratum' rather than *opinio juris*.[57] The US, for example, made it clear that it considered the Declaration to be 'only a statement of political intention and not a formulation of law',[58] which was not challenged by the ICJ in *Nicaragua*.[59] A number of other states, though having voted in favour of the Declaration, also clearly stated that they understood its content as political and moral rather than legal.[60] It follows that a

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55 See eg Kunig (n 11) [20]; D Tladi in *Fundamental Principles* (2020) 91; SP Subedi in *Unilateral Sanctions in International Law* (2021) 29; BE Carter, 'Economic Coercion', *MPEPIL* (2009) [7]; DW Bowett (1972) 13 VJIL 2; RB Lillich (1977) 12 TILJ 20; CC Joyner (1984) 17 VJTL 243.

56 UN Doc A/RES/2131(XX) (1965).

57 UN Doc A/CN.4/672 (2014) 59 [76].

58 UN Doc A/C.1/SR.1423 (1965) 436 (US).

59 *Nicaragua* (n 8) 107 [203].

60 UN Doc A/C.1/SR.1422 (1965) 432, A/AC.125.SR.8 (1966) 8 [14] and A/AC.125/SR.12 (1966) 6 [4] (France); A/C.1/SR.1422 (1965) 432 (New Zealand); A/C.1/SR.1422 (1965) 433, A/AC.125/SR.8 (1966) 9 [16] and A/AC.125/SR.15 (1966) 10 [24] (Canada); A/C.1/SR.1422 (1965) 434 (Philippines); A/C.1/SR.1423 (1965) 435, A/AC.125/SR.18 (1966) 5 [5] (Japan); A/C.1/SR.1423 (1965) 436 (Belgium); A/C.1/SR.1423 (1965) 436 (Israel); A/AC.125/SR.11 (1966) 10 [19] (Australia); A/AC.125/SR.12 (1966) 8 [9] (Sweden); A/AC.125/SR.14 (1966) 9 [19] (Italy); A/AC.125/SR.15 (1966) 9 [20] (Lebanon); A/AC.125/SR.73 (1967) 7 (The Netherlands). The UK, the only state abstaining, also expressed the same view, see A/AC.125/SR.16 (1966) 16 [50] (UK).

general *opinio juris* regarding the illegality of economic coercion cannot be deduced from Resolution 2131 (XX), let alone any concrete definition of the content of the notion.[61]

2.1.3 Friendly Relations Declaration (GA Res 2625 (XXV))

The GA adopted the Friendly Relations Declaration (annexed to Resolution 2625 (XXV)) without a vote on 24 October 1970.[62] As asserted by the Declaration itself and confirmed by the ICJ,[63] it is now generally accepted as reflecting customary international law or at least constitutes a strong indication of states' *opinio juris*.[64] The non-intervention principle being one of the 'seven principles of international law' included in the Declaration, the latter is an instrument of principal importance when trying to establish a clear understanding of the principle.

The operative paragraph of the Declaration concerning economic intervention/coercion, which are almost identical to those of Resolution 2131 (XX),[65] read as follows:

> No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind. Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards

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61 OY Elagab, *Non-Forcible Counter-Measures* (1988) 204–05.

62 UN Doc A/PV.1883 (1970) [8].

63 *Nicaragua* (n 8) 100 [188]; *Kosovo* [2010] ICJ Rep 437 [80].

64 H Keller, 'Friendly Relations Declaration (1970)', *MPEPIL* (2021) [39]–[40].

65 One of the major changes in this regard is the choice of the conjunction 'and' rather than 'or'. According to the Special Committee, the change was for the sole purpose of keeping the text in line with the wording of article 20 (then article 19) of the OAS Charter. See UN Doc A/8018 (1970) 76, 108.

> the violent overthrow of the regime of another State, or interfere in civil strife in another State.

Apart from specifying two concrete types of prohibited intervention, i.e. 'armed intervention' and intervention in the form of 'subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State' ('subversive/terrorist intervention'), the text merely reiterates the two elements of illegal intervention: use of coercion (1) in order to intervene in the *domaine réservé* (2) of another state. As many observers have suggested, such language is so 'vague', 'general', and 'abstract' that it is 'almost useless', '[in]effective', 'of little help', and 'virtually meaningless'; it can thus provide little guidance for decision-makers in determining the legality of specific unilateral economic measures.[66] Indeed, terms like 'coerce' or 'subordination of sovereign rights' are so broad that it is difficult to delineate their scope in the abstract. Therefore, the focus of the analysis in this section will be on the individual positions of states regarding the rule, as these positions were expressed during or after the negotiation process, rather than on the (vague) text.

Whether Economic Measures May Violate the Non-intervention Principle

Since the Declaration explicitly prohibits 'the use of economic…measures to coerce another State', a straightforward textual interpretation necessarily denotes that economic measures can at certain points violate the non-intervention principle.[67] The majority of states supported this viewpoint during the negotiation process. In various proposals

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66 DW Bowett (1976) 16 VJIL 248; JA Boorman III (1974) 9 JILE 230; JD Muir (1974) 9 JILE 204; Lillich (n 55) 21.

67 YZ Blum (1977) 12 TILJ 12; Bowett (n 66) 246; EY Benneh (1994) 6 AJICL 249; RB Lillich (1975) 51 International Affairs 362.

submitted by states from Asia, Eastern Europe, Latin America, and Africa, economic coercion was clearly regarded as prohibited; these proposals either expressly declared the illegality of economic coercion[68] or suggested adherence to the text of Resolution 2131 (XX) which, as mentioned above, also prohibited economic coercion.[69] Delegates from these regions also advocated this position in the relevant debates. For example, several states referred to the text of the OAS Charter, which prohibits 'not only armed force but also any other form of interference', as a model for defining unlawful intervention.[70] One of them plainly stated that any coercive act, even involving 'merely economic or political pressure', constitutes illegal intervention.[71] Similarly, a number of states supported proposals repeating the relevant paragraphs of Resolution 2131 (XX).[72] Besides, states from the Soviet Bloc[73] and the Third World[74] highlighted the need to prohibit economic coercion so as to safeguard their particular interests concerning decolonisation and the

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68 UN Doc A/5746 (1964) 110–14; UN Doc A/6230 (1966) 124–26.

69 UN Doc A/6230 (1966) 129, 131; UN Doc A/6799 (1967) 140.

70 UN Doc A/AC.119/SR.28 (1964) 5 (Argentina); A/AC.119/SR.30 (1964) 11 and A/AC.119/SR.32 (1964) 19 (Mexico); A/AC.119/SR.32 (1964) 4 (Guatemala); A/AC.119/SR.32 (1964) 14–17 (Venezuela); A/AC.119/SR.31 (1964) 5 (Burma); A/AC.119/SR.31 (1964) 9 (Canada).

71 UN Doc A/AC.119/SR.28 (1964) 4 (Argentina).

72 UN Doc A/AC.125/SR.8 (1966) 12 [25], A/AC.125/SR.72 (1967) 20 (Poland); A/AC.125/SR.8 (1966) 13 [30], A/AC.125/SR.9 (1966) 8 [19] (United Arab Republic); A/AC.125/SR.10 (1966) 9 [18], A/AC.125/SR.72 (1967) 17 (Kenya); A/AC.125/SR.10 (1966) 10 [22] (Syria); A/AC.125/SR.10 (1966) 11 [25] (Chile); A/AC.125/SR.11 (1966) 5 [4] (Mexico); A/AC.125/SR.11 (1966) 11 [23] (Algeria); A/AC.125/SR.8 (1966) 5 [3], A/AC.125/SR.9 (1966) 7 [16], A/AC.125/SR.11 (1966) 10 [17], A/AC.125/SR.14 (1966) 10 [20], A/AC.125/SR.16 (1966) 21 [66] and A/AC.125/SR.71 (1967) 7 (Czechoslovakia); A/AC.125/SR.14 (1966) 17 [44] (USSR); A/AC.125/SR.15 (1966) 13 [33] (Nigeria); A/AC.125/SR.16 (1966) 4 [3] (Cameroon); A/AC.125/SR.16 (1966) 8 [19] (Romania); A/AC.125/SR.16 (1966) 12 [35] (Argentina), A/AC.125/SR.16 (1966) 13 [38] (Guatemala); A/AC.125/SR.72 (1967) 13 (Ghana).

73 UN Doc A/AC.119/SR.25 (1964) 5 and A/AC.125/SR.71 (1967) 6 (Czechoslovakia); A/AC.119/SR.25 (1964) 10 (Poland); A/AC.119/SR.28 (1964) 15 (USSR); A/AC.125/SR.73 (1967) 4 (Romania).

74 UN Doc A/AC.119/SR.25 (1964) 8–9 (Yugoslavia); A/AC.119/SR.28 (1964) 18 (Nigeria); A/AC.119/SR.31 (1964) 4 (Burma); A/AC.119/SR.29 (1964) 15 (India); A/AC.119/SR.30 (1964) 5 (Mexico).

choice of their own social and political systems. Some states also mentioned specific types of economic measures as illegal intervention.[75]

Some argue, however, that the textual prohibition of economic coercion did not reflect the real positions of certain states and accordingly has not been firmly established in customary law.[76] According to one commentator, despite joining the consensus concerning the final text, WEOG States only recognised that the principle covered armed activities and subversive/terrorist intervention.[77] This argument mainly relied on the joint proposal submitted by Australia, Canada, France, Italy, the UK, and the US, which highlighted 'the generally recognised freedom of States to seek to influence the policies and actions of other States' and prohibited explicitly only armed intervention and subversive/terrorist intervention.[78] It was also contended that WEOG states decided to join in the final consensus not because they accepted that the principle might prohibit non-military and non-subversive activities, but due to political considerations: they did not want to exacerbate their differences with non-WEOG states and wished to avoid a complete breakdown in the negotiations, especially considering other acceptable formulations of rules achieved elsewhere in the Declaration.[79]

Yet a closer scrutiny of the positions of WEOG States reveals that they did not oppose the idea that economic measures may violate the non-intervention principle. In

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75 UN Doc A/C.6/SR.823 (1963) 237 (Philippines); A/C.6/SR.812 (1963) 167 (Cambodia); A/C.6/SR.805 (1963) 128 (Ceylon); A/C.6/SR.820 (1963) 221 (Cuba); A/C.6/SR.825 (1963) 254 (Thailand).

76 Pomson (n 12) 195; Benneh (n 67) 249–50; Watts (n 12) 260.

77 Pomson (n 12) 195.

78 UN Doc A/6230 (1966) 127.

79 Pomson (n 12) 196–97.

defending the joint proposal, many of these states interpreted it as covering economic coercion. For example, the UK explicitly stated that the joint proposal 'did not…limit the prohibition of intervention to armed force only: paragraph 2B covered economic and other types of action.'[80] Similar statements were made by several other drafters of the proposal.[81] Additionally, the Netherlands stated that the principle covered 'obviously not only the use of physical force, but also coercive measures.'[82] Canada explained that the 'freedom of States to seek to influence the policies and actions of other States' was not intended to advocate the permissibility of intervention, but to legalise instances where States should influence others to follow policies consistent with international law.[83] Spain stated that illegal intervention includes 'economic or political measures of such a nature as to affect the Government of another State'.[84] France also stated at the concluding stage of the Special Committee's session that the non-intervention principle's scope went 'beyond what was required by the mere prohibition of the threat or use of force'.[85]

Moreover, the UK submitted in its 1967 proposal that '[i]ntervention in order to coerce another State, whether involving measures of an economic, political or other character, is a violation of international law and the Charter.'[86] The position was supported by Canada and Sweden.[87] The UK also stressed, when explaining its proposal, that 'if State

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80 UN Doc A/AC.125/SR.16 (1966) 17 [51] (UK).

81 UN Doc A/AC.125/SR.14 (1966) 16 [37] (Australia); A/AC.125/SR.15 (1966) 11 [25] (Canada); A/AC.125/SR.16 (1966) 14 [42] (Italy).

82 UN Doc A/AC.125/SR.16 (1966) 6 [10] (The Netherlands).

83 UN Doc A/AC.125/SR.15 (1966) 12 [29] (Canada).

84 UN Doc A/C.6/SR.877 (1965) 214 (Spain).

85 UN Doc A/8018 (1970) 91 (France).

86 UN Doc A/6799 (1967) 140.

87 UN Doc A/AC.125/SR.73 (1967) 10 (Canada); A/AC.125/SR.73 (1967) 13 (Sweden).

A sought to persuade State B by threats or by other measures amounting to economic coercion not to enter into an association with other state', that would be 'a flagrant form of intervention' that the proposal aimed to ban.[88] Even the US, which used to be the most hesitant in accepting the prohibition of economic coercion[89] stated in this regard that 'coercive economic or political measures, or any other measures of a similar character could not be condoned', and that 'intervention…by coercive political, economic or other measures… should clearly be described as illegal'.[90]

In sum, it seems safe to conclude that, consistent with most states and commentators believed, the Friendly Relations Declaration reflected a general consensus among states that economic measures are covered and regulated by the non-intervention principle. Nevertheless, it remains to be examined when economic measures are considered by states to constitute violations of the non-intervention principle.

The Precise Scope of Prohibited Economic 'Intervention' or 'Coercion'

During the drafting process, a number of states acknowledged the difficulties in giving a general definition of unlawful intervention.[91] States from different blocs, including both

88 UN Doc A/AC.125/SR.73 (1967) 22 (UK).

89 The US emphasised in the early stage of negotiation that article 2(4) is the only *Charter* rule that regulates inter-state interventions, and accordingly the *Charter* only prohibited armed intervention. It remains unclear whether this restrictive conception of intervention referred only to the non-intervention principle under the Charter or to the principle under customary law as well. See UN Doc A/AC.119/SR.29 (1964) 9, 12 and A/AC.119/SR.30 (1964) 23 (US).

90 UN Doc A/AC.125/SR.72 (1967) 6 (US).

91 UN Doc A/AC.119/L.1 (1964) 87; A/5746 (1964) 121–23, 124–27.

Third World states[92] and WEOG states,[93] shared the view that the notion of 'intervention' was 'extremely fluid', 'changeable' and 'vague', and thus hard to define at least under existing international law at the time. Confronting such a predicament, two different views emerged.

On the one hand, several WEOG states expressed their doubt and reluctance about attempts to define illegal intervention, believing that no satisfactory definition could be formulated. France and Australia suggested that, considering 'the present state of international relations', no meaningful but also widely accepted definition of intervention or coercion could be formulated under the *lex lata*.[94] The UK and the US feared that any definition would either be too restrictive to prohibit certain truly dictatorial pressures, or, perhaps more importantly to them, too expansive to allow ordinary diplomatic intercourse and international cooperation; they thus deemed it 'unwise and unprofitable' to define intervention.[95] They instead proposed a more 'flexible and pragmatic' method to leave the elaboration of the contours of the concept to competent international bodies on a case-by-case basis.[96] Canada also expressed a similar view.[97]

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92 UN Doc A/C.6/SR.806 (1963) 134 (Mexico); A/C.6/SR.816 (1963) 195 (Pakistan); A/AC.119/SR.25 (1964) 8–9 (Yugoslavia); A/AC.119/SR.30 (1964) 16 (Lebanon); A/AC.119/SR.30 (1964) 21 (United Arab Republic).

93 UN Doc A/C.6/SR.806 (1963) 250 (US); A/5746 (1964) 111 and A/AC.119/SR.26 (1964) 5 (UK); A/AC.119/SR.28 (1964) 8 (France); A/AC.119/SR.31 (1964) 8–9 (Canada); A/AC.119/SR.32 (1964) 13 (Australia).

94 UN Doc A/AC.119/SR.28 (1964) 10 (France); A/AC.119/SR.32 (1964) (Australia).

95 UN Doc A/C.6/SR.806 (1963) 250 and A/AC.119/SR.30 (1964) 22 (US); A/AC.119/SR.26 (1964) 5 (UK).

96 UN Doc A/AC.119/SR.30 (1964) 23 (US); A/AC.119/SR.32 (1964) 18–9 (UK).

97 UN Doc A/C.6/SR.877 (1965) 218 (Canada).

Another view was that the vagueness of the concept of intervention did not necessarily defy the formulation of a workable definition. Accordingly, certain states made attempts to develop a more comprehensive and precise definition by establishing criteria for the determination of illegal intervention, e.g. elements of 'coercion' and infringements on the 'internal or external affairs', 'personality', or 'political, economic and cultural elements' of a state, and/or enumerating specific types of illegal intervention.[98] However, such efforts turned out to be unsuccessful as the final wording neither enumerated any concrete examples of intervention nor provided any clear-cut qualifying criteria. Other states advocating a definition of intervention seemed more tolerant of a highly generalised formulation. Some of these states, particularly those from the Soviet bloc, suggested a categorical prohibition of any form of pressure or influence.[99] A less assertive group of states, while supporting the wording of a general and categorical prohibition, seemed to have rejected the absolute application of the non-intervention principle, and have acknowledged that the legality of a given interventionist measure under the principle is subject to case-by-case determination.[100]

Judging from the above, a tentative conclusion seems to be that states ultimately agreed on a generalised definition of intervention in the final text, qualified only with equally ambiguous terms such as 'coercion', 'subordination of sovereign rights' and

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98 UN Doc A/C.6/SR.804 (1963) 121 (Chile); A/C.6/SR.831 (1963) 280 (Iraq); A/5746 (1964) 113 and A/AC.119/SR.30 (1964) 8–9 (Mexico); A/5746 (1964) 111 and A/AC.119/SR.32 (1964) 6–7 (Guatemala); A/AC.119/SR.28 (1964) 4–5 (Argentina); A/AC.119/SR.30 (1964) 19 (USSR).

99 UN Doc A/C.6/SR.812 (1963) 168 (Syria); A/C.6/SR.814 (1963) 179 (Bolivia); A/AC.119/SR.25 (1964) 5, A/5746 (1964) 109 (Czechoslovakia); A/AC.119/SR.25 (1964) 10 (Poland); A/AC.119/SR.26 (1964) 8 (Romania); A/AC.119/SR.28 (1964) 19 (Nigeria).

100 UN Doc A/C.6/SR.806 (1963) 134, A/AC.119/SR.30 (1964) 9–10 and A/AC.119/SR.32 (1964) 21 (Mexico); A/AC.119/SR.25 (1964) 9 (Yugoslavia); A/AC.119/SR.30 (1964) 16 (Lebanon); A/AC.119/SR.30 (1964) 22 (United Arab Republic).

'secure advantages', which they found malleable enough for different interpretations, ranging from an absolute prohibition to a flexible one leaving states with great freedom in interfering with one another's affairs. This obviously offers little help in clarifying the scope of the non-intervention principle. An examination of how states perceive the legality of specific examples of economic measures is needed to further survey what constitutes prohibited economic coercion.

During the negotiation process, one of the most discussed types of economic coercion was the provision and withdrawal of economic aid. Several non-WEOG states argued that economic aid used for pressuring other states might constitute unlawful intervention.[101] Italy also mentioned this possibility, though without explicitly supporting it.[102] By contrast, the US suggested that a state's conditioning of capital investment on another's acceptance of a bilateral or multilateral investment agreement shall not be considered as illegal economic coercion.[103] In a subsequent comment, the US further stated that the suspension of economic assistance to secure 'just compensation from a foreign expropriation' did not constitute illegal coercion.[104] Sweden also argued that a State which gave aid to another could legitimately seek to influence the recipient State to ensure that the aid was used for the agreed purpose, and accordingly it was 'not easy to determine the borderline between legitimate influence and improper intervention'.[105]

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101 UN Doc A/C.6/SR.805 (1963) 128 (Ceylon); A/C.6/SR.825 (1963) 254 (Thailand); A/AC.125/SR.72 (1967) 18 and A/AC.125/SR.73 (1967) 24 (Kenya).

102 UN Doc A/C.6/SR.821 (1963) 227 (Italy).

103 UN Doc A/AC.125/SR.72 (1967) 5 (US).

104 (1976) DUSPIL 578.

105 UN Doc A/AC.125/SR.73 (1967) 13 (Sweden).

States also disagreed on the legal characterisation of trade-related measures. Mexico argued that it is 'plainly unlawful' when a state applies 'discriminatory health regulations' to ban imports of a product from a given country to force its sovereign will.[106] Cuba similarly suggested that 'the closing of markets' and the 'establishment of embargoes' constituted economic coercion.[107] By contrast, France argued that 'raising its customs tariffs with a view to initiating negotiations with another State on certain economic problems' did not constitute economic coercion, even if this might result in certain economic advantages to the sender state.[108] The US suggested that economic policies are 'generally recognized as lying within the discretion of the State taking them' unless prohibited by treaty or customary law, and thus they could not 'merely by virtue of their consequential relationship be considered intervention.'[109] It also stated that international law recognises an 'inherent right to exercise full control over its trade relations, including the withholding of exports and prohibition of imports with respect to any other state or states, absent treaty commitments to the contrary.'[110]

In sum, the *travaux* suggests that states remained profoundly divided on what economic measure constitutes coercion under the non-intervention principle.[111] Third World and Soviet states generally claimed that economic measures such as (withdrawal of) aid or embargoes that are weaponised to alter the sovereign will of another state shall be

106 UN Doc A/AC.119/SR.30 (1964) 8–9 (Mexico).

107 UN Doc A/C.6/SR.820 (1963) 221 (Cuba).

108 UN Doc A/AC.125/SR.12 (1966) 6 [5] (France).

109 UN Doc A/C.6/SR.825 (1963) 250 (US).

110 DUSPIL (n 104) 577.

111 Damrosch (n 13) 10.

regarded as prohibited coercion. Major WEOG states, however, emphasised states' freedom to 'seek to influence the actions and policies of other States' and even deemed it 'inevitable and desirable'.[112] Though not all WEOG states directly commented on the legality of specific types of economic measures, it is reasonable to infer that they at least wanted to maintain a flexible interpretation of the far-from-self-evident concept of economic coercion. It was perhaps because of such ambiguity that the debates preceding the adoption of the Declaration did not centre on a definition of the term 'coerce', as different sides could have their respective understanding of it. [113] It is therefore concluded that, by the adoption of the Friendly Relations Declaration, there was still no general *opinio juris* as to the exact scope of economic coercion, a notion which received unanimous support but remained 'devoid of legally definable content'.[114]

2.1.4 The Charter on the Economic Rights and Duties of States (GA Res 3281 (XXIX))

As a result of developing states' push for the New International Economic Order (NIEO), the GA adopted Resolution 3281 (XXIX) on 12 December 1974 with 120 votes in favour, 6 against and 10 abstentions.[115] Apart from citing non-intervention as a guiding principle in the Preamble, the relevant article on economic coercion (article 32) resembles those that appeared in previous resolutions. The legal status of the Charter, however, has been controversial. In *Texaco*, the sole arbitrator questioned the extent to which the Charter

112 UN Doc A/5746 (1964) 111; A/6230 (1966) 127.

113 Pomson (n 12) 198.

114 ILA Statement 62.

115 UN Doc A/PV.2315 (1974) 1372.

reflects customary law, though he only explicitly denied the customary status of those provisions on nationalisation and compensation.[116] As to article 32 in particular, it obtained 119 votes in favour, 0 against, and 11 abstentions in a separate vote.[117] With no express objections, it follows that at the adoption of the Charter, states still generally accepted that the non-intervention principle included economic coercion. Nevertheless, the relevant article and the debates surrounding it did not focus on the meaning that should be ascribed to economic coercion, and thus cannot not help determine the scope of this concept.

2.1.5 Declaration on the Inadmissibility of Intervention and Interference (GA Res 36/103)

On 9 December 1981, the GA adopted Resolution 36/103 with 102 votes in favour, 22 against, and 6 abstentions.[118] The significance of the resolution lies in its enumeration of twenty-three detailed 'rights' and 'duties' deriving from the non-intervention principle, with paragraph (k) listing several specific forms of illegal economic coercion, including:

> …the duty of a State not to use its external economic assistance programme or adopt any multilateral or unilateral economic reprisal or blockade and to prevent the use of transnational and multinational corporations under its jurisdiction and control as instruments of political pressure or coercion against another State, in violation of the Charter of the United Nations;

However, the legal value of the instrument is largely diminished by the fact that it was opposed by almost all WEOG states. As to this provision on economic coercion, the US described it as referring to 'new and hitherto unrecognized duties of States' which it

116 *Texaco* (n 38) 28–30.

117 [1974] YUN 402.

118 UN Doc A/36/PV.91 (1981) 1631.

had ‘the most serious substantive difficulties’ with.[119] Similarly, Finland expressly stated that it ‘would have voted against’ the paragraphs regarding ‘the economic aspects of the principle of non-interference’.[120] Accordingly, it is likely that the Charter and the provision on economic coercion do not reflect customary law.[121] At a minimum, WEOG states and non-WEOG states were still divided on whether pressure exerted through economic assistance programmes and multinational corporations constitutes economic coercion.

2.1.6 The Serial Resolutions on Economic Coercion

Starting in 1983, the GA has been adopting a series of resolutions entitled ‘economic measures as a means of political and economic coercion against developing countries’ – and since 1997 entitled ‘Unilateral economic measures as a means of political and economic coercion against developing countries’ (hereinafter ‘Coercion against Developing Countries Resolutions’) – which have essentially identical content and which condemn unilateral economic coercion.[122] Generally, these resolutions ‘recall’ and/or ‘reaffirm’ the principles contained in previous GA resolutions[123] that ‘no State may use or encourage the use of unilateral 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’,[124] ‘bear in mind’ the ‘general principles governing international trade and trade

119 UN Doc A/C.1/36/PV.51 (1981) 56 (US).

120 ibid 58 (Finland).

121 Jamnejad and Wood (n 7) 355; Kunig (n 11) [20].

122 Adopted on a yearly basis from 1983 to 1987, and biennially since then.

123 Including *inter alia* the Friendly Relations Declaration and the Charter on the Economic Rights and Duties of States.

124 UN Doc A/RES/38/197 (1983) to A/RES/76/191 (2021).

policies for development',[125] and 'urge' or 'call upon' the international community to 'adopt urgent and effective measures to eliminate the use of unilateral coercive economic measures against developing countries'. [126] Since 2007 the resolutions have also 'recognize[d]' that such measures 'constitute a flagrant violation of the principles of international law as set forth in the Charter, as well as the basic principles of the multilateral trading system'.[127]

Similarly, starting in 1996, the GA has been adopting annually resolutions entitled 'Human rights and unilateral coercive measures' (hereinafter 'Coercion and Human Rights Resolutions'). These resolutions 'reaffirm' the 'pertinent principles and provisions contained in the Charter of Economic Rights and Duties of States', in particular article 32, [128] 'stress' that unilateral coercive measures are 'contrary to international law, international humanitarian law, the Charter of the United Nations and the norms and principles governing peaceful relations among States' and 'urge' all states to cease adopting or implementing such measures.[129]

Clearly, these two series of resolutions have explicitly accepted that the non-intervention principle may be violated through the adoption of certain unilateral economic measures—namely, those that are deemed to be 'coercive'. Although the terms 'economic coercion' or 'unilateral coercive economic measures' have not been directly defined, some of the early resolutions cite 'trade restrictions, blockades, embargoes and other economic

125 ibid.

126 UN Doc A/RES/52/181 (1997) to A/RES/76/191 (2021).

127 UN Doc A/RES/62/183 (2007) to A/RES/76/191 (2021).

128 UN Doc A/RES/51/103 (1996) to A/RES/77/214 (2022).

129 ibid.

sanctions' as 'a form of political and economic coercion'. It is thus reasonable to interpret the resolutions as considering a broad range of economic measures as coercive. This can be confirmed by non-WEOG states' statements concerning the issue, which seem to include 'any' or 'all (other) forms of' 'economic, financial and trade measures' as prohibited coercive measures.[130]

However, the voting pattern does not suggest that these positions have been accepted by the international community as a whole. In recent years, a steady voting trend has been formed where the Coercion against Developing Countries Resolutions obtain roughly 130 positive votes from non-WEOG states and around 50 abstentions from WEOG states and their allies, and the Coercion and Human Rights Resolutions attain about 130 non-WEOG states' positive vote and around 50 negative votes from WEOG countries and their allies.[131] Obviously, WEOG states and their allies have again deviated from other states' conception of unilateral economic coercion. An analysis of the precise positions of these opposing and objecting states follows.

The US has been straightforward about its justification for the legality of unilateral economic measures, i.e. that they derive from 'the sovereign right of States to conduct their economic relations freely and to protect legitimate national interests'.[132] This justification seems to imply that the US considers all unilateral measures concerning its 'economic relations', which presumably cover most types of economic measures, to be non-coercive under the non-intervention principle.

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130 See eg UN Doc TD/552 (2021); [2022] PMPRC, 19 October <http://un.china-mission.gov.cn/eng/hyyfy/202210/t20221019_10786144.htm>.

131 A Hofer (2017) 16 CJIL 188.

132 See ibid 189.

The EU has taken a more cautious approach regarding the legality of unilateral economic measures. On the one hand, it has consistently stated that 'economic measures should be compatible with the principles of international law as set out in the Charter of the United Nations, including in the wider sense the principles of the multilateral trading system and the rules of the World Trade Organization'.[133] On the other hand, in explaining its abstention regarding the Coercion against Developing Countries Resolutions, it has stated since 2007 that

> unilateral economic measures are admissible in certain circumstances, in particular when necessary in order to fight terrorism and the proliferation of weapons of mass destruction, or to uphold respect for human rights, democracy, the rule of law and good governance.[134]

The reference to 'democracy, the rule of law and good governance' in the latter statements is significant for the present discussion: even if conduct concerning terrorism, proliferation of weapons of mass destruction and human rights is regulated by international law and thus falls outside the reserved freedom of sovereign states, the use of economic measures to push for 'democracy', 'rule of law', and 'good governance' clearly constitute interference in a state's *domaine réservé*, as the choice of governmental structure and political system is one of the most accepted examples of *domaine réservé*[135] and there barely exists a right to democracy and/or rule of law under international law.[136] Accordingly, the EU has been suggesting that when unilateral economic measures are taken for certain purposes that it deems legitimate, they remain lawful despite intervening in the

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133 Hofer (n 131) 189–90.

134 ibid.

135 *Nicaragua* (n 8) 108 [205].

136 GH Fox, 'Democracy, Right to, International Protection', *MPEPIL* (2008) [4]–[7]; see also the literature cited in J Klabbers et al (2021) 32 EJIL 10.

domaine réservé of another state. The necessary implication then is that such measures do not constitute economic coercion in the EU's view. In sum, it seems fair to conclude that, although the EU has not gone so far as explicitly rejecting the possibility that unilateral economic measures may violate the non-intervention principle, it favours a limited and flexible definition of economic coercion as compared with non-WEOG states.

Judging from the above, despite the repetition of numerous resolutions on Economic Coercion since the 1980s, no consensus on the scope of economic coercion has been formed. Indeed, the fact that non-WEOG states deemed it necessary to continuously push for the adoption of such resolutions is evidence of their *desire* or *expectation* to establish their conception of economic coercion as the standard under customary law; the only logical consequence of this is that such a standard has not been established as *lex lata*.[137]

2.1.7. Interim Conclusion

To sum up, the general positions expressed by states on the law on non-intervention and economic coercion confirm that economic measures may be in violation of the non-intervention principle, but do not offer conclusive guidance as to the legal content of illegal economic coercion. WEOG states generally demonstrate a flexible understanding of economic coercion, and some of them have even explicitly opposed the categorisation of certain types of economic measures as illegal coercion. Given that WEOG states are especially capable of imposing economic measures, it is unsurprising that they have taken this position in order to avoid constraints on the range of foreign policy tools available to

[137] R Porotsky (1995) 28 VJTL 927; Hofer (n 131) 196.

them. By contrast, non-WEOG states generally have a broader conception of economic coercion, believing that certain economic measures not prohibited by general international law such as economic aid and trade control could constitute coercion at least when they are accompanied by a coercive intent (with the exception of a few states seemingly adhering to a more flexible approach). This is in line with the UN Secretary-General's Note in 1993 which stated that there was 'no clear consensus in international law as to when coercive economic measures are improper, despite relevant treaties, declarations and resolutions adopted in international organizations which try to develop norms limiting the use of such measures.'[138] To further address the problem, it remains to be examined whether any implications as to the concept of economic coercion can be drawn from state practice.

2.2 Specific Instances of State Practice

This section analyses specific instances of practice where states impose and respond to unilateral economic measures aimed at altering one another's behaviour. It aims to determine whether there is any kind of economic measures which the international community as a whole agrees are coercive and thus unlawful. Two preliminary remarks on scope are required.

Firstly, this section only discusses economic measures that demand certain conduct ostensibly falling within the *domaine réservé* of the target state and precludes economic measures which solely demand the compliance with norms of international law. The latter type of economic measures does not violate the non-intervention principle since they do not intend to intervene in the *domaine réservé* of another state even if the measures can

[138] UN Doc A/48/535 (1993) 1 [2(a)].

otherwise be regarded as legally coercive.[139] In these latter situations, states' positions regarding the legality of such economic pressure will not be very helpful for the topic at hand, as they may not be related to their attitudes towards the coercive nature of the relevant act at all.[140]

Secondly, given the limited scope of this work, the practice included in this section must be selective. I will look at high-profile and representative practice of major sender states, i.e. WEOG states, of exerting economic pressure to bring about changes in the sovereign choices of other states within their reserved domain. However, considering the sheer number of 'sanction regimes' established by these states and the similarities among many of them, it is both unrealistic and unnecessary to devote time to conducting a comprehensive description and analysis of all such practice. Instead, a considerable portion of this section will be devoted to discussing the practice of non-WEOG states in imposing economic pressure. Since they have traditionally been both the targets of alleged economic coercion and advocates for the illegality of economic coercion, such practice, as well as the responses triggered by that practice, serves as particularly valuable evidence as to the international community's view on the issue. The instances of practice are provided in chronological order.

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139 See section 1.2 above.

140 Especially for states that have supported the lawfulness of such economic measures, as they may have claimed so only because the measures did not interfere with the *domaine réservé* of the target state and not because they believed the measures not to be coercive.

2.2.1 The Soviet Union's Economic Pressure against Albania

Since Khrushchev delivered his 'Secret Speech' denouncing Stalin during the 20th Congress of the Communist Party of the Soviet Union in 1956 and subsequently advocated for de-Stalinization policies, political and ideological differences intensified within the Soviet bloc. Notably, the communist parties in Albania and China remained strongly aligned with the Stalinist model and expressed dissatisfaction with Khrushchev's political stance, which they criticised as 'revisionist'. To exert pressure on Albania to align with their position instead of China's, the Soviet Union implemented various economic measures against Albania starting in March 1960, including withdrawing scholarships granted to Albanian students and technical specialists sent to assist Albania's economy, cancelling all aid to Albania's third five-year plan and eventually cutting off all trade with Albania. It also effectively excluded Albania from the Council for Mutual Economic Assistance. The measures were not lifted until the dissolution of the Soviet Union in 1991.[141]

Since international law does not oblige Albania to adopt the same political position with its allies, the demands of the Soviet Union obviously fell within the *domaine réservé* of Albania. However, it can be inferred that the Soviet Union, without putting forward any legal justification for its economic measures, believed in the lawfulness of measures.[142] Albania described the Soviet economic pressure as 'improper', 'unacceptable', 'wrong', or even sometimes 'brutal interference' in its internal affairs, [143] but it is unclear whether these

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141 For an overview of the history, see RO Freedman, *Communist Economic Warfare* (1970) 58–80.

142 MB Akehurst (1974-5) 47 BYIL 37–38.

143 See eg E Hoxha, *Selected Works* (1980) 189, 626, 662.

accusations were meant to have any international legal implications or were purely political in nature. Indeed, as commentators have observed, 'there was no room for the principle of non-intervention' in the relations among socialist states, as there existed a higher norm of 'socialist' or 'proletarian' internationalism which could trump the application of the non-intervention principle.[144] Therefore, despite their strong support for an expansive definition of prohibited intervention (which presumably covered all forms of economic pressure) during the drafting process of various normative instruments, the practice of the Soviet Union along with other Eastern Bloc (or Socialist) states, which regarded severe economic pressure like the Soviet pressure against Albania as lawful, undermined the formation of any *opinio juris* among them about a coherent definition of prohibited intervention and economic coercion.

2.2.2 Indonesian Boycott against Malaysia

Since June 1961, Malayan Prime Minister Tunku Abdul Rahman had been pushing for a merger of Malaya, Singapore and other British colonies in Borneo to form a Federation of Malaysia. The proposal was opposed by Indonesia, particularly after the outbreak of the 1962 Brunei revolt. On September 16th, 1963, the state of Malaysia formally came into existence with the merger of Malaya, Singapore, North Borneo and Sarawak, and it decided to break off diplomatic relations between its predecessor (Malaya) and Indonesia on the next day. In response, Indonesia decided to cut off all economic relations with Malaysia on September 21st and President Sukarno announced the 'ganyang Malaysia' ('Crush Malaysia') campaign on September 25th. The relevant Indonesian measures included a

144 H Neuhold, *Law of International Conflict* (2015) 164–65; RJ Vincent, *Nonintervention and International Order* (1974) 183–87.

total ban on import from and export to Malaysia as well as reshipment of cargoes in Singapore.[145] The confrontation later escalated to a military conflict. Eventually, domestic political strife in Indonesia forced Sukarno to transfer power to General Suharto, who ended the confrontation and reestablished normal relations with Malaysia in 1966.[146]

The boycott appeared to contradict Indonesia's traditional position as a strong supporter of the non-intervention principle and prohibition of economic coercion. Indeed, less than 2 months after the imposition of the boycott, Indonesia argued in the Six Committee that a state would violate the non-intervention principle against another by 'refusing to recognize its new government and subjecting the latter to economic or financial pressure until it was obliged to resign or was overthrown'.[147] It is nevertheless possible to harmonise these seemingly contradictory positions. As Indonesia claimed that Malaysia was 'but British colonialism in new form' and 'did not arise out of a free association at the will of the people concerned',[148] it seemed to have suggested that its economic measures constituted responses to a violation of the principle of self-determination.[149] Indonesia also implied that the formation of Malaysia violated the 1963 Manila Agreements and the economic measures were to counter such breaches.[150] Moreover, it seemed to have justified its confrontation policy by accusing Malaysia of aiding and assisting, or failing to prevent illegal subversion against Indonesia.[151] It can thus be suggested that Indonesia believed

145 [1963] NYT, 22 September 2.

146 For an overview of the history, see JAC Mackie, *Konfrontas* (1974).

147 UN Doc A/C.6/SR.809 (1963) 152 (Indonesia).

148 Mackie (n 148) 203.

149 RA Falk, *Status of Law* (1970) 100.

150 See eg UN Doc A/PV.1219 (1963) 11–12 [102]–[108] (Indonesia).

151 UN Doc S/PV.1144 (1964) 23 [97] and S/PV.1149 (1964) 4 [12] (Indonesia).

that its measures were to deter conduct not falling within Malaysia's *domaine réservé* and accordingly considered its boycott not to constitute prohibited intervention.

Legally more significant was the position of Malaysia, the target state. Despite complaints about Indonesia's confrontation policy in general[152] and its military operations subsequently,[153] no protest was made by Malaysia on the ground of the illegality of the boycott. As Malaysia was directly impacted by the Indonesian boycott, such silence constituted strong indication of the absence of an *opinio juris* of Malaysia[154] that economic measures like the boycott should be deemed coercive.

2.2.3 The 1973 Arab Oil Embargo

After the 1956 Suez Crisis and the Six-Day War of 1967, Israel occupied *inter alia* the Egyptian Sinai Peninsula and roughly half of the Syrian Golan Heights. On 6 October 1973, Egypt and Syria, together with a coalition of Arab states, initiated an armed conflict against Israel ('the Ramadan War') to recover the lost territories. Soon after, in response to the western support of Israel, a number of Arab oil-producing states gradually reduced their oil output up to 25 percent, causing serious difficulties to the US, Canada, the member states of the European Economic Community, Japan, and subsequently Portugal, Rhodesia, and South Africa, who were targeted by that reduction in output. After the end of hostilities

152 Describing it as 'direct attack' and 'disregard[ing] diplomatic etiquette and all international practices', see [1963] The Straits Times, 22 January 1; [1963] The Straits Times, 20 September 1.

153 See eg UN Doc S/5930 (1964).

154 Since reaction is called for when the relevant practice affects the interests or rights of the receiving state, otherwise the silence would amount to acquiescence. See UN Doc A/CN.4/682 (2015) 106 [23].

in late October and the conclusion of a ceasefire agreement and a 'six-point' disengagement agreement by January 1974, the embargo eventually ended in March 1974.[155]

As the embargo was in response to a breach of international law – the military occupation of Egyptian and Syrian territory – it could not be regarded as interference in the *domaine réservé* of Israel.[156] It remains to be examined, however, whether the embargo intervened in the reserved domain of targets other than Israel, who had not violated the rule on the use of force. Some argue that states targeted by the embargo violated their obligations of neutrality by supplying war materials or allowing their territories to be used for transiting war materials to Israel.[157] However, there was 'no evidence for the assertion of a breach of neutrality' by the Arab states; instead, they only claimed that the embargo was to counter the 'unfriendly' or 'hostile' stand of certain WEOG states, and asserted a right to control oil supplies and prices based on their economic sovereignty.[158] It follows that the Arab states considered their oil embargo to be lawful regardless of its underlying intent (to intervene in the *domaine réservé* of other states or not); in other words, the embargo was believed to be non-coercive.

The international community remained largely silent as regards the legality of the oil embargo under the non-intervention principle, which had been textually codified just a few years ago. It was observed that 'not a single voice has been raised in the United Nations'

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155 For an overview of the history, see Shihata (n 4) 592–98; JJ Paust and AP Blaustein (1974) 68 AJIL 410–12.

156 Shihata (n 4) 617.

157 ibid 615–16; Boorman III (n 66) 229.

158 Bowett (n 66) 247; Shihata (n 4) 593–96.

to cite the non-intervention principle as applicable to the Arab oil embargo.[159] For non-WEOG states, such silence may have resulted from geopolitical reasons or the limited effects of the embargo on their interests, or because they simply deemed the embargo as not interfering in the *domaine réservé* of the target states. But even for WEOG states and their allies, the target states of the embargo in the present case, 'no real effort was made' to characterise the Arab oil embargo as economic coercion against them.[160] Accordingly, the 1973 Arab oil embargo, despite its significant impact on the global economy, was not seen by most WEOG states and their allies to constitute economic coercion. This also appears to have been the most widely accepted view among scholars at the time.[161]

2.2.4 The US Embargo against Nicaragua

In July 1979, the *Frente Sandinista de Liberación Nacional* (the 'Sandinistas') led a revolution in Nicaragua and successfully established itself as the government in Nicaragua. After an initial period of friendly relations with the US, the Sandinistas soon consolidated its power, turned to the Soviet bloc, and allegedly began to support insurrectional and subversive activities in El Salvador, Honduras, and Costa Rica. In response, the Reagan administration decided to use mines against Nicaraguan ports, to provide support to the *contras* in Nicaragua and to take a series of economic measures.[162] The economic measures included the cessation of economic aid of around USD 36 million per year, the blocking of loans from international and regional financial institutions (causing losses to the tune of

159 RN Gardner (1974) 52 Foreign Affairs 567.

160 Bowett (n 66) 246; I Shihata, *Oil Embargo* (1975) 51–59.

161 HG Kausch (1977) 46 NJIL 32; Boorman III (n 66) 231; R Bilder (1977) 12 TILJ 41; Lillich (n 67) 362; Joyner (n 55) 252, 254. But cf Paust and Blaustein (n 155) 410; Cameron (n 14) 244.

162 For an overview of the history, see E Crawley, *Nicaragua in Perspective* (1984) 169–86.

USD 200–400 million), the reduction of a 90% quota of sugar imports from Nicaragua (causing losses of USD 15–18 million), and eventually resulted in a comprehensive trade embargo against Nicaragua.[163]

The US broadly claimed that its measures were taken in response to Nicaragua's previous conduct, such as its armed and subversive activities in Latin America and its political suppression domestically, which allegedly violated the prohibition of the use of force and human rights law, respectively.[164] However, some of Nicaragua's acts, especially the interventionist activities abroad, were either considered not established for lack of evidence or had ended when the comprehensive embargo began in 1985.[165] The US itself also admitted that its economic measures were intended to prevent funds going towards Nicaragua's militarisation and to suppress its military and security ties to Cuba and the USSR and its imposition of a Communist totalitarian regime.[166] These acts by Nicaragua, however, were not prohibited by international law.[167] Therefore, the Nicaraguan embargo clearly interfered in matters within Nicaragua's reserved domain, and would thus violate the non-intervention principle once established as coercive.[168]

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163 *Nicaragua* IV ICJ Pleadings 9, 122; V ICJ Pleadings 95, 97.

164 *Nicaragua* (n 8) 130–35 [257]–[69]; (1985) 24 ILM 813.

165 *Nicaragua* (n 8) 86 [160]–[62].

166 R Reagon [1983] RRPLM, 10 May <https://www.reaganlibrary.gov/archives/speech/announcement-revised-united-states-sugar-import-quotas-nicaragua-honduras-costa>; R Reagan [1985], RRPLM 1 May <https://www.reaganlibrary.gov/archives/speech/message-congress-economic-sanctions-against-nicaragua>.

167 *Nicaragua* (n 8) 130–31, 135 [258], [269].

168 Pomson (n 12) 208–09.

Nicaragua unsurprisingly contended that the US embargo constituted coercion and illegal intervention,[169] which was supported by many non-WEOG states. For example, nine OAS member States submitted a draft resolution that reaffirmed that adopting unilateral coercive economic measures violates the UN Charter and the OAS Charter and urged 'a repeal of the complete trade embargo and other coercive measures taken against Nicaragua'.[170] The US, by contrast, maintained that 'there is no general principle of customary law which obliges one State to trade with another', and that the OAS Charter 'did not, and was not intended to, create such a rule.'[171] When the issue was eventually put before the ICJ, the Court made an extremely brief ruling:

> At this point, the Court has merely to say that it is unable to regard such action on the economic plane as is here complained of as a breach of the customary-law principle of non-intervention.[172]

It is unclear what the reasoning behind the decision was. Some may link the Court's reason for characterising the Nicaraguan embargo as non-coercive to its *dicta* in subsequent paragraphs of the judgment regarding the freedom of states to conduct their trade relations absent specific treaty commitments or other specific legal obligations.[173] Such an interpretation of the Court's reasoning is confusing, however, since the sovereign freedom to decide on one's economic relations is not absolute as it may encroach upon the sovereignty of others – this is exactly the situation that the non-intervention principle is

169 *Nicaragua* (n 8) 126 [244].

170 Benneh (n 67) 241.

171 ibid 241–42.

172 *Nicaragua* (n 8) 126 [245].

173 ibid 138 [276].

supposed to regulate.[174] Two possible interpretations remain accordingly: (1) the Court simply denied that economic measures, or at least the type of measures imposed by the US, may be characterised as coercive;[175] (2) although the Court did not rule out the applicability of the non-intervention principle to economic measures, or more specifically to trade embargoes, financial restrictions, and withdrawal of aid, it nevertheless set a high standard for these measures to constitute coercion.[176] In any event, *Nicaragua* established that some of the 'most common, and potentially most severe' economic measures could not constitute economic coercion, at least under the law at the time of the ruling.[177]

2.2.5 The US Comprehensive Embargo against Cuba

In 1960, US President Eisenhower cancelled Cuba's sugar quota and prohibited all exports from the US to Cuba except food and medicine.[178] This was in response to the Cuban revolution against the Batista regime, and to Cuba's conduct towards US corporations, which was perceived as hostile. In 1962 President Kennedy imposed a total embargo against Cuba, and the US prohibited any financial transactions between US citizens and Cuba and any travel to Cuba and ordered the freezing of all Cuban assets in the US. Despite limited relief during the Carter administration, the measures persisted through the 1970s into the 1980s and 1990s. In 1992 the Bush administration adopted the Cuban Democracy Act, which prohibited transactions between foreign subsidiaries of US corporations and Cuba and prohibited the entry into US ports of any ships that had visited a Cuban port in

174 JC Henderson (1986) 43 WLLR 179.

175 Pomson (n 12) 209–11.

176 Jamnejad and Wood (n 7) 370–71; Tladi (n 55) 100–01.

177 Jamnejad and Wood (n 7) 370.

178 White (n 5) 100.

the past six months. In 1996 President Clinton introduced the Helms-Burton Act which codified and strengthened the embargo by opposing Cuban membership of the IMF and World Bank and allowing private law actions before US courts against all foreign companies in Cuba whose business is related to property confiscated by the Cuban government since 1959. The embargo was slightly relaxed during the Bush and Obama administrations, but most restrictions under the embargo have remained until this day.[179]

A preliminary issue to address here is whether the US measures constitute solely responses to Cuba's alleged violations of international law, including its failure to provide compensation upon expropriation of US corporations, its intervention in Latin American and African states as well as the regime's violation of human rights norms.[180] The evidence suggests that they are not. Many of Cuba's allegedly wrongful acts would have ceased since the 1990s when it ceased any intervention abroad, but the embargo continued afterwards. In any event, the relevant US legislation states that the embargo is aimed at 'the holding of free and fair elections in Cuba' and at the 'formation of a transitional government or a democratically elected government in Cuba'.[181] This explicitly suggests that the embargo has an objective other than the enforcement of international law, i.e. to alter the political system of Cuba. Therefore, the embargo intrudes into Cuba's reserved domain and should be seen as violating the non-intervention principle if it is also of a coercive nature.

179 For an overview of the history, see ibid 114–27.

180 ibid 99.

181 Helms-Burton Act § 6022.

The legality of the embargo has been widely debated in the GA, and a resolution condemning the embargo entitled 'Necessity of ending the economic, commercial and financial embargo imposed by the United States of America against Cuba' has been adopted annually since 1992. The resolutions 'reaffirm', among other principles, 'the sovereign equality of States, non-intervention and non-interference in their internal affairs and freedom of international trade and navigation', and 'call upon' the US to refrain from carrying on the embargo 'in conformity with their obligations under the Charter of the United Nations and international law, which, inter alia, reaffirm the freedom of trade and navigation.' [182]

Many states have expressly supported the resolution and deemed the US embargo as illegal economic coercion. Cuba itself has repeatedly alleged that the embargo constituted illegal intervention in its domestic affairs.[183] The Non-Aligned Movement has called for 'strict adherence to the principle of non-interference' and '[i]n this context' called for the termination of the embargo.[184] Many non-WEOG states have also claimed that the embargo constitutes economic coercion and a violation of the non-intervention principle.[185] Apart from these states, since 1996, almost all WEOG states have voted in

182 See UN Doc A/RES/47/19 (1992) to A/RES/77/7 (2022).

183 See eg UN Doc A/47/400 (1992) 5; [2022] CFM, 19 October <https://cubaminrex.cu/en/cubas-report-resolution-75289-united-nations-general-assembly-entitled-necessity-ending-economic>.

184 See eg UN Doc A/47/PV.70 (1992) 33 (Indonesia, speaking on behalf of the non-aligned countries).

185 See eg UN Doc A/77/PV.28 (2022) 7 (Nicaragua), 10 (Angola), 12 (Algeria), 13 (Zimbabwe), 17 (Belize), 21 (Solomon Islands), 22 (Sri Lanka), and 23 (Indonesia) for the most recent debate.

favour of the resolutions.[186] For the last 19 resolutions (since 2003) there have been at most five states abstaining or voting against.[187]

However, such overwhelming support for these resolutions cannot automatically be read as evidence of a general *opinio juris* considering the embargo against Cuba as economic coercion prohibited under the non-intervention principle. Firstly, the operative part of the resolutions has never expressly invoked the non-intervention principle, but instead focused on obligations concerning 'the freedom of trade and navigation'; the omission may be interpreted as states having reservations as to the coerciveness of the embargo *per se*.[188] Secondly, the preamble also mentions concerns about the embargo's 'extraterritorial effects' on 'the sovereignty of other States', and it may be argued that the preambular references to the non-intervention principle only point to coercive interference in the reserved domain of these third states.[189] Thirdly, a closer look at the voting explanations suggests that WEOG states and their allies which have voted in favour of the resolutions have refrained from basing the illegality of the embargo on the non-intervention principle; instead, they have been consistent in criticising only the embargo's 'extraterritorial application and impact…in violation of commonly accepted rules of international trade'.[190] Of course, such omission does not denote unequivocally that these states have regarded the embargo as non-coercive and thus lawful under the non-

186 See UN Doc A/51/PV.57 (1996) 22 and subsequent voting records.

187 See eg UN Doc A/77/PV.28 (2022).

188 Porotsky (n 137) 940–41.

189 BE Hernández-Truyol (2009) 4 IHRLR 65.

190 For earlier statements, see eg UN Doc A/47/PV.70 (1992) 79–81 (UK, speaking on behalf of the EC) and A/48/PV.48 (1993) 10 (Canada), 12 (France), 13 (Japan). For recent statements, see eg A/77/PV.28 (2022) 19–20 (Czech Republic, speaking on behalf of the EU).

intervention principle: since these states perceive the embargo as a 'bilateral' matter between Cuba and the US,[191] their legal reaction is not necessarily called for. Nevertheless, the cautious language used by these states at least indicates that they prefer to maintain some flexibility on the issue. Additionally, the US has, at least since 1994, expressly denied the coerciveness of its embargo by justifying its conduct based on 'the sovereign right to determine its bilateral relationships, including its trading partners' rather than invoking countermeasure-type arguments.[192] Taken together, it seems fair to conclude that WEOG states have generally been reluctant to characterise the Cuban embargo as economic coercion.

2.2.6 The EU and US Economic Measures against Iran

The US has adopted various economic measures (or so-called 'sanctions') against Iran since 1979. From 1979 to 1981, the US imposed a trade embargo and froze 8.1 billion of Iranian assets as a response to the Iran hostage crisis. In 1987 it imposed another embargo on Iranian goods and services 'as a result of Iran's support for international terrorism and its aggressive actions against non-belligerent shipping in the Persian Gulf'. In 1995, President Clinton prohibited US trading with Iran's oil industry and later upgraded the measures to a full embargo, which was not eased until the election of President Mohammad Khatami in 1997. In 1996 the US passed the Iran and Libya Sanctions Act (renamed Iran Sanctions Act in 2006), imposing penalties on both American and non-American corporations that invest over US $20 million in Iran for the development of petroleum

191 See eg UN Doc A/47/PV.70 (1992) 81 (UK, speaking on behalf of the EC).

192 See eg UN Doc A/49/PV.45 (1994) 11 (US).

resources, and the Act has been extended several times since and is still in force now. Since the early 2000s the US had also been imposing measures such as restrictions on trade and access to US financial institutions in response to Iran's nuclear programme. In 2012 President Obama blocked all assets of the Iranian Government and Iranian financial institutions within US territory as 'additional steps with respect to the national emergency' posed by Iran. After the conclusion of the JCPOA in 2015, the US agreed to cancel most of its economic measures against Iran, but President Trump subsequently 'withdrew' from the JCPOA in 2018 and imposed new economic measures on oil trade and froze assets of Iranian leaders and financial institutions.[193]

The EU has also adopted different economic 'restrictive measures' against Iran. Since 2007 the EU has introduced a range of economic measures both within and beyond the Security Council's sanction regime to deter Iran's nuclear development, including the freezing of Iranian assets, a ban on the access of all Iranian cargo flights, all new 'financial support for trade with Iran', and transactions and investments in various fields with Iran.[194] These measures have been gradually lifted since the agreement on the JCPOA. The EU has also adopted various economic measures against individuals and entities 'responsible for serious human rights violations' in Iran, including freezing of their assets, prohibition to make funds or economic resources available to them, and ban on exports to Iran of goods which might be used for human rights infringements.[195] It has been shown by studies that the US and EU economic measures against Iran have caused severe impacts on Iran's

193 For an overview of the history, see MH Richter, *US Sanctions against Iran* (2021).

194 See generally in Orakhelashvili (n 15) 20–3.

195 For an overview, see [2023] European Council, 25 July <https://www.consilium.europa.eu/en/policies/sanctions/iran/>.

economy and human rights conditions, including a 'significant decline in oil sales…as well as in foreign currency reserves' and 'serious impediments' to the right to food, right to health, right to live in a favourable environment, access to clean water, freedom from poverty, right to education, right to development and the right to life of the Iranian people.[196]

Although many of the US measures have been claimed to be responses towards Iran's breaches of international obligations (under diplomatic law and the laws against terrorism and nuclear proliferation) and thus not interference in Iran's *domaine réservé*, some of them have not. For example, the purpose of Trump's 2018 'sanctions' against Iran's oil industry was to alter Iran's support for militant groups across the Middle East and its development of ballistic missiles,[197] which were not Iran's international obligations.[198] This indicates that the US has not regarded such measures as coercive. By contrast, Iran has condemned the measures multiple times, insisting that they constitute illegal interference in its internal affairs.[199] Other non-WEOG states such as China,[200] Cuba,[201] and Syria[202] have explicitly supported Iran's position. On the other hand, the EU

196 UN Doc A/HRC/51/33/Add.1 (2022) [29], [42], [54], [58]; E Ianchovichina, S Devarajan and C Lakatos, *Lifting Iranian Sanctions* (2016).

197 [2018] ABC News, 3 November <https://www.abc.net.au/news/2018-11-03/trump-and-iran-sanctions/10462528 >.

198 *Nicaragua* (n 8) 135 [269]; IS Abdel and H Menshawy (2021) 21 GJHSS 37.

199 See eg [2010] Tehran Times, 2 October <https://www.tehrantimes.com/news/227717/Iran-calls-new-U-S-sanctions-blatant-interference>.

200 See eg [2022] Reuters, 15 January <https://www.reuters.com/world/china/china-reaffirms-opposition-us-sanctions-iran-2022-01-15/>.

201 See eg M Rahmani [2022] MEHR News Agency, 17 November <https://en.mehrnews.com/news/193768/Cuba-condemns-US-anti-Iran-sanctions-interventionist-moves>.

202 See eg [2021] Xinhuanet, 28 September <http://www.news.cn/english/2021-09/28/c_1310213350.htm>.

and its member states have only condemned the extraterritorial effects of the measures on the EU's own commercial interests and countered these measures through the enactment of blocking statutes.[203] Therefore, the legal positions of WEOG states regarding the US economic measures against Iran are similar to their positions regarding the Cuban embargo, i.e. a general reluctance to expressly advocate for the coerciveness of these economic measures, even if they have significant impact.

As to EU measures against Iran, the EU has consistently claimed that such measures are solely intended to compel Iran to comply with its obligations under the law of nuclear non-proliferation, international human rights law, the *jus ad bellum*, etc.[204] Accordingly, it is difficult to argue that they have interfered in the reserved domain of Iran, and one can hardly infer any concrete information on the EU's position concerning the coerciveness of these measures. The overall conclusion drawn from the US and EU economic measures against Iran, then, must be that WEOG states are yet to form a clear *opinio juris* that recognises the coerciveness of such measures.

2.2.7 The Arab Boycott against Qatar

On June 5 2017, following long-standing political tensions and reports of sensitive statements allegedly made by the Qatari Emir, Egypt, Saudi Arabia, the UAE and Bahrain announced the severance of diplomatic relations with Qatar and imposed a series of restrictive measures, including a halt of all land, air, and sea transportation to and from

203 C Beaucillon in *Extraterritorial Sanctions Handbook* (2021) 121–23.

204 European Council (n 195); PE Dupont in *Economic Sanctions and International Law* (2016) 40.

Qatar.[205] Due to Qatar's special geographical condition as a peninsula, its access to the wider world was significantly restricted by the boycott. Consequently, the boycott caused significant impact on the Qatari economy and its people, with a financial loss of more than US $43 billion and harmful effects on human rights such as the right to health, the right to food and medicine and various economic rights.[206] The measures were lifted in January 2021 following a summit at Al-'Ula.[207]

The objective of the boycott was rather difficult to ascertain. The Arab quartet initially justified the June 5 boycott based on Qatar's alleged support for terrorist activities,[208] and relied more specifically on Qatar's alleged violation of the 2013 Riyadh Agreement and the 2014 Comprehensive Agreement when they launched the June 9 'targeted sanctions'.[209] However, as determined by the Special Rapporteur on unilateral coercive measures, there was 'a lack of evidence' for the veracity of these allegations.[210] Moreover, the 4 Arab allies subsequently issued a list of 13 demands as the condition for lifting the boycott.[211] Although most of the demands concerned the cessation of Qatar's alleged violation of international obligations, some arguably fell within Qatar's reserved

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205 P Wintour [2017] The Guardian, 5 June <https://www.theguardian.com/world/2017/jun/05/saudi-arabia-and-bahrain-break-diplomatic-ties-with-qatar-over-terrorism>.

206 A Ibrahim [2020] Aljazeera, 5 June <https://www.aljazeera.com/news/2020/6/5/beating-the-blockade-how-qatar-prevailed-over-a-siege>; UN Doc A/HRC/48/59/Add.1; OHCHR (December 2017) <https://www.nhrc-qa.org/storage/news/2018/01/OHCHR-TM-REPORT-ENGLISH.pdf>.

207 [2021] BBC News, 5 January <https://www.bbc.co.uk/news/world-middle-east-55538792>.

208 Wintour (n 205).

209 [2017] Saudi Press Agency, 9 June <https://www.spa.gov.sa/viewstory.php?lang=en&newsid=1638584>.

210 A Douhan [2020] OHCHR, 12 November <https://www.ohchr.org/en/statements/2020/11/human-rights-and-unilateral-coercive-measures-un-special-rapporteur-negative>.

211 P Wintour [2017] The Guardian, 23 June <https://www.theguardian.com/world/2017/jun/23/close-al-jazeera-saudi-arabia-issues-qatar-with-13-demands-to-end-blockade>.

domain, including in particular the demands to reduce its diplomatic relations with Iran, to terminate military cooperation with Turkey and to 'align itself with other Arabs and the Gulf, militarily, politically, socially and economically, as well as in financial matters'.[212] In early July the Arab quartet attempted to reduce the 13 demands to 6 broad principles requiring Qatar to fulfil its international commitments, but soon abandoned the plan and stuck to the original demands.[213] From an objective perspective, the boycott was likely to constitute interference in Qatar's *domaine réservé*.[214]

In its diplomatic statements[215] and pleadings before different judicial bodies,[216] Qatar described the boycott as having 'intervened in the internal affairs of the State', as 'unlawfully seeking to pressure Qatar to…interfere in Qatari sovereignty over its affairs' and as 'coercive attempts at economic isolation'. Qatar thus appeared to have regarded the boycott as economic coercion. With respect to the Arab quartet, it is noteworthy that the relevant states had consistently formulated their economic measures as the response against previous breaches by Qatar of its international obligations. On multiple occasions, these states either directly declared that the economic measures were intended to induce Qatar to comply with its counter-terrorism and non-intervention obligations, or claimed that the measures constituted countermeasures.[217] Even regarding the 13 demands that seemingly

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212 A Hofer and L Ferro [2017] EJIL:Talk!, 30 June.

213 [2017] BBC News, 19 July <https://www.bbc.co.uk/news/world-middle-east-40654023>; [2017] BBC News, 30 July <https://www.bbc.co.uk/news/world-middle-east-40769235>.

214 Hofer and Ferro (n 212).

215 [2017] Aljazeera, 24 June <https://www.aljazeera.com/news/2017/6/24/saudi-led-demands-not-reasonable-or-actionable-qatar>; UN Doc A/72/PV.4 (2017) 18 (Qatar).

216 *CERD (Qatar v UAE)* Application Instituting Proceedings [2]; *UAE Measures* Request for Consultations by Qatar [5]–[7].

217 (n 208–09); [2018] The Daily Tribune, 31 January <https://www.newsofbahrain.com/bahrain/41600.html>; *CERD (Qatar v UAE)* Preliminary Objections of the UAE Vol I [34]; *ICAO Appeal* Memorial of Bahrain, Egypt, Saudi Arabia and the

went beyond compliance inducement, the quartet maintained that they were to let the Qatari government 'fulfill their previous pledges and commitments' and were 'fully in line with the spirit' of the previous agreements concluded between the states.[218] It seems reasonable to assume that such construction of their economic measures was to avoid the possibility of the measures being deemed as illegal, supposedly under the non-intervention principle, if they were not taken for law enforcement purposes. This thus indicates that the four Arab states believed or at least accepted a high probability that the boycott was coercive.

As to global reactions, Turkey expressly condemned the 13 demands as 'against international law';[219] Iran denounced the boycott as 'unacceptable' but did not explicitly comment on its legality.[220] Besides these two major regional allies of Qatar, however, both WEOG and non-WEOG states seemed to have taken a relatively neutral stance. Non-WEOG states such as China, Russia, India, Pakistan, Malaysia, and Indonesia, which are traditional critics of unilateral economic coercion, did express concern about the situation and called for resolution of the conflict through dialogue and/or easing the measures, but all refrained from addressing the legality of the boycott.[221] So did major WEOG states such

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UAE Vol I [2.53]. But see the statement by Saudi Foreign Minister: 'there was no blockade…this is our sovereign right'; which may militate against a position recognising the coerciveness of the boycott, [2017] BBC News, 13 June 2017 <https://www.bbc.co.uk/news/world-middle-east-40261479>.

218 J Sciutto and J Herb [2017] CNN Politics, 11 July <https://edition.cnn.com/2017/07/10/politics/secret-documents-qatar-crisis-gulf-saudi/index.html>.

219 [2017] Aljazeera, 25 June <https://www.aljazeera.com/news/2017/6/25/turkeys-erdogan-denounces-demands-on-qatar>.

220 [2017] Aljazeera, 25 June <https://www.aljazeera.com/news/2017/6/25/iran-hassan-rouhani-condemns-siege-of-qatar>.

221 [2017] Reuters, 9 June <https://www.reuters.com/article/uk-gulf-qatar-china-idUKKBN18Z333>; A Shcherbak [2017] TASS, 10 June <https://tass.com/politics/950827>; [2017] The Times of India, 10 June <https://timesofindia.indiatimes.com/india/qatar-crisis-india-favours-constructive-dialogue/articleshow/59084917.cms>; F Chaudhry [2017] Dawn, 8 June <https://www.dawn.com/news/1338258/middle-east-diplomatic-crisis-lawmakers-pass-resolution-in-na-urging-restraint>; [2017] The Star, 30 June

as France, Germany, Italy and the UK.[222] The US also did not appear to have considered the boycott as illegal coercion: President Trump once described the boycott as 'hard but necessary', and while the US Secretary of State called on the quartet to ease the blockade, his reasons for this request referred only to humanitarian, commercial, and security concerns.[223] Taken together, the following conclusion may be drawn: (1) it is difficult to ascertain the exact legal positions of non-WEOG states vis-à-vis the Qatari boycott, which is understandable given the potential tension between their traditional broad understanding of coercion and the need to maintain good relations with all Gulf States; (2) there was no evidence of departure by WEOG states from their traditionally flexible position on the (non-)coerciveness of (primary) embargoes and boycotts.

2.2.8 The EU Anti-Coercion Instrument

On 8 December 2021, the European Commission submitted a proposal for an 'Anti-Coercion Instrument' to counter 'economic coercion' adopted by third states against the EU and its member states. Subsequently, the Committee on International Trade of the European Parliament adopted amendments and clarifications for the original proposal on

<https://www.thestar.com.my/news/nation/2017/06/30/neutral-malaysia-hopes-to-mediate-qatar-crisis/>; [2017] Antara, 5 June <https://en.antaranews.com/news/111240/indonesia-calls-for-dialogue-over-qatar-rift-with-arab-states>.

222 F Abuelgasim and A Batrawy [2017] The Washington Post, 15 July <https://www.nbcwashington.com/news/national-international/france-wades-into-qatar-row-urges-end-to-punitive-measures/2053296/>; [2017] Reuters, 9 June <https://www.reuters.com/article/us-gulf-qatar-germany-idUSKBN19010W?il=0>; A Younes [2017] Aljazeera, 2 August <https://www.aljazeera.com/news/2017/8/2/qatar-to-buy-seven-navy-vessels-from-italy-for-e5bn>; [2017] Aljazeera, 12 June <https://www.aljazeera.com/news/2017/6/12/uk-urges-gulf-states-to-ease-blockade-against-qatar>.

223 T Berenson [2017] Time, 9 June <https://time.com/4813247/donald-trump-contradict-rex-tillerson-qatar/>.

10 October 2022,[224] and the European Parliament and the Council reached a final political agreement on the text of the instrument on 6 June 2023.[225] The instrument is expected to enter into force in September 2023.[226]

The Anti-Coercion Instrument applies in the event of 'economic coercion', which is defined as an act that

> – interferes in the legitimate sovereign choices of the Union or a Member State by seeking to prevent or obtain the cessation, modification or adoption of a particular act by the Union or a Member State
>
> – by applying or threatening to apply measures affecting trade or investment.[227]

The wording 'interferes in the legitimate sovereign choices' implies a link between the non-intervention principle and the notion of economic coercion as defined in the instrument. This is confirmed by the preambular language of the instrument, which states that the instrument is adopted pursuant to the Friendly Relations Declaration, the 'principles of sovereign equality and non-intervention', and more specifically the obligation not to 'use or encourage the use of economic political or any other type of measures to coerce another State'.[228] It also claims that '[c]oercion is prohibited under international law when a country deploys measures…in order to obtain from another country an action or inaction which that country is not internationally obliged to perform and which falls within its sovereignty' and when 'the coercion reaches a certain qualitative

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224 A9-0246/2022.

225 [2023] European Commission, 6 June <https://ec.europa.eu/commission/presscorner/detail/en/IP_23_3046>.

226 ibid.

227 COM (2021) 775 final 16, art 2(1).

228 A9-0246/2022 amended recitals 3 and 4.

or quantitative threshold'.[229] It is thus reasonable to infer that 'prohibited' economic coercion or economic coercion that can trigger the EU's adoption of countermeasures in the Anti-Coercion Instrument refer to economic measures that are 'coercive' in the sense of breaching the non-intervention principle,[230] which is exactly the subject of this thesis.

The precise scope and content of economic coercion, however, is left unclear by the instrument.[231] The instrument suggests that coercion is found when it 'reaches a certain qualitative or quantitative threshold, depending on both the ends pursued and the means deployed', and lists 5 factors to be 'taken into account'.[232] However, the instrument does not provide any objective standard as to how these factors are to be considered.[233] One may then refer to the examples of economic coercion which the Commission identified in its impact assessment report, including Russia's threatened ban of flower imports from The Netherlands after the latter's allegation that Russia shot down Malaysia Airlines flight MH17 in 2015, China's import restrictions on Philippine bananas during the South China Sea dispute in 2016, Indonesia's block of EU imports of spirits, wine, and dairy products in response to the EU's regulatory treatment of palm oil in 2019, the imposition of additional tariffs by the US against the products of France, Austria, Spain, and Italy to counter their 'unreasonable or discriminatory' restrictions on US commerce following its Section 301 investigation in 2021, just to name a few.[234] A more explicit example may be

229 ibid amended recital 11.

230 CH Wu (2023) 57 JWT 310–11.

231 M de Andrade [2022] IELPB, 23 November.

232 COM (2021) 775 final 16, art 2(2).

233 D Raju [2022] EJIL:Talk!, 6 January.

234 SWD (2021) 371 final, 9 and 12–13.

China's *de facto* ban of imports from Lithuania following the latter's establishment of the 'Taiwan Representative Office', a *de facto* Taiwanese embassy, in Vilnius.[235] The measures against Lithuania have been suggested as a typical example of measures that the Anti-Coercion Instrument deals with,[236] which may indicate that they are considered by EU member states as economic coercion under the non-intervention principle.

However, it is uncertain what the exact legal implications of these statements are. The impact assessment report does not constitute the official legal position of EU member states, and 'economic coercion' may well be invoked as a mere political description. Indeed, when condemning China's measures against Lithuania, the EU and its member states have mainly referred to violations of trade rules and refrained from directly mentioning the non-intervention principle.[237] More importantly, in most examples mentioned above the economic measures were not unequivocally inconsistent with WTO law and had limited impact; treating them as prohibited economic coercion under the non-intervention principle will contradict the EU's long-held position that there is a high threshold for economic measures to be considered coercive, as illustrated in previous sections.[238] Therefore, more

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235 China has formally denied such restrictions, but the European Commission suggested that China has been refusing to clear Lithuanian goods through customs, rejecting import applications and pressuring EU companies to remove Lithuanian inputs from their supply chains. J Parker [2022] BBC News, 27 January <https://www.bbc.com/news/world-europe-60140561>.

236 M Reynolds and MP Goodman [2022] CSIS, 6 May <https://www.csis.org/analysis/chinas-economic-coercion-lessons-lithuania>; P Blenkinsop [2023] Reuters, 28 March <https://www.reuters.com/world/europe/eu-agrees-trade-defence-against-economic-coercion-2023-03-28/>.

237 [2022] European Commission, 7 December <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7528>; [2021] EEAS, 8 December <https://www.eeas.europa.eu/eeas/joint-statement-high-representativevice-president-josep-borrell-and-executive-vice-president_en>; [2022] MFARL, 18 August <https://urm.lt/default/en/news/lithuanias-foreign-ministry-summons-the-charge-daffaires-of-china->.

238 See also F Baetens and M Bronckers [2022] EJIL:Talk!, 19 January.

decisive evidence is needed before one can conclude that the EU has, through the Anti-Coercion Instrument, abandoned the cautious stance concerning the scope of economic coercion that it previously held. In the end, the Anti-Coercion Instrument has yet to express an unequivocal understanding of the scope of economic coercion.

2.2.9 Interim Conclusion

The examination of specific instances of state practice confirms the conclusion reached through the analysis of general legal positions of states in section 2.1. In most instances non-WEOG states have deemed unilateral economic measures as coercion regardless of their forms and impact, though there has also been inconsistent practice where states within this group engage in or fail to protest against such measures. WEOG states and their allies have generally been reluctant in condemning economic measures, even those directed against themselves, as prohibited coercion under the non-intervention principle. Although there have been signs recently that EU member states are moving towards a more expansive understanding of economic coercion, it is premature to say that these signs constitute solid legal positions that may count as evidence of *opinio juris*. For now, it seems fair to conclude that WEOG and non-WEOG states have not reached a clear consensus as to the exact legal content of economic coercion under the non-intervention principle.

3 THE ANALYTICAL FRAMEWORK FOR IDENTIFYING UNILATERAL ECONOMIC COERCION

The previous examination of state practice and *opinio juris* shows that they cannot provide useful guidance as to when unilateral economic measures constitute coercion under the non-intervention principle. Given this, it is also crucial to see how scholars define the contours of unilateral economic coercion. Additionally, given that coercive economic measures used by private entities are subject to legal regulation under various branches of domestic law, it is possible to draw analogies from domestic law to clarify the scope of economic coercion under international law, which presumably shares certain commonalities with its domestic counterpart. Accordingly, this chapter first examines the different approaches taken by international lawyers to identify unilateral non-forcible coercion and explores their pros and cons (section 3.1). It then looks at domestic legal regulation of coercive economic behaviour and seeks to draw helpful implications for clarifying the scope of the international legal regulation of unilateral coercive economic measures (section 3.2). Based on these two sections, the thesis proposes a conceptual framework for analysing and identifying unilateral economic coercion which is broadly consistent with practice and *opinio juris* of states and demonstrates internal coherence and soundness. (section 3.3).

3.1 Approaches Put forward by International Law Scholars

Based on the different factors and/or elements proposed by international lawyers, the modes for identifying unilateral coercion under the non-intervention principle can be broadly categorised into 5 groups, including approaches relying on (1) the intent of the

sender state, (2) the effects on the target state, (3) the unlawfulness of the means, (4) a combination of different factors, and (5) other approaches which cannot fall in any of the aforementioned categories. These approaches will be discussed in turn.

3.1.1 The Intent Approach

A group of scholars suggest that the coerciveness of a unilateral measure depends on the existence of an accompanying improper intent or motive on the part of the sender state. Most of them argue that any measure 'used to subordinate a state's sovereign powers to foreign control' should be considered as wrongful intervention, regardless of its lawfulness *per se*;[239] in other words, an otherwise discretionary act or a retorsion, such as withdrawal of economic aid, constitutes coercion when it is intended to interfere in another state's *domaine réservé*.[240] This approach is mainly justified by the vagueness and futility of defining coercion by its harmful effects on or the actual 'subordination of sovereign rights' of the target state. Simply put, state economies are by nature competitive, and any form of economic policy will almost inevitably cause negative consequences on other states and pressure them to adjust their own policies; thus, it is difficult to successfully and meaningfully distinguish illegal economic coercion from legal economic pressure by the measure's effects on the target state's economy and decision-making.[241] By contrast, the

239 EJ Criddle (2013) 24 EJIL 591–92.

240 O Schachter, *Theory and Practice* (1991) 199. See also Bowett (n 55) 5; Blum (n 67) 12–13; Lowe (n 7) 67; Henderson (n 174) 192–93; D Hovell (2019) 113 AJIL Unbound 144; GN Barrie (1985–1986) 11 SAYIL 46.

241 Bowett (n 66) 248; Bowett (n 55) 3–5.

wrongful intent of the sender state is a 'more effective criterion for defining illegal economic coercion'.[242]

The intent approach also aligns with the legal position of various non-WEOG states. Mexico explicitly stated during the drafting of the Friendly Relations Declaration that 'the criterion of the illegality of…coercion was the *object* sought'.[243] Argentina likewise stressed the importance of an '*intention*…to coerce the sovereign will of the other State' when defining illegal intervention.[244] Many other non-WEOG states, by condemning any pressure imposed to interfere with another state's *domaine réservé* as illegal intervention, also seemed to support the position that an economic measure constitutes coercion so long as the sender state has an intention to intrude in the *domaine réservé* of the target state.[245]

The criticism of this approach first lies in the difficulties in determining the intent of states and the corresponding legal uncertainty. Since states are incorporeal entities which possess no single state of mind and state actions are always motivated by complex political considerations, it is extremely difficult if not impossible to identify the exact intent behind an economic measure.[246] A second, and perhaps more significant criticism is that the intent approach has essentially conflated the 'coercion' requirement with the '*domaine réservé*' requirement. As argued above, the two elements of the *Nicaragua* formulation of the non-intervention principle are (1) the use of coercive methods and (2) an *intention to change* certain policy of the target state within its *domaine réservé*; the coercion element refers to

242 Bowett (n 55) 5.

243 UN Doc A/AC.119/SR.30 (1964) 8–9 (Mexico) (emphasis added).

244 UN Doc A/AC.119/SR.28 (1964) 4–5 (Argentina) (emphasis added).

245 See sections 2.1.3 and 2.1.6.

246 Cameron (n 14) 239–240; Kausch (n 161) 32; C Parry (1977) 12 TILJ 4.

wrongful *means*, and the *domaine réservé* element points to wrongful *ends*.[247] If coercion is defined solely by a wrongful intent, and such intent is in turn defined as an intention to interfere in the target state's *domaine réservé*, then the coercion element will collapse into a mere repetition of the '*domaine réservé*' requirement, and the only element that needs to be proved for a breach of the non-intervention principle will be the intent to intervene in another state's *domaine réservé*. This effectively renders the 'coercion' element redundant and could not have been what the Court intended.

Some scholars have taken a more nuanced as to intent. For example, Farer argues that unilateral economic measures constitute coercion only when they are intended to cause extremely significant impact on the target state, such as to 'liquidate an existing state or to reduce that state to the position of a satellite'; yet other less grave objectives, such as one to 'influence the foreign policy of one state as part of an effort to cause the transfer of territory where sovereignty is problematical', cannot qualify the measure as coercive.[248] The immediate problem with this formulation is that the line between sufficiently grave and insufficiently grave intent remains blurry: if 'liquidation' and 'satellisation' of a state is grave enough for rendering an act coercive, what about the intent to support a peaceful regime change, and what about supporting a secessionist movement? Moreover, using intent as the sole criterion for determining coercion may create absurd outcomes since widely accepted non-coercive actions may well be accompanied by devastating intent. Consider the example where a state imposes travel restrictions against a foreign head of state for the purpose of compelling him or her to adopt policies that will effectively render

247 See Chapter 1.2.

248 T Farer (1985) 79 AJIL 413.

the government a puppet. These measures *per se* are generally accepted as non-coercive, and it is questionable that they turn coercive once coupled with some highly destructive intent, especially when such measures contribute little to any actual changes within the target state's *domaine réservé*. It appears that a satisfactory construction of the coercion element must also consider the nature and/or consequences of the measure and not merely the motive behind it. As another example, Lillich argues that the coerciveness of economic measures should depend on whether their purpose is 'compatible with the overall interests of the world community'.[249] Yet this approach is also likely to result in unpredictability and manipulation, given the inherent vagueness of the concept 'overall interests of the world community'.

3.1.2 The Effect Approach

Another group of scholars emphasise the effects caused on the target state as determinative of whether an economic measure is coercive. Some of these writers argue that coercion is characterized by the actual subordination of the sovereign will of the target state, i.e. that the measure has 'compelled the [coerced] State to act in a way that it otherwise would not act'.[250] This approach is said to be based on a plain understanding of the meaning of 'dictatorial intervention' and philosophical studies on the concept of coercion and conditional offers/threats.[251] It also seems to be in line with the ILC's definition of coercion, which suggests that coercion 'has the same essential character as *force majeure*' and only

249 Lillich (n 67) 366–67.

250 JD Ohlin (2017) 95 TLR 1592. See also I Kilovaty (2019) 113 AJIL Unbound 90; R Jennings and A Watts, *Oppenheim* (1996) 432; Joyner (n 55) 243–44.

251 Ohlin (n 250) 1590–91; Jennings and Watts (n 250) 432.

covers conduct that 'forces the will of the coerced State…giving it no effective choice but to comply with the wishes of the coercing State'.[252]

However, analysis based on the actual deprivation of sovereign will is unfounded for several reasons. Firstly, it is inconsistent with the language of case law and GA resolutions. The ICJ clearly stipulated that intervention is wrongful when it 'uses certain *methods* of coercion', and the Friendly Relations Declaration states that '[n]o State may use or encourage the use of *economic political or any other type of measures* to coerce another State'.[253] Secondly, it creates a lot of indeterminacy: it is 'exceedingly difficult' and 'challenging' to establish a clear causal link between state conduct and outside pressure, since states often act out of a combination of both coercion and consensual/cooperative concerns, making it difficult to determine the exact motivations and causal factors driving state behaviour.[254] Thirdly, it may give rise to odd legal consequences: severe pressure that does not change the behaviour of the coerced state might be deemed non-coercive and lawful, whereas minimal pressure that happens to lead to a behavioural change would be coercive and unlawful. Also, the exact same conduct could be coercive if it prompts the coerced state to alter its behaviour, but non-coercive if it fails to achieve the intended outcome.[255] This brings about an evidently absurd 'no-win situation' where states will either resist the pressure and suffer the relevant damage but lose any protection from the non-intervention principle, or have to unwillingly comply with the intervening state's

252 ARSIWA Commentary 69 [2].

253 Hofer and Ferro (n 212).

254 Helal (n 11) 78–79.

255 ibid, 79–80.

demands in order to attain legal protection.[256] Fourthly, it is one thing to identify coercion as an unlawful act, and quite another to identify it as a basis for derivative responsibility. In fact, the ILC explicitly stated that coercion under article 18 'is not limited to unlawful coercion', and indicated that 'serious economic pressure' (which it differentiated from 'coercive interference in the affairs of another State') may constitute coercion in this sense.[257] This affirms that the definition under article 18 does not address the legality of coercion but determines when a coercing state's responsibility should be triggered by the wrongful acts committed by the coerced state, and it is perfectly reasonable that there should be different standards for these two different tasks.[258]

Other writers within the effect group do not dwell on the actual alternation of the target state's behaviour, but instead look at the intensity and gravity of the impact caused by the measure.[259] Some generally refer to the factors of intensity and effect;[260] some suggest that to constitute coercion, the 'impact of these measures on the target state…is such that it could [not] reasonably be resisted';[261] some contend that the effect of the economic measure must reach the level of 'serious', 'material' or 'clearly observable.'[262] The underlying idea is that the ICJ's reluctance of finding economic coercion in *Nicaragua* indicates that 'any prohibition of economic intervention is narrowly construed', and

256 Hofer and Ferro (n 212).

257 ARSIWA Commentary 70 [3].

258 Helal (n 11) 80.

259 The scholars referred to here also include those who consider both intent and effect as factors for the identification of coercion. This is because their consideration of the intent requirement can be seen as an (mislabelled) inquiry into the *domaine réservé* requirement, and thus effectively the only determinant they are concerned with when identifying coercion is the effect factor.

260 (1974) 122 UPLR 988, 992–93; J Schmidt (2022) 27 JCSL 80; Tladi (n 55) 100–01.

261 Jamnejad and Wood (n 7) 370–71.

262 Muir (n 66) 203; UN Doc A/44/510 (1989) Annex [11]–[12]; OY Elagab (1992) 41 ICLQ 693.

therefore the coercion element 'removes minor international friction from the scope of the principle', and should only involve acts 'of a certain magnitude' and 'to some degree "subordinate the sovereign will" of another state'.[263] This approach can also find some support in state practice. For example, the UK once stated that the concept of coercion has two elements, i.e. the intention to coerce and the effect 'created upon the political independence of another State.'[264] Nevertheless, the exact threshold for the required effect remains disputed among this group of scholars.[265] A tough follow-up question may be, if the effect of the US embargo against Nicaragua – 'the most common, and potentially most severe' economic pressure that can be employed – is not serious enough to constitute coercion as shown by the results of *Nicaragua*, what kind of effect will suffice?[266] Also, this approach does not take into account the nature of the intervening measure and may include otherwise lawful acts – acts purportedly constituting exercise of sovereign rights – as coercion.[267] This cannot be easily presumed and calls for further legal and theoretical justification.

Several commentators have also proposed certain modified versions of the effect doctrine. For example, McDougal and Feliciano suggest that the identification of coercion should consider three dimensions of effect, including 'the importance and number of values affected, the extent to which such values are affected, and the number of participants whose

263 Jamnejad and Wood (n 7) 348, 370, 381.

264 UN Doc A/AC.125/SR.10 (1966) 8 [16] (UK).

265 UN Doc A/44/510 (1989) Annex [12].

266 Jamnejad and Wood (n 7) 370; Pomson (n 12) 210.

267 For example, it has been submitted that when a state is dependent on aid from one state or conducts its trade almost exclusively with that state, then trade embargoes and withdrawal of economic aid against that state, even if not violating any other international obligation, may be deemed as coercive and thus illegal under the non-intervention principle. See Jamnejad and Wood (n 7) 371.

values are so affected.'[268] Damrosch argues that non-forcible measures directed against other states to promote policy changes are generally non-coercive and permissible unless they have the effect to 'infringe upon the ability of the target's people to exercise free political choice'.[269] Under this approach, while normal adjustment of a state's economic relationship with an unfriendly regime is lawful, economic measures that are 'so crippling as to undermine the economic foundations for the exercise of political freedoms' will constitute illegal coercion.[270] Finally, Cameron argues that an economic measure constitutes coercion when its effects entail a breach or threat to international peace; the likelihood of such threat hinges on 'the quantity of economic hardship that is suffered by the target State'.[271] These proposals, however, introduce complex value judgment into the legal assessment, may result in too much indeterminacy, and have not found general support in state practice.

3.1.3 The Lawfulness Approach

This group of commentators focus on the evaluation of the unilateral measure's nature within the broader system of international law, and argue that 'only acts that are *prima facie* wrongful under international law (e.g., armed attacks, breaches of trade agreements) constitute wrongful "intervention".'[272] The underlying rationale is that the non-intervention principle should be interpreted systematically and should not be interpreted as

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268 MS McDougal and FP Feliciano in *World Public Order* (1987) 263–68.

269 Damrosch (n 13) 49.

270 ibid 47.

271 Cameron (n 14) 251.

272 Criddle (n 239) 592. See also Ronzitti (n 7) 6; Helal (n 11) 80–81; Raju (n 233).

intended to preclude states from engaging in otherwise lawful acts of retorsion.[273] Otherwise, there will be 'no room for States to freely seek and give concessions on actions lying within their respective *domaines réservé*, in conducting their diplomatic relations'.[274] The approach is also believed to be a 'single objective legal standard' that provides more legal certainty than the effect approach.[275]

The first criticism of the lawfulness approach is that it may include certain minor pressure as coercion. Certain unlawful pressure may be so insignificant that it barely has any meaningful influence on the target state's decision-making, e.g. an export ban for limited types and numbers of goods for a limited period of time, and it seems unreasonable to treat such pressure as coercion. Secondly, using lawfulness as the sole criterion for identifying coercion seems *prima facie* inconsistent with case law and state practice. For instance, the ICJ held that the US embargo against Nicaragua violated the 1956 FCN Treaty concluded between them, while simultaneously denied that the same measure constitute coercion under the non-intervention principle.[276] Furthermore, there is hardly any state which has proposed the coerciveness of a measure should contingent upon its legality under some other legal regime. Many unilateral economic measures adopted in practice, as discussed in the preceding chapter, are also likely to have violated certain rules of international law, but are still regarded as non-coercive at least by WEOG states and their

273 Criddle (n 239) 592; Ronzitti (n 7) 6.

274 Raju (n 233).

275 Helal (n 11) 80.

276 *Nicaragua* (n 8) 140–41 [279]–[82].

allies.[277] Thirdly, there might arise a so-called 'double remedy' question: since the alleged economic coercion has already triggered breach and thus responsibility under other branches of international law, such as the *jus ad bellum* and international economic law, there is no need to provide another layer of illegality (and remedy) for such acts under the non-intervention principle.

3.1.4 The Mixed Approach: Combination of Different Factors

There is a group of writers that suggests that the determination of coercion should be a contextualised inquiry which takes into account more than one of the aforementioned factors. For example, Kunig argues that a range of factors need to be considered when determining prohibited economic coercion, including 'the object of the state action', 'intensity of the measures taken', 'the result actually reached', and 'the relationship between the means and the object'.[278] Schmitt, in the context of cyber intervention, also contends that there are 'certain non-exhaustive factors' affecting the characterization of coercion, including the operation's scale and effects, its timing, the specificity of its object, and the presence of exploitation of vulnerabilities in the target State.[279] Other opinions that propose a relatively general and flexible standard without specifying the factors to be considered are also classed in the mixed approach group. Tomuschat, for example, argues that 'the concept of coercion cannot be stated in objective terms without considering the entire context', and that the identification of coercion must be done through 'a careful

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277 The US sanctions against Iran since 2018 may serve an example here: although the sanctions regime violates the 1955 US-Iran Treaty of Amity according to the ICJ, it has not been considered as coercion by WEOG states. See *Certain Iranian Assets* (Judgment) 30 March 2023 [236].

278 Kunig (n 11) [25].

279 MN Schmitt (2021) 97 ILS 748–50.

assessment of all relevant factors'.[280] Subedi similarly states that the coerciveness of an economic measure 'depends on a case-by-case analysis of each and every kind of sanction and their impact on the target state.'[281] A few experts contributing to the Tallinn Manual 2.0 also suggest that it is 'impossible to prejudge whether an act constitutes intervention without knowing its specific context and consequences.'[282]

This contextualised approach appears to have generally coincided with the position of those states that preferred a flexible definition of coercion and intervention.[283] It has also been recently reflected in the EU's Draft Anti-Coercion Instrument, which provides for 5 factors that 'shall be taken into account' when determining economic coercion, including (1) the 'intensity, severity, frequency, duration, breadth and magnitude' of the measure, (2) the existence of 'a pattern of interference', (3) the level of encroachment upon the sovereignty of the target state, (4) the existence of 'a legitimate concern that is internationally recognised' on the part of the sender state and (5) the existence of serious attempts to settle the matter through coordination or adjudication.[284] It is clear that there is no objective standard for how a result can be reached through the consideration of these factors.[285] The problem with this approach lies exactly in such a high level of abstraction and its impact on the usefulness of the test – it is so ambiguous that is 'almost impossible to apply in a predictable and fair manner.'[286] Therefore, even if a contextualised approach

280 C Tomuschat (1999) 281 Recueil des Cours 235–36.

281 Subedi (n 55) 30.

282 Schmitt (n 24) 319.

283 See sections 2.1.3 and 2.1.6.

284 COM (2021) 775 final 16 art 2(2).

285 Raju (n 233).

286 Cameron (n 14) 240.

is to be taken, it is insufficient to merely outline the possible determinants affecting the coerciveness of economic measures; it is imperative to provide a principled approach that gives some indication as to how these factors should be applied, rationalised and ranked against concrete situations, and to examine the consistency of this approach with existing practice. This will be done in the next two sections through the analysis of domestic law and relevant state practice.

3.1.5 Other Approaches

Lastly, there are certain approaches which cannot fall in any of the above groups. Some of the representative approaches are summarised here. To begin with, Aloupi argues for an 'intent or lawfulness' model, suggesting non-forcible pressure may be illegal 'in two extreme hypotheses': first, when the measure has an illegal intent of 'affecting the stability of a government'; second, when the measure 'result[s] in depriving a state of a legal right to which it was entitled.'[287] Hofer takes a similar but slightly different approach which also focuses on both lawfulness and intent: an economic measure constitutes coercion either (1) because it violates international law or (2) because it amounts to an abuse of right, which is in turn defined as the exercise of sovereign rights accompanied with a wrongful intention solely to harm or damage another State.[288] Beyond that, Parry draws an analogy from historical fishing rights under the law of the sea and the law on the treatment of aliens, and argues that it is the abruptness of economic measures that determines whether they are coercive.[289] Accordingly, otherwise lawful economic measures may become coercive

[287] Aloupi (n 17) 576–77.

[288] Hofer and Ferro (n 212).

[289] Parry (n 246) 4.

when they constitute 'abrupt termination of or interference with an established trade pattern'.[290] Finally, Chen proposes an analytical framework based on a sliding scale between the means and object of the intervening measure: the more important the interest interfered with is, the less stringent the requirement of coercion will be and vice versa.[291] To illustrate, for 'sovereign matters of fundamental importance' such as the political and territorial integrity of a state, even non-forcible or verbal interference such as premature recognition will constitute coercion; by contrast, when the object of intervention is less significant, only manifestly coercive acts such as the use of force will be regarded as prohibited intervention.[292] Despite certain merit these approaches may have, they remain relatively niche and not generally accepted in either scholarship or practice.

In conclusion, there is still ongoing disagreement among international lawyers regarding the identification of non-forcible coercion under the non-intervention principle. Each proposed approach has its own strengths and weaknesses. To achieve a more comprehensive understanding of how the coerciveness of unilateral economic measures should be assessed, it is advantageous to look beyond international law and draw insights from more well-established areas of domestic law. This task will be undertaken in the following section.

290 ibid.

291 Y Chen, *Non-intervention* (2013) 153–54.

292 ibid 152–53.

3.2 Lessons Drawn from Domestic Law

3.2.1 Overview

Ever since the earliest stages of international law, there has been a tendency for jurists to turn to rules and theories of domestic law to further the understanding of international law, premised on a widely accepted analogy between states and natural persons (and the horizontal relationship within each type of subjects).[293] Private law, among the various branches of municipal law, has been the main reference in such analogical reasoning.[294] Indeed, as early as 1927, Lauterpacht suggested multiple examples where private law analogies may inform the content of international law, including the law of treaties, the law on acquisition of territory, the law of responsibility, the law of procedure and evidence, etc.[295] Although certain scholars have criticised the use of domestic law analogy in international legal argumentation,[296] it is an overstatement to claim that the international and municipal legal orders are so different that any domestic analogy for international legal reasoning must be rejected. Rather, the inquiry should focus on whether the disparities between a domestic rule and an international rule, or between the international and domestic legal systems in general, are significant enough so as to undermine the persuasiveness of a particular domestic law analogy.[297] It should also be noted that to rely on domestic analogy is different from borrowing 'lock, stock and barrel' from ready-made

293 ED Dickinson (1917) 26 YLJ 564–81.

294 FL Bordin in *Concepts for International Law* (2019) 26.

295 H Lauterpacht, *Private Law Analogies* (1927) 31–2.

296 See eg Dickinson (n 293) 582–91; H Thirlway (2002) 294 Recueil des Cours ch IV; J Waldron (2011) 22 EJIL 329–30; A Pellet (1999) 10 EJIL 433.

297 A Hertogen (2018) 29 EJIL 1134–36.

domestic rules,[298] but is to 'throw light on' or 'provide a way of conceptualizing' international law rules.[299] At the very least, even absent a suitable domestic analogy, the analysis of domestic law and the precise reason that bars the legal transposition may still assist in resolving the international legal problem.[300] It is thus justifiable to conclude that a study of pertinent areas of domestic law can provide valuable insights in achieving the objective of this chapter, i.e. to elucidate the relevant grey areas of the non-intervention principle in international law.

Regarding the specific issue at hand, i.e. the conception of (economic) coercion under the non-intervention principle, multiple commentators have submitted that domestic law can be a 'fruitful area of exploration' to help clarify the scope of the concept.[301] The present section will focus on two areas of municipal law: the tort of intimidation under tort law and economic duress (or economic coercion) under contract law.[302] This is because the non-intervention principle is a typical 'rule of coexistence' to ensure the mutual respect for the sovereignty of states; here states are especially comparable to individuals in private law fields such as tort, property, trust, and contract, and the two regimes are analogous in the sense that both govern the horizontal relationship between equal actors, ensure the

298 *South West Africa* [1950] ICJ Rep 148–49 (Separate Opinion by Sir Arnold McNair).

299 Hertogen (n 297) 1130.

300 M Shahabuddeen in *Honour Jennings* (1996) 101–02.

301 S Townley (2019) 42 FILJ 1200; S Wheatley (2020) 31 DJCIL 176; Ohlin (n 250) 1590–92.

302 It might be helpful to provide a general definition for both concepts here: intimidation is defined as 'the use of violence or other threats to compel a person to behave in a particular way', and has a similar meaning with 'unlawful coercion' and 'extortion'; economic duress is defined as 'conduct that constitutes the improper use of economic power to compel another to submit to the wishes of one who wields it'. See 'Intimidation' and 'Economic Duress' in *Jowitt's* (2019); 'Intimidation' and 'Coercion' in *Black's* (2019).

coexistence of these actors and safeguard and delimit their freedom of action.[303] Accordingly, domestic law that addresses inter-personal coercive behaviour can serve as a source of inspiration for the law concerning inter-state coercion. In fact, the development of the concept of coercion under another area of international law, i.e. the validity of treaties concluded through coercive means (under article 52 VCLT), has already drawn upon the concept of duress in contract law.[304] Therefore, it would be reasonable to draw similar analogies in order to enhance our understanding of the scope of coercion under the non-intervention principle.

Admittedly, the subjects regulated by the non-intervention principle and by domestic private law, i.e. states and natural persons, are quite different in nature: the former are incorporeal entities capable of carrying out legislative and enforcement acts whereas the latter are not.[305] Given that difference, there are no domestic counterparts of certain interventionist acts such as support for foreign rebel groups, prescription of extraterritorial laws and (premature) recognition of statehood and government. Nevertheless, economic coercion is known to domestic laws. Both international and municipal law deal with the situation where an actor leverages economic hardship caused against the target to alter the target's decision-making for its own benefit. The economic measures employed by individuals and states are also quite comparable: a trade embargo in violation of a bilateral trade agreement is similar to a breach of sales contract and freezes of sovereign assets are similar to the seizure or detention of another's property. Therefore, the different internal

303 Hertogen (n 297) 1135–40.

304 [1953] II YILC 149 [5].

305 Waldron (n 296) 328–30.

structures of states and natural persons do not constitute a critical dissimilarity in the regulation of economic pressure exerted between private entities and that between states. It should not affect the availability of domestic law analogies in the present chapter.

Admittedly, in domestic legal orders, coercion is also regulated by criminal law and certain areas of constitutional or administrative law. However, these two branches of law are less analogous with the concept of coercion in international law. Whereas the non-intervention principle stipulates a general prohibition of coercion, criminal law usually categorises coercive behaviour into specific types of crimes and assigns legal responsibility respectively; and whereas the non-intervention principle regulates the horizontal relationship between states, domestic public law only regulates the vertical relationship between the government and individuals. Consequently, criminal, constitutional, and administrative law are excluded from the inquiry in this section. Furthermore, in terms of which states' domestic laws to examine, this section only investigates the laws of England, Australia, Canada, Hong Kong, the US, Germany, and China. This selection is based on the author's language proficiency and the time constraints of the research. While a more comprehensive study involving the domestic laws of additional legal systems would undoubtedly enhance the persuasiveness of the analysis, it is submitted that, for the present purpose, studying the experience of these jurisdictions is sufficient to offer at least some indication and guidance on how the international law concept of economic coercion has and should develop.

3.2.2 The Evolution from Specific Types of Threats to a General Approach

The first implication from the examination of domestic law is that quite often coercion is originally identified in limited types of acts, such as physical harm or infringement of

property, and then developed to cover a wider range of coercive activities. For example, duress first appeared in the common law as a mere by-product of legal controls over crime and tort, and comprised only physical imprisonment or threats of serious bodily harm.[306] It was not until the eighteenth century that the concept of duress extended to the field of economic pressure through the doctrine of 'duress of goods', where the tortious seizure or detention of another's property was recognised as a new type of duress.[307] The introduction of a general 'economic duress' doctrine that includes other types of economic pressure, e.g. threatened breaches of contract, appeared much later. In English law, 'economic duress' was first expressly accepted by judges in the 1970s.[308] Likewise, in US law, the possibility that a threatened breach of contract may constitute economic duress or the so-called 'business compulsion' had not been accepted in judicial practice until the early twentieth century.[309]

Civil law jurisdictions following the Roman law tradition have evolved in a similar way. In Roman law, duress (*metus*) was defined as 'fear of a serious evil…which reasonably has an effect upon a man of the most resolute character'.[310] Despite such a general formulation, the scope of duress was generally understood to be limited to physical harm, including death, enslavement, imprisonment, *stuprum*, and capital charge.[311] The influence of Roman law has long restricted the development of the doctrine of duress in

306 JP Dawson (1947) 45 MLR 254.

307 ibid 255–56; *Astley v Reynolds* (1731) 2 Stra 915.

308 *The Atlantic Baron* [1979] QB 705; A Burrows, *Casebook on Contract* (2020) 801.

309 RJ Sutton (1974) 20 MLJ 563–66.

310 JA Borkowski and PJ du Plessis, *Roman Law* (2020) 349.

311 ibid; R Zimmermann, *Law of Obligations* (1996) 653–54.

continental law – for instance, the German law concept of duress was expanded to encompass a wider range of pressure only in the early twentieth century, during which courts began to hold that threats of criminal prosecution or even a refusal of payment in breach of a previous contract might constitute duress.[312]

In China, duress has long been defined as 'threatening to cause damages to the life, health, honor, reputation, or property of any citizen or [their] relatives or friends', and whether this covered economic pressure such as threatened breach of contract has been controversial.[313] Only since the 2010s has judicial practice started recognising a broader range of economic duress as a vitiating factor.[314]

Likewise, the development of the law of intimidation in English law can be traced back to cases involving physical violence and threats. Early case law only denounced as a tort the threat of death or 'mayhem' to intimidate another to conduct or refrain from certain activities.[315] It was not until the1964 *Rookes v. Barnard* decision that the tort of intimidation was extended to a broader range of activities, in this case a threatened strike by trade union members in breach of their employment contract.[316] A general definition of intimidation, which expressly encompassed the use of 'unlawful means (such as violence or a *tort* or a *breach of contract*) so as to compel another to obey his wishes', was developed

312 JP Dawson (1936-1937) 11 Tul LR 347, 357–60.

313 PRC Supreme Court Opinion, art 69; S Han, *Contract* (2018) 260.

314 See eg Q Yan and Y Zhai [2013] People's Court Daily, 20 June 7.

315 J Murphy (2014) 77 Mod LR 33.

316 *Rookes v Barnard* [1964] AC 1129.

four years later by Lord Denning MR.[317] The law of intimidation in various other commonwealth regions followed a similar path to that of English law.[318]

A similar pattern can be glimpsed in international law. Activities involving violence against another state's government or territory, i.e. the use of armed force and/or support for armed rebels in another state, have been the first recognized form of coercion in violation of the non-intervention principle. At least since the *Corfu Channel* judgment in 1949, the use of force has been considered to constitute a 'still less admissible' or 'particularly obvious' form of prohibited intervention,[319] and it was accepted even earlier that contribution to foreign armed revolution constituted illegal interference.[320] The phenomenon is supposed to have resulted from the manifest impermissibility of these acts under general international law, similar to that of tortious or criminal behaviour under domestic law. By contrast, the general prohibition of coercive intervention and the concept of economic coercion occurred much later and was generally accepted only after the adoption of the 1970 Friendly Relations Declaration. This, however, should not come as a surprise considering the fact that the general acceptance of economic duress and/or intimidation in many jurisdictions also began at roughly the same time.

3.2.3 The Indeterminacy in Law and Doctrine

The second observation is that, similar to that in international law, the scope of unlawful economic coercion or duress in domestic law has been quite indeterminate. Both US and

317 *Morgan v Fry* [1968] 2 QB 724 (emphasis added).

318 N Tamblyn, *Duress and Necessity* (2017) 8–12.

319 *Corfu Channel* [1949] ICJ Rep 35; *Nicaragua* (n 8) 108 [205].

320 H Lauterpacht (1928) 22 AJIL 105.

English case law suggest that to determine whether certain economic pressure constitutes duress a range of factors need to be considered, such as the relative bargaining positions of the parties, gravity of the threatened evil, wrongfulness or illegality of the threats, fairness of the resulting bargain, good faith of the coercing party, the existence of reasonable alternatives to the threat, etc.[321] It is observed that '[n]o single approach can reconcile all the cases' in English law concerning economic duress, especially those with regard to threatened breach of contract.[322] Likewise, in US law, courts are found to have essentially been 'making moral judgments of the most delicate sort' when identifying economic duress.[323]

In civil law jurisdictions, the vague concept of duress has also been notoriously difficult to interpret. In German law, the Civil Code (BGB) lists 'unlawful threats' as a vitiating factor for contracts, but German courts have been 'struggling…to define what exactly makes a threat unlawful', with cases related to economic pressure being the 'main disputes'.[324] The line between unlawful threat and legally accepted pressure has been extremely thin, and courts tend to consider 'a range of policy factors' to ascertain the existence of duress.[325] In particular, to determine if a threat whose means and ends are both lawful constitutes unlawful duress, German courts have adopted a test which examines 'whether in the view of all fair and right-thinking persons the pressure used was a

321 For English law, see eg *DSND* [2000] BLR 530 [131]; for US law, see eg the summary of case law in (1968) 53 Iowa LR 895.

322 A Burrows, *Restatement* (2016) 198.

323 EA Farnsworth, *Contracts* (2019) 4-102–4-103.

324 A Hadjiani (2002) OUCLF 1.

325 JM Smits, *Contract* (2021) 169; B Markesinis et al, *German Contract* (2006) 317.

reasonable means',[326] which is rightly criticized as 'overly vague'.[327] In Chinese law, the rules on duress are mainly inherited from German law, but academic scholarship on the scope of economic duress is far more scarce, and judicial practice remains inconsistent.[328]

To summarise, as a Hong Kong court has found, economic duress is 'an area of law shaped by relatively high-level principles rather than readily applicable tests. There are few hard and fast rules. Each case has to be decided on its own facts based on the guidance provided by the cases'.[329] With respect to the English law of the tort of intimidation, since the test for coercive intimidation by economic means largely overlaps with the test for economic duress,[330] it can be said that this area of law has a similar uncertain scope.

Additionally, there are varying academic doctrines and conceptualisations of economic duress and the tort of intimidation. Some representative examples are listed here. Firstly, there is a subjective or 'overborne of will' approach, which suggests that duress is found where the threat has actually overcome the free will of the victim so that no consent is given.[331] In other words, to constitute economic coercion, commercial pressures 'must be such that the victim must have entered the contract against [their] will' and 'must have had no alternative course open to [them]'.[332] Secondly, there has been reliance on the lawfulness of the conduct. This approach argues that the tort of intimidation and economic

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326 BGHZ 25, 217 and 220, cited and translated in JP Dawson (1976) 89 HLR 1049.

327 S Zhang (2018) 30 PULJ 642.

328 Y Liu (Xiamen University 2018) 2–4, 7.

329 *Zebra Industries* [2015] HKEC 1807 [87].

330 A Howell and K Hamill [2010] TRPL, 24 March <https://uk.practicallaw.thomsonreuters.com/7-501-7822>.

331 (n 321) 893–94.

332 *Pao On* [1980] AC 636.

duress should be regarded as a regime that polices coercive activity by 'drawing a line consistent with the rest of the law', i.e. by outlawing activities which have already been prohibited by other areas of law.[333] Thirdly, reference has been made to commercially viable alternatives. This line of thinking suggests that the core inquiry for the law on economic duress is to determine whether the contract was formed for lack of alternatives, or simply by a calculated business decision.[334] Fourthly, there has been focus on the unreasonableness of the threat as an alternative for the demand, meaning that the key factor for economic duress must be the fact that the threatened action is an 'unreasonable alternative to an injurious contractual demand in a bargain situation'.[335] Fifthly, there is emphasis on the malicious use of unequal bargaining position, suggesting that duress is established in any 'excessive gain that results, in a bargain transaction, from impaired bargaining power' regardless of the form of the impairment.[336] Lastly, some have proposed a three-prong analytical framework, under which a threat constitutes unlawful duress if (1) the means used is illegal, or (2) the end of the threat is illegal, or (3) the particular connection between means and end is unlawful, even if the means and end are lawful *per se*.[337] None of these theories have been universally accepted or expressly recognised as authoritative interpretation of law.

Given the indeterminate legal regulation of intimidation and economic duress in domestic law, the uncertainty regarding its counterpart, i.e. the regulation of unilateral

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333 Tamblyn (n 318) 16.

334 MH Ogilvie (1981) 26 MLJ 317.

335 (n 321) 898–99.

336 Dawson (n 306) 289.

337 Markesinis et al (n 325) 317; Q Zhu, *Civil Law* (2016) 286–87.

economic coercive measures in international law, appears more understandable. If it is difficult to draw a clear line between permissible economic pressure and illegal economic coercion in legal systems with centralised legislative and adjudicatory institutions, it is surely more difficult to articulate a general rule on economic coercion with sufficient clarity in the international legal system where such centralised decision-making mechanisms are generally lacking, and where states, as both lawmakers and subjects of law, have deep political divisions on the issue. Nevertheless, domestic courts and academics have dedicated countless efforts to achieve a more lucid and coherent comprehension of economic duress and intimidation. These endeavours have identified some common organising principles and legal tools that can serve as guidance for the conceptualisation of economic coercion in international law. The next section will review these ideas.

3.2.4 The Underlying Rationale for Determining Economic Coercion

This section discusses the underlying rationale for the identification of economic duress and intimidation in the laws of different jurisdictions, their similarities and differences, and how they may inform the determination of economic coercion in international law. As a preliminary observation, the rules on coercion in both international law and domestic law share the same overall objective, which is to differentiate acceptable pressure from unacceptable pressure in an interdependent world. In interpersonal relationships, the existence of certain element of social or economic pressure is inevitable.[338] Such pressure needs to be tolerated or even encouraged, especially commercial dealings, in order to

[338] Dawson (n 312) 361.

facilitate bargains and promote competition.[339] Therefore, not all 'coercion' in this sense should be legally actionable.[340] The task of economic duress and/or intimidation is to delineate the line between lawful commercial pressure from unacceptable coercive pressure.[341]

The same holds true in the international context. As demonstrated above, in the modern world states are economically linked and are meant to compete with each other.[342] This is why WEOG states have been consistently emphasising 'the generally recognized freedom of States to seek to influence the policies and actions of other States' which is 'inevitable and desirable' in such an interdependent world,[343] and even certain non-WEOG states concede that such influences and pressures are 'a part of international relations'.[344] Therefore, the objective of the element of coercion under the non-intervention principle 'is not to prevent such activity'.[345] Instead, it aims to establish a dividing line between *unwelcome* deployment of pressure and *unlawful* intervention in order to ensure that while severely detrimental pressure is forbidden, 'legitimate' policy pursuit is not hampered.[346] The following three subsections will explore the appropriate criteria for delineating this line.

339 R Bigwood (1996) 46 UTLJ 201–02.

340 Tamblyn (n 318) 16.

341 R Bigwood, *Exploitative Contracts* (2002) 280.

342 (n 241) and accompanying text; see also Kunig (n 11) [25].

343 UN Doc A/5746 (1964) 111; A/6230 (1966) 127.

344 UN Doc A/AC.119/SR.25 (1964) 9 (Yugoslavia); A/AC.119/SR.30 (1964) 8–9 (Mexico).

345 UN Doc A/5746 (1964) 111.

346 Wheatley (n 301) 184; Damrosch (n 13) 47.

The Unfeasibility of the 'Overborne Will' Approach

As mentioned above, in both domestic and international legal doctrine, one popular test for the identification of coercion is the 'overborne will' or 'subordination of sovereign will' approach, which emphasises the actual deprivation of the target's free will.[347] This approach, as pointed out correctly by domestic law scholars, is unfounded for at least two reasons. Firstly, the 'overborne will' theory does not accurately describe the process of coercion and is not rationally persuasive. It is fictional to say that there is 'no alternative course' available to the victim, and thus his/her will is 'overborne' when he/she is coerced; instead, the victim always has available alternatives – even the victim of a mugger may choose to resist at the risk of their own life, provided they possess the courage to do so.[348] In fact, 'an intention to bring about a consequence of an act can co-exist with a desire that such consequence should not ensue',[349] and 'the more unpleasant the alternative, the more real the consent to a course which would avoid it.'[350]

Secondly, and perhaps more importantly, the inquiry into the factual question of whether one's psychological status has changed distorts the real issue, that is, what sort of threats it is legally permissible to make.[351] Since both normal pressure and coercive pressure present a choice between evils, it is impossible to differentiate between these situations based on the level of the freedom of the consent; in this sense, the 'overborne

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347 (n 250, 331–32) and accompanying text.

348 PS Atiyah (1982) 98 LQR 199–200.

349 *Lynch* [1975] AC 690 (Lord Simon of Glaisdale).

350 Dawson (n 306) 267.

351 Atiyah (n 348) 202.

will' test 'has little analytical value in itself'.[352] Similarly, in international law, it is impossible and indeed artificial to differentiate between the situation where the target state's will is 'actually overcome', and where the target state retains 'some free will'. Accordingly, the 'subordination of sovereign will' approach which sees coercion as the actual subordination of sovereign will is principally unhelpful and should be rejected.

The Proposal Prong: Lawfulness of the Coercive Act as a Critical Determinant?

Legally prohibited coercion generally has two constituents: the first is the 'proposal prong', i.e. the normative wrongfulness of the threatened conduct; the second is the 'choice prong', i.e. sufficient restriction of the target's exercise of free will.[353] This subsection deals with the first constituent. Such a requirement is intended to differentiate prohibited coercion from allowed pressure by the nature of the threatened act.[354] As observed above, in all jurisdictions studied, the initial concept of duress and intimidation only encompasses acts that are also prohibited by the law as crimes or torts; they necessarily satisfy the requirement of wrongfulness for coercion. The controversial question, then, is how to characterise activities that are not as evidently unlawful as crimes and torts, such as a (threatened) breach of contract or even an otherwise lawful exercise of one's freedom. A detailed exploration of how different jurisdictions tackle these issues follows.

In commonwealth jurisdictions, a (threatened) breach of contract has been explicitly recognized as a type of activity satisfying the unlawfulness requirement for the

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352 (n 321) 894.

353 A Wertheimer, *Coercion* (1987) 172; for judicial illustration, see eg *The Universe Sentinel* [1983] 1 AC 400.

354 Bigwood (n 339) 213–14.

tort of intimidation.[355] When it comes to economic duress, there are cases where (threatened) breaches of contract are held not to constitute duress.[356] Nevertheless, these decisions can be interpreted as resulting either from the fact that the coercer has been trying to solve a genuine problem such as significant changes in circumstance rather than exploiting the target's weak position in bad faith,[357] or that the target has reasonable/practical alternatives to resist the threat (which will be further discussed in the next subsection).[358] These situations thus remain exceptional, and the general rule still deems a (threatened) breach of contract as unlawful duress.[359]

The situation is more complex concerning acts not violating any other obligations of the coercer. Regarding the tort of intimidation, Australian and Canadian courts have been rather consistent in maintaining that the illegality of the threat is necessary; accordingly, a supplier's refusal to provide goods or services in the future, for example, does not constitute intimidation.[360] In English law, the classical position is that only an otherwise illegal act can constitute coercion and the tort of intimidation.[361] Although there have been recent decisions leaving open the possibility of 'lawful act intimidation', no court has explicitly ruled in the affirmative of this approach.[362]

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355 See eg *Morgan* (n 317) 724 for English law; *Latham v Singleton* [1981] 2 NSWLR 857–58 and *AS v Murray* [2013] NSWSC 733 [14] for Australian law; *Eks v Tadeu*, 2019 ONSC 3745 [141] for Canadian law.

356 See eg *Pao On* (n 332) and *DSND* (n 321) for English law; *Moyes & Groves* [1982] 1 NZLR 368 for New Zealand law.

357 P Birks, *Restitution* (1989) 183; J Beatson, *Unjust Enrichment* (1991) 119.

358 Burrows (n 322) 198.

359 Tamblyn (n 318) 92.

360 *IceTV* [2008] NSWSC 1321; *Roman Corp* [1973] SCR 820.

361 *Rookes v Barnard* (n 316) 1168.

362 *Berezovsky v Abramovich* [2011] EWCA Civ 153 [5].

With respect to the law on economic duress, again Australian and Canadian authorities have been very cautious about the possibility of lawful act duress.[363] The few case law and scholars that accept lawful acts duress seem to have based the test for such duress on the 'unconscionability' of the coercer.[364] In English law, although there has been explicit recognition of the possibility of lawful act duress, there has been no case that has found the existence of duress caused by lawful acts except when (1) the case involves very specific types of threats such as 'blacking' ships from leaving the port,[365] or (2) the case involves unlawful acts such as breach of contract apart from the lawful threat.[366] In a recent case the UK Supreme Court put forward a 'unconscionability' test for lawful act duress which asks whether the threatening party 'deliberately manoeuvres' the threatened party into a 'position of vulnerability' or 'increased vulnerability' via 'morally reprehensible' conduct that would render enforcement of a contract 'unconscionable'.[367] In this case, although the claimant was a travel sales agency whose business was almost exclusively reliant upon its ability to sell the tickets from the defendant, an airline company, the defendant's threat of ceasing the claimant's ticket selling permission in the future was held not to constitute duress because the defendant had not performed any unconscionable acts to create the claimant's vulnerable position.[368]

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363 See eg *Smith v William Charlick Ltd* (1924) 34 CLR 38 and *Karam* [2005] NSWCA 344 for Australian law; *Sutherland v Sutherland*, (1946) 4 DLR 605, *Morton Construction Co v Hamilton (City)* (1961) 31 DLR (2d) 323 and *Greater Fredericton*, (2008) 290 DLR (4th) 405 for Canadian law.

364 See eg *Crescendo* (1988) 19 NSWLR 40; *Stott v Merit Investment Corpn* (1988) 63 OR (2d) 545; SM Waddams, *Contracts* (2017) 354.

365 *The Universe Sentinel* (n 353).

366 *Borrelli v Ting* [2010] UKPC 21; *Progress Bulk Carriers* [2012] EWHC 273 (Comm).

367 *Times Travel* [2021] UKSC 40 [2], [4], [17].

368 ibid [58].

The US approach to economic duress seems much more flexible. Section 176(1) of the US Restatement (Second) of Contracts provides:

> A threat is improper if
>
> (a) what is threatened is a crime or a tort, or the threat itself would be a crime or a tort if it resulted in obtaining property,
>
> (b) what is threatened is a criminal prosecution,
>
> (c) what is threatened is the use of civil process and the threat is made in bad faith, or
>
> (d) the threat is a breach of the duty of good faith and fair dealing under a contract with the recipient.[369]

The fourth situation is the most relevant here, from which two implications can be drawn: firstly, a (threatened) breach of contract does not constitute duress *per se*, but requires further qualification (i.e. lack of good faith and fair dealing); secondly, it is possible for lawful acts to constitute duress (as long as they breach good faith and fair dealing duties). Indeed, the US legal tradition does not adhere strictly to the *pacta sunt servenda* principle and recognises a right to breach a contract to cut commercial loss so long as compensation is paid.[370] Thus a (threatened) breach of contract, albeit certainly unlawful, is not itself improper coercion, let alone acts not prohibited by law.[371] Nevertheless, under certain circumstances such economic pressure may be deemed improper and thus impugnable, that is when the pressure is in violation of a good faith/fair dealing standard, or, in scholars' words, is 'deliberately oppressive', 'extortionate',

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369 *Restatement (Second) of Contracts* (1981) § 176(1).

370 OW Holmes (1897) 10 HLR 462.

371 For examples in case law, see eg *Hackley et al v Headley* 8 NW 511 (Mich 1881) for (threatened) breach of contract, and *United States v Bethlehem Steel Corp* 315 US 289 (1942) for lawful act.

'exploitative', 'opportunistic' or 'unconscionable'.[372] To find such unfairness, a variety of factors may be considered.

Firstly, it should be asked whether the pressure is applied to achieve 'illegitimate ends' not intrinsically connected with the right (to renegotiate a contract or not to deal with someone in the future, etc.).[373] Accordingly, a threat by an employer to terminate a contract of employment (when the employer has a right to do so) is generally not duress but may constitute duress if used as a means to release a claim sell shares of stock.[374]

Secondly, it should be asked whether and to what extent the threatening party has contributed to the effectiveness of the threat by prior unfair dealing.[375] Therefore, though a supplier's refusal to supply goods in the future is generally lawful and non-coercive, it may become coercive when the supplier induces the purchaser to resell and then threatens not to supply.[376] Similarly, if a buyer of business induces the seller to cease seeking other ways of resolving its financial difficulties and then threatens to not to pay, the threat may constitute coercion.[377] By contrast, when the threatened party is in a hard financial situation in urgent need of the threatening party's performance of a previous contract, but such difficulties are neither created by the threatening party nor contemplated by either party at the conclusion of the previous contract, then a (threatened) breach of contract is not improper coercion, even if it does take advantage of the vulnerability of the threatened

372 See the summary in Bigwood (n 339) 245.

373 Restatement (n 369) § 176(2)(c); J Dalzell (1942) 20 NCLR 364.

374 *Mitchell v CC. Sanitation Co* 430 SW2d 933 (Tex Civ App 1968); *Laemmar v J Walter Thompson Co* 435 F 2d 680 (7th Cir 1970).

375 Restatement (n 369) § 176(2)(b); Farnsworth (n 323) 4-103–4-104.

376 *Hochman v Zigler's Inc* 50 A 2d 97 (NJ Eq 1946).

377 *Litten v Jonathan Logan Inc* 286 A 2d 913 (Pa Super 1971).

party.[378] In essence, to determine whether a (threatened) breach of contract or otherwise lawful act constitutes duress, US courts are asked to make a qualitative judgment about the nature of the coercer's conduct and the substantive merits of the resultant transaction.[379]

Under German law, as introduced above, a threat can constitute duress when (1) the means used, or (2) the end of the threat, or (3) the particular connection between means and end, is unlawful.[380] Traditionally, a (threatened) breach of contract, e.g. refusal to deliver goods in pursuit of extra payment, will fall within the 'illegal means' category and thus be coercive, but in certain cases the courts ruled towards the opposite and considered the threat to be acceptable economic pressure.[381] When a lawful act falls within the 'unlawful end' or 'unlawful combination of means and end' categories is also difficult to ascertain. It has been held that absent an appropriate relationship between the means and ends of the threat, e.g. when a creditor threatens to expose the debtor for drunk driving to get immediate repayment, the threat constitutes duress despite both its means and ends being lawful.[382] However, in other cases courts have been struggling to regard lawful acts as duress. For example, when an estate seller threatened not to sign the purchase contract (so that the estate agent would not attain any commission) unless the agent waived the seller's agency fee, and the agent succumbed to the threat due to their urgent need for money, the court held, in contrast to a previous decision, that the seller's conduct did not

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378 See eg *ConAgra Trade Grp v Fuel Exploration* 636 F Supp 2d 1166 (D Colo 2009) and *Swindle v Harvey* 23 So 3d 562 (Miss App 2009); but cf *Austin Instrument Co v Loral Corp* 272 NE 2d 522 (NY 1971).

379 Bigwood (n 339) 246.

380 See supra note 337 and accompanying text.

381 Dawson (n 312) 360–61; H Kötz et al, *European Contract Law* (2017) 187.

382 Hadjiani (n 324).

constitute duress.[383] In the end, the determination of lawful act duress still depends on a largely discretionary and case-specific test of 'reasonableness in the view of all fair and right-thinking persons'.[384]

The dominant position in Chinese legal scholarship is inherited from the 3-prong test in German law.[385] The judicial position, however, is far less clear. A case study of over 100 judgments has found that the courts' determination of duress has been 'confusing, discretionary and arbitrary', taking into account a variety of factors including (1) the threatened party's will to seek legal remedies, (2) the legitimacy of the interests sought, (3) the circumstances under which the threat occurred, (4) the fairness of the resulting contract and (5) the nature and gravity of the means of the threat, etc.[386] Regarding economic duress more specifically, in some cases breaches of contract are held to be duress whereas in others they are not. For example, in one case a foreign travel agency, just one day before departure, threatened to cancel all local service unless extra payment was made, and the court held that duress was made out.[387] By contrast, in another case the court held that refusal to pay wages to force an employee to sign a termination agreement does not constitute duress.[388] In a case where the operator of a gym threatened a sell-off of gym passes to force a termination of the original operating agreement, the Court held that this did not amount to duress as the termination agreement might have been signed 'out of the own interests' of

383 BGH 28.5.1969, cited and translated in ibid.

384 K Larenz, *German Civil Law* (2013) 550; Markesinis et al (n 325) 317.

385 Zhu (n 337) 286–87.

386 Liu (n 328) 28–31.

387 *Google Travel* (2013).

388 *Zhong Zhiyong* (2019).

the threatened party.[389] It is thus fair to suggest that Chinese law also adopts a flexible and case-by-case approach to identify economic duress.

In sum, the legality of the means taken by the coercer has been an important factor in domestic law's regulation of economic coercion – illegal acts, whether being a violation of criminal/tort law or a breach of contractual obligations (at least when not done in good faith), are generally regarded as improper coercion/duress/intimidation. For otherwise legal acts, the law has been much more uncertain. Despite some attempts to maintain a clear line between lawful and unlawful acts and preclude the former from the scope of duress/intimidation, most jurisdictions have chosen to accept the possibility of lawful act duress/intimidation and engage in a substantive (and subjective) value judgment to determine its existence in individual cases. The underlying rationale for these tests, as scholars have submitted, are essentially the doctrines of abuse of rights and unconscionability.[390] What this implies for international law is that there are two possible modes to determine whether an act constitute improper coercion: one uses lawfulness as the key criterion for the determination of coerciveness, and thus acts not violating any other international obligations will never be deemed coercive; the other relies on the fairness of the pressure under the specific circumstances to reach a comprehensive assessment of coerciveness, and may regard otherwise lawful acts as coercion. Section 3.3 will examine the pros and cons of each mode and propose the better option to adopt.

389 *Zhuang Yuezhu* (2009).

390 Tamblyn (n 318) 22–29; Dawson (n 306) 289; Waddams (n 364) 354.

The Choice Prong: Effects on the Target and Lack of Reasonable Alternatives?

This subsection focuses on the 'choice prong' of coercion, which looks at the deprivation of the exercise of free will on the part of the target. The fundamental reason for policing coercion is to prevent interference with autonomy.[391] However, the gravity of the threatening party's pressure and its corresponding impact on the target's decision-making may differ. In some situations, the gravity of the consequences of resisting the threat and the degree of influence on the threatened party's choice are so minimal that, in a moral sense, they should resist the pressure, or, if they choose to comply with the demand, at least not expect judicial remedies afterwards.[392] In particular, in an economic or commercial context, when alternatives are available to the threatened party, a choice to succumb to the threat may simply be a 'calculated business decision' rather than a forced submission to the threat; in this case, the threat is better qualified as lawful commercial pressure and there is 'a strong case' for not awarding relief against such pressure.[393] By the same token, when the consequence of a threat is so serious that no one in the situation should be expected to resist it, even if someone does choose to withstand the threat and suffer the loss instead, the law should label such pressure as prohibited coercion. Therefore, to identify coercion, an additional question that needs to be addressed, apart from the wrongfulness of the threatened act, is whether the impact on the target's free will is significant enough to warrant legal intervention for its protection.

391 Tamblyn (n 318) 14.

392 Wertheimer (n 353) 268.

393 Ogilvie (n 334) 317; Sutton (n 309) 586.

The acknowledgment that it is necessary to have a certain degree of influence on the target's will is well-established under the law of the tort of intimidation. It has been held that the tort requires that 'the threat must…coerce the claimant to take [some course of action]' and that 'the threatened unlawful act must be effective'.[394] When the threatened party does not comply with the threat, the threat must achieve a level that it is serious and has been taken seriously by the target so as to allow the claimant to seek injunctive relief.[395] In an Australian case, for example, the court indicated that a boycott campaign by retailers in Europe and the US against the Australian wool industry may be grave enough to constitute intimidation, considering 'the additional funds and resources by way of publicity, promotions and otherwise to combat the intended effect of the respondents' conduct, and the adverse publicity consequences of that conduct'.[396]

Regarding the law on economic duress, the question becomes a bit more complex. In German law, a causal link is required between the signing of the contract and the fear of the threat.[397] This is a purely factual test which determines whether the actual state of mind of the threatened party is altered by the threat and does not examine whether it was reasonable for them to succumb.[398] Chinese legal doctrine adheres to the same approach.[399] By contrast, it is well established in US law since the mid-twentieth century that duress can only be found when the threat has left the target 'no reasonable alternative'.[400] This is a

394 *Berezovsky v Abramovich* (n 362); *Australian Wool Innovation* [2005] FCA 1307 [66].

395 *News Group Newspapers* [1987] ICR 204.

396 *Australian Wool Innovation* (n 394) [69].

397 Hadjiani (n 324).

398 Markesinis et al (n 325) 315.

399 Zhu (n 337) 285–86.

400 Dalzell (n 373) 367; Farnsworth (n 323) 4-106–4-107.

normative test which determines whether the degree of pressure exerted is objectively grave enough to justify the target's succumbing to the threat.[401] The law of various commonwealth countries have also followed this approach by requiring the lack of 'reasonable', 'acceptable', 'practical', 'viable', 'adequate' or 'realistic' alternative in identifying duress.[402] The form of alternatives may be legal (i.e. judicial remedies) or extra-legal (i.e. commercial substitutes), and the reasonableness of the alternatives is dependent on all the circumstances such as the target's background, capacity, relation of the parties and availability of disinterested advice, etc.[403] Regarding economic pressure in particular, the withholding of goods and services will amount to duress when no reasonable substitute in the market is available,[404] but will not constitute duress if a proper (even if more expensive) substitute can be found in the market in an expedient manner.[405] In addition, the threat not to pay is presumed to leave the threatened party with sufficient alternatives,[406] but this assumption may be rebutted when the threatened party is in a state of particular necessity such as facing bankruptcy or being the sole source of income of a family.[407]

In international law, it seems preferable to adopt the 'reasonable alternative' test in the identification of coercion under the non-intervention principle. The German and Chinese approaches, which focuses on the factual causation between a threat and the

401 Bigwood (n 339) 252.

402 ibid 209, 252.

403 Farnsworth (n 323) 4-107–4-111.

404 See eg *Atlas Express v Kafco* [1989] QB 837; *Kolmar v Traxpo* [2010] EWHC 113 (Comm) [93]–[94]; *Austin Instrument* (n 378).

405 See eg *DSND* (n 321) [136]; *ConAgra Trade* (n 378).

406 See eg *Hackley* (n 371); *Sistrom v Anderson* 124 P 2d 372 (Cal App 1942).

407 See eg *Totem Marine Tug & Barge v Alyeska Pipeline Serv Co* 584 P 2d 15 (Alaska 1978); *In re RLS Legal Solutions* 156 SW 3d 160 (Tex Civ App 2005).

resulting action compelled by the threat, are applicable only in a particular factual situation where the threatened party does comply with the demands of the threatening party (typically by concluding a contract according to the latter's will in duress cases). These approaches thus fail to address the scenarios where the threatened party opts not to yield and endure the consequences of the threat, which is likely to arise within the context of intervention in international law. These approaches also overlook the aforementioned distinction between pressure of substantial gravity and pressure that can be reasonably resisted, which deserves different legal treatment. In the latter case, it is difficult to assert that the sovereign will of the target state has been 'coerced'.[408] The 'reasonable alternative' test, by contrast, will not encounter these shortcomings.

3.3 The Proposed Analytical Framework

What does this review of the approaches of domestic law to the regulation of coercion tell us about the regulation of coercion under international law? Drawing on the principles and tools provided by domestic law, an analytical framework for the determination of economic coercion is proposed as follows:

Firstly, it is necessary to establish whether the unilateral measure falls within universally recognised types of coercive behaviour, such as the use or threat of force and/or the (non-military) support to foreign subversive activities. If so, then such measures automatically constitute coercion. Unilateral economic measures will generally not fall within these types, except, perhaps, when the measure amounts to a *de facto* blockade.

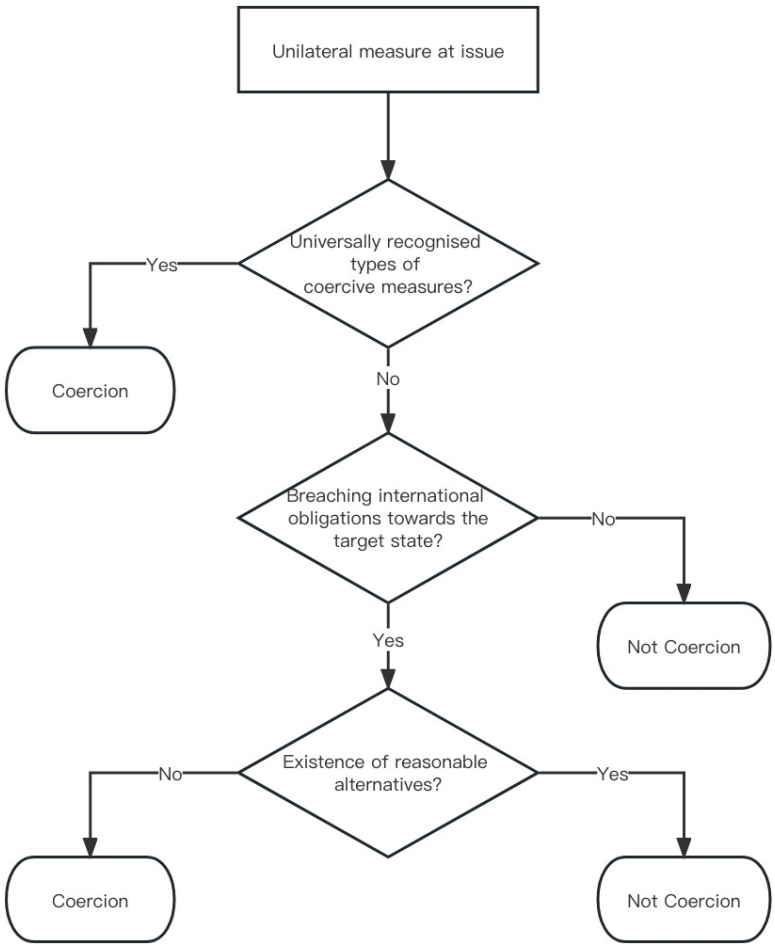
[408] Jamnejad and Wood (n 7) 348.

Secondly, failing the first step, i.e. if the measure does not fall within the aforementioned categories, it must be determined whether the unilateral measure violates any international obligations of the sender state towards the target state. If no such obligations are breached, then the measure will not constitute coercion.

Thirdly, if the unilateral measure breaches the international obligations of the sender state, it needs to be determined whether the effect of the measure is so significant that the target state has no reasonable alternatives to resist. If so, then the measure constitutes coercion; if not, then it does not amount to coercion.

This framework can also be seen in the following flowchart:

Figure 1: The Proposed framework for the identification of coercion



It is submitted that this model provides a framework to theorise and conceptualise the notion of coercion as well as its contours. By utilising analogies from well-established domestic legal doctrines on coercion, it offers a test with solid theoretical foundation for differentiating between permissible economic pressure and prohibited economic coercion. It also avoids most of the criticisms against the various approaches to conceptualise coercion that were discussed in section 3.1: it does not conflate the coercion element with the *domaine réservé* element and render it redundant; it avoids an artificial test of actual 'subordination of sovereign will' and the absurd results this test may cause; it also reduces

some of the arbitrariness and predictability caused by purely contextual analysis.[409] Additionally, by including the qualification of 'reasonable alternatives', it remedies the main defects of the pure lawfulness-based approach, i.e. the possibility of including unlawful but subtle pressure as coercion, and the existence of certain instances of otherwise unlawful economic measures being held to be non-coercive.[410]

The model will preclude economic pressure that is illegal but inflicts little harm on the target from being characterised as coercive on the basis that such pressure can be reasonably resisted. It also makes it possible to provide a consistent and coherent explanation of case law and positions of states. An illustrative example is the ICJ's determination that the US economic measures against Nicaragua were non-coercive yet simultaneously constituted a violation of the US-Nicaragua FCN treaty. This can be rationalised on the premise that Nicaragua had the capability to reasonably resist the effects of those measures. The same conclusion may apply to the US measures against Iran following its withdrawal from the JCPOA. Admittedly, one may question whether this would stretch the meaning of 'reasonable alternatives' too far, given that economic measures such as those against Nicaragua are 'vast and devastating' and seemed to be 'a major cause of the actual regime change'.[411] Nevertheless, because of the deep divergence of states' positions regarding the non-intervention principle, such arbitrariness seems inevitable in almost any test for economic coercion. The flexibility of the reasonableness

409 (n 246–47, 253–58, 265–67, 286) and accompanying text.

410 (n 275–77) and accompanying text.

411 Pomson (n 12) 210.

test at least renders it suitable for further normative development: it can be interpreted more restrictively if future practice points to this direction.

Possible Counterarguments

Advantages aside, the proposed framework will be more comprehensive and robust if some counterarguments are addressed and rebutted. Firstly, it might be argued that the framework is inconsistent with certain practice and legal positions of states. For example, it has been submitted that the US embargo against Cuba is likely to have violated rules under the WTO regime as well as various human rights of the Cuban population.[412] Yet WEOG states and their allies have avoided expressly denouncing the embargo as coercive.[413] Given the severity of the impact of the embargo, it is difficult to argue that it is unlawful yet reasonably resistible, and hence an apparent conflict with the proposed model emerges. Notwithstanding the fact that the contours of the relevant international rules and their application in those specific cases remain controversial,[414] it must be pointed out that it does not matter whether these measures have *actually* violated international law; what matters is that the states concerned *believe* or *claim* that they have not. The US has (unsurprisingly) never admitted the illegality of the Cuban embargo under either the WTO law or human rights law.[415] EU member states have also refrained from denying the

412 J Cain (1994) 24 GJICL 389; I Bogdanova, *Human Rights Sanctions* (2022) 133–148, especially 147; R Barber (2021) 70 ICLQ 368–69; SMH Razavi and F Zeynodini (2020) 29 WILJ 338–39.

413 See section 2.2.5 above.

414 For controversies concerning WTO law compliance, see eg A Ventouratou (2022) 21 LPICT 612–23 and KJ Kuilwijk (1997) 31 JWT 52–53; for controversies concerning human rights compliance, see eg M Craven in *Rights in Action* (2007) 75–77 and J Schechla in *Human Rights Handbook* (2022) 259.

415 See eg UN Doc A/77/PV.28 (2022) 20–1 (US).

coerciveness of the embargo while simultaneously criticising its human rights violations.[416] Therefore, the silence of WEOG state on the coerciveness of the Cuban embargo does not necessarily lead to a conclusion contrary to the present analytical framework that the Cuban embargo is non-coercive despite violating certain US obligations towards Cuba. These states may simply remain neutral on the issue, or they may believe that the US measures do not violate WTO or human rights law (and are hence non-coercive).

Another possible criticism of the present framework is the so-called 'double-remedy' issue, i.e. the claim that the unlawfulness of the economic measure under other regimes may be sufficient and thus preclude the need for another layer of illegality (and remedy) under the non-intervention principle. However, double illegality is not unfamiliar to international law, and the non-intervention principle itself has been perfectly comfortable with accepting this phenomenon with regard to the use of unilateral forcible measures – they violate the non-intervention principle only if they violate the *jus ad bellum* rules. Because the illegality stems from the same wrongful act, the actual remedy will also only be counted once. Furthermore, drawing from the principle of fair labeling in domestic and international criminal law, it is imperative for the law to accurately label misconduct to effectively fulfil its declarative function.[417] Thus the unlawfulness of a unilateral economic measure under some other legal regime should not preclude it from being unlawful under the non-intervention principle if it should be characterised as such because of its unique wrongfulness regulated by the principle.

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416 See eg ibid 19–20 (Czech Republic, speaking on behalf of the EU).

417 A Ashworth, *Criminal Law* (2019) 78; T Dias, *Fair Labelling* (2022) 90–98.

The third and perhaps the most significant counterargument relates to the characterisation of otherwise lawful economic measures. As observed in section 3.2, there are two possible ways for the identification of coercion in domestic law, i.e. (1) a more clear-cut approach which only regard illegal pressure that cannot be reasonably resisted as coercive, which serves as the reference for the proposed conceptual framework, and (2) a more contextualised and case-by-case approach which takes into account a variety of factors and finds coercion whenever the pressure is substantively unfair, regardless of its otherwise lawfulness. One may therefore ask why the second model is not adopted, especially when it also seems to be broad enough to reconcile with contemporary practice and thus the *lex lata*.[418] However, it is submitted that this contextualised approach is not suitable for or reflective of the present state of international law and international relations.

While it may be possible to determine what is deemed unconscionable and unfair in a commercial transaction between business parties, it is significantly more difficult to determine what is unconscionable and unfair in the course of international politics, where far more multifaceted and divergent economic, political and social considerations are at issue. The underlying principles for the contextualised legal evaluation of duress/intimidation, which have solid foundations in domestic law, have no well-established counterparts in international law: there is no doctrine of 'unconscionability' of behaviour between states, and there is no agreement on how general principles such as abuse of rights, good faith or equity should apply in specific contexts.[419] It is thus counter-

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418 For example, it can be argued that the ICJ's denial of the coerciveness of the US embargo in *Nicaragua* was based on the consideration that the embargo has not been unconscionable, in bad faith, or an abuse of rights, etc.

419 See generally in A Kiss, 'Abuse of Rights', *MPEPIL* (2006); M Kotzur, 'Good Faith (Bona fide)', *MPEPIL* (2009); F Francioni, 'Equity in International Law', *MPEPIL* (2020).

productive and unhelpful to attempt to clarify a vague concept like coercion by resorting to principles or concepts that are even more open-ended, indeterminate and underdeveloped.

Moreover, the disparity between domestic (especially those in common law jurisdictions) and international adjudicatory bodies is all the more apparent here.[420] In domestic legal orders, courts with compulsory and centralised adjudicatory powers are well-prepared to develop a rather consistent stream of application of a flexible legal doctrine, or may even be empowered to create the law themselves; by contrast, in a decentralised legal order lacking compulsory judicial settlement mechanism, the contextualised approach will almost inevitably be abused by different actors, or become too generalised that cannot provide any concrete guidance for state behaviour. Therefore, a contextualised approach is almost doomed to lead to an uncertain state of affairs where no state 'could well know when he would be safe' in dealing with an economically vulnerable state, which is even more worrying than what domestic courts have warned.[421] In comparison, by recognising only unlawful acts as possible forms of coercion, the present analytical framework can draw a line consistent with the rest of the international legal system by outlawing the leveraging of activities which other areas of the law have already proscribed; it also enhances the clarity of the non-intervention principle and avoids discussion of vague concepts or policy choices.[422] Despite all the potential normative arguments for including severe yet otherwise lawful economic measures as coercion, it is

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420 For an overview of such differences, see generally in eg MN Shaw, *International Law* (2017) 339–340.

421 *Hackley* (n 371).

422 To draw on the comments from domestic lawyers: Tamblyn (n 318) 16; T Weir, *Economic Torts* (1997), Lecture 3; R Stevens, *Torts and Rights* (2007) 189–90.

important to bear in mind that positive international law is inherently imperfect and limited, and that the law on economic coercion is no exception.[423]

[423] Tzanakopoulos (n 16) 633.

4 CONCLUSION

This thesis has demonstrated that while unilateral economic coercion is universally recognised as a form of prohibited intervention, the precise scope of this concept remains unclear under *lex lata*. In this regard, it has conducted a detailed examination of the conception of the notion of economic coercion. It found that international normative instruments have repeatedly emphasized the prohibition of economic coercion, yet there remains a division between WEOG and non-WEOG states concerning the interpretation of these vague textual pronouncements. In particular, the *travaux* of the Friendly Relations Declaration suggests that non-WEOG states have advocated an expansive definition of economic coercion, encompassing almost all types of economic measures aimed at interfering in the reserved domain of another state; by contrast, major WEOG states have preferred a flexible definition of coercion to maintain their freedom to 'seek to influence the actions and policies of other States'. This divide is further evidenced by the continuous efforts of non-WEOG states to push for GA resolutions condemning unilateral economic measures as 'a means of political and economic coercion against developing countries' and their adverse impact on human rights, as well as the reluctance of WEOG states to consent to the adoption of such resolutions.

A similar conclusion can be deduced from the investigation of specific instances of unilateral economic measures implemented in practice. In general, non-WEOG states have consistently denounced unilateral economic measures as coercion irrespective of their forms and impact. Occasionally, however, some non-WEOG states have themselves imposed economic measures to interfere in the *domaine réservé* of other states or have

chosen not to protest against such measures when they were targeted. On the other hand, WEOG states and their allies have refrained from criticising economic measures adopted by states within their group as prohibited coercion under the non-intervention principle. They have also shown tolerance towards economic measures that target themselves. Consequently, among the representative practice analysed by the thesis, there has been no instance of unilateral economic measure which is expressly acknowledged as coercive by both groups of states. In sum, state practice and *opinio juris* cannot offer useful guidance on when unilateral economic measures amount to coercion.

Given the uncertainty reflected in practice, the thesis proceeded to establish an analytical framework to provide further guidance on the identification of economic coercion. It began by analysing five groups of approaches proposed by international lawyers for determining non-forcible coercion, which are based on (1) the intent of the pressure-imposing state, (2) the effects on the target state, (3) the unlawfulness of the means, (4) a combination of different factors, and (5) other factors. However, each of these approaches has its weaknesses, either leading to conceptual absurdities or failing to explain existing practice.

The thesis then resorted to the experiences of domestic law on the regulation of coercive economic pressure to shed light on the concept of economic coercion in international law. It examined tort law rules on intimidation and contract law rules on economic duress in England, Australia, Canada, Hong Kong, the US, Germany and China, identifying common regulatory trends. It observed that in all domestic systems coercion has been slowly developed from encompassing only limited types of acts involving physical harm or proprietary damages to including economic pressure. This mirrors and

explains the international law-making process on the prohibition of coercion. Additionally, the indeterminacy in the identification of economic intimidation/duress in all domestic systems explains the difficulties in determining economic coercion under the non-intervention principle. Moreover, the detailed examination of domestic law showed that all domestic legal systems have abandoned tests that inquire about the actual 'deprivation of free will' in the determination of economic coercion. They rely instead on the otherwise lawfulness or the unconscionability of the means used to pressure the target as criteria for determining improper coercion/duress/intimidation. Some jurisdictions also require that economic pressure must have a significant influence on the target, leaving them with no reasonable alternatives but to submit.

Drawing on both domestic and international legal doctrines on the regulation of economic pressure, the thesis finally proposed a three-step method to identify economic coercion under the non-intervention principle. Essentially, an economic measure constitutes coercion either because (1) it falls within a specific type of measures universally recognised as coercive or (2) it breaches international obligations of the sender state towards the target state and (3) has such significant effects that the latter has no reasonable alternatives to resist. This conceptual framework is internally coherent, theoretically sound, less arbitrary, broadly consistent with the existing legal positions of states and suitable for future normative development. Importantly, this model uses the legality of an economic measure under the entire international legal system as the primary determinant and precludes otherwise lawful pressure from the scope of coercion. This ensures the clarity and predictability of the test and aligns better with the current reality of international relations and positive international law.

The precise contours of this framework, of course, remain to be further elaborated by state practice. That said, the framework does provide some helpful normative directions for both WEOG and non-WEOG states in their future practice. For non-WEOG states, the expansive definition of prohibited intervention which includes all forms of economic pressure as coercive will always be blocked by WEOG states from achieving customary status. Apart from this futile attempt, it might be more beneficial for them to concede to a more restrictive definition of economic coercion chiefly based on its otherwise legality under international law, and focus their efforts on pushing for the concretisation of more specific rules governing unilateral economic measures, such as trade law, state immunity law, and human rights law. Not only is this more likely to succeed than forcing a conception of coercion unacceptable to WEOG states, but even if it does not, it would still establish concrete rules of international law constraining unilateral economic measures, which non-WEOG states could more conveniently invoke when necessary. The framework also seems to be the only coherent account which WEOG states may adopt to achieve their dual objectives, i.e. to be able respond to economic challenges from emerging great economic powers while at the same time not to excessively restrain their own policy options. Accordingly, if these states do intend to advance towards a rule of economic coercion that is predictable, appropriate in scope and without selective application, they should explicitly express their adherence to the conceptual model based on lawfulness and effect in future statements of their *opinio juris* on the non-intervention principle.

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