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ARTICLE

Imperial Presidency Versus Fragmented Executive? Unilateral Trade Measures and Executive Accountability in the European Union and the United States

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Abstract

Faced with a changing geopolitical environment, the European Union has embarked on a legislative program to upgrade its unilateral trade instruments toolbox. By reforming existing instruments—for example, anti-dumping—and by adding new instruments to the European Commission's toolbox (foreign subsidies instrument, international procurement instrument, anti-coercion instrument, and others), the EU legislature is significantly strengthening the position of the Commission in the governance of unilateral trade policy in the EU. This development raises accountability questions. By means of a comparative analysis of democratic accountability in unilateral trade policy in the United States and the EU, I describe this transformation of executive power in the EU and I argue that a further strengthening of democratic accountability mechanisms is needed to match the Commission's growing responsibilities in this underexamined corner of EU trade policy.

Keywords: Geopoliticization; geoeconomics; economic statecraft; open strategic autonomy; anti-coercion instrument; unilateral trade measures; autonomous trade measures; United States; European Union; democratic accountability; democratic legitimacy; rule of law; separation of powers; checks and balances; Section 232; Section 301

A. Introduction

Faced with a changing geopolitical environment, the European Union started upgrading its unilateral trade instruments toolbox.[1] In 2017, the EU modernized its anti-dumping and anti-subsidy rules to better equip the European Commission to deal with state-induced trade distortions.[2] In 2019, the EU established a framework to screen foreign direct investment in the EU.[3] In 2021, the EU revised its Enforcement Regulation to enable the Commission to retaliate against violations of

[1] *See generally What is a Unilateral Trade Agreement?*, EUROPEAN COMMISSION, https://trade.ec.europa.eu/access-to-markets/en/content/unilateral-trade-arrangements#:~:text=Unilateral%20trade%20agreements%20are%20one,exports%20and%20spur%20economic%20development (last visited Sept. 3, 2023) ("Unilateral trade agreements are one-sided, non-reciprocal trade preferences granted by developed countries to developing ones, with the goal of helping them to increase exports and spur economic development."). In this Article, I specifically look at unilateral trade instruments that *restrict* rather than *expand* market access, and I limit the inquiry to instruments that explicitly pursue foreign policy and security-related goals.

[2] *See* Regulation 2017/2321, 2017 O.J. (L 338) 1 (EU).

[3] *See* Regulation 2019/452, 2019 O.J. (L 79I) 1 (EU); *see also* Thomas Verellen, *When Integration by Stealth Meets Public Security: The EU Foreign Direct Investment Screening Regulation*, 48 LEGAL ISSUES ECON. INTEGRATION 19, 19–41 (2021) (Neth.) (analyzing critically the Foreign Direct Investment Screening Regulation).

international trade rules in the event of a so-called appeal "into the void," wherein a World Trade Organization (WTO) member appeals against a panel report even though the WTO Appellate Body is currently dysfunctional.[4] In December 2021, the Commission proposed an "anti-coercion" instrument, which will grant the Commission broad powers to retaliate against acts of "coercion" targeted at EU Member States or institutions.[5] In June 2022, the European Parliament and the Council adopted a regulation that empowers the Commission to restrict the access of economic operators, goods or services from third countries to EU public procurement procedures when it is in the "Union['s] interest" to do so.[6] And in December 2022, Parliament and Council adopted an instrument that would enable it to tackle subsidies issued by third country governments to companies established in the EU—thereby filling an alleged gap between the EU's state aid, public procurement, and trade defense rules.[7] All of these initiatives fit in the Commission's ambition to strengthen the EU's "open strategic autonomy"[8] and to put in place a trade policy that is "open, sustainable, and assertive."[9]

The list of proposed and adopted measures is impressive.[10] The combined effect of these initiatives is a significant strengthening of executive power in EU trade policy—an area in which the EU holds exclusive competence and in which Member States are thus constitutionally precluded from acting on their own.[11] Moreover, these legislative initiatives have to be looked at in conjunction with the increased use in recent years of sectoral economic sanctions adopted by the Council within the framework of the EU's Common Foreign and Security Policy (CFSP). Most recently, in response to the Russian invasion of Ukraine, the Council restricted imports of a wide range of Russian and Belarussian goods into the EU, including coal, iron, steel, and wood.[12]

[4]*See* Regulation 2021/167, para. 3, 2021 O.J. (L 49) 1 (EU) [hereinafter Enforcement Regulation]; *see also* Joost Pauwelyn, *WTO Dispute Settlement Post 2019: What to Expect?*, 22 J. INT'L ECON. L. 297, 303–09 (2019) (Eng.) (explaining the reality of "appeals into the void"). *But see* Folkert Graafsma, *The Revised Enforcement Regulation (No 2021/167) and Some Possible Effects on EU Trade Disputes*, 17 GLOB. TRADE CUSTOMS J. 289, 297–98 (2022) (expressing doubts about the compatibility of the revised Enforcement Regulation and the WTO).

[5]*See Commission Proposal for a Regulation of the European Parliament and the Council on the Protection of the Union and its Member States from Economic Coercion by Third Countries*, COM (2021) 775 final (Dec. 8, 2021) [hereinafter *Anti-Coercion Instrument Proposal*].

[6]*See* Regulation 2022/1031, art. 6(1)–6(2), 2022 O.J. (L 173) 1 (EU) [hereinafter International Procurement Instrument].

[7]*See* Regulation 2022/2560, 2022 O.J. (L 330) 1 (EU) [hereinafter Foreign Subsidies Regulation]. In a 2020 White Paper, the Commission argued that "where foreign subsidies take the form of financial flows facilitating acquisitions of EU undertakings or where they support the operation of an undertaking in the EU, there appears to be a regulatory gap." *See also Commission White Paper on Levelling the Playing Field as Regards Foreign Subsidies*, at 9, COM (2020) 253 final (June 17, 2020). In particular, such financial flows are not covered by EU competition, trade, or public procurement rules. *See id.* at 9–11. Competition rules, including state aid rules, and public procurement rules apply only to EU Member State, not third countries, whereas trade rules, including anti-subsidy rules, apply to goods, not to trade-in services, investment or other financial flows. *Id.*

[8]*See Communication from the Commission to the European Parliament, the Council, the European Social and Economic Committee, and the Committee of the Regions: Europe's Moment: Repair and Prepare for the Next Generation*, COM (2020) 456 final (May 27, 2020), at 12–13.

[9]*See Communication from the Commission to the European Parliament, the Council, the European Social and Economic Committee, and the Committee of the Regions: Trade Policy Review: An Open, Sustainable, and Assertive Trade Policy*, COM (2021) 66 final (Feb. 18, 2021); *see also* Luuk Schmitz & Timo Seidl, *As Open as Possible, as Autonomous as Necessary: Understanding the Rise of Open Strategic Autonomy in EU Trade Policy*, 61 J. COMMON MKT. STUD. 834 (2022) (exploring the emergence of "open strategic autonomy").

[10]*See, e.g.*, Jakob Hanke, *EU Builds Anti-Trump Trade Bazooka*, POLITICO (Oct. 10, 2019), https://www.politico.eu/article/eu-builds-anti-trump-trade-bazooka/.

[11]*See* Consolidated Version of the Treaty on the Functioning of the European Union art. 2(1), June 7, 2016, 2016 O.J. (C 202) 50 [hereinafter TFEU].

[12]For an overview, *see generally EU Restrictive Measures Against Russia Over Ukraine (Since 2014)*, EUROPEAN COUNCIL, https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/ (last visited Apr. 8, 2022) (detailing, for example "Sanctions Against Russia," "Bans on Media Outlets," "Restrictions on Economic Relations," and more).

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This return to sectoral economic sanctions represents a policy change, as in recent decades CFSP restrictive measures have typically been targeted at individuals rather than economic sectors or entire economies.[13] Taken together, this makes for a picture of a heavily-armed European Union trade power—a Union that is increasingly capable of deploying and leveraging its large internal market as an instrument of economic statecraft.[14] And a Union that is increasingly willing to deploy trade policy instruments not only in pursuit of trade liberalization, but also in pursuit of non-trade related objectives, including, most significantly in this moment: Security.[15]

A growing toolbox of unilateral trade policy instruments empowers the executive—in this case, primarily the European Commission. As executive power grows, it is harder for the other branches of the *trias politica*—the legislature and the judiciary—to hold the executive accountable. To get a sense of the accountability challenges that executive empowerment brings, it is useful to look at the experience of the United States. The U.S. President has important independent constitutional responsibilities over foreign affairs, including the power to control the military. In the trade policy sphere, the President's independent constitutional responsibilities are more limited. However, Congress has delegated much of its trade policy-related responsibility to the President.[16] These powers include important unilateral trade powers: the President can impose economic sanctions in response to perceived threats to U.S. national security, or when sanctions are deemed necessary to preserve U.S. commercial interests. The experience under the Trump administration has demonstrated how difficult it is for Congress to operate as a check over the President. This, in turn, has raised the question of whether the existing division of labor between Congress and the President should be reconsidered.

In this Article I look at how executive power in the unilateral trade policy sphere is held to account in the European Union. I will do so in light of the abovementioned reforms to the EU's trade defense toolbox, and I will do so from a comparative perspective by contrasting the allocation of executive power in the EU in the area of unilateral trade policy with that in the United States. All knowledge is comparative. In that spirit, I look at the U.S. experience in this area to reflect on how that experience may inform how EU policy makers should think about executive accountability in unilateral trade policy.[17]

[13]*See* ECJ, Joined Cases C-402/05 P & C-415/05 P, Kadi v. Council and Commission, ECLI:EU:C:2008:461 (Sept. 3, 2008) (concerning restrictive measures—namely the freezing of assets—taken against persons and entities associated with Osama bin Laden, Al-Qaeda, and the Taliban in the aftermath of the 9/11 bombings and in the early stages of the Global War on Terrorism). This is not to say that restrictive measures against individuals are no longer part of the EU's sanctions practice, as they very much are. *See, e.g.*, Council Decision (CFSP) 2022/411, 2022 O.J. (L 84) 28 (EC) ("Decision . . . concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine.").

[14]*See* Robert D. Blackwill & Jennifer M. Harris, War by Other Means: Geoeconomics and Statecraft (2016) (writing on the return of economic statecraft or "geo-economics"); Anthea Roberts, Henrique Choer Moraes & Victor Ferguson, *Toward a Geoeconomic Order in International Trade and Investment*, 22 J. Int'l Econ. L. 655 (2019); David A. Baldwin & Ethan B. Kapstein, Economic Statecraft: New Edition (2020) (providing the seminal work on this topic); *see also* Sophie Meunier & Kalypso Nicolaidis, *The Geopoliticization of European Trade and Investment Policy*, 57 J. Common Mkt. Stud. 103, 103 (2019) (discussing a closer study within the European context).

[15]*See* Consolidated Version of the Treaty on European Union art. 21(2)(a), Oct. 7, 2016, 2016 O.J. (C 326) 13, 28 [hereinafter TEU] ("The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields . . . in order to: safeguard its values, fundamental interests, security, independence, and integrity").

[16]*See generally* Douglas A. Irwin, Clashing over Commerce: A History of US Trade Policy (2017) (describing this process).

[17]*See generally* Wojciech Sadurski, *European Constitutional Identity?* (Sydney L. Sch., Research Paper No. 06/37 2006), http://www.ssrn.com/abstract=939674. Having decided to perform a comparison of the EU and U.S. in this realm, I'm reminded of Sadurski's 2006 working paper, which mentions how we Europeans like to contrast the European constitutional experience with that of the United States—not because we believe the United States provides a superior model, but because it is the closest we have to a realistic alternative model. Because of the family resemblance, we often define our identity by reference to the United States.

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The argument I put forward has two components: One descriptive, one normative. In *descriptive* terms, I argue that executive power in unilateral trade policy in the EU is going through a transformation. Taken together, the various instruments I referred to in the above significantly strengthen the position of the European Commission. This is the case as most of these instruments will be—or already are—deployed by the Commission. The Commission both proposes and adopts measures, and in the process exercises a growing amount of discretion. At the same time, it remains difficult for the Member States, and impossible for the European Parliament, to oppose measures. As I will describe, this state of affairs is not as different from that in existence in the United States as one might expect at first glance given the important structural differences between the EU and U.S. executives. Indeed, the U.S. experience in this area can be understood as a cautionary tale of how growing executive power leads to accountability challenges that over time become increasingly difficult to surmount.

In *normative* terms, I argue that this process of growing executive power calls for a concomitant strengthening of accountability mechanisms in the EU. Crucially, as a polity that has both states and individual citizens as co-equal sources of legitimacy,[18] and which is constitutionally committed to representative democracy,[19] accountability lines must run from the Commission to both the Member States and the EU citizens. This means, in institutional terms, that both the Council and the European Parliament should be meaningfully involved in the executive decision-making process whereby the Commission proposes and adopts unilateral trade measures. Importantly, as trade policy becomes increasingly "geopoliticized"[20] and the amount of discretion that is involved in decision making grows, *ex post* legal accountability through judicial review is not sufficient to ensure an acceptable level of legitimacy.

The Article has two parts. First, I take a comparative detour to look at how executive accountability works in the United States, and at how the perceived shortcomings of the U.S. arrangements have led to calls for reform. Second, I then turn to the EU and further unpack how executive power is allocated in the EU when it comes to unilateral trade instruments—a category that covers the instruments adopted in the context of both the EU's Common Commercial Policy (CCP) and the CFSP. In a final section, I develop the normative argument that more and better democratic accountability mechanisms are called for in this area.

B. Unilateral Trade Measures in the United States: Taming the Imperial Presidency

I. The Imperial Presidency in Unilateral Trade Policy

In his 1973 book, Arthur Schlesinger referred to the US Presidency as "imperial" in nature. Writing in the aftermath of the Watergate scandal—President Nixon's infamous scheme to wiretap the headquarters of the Democratic Party—Schlesinger wrote:

> The all-purpose invocation of "national security," the insistence on executive secrecy, the withholding of information from Congress, the refusal to spend funds appropriated by Congress, the attempted intimidation of the press, the use of the White House itself as a base for espionage and sabotage directed against the political opposition—all signified the extension of the imperial Presidency from foreign to domestic affairs. Underneath such developments there could be discerned a revolutionary challenge to the separation of powers itself.[21]

[18]*See* TEU art. 10(2) (explaining how EU citizens are "directly represented" in the European Parliament).

[19]*See* TEU art. 10(1) ("The functioning of the Union shall be founded on representative democracy."); *see also* Thomas Verellen, *Hungary's Lesson for Europe*, VERFASSUNGSBLOG (Apr. 8, 2022), https://verfassungsblog.de/hungarys-lesson-for-europe/ (explaining the significance of the TEU art. 10(1)).

[20]*See* Meunier & Nicolaidis, *supra* note 14, at 103.

[21]ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY, xxvii–xxviii (2004).

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As Schlesinger himself noted in this quote, the Imperial Presidency was not a novel phenomenon in the United States of the early 1970s.[22] What *was* new, he argued, was its extension from *foreign* to *domestic* affairs.[23] For indeed, in the foreign affairs realm, the President's powers have traditionally been expansive. Domestically, the President is bound by numerous checks and balances—not in the least the fact that the President does not control Congress and depends on it to pass legislation. By contrast, in the foreign affairs realm the President has more leeway to act independently from the other branches of government, be it by making executive agreements that do not require Congressional approval,[24] by making use of his own constitutional powers as Commander-in-Chief, or by making use of the unilateral trade powers delegated to him by Congress.[25]

In the trade policy sphere broadly considered, Congress has delegated important responsibilities to the President.[26] As is well known, the United States Trade Representative (USTR) negotiates trade agreements on behalf of the President.[27] In the narrower context of *unilateral* trade policy, Congress delegated important powers to both the President and the USTR. For example, under Section 232 of the Trade Expansion Act of 1962, the President can undertake "action . . . to adjust the imports of [an] article and its derivatives so that such imports will not threaten to impair the national security."[28] This includes the raising of import tariffs or the introduction of import quotas.[29] "National security" is left undefined by Congress, leaving it to the President to give meaning to the concept. And perhaps unsurprisingly, the President has interpreted the concept expansively as essentially encompassing the entire national economy.[30] In other words: Congress empowered the President to take trade measures against imports that threaten to impair U.S. national security, and it left the assessment of when measures do so to the President's own discretion. Similar points can be made about other unilateral trade powers, such as the President's authority to take measures—including import bans—under the International Emergency Economic Powers Act (IEEPA),[31] or the USTR's power to take measures under Section 301 of the Trade Act of 1974.[32] For each of these instruments, Congress has delegated a power to the President or an agency or cabinet department that the President controls, such as the USTR.

[22] *Id.*

[23] *Id.* at x–xii (explaining that, while as far back as de Tocqueville and The Federalist Papers, the President had broad powers in "foreign relations," the consolidation of domestic powers at the expense of Congress marked a change in the role of the President over time).

[24] *See* Oona A. Hathaway, Jack L Goldsmith, & Curtis A. Bradley, *The Failed Transparency Regime for Executive Agreements: An Empirical and Normative Analysis*, 134 HARV. L. REV. 629, 639–41 (2020); *see also* Kathleen Claussen, *Trade's Mini-Deals*, 62 VA. J. INT'L L. 315 (2022) (discussing executive agreements in trade policy).

[25] *See generally* Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255 (1988).

[26] *See* IRWIN, *supra* note 16.

[27] *See* Trade Act of 1974 § 301, 19 U.S.C. §§ 2411–19 (granting the USTR power to take actions "that are within the power of the President").

[28] Trade Expansion Act of 1962 § 232, 19 U.S.C. § 1862.

[29] *See* Fed. Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548, 561 (1976) (confirming that Section 232 measures may consist of quotas as well as fees).

[30] *See id.; see also* 15 C.F.R. § 705.4 (2023). This regulation, proffered by the Department of Congress, an executive agency under the command of the President, offers in pertinent part:

> In recognition of the close relation between the strength of our national economy and the capacity of the United States to meet national security requirements, the Department shall also, with regard for the quantity, availability, character[,] and uses of the imported article under investigation, consider the following: . . . Any other relevant factors that are causing or will cause a weakening of our national economy.

[31] *See* International Emergency Economic Powers Act, 50 U.S.C. § 1701 (empowering the President to impose sanctions on individuals and, perhaps, also import tariffs). In order for the powers under IEEPA to vest, the President must declare a national emergency, which is statutory so long as the President finds "any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States." *See id.* at § 1701(a).

[32] *See* 19 U.S.C. § 2411(b) (defining "discretionary action").

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This power is subject to relatively undemanding substantive checks in the form of broadly framed, open-ended conditions.[33]

Crucially, the executive has the final say on whether those conditions are met in a specific case. Relevant in this regard is that federal courts in the U.S. have in the recent past been deferential towards the executive in their own assessment of whether the executive had complied with the conditions.[34]And further upstream, U.S. courts have not questioned the constitutionality of the broad delegations of powers.[35] In a similar vein, while Section 232 measures are reviewable in light of the General Agreement on Tariffs and Trade's (GATT)[36] security exception following the WTO panel report in *Russia—Measures Concerning Traffic in Transit*,[37] the paralysis of the WTO Appellate Body undermines the effectiveness of the WTO dispute settlement mechanism and thus of the international legal disciplines imposed on the discretion of the President in this area.[38] In *Russia—Measures Concerning Traffic in Transit*, a WTO panel held that WTO panels have jurisdiction to review aspects of a WTO Member's invocation of the GATT's security exception.[39] Following this report, a dispute on the scope of the GATT security exception could be brought before a WTO panel. Ever since the Appellate Body became dysfunctional in December 2019, however, the panel could issue a report but each of the parties can appeal "into the void." As a result, the initial panel report will not be adopted by the Dispute Settlement Body and will thus not become binding.[40]

[33]*See, e.g.*, 50 U.S.C. § 1701(a) (providing the President with broad power to take measures in the presence of an "unusual and extraordinary threat . . . to the national security, foreign policy, or economy of the United States"). IEEPA does not define its terms in greater detail, however. Similarly, Section 301 measures can be taken when the United States is faced with "an act, policy, or practice of a foreign country [that is] is unreasonable or discriminatory and burdens or restricts United States commerce." *See also* 19 U.S.C. § 2411(b)(1). The statute does not define these terms either.

[34]*See, e.g.*, PrimeSource Bldg. Prods., Inc. v. United States, 505 F. Supp. 3d 1352, 1357 (Ct. Int'l Trade 2021) (holding that a highly deferential standard of review is called for, under which US courts may review Presidential actions only for "clear misconstructions of the governing statute, significant procedural violations, and actions outside delegated authority").

[35]*But see* Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, 142 S. Ct. 661 (2022) (finding that challengers were likely to succeed on the merits of their claim and therefore, granting a stay of the OSHA COVID-19 vaccine mandate, the Supreme Court has shown that it is willing to review the limits and constitutionality of delegations of power to executive agencies). Although the decision was narrow and the Court refrained from actually deciding on the merits of challengers' suit against the OSHA vaccine mandate, the case nevertheless indicates that the Supreme Court may be willing to serve as a check on executive power. Justice Gorsuch's concurrence is of particular interest here, as he indicated that even if OSHA's contested vaccine mandate were not to exceed the limits of its congressionally-delegated power, the delegation may still be unconstitutional because of the "non-delegation doctrine." *See id.* at 668–69. Nevertheless, this case is in the domestic sphere. *See id.* at 661. It remains very much to be seen whether this approach might spill over into the foreign affairs and trade policy spheres.

[36]*See generally, History of the Multilateral Trading System*, World Trade Organization, https://www.wto.org/english/thewto_e/history_e/history_e.htm (last visited Sept. 3, 2023) (explaining that GATT preceded the World Trade Organization and was in effect from 1947 until 1994).

[37]Panel Report, *Russia—Measures Concerning Traffic in Transit*, 30, WTO Doc. WT/DS512/R (adopted Apr. 26, 2019) [hereinafter Panel Report, *Russia*].

[38]*See* Bernard Hoekman & Petros C. Mavroidis, *Burning Down the House? The Appellate Body in the Centre of the WTO Crisis* (Eur. Univ. Inst., Robert Schuman Ctr. for Advanced Stud., Glob. Governance Programme Working Paper No. RSCAS 2019/56, 2019) (following the adoption of Section 232 tariffs on steel and aluminum imports in 2018, many of the targeted countries initiated WTO dispute settlement proceedings); *see also* Jean Galbraith, *U.S. Tariffs on Steel and Aluminum Imports Go into Effect, Leading to Trade Disputes*, 112 Am. J. Int'l L. 499 (2022) (providing an overview). Individual Section 301 measures and IEEPA sanctions have, by contrast, never been challenged at WTO level; at one point, the EU did challenge Section 301 itself rather than a measure taken on the basis of Section 301, but the panel dismissed the claim. *See also* Sean D. Murphy, *WTO Upholds U.S. Section 301 Trade Authority As GATT-Consistent*, 94 Am. J. Int'l L. 376 (2002) (citing *United States—Sections 301–310 of the Trade Act of 1974*, WTO Doc. WT/DS512/R/Add.1 (adopted Dec. 22, 1999)).

[39]*See* Panel Report, *Russia*, *supra* note 37.

[40]*See* Understanding on Rules and Procedures Governing the Settlement of Disputes art. 16.4, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU]. Note that the Multi-Party Interim Appeal Arbitration Arrangement (MPIA) aims to fill the gap left by the WTO Appellate Body. *See generally* Geneva Trade Platform, *Multi-Party Interim Appeal Arbitration Arrangement (MPIA)*, WTO Plurilaterals, https://wtoplurilaterals.info/plural_initiative/the-mpia/ (last visited Sept. 3, 2023). However, at the time of writing, only 25 WTO Members were party to the arrangement.

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II. Congressional Checks on Presidential Power

When delegating powers to the President or any other part of the executive branch, Congress tries to retain a degree of control over how the executive exercises those powers. Historically, the legislative veto was an important instrument for Congress to do so. Under the legislative veto, depending on how the veto was set up, either both houses of Congress or a single house could veto a Presidential order taken on the basis of such delegated authority. It could do so by means of, respectively, a concurrent or a simple resolution. Each chamber could act by an ordinary majority. In contrast to the ordinary legislative process, no presidential signature was required to veto an executive measure. Commentators have argued that this was an effective tool for Congress to exercise oversight over the executive.[41] The legislative veto was effective particularly because, in the field of trade policy, many of the administrative safeguards of the Administrative Procedure Act (APA)—for example, the requirement that the public has the opportunity to comment—do not apply.[42] In this area, some delegations of authority to the President—notably, IEEPA sanctions and Section 232 sanctions on oil and oil-related products—are subject to the legislative veto.[43] However, in the 1983 in the case of *INS v. Chadha*[44] the Supreme Court declared the one-house and the two-house legislative veto without presentment to the President unconstitutional.[45] As a consequence of this ruling, it was no longer possible for a single house of Congress to terminate unilateral trade measures taken by the President on the basis of, for example, Section 232 by means of an *ordinary* majority.[46] Instead, a *two-thirds* majority in *both* houses was required to insulate the resolution against a potential presidential veto. As a result, to the regret of some[47] and the delight of others,[48] the legislative veto became ineffective as a means to keep a check on the President's exercise of delegated trade powers.[49]

The fate of the legislative veto is symptomatic of the wider state of executive accountability in unilateral trade policy in the United States. Congress has other instruments at its disposal to exercise oversight over the President, but it faces collective action problems in deploying those

[41] *See* Joseph R. Biden, *Who Needs the Legislative Veto?*, 35 SYRACUSE L. REV. 685, 693 (1984) (writing as a U.S. Senator and member of the Foreign Relations Committee, current US President Biden wrote that the loss of the legislative veto "[left the US] dangerously uncertain about the role of Congress, and especially the Senate, in formulating and implementing foreign policy"). Although he may have been skeptical towards the effectiveness of the legislative veto as an instrument of Congressional oversight over the President, then-Senator Biden praised the legislative veto as an instrument to induce the President to take into account Congressional concerns, for example, concerns around arms sales or export controls. *Id.* at 696. He pointed out that "Congress has never vetoed an arms sale, but that does not mean that Congress has not exercised influence over such sales." *But see* Harold Hongju Koh, *Congressional Controls on Presidential Trade Policymaking after I.N.S. v. Chadha*, 18 N.Y.U. J. INT'L L. & POL. 1191 (1986) (offering a critical perspective of the merits of the legislative veto in trade policy); Timothy Meyer & Ganesh Sitaraman, *Trade and the Separation of Powers*, 107 CALIF. L. REV. 583, 609 (2019) (arguing that Congress' own abdication, rather than the end of the legislative veto, led to a weakening of Congress' position vis-à-vis the President); *see also* Curtis A. Bradley, *Reassessing the Legislative Veto: The Statutory President, Foreign Affairs, and Congressional Workarounds*, 13 J. LEGAL ANALYSIS 439 (2021) (arguing that Congress has other effective instruments at its disposal to hold the President accountable).

[42] *See* Kathleen Claussen, *Trade Administration*, 107 VA. L. REV. 845, 850 (2021) (explaining that much of the APA does not apply to unilateral trade measures).

[43] *See* 50 U.S.C. § 1703(b); *see also* 19 U.S.C. § 1862(f).

[44] *See* INS v. Chadha, 462 U.S. 919 (1983).

[45] *Id.* at 959.

[46] *Id.*

[47] *See, e.g.*, Peter L. Strauss, *Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision*, 1983 DUKE L. J. 789 (1983); *see also* Biden, *supra* note 42 (arguing that, too often, the legislative veto led Congress to outsource its task of writing law to administrative agencies, but seemingly sharing Strauss' concern that Congress might have lost a useful tool in other areas, in particular in the foreign policy realm).

[48] *See* Carl McGowan, *Congress, Court, and Control of Delegated Power*, 77 COLUM. L. REV. 1119, 1149 (1977) (referencing the congressional testimony given by future Supreme Court Justice Antonin Scalia to discuss how many American lawyers, including Scalia, had expressed the view that the legislative veto was unconstitutional).

[49] *See* Robert Schütze, *"Delegated" Legislation in the (New) European Union: A Constitutional Analysis*, 74 MOD. L. REV. 661, 666–69 (2011) (criticizing the ruling).

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instruments effectively.[50] To be clear, existing trade delegations are subject to some procedural checks. Sections 232 and 301 impose specific executive decision-making procedures,[51] and Section 232 imposes time limits on Presidential action[52]—limits which federal courts have enforced in response to President Trump's failure to comply with them when imposing tariffs on steel imports.[53] Section 232 also still contains a legislative veto provision, although the statute now expressly provides that Congress can only exercise the veto by means of a joint resolution, which must be presented to the President.[54] Similarly, IEEPA requires the President to first declare a national emergency before taking action; the President must consult with Congress for as long as the national emergency continues;[55] the President must submit a report to Congress whenever he or she adopts a measure in the framework of IEEPA;[56] and the President must periodically report to Congress about the actions the President has undertaken and changes that have occurred since the previous report.[57] Similar consultation requirements exist for Section 232 measures,[58] but not for Section 301 measures.[59] However, more far-reaching mechanisms such as sunset provisions or report-and-wait requirements have not been used in the unilateral trade policy context.[60] Likewise, Congress has not tried to frame existing delegations more narrowly.[61] Bills have been introduced to grant Congress an *ex ante* veto power over individual measures as opposed to an *ex post* power to terminate measures as currently exists under the legislative veto, but such bills have not been adopted.[62]

The scarcity of alternative procedural checks coupled with the demise of the pre-*Chadha* legislative veto makes it difficult for Congress to meaningfully impact Presidential unilateral trade policy. It is difficult for Congress, a collective body, to act—even by ordinary majority.[63] To raise the bar further and to require a two-thirds majority to oppose Presidential actions means Congress can act only if there is a quasi-complete bipartisan consensus that the President's actions

[50]*See* Koh, *supra* note 25.

[51]*See* 19 U.S.C. § 1862; *see also* 19 U.S.C. § 2411(a)(1).

[52]*See* 19 U.S.C. § 1862(c)(1) (requiring the President to take action within 105 days following receipt of a report prepared by the Commerce Secretary).

[53]*See, e.g.*, *PrimeSource*, 505 F. Supp. 3d at 1352.

[54]*See* 19 U.S.C. § 1862(f).

[55]*See* 50 U.S.C. § 1703(a).

[56]*Id.* § 1703(c).

[57]*Id.*

[58]*See* 19 U.S.C. § 1862(c) (detailing that the President must inform Congress of any Section 232 measures being undertaken and any investigations being conducted).

[59]*See* 19 U.S.C. § 2411–19. Nowhere in Section 301 does it say that measures taken under the statute need to be reported to Congress. Thus, Congress plays no direct role in the Section 301 decision-making process.

[60]*See, e.g.*, Elizabeth Goithein, *Good Governance Paper No. 18: Reforming Emergency Powers*, JUST SECURITY (Oct. 31, 2020), https://www.justsecurity.org/73196/good-governance-paper-no-18-emergency-powers/ (calling for the use of sunset provisions in the emergency powers context—which includes IEEPA sanctions—and discussing report-and-wait requirements, which force the President, or the relevant executive branch agency, to report a draft rule to Congress). After receiving a draft rule, Congress gets a set amount of time to consider taking action before the President or the executive agency adopts the rule. Sunset provisions make the delegation of authority by Congress to the President or the executive agency to expire automatically after a set amount of time, thus requiring Congress to renew the delegation.

[61]*See* Kathleen Claussen, *Trade War Battles: Congress Reconsiders Its Role*, LAWFARE (Aug. 5, 2018), https://www.lawfaremedia.org/article/trade-war-battles-congress-reconsiders-its-role (listing this option as one of the options Congress has not yet considered); *see also* Kathleen Claussen, *Forgotten Statutes: Trade Law's Domestic (Re)Turn*, 113 AM. J. INT'L L. UNBOUND 40, 44 (2019) (looking specifically at Section 301 and explaining that "[Congress] could now narrow the president's authority further by limiting Section 301 to action only against non-WTO members").

[62]*See, e.g.*, Global Trade Accountability Act of 2021, H.R. 2618, 117th Cong. (2021); *see also* Jennifer A. Hillman, *How to Stop Trump's Trade War Madness,* N.Y. TIMES (Aug. 11, 2019), https://www.nytimes.com/2019/08/11/opinion/trump-china-trade.html (calling for stronger procedural checks on the President by a former US appointed member of the WTO Appellate Body).

[63]*See* Meyer & Sitaraman, *supra* note 41, at 609 (emphasizing the role of Congressional abdication in the empowerment of the President).

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were ill-advised. In a two-party system in which the President is a member of one of the two parties represented in Congress, it is difficult to assemble that broad of a coalition. At least when it comes to unilateral trade capabilities, then, procedural checks on an Imperial Presidency endowed with significant trade powers remain limited. While this may have been appropriate in an era in which Presidents felt constrained not only by legal limits but also by non-legal conventions and informal codes of conduct,[64] it is worth considering whether the Trump experience does not call for legal guardrails to be introduced to ensure executive accountability moving forward.[65]

C. Unilateral Trade Measures in the European Union: A Fragmented, Yet Increasingly Powerful, Executive

I. A Fragmented Executive to Engage in Unilateral Trade Policy

How does the European Union compare to the United States when it comes to accountability in the realm of unilateral trade policy? It is important to acknowledge at the outset how very different the EU is structured compared to the U.S. Contrary to the constitutional arrangements in the U.S., the EU Treaty framers—the Member States—did not establish a directly-elected executive with important constitutional powers of its own, including the power to deploy the military. Instead, as described by Deirdre Curtin, executive power in the EU is more dispersed and more fragmented.[66] The European Commission exercises important *administrative* executive powers,[67] but so does the Council.[68] This is the case in particular in the framework of the CFSP, where the Council can impose restrictive measures. As far as the *political* aspects of executive power are concerned—that is, the power to exercise political leadership and to determine the course of the "ship of state"—the European Council is the main player.[69] Similarly, the Commission is also trying to steer a course between loyalty towards the European Council—of which the Commission president is a member—and steering its own independent course as the EU institution charged with the responsibility of defending the general EU interest.[70] That being said, however, executive dominance is very much a feature of the EU decision-making landscape, and the question of how to ensure that executive power is held accountable is a key challenge for the EU moving forward.[71] This certainly holds true for unilateral trade policy, where EU executive bodies—in particular, the Council and the

[64]*See generally* JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11 (2012) (explaining the pre-Trump-era argument that the President is in fact constrained by such conventions).

[65]*See* BOB BAUER & JACK GOLDSMITH, AFTER TRUMP: RECONSTRUCTING THE PRESIDENCY (2020) (arguing for increased legal guardrails to avoid abuses of power by a sitting President). This book is particularly interesting because it is written by the same author as THE ACCOUNTABLE PRESIDENCY AFTER 9/11, who expressed confidence in the ability of social and political conventions to operate as guardrails.

[66]*See* DEIRDRE CURTIN, EXECUTIVE POWER OF THE EUROPEAN UNION: LAW, PRACTICES, AND THE LIVING CONSTITUTION 65 (2009).

[67]*Id.* at 4–5 (discussing the distinction between administrative and political executive power, which is the particular case in the framework of the CFSP because the Council can impose restrictive measures).

[68]*Id.*

[69]*See generally* LUUK VAN MIDDELAAR, THE PASSAGE TO EUROPE: HOW A CONTINENT BECAME A UNION (Liz Waters trans., 2013) (arguing that the EU's political executive power is centralized in the European Council).

[70]*See generally* Pierre Bocquillon & Mathias Dobbels, *An Elephant on the 13th Floor of the Berlaymont? European Council and Commission Relations in Legislative Agenda Setting*, 21 J. EUR. PUB. POL'Y 20 (2014) (describing the relation between European Council and European Commission as one of "competitive cooperation").

[71]*See generally* Deirdre Curtin, *Challenging Executive Dominance in European Democracy*, 77 MOD. L. REV. 1 (2014) (highlighting the problem of executive dominance in EU decision-making); *see also* Deirdre Curtin, Herwig Hofmann & Joana Mendes, *Constitutionalising EU Executive Rule-Making Procedures: A Research Agenda*, 19 EUR. L. J. 1 (2013) (explaining the same within the context of executive rule-making).

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Commission—exercise meaningful discretionary authority and are likely to do so to an even greater extent as the EU legislature upgrades the EU's unilateral trade instruments toolbox.[72]

How then, is the accountability of the executive ensured in this area of EU policy making? A first observation: The executive power to deploy unilateral trade instruments in the EU is fragmented. Two decision-making set-ups live side by side. On the one hand, the Council can adopt restrictive measures with little Commission involvement. As a general rule, it must do so by unanimity. On the other hand, the Commission plays a central role in the deployment of the CCP unilateral trade instruments listed in the introduction to this Article. Most of these instruments are adopted by means of implementing acts. Bar exceptional cases in which the EU legislature empowers the Council rather than the Commission to enact implementing acts,[73] such acts are adopted on the basis of the so-called "Comitology" system.[74] In this system, the Commission proposes measures, and a committee consisting of Member States—technically not a Council committee—has the opportunity to oppose measures the Commission proposes. However, it can only do so by means of a qualified majority of its members.[75] This is a high threshold, which makes it hard for Member States to stop the Commission in its tracks. Crucially, in neither decision-making set-up does the European Parliament play a meaningful role. The Parliament only needs to be informed of the general developments in the CFSP, and in the context of CCP-implementing acts, the Parliament can let the Commission know that it believes a proposed measure to be *ultra vires* the Commission's powers.[76] In such a case, the Commission has to reconsider the measure, but it cannot be stopped from adopting the measure the second time around.[77]

CCP unilateral trade instruments have traditionally been subject to more demanding substantive conditions compared to their US counterparts. Classic trade defense measures such as anti-dumping and anti-subsidy measures need to comply with the requirements set out in the WTO agreements on the same topic as implemented in the EU's legal order.[78] Many of the proposed instruments are—or will be, if they get adopted—subject to fairly stringent substantive conditions as well. For example, under the Foreign Subsidies Regulation, redressive measures can be adopted only in the presence of foreign subsidies that "distort the internal market."[79] Foreign subsidies distort the internal market "where a foreign subsidy is liable to improve the competitive position of the undertaking concerned in the internal market and where, in doing so, [it] actually or potentially negatively affects competition on the internal market."[80] To make that determination, the Commission proposal lists a number of criteria that the Commission may take into account, including:

a) The amount of the subsidy;
b) The nature of the subsidy;
c) The situation of the undertaking and the markets concerned;

[72]*See* Thomas Verellen, *Unilateral Trade Measures in Times of Geopolitical Rivalry*, VERFASSUNGSBLOG (May 25, 2021), https://verfassungsblog.de/unilateral-trade-measures-in-times-of-geopolitical-rivalry/ (arguing for more effective democratic accountability mechanisms in the context of unilateral trade policy).

[73]*See* TFEU art. 291(2) (empowering the EU legislature to delegate implementing powers onto the Council in "duly justified specific cases"). It bears mentioning, however, that none of the existing or proposed instruments delegate implementing powers to the Council.

[74]*See* Regulation 182/2011, art. 3, 2011 O.J. (L 55) 13 (EU) [hereinafter Comitology Regulation].

[75]*Id.* at art. 5.

[76]*Id.* at art. 11.

[77]*Id.*

[78]*See, e.g.*, Regulation 2016/1036, O.J. (L 176) 21 (EU) [hereinafter Anti-Dumping Regulation].

[79]*See* Foreign Subsidies Regulation, *supra* note 7, at art. 1(1).

[80]*Id.* at art. 4(1).

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d) The level and evolution of economic activity of the undertaking concerned on the internal market;
e) The purpose and conditions attached to the foreign subsidy as well as its use on the internal market.[81]

In similar fashion, under the International Procurement Instrument, measures can be adopted in the presence of "third-country measures or practices" that "result in a serious and recurrent impairment of access of Union goods, services and/or economic operators to the public procurement or concession markets."[82] The substantive conditions in both of these instruments reflect the defensive finalities of the CCP unilateral trade instruments. As the Commission emphasizes, they aim to better equip the EU to withstand unfair trade practices by third countries; not to empower the EU to actively pursue geo-political objectives other than trade liberalization. In other words, they are presented as instruments of deterrence rather than economic statecraft.[83]

II. Procedural Checks on the European Commission

That said, the abovementioned substantive conditions will only have teeth—and abuse will only be avoided—if those conditions are embedded in an institutional framework that provides for meaningful procedural checks on the decision-maker. At this level, the differences between the European Union and the United States are less pronounced than they appear at first glance. In both systems the power to propose and the power to adopt often rest in the hands of a single institution: The President in the U.S., the Commission in the EU. Certainly, anti-dumping and anti-subsidy investigations are typically launched following a complaint brought by industry. The same will hold true for the International Procurement Instrument.[84] However, both of these instruments also empower the Commission to launch investigations *ex officio*.[85] By contrast, under the Foreign Subsidies Regulation, there will not be a complaint mechanism, and the Commission will always start investigations on its own initiative.[86] The same will hold true for the Anti-Coercion Instrument if it is adopted in its current form.[87] For all of these instruments, the Commission can thus propose measures and also adopt them. Coupled with the reverse qualified majority voting rule in the Comitology committee, this makes for a particularly weak procedural check on the Commission.

[81] *Id.*

[82] *See* International Procurement Instrument, *supra* note 6, at art. 2(f).

[83] *See, e.g.*, European Commission Press Release IP/21/6642, EU Strengthens Protections Against Economic Coercion (Dec. 8, 2021) [hereinafter Dombrovskis Press Release]. Speaking on behalf of the Commission, Commissioner for Trade Valdis Dombrovskis said: "

> At a time of rising geopolitical tensions, trade is increasingly being weaponized and the EU and its Member States becoming targets of economic intimidation. We need the proper tools to respond. With this proposal we are sending a clear message that the EU will stand firm in defending its interests. The main aim of the anti-coercion tool is to act as a deterrent. But we now also have more tools at our disposal when pushed to act. This instrument will allow us to respond to the geopolitical challenges of the coming decades, keeping Europe strong and agile. *Id.*

[84] *See* International Procurement Instrument, *supra* note 6, at art. 6(1).

[85] *Id.*; *see also* Regulation 2016/1036, *supra* note 78, at art. 5(6) (providing trade defense context).

[86] *See* Regulation 2022/2560, 2022 O.J. (L 330) art. 9(1) [hereinafter Foreign Subsidies Regulation].

[87] *See* Anti-Coercion Instrument Proposal, *supra* note 5, at art. 3(1). Note that this Article was submitted in October 2022, and thus does not take into account more recent developments. In June 2023, a provisional agreement was reached on the Anti-Coercion Instrument. As part of the agreement, the Council was granted the power to establish the existence of economic coercion—a possibility mentioned infra. See Provisional Agreement Resulting from Interinstitutional Negotiations on a Proposal for a regulation of the European Parliament and of the Council on the protection of the Union and its Member States from economic coercion by third countries (June 21, 2023).

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Furthermore, if the Anti-Coercion Instrument is adopted in its current form, the Commission will find itself in the peculiar position of being able to circumvent the unanimity requirement that governs the adoption of restrictive measures in the CFSP. Under the Anti-Coercion Instrument, the Commission would be able to propose and adopt measures "where a third country seeks, through measures affecting trade or investment, to coerce the Union or a Member State into adopting or refraining from adopting a particular act."[88] This would be the case when that third country "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."[89] Here, as well, the Commission proposal lists a number of indicators to guide that assessment. These indicators include:

a) The intensity, severity, frequency, duration, breadth and magnitude of the third country's measure and the pressure arising from it;
b) Whether the third country is engaging in a pattern of interference seeking to obtain from the Union or from Member States or other countries particular acts;
c) The extent to which the third-country measure encroaches upon an area of the Union's or Member States' sovereignty;
d) Whether the third country is acting based on a legitimate concern that is internationally recognized;
e) Whether and in what manner the third country, before the imposition of its measures, has made serious attempts, in good faith, to settle the matter by way of international coordination or adjudication, either bilaterally or within an international forum.[90]

Despite these efforts at further determining what constitutes "economic coercion," the notion inevitably remains nebulous. The concept of "coercion" is known in international law, but it remains unclear whether coercion can exist outside of the context of the use of military force.[91] The concept as defined in the proposed Anti-Coercion Regulation also contains a subjective element: For there to be economic coercion, there must be an *intention* on behalf of the third country to practice coercion. This subjective element raises evidentiary hurdles as it will be difficult—if not impossible—for the Commission to get watertight evidence of what the third country's intentions really are.[92] At the same time, there may be pressure on the Commission to act, especially in the face of gridlock within the Council making it impossible for the EU to adopt restrictive measures.

Indeed, absent procedural checks, and despite the Commission's insistence that the tool will be used first and foremost for purposes of deterrence,[93] the Commission may in practice be quick to conclude that economic coercion is indeed present, as drawing this conclusion would enable the EU to impose measures very similar to restrictive measures, but without the need for unanimity

[88]*Id.* at art. 1(1).

[89]*Id.* at art. 2(1).

[90]*Id.* at art. 2(2). In the June 2023 provisional agreement, minor modifications were made to this list.

[91]*See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, para. 124 (June 27) (holding that coercion was present 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); *see also* Freya Baetens & Marco Bronckers, *The EU's Anti-Coercion Instrument: A Big Stick for Big Targets*, EJIL: TALK! (Jan. 19, 2022), https://www.ejiltalk.org/the-eus-anti-coercion-instrument-a-big-stick-for-big-targets/ (discussing whether coercion can also exist outside of the context of the use of force); *see also* Deepak Raju, *Proposed EU Regulation to Address Third Country Coercion—What Is Coercion?*, EJIL: TALK! (Jan. 6, 2022), https://www.ejiltalk.org/proposed-eu-regulation-to-address-third-country-coercion-what-is-coercion/ (discussing the meaning of "coercion" more generally).

[92]Interesting, in this regard, is whether Section 232 measures imposed by the Trump Administration against EU imports could also be considered coercive and could thus trigger the anti-coercion measures.

[93]*See* Dombrovskis Press Release, *supra* note 84.

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among the Member States. The situation would be somewhat different if the EU legislature were to empower the Council, rather than the Commission, to adopt the necessary implementing acts to retaliate against coercive practices by third countries. In this scenario, a qualified majority of Member States would have to *approve* the measure before it gets enacted.[94] This is a higher threshold compared to the negative qualified majority requirement in the Comitology process. It is, however, still a lower threshold compared to CFSP restrictive measures, which are adopted by unanimity in the Council. The risk that unanimity in CFSP decision-making will be circumvented through a broad interpretation of the substantive conditions to impose anti-coercion measures thus exists also, albeit to a lesser extent, in the scenario that the Council rather than the Commission has the final say on such measures.

Such "slippery slope" dynamics have played out in the United States where Congress has found it difficult to operate as a check on Presidential power. One example outside of the unilateral trade policy context is the practice of concluding executive agreements. The U.S. Constitution prescribes that the Senate is to give its "advice and consent" to treaties by means of two-thirds of its members. Yet since the late 1930s, over 90% of international agreements concluded by the U.S. are made by the President, often in tandem with Congressional legislation adopted by ordinary majorities.[95] This practice is premised on a distinction maintained by the President between "treaties" in the meaning of Article II of the U.S. Constitution and other international agreements. Yet there is reason to question the distinction, as nowhere in the text of the Constitution is any mention made of executive agreements as an alternative way of concluding international agreements.[96] A similar phenomenon has occurred in the context of the use of military force. In 2011, President Obama insisted that military operations such as imposing a no-fly zone over Libya did not constitute "war" in the meaning of the War Powers Resolution, and that therefore no Congressional approval of the operation was needed.[97] Similarly, in the unilateral trade policy context, "national security" has been interpreted so broadly that it encompasses the entire national economy,[98] and "national emergencies"—the presence of which are required for the President to be able to adopt IEPPA sanctions—have become so common that in July 2020 there were no fewer than 33 national emergencies ongoing.[99]

Could similar erosions of the substantive conditions governing the use of unilateral trade instruments materialize in the European Union? It is important to acknowledge that similar risks do exist in the EU context as well. For various reasons, EU institutions, including the Commission, may feel compelled to stretch the text of the secondary legislation empowering it to act. Examples of such efforts are not hard to find. For example, in response to President Trump's unilateral Section 232 import tariffs, the Commission imposed safeguard measures.[100] The legality of such measures under WTO law was questionable, and, in April 2022, a WTO panel indeed concluded that the EU had breached its obligations under the WTO's Safeguards Agreement and the GATT by unilaterally imposing safeguard measures rather than starting WTO proceedings in reply to the U.S. Section 232 tariffs.[101]

[94]*See* TEU art. 16(4).

[95]*See* Hathaway et al., *supra* note 24, at 632.

[96]*See generally* Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995) (challenging the thesis that the President can choose which procedure to follow).

[97]*See generally* Louis Fisher, *The Law: Military Operations in Libya: No War? No Hostilities?*, 42 PRESIDENTIAL STUD. Q. 176 (2012) (providing more information on the Libyan episode).

[98]*See* 15 C.F.R. § 705.4.

[99]*See* CHRISTOPHER A. CASEY, IAN F. FERGUSON, DIANNE E. RENNACK, & JENNIFER K. ELSEA, CONG. RSCH. SERV., R45618, THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT: ORIGINS, EVOLUTION, AND USE 48–66 (2020).

[100]*See* Commission Implementing Regulation 2019/159, 2019 O.J. (L 31) 27 (EU).

[101]*See* Panel Report, *European Union—Safeguard Measures on Certain Steel Products*, WTO Doc. WT/DS595/12 (adopted May 31, 2022); 30, WTO Doc. WT/DS512/R (adopted Apr. 26, 2019).

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Consider a second example: In 2020, the Commission imposed countervailing duties on imports of glass fiber fabrics from Egypt. Duties were imposed following an investigation that established that a Chinese state-owned company had set up shop in Egypt, from where it subsequently exported subsidized fabrics to EU markets.[102] The Commission held that financial contributions the Chinese company had received from the Chinese government could legally be attributed to Egypt.[103] In so doing, the Commission bypassed the thorny question of whether the SCM Agreement covers subsidies granted by a WTO member to a company outside of its own territory. A privileged observer argued *in tempore non suspecto* that the drafters of the Agreement on Subsidies and Countervailing Measures (the SCM Agreement) had deliberately excluded so-called 'transnational subsidies' from the scope of the agreement as including them would bring the U.S. in trouble, which at the time was the world's largest donor of overseas development assistance.[104] Yet, whether or not WTO law allows conduct of one member to be attributed to another—here, China and Egypt respectively—is perhaps just as controversial as the issue of the SCM Agreement's territorial scope.[105] By imposing countervailing duties, the Commission may very well have misapplied the EU regulation. Yet, there is little that other EU institutions could do to prevent the measures from being adopted as these measures too are subject to the abovementioned reverse qualified majority requirement.

III. Why Judicial Review is Insufficient to Ensure Accountability

To be clear, the Court of Justice as well as international bodies, such as the WTO dispute settlement mechanism, have played and continue to play an important role in holding the Commission to account. At the time of writing this Article in the Fall of 2022, a challenge against the Commission's decision in the abovementioned trade defense case involving glass fiber fabrics was pending before the General Court of the EU.[106] Additionally, in other recent trade defense cases as well, the General Court has not shied away from taking a deep dive into the Commission's calculations and from ultimately concluding that those calculations were not in conformity with the applicable legislation.[107] If the trade defense context is of any guidance, the General Court and the Court of Justice likely will not shy away from scrutinizing Commission decisions under the Foreign Subsidies Regulation, the International Procurement Instrument or the Anti-Coercion Instrument either. In so doing, both EU courts will ensure that the limits of the delegations of authority are complied with and the Commission does not act *ultra vires*.

However, judicial review may not be sufficient to ensure accountability. For starters, judicial review operates *ex post*. For this reason, judicial review may not provide effective relief for the affected industries.[108] This is all the more the case because measures are presumed to be legal until the Court of Justice establishes they are not.[109] Moreover, only rarely are duties suspended pending judicial review. As a consequence, affected businesses may very well have left the market by the time the illegality is established by the Court.

[102]*See* Commission Implementing Regulation 2020/776, 2020 O.J. (L 189) 1 (EU).

[103]*Id.* at 674.

[104]*See* Gary N. Horlick, *An Annotated Explanation of Articles 1 and 2 of the WTO Agreement on Subsidies and Countervailing Measures*, 8 GLOB. TRADE CUSTOMS J. 298 (2013).

[105]*See generally* Edwin Vermulst, Simon J. Evenett, & Juhi Dion Sud, *The European Union's New Move Against China: Countervailing Chinese Outward Foreign Direct Investment*, 15 GLOB. TRADE CUSTOMS J. 419 (2020).

[106]*See* Case T-480/20, Hengshi Egypt Fiberglass Fabrics v. Comm'n, ECLI:EU:T:2023:90 (Mar. 1, 2023).

[107]*See* Case T-383/17, Hansol Paper Co. v. Eur. Comm'n, ECLI:EU:T:2020:139, para. 77 (Apr. 4, 2020); *aff'd sub nom.* Case C-260/20 P, Comm'n v. Hansol Paper, ECLI:EU:C:2022:370 (May 12, 2022).

[108]*See generally* Bregt Natens, Sven de Knop, & Arnoud Willems, *Effect of and Compliance with Judgments of the Court of Justice of the European Union: The Case of Trade Defence Measures*, 15 GLOB. TRADE CUSTOMS J. 54 (2020).

[109]*See* Case C-533/10, Compagnie Internationale pour la Vente à Distance (CIVAD) SA v. Receveur des Douanes de Roubaix, ECLI:EU:C:2012:347 (June 14, 2012), para. 39, https://curia.europa.eu/juris/liste.jsf?num=C-533/10&language=EN.

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But there is a more fundamental point to be made. Despite the comparatively stringent substantive conditions attached to many of the unilateral trade instruments I look at in this Article, all of them endow—or are likely to endow—the Commission with a degree of discretion. This discretion can take many forms. It may consist of granting the Commission the power to open or not open an investigation. Or it may empower the Commission to assess whether imposing measures is in the Union's general interest—the "Union interest"[110]—and to impose or not impose measures depending on the outcome of that assessment. A degree of discretion can also be found in the Commission's fact-finding role. Which facts the Commission deems relevant and which facts it deems irrelevant is an assessment that the Commission is best placed to make, and, as Joanna Mendes has argued, "[t]he choice between alternative views on technical issues and the choice between the various significations that value (undetermined) concepts entail is also a discretionary choice . . . insofar as it will determine a certain course of action and entail normative consequences."[111] The Court of Justice recognizes this reality where it accepts that the Commission disposes of a margin of discretion that covers both factual and policy appraisals.[112] As the General Court put it in *Hansol*,[113] an anti-dumping case:

> In the sphere of the common commercial policy and, most particularly, in the realm of measures to protect trade, the EU institutions enjoy broad discretion because of the complexity of the economic, political and legal situations they have to examine. Since the application of Article 2(11) of the basic regulation requires an appraisal of complex economic situations, the judicial review of such an appraisal is limited to verifying whether the procedural rules have been complied with, whether the facts on which the contested choice is based have been accurately stated, and whether there has been a manifest error in the appraisal of those facts or a misuse of powers.[114]

In complex administrative regimes such as the EU, there will always be discretion involved in executive decision-making.[115] The Court of Justice plays an important role in ensuring that the executive—here: The Commission—does not abuse that discretion and stays within the limits of the powers delegated to it and respects fundamental rights. However, within those legal limits, it is not for the Court of Justice to second-guess the Commission's decisions.[116]

At this juncture, separation of powers considerations call for alternative accountability mechanisms to kick in. If we take seriously the Treaty requirement that the "functioning of the

[110]*See* Anti-Dumping Regulation, *supra* note 78, at art. 21(1). In the trade defense context, the Commission can choose not to impose measures if doing so runs counter the "Union interest"—a notion arguably as open-textured as "national security" in the US and requiring the Commission to take into account "all the various interests taken as a whole." *Id*. The "Union interest" test also plays a role in the Enforcement Regulation, where the Commission must decide on the necessary measures "in light of available information and of the Union's general interest." *See* Enforcement Regulation, *supra* note 4, at art. 4(3). And it appears also in the most recent draft of the International Procurement Instrument, which empowers the Commission to take measures "if it considers it to be in the interest of the Union" to do so. *See* International Procurement Instrument Proposal, *supra* note 6, at art. 8(1).

[111]*See* Joana Mendes, *Administrative Discretion in the EU: Comparative Perspectives*, *in* COMPAR. ADMIN. L. 644 (Susan Rose-Ackerman et al. eds., 2017)

[112]*See Hansol Paper Co.*, Case T-383/17.

[113]*Id.*

[114]*Id.* at para. 77.

[115]*See* Peter Lindseth, *Judicial Review in Administrative Governance: A Theoretical Framework for Comparative Analysis*, *in* JUDICIAL REVIEW OF ADMINISTRATIVE DISCRETION IN THE ADMINISTRATIVE STATE 177 (Jurgen de Poorter et al. eds., 2019) ("Modern states are, of course, rife with [principal-agent] relationships and therefore agency-cost problems.").

[116]This point has implications also for the desirability of review of measures under the GATT security exception. In similar fashion to domestic judicial review, review at WTO level should be permissible but a deferential standard of review is appropriate to ensure that only cases of abuse are sanctioned.

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Union shall be founded on representative democracy"[117] the Commission must be answerable for its actions not only to the Court of Justice, but also to those institutions that endow the EU decision-making process with input legitimacy. This will ensure that all discretionary actions undertaken by the EU are subject to democratic control.[118] This imperative becomes all the more salient as EU trade policy involves increasingly complex trade-offs between public and private interests—often with redistributive implications.[119] To name but one example, in the context of the proposed Anti-Coercion Instrument: Would it be in the Union's interest to take measures to tackle economic coercion practiced by China against Lithuania if, by doing so, German exports to China will suffer? As discussed, today such input legitimacy is ensured primarily through the involvement of the Member States in the adoption of implementing acts. In the next section, I argue that Member State oversight is not sufficient to ensure proper accountability in the EU's unilateral trade policy. European Parliament involvement is needed as well.

D. In Search of Democratic Accountability in EU Unilateral Trade Policy

In the previous Section I explained how risks of executive overreach and abuse of power are not unique to the United States Presidency. They arise also in the area of unilateral trade policy in the EU. Such risks will further increase in the future as the EU legislature endows the Commission with additional powers. To avoid abuses of power and to ensure that the Commission is answerable for its actions, checks and balances must be put in place.

It is interesting to observe, in this regard, that the Lisbon Treaty, which entered into force in 2009, did much to upgrade the role of the European Parliament in EU foreign relations. Since Lisbon, the Parliament has a veto power over most international agreements that the Council concludes.[120] However, the Lisbon Treaty did little to democratize executive decision-making in the EU.[121] On the contrary, it reduced European Parliament involvement in the Comitology process, through which the Commission adopts many of the instruments discussed in this Article. Prior to Lisbon, Council *and* Parliament were sometimes able to oppose proposed implementing acts.[122] Following Lisbon, the Parliament lost that ability for *implementing* acts, while it acquired it for the newly established category of *delegated* acts. However, none of the instruments explored in this Article are or are likely to be adopted by a delegated act. Instead, the implementing act has been the instrument of choice of the EU legislature: all of the instruments looked at in this Article provide for decision-making by implementing act. As a consequence, the European Parliament plays no meaningful role in the process of adopting any of the unilateral trade measures that are or soon may be at the disposal of the Commission.

As mentioned, lack of parliamentary involvement in this process of executive decision-making is difficult to justify in an organization that is constitutionally committed to representative democracy.[123] Others have argued persuasively that the distinction between implementing acts

[117]*See* TEU art. 10(1).

[118]*See generally* Vivien A. Schmidt, *Democracy and Legitimacy in the European Union Revisited: Input, Output and "Throughput,"* 61 POL. STUD. 2 (2013) (considering the distinction between input, output, and throughput legitimacy).

[119]*See* Peter Lindseth, *Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community*, 99 COLUM. L. REV. 628, 693–94 (1999) (referring to this imperative as the "normative yearning for political control"—a yearning he considered distinctly American but which to my understanding is as relevant in Europe as in the US).

[120]TFEU art. 218(6)(a).

[121]*See, e.g.*, Schütze, *supra* note 49 (having received initial positive reactions in the literature, the Treaty of Lisbon has yet to prove out).

[122]*See generally* Michael Kaeding & Alan Hardacre, *The European Parliament and the Future of Comitology After Lisbon*, 19 EUR. L. J. 382 (2013) (explaining that this was the particular situation for implementing acts adopted on the basis of the so-called "regulatory practice with scrutiny").

[123]*See* TEU art. 10(1).

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and delegated acts is unclear and, to an important extent, a political as opposed to a legal issue.[124] Insofar as the distinction is devoid of legal meaning, the rationale for excluding the Parliament from the Comitology process according to which only the Member States should be involved as Member States hold primary responsibility for enforcing and implementing EU law, fails to persuade.[125] Both implementing acts and delegated acts are cases of delegation of authority by the legislature to the executive, whereby the former establishes a principal-agent relation with the latter and which endows the latter with a degree of discretionary decision-making authority.[126] In both scenarios, the legislature empowers the executive to take decisions which the legislature, as a collective body, is institutionally ill-equipped to take. However, as the U.S. experience shows, the legislature should think carefully not only about the substantive conditions it attaches to the exercise of delegated authority, but also about the procedural checks to which the exercise of that authority should be subject.

The foregoing leads me to suggest that, as the EU endows itself with important new unilateral trade instruments, the lack of European Parliament involvement in the process of deploying unilateral trade measures should be reconsidered. To be clear, the power to deploy instruments should not be fully shared between Commission, Council, and Parliament. Such an arrangement would lead to gridlock. Requiring both Council and Parliament to positively agree to each proposed Commission measure would also run counter to the rationale of delegated decision-making, which is precisely to make it easier to adopt individual decisions. From this perspective, suggestions to endow the Council instead of the Commission with the necessary implementing powers to adopt anti-coercion measures are ill-conceived.[127] A more sensible approach consists of endowing the European Parliament with a power to oppose draft implementing acts in a similar fashion to the power already held by the Member States in the Comitology process. In that process, Member States can oppose a draft measure by means of a qualified majority. Similarly, the European Parliament should be able to oppose a draft measure by an absolute majority of its members. Under this arrangement, reminiscent of the procedure to adopt delegated acts, it is difficult, but not impossible, for the European Parliament to oppose a Commission proposal. The mere possibility that the Parliament may veto a draft measure will, in turn, incentivize the Commission to take into account the Parliament's preferences and interests as it deploys unilateral trade instruments.

In the above set-up, Parliament and the Member States would have the ability to oppose measures before they have been enacted and thus before they enter into force. This avoids a

[124]*Compare* Carlo Tovo, *Delegation of Legislative Powers in the EU: How EU Institutions Have Eluded the Lisbon Reform*, 29 EUR. L. REV. 678 (2017) (describing EU trade policy decision-making as "almost absolute"), *with* Merijn Chamon, *The Dividing Line between Delegated and Implementing Acts, Part Two: The Court of Justice Settles the Issue in Commission v. Parliament and Council (Visa Reciprocity)*, 52 COMMON MKT. L. REV. 1617, 1629 (2015) (describing the "the remarkably strong position of the legislature" on the issue of the choice between delegated and implementing acts). *But see* Paul Craig, *Comitology, Rulemaking, and the Lisbon Settlement*, *in* RULEMAKING BY THE EUROPEAN COMMISSION 181 (Carl Fredrik Bergström & Dominique Ritleng eds., 2016) (calling the position of the legislature "fragile and difficult").

[125]*See Commission Proposal for a Regulation of the European Parliament and of the Council Laying Down the Rules and General Principles Concerning Mechanisms for Control by Member States of the Commission's Exercise of Implementing Powers*, COM (2010) 83 final (Mar. 9, 2010) (explaining, in an orthodox account of the structural implementing powers, that the "Member States are naturally responsible for implementing the legally binding acts of the European Union," but "where such basic acts require uniform implementing conditions, it is the Commission that must exercise implementing powers"). The Proposal continues, offering with finality that "[this implementing structure] is why it is the Member States that are responsible for controlling the Commission's exercise of these implementing powers."

[126]*See* Case C-88/14, Comm'n v. Parliament and Council, EU:C:2015:499, para. 32 (July 16, 2015) (holding that the presence of discretionary authority is not a criterion to distinguish between implementing and delegated acts). The Court explained that "neither the existence nor the extent of the discretion conferred on it by the legislative act is relevant for determining whether the act to be adopted by the Commission comes under [TFEU art. 290] or [TFEU art. 291]."

[127]On May 20, 2022, Politico Pro reported in its *Morning Trade* newsletter that the French Council Presidency had proposed that some more power over decision-making should be given to the Council.

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scenario that plagues Congressional efforts to hold the President accountable in the United States: The legislative veto, mentioned earlier, is also subject to high decision-making thresholds. However, unless the Congressional statute delegating authority to the President contains a report-and-wait requirement—which none of the statutes looked at in this Article do—the President does not have to give Congress time to consider issuing a veto. The President can act immediately and thereby create facts on the ground that make recourse to the legislative veto useless. Not so in the EU, where the Commission has to submit draft measures to the responsible Comitology committee. In a reformed Comitology procedure, the Commission would have to submit the same proposal to the responsible European Parliament committee, give the committee time to consider the proposal, and adopt the proposal only after the committee did not oppose the proposal within a given timeframe. This could be achieved by amending the Comitology regulation, by concluding an interinstitutional agreement, or by providing for ad hoc mechanisms in the individual legislative acts empowering the Commission to adopt measures.[128]

By bringing the European Parliament back into the room, the democratic legitimacy of the Commission's decisions increases. The Commission would answer to the Council, which represents one, indirect source of democratic legitimacy in EU decision-making, and it would answer to the European Parliament, which represents another, more direct source.[129] In this setup, it would remain difficult for either Council or Parliament to veto a draft measure. Conversely, the Commission will in many—and most likely most instances be able to get measures adopted. In this sense, my earlier criticism that the strengthening of the EU's unilateral trade toolbox also strengthens the Commission's institutional position remains unaddressed. However, European Parliament involvement may lead to more attention by Members of the European Parliament to what the Commission is up to in its trade policy beyond those high-profile moments on which the Parliament is called on to vote—for example, on a free trade agreement with Canada, or on any of the initial legislative acts that empower the Commission to take the measures I looked at in this Article. If anything, European Parliament involvement in the Comitology process will bring new voices into the Commission's decision-making process—voices that express concerns and preferences that may not be those of any of the Member State executives, but which are shared by broad segments of the European population.

E. Conclusion

In this Article, I looked at the allocation of executive power in unilateral trade policy in the United States and the European Union. I highlighted how growing executive power leads to accountability challenges. In particular, with reference to the U.S. experience, I showed how also in the European Union, a risk exists for abuse of power by the executive as it deploys an increasingly powerful set of unilateral trade instruments. The existence of such risk should be taken into consideration in the

[128] *See* TFEU art. 291(3) (containing a legal basis for the EU legislature to enact "rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers"); *see also* Comitology Regulation, *supra* note 75 (adopting the EU Comitology Regulation on this basis of Member States exercising control over the implementing powers). Rules to involve the European Parliament, however, arguably cannot be adopted on this basis. However, an interinstitutional agreement that provides for parliamentary control over the exercise of Commission implementing powers could be considered a further determination of the duty of sincere cooperation and would, as such, be legally binding on the Commission. *See also* Case C-25/94, Comm'n v. Council ("FAO"), EU:C:1996:114, para. 49 (Mar. 19, 1996). An alternative option is to include such rules in the specific statute that empowers the Commission. Nothing precludes the EU legislature from setting up ad hoc control mechanisms that allow the Parliament to exercise oversight outside of the context of delegated acts.

[129] *See* Sergio Fabbrini, *Intergovernmentalism and Its Limits: Assessing the European Union's Answer to the Euro Crisis*, 46 COMP. POL. STUD. 1003, 1022 (2013) (arguing, in the context of the Euro Crisis, that "the legitimacy of decisions taken on behalf of the EU cannot be a derivative of the legitimacy enjoyed by the governments of its member states"). Fabbrini points out, further, that "[d]ecisions made at the EU level would require a legitimizing mechanism at that level, not at the level of its member states."

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design of the governance framework of unilateral trade instruments. As trade policy becomes more political and indeed geopolitical, the stakes increase and the balancing of interests and values becomes more difficult. Such decision-making should be subject to meaningful procedural checks. At present, and in addition to judicial review by the Court of Justice, Member States can operate as a check on the Commission through their involvement in the Comitology process. In a polity that draws its legitimacy both from states and individual citizens, it is important, however, that the European Parliament also has a role to play in the process of adopting unilateral trade measures as it is that Parliament that represents EU citizens within the EU political process.

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