IMPERIAL PRESIDENCY VERSUS FRAGMENTED EXECUTIVE? UNILATERAL TRADE MEASURES AND EXECUTIVE ACCOUNTABILITY IN THE EUROPEAN UNION AND THE UNITED STATES

Thomas Verellen, Utrecht University, t.e.verellen@uu.nl[1]

Abstract:

Faced with a changing geopolitical environment, the European Union has embarked on a legislative programme to upgrade its unilateral trade instruments toolbox. By reforming existing instruments (trade defence) and by adding new instruments to the European Commission's toolbox (foreign subsidies instrument, international procurement instrument, anti-coercion instrument…), the EU legislature is significantly strengthening the position of the Commission in the governance of unilateral trade policy in the EU. This development raises questions of accountability. By means of a comparative analysis of executive 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 accountability mechanisms is needed to match the Commission's growing responsibilities in this underexamined area of EU trade policy.

Contents

Introduction 1

Unilateral trade measures in the United States: Taming the Imperial Presidency 4

Unilateral trade measures in the European Union: A fragmented yet increasingly powerful executive 8

In search of executive accountability in EU unilateral trade policy 15

Conclusion 18

INTRODUCTION

Faced with a changing geopolitical environment, the European Union started upgrading its unilateral trade instruments toolbox.[2] In 2017, the EU modernized its anti-dumping and anti-subsidy rules to better equip

---

[1] Special thanks to the Belgian American Educational Foundation which generously funded the research stay at the University of Michigan Law School during which I researched and wrote this chapter.

[2] I use the term 'unilateral' in a strictly descriptive manner to distinguish the instruments looked at in this chapter from bilateral, plurilateral or multilateral initiatives such as the network of second generation free trade agreements the EU has been setting up in recent years.

the European Commission to deal with state-induced trade distortions.[3] In 2020, the EU established a framework to screen foreign direct investment in the EU.[4] In May 2021, the Commission proposed an instrument that would enable it to tackle subsidies issued by third country governments to companies established in the EU – thereby filling a perceived gap between the EU's state aid and anti-dumping rules.[5] Also in 2021, the EU revised its Enforcement Regulation to enable the Commission to retaliate against violations of international trade agreements in the absence of a final WTO dispute settlement report.[6] In the Spring of 2022, Parliament and Council reached an agreement to make access to procurement markets in the EU dependent on reciprocity.[7] And in December 2021 the Commission proposed an 'anti-coercion' instrument, which – if adopted – will grant the Commission broad powers to retaliate against acts of 'coercion' targeted at EU Member States or institutions.[8]

The list of proposed and adopted measures is impressive.[9] The combined effect of these initiatives is a significant empowerment of the European Commission as the EU's executive body at the helm of 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.[10] Moreover, these legislative initiatives have to be looked at in conjunction with an increased use of sectoral economic sanctions adopted by the Council within the framework of the EU's Common foreign and security policy (CFSP).[11] 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. 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.[12]

---

[3] For an analysis of the changes, see generally Frank Hoffmeister, 'The Devil Is in the Detail: A First Guide on the EU's New Trade Defence Rules' in Wolfgang Weiß and Cornelia Furculita (eds), *Global Politics and EU Trade Policy: Facing the Challenges to a Multilateral Approach* (Springer International Publishing 2020).
[4] Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, OJ L 79I , 21.3.2019, p. 1–14.
[5] Proposal for a regulation of the European Parliament and the Council on foreign subsidies distorting the internal market, 5.5.202, COM(2021) 223 final (the 'Foreign Subsidies Instrument Proposal').
[6] Regulation (EU) 2021/167 of the European Parliament and of the Council of 10 February 2021 amending Regulation (EU) No 654/2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules OJ L 49, 12.2.2021, p. 1–5 (the 'Enforcement Regulation').
[7] Andy Bounds, 'Brussels to Bring in Powers to Handicap Foreign Bids for State Contracts' *Financial Times* (15 March 2022) <https://www.ft.com/content/8532ffc0-f064-40e0-b8b2-7841ae9dc281> accessed 8 April 2022.
[8] 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, 8.12.2021, COM/2021/775 final (the 'Anti-Coercion Instrument Proposal').
[9] Politico, a media outlet, spoke of a 'trade bazooka.' See Jakob Hanke, 'EU Builds Anti-Trump Trade Bazooka' *Politico* (10 October 2019) <https://www.politico.eu/article/eu-builds-anti-trump-trade-bazooka/> accessed 14 October 2019.
[10] Art. 2(1) TFEU.
[11] See e.g. the trade sanctions imposed on Russian and Belarussian exports to the EU following the Russian invasion of Ukraine in the spring of 2022. For an overview, see https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/ accessed 8 April 2022.
[12] Art. 21(2)(a) TEU.

A growing toolbox of unilateral trade policy instruments empowers the executive – in this case, the European Commission. As executive power grows, it 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 about, it is useful to have a 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, his independent constitutional responsibilities are more limited. However, Congress has delegated much of its trade policy-related responsibility to the President.[13] 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 labour between Congress and the President should be reconsidered.

In this chapter 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 defence 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 we as Europeans should think about executive accountability in unilateral trade policy.[14]

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 sight given the important structural differences between the EU and U.S. executives. Indeed, the U.S. experience in this area can be understood

[13] Describing this process, see generally Douglas A Irwin, *Clashing over Commerce: A History of US Trade Policy* (University of Chicago Press 2017).

[14] I'm reminded of how Wojciech Sadurski in a 2006 paper mentioned how we Europeans like to contrast the European constitutional experience with that of the U.S. – not because we believe the U.S. 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 U.S. See Wojciech Sadurski, 'European Constitutional Identity?' (European University Institute 2006) 8 <http://www.ssrn.com/abstract=939674> accessed 7 April 2022.

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[15], and which is constitutionally committed to representative democracy[16], accountability lines must run from the Commission to both the Member States and the EU citizens. This means, in institutional terms, that both 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'[17] 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 chapter has two parts. I first 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. 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, which also operates as a conclusion, I develop the normative argument that more and better executive accountability mechanisms are called for in this area.

UNILATERAL TRADE MEASURES IN THE UNITED STATES: TAMING THE IMPERIAL PRESIDENCY

In his 1973 book, Arthur Schlesinger referred to the U.S. 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.[18]

---

[15] Art. 10(2) TEU.
[16] Art. 10(1) TEU. On the significance of this provision, see also Thomas Verellen, 'Hungary's Lesson for Europe' (*Verfassungsblog*, 8 April 2022) <https://verfassungsblog.de/hungarys-lesson-for-europe/> accessed 8 April 2022.
[17] Sophie Meunier and Kalypso Nicolaidis, 'The Geopoliticization of European Trade and Investment Policy' (2019) 57 JCMS: Journal of Common Market Studies 103.
[18] Arthur Meier Schlesinger, *The Imperial Presidency* (Houghton Mifflin Harcourt 1973) ix–x.

As Schlesinger himself noted in this quote, the Imperial Presidency was not a novel phenomenon in the United States of the early 1970s. What *was* new, he argued, was its extension from *foreign* to *domestic* affairs. 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[19], 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.[20]

In the trade policy sphere broadly considered, Congress has delegated important responsibilities to the President. As is well known, the United States Trade Representative (USTR) negotiates trade agreements on behalf of the President. 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 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.'[21] This includes the raising of import tariffs or the introduction of import quotas.[22] '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.[23] 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.[24] Similar points can be made about other unilateral trade powers, such as the President's authority to take measures –

---

[19] Oona A Hathaway, Curtis A Bradley and Jack L Goldsmith, 'The Failed Transparency Regime for Executive Agreements: An Empirical and Normative Analysis' (2020) 134 Harvard Law Review 629, 639–641. In the trade sphere, see Kathleen Claussen, 'Trade's Mini-Deals' (Social Science Research Network 2021) SSRN Scholarly Paper 3836909 <https://papers.ssrn.com/abstract=3836909> accessed 9 May 2022.

[20] In this sense, see generally Harold Hongju Koh, 'Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair' (1988) 97 The Yale Law Journal 1255.

[21] 19 U.S.C. § 1862 (c) (1) (A).

[22] The Supreme Court confirmed that Section 232 measures can consist of quotas as well as fees. See *FEA v. Algonquin SNG, Inc*., 426 U.S. 548 (1976), at 561.

[23] 15 CFR § 705.4 (b) (3).

[24] See also the U.S. third party submission in the *Traffic in Transit* WTO dispute settlement proceedings, in which it argued that Article XXI GATT on the protection of essential security interests is self-judging and thus not susceptible to review. This view is in sync with the President's position that he alone can assess whether national security requires imposing section 232 measures. See Panel Report, *Russia – Measures concerning traffic in transit*, WTO Doc. WT/DS512/R/Add.1 (adopted Apr. 19, 2019), Annex D-10. And while a WTO panel report has rejected U.S. claims, this clarification won't have much practical impact given the paralysis of the WTO's appellate body which enables WTO members to appeal 'into the void'. On the paralysis, see Bernard Hoekman and Petros C Mavroidis, 'Burning Down the House? The Appellate Body in the Centre of the WTO Crisis' (European University Institute 2019) 56 <https://www.ssrn.com/abstract=3424856> accessed 28 October 2019.

including import bans – under the International Emergency Economic Powers Act (IEEPA)[25], or the USTR's power to take measures under Section 301 of the Trade Act 1974. For each of these instruments, Congress has delegated a power to the President or an agency or cabinet department that he controls such as the USTR. This power is subject to relatively undemanding substantive checks in the form of broadly framed, open-ended conditions.[26] 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 past been deferential towards the executive in their own assessment of whether the executive had complied with the conditions.[27]

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. Most commentators agree that this was an effective tool for Congress to exercise oversight over the executive, including in the field of trade policy.[28] 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.[29] However, in 1983 in the case of *INS v Chadha* the Supreme Court declared the one-house and the two-house legislative veto without presentment to the President unconstitutional.[30] 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 e.g. Section 232 by means of an *ordinary* majority. Instead, a *two-third* majority in *both* houses was required to insulate

---

[25] IEEPA empowers the President to impose sanctions on individuals and – perhaps – also import tariffs. To adopt such measures, the President must declare a national emergency. He can do so when he considers there to be 'any unusual and extraordinary threat … to the national security, foreign policy, or economy of the United States.'

[26] Under the IEEPA, the President can take measures in the presence of an 'unusual and extraordinary threat … … to the national security, foreign policy, or economy of the United States.' (50 U.S.C. § 1701). The statute does not define these 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' (50 U.S.C. § 2411(b)). The statute does not define these terms either.

[27] In *PrimeSource*, the Court of International Trade held that a highly deferential standard of review is called for, under which courts could review Presidential actions only for 'clear misconstructions of the governing statute, significant procedural violations, and actions outside delegated authority.' See *PrimeSource Bldg. Prod., Inc. v. United States*, 505 F. Supp. 3d 1352 (Ct. Int'l Trade 2021), 1304.

[28] Contra, see Curtis A Bradley, 'Reassessing the Legislative Veto: The Statutory President, Foreign Affairs, and Congressional Workarounds' (2021) 13 Journal of Legal Analysis 439., arguing that Congress has other effective instruments at its disposal to hold the President to account.

[29] 50 U.S.C. § 1703 (b) and 19 U.S.C. § 1862 (f).

[30] *I.N.S. v. Chadha*, 462 U.S. 919 (1983).

the resolution against a potential presidential veto. As a result, to the regret of some[31] and the delight of others[32], the legislative veto became ineffective as a means to keep a check on the President's exercise of delegated trade powers.[33]

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 structural problems in deploying those instruments effectively. To be clear, existing trade delegations are subject to some procedural checks. Sections 232 and 301 impose specific executive decision-making procedures[34], and Section 232 imposes time limits on Presidential action[35] – limits which federal courts have enforced in recent years.[36] Section 232 also still contains a legislative veto provision, although the statute now expressly provides Congress can only exercise the veto by means of a joint resolution, which must be presented to the President.[37] Similarly, IEEPA requires the President to first declare a national emergency before taking action; he must consult with Congress for as long as the national emergency continues[38]; he must submit a report to Congress whenever he adopts a measure in the framework of the IEEPA[39]; and he must periodically report to Congress about the actions he has undertaken and changes that have occurred since the previous report.[40] Similar consultation requirements exist for Section 232 measures[41], but not for Section 301 measures.[42] However, more far-reaching mechanisms such as sunset provisions or report-and-wait requirements have not been used in the unilateral trade policy context. Likewise, Congress has not tried to frame existing delegations more narrowly, despite calls to do so.[43]

---

[31] See e.g. Peter L Strauss, 'Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision' (1983) 1983 Duke Law Journal 789. See also the intervention by the current U.S. President and then U.S. Senator Joe Biden in 'Who Needs the Legislative Veto?' (1984) 35 Syracuse Law Review 685., 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.
[32] Some lawyers in the United States had expressed the view that the legislative veto was unconstitutional. See e.g. the reference to Congressional testimony by then future Supreme Court Justice Antonin Scalia, mentioned in Carl McGowan, 'Congress, Court, and Control of Delegated Power' (1977) 77 Columbia Law Review 1119, 1149.
[33] Criticizing the ruling, see also Robert Schütze, '"Delegated" Legislation in the (New) European Union: A Constitutional Analysis' (2011) 74 The Modern Law Review 661, 666–669.
[34] 50 U.S.C. § 1862 (b) and 50 U.S.C. § 2414 (a) (1).
[35] 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.
[36] See e.g. *PrimeSource Bldg. Prod., Inc. v. United States*, 505 F. Supp. 3d 1352 (Ct. Int'l Trade 2021).
[37] 19 U.S.C. § 1862 (f).
[38] 50 U.S.C. § 1703 (a).
[39] 50 U.S.C. § 1703 (c).
[40] *Id*.
[41] The President must inform Congress of Section 232 measures and he must report to Congress about investigations that are being conducted (50 U.S.C. § 1862 (d)).
[42] Section 301 measures do not have to be reported to Congress; Congress plays no direct role in the Section 301 decision-making process at all.
[43] See e.g. Kathleen Claussen, 'Trade War Battles: Congress Reconsiders Its Role' (*Lawfare*, 5 August 2018) <https://www.lawfareblog.com/trade-war-battles-congress-reconsiders-its-role> accessed 12 July 2020.

The scarcity of 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. 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 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 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[44], it is worth considering whether the Trump experience does not call for legal guardrails to be introduced to ensure executive accountability moving forward.[45]

UNILATERAL TRADE MEASURES IN THE EUROPEAN UNION: A FRAGMENTED YET INCREASINGLY POWERFUL EXECUTIVE

How does the European Union compare to the United States when it comes to executive 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, more fragmented.[46] The European Commission exercises important *administrative* executive powers[47], but so does the Council. (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 (i.e. the power to exercise political leadership and to determine the course of the 'ship of state'), the European Council is the main player[48], with the Commission 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

[44] For a pre-Trump era argument that the President is in fact constrained by such conventions, see generally Jack Goldsmith, *Power and Constraint: The Accountable Presidency After 9/11* (1 edition, W W Norton & Company 2012).
[45] It is interesting that the above author, who in his 2012 book still expressed confidence in the ability of conventions to operate as guardrails, in a recent book argues for harder legal guardrails to avoid abuse of power by the sitting President. See Bob Bauer and Jack L Goldsmith, *After Trump: Reconstructing the Presidency* (Lawfare Press 2020).
[46] See Deirdre Curtin, *Executive Power of the European Union: Law, Practices, and the Living Constitution* (Oxford University Press 2009) 65.
[47] On the distinction between administrative and political executive power, see ibid 4 and 5.
[48] For an argument that political executive power in the EU is centralized in the European Council, see generally Luuk van Middelaar, *The Passage to Europe: How a Continent Became a Union* (Yale University Press 2013).

the general EU interest.[49] 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.[50] This certainly holds true for unilateral trade policy, where EU executive bodies – in particular Council and 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.[51]

How then, is executive accountability 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. 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 chapter. Most of these instruments are adopted by means of implementing acts. Implementing acts are adopted on the basis of the so-called 'comitology' system.[52] 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. 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 it can let the Commission know that it believes a proposed measure to be *ultra vires* the Commission's powers.[53] In such a case, the Commission has to reconsider the measure, but it cannot be stopped from adopting the measure the second time around.

CCP unilateral trade instruments have traditionally been subject to more demanding substantive conditions compared to their U.S. counterparts. Classic trade defence 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. Many of

---

[49] Describing the relation between European Council and European Commission as one of 'competitive cooperation', see generally Pierre Bocquillon and Mathias Dobbels, 'An Elephant on the 13th Floor of the Berlaymont? European Council and Commission Relations in Legislative Agenda Setting' (2014) 21 Journal of European Public Policy 20.
[50] Highlighting the problem of executive dominance in EU decision-making, see generally Deirdre Curtin, 'Challenging Executive Dominance in European Democracy' (2014) 77 The Modern Law Review 1., and in the context of executive rule-making, see also Deirdre Curtin, Herwig Hofmann and Joana Mendes, 'Constitutionalising EU Executive Rule-Making Procedures: A Research Agenda' (2013) 19 European Law Journal 1.
[51] For an argument for more effective democratic accountability mechanisms in the context of unilateral trade policy, see Thomas Verellen, 'Unilateral Trade Measures in Times of Geopolitical Rivalry' (*Verfassungsblog*, 25 May 2021) <https://verfassungsblog.de/unilateral-trade-measures-in-times-of-geopolitical-rivalry/> accessed 13 June 2021.
[52] Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, OJ L 55, 28.2.2011, p. 13-18.
[53] Ibid, Art. 11.

the proposed instruments are – or will be, if they get adopted – subject to fairly stringent substantive conditions as well. For example, under the proposed Foreign Subsidies Instrument, redressive measures could be adopted only in the presence of foreign subsidies that 'distort the internal market.'[54] 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.'[55] And 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;

d) the level 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.[56]

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.'[57] The substantive conditions in both of these instruments reflect the *defensive* finalities of the CCP unilateral trade instruments: they are intended 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.

That said, the substantive conditions will only have teeth when 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 sight. In both systems does 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. Surely, in the framework of anti-dumping or anti-subsidy investigations, investigations are typically launched following a complaint brought by industry. The same will hold true for the International Procurement Instrument.[58] However, both of these instruments also

---

[54] Foreign Subsidies Instrument Proposal, Art. 1(1).
[55] Ibid., Art. 3(1).
[56] Ibid.
[57] Consolidated proposal for a regulation on the access of third-country economic operators, goods and services to the Union's public procurement market and procedures supporting negotiations on access of Union economic operators, goods and services to the public procurement markets of third countries (International Procurement Instrument - IPI), 2012/0060 (COD) (the 'International Procurement Instrument Proposal'), Art. 2(f).
[58] Ibid., Art. 6(1).

empower the Commission to launch investigations *ex officio*.[59] 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.[60] The same will hold true for the Anti-Coercion Instrument if it is adopted in its current form.[61] For all of these instruments, the Commission can thus propose measures and also adopt them. Coupled with the reversed qualified majority voting rule in the Comitology committee, this makes for a particularly weak procedural check on the Commission.

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 will 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.'[62] 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.'[63] 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 recognised;
>
> 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.

[59] Ibid for the International Procurement Instrument, and in the trade defence context see e.g. Art. 5(6) of Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union, OJ L 176, 30.6.2016, p. 21–54.
[60] Foreign Subsidies Instrument Proposal, Art. 8(2).
[61] Anti-Coercion Instrument Proposal, Art. 3(1).
[62] Ibid., Art. 1(1).
[63] Ibid., Art. 2(1).

Despite these efforts at further determining what constitutes 'economic coercion', the notion inevitably remains nebulous. It cannot be otherwise, as the concept 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 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. 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. Absent procedural checks, the Commission may 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 among the Member States.

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.[64] 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.[65] 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.[66] Similarly, in the unilateral trade policy context, 'national security' has been interpreted so broadly that it encompasses the entire national economy[67], and 'national emergencies' – the presence of which is required for the President to be able to adopt IEPPA sanctions – have become so common that in July 2020 there were no less than 33 national emergencies ongoing.[68]

---

[64] Hathaway, Bradley and Goldsmith (n 17) 632.

[65] Challenging the thesis that the President can choose which procedure to follow, see generally Laurence H Tribe, 'Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation' (1995) 108 Harvard Law Review 1221.

[66] On this episode, see generally Louis Fisher, 'The Law: Military Operations in Libya: No War? No Hostilities?' (2012) 42 Presidential Studies Quarterly 176.

[67] See 15 CFR § 705.4 (b) (3): '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: … (3) Any other relevant factors that are causing or will cause a weakening of our national economy.'

[68] For the full list, see Christopher A Casey and others, 'The International Emergency Economic Powers Act: Origins, Evolution, and Use' (Congressional Research Centre - Library of Congress 2020) 48–66.

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 EU imposed retaliatory measures on the basis of the Enforcement Regulation.[69] The legality of such measures under WTO law and under the Enforcement Regulation was premised on the U.S. tariffs being safeguard measures. It is doubtful, however, whether that was really the case. (The U.S. itself maintained that they were national security measures.[70]) Or a second example: in 2020, the Commission imposed countervailing duties on imports of glass fibre fabrics from Egypt following an investigation that established that a Chinese state-owned company had set up shop in Egypt, from which it subsequently exported subsidized fabrics to EU markets.[71] On this occasion, the Commission could be criticized for stretching the Anti-Subsidy Regulation – and the Agreement on Subsidies and Countervailing Measures which it implements into EU law – beyond what its text can bear.[72] 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.

To be clear, the Court of Justice plays an important role in holding the Commission to account. At the time of writing in the spring of 2022, a challenge against the Commission's decision in the abovementioned trade defence case involving glass fibre fabrics was pending before the General Court of the EU. And in other recent trade defence 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.[73] If the trade defence 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*.

---

[69] Commission Implementing Regulation (EU) 2019/159 of 31 January 2019 imposing definitive safeguard measures against imports of certain steel products, OJ L 31, 1.2.2019, p. 27–74.

[70] Discussing the legality of the EU's retaliatory measures, see Yong-Shik Lee, 'Three Wrongs Do Not Make a Right: The Conundrum of the US Steel and Aluminum Tariffs' (2019) 18 World Trade Review 481, 492–496.

[71] Implementing Regulation 2020/776 imposing definitive countervailing duties on imports of certain woven and/or stitched glass fibre fabrics originating in the Chinese mainland and Egypt, OJ L 189, 15.6.2020, p. 1– 170.

[72] Questioning the legality of the countervailing duties imposed on glass fibre fabric imports from Egypt, see generally Victor Crochet and Vineet Hegde, 'China's "Going Global" Policy: Transnational Subsidies under the WTO SCM Agreement' (Leuven Centre for Global Governance Studies 2020) Working Paper 220.

[73] See in particular Case T-383/17, *Hansol Paper Co. Ltd v European Commission*, EU:T:2020:139, para. 77, pending on appeal at the time of writing (Case C-260/20 P).

However, judicial review may not be sufficient to ensure executive accountability. For starters, judicial review operates *ex post*. For this reason, judicial review may not provide effective relief for the affected industries.[74] This is all the more the case because measures are presumed to be legal until the Court establishes they are not.[75] 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.

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 chapter, all of them endow the Commission with a degree of discretion. This discretion can take many forms. It may consist in 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'[76] – 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.'[77] 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. As the General Court put it in *Hansol*, 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

[74] In this sense, see generally Bregt Natens, Sven De Knop and Arnoud Willems, 'Effect of and Compliance with Judgments of the Court of Justice of the European Union: The Case of Trade Defence Measures' (2020) 15 Global Trade and Customs Journal 54.

[75] In this sense, see Case C-533/10, *Compagnie internationale pour la vente à distance (CIVAD) SA v Receveur des douanes de Roubaix e.a.*, EU:C:2012:347, para. 39.

[76] In the trade defence 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 U.S. which requires the Commission to take into account 'all the various interests taken as a whole.' See Anti-dumping Regulation, Art. 21(1). 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. 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, Art. 8(1).

[77] Joana Mendes, 'Administrative Discretion in the EU: Comparative Perspectives' in Susan Rose-Ackerman, Peter Lindseth and Blake Emerson (eds), *Comparative Administrative Law* (Edward Elgar Publishing 2017) 644.

> 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.[78]

In complex administrative regimes such as the EU, there will always be discretion involved in executive decision-making.[79] 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. However, within those legal limits, it is not for the Court of Justice to second-guess the Commission's decisions. 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 Union shall be founded on representative democracy'[80], 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 so as to ensure that all discretionary actions undertaken by the EU are subject to democratic control. 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.[81] (To name but one example: in the context of the proposed Anti-Coercion Instrument: Would it be in the Union 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 executive accountability in the EU's unilateral trade policy. European Parliament involvement is needed as well.

In search of executive 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.

---

[78] Case T-383/17, *Hansol Paper Co. Ltd v European Commission*, EU:T:2020:139, para. 77.

[79] In this sense, see also Peter Lindseth, 'Judicial Review in Administrative Governance: A Theoretical Framework for Comparative Analysis' in Jurgen de Poorter, Ernst Hirsch Ballin and Saskia Lavrijssen (eds), *Judicial Review of Administrative Discretion in the Administrative State* (TMC Asser Press 2019) 177. ('Modern states are, of course, rife with [principal-agent] relationships and therefore agency-cost problems.')

[80] Art. 10(1) TEU.

[81] In a 1999 contribution, Peter Lindseth referred to this imperative as the 'normative yearning for political control' – a yearning he considered distinctly American but which in my understanding is as relevant in Europe as it is in the U.S. See Peter Lindseth, 'Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community' (1999) 99 Columbia Law Review 628, 693–694.

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.[82] However, the Lisbon Treaty did little to democratize executive decision-making in the EU.[83] To the contrary, it reduced European Parliament involvement in the Comitology process through which the Commission adopts many of the instruments discussed in this chapter.[84] Prior to Lisbon, Council *and* Parliament were often able to oppose proposed implementing acts.[85] 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 chapter are or are likely to be adopted by delegated act. Instead, the implementing act has been the instrument of choice of the EU legislature: all of the instruments looked at in this chapter 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 will 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.[86] Others have argued persuasively that the distinction between implementing and delegated acts is unclear and, to an important extent, a political as opposed to a legal question.[87] In so far 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 to enforce and implement EU law, fails to persuade.[88] 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. In both scenarios, the legislature empowers the executive to take decisions which the

---

[82] Art. 218(6)(a) TFEU.
[83] Despite initial positive reactions in the literature. See e.g. Schütze (n 31).
[84] On this story, see generally
[85] This was the case in particular for implementing acts adopted on the basis of the so-called ‘regulatory procedure with scrutiny.’ On this procedure, see generally Michael Kaeding and Alan Hardacre, ‘The European Parliament and the Future of Comitology after Lisbon’ (2013) 19 European Law Journal 382.
[86] Art. 10(1) TEU.
[87] Carlo Tovo has described this discretion as ‘almost absolute’ whereas Merijn Chamon has spoken of a ‘a remarkably strong position of the legislature’ on the issue of the choice between delegated and implementing acts. See, respectively Carlo Tovo, ‘Delegation of Legislative Powers in the EU: How EU Institutions Have Eluded the Lisbon Reform’ [2017] European Law Review 29, 678; 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)’ (2015) 52 Common Market Law Review 1617, 1629.
[88] In this sense, 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: ‘The Member States are naturally responsible for implementing the legally binding acts of the European Union. However, where such basic acts require uniform implementing conditions, it is the Commission that must exercise implementing powers. This is why it is the Member States that are responsible for controlling the Commission's exercise of these implementing powers.’

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 the rationale of delegated decision-making, which is precisely to make it easier to adopt individual decisions. A more sensible approach consists in 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, the 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 (i.e. 352 members). This makes it 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 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, 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.

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 source of

democratic legitimacy in EU decision-making, and it would answer to the European Parliament, which represents another. 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 chapter. 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.

CONCLUSION

In this chapter 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 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, which represents EU citizens within the EU political process, also has a role to play in the process of adopting unilateral trade measures.