

# Review of EU Enforcement Regulation for trade disputes

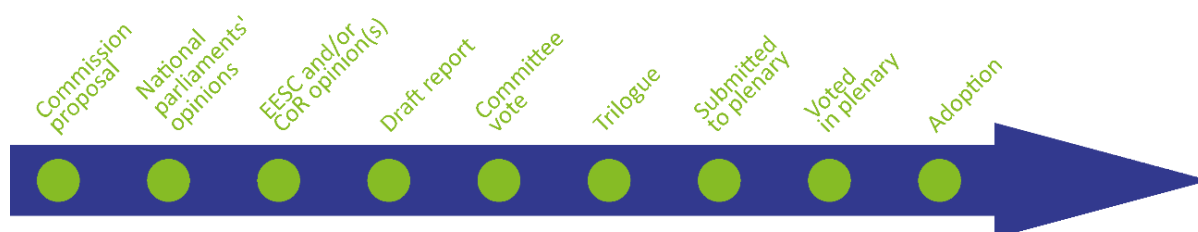
## OVERVIEW

On 12 December 2019, the European Commission adopted a proposal to amend Regulation (EU) No 654/2014 concerning the exercise of the EU's rights for the application and enforcement of international trade rules ('the Enforcement Regulation') of 15 May 2014. The Enforcement Regulation enables the EU to suspend or withdraw concessions or other obligations under international trade agreements in order to respond to breaches by third countries of international trade rules that affect the EU's commercial interests. The proposed amendments were aimed at empowering the EU to impose counter-measures in situations where EU trade partners violate international trade rules and block the dispute settlement procedures included in multilateral, regional and bilateral trade agreements, thus preventing the EU from obtaining final binding rulings in its favour. -

The Council adopted its negotiating position on 8 April 2020, and the Committee on International Trade (INTA) of the European Parliament adopted its position on 6 July 2020. Trilogue negotiations concluded on 28 October with a provisional agreement, which INTA endorsed on 10 November. Parliament adopted the agreed text on 19 January 2021. Following the Council's approval, the Regulation as amended entered into force on 13 February 2021.

**Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 654/2014 of the European Parliament and of the Council concerning the exercise of the Union's rights for the application and enforcement of international trade rules**

<i>Committee responsible:</i>	International Trade (INTA)	COM(2019) 623 12.12.2019
<i>Rapporteur:</i>	Marie-Pierre Vedrenne (Renew Europe, France)	2019/0273 (COD)
<i>Shadow rapporteurs:</i>	Anna-Michelle Asimakopoulou (EPP, Greece) Bernd Lange (S&D, Germany) Reinhard Bütikofer (Greens/EFA, Germany) Emmanouil Fragkos (ECR, Greece) Helmut Scholz (The Left, Germany)	Ordinary legislative procedure (COD) (Parliament and Council on equal footing – formerly 'co-decision')
<i>Procedure completed.</i>	Regulation (EU) 2021/167 <a href="#">OJ L 49, 12.2.2021, pp. 1–5.</a>	



## Introduction

On 12 December 2019, the European Commission [published](#) a legislative [proposal](#) under [Article 207](#) of the Treaty on the Functioning of the European Union (TFEU) aimed at amending Regulation (EU) No 654/2014 concerning the exercise of the EU's rights for the application and enforcement of international trade rules in certain specific situations (the Enforcement Regulation) of 15 May 2014. The Enforcement Regulation enables the EU to suspend or withdraw concessions or obligations under international trade agreements in certain situations and under certain conditions to protect its commercial interests.

The proposal was driven by the fact that the assumption of a functioning second instance of the WTO Dispute Settlement Body, the Appellate Body, which was valid at the time of the Enforcement Regulation's adoption, was no longer accurate and that a temporary contingency solution promoted by the EU was as yet applicable to only a small number of WTO members. It also addressed the potential for similar blockages in dispute settlement arrangements under the EU's bilateral and regional trade agreements.

The proposal furthermore reflected the EU's commitment to multilateralism and binding independent adjudication and sought to prevent the current paralysis of the [Appellate Body](#) from acting as an incentive for EU trading partners to thwart the international rules-based trading system.

The proposed amendments to the Enforcement Regulation were consistent with the new Commission's pledge to put particular emphasis on implementing and enforcing international trade agreements effectively ([political guidelines](#) for the Commission and [mission letter](#) to the Commissioner for Trade), including through the [new position](#) of Chief Trade Enforcement Officer.

## Context

On 11 December 2019, the WTO Appellate Body, [ceased](#) to function, as the terms of two of the three remaining judges necessary to decide upon appeals of first instance panel reports came to an end. This situation resulted from the US [blocking](#) the nomination of new judges to the Appellate Body for several years on both procedural and substantive grounds. The US has notably argued that the Appellate Body's '[judicial over-reach](#)' has taken the rule-making power away from WTO members and [allegedly](#) made US trade remedies less effective.

The paralysis of the Appellate Body challenges WTO members' legitimate rights to enforce international trade rules. Under the new circumstances, in the [absence](#) of agreements among all WTO members on alternative dispute resolution under [Article 25](#) of the WTO Dispute Settlement Understanding (DSU), an appeal by the losing party in a WTO trade dispute against a first instance panel report decided in favour of the winning party will be caught in 'the legal void' and remain unsolved and unenforceable, since there are no Appellate Body judges to hear new appeal cases.

As the completion of dispute settlement procedures with a favourable final binding WTO ruling is required to obtain WTO authorisation to proceed to enforcement action against WTO members found to be violating WTO law, the losing WTO member appealing into the legal void will have de facto veto power against a favourable ruling, thereby depriving the winning WTO member of its legitimate enforcement rights.

The EU has pursued a three-pronged approach to address the challenges surrounding the WTO Appellate Body. First, in response to long-standing US complaints, the EU has submitted concrete [reform proposals](#) for the WTO's adjudication function to the WTO General Council and has participated in plurilateral discussions with like-minded countries on [concrete text proposals](#).

Second, the EU has played a leading role in attempting to fill the legal enforcement gap left by the temporary stalemate over the WTO Appellate Body through a contingency solution pursuant to Article 25 DSU until the reinstatement of the Appellate Body. This approach was endorsed by the Council of the European Union on [27 May 2019](#). On 27 March 2020, the Commission [revealed](#) that

16 WTO members had agreed to establish a [multiparty interim appeal arbitration](#) arrangement (MPIA) that [mirrors](#) the WTO appeal rules and that can be used between any WTO members willing to join, as long as the WTO Appellate Body is not operational.

On 15 April 2020, Council [approved](#) the arrangements. By August 2020, 23 WTO members had joined,<sup>1</sup> but [major litigating parties](#) remained outside the MPIA, including India, [Japan](#), Russia, and the [US](#).<sup>2</sup> South Africa, for instance, has voiced [concern](#) about the plurilateral nature of the MPIA and the risk of a two-speed WTO.

Of the current [WTO cases](#) that [may be](#) appealed in the near future only a few (e.g. [DS537](#) Canada – Measures Governing the Sale of Wine and [DS524](#) Costa Rica – Measures Concerning the Importation of Fresh Avocados from Mexico) fall under the jurisdiction of the interim court.<sup>3</sup> However, for instance a landmark case, [DS543](#) (US – Tariff Measures on Certain Goods from China), brought by China against the US to challenge the WTO compliance of tariffs imposed against Chinese imports to the US under [Section 301](#) of the 1974 US Trade Act falls outside MPIA. On 26 October 2020,

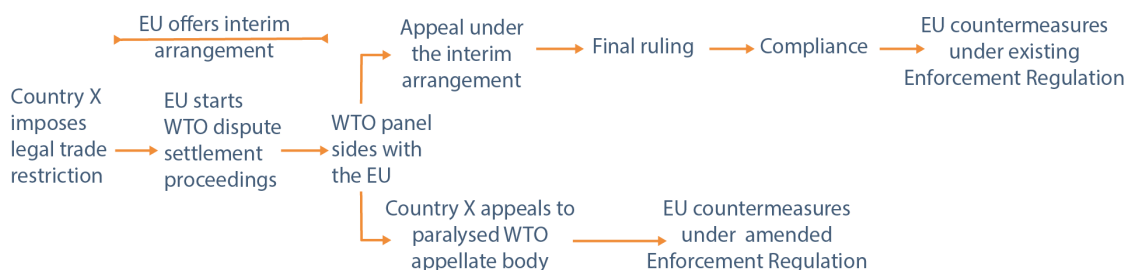
the US [appealed](#) the panel report. The panel [found](#) that the US had not met its burden of demonstrating that the measures taken are justified under Article XX(a) GATT (public morals). Another important case not covered by MPIA is a WTO dispute opposing the EU and Russia. On 28 August 2020, the EU appealed the panel report in [DS494](#) (EU – Cost Adjustment Methodologies and Certain Anti-Dumping Measures on Imports from Russia) brought against the EU by Russia, 'into the void', with Russia deciding to cross-appeal on 2 September 2020.

Third, the EU has proposed amendments to the 2014 Enforcement Regulation to address disputes with WTO members not covered by the stop-gap solution as well as disputes with trading partners with which the EU has bilateral or regional trade agreements that include dispute settlement mechanisms.

### Section 232 WTO cases pending

One pending WTO case that may be appealed in the legal void is the landmark WTO case [DS548](#) (US – Steel and Aluminium Products), which the EU launched against the US in June 2018 following the [US decision](#) to impose import tariffs on steel and aluminium tariffs under [Section 232](#) of the 1962 US Trade Expansion Act. If the panel report decides against the US, a US appeal into the legal void is very likely, since the US claims that the import duties imposed 'concern issues of national security not susceptible to review or capable of resolution by WTO dispute settlement'. The US considers [Article XXI GATT](#), which allows WTO members to take measures to protect 'essential security interests' to be a self-judging clause. Other pending Section 232 WTO cases [DS544](#), [DS547](#), [DS550](#), [DS551](#), [DS552](#), [DS554](#), [DS556](#) and [DS564](#) would be similarly affected.

Figure 1 – Appeal stage of WTO disputes with and without interim appeal arbitration arrangement



Source: EPRS based on [European Commission](#) original.

## Existing situation

The current [Enforcement Regulation](#) (Article 1) lays down rules and procedures to ensure an effective and timely exercise of the EU's rights to suspend or withdraw concessions or other

obligations under international trade agreements in order to respond to breaches by third countries of international trade rules that affect the EU's commercial interests.

According to Article 3 (Scope), the Enforcement Regulation applies to the following four **situations**:

- following the **adjudication of trade disputes** under the [WTO Dispute Settlement Understanding](#) (DSU), when the EU has been authorised to suspend concessions or other obligations under the multilateral and plurilateral agreements covered by the WTO DSU;
- following the **adjudication of trade disputes** under other international trade agreements, including regional or bilateral agreements, when the EU has the right to suspend concessions or other obligations under such agreements;
- for the rebalancing of concessions or other obligations, to which the **application of a safeguard measure** by a third country may give the right pursuant either to Article 8 of the [WTO Agreement on Safeguards](#), or to the provisions on safeguards included in other international trade agreements, including regional or bilateral agreements;
- in cases of **modification of concessions** by a WTO member under [Article XXVIII of the General Agreement on Tariffs and Trade \(GATT\)](#), where no compensatory adjustments have been agreed.

Hence, currently the first and second situations require a final ruling from a dispute settlement mechanism under either the WTO DSU or another international trade agreement, while a blockage of such mechanisms is not envisaged.

Article 5 (Commercial policy measures) provides for three types of measure:

- the suspension of tariff concessions and the imposition of new or increased **customs duties**;
- the introduction or increase of **quantitative restrictions** (quotas) on imports of goods through quotas, import or export licences or other measures; and
- the suspension of **concessions** regarding goods, services or suppliers in the area of public procurement.

The EU can adopt these under the conditions listed in Article 4 (Exercise of the Union's rights) in the form of [implementing acts](#) in accordance with [Article 291](#) TFEU.

The areas of action currently are confined to trade in goods and to the field of public procurement, which does not take into consideration the increasing importance of trade in services and intellectual property rights.

As for the **first situation** under Article 3, the current terms of the Enforcement Regulation do **not** allow the EU to suspend or withdraw obligations under the WTO Agreement if the adjudication of a trade dispute is not concluded with a final ruling. An EU trading partner losing a WTO trade dispute against the EU in first instance could therefore appeal the case into the legal void to prevent the EU from retaliating. At present, several pending WTO disputes involving the EU could be affected by appeals into the legal void at different stages of the dispute settlement procedure.<sup>4</sup>

The same logic applies to the **second situation** which covers similar blockages of dispute settlement processes that may arise under bilateral or regional trade agreements, for instance when a trading partner obstructs the functioning of a binding dispute settlement mechanism, for example by obstructing the appointment of an arbitrator, and no fall-back mechanism is available for the EU to obtain a binding ruling. Like under the first situation, the current Enforcement Regulation does **not** allow the EU to impose countermeasures without a final ruling.

According to the [Commission](#), only one case has occurred during the five years of the regulation's application of the **third situation**, i.e. when a trading partner imposes a safeguard measure without agreeing with the EU on compensation. In response to the US Administration's decision in 2018 to impose *erga omnes* duties on steel and aluminium imports, the EU, considering these measures as

US safeguards, adopted rebalancing measures against the US in the form of additional tariffs on a number of products imported from the US under the terms of the Enforcement Regulation.<sup>5</sup> The application of a significant part of the EU rebalancing measures were postponed for three years following the introduction of the US duties, as required by [Article 8.3](#) of the WTO [Agreement on Safeguards](#).

Enforcement measures under the **fourth situation**, where a WTO member modifies its concessions under Article XXVIII of the GATT 1994 without having agreed on compensation with the EU, have never yet been used.

## Parliament's starting position

Prior to the publication of the Commission proposal, in its [resolution](#) of 28 November 2019 on the impasse of the WTO Appellate Body, the European Parliament called on the Commission to continue its engagement with all of the WTO members in order to unblock the appointments procedure. It supported the EU initiatives to conclude interim arrangements for provisional solutions with the EU's major trade partners that would preserve the EU's right to the resolution of trade disputes at the WTO through binding two-level, independent and impartial adjudication, while noting that a standing appellate body remained the core objective of the EU's strategy.

## Council/European Council starting position

In its [conclusions](#) of 12 December 2019 the European Council 'reiterates its full support for the global rules-based international order and notes with concern the paralysis of the WTO's mechanism for settling disputes. It supports the Commission's efforts to set up interim arrangements with third countries while actively pursuing a permanent solution'. The European Council called on the European Parliament and the Council 'to examine, as a matter of priority, the Commission's proposal to adapt, in line with WTO rules, the current EU legislation on the effective exercise of the EU's rights under international trade agreements to this new situation.'

## Preparation of the proposal

In line with the two-step review procedure provided for in Article 10 of the Enforcement Regulation, the Commission carried out an [initial review](#) of the regulation's scope in 2017. The review did not reveal a need to amend the regulation's scope but it signalled the Commission's willingness to submit a legislative proposal for an amendment if there were a need to resort to trade policy measures not covered, including in the field of trade in services.

The second step of the review after five years following the regulation's entry into force was performed in 2019 and led the Commission to conclude that amendments to the scope were necessary. However, no new areas such as trade in services or intellectual property were mentioned. The review [report](#) was published jointly with the proposal for the Regulation's amendments. It revealed the extremely rare use of the regulation (one case in 2018), which, the Commission argues, can be explained partly by the few cases typically brought during the very advanced phase of trade disputes.

The Commission did not proceed to an impact assessment, arguing that the proposal lacked a direct economic, social or environmental impact and that the nature of the measures that might be adopted did not allow an ex-ante evaluation.

The Commission organised no public consultation of stakeholders, stating that the adoption of commercial policy measures under the terms of the regulation through individual implementing acts already required the Commission to gather information and views from stakeholders (see [example](#)) in relation to the EU's economic interests in specific sectors in which countermeasures were considered and to follow the implementing act procedure in each individual case of application.



## Changes the proposal would bring

The amendments proposed concern Articles 3, 4 and 10 of the Enforcement Regulation.

First, the scope of the Enforcement Regulation (Article 3) would be extended to allow EU action in **two new situations** where the non-cooperation of a trading partner results in the lack of a binding final ruling in a trade dispute either at WTO level or in the context of regional or bilateral trade agreements.

EU enforcement action in a WTO dispute would require:

- a WTO panel report ruling confirming the EU's right of action;
- that an appeal under Article 17 DSU could not be carried out;
- the trading partner not to have agreed to an interim arrangement for appeal arbitration under Article 25 DSU.

In trade disputes concerning bilateral or regional trade agreements, EU enforcement action would require:

- non-cooperation of the trading partner as regards the functioning of a binding dispute settlement mechanism, including by failing to appoint arbitrators.

Second, the amendment to Article 4 would reaffirm that in accordance with the EU's obligations under international law, EU countermeasures must be commensurate with the [nullification or impairment](#) of the EU's trade interests caused by the trading partner's breach of international trade rules.

Third, the amendment to Article 10 would renew the **review clause** of the current regulation for a further five years.

## National parliaments

As the proposal is based on Article 207(2) TFEU, which concerns the common commercial policy, an area of exclusive EU competence as defined in Article 3(1)(e) TFEU, it is not subject to a [subsidiarity check](#) by national parliaments. Proposals in the area of exclusive EU competence are nevertheless transmitted to national parliaments as part of the [informal political dialogue](#), which allows for an exchange of views on proposals between national parliaments, the European Parliament and the Commission.

## Stakeholder views<sup>6</sup>

On 21 January 2020, the Federation of German Industries (BDI) [welcomed](#) the EU proposal to amend the Enforcement Regulation. It stressed that rules had to be enforceable and that 'if trading partners block agreed rules and independent arbitration procedures, the EU must be able to respond in accordance with multilateral rules and principles'.

Some academics [discussing](#) the impasse of the Appellate Body and options for potential remedies have [questioned](#) whether unilateral (self-determined rather than WTO-authorised) EU measures as a response to its trading partners' non-cooperation on dispute settlement procedures can be consistent with multilateral trade rules, while not providing a detailed legal analysis underlying this argument.<sup>7</sup>

## Legislative process

The Council's Working Party on Trade Questions [discussed](#) the proposal on 25 February 2020. On 8 April 2020, the Council [approved](#) its negotiating position. According to the press release, the Council follows the Commission proposal, but is proposing to shorten the review period to three years, at the end of which the Commission would be tasked with assessing the scope of the

regulation as amended and the potential need to expand the scope to trade in services and intellectual property rights.

On 20 February 2020, Parliament's Committee on International Trade (INTA) held a first exchange of views on the legislative file. INTA's draft report of 6 May 2020, submitted by rapporteur Marie-Pierre Vedrenne (Renew Europe, France), was debated at the INTA meeting on 28 May 2020.

The [draft report](#) proposed to extend the scope of the countermeasures envisaged by the regulation to trade in services and trade-related aspects of intellectual property rights, to take provisional measures prior to a final ruling as a last resort, provided that the EU had challenged the illegal measures at issue at the WTO or under the relevant dispute settlement body, to allow Parliament and the Council to propose to initiate the enforcement procedure which so far is the European Commission's prerogative, and to advance the proposed date for the regulation's review. MEPs considered [amendments](#) to the draft report in the INTA meeting of 25 June 2020.

At the INTA meeting of 6 July 2020, MEPs [adopted](#) the draft report by 32 votes in favour, three against and three abstentions. The [report incorporates](#) all changes cited above, and further stresses that the regulation's future review should include proposals to strengthen the enforcement of sustainable development commitments as well as a full impact assessment. INTA MEPs also [decided](#) by 35 votes for and three abstentions to enter into negotiations with the Council and the Commission on the basis of this report. This intention was [announced](#) at the opening of the plenary session on 8 July 2020. As there were no requests for a vote in Parliament pursuant to [Article 71](#) of Parliament's Rules of Procedure, INTA has been authorised to begin interinstitutional negotiations (trilogues) on the basis of its report with a view to reaching an agreement between Parliament and Council on the regulation's final version. -

Following first and second trilogue meetings, on 17 July 2020 and 23 September 2020 respectively, the third trilogue meeting on 28 October 2020 [concluded](#) in a provisional agreement. The [agreed final compromise text](#) was endorsed during the INTA meeting of [10 November 2020](#) by [40 votes](#) in favour and two against without abstentions. Parliament's first-reading vote on adopting the provisional text is set to take place during the January 2021 part-session.

The agreed text [provides for](#) the following modifications in the legally binding regulation:

- the scope of the regulation will be extended, also covering services and partially trade-related aspects of intellectual property rights granted by a Union institution or agency and valid throughout the Union (Union-wide IPR);
- the regulation will be subject to an additional review with the objective of extending its scope further in the field of IPR after only one year;
- in the context of bilateral and regional trade agreements, a third country unduly delaying the dispute settlement procedure will be considered as amounting to non-cooperation that leads in a similar way to the impossibility of adjudication as failure to take the necessary steps for a dispute settlement procedure to function;
- the adoption of Commission measures in the area of trade-related aspects of intellectual property rights requires the Commission to follow a hierarchy of steps and to carry out a regular follow-up with reviews and evaluation reports to be performed within certain periods of time;
- the Commission is required to consult with stakeholders to establish the Union's economic interest and to take their input into account; the requirements of consultation with stakeholders and Member States' public authorities are particularly highlighted as regards measures in the area of trade in services and of trade-related aspects of intellectual property rights where the Commission 'shall take into utmost account' the information gathered, and shall provide an analysis of the measures envisaged before proposing implementing measures to Member States;
- the review of the regulation's scope is to be carried out at the latest one year after the entry into force of the regulation as amended;

The agreed text also contains several declarations, reflecting concerns raised in Parliament's amendments:

- a Commission declaration on compliance with international law and a statement by the Commission on its power to adopt implementing acts under the control of Member States in the context of the regulation;
- in response to Parliament's request for measures in case of a clear breach or violation of international trade rules, a Joint Declaration of the Commission, the Council and the Parliament on an instrument to deter and counteract coercive action by third countries that is announced in the Commission work programme 2021 for the end of 2021;
- a declaration of the Commission whereby it undertakes to examine alleged violations of the Union's international trade agreements under an enhanced enforcement system when raised by the Parliament, its Members, or its Committees, or by the Council, and accompanied by supporting evidence. The Commission pledges to give equal attention to alleged breaches of the trade and sustainable development provisions of trade agreements as to alleged breaches of market access systems;
- a declaration of the Parliament, Council and the Commission on the Union's commitment to a multilateral approach to international dispute settlement.

Parliament [adopted](#) the agreed text on 19 January 2021 with 653 votes for, ten against and 30 abstentions. Following the Council's approval, the [Regulation](#) as amended was published in the Official Journal and entered into force on 13 February 2021.

## EP SUPPORTING ANALYSIS

Bassot, E. et al., Unlocking the potential of the EU Treaties: An article-by-article analysis of the scope for action, EPRS, May 2020 – [Chapter 42 on Enforcing international trade rules](#), p. 111.

Titievskaja, J., [International trade dispute settlement: WTO Appellate Body crisis and the multiparty interim appeal arrangement](#), EPRS, March 2021.

European Parliament Legislative Train Schedule, [Enforcement Regulation Review](#).

## OTHER SOURCES

[Exercise of the Union's rights for the application and enforcement of international trade rules](#), European Parliament, Legislative Observatory (OEIL).

Report from the Commission to the European Parliament and the Council, [Initial Review of the scope of the Enforcement Regulation](#), COM(2017) 373 final, 11 July 2017.

Report from the Commission to the European Parliament and the Council, [Review of the scope of the Regulation No 654/2014 of the European Parliament and of the Council of 15 May 2014](#), COM(2019) 639 final, 12 December 2019.



## ENDNOTES

- <sup>1</sup> By the end of June 2020, the 21 parties to the MPIA were the following: Australia, Brazil, Canada, Chile, China, Colombia, Costa Rica, Ecuador, the European Union, Guatemala, Hong Kong, Iceland, Mexico, New Zealand, Nicaragua, Norway, Pakistan, Singapore, Switzerland, Ukraine, and Uruguay. In August 2020, Benin and Montenegro were [reported](#) to have joined and the European Commission [announced](#) that MPIA was operational.
- <sup>2</sup> It is interesting to note that Articles 31.8 and 31.9 of the [Protocol of Amendment](#) to the US-Mexico-Canada Agreement (USMCA), which was signed in 2018, [entered into force](#) on 1 July 2020 and replaces the former North American Free Trade Agreement (NAFTA), [concern](#) the prevention of panel blockings in dispute settlement. They seek to ensure the formation of a panel in dispute cases where a party refuses to participate in the selection of panellists.
- <sup>3</sup> Several legal experts have shared their assessments of MPIA: [MPIA and Use of Arbitration: Bypassing the WTO Appellate Body](#), Bashar H. Malkawi, 28 May 2020; [Can Interim Appeal Arbitration Preserve the WTO Dispute System?](#), Simon Lester, Cato, 1 September 2020.
- <sup>4</sup> As of June 2020, the [list](#) of pending WTO appeal cases includes two cases involving the EU ([DS316](#) – European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft and [DS476](#) – European Union and its Member States – Certain Measures Relating to the Energy Sector). -
- <sup>5</sup> These measures were introduced by [Commission Implementing Regulation \(EU\) 2018/724](#) of 16 May 2018 on certain commercial policy measures concerning certain products originating in the United States of America (OJ L 122, 17.5.2018, pp. 14-28) and [Commission Implementing Regulation \(EU\) 2018/886](#) of 20 June 2018 on certain commercial policy measures concerning certain products originating in the United States of America and amending Implementing Regulation (EU) 2018/724 (OJ L 158, 21.6.2018, pp. 5-18).
- <sup>6</sup> This section aims to provide a flavour of the debate and is not intended to be an exhaustive account of all different views on the proposal. Additional information can be found in related publications listed under 'EP supporting analysis'.
- <sup>7</sup> In a contribution to a Borderlex edition of 12 December 2020 ([EU strengthens trade retaliation tool box after Appellate Body demise](#), pay wall), Wolfgang Weiss, Professor of International and EU Law at the University of Speyer in Germany, has raised this concern as well. He adds that the 'EU-style approach will also directly conflict with the US approach. The United States' current strategy is to insist on its right to [appeal](#) and to use an appeal to force the other party back to the negotiating table, as one can infer from the US' recent statements in a compliance case involving India ([DS436](#) – United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India)].

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