



Brussels, 18.12.2012
COM(2012) 773 final

2012/0359 (COD)

Proposal for a

REGULATION 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**

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

Grounds and objectives

The present proposal for a Regulation of the European Parliament and of the Council reflects the Union's priority to enforce effectively its trade rights. This objective was set out in the Commission Communication on "Trade, growth and world affairs"¹ and endorsed in the Council conclusions of 21 December 2010².

The Union currently does not have a common legislative framework³ to enforce its rights under international trade agreements. The present proposal aims to remedy this situation.

General context

The Union may be called on to take unilateral measures to enforce and defend its rights and interests under international trade agreements. This is the case under the dispute settlement rules of the World Trade Organization (WTO), as well as under bilateral or regional dispute settlement mechanisms. A similar situation exists as regards trade safeguards and so-called "rebinding" exercises under international agreements. Any such measures require rapid action in order to function as an effective and credible tool to induce compliance and in order to meet the deadlines set out in the Union's relevant international commitments. This calls for rapid, efficient and flexible decision-making within the structures provided by the Treaty of Lisbon.

Prior to the entry into force of the Lisbon Treaty, the Union approached enforcement in an ad hoc manner in the form of Regulations adopted by the Council on the basis of a Commission proposal, based on former Article 133. On the other hand, after the entry into force of the Treaty of Lisbon, the Council and the European Parliament are co-legislators under the ordinary legislative procedure in relation to the measures defining the framework for implementing the common commercial policy (Article 207 of the Treaty on the Functioning of the European Union, "the TFEU"). Enforcement of rights under international trade agreements is a typical executive function that may require adopting and implementing measures within strict deadlines. It is appropriate for the Council and the European Parliament to establish a clear and predictable framework for the adoption of any such acts.

The practice prior to the entry into force of the TFEU serves as an illustration of the desirability to operate under procedures that enable quick and efficient decision-making to enforce the Union's rights:

- In the WTO dispute settlement case US-Foreign Sales Corporation, the adoption of Council Regulation (EC) 2193/2003 of 8 December 2003 increasing customs duties on some imports from the US took 8 months from the adoption of a Commission proposal. The suspension of that measure, through Council Regulation (EC) No 728/2006 of 15 May 2006, took 3 days to adopt from the adoption of a Commission proposal.

¹ See COM (2010)612 final of 9.11.2010, section 4.

² See Council conclusions on the EU's trade policy of 21.12.2010, paragraph 8.

³ The EU has always acted on a case-by-case basis in the past (Council Regulation on Commission proposal based on former - Article 133).

- In the WTO dispute settlement case US-Byrd, Council Regulation (EC) No 673/2005 of 25 April 2005 increasing customs duties on certain products originating in the US took approximately 2 months to be adopted, from the adoption of a Commission proposal.
- In WTO dispute settlement case US-wheat gluten, Council Regulation (EC) No 1804/98 of 14 August 1998 reserved the EU rights to rebalance the adverse effects of the US safeguards measures in accordance with Article 8 of the WTO agreement on safeguards. Its adoption took 1 month from the adoption of a Commission proposal.
- In US-Steel, adoption of Council Regulation (EC) No 1031/2002 of 13 June 2002 on safeguard rebalancing measures took 2 months; repeal of rebalancing under the same case only took 4 days.

In the absence of an appropriate legislative framework for the implementation of commercial policy measures in situations similar to the above mentioned cases, it would be necessary to resort to the ordinary legislative procedure for the adoption of measures in certain situations. It takes 15 to 31 months on average for the adoption of a legislative act, a length which could affect the ability of the Union to exercise its rights effectively within the time frames defined in international trade agreements.

The present draft Regulation is rooted in the consideration that (a) the adoption of commercial policy measures to enforce the Union's rights under international agreements is a typical executive function that needs to be implemented within a framework of common rules; (b) in the absence of an appropriate legislative framework, the Union's ability to effectively enforce its rights may be compromised; (c) there is a potential conflict between the relatively lengthy Union's decision-making time frames and the time frames for the enforcement of rights under international trade agreements.

In this context, the present draft Regulation proposes the creation of a common legislative framework to enforce the Union's rights under international trade agreements, in line with the Treaty of Lisbon. The Regulation proposes to empower the Commission to adopt implementing acts in accordance with Article 291 of the TFEU, within the scope established by this draft Regulation and within the limits and in accordance with the criteria expressly set out. The scope of the Regulation extends to adoption, suspension, modification and termination of implementing acts with regard to:

- (a) Enforcement of the Union's rights under binding multilateral and bilateral dispute settlement rules;
- (b) Rebalancing measures under multilateral and bilateral safeguard rules;
- (c) Rebalancing measures in cases of modifications by a third country of its concessions under Article XXVIII GATT 1994.

Under the present draft Regulation, the Commission may adopt the following types of commercial policy measures: customs duties, quantitative restrictions on imports or exports of goods, and measures in the area of public procurement. This approach results from the experience gained over the years in the adoption of commercial policy measures, and it reflects the fact that action in the selected areas is practicable and generally effective. At the current stage of development of Union law, particularly taking into account national regulations on services and intellectual property and the limits to effective action inherent to the nature of those sectors, it is appropriate to focus on other commercial policy areas for the

purposes of the Commission's empowerment. It should be noted that so-called "cross retaliation" (i.e. suspension of concessions or other obligations in a different sector from the one where the violation was adjudicated) is generally possible under WTO rules and that there is no limitation on "cross retaliation" in the Union's free trade agreements. Should it prove necessary for the Union to resort to commercial policy measures not covered by the draft Regulation, including with regard to trade in services or the commercial aspects of intellectual property rights, the Commission could make proposals for a legislative act on the basis of Article 207 TFEU or resort to other applicable procedures.

A review clause establishes that the Commission shall assess the functioning of the present Regulation three years after the first instance of implementation of the draft Regulation occurred. The Commission shall issue a report and, if the circumstances so warrant, may propose adequate measures to improve the Regulation efficiency. In this context, consideration can be given to the range of commercial policy measures under the Regulation such as trade in services and intellectual property rights, in addition to goods.

With respect to government procurement, under the terms of the WTO Agreement on Government Procurement ("the GPA"), both in the version currently in force and in the revised version, when a GPA Party fails to respect its commitments, other GPA Parties may suspend concessions or other obligations only with regard to procurement markets. Given this, it is important to foresee in the proposed draft Regulation the possible adoption of commercial policy measures concerning public procurement, in order to make it possible for the Union to effectively enforce its legal rights with respect to government procurement covered by the Union's international obligations. Aside from the WTO dispute settlement system, which has been used in several occasions to tackle practices contrary to the GPA, action to enforce procurement commitments is also likely to arise in a bilateral context, as recent bilateral trade agreements concluded by the Union include fully-fledged dispute settlement mechanisms. The Union has experience in the implementation of commercial policy measures limiting access for third countries to the Union's procurement markets, where necessary⁴. Due to the particularities of public procurement, in particular the existence of an administrative procedure that regulates and determines access to specific calls for tenders, it is possible to foresee action as regards procurement of both goods and services. Furthermore, commercial policy measures under this draft Regulation would match the scope of the procurement commitments that are suspended –i.e. they would apply to certain entities and above certain thresholds only. Finally, the relationship between the present proposal and the Commission proposal for a Regulation of the European Parliament and of the Council on the access of third-country goods and services to the Union's internal market in public procurement (COM(2012) 124 of 21 March 2012) should be noted. The latter proposal aims at increasing the Union's leverage for the negotiation of terms of access for the Union's goods, services and suppliers to the public procurement markets of third countries: it thus focuses on the access to the Union's procurement market of third country goods and services not benefiting from any market access commitments under existing international agreements covering public procurement. The present proposal, by contrast, deals in a horizontal manner with the enforcement of such agreements: it thus completes the regulation of international aspects of public procurement, in so far as it provides a framework of rules that will allow the enforcement of procurement provisions in international trade agreements.

⁴ See in this regard Council Regulation (EEC) No 1461/93 concerning access to public contracts for tenderers from the United States of America; and Council Regulation (EC) No 1836/95 completing the Annex to Regulation (EEC) No 1461/93 concerning access to public contracts for tenderers from the United States of America.

2. RESULTS OF CONSULTATIONS WITH THE INTERESTED PARTIES AND IMPACT ASSESSMENTS

In the preparation of the present proposal, two non-papers were circulated to the Council's Trade Policy Committee and the European Parliament's International Trade Committee (INTA) on 19 September 2011 and 11 November 2011, respectively. Member States were consulted in two technical meetings on 27 September and 28 November 2011 respectively.

The purpose of efficient and efficacious enforcement of the Union's rights enjoys broad support.

No impact assessment of the present proposal has been carried out, since: the present initiative does not have a direct economic, social or environmental impact and the nature of the measures at issue (case by case) does not in any case allow an ex-ante evaluation.

3. LEGAL ELEMENTS OF THE PROPOSAL

Summary

The Union does not have a common legislative framework to enforce the Union's rights under international trade agreements. The current initiative intends to remedy to this situation by proposing the establishment of a legislative instrument to allow the Union to enforce and defend its rights in compliance with its international obligations. Its objective is efficient and swift implementation with a view to safeguarding the Union's interest. Accordingly, on the basis of Article 207 of the TFEU, it proposes to empower the Commission to adopt, suspend, modify or terminate implementing acts to enforce the Union's rights within the structure of the Treaty of Lisbon, i.e. in accordance with Article 291 of the TFEU.

Under WTO and bilateral dispute settlement rules as well as multilateral and bilateral safeguard measures the Union may be required to take unilateral measures to defend its rights and interests. Enforcement action under dispute settlement provisions or re-balancing measures requires relatively swift action in compliance with the relevant trade rules and in order to function as an effective tool to induce compliance.

The regulation must be adopted at Union level. The common commercial policy is an exclusive competence of the Union.

Legal basis

Article 207 of the TFEU.

Structure of the Regulation

The objective of the draft Regulation is to lay down rules and procedures to ensure that the Union is in a position to effectively exercise its rights to suspend or withdraw concessions in response to breaches of by a third country of international trade rules with a view to securing a satisfactory solution; and to rebalance concessions or other obligations in the trade relations with third countries, when the import treatment accorded to goods from the Union is altered.

The scope of the draft Regulation, as set out in Article 3 covers the following situations:

- (a) Following the adjudication of trade disputes under the WTO Dispute Settlement Understanding (DSU), when the Union has been authorised to suspend concessions

or other obligations under the multilateral and plurilateral agreements covered by the Dispute Settlement Understanding.

Under the WTO, suspension of concessions or other obligations is governed by Article 22, paragraph 3 of the DSU; in case of prohibited subsidies, Article 4.10 of the Agreement on Subsidies and Countervailing Measures applies⁵ and with regard to so called actionable subsidies Article 7.9 of the Agreement on Subsidies and Countervailing Measures.

- (b) Following the adjudication of trade disputes under other international trade agreements, including regional or bilateral agreements, when the Union has the right to suspend concessions or other obligations under such agreements.

Such international trade agreements concluded by the Union set out rules for dispute settlement which entitles the parties to enforce their own rights in accordance with the rules set out in the relevant agreement.

- (c) For the rebalancing of concessions or other obligations, to which the application of a safeguard measure by a third country may give right pursuant to either Article 8 of the WTO Agreement on Safeguards (AoS) or the provisions on safeguard rules included in the Union's regional or bilateral agreements.

Article 8 AoS, which only relates to goods⁶, states that Members applying safeguard measures generally must offer trade compensation to countries affected by the safeguard adverse effects following consultation prior to the application or extension of a safeguard measures, in accordance with Article 12, paragraph 3 of the AoS. In the event no agreement is reached, the affected exporting Members individually may take re-balancing measures, not later than 90 days after the measure is applied. The right to take re-balancing measures vis-à-vis the Member applying the safeguard may be exercised a) either three years after the measure has come into effect or b) as soon as the measure is found to be WTO-incompatible by the WTO Dispute Settlement Body (DSB) (the three-year grace period set out in Article 8 of the AoS does not apply if the measure is based on a relative increase in imports). Similarly rebalancing measures may arise under the application of safeguard rules embedded in bilateral or regional FTAs⁷.

⁵ Under specific circumstances, Article 4.10 ASCM grants authorization to the complaining member to take "appropriate countermeasures".

⁶ The WTO Agreement on Safeguards and safeguards rules under the FTAs only relate to trade in goods. WTO Members have yet to agree on an emergency safeguards for services for which multilateral negotiations have been mandated by Article X of the general agreement on trade in services (GATS).

⁷ E.g. Article 3.4 of the EU/Korea FTA: « 1. A Party applying a bilateral safeguard measure shall consult with the other Party in order to mutually agree on appropriate trade liberalising compensation in the form of concessions having substantially equivalent trade effects or equivalent to the value of the additional duties expected to result from the safeguard measure. The Party shall provide an opportunity for such consultations no later than 30 days after the application of the bilateral safeguard measure. 2. If the consultations under paragraph 1 do not result in an agreement on trade liberalising compensation within 30 days after the consultations begin, the Party whose goods are subject to the safeguard measure may suspend the application of substantially equivalent concessions to the Party applying the safeguard measure. 3. The right of suspension referred to in paragraph 2 shall not be exercised for the first 24 months during which a bilateral safeguard measure is in effect, provided that the safeguard measure conforms to the provisions of this Agreement”.

The existing Union legislation implementing multilateral and bilateral safeguard measures does not regulate these aspects of either Article 8 of the AoS or the relevant rules in the FTAs but rather establishes the procedures for the application of safeguard measures by the Union. Any rebalancing measure would in principle be subject to the ordinary legislative procedure, unless covered by the present single legislative framework.

- (d) In cases of modification of concessions by a WTO member under Article XXVIII of the General Agreement on Tariffs and Trade (GATT) 1994, where no compensatory adjustments have been agreed.

In case of modification of a concession by another WTO member pursuant to Article XXVIII of the GATT 1994, if no agreement is achieved with the members holding negotiating or supplying rights, the contracting party which proposes to modify its concession is free to do. In this case, those members⁸ holding a right may take rebalancing measures not later than six months after such modification of the concession has occurred. Such rebalancing measures would imply withdrawing, upon the expiration of thirty days from the day on which written notice of the withdrawal of the concession is received by the contracting parties, substantially equivalent concessions to those initially negotiated with the contracting party that modifies or withdraws a concession. So far the Union has not withdrawn concessions under Article XXVIII of the GATT 1994. However, should the possibility arise, trade rebalancing stemming from modification of concessions by other WTO members under Article XXVIII GATT respectively would occur within relatively short deadlines (not later than 6 months after the Member modifies or withdraws its concession). Effective decision-making procedures to implement rebalancing measures would allow the Union to engage credibly vis-à-vis its partner in rebinding negotiations and may influence the course of negotiations on compensatory adjustment to the Union's advantage.

The Regulation is without prejudice to the adoption of commercial policy measures under other procedures, for instance with regard to commercial policy measures in the sector of services and intellectual property rights following multilateral and regional or bilateral dispute settlement adjudication.

Pursuant to Article 291 of the TFEU, when action is necessary to enforce the EU rights under the circumstances above mentioned the Commission shall adopt implementing acts in accordance with the examination procedure (Article 4 "Exercise of the Union's rights"). Implementing acts shall respect the rule that the level of countermeasures should not exceed the level of nullification and impairment, generally intended as the adverse impact on the Union resulting from the third country measure, as defined in the relevant agreement (Article 2 "Definitions"). In determining the scope of the implementing act to be adopted the Commission shall also rely on various criteria, in addition to the interests expressed in the public consultations and the Union's general interests, i.e. effectiveness of the measures in inducing compliance of third countries with international trade rules; potential of the measures to provide relief to economic operators within the Union affected by third country measures; availability of alternative sources of supply for the products concerned, in order to avoid or minimise any negative impact on downstream

⁸ On condition they hold an "initial negotiating right", a "principal supplying interest" or a "substantial interest".

industries or final consumers within the Union; any specific criteria that may be established in international trade agreements in connection with the situations foreseen in Article 3.

The types of commercial measures that may be enacted by means of an implementing act are measures concerning imports or exports of goods and measures in the field of public procurement.

Import or export measures include the suspension of tariff concessions and the imposition of new or increased customs duties; introduction or increase of quantitative restrictions on imports or exports, whether made effective through quotas, import or export licenses or other measures.

The WTO Agreement on Government Procurement states that any dispute arising thereunder shall not result in the suspension of concessions or other obligations under any other covered agreement of the WTO. Being so, it is important to foresee in the proposed Regulation the possible adoption of commercial policy measures concerning public procurement, in order to make it possible for the Union to effectively enforce its legal rights. Due to the particularities of public procurement, in particular the existence of an administrative procedure that regulates and determines access to specific calls for tenders, it is possible to foresee action as regards procurement of both goods and services.

In this regard, the type of commercial policy measures that may be enacted concern the exclusion from public procurement of tenders the total value of which is made up for more than 50% of goods or services originating in the third country concerned; and/or the imposition of a mandatory price penalty on that part of the tender consisting of goods or services originating in the third country concerned (Article 5 "Commercial policy measures").

The examination procedure should be used for the adoption, suspension, modification and termination of the implementing acts determining the appropriate commercial policy measures for the exercise of the Union's rights (Articles 4 "Exercise of the Union's rights" and 7 "Suspension, modification and termination of measures"). In adopting implementing acts, and with a view to avoiding the proliferation of additional structures, the Commission should be assisted by the existing Trade Barrier Regulation Committee, established by Regulation (EC) No 3286/94.

4. BUDGETARY IMPLICATION

None.

The proposed Regulation provides a mechanism to enforce the Union's rights and apportion responsibility between all institutions.

Proposal for a

REGULATION 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

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 207 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) The Union has concluded a number of multilateral, regional and bilateral international trade agreements creating rights and obligations for the mutual benefit of the parties.
- (2) It is essential that the Union possesses appropriate instruments to ensure the effective exercise of the Union's rights under international trade agreements, in order to safeguard its economic interests. This is particularly the case in situations where third countries enact trade restrictive measures that diminish the benefits accruing to the Union's economic operators under international trade agreements. The Union should be in a position to react swiftly and in a flexible manner in the context of the procedures and deadlines set out by the international trade agreements which it has concluded. The Union should therefore adopt legislation defining the framework for exercising the Union's rights in certain specific situations.
- (3) The WTO and other, including regional or bilateral, dispute settlement mechanisms aim at finding a positive solution to any disputes arising between the Union and the other party or parties to those agreements. The Union should, nevertheless, suspend concessions or other obligations, in accordance with those dispute settlement rules, when other avenues to find a positive solution to a dispute have proven unsuccessful. Action by the Union in such cases serves the purpose of inducing compliance of the third country concerned with the relevant international trade rules, in order to restore a situation of reciprocal benefits.
- (4) Under the WTO Agreement on Safeguards, a WTO member proposing to apply a safeguard measure or seeking the extension of a safeguard measure should endeavour to maintain a substantially equivalent level of concessions and other obligations between it and the exporting members, which would be adversely affected by such a

safeguard measure. Similar rules apply in the context of other, including regional or bilateral international trade agreements concluded by the Union. The Union should take rebalancing measures by suspending concessions or other obligations in cases where the third country concerned implements no satisfactory adjustments. Action by the Union in such cases serves the purpose of inducing the introduction of trade-enhancing measures by third countries in order to restore a situation of reciprocal benefits.

- (5) Article XXVIII of the GATT 1994 and the related Understanding govern the modification or withdrawal of concessions established in the tariff schedules of WTO Members. WTO members affected by any such modification are entitled, under certain conditions, to withdraw substantially equivalent concessions. The Union should adopt rebalancing measures in such cases, unless compensatory adjustments are agreed. Action by the Union would be aimed at inducing third countries to implement trade-enhancing measures.
- (6) The Union should have the possibility to enforce its rights in the area of government procurement in view of the fact that the WTO Agreement on Government Procurement states that any dispute arising thereunder shall not result in the suspension of concessions or other obligations under any other covered agreement of the WTO.
- (7) This Regulation should focus on those measures where the Union has experience in their design and application; the possibility to extend the scope of this Regulation to the sectors of services and intellectual property rights should be assessed in due time with regard to the specificities of each area.
- (8) When enforcing the rights of the Union, the origin of a good should be determined in accordance with Council Regulation (EEC) No 2913/92 of the Council of 12 October 1992 establishing the Community Customs Code⁹; with regard to enforcing the Union rights following dispute settlement in the government procurement area, the origin of a service should be determined on the basis of the origin of the natural or legal person providing it.
- (9) The Commission should evaluate the functioning of this Regulation no later than three years after the first instance of its implementation with a view to assessing and, if necessary, improving its efficiency.
- (10) Implementing acts pursuant to this Regulation should be adopted subject to specific criteria of appropriateness laid down in the Regulation.
- (11) The Council Regulation (EC) No 3286/94 of 22 December 1994 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization (also known as the "Trade barrier Regulation"(TBR)) should be amended in order to reflect the adoption of this Regulation with regard to the implementation of commercial policy measures.

⁹ OJ L 302, 19.10.1992, p. 1.

- (12) In order to ensure uniform conditions for the implementation of this Regulation, implementing powers should be conferred to the Commission. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011¹⁰ laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.
- (13) In order to safeguard the Union's interests, the Commission should adopt immediately applicable implementing acts where, in duly justified cases relating to the need to adapt the commercial policy measures to the behaviour of the third party concerned, imperative grounds of urgency so require,

HAVE ADOPTED THIS REGULATION:

Article 1

Objective

This Regulation lays down rules and procedures in order to ensure an effective exercise of the Union's rights to suspend or withdraw concessions or other obligations under international trade agreements, with the aim of:

- (a) responding to breaches by third countries of international trade rules which affect the interests of the Union, with a view to seeking a satisfactory solution.
- (b) rebalancing concessions or other obligations in the trade relations with third countries, when the import treatment accorded to goods from the Union is altered.

Article 2

Definitions

For the purposes of this Regulation the following definitions apply:

- (a) "country" means any State or separate customs territory;
- (b) "concessions or other obligations" means tariff concessions or any other benefits that the Union committed to apply in its trade with third countries by virtue of international trade agreements to which it is a party,
- (c) "level of nullification or impairment" means the degree to which the Union's interests under an international trade agreement are affected. Except as otherwise defined in the relevant agreement, it shall include any adverse economic impact resulting from a third country measure;
- (d) 'mandatory price penalty' means an obligation for contracting authorities or entities conducting public procurement procedures to increase, subject to certain exceptions, the price of services and/or goods originating in certain third countries that have been offered in contract award procedures.

¹⁰ OJ L 55, 28.2.2011, p. 13.

Article 3

Scope

1. This Regulation applies:
 - (a) following the adjudication of trade disputes under the WTO Dispute Settlement Understanding, when the Union has been authorised to suspend concessions or other obligations under the multilateral and plurilateral agreements covered by the WTO Dispute Settlement Understanding;
 - (b) following the adjudication of trade disputes under other international trade agreements, including regional or bilateral agreements, when the Union has the right to suspend concessions or other obligations under such agreements;
 - (c) for the rebalancing of concessions or other obligations, to which the application of a safeguard measure by a third country may give right pursuant 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;
 - (d) in cases of modification of concessions by a WTO member under Article XXVIII of the General Agreement on Tariffs and Trade 1994, where no compensatory adjustments have been agreed.
2. This Regulation is without prejudice to the adoption of commercial policy measures under other relevant procedures in cases where the measures provided for in Article 5 are not available or would provide an inadequate or ineffective response to the situations referred to in paragraph 1.

Article 4

Exercise of the Union's rights

1. Where action is necessary to safeguard the interests of the Union in the cases referred to in Article 3(1), the Commission shall adopt an implementing act determining the appropriate commercial policy measures. Such implementing act shall be adopted in accordance with the examination procedure referred to in Article 8(2).
2. Implementing acts adopted pursuant to the first paragraph shall meet the following conditions:
 - (a) Where concessions or other obligations are suspended following the adjudication of a trade dispute under the WTO Dispute Settlement Understanding, their level shall not exceed the level authorised by the WTO Dispute Settlement Body.
 - (b) Where concessions or other obligations are suspended following the discharge of an international dispute settlement procedure under a bilateral or a regional agreement, their level shall not exceed the level of nullification or impairment

resulting from the third country measure at stake as determined by the Commission or through recourse to arbitration, as the case may be.

- (c) In the case of rebalancing of concessions or other obligations under provisions on safeguards in international trade agreements, the Union's action shall be substantially equivalent to the level of concessions or other obligations affected by the safeguard measure, in accordance with the conditions of the WTO Agreement on Safeguards or of the provisions on safeguards in regional or bilateral trade agreements under which the safeguard measure is applied.
 - (d) Concessions withdrawn in the trade with a third country in connection with Article XXVIII of the GATT 1994 and the related Understanding shall be substantially equivalent to the concessions modified or withdrawn by that third country, in accordance with the terms established in Article XXVIII of the GATT 1994 and the related Understanding.
3. Commercial policy measures in accordance with paragraph 1 shall be determined on the basis of the following criteria, in light of available information and of the Union's general interest:
- (a) effectiveness of the measures in inducing compliance of third countries with international trade rules;
 - (b) potential of the measures to provide relief to economic operators within the Union affected by third country measures;
 - (c) availability of alternative sources of supply for the products concerned, in order to avoid or minimise any negative impact on downstream industries or final consumers within the Union;
 - (d) any specific criteria that may be established in international trade agreements in connection with the situations foreseen in Article 3.

Article 5

Commercial policy measures

Without prejudice to any international agreement to which the Union is a party, the commercial policy measures that may be enacted by means of an implementing act pursuant to Article 4(1) shall be:

- (a) the suspension of tariff concessions and the imposition of new or increased customs duties, including the re-establishment of customs duties at the most favoured nation level or the imposition of customs duties beyond most favoured nation level, or the introduction of any additional charge on imports or exports of goods;
- (b) the introduction or increase of quantitative restrictions on imports or exports of goods, whether made effective through quotas, import or export licences or other measures;
- (c) the suspension of concessions in the area of public procurement, through:

- (i) the exclusion from public procurement of tenders the total value of which is made up for more than 50% of goods or services originating in the third country concerned; and/or
- (ii) the imposition of a mandatory price penalty on that part of the tender consisting of goods or services originating in the third country concerned.

Article 6

Rules of Origin

1. The origin of a good shall be determined in accordance with Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code¹¹.
2. The origin of a service shall be determined on the basis of the origin of the natural or legal person providing it. The origin of the service provider shall be deemed to be:
 - (a) in the case of a natural person, the country of which the person is a national or where he has a right of permanent residence;
 - (b) in the case of a legal person any of the following:
 - (i) if the service is provided other than through a commercial presence within the Union, the country where the legal person is constituted or otherwise organised under the laws of that country and in the territory of which the legal person is engaged in substantive business operations;
 - (ii) if the service is provided through a commercial presence within the Union, the Member State where the legal person is established and in the territory of which it is engaged in substantive business operations such that it has a direct and effective link with the economy of a Member State concerned.

For the purposes of point (ii) if the legal person is not engaged in substantive business operations such that it has a direct and effective link with the economy of a Member State concerned, the origin of the natural or legal persons which own, or control the legal person providing the service.

The legal person providing the service shall be considered to be "owned" by persons of a given country if more than 50% of the equity interest in it is beneficially owned by persons of that country and "controlled" by persons of a given country if such persons have the power to name a majority of its directors or otherwise to legally direct its actions.

Article 7

Suspension, modification and termination of measures

¹¹ OJ L 302, 19.10.1992, p. 1.

1. Where, subsequently to the adoption of an implementing act pursuant to Article 4(1), the third country concerned accords satisfactory compensation to the Union in the cases referred to in Article 3(1)(a) and (b), the Commission may suspend the application of that implementing act for the duration of the compensation period. The suspension shall be decided in accordance with the examination procedure referred to in Article 8(2).
2. The Commission shall terminate an implementing act adopted under Article 4(1) in any of the following circumstances:
 - (a) when the third country whose measures were found to be inconsistent with international trade rules in a dispute settlement procedure brings itself into compliance, or where a mutually satisfactory solution has otherwise been reached;
 - (b) in cases of rebalancing of concessions or other obligations following the adoption by a third country of a safeguard measure, when the safeguard measure is withdrawn or expires, or when the third country concerned accords satisfactory compensation to the Union subsequently to the adoption of an implementing act under Article 4(1);
 - (c) in cases of modification of concessions by a WTO member under Article XXVIII of the General Agreement on Tariffs and Trade 1994, when the third country concerned accords satisfactory compensation to the Union subsequently to the adoption of an implementing act under Article 4(1).

The termination shall be decided in accordance with the examination procedure set out in Article 8(2).

3. Where it is necessary to make adjustments to commercial policy measures adopted under this Regulation, account taken of the conditions and criteria laid down in Article 4(2) and 4(3), the Commission may introduce any appropriate modifications in accordance with the examination procedure set out in Article 8(2).
4. On duly justified imperative grounds of urgency relating to the termination or the modification of the third country measure concerned, the Commission shall adopt immediately applicable implementing acts suspending, modifying or terminating implementing acts adopted under Article 4(1), as provided for in this Article, in accordance with the procedure referred to in Article 8(3).

Article 8

Committee procedure

1. The Commission shall be assisted by the committee established by Council Regulation (EC) No 3286/94. That committee shall be a committee within the meaning of Article 3 of Regulation (EU) No 182/2011.
2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply.

3. Where reference is made to this paragraph, Article 8 of Regulation (EU) No 182/2011 in conjunction with Article 5 thereof, shall apply.

Article 9

Information gathering

1. The Commission shall seek information and views regarding the Union's economic interests in specific products or sectors, in the application of this Regulation, through a notice in the Official Journal of the European Union or other suitable public communication means.
2. Information received pursuant to this Regulation shall be used only for the purpose for which it was requested.
3. Neither the Commission nor the Council, nor the European Parliament nor Member States, nor their officials shall reveal any information of a confidential nature received pursuant to this Regulation, without specific permission from the supplier of such information.
4. The supplier of information may request that information supplied be treated as confidential. In such cases, it shall be accompanied by a non-confidential summary or a statement of the reasons why the information cannot be summarised.
5. If it appears that a request for confidentiality is not justified and if the supplier is unwilling either to make the information public or to authorise its disclosure in generalised or summary form, the information in question may be disregarded.
6. Paragraphs 2 to 5 shall not preclude the disclosure of general information by the Union authorities. Such disclosure must take into account the legitimate interest of the parties concerned in not having their business secrets divulged.

Article 10

Review

No later than three years after the first instance of adoption of an implementing act under this Regulation, the Commission shall review its implementation and report to the European Parliament and the Council.

Article 11

Amendments to other acts

In Article 13(3) of Council Regulation (EC) No 3286/94 [the TBR] is replaced by the following text:

"Where the Union, having acted in accordance with Article 12(2), has to take a decision on the measures of commercial policy to be adopted pursuant to Article 11(2)(c) or pursuant to

Article 12, it shall act, without delay, in accordance with Article 207 of the Treaty and, as appropriate, Regulation No XX/XX or any other applicable procedures".

Article 12

This Regulation shall enter into force on the [...] day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President