Nothing Ado About Much?

Challenges to Anti-Dumping Measures After the Lisbon Reforms to Art 263(4) TFEU

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Standing is a particularly controversial aspect of EU law. In the Lisbon Treaty, a third head was added to Art 263(4) with the aim of liberalising standing for private litigants. This article examines the practical effects of those reforms, by reference to three cases – Bricmate, FESI and SolarWorld – where litigants sought to challenge anti-dumping measures directly before the EU courts. It concludes that the interpretation of the third head is highly unsatisfactory, both on its own terms and in light of the purpose of the third head. The EU Courts have deliberately restricted the third head of standing, to the extent of making it sometimes more difficult to satisfy than the second head. The article fleshes out a model in keeping with the purpose and text of the Lisbon reforms, and critically assesses the argument that the relaxation of standing rules would result in an unmanageable increase in the workload of the EU courts.

I. Introduction

In order to challenge the validity of an EU provision directly before the EU courts, a party must have standing. The standing rules, for natural legal persons, are contained in Art 263(4) of the Treaty on the Functioning of the European Union (TFEU). Following the Lisbon Treaty, there are three "heads" of standing: before there were only two. Much has been written on this controversial topic,[1] but most of the salient critiques of the courts' interpretation of the third head may be ascertained from challenges to anti-dumping measures.

The purpose of this article is not to offer a comprehensive treatise on all the possibilities of challenging anti-dumping measures, nor to survey how the many parties implicated in or affected by such measures could have standing in EU law. The interested reader is referred to the leading texts in this area for such detailed investigations.[2] Rather, the purpose of this article is to offer a general critique the EU courts' approach to standing through the prism of anti-dumping cases after the Lisbon reforms. To that extent, the predominant focus will be on three recent challenges to anti-dumping measures at various stages of their implementation by relying on the third head of Art 263(4). This deliberately leaves to the side cases where parties argue that they have standing on other grounds.[3]

A brief introduction to the third head will be presented, after an examination of the two pre-Lisbon heads of standing. The third part will briefly sketch the anti-dumping scheme in EU law, and the fourth

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1 Opinion of AG Kokott in Case C-583/11 P, ECLI:EU:C:2013:21, *Inuit Tapiriit Kanatami v Parliament and Council,* at para. 1 describing EU standing rules as having "long been one of the most contentious issues in EU law"

2 See, Ivo Van Bael and Jean-François Bellis, *EU Anti-dumping and Other Trade Defence Instruments,* 5th Ed., (Kluwer, 2011); Edwin Vermulst, *EU Anti-Dumping Law & Practice,* 2nd Ed, (Sweet and Maxwell, 2010); Edmond McGovern, *EU Anti-Dumping and Trade Defence Law and Practice,* §5822, available on internet at http://www.globefield.com/index.html (last accessed 5th May 2016)

3 This would include parties who argue that they have standing on the basis that their procedural rights in the process of imposing anti-dumping duties would be violated, or those who seek to found standing on the basis of the EU anti-dumping regulation itself. See, e.g. Case 191/82, ECLI:EU:C:1983:259, *FEDIOL v Commission,* paras. 29 to 33 (on illegal market practices); Case T-256/97, ECLI:EU:T:2000:21, *BEUC v Commission* Van Bael and Bellis, *EU Anti-Dumping, supra* note 2, at p. 607

presents the pre-Lisbon case law on standing in this area. The fifth will examine three recent General Court cases on anti-dumping challenges dealing with the third head. The conclusion will then suggest that the overall result is that the third head has had little perceptible impact in this area given the courts' restrictive reading of "implementing measures".

II. The Three Heads of Standing

Prior to the Lisbon Treaty, there were only two heads of standing which a party could rely on in order to directly challenge a EU measure:

1. The party is specifically addressed in the contested measure.
2. The party is directly and individually affected by the contested measure.

The first head would be satisfied, for example, where a party is found by the Commission to have violated Art 101 and Art 102 TFEU against anti-competitive practices. In such a situation, the Commission Decision would list the specific parties who have committed the wrongful acts, and, possibly, fine them. They are, as addressees of the measure, free to challenge the Decision before the EU courts.[4] Third parties, however, would have not been able to rely on the first head, and would have to rely on the second.[5] This head is much more difficult to satisfy given the courts' strict interpretation of the requirements of direct and individual concern, to which we now turn.

Direct concern requires two cumulative requirements, or halves, to be met. First, the measure must directly affect the legal situation of the person concerned, and, second, the implementation of that measure must be purely automatic, resulting from Union norms without the application of other intermediate rules[6].

Individual concern means, since the seminal *Plaumann* case of 1963, that parties need to show that they have features or characteristics such that the measure in question affects them as if they were addressed.[7] For example, a company that was merely part of a market sector that received State aid would not, other things being equal, have standing to directly challenge the Commission Decision ruling that the aid in question was unlawful.[8] Although some examples can be found where this criterion is satisfied, it is notoriously difficult to be individually concerned by a measure.[9]

Together, the highly restrictive criterion of individual concern in the second head made it very difficult for an individual to directly challenge provisions of EU law. This was justified on the basis that, even if a litigant could not challenge a provision *in the EU courts,* it could challenge national implementation measures *in national courts,* which could then make a reference to the CJEU under the preliminary reference procedure in Art 267 TFEU.[10] Effective judicial protection was satisfied because indirect challenges are, according to the Court, acceptable substitutes for direct challenges. Indeed, a number of examples can be found where this indirect challenge was successful,[11] but the overall cogence of this

4 See e.g. Commission Decision C(2006) 4350, Art 1 "The following [24] undertakings have infringed Article 81 [EC] and Article 53 of the EEA Agreement by using, in their reciprocal representation agreements, the membership restrictions which were contained in Article 11 [paragraph 2] of the model contract … or by de facto applying those membership restrictions" available on the internet at http://ec.europa.eu/competition/antitrust/cases/dec_docs/38698/38698_4567_1.pdf (last accessed 5th May 2016)

5 Koen Lenaerts, Ignace Maselis, and Kathleen Gutman, *EU Procedural Law*, Chapter 7(OUP, 2014).

6 Joined Cases C-445/07 and C-455/07, ECLI:EU:C:2009:529, *Commission v Ente per le Ville Vesuviane,* at para 45; Case C-404/96 P, ECLI:EU:C:1998:196, *GlencoreGrain v Commission*, at para. 41

7 Case C-25/62, ECLI:EU:C:1963:17, *Plaumann v Commission*; Case C-456/13 P, ECLI:EU:C:2015:284 *T & L Sugars Ltd and Others v Commission,* at para. 63; C-583/11 P, EU:C:2013:625 *Inuit Tapiriit Kanatami and Others v Parliament and Council*, at para. 72; and *Telefónica v Commission*, C-274/12 P, EU:C:2013:852, at para. 46

8 Joined Cases 67/85, 68/85 and 70/85, ECLI:EU:C:1988:38, *Kwekerij van der Kooy and Others* v *Commission,* at para. 15; Case C-6/92, ECLI:EU:C:1993:913*, Federmineraria and Others* v *Commission*, at paras. 11 to 16

9 For example, See Paul Craig, "Standing, Rights and the Structure of Legal Argument" 9 *European Public Law* (2003) pp. 493 *et sqq*., at p. 494 (describing the test of individual concern as rendering it "literally impossible" for an applicant to succeed); Ewa Biernat, "The *Locus Standi* of Private Applicants under Article 230(4) EC and the Principle of Judicial Protection in the European Community", Jean Monnet Working Paper 12/03, p. 15 (Describing these rare exceptions as "few and casuistic")

10 Case C-301/99 P, ECLI:EU:C:2001:72, *Area Cova SA*, at para. 46 (describing indirect challenges before national courts the "very essence" of effective judicial protection). See also Case C-50/00 P, ECLI:EU:C:2002:462, *Unión de Pequeños Agricultores v Council,* at paras. 40 to 46 ("UPA"); Case C-262/03 P ECLI:EU:C:2004:210 *Commission v Jégo-Quéré,* at paras. 30 to 39

11 See, for example, Case C-362/14, ECLI:EU:C:2015:650, *Schrems v Data Protection Commissioner*; Joined Cases C-293/12 and C-594/12, ECLI:EU:C:2014:238, *Digital Rights Ireland v Minister for Communications*; Case C-333/07, ECLI:EU:C:2008:764, *Société Régie Networks v Direction de Contrôle Fiscal Rhône-Alpes Bourgogne*

equivalence remains to be examined after a fuller analysis of the case law.

At any rate, the argument did not hold in respect of "self-executing measures".[12] These measures would not give rise to any domestic implementation measures that an aggrieved party could challenge before national courts. In such a case that party would be in a dilemma; it would have no choice but to contravene the provision in order to challenge it in subsequent proceedings. This was widely recognised as a gap in EU standing rules, and prompted much critical comment from both within and without the judicature.[13]

In order to address this problem, the Lisbon Treaty included a third head of standing.[14] It dispenses with the need to show individual concern, but not *direct concern*, when a party seeks to challenge a *regulatory act* that does *not entail implementing measures*. As AG Cruz Villalón noted, this is a rather awkward extension since it is entirely predicated on two terms that are not defined in the Treaties.[15] In any case, this head is lifted wholesale from the failed Constitution for Europe, which further complicates its interpretation.[16] Considerable comment can be found on the topic; this article will be confined to an examination of what "regulatory act" and "implementing measures" mean in the context of anti-dumping challenges.

As a general matter, a *regulatory act* requires two conditions to be satisfied.[17] First, it must be non-legislative. It must therefore not be adopted in accordance with either the ordinary legislative procedure or the special legislative procedure within the meaning of paragraphs 1 to 3 of Art. 289 TFEU.[18] Second, it must be of general application. This means that it must apply to "objectively determined situations and produce legal effects in regard to categories of persons envisaged generally and in the abstract".[19]

The interpretation of *implementing measures* is central to this area, and shall be examined in detail in this article. In short, it requires that the contested provision produces legal effects vis-à-vis the party automatically, without the need for any further measures to be taken by the state. This generally a difficult hurdle to overcome. *Microban* is a rare example where it was satisfied.[20] In that case, the refusal to include a given chemical on a list of permissible substances that could come into contact with foodstuffs had automatic legal consequences, without the need for any intermediate national rules or calling for any action on behalf of national authorities.

III. The Basic Anti-dumping Regulation

A brief overview of the anti-dumping framework may be of assistance for the uninitiated. An anti-dumping measure is a tariff, or other obligation, imposed by the EU in respect of third country imports that are priced below normal market value. The EU has exclusive competence to defend the internal mar-

12 See, e.g. Koen Lenaerts and Nathan Cambien "Regions and the European Court: Giving Shape to the Regional Dimension of the Member States" 35 *European Law Rev* (2010) pp. 609 *et sqq.*, at p. 617

13 From within the EU judicature, Case T-177/01, ECLI:EU:T:2002:112, *Jégo-Quéré* v *Commission*; Opinion of AG Jacobs in Case C-50/00 P, ECLI:EU:C:2002:197 *Unión de Pequeños Agricultores v Council*; Opinion of AG Jacobs Case C-358/89, ECLI:EU:C:1991:144 *Extramet v Council* ; Opinion of AG Geelhoed in Case C-491/01, ECLI:EU:C:2002:476, *British American Tobacco*From outside, see: Christopher Brown and John Morijn, "Case C-262/03 P Commission v Jégo-Quéré" 41 *Common Market Law Review* (2004), p. 1639 *et sqq*; Anthony Arnull, "April shower for Jégo-Quéré" 29 *European Law Review* (2004) at p. 287 *et sqq*; Anthony Arnull, "1952-2002: plus ca change..." 27 *European Law Review* (2002), at p. 509, *et sqq*; H. Rasmussen "Why is Article 173 Interpreted against Private Plaintiffs?" (1980) 5 *European Law Review* 112, *et sqq.*

14 Cover note from the Praesidium to the Convention on the Court of Justice and the High Court, CONV 734/03, at p. 20 ("Members of the circle who were in favour of amending the fourth paragraph of Article 230 stressed in particular the fact that, in certain exceptional cases, an individual could be directly concerned by an act of general application without it entailing an internal implementing measure. In such cases, the individual concerned would currently have to infringe the law to have access to the court"); See also, generally, Cornelia Koch, "Locus Standi of private applicants under the EU Constitution: preserving gaps in the protection of individuals' right to an effective remedy", 32 *European Law Review* 2005, at p. 511 *et sqq*.

15 Opinion of AG Cruz Villalón, Case C-456/13, ECLI:EU:C:2014:2283, *T and L Sugars and Another v Commission,* at para. 26

16 Lenaerts and Cambien, "Regions and the European Court", *supra* note 12, at p. 617 ("it is far from self-evident that the interpretation given to the original provision as it figured in the EU Constitution can be transposed *ipso facto* to Art 263 TFEU"); Pieter-Augustijn Van Malleghem and Nils Baeten, "Before the law stands a gatekeeper – or what is a "regulatory act" in Article 263(4)", 51 *Common Market Law Review* (2014), p. 1187, *et sqq.,* at p. 1204-1213

17 *Inuit,* supra note 7

18 Ibid, at para. 61

19 Case T-18/10, ECLI:EU:T:2011:419, 625 *Inuit Tapiriit Kanatami and Others v European Parliament and Council,* at para. 63

20 Case T-262/10, ECLI:EU:T:2011:623, *Microban and another v Commission*.

ket from dumping practices. The imposition of such duties involves the dual input of both the Commission and the Council.

The imposition of the duty starts with the Commission's investigation of a complaint.[21] If a threshold is met,[22] it will publish its intent to proceed, give notice to certain parties, and allow other parties to make submissions on the matter.[23] The Commission may then, in a window of roughly seven months, impose temporary *provisional duties* based on its initial assessment of the margin of dumping. It may also accept voluntary undertakings from specific importers where satisfied that the injurious effect of the dumping is eliminated. This exempts the products from provisional duties as long as those undertakings are respected and are in force.[24]

After consultations, the Commission must submit a proposal to the Council and the Council must impose an anti-dumping duty.[25] These duties are known as *definitive duties,* and take the form of specific duties to given importers, and/or general duties imposed to all third-country imports. This is important in relation to whether the duties are "general" within the definition of a regulatory act.

The determination of the dumping duties, both in terms of whether to impose them and the extent of those duties, requires complex and in-depth market analysis. The data for this analysis may be gathered from the very companies that seek to challenge the duties eventually imposed. This, as shall be seen, adds further complexity to the standing regime in this area.

IV. Standing to Challenge Anti-Dumping Measures pre-Lisbon

Direct concern is not particularly difficult to establish in the context of anti-dumping. Subject to what will be discussed below in relation to the notion of "not entailing implementing measures", a party will be directly concerned by any anti-dumping measures that impose duties on their products.[26] As noted above, the real stumbling block in standing under the pre-Lisbon position was the need to demonstrate individual concern.

The application of individual concern took shape over a number of decades, taking on various meanings in different areas. In anti-dumping cases, the Court had found that the criterion was generally satisfied in respect of three groups[27]

1. *Producers or exporters*, where their commercial data was used in the quantification of the contested duties,[28]
2. *Importers*, where their resale prices were used to determine the export prices, or where an importer associated with an non-EU exporter whose products were subject to anti-dumping duties, [29] and,
3. *Original equipment manufacturers,* where the anti-dumping duties pertained to the practices of the producer from which it had bought the products because of the particular features of its business dealings with that producer.[30]

In the first and second groups, however, the Court added the caveat that the mere fact that a party's information was used by the Commission and the Council in the process of imposing duties did not satisfy this criterion. Any cooperating sampled importer could provide facts that could be taken into account by the institutions. It was therefore still necessary to provide evidence of a "particular situation

21 Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community ('basic Regulation'), Art 5

22 ibid, Art 5(4)

23 ibid, Art 5(9), (10), (11); Art 6(5)

24 ibid, Art 8

25 ibid, Art 9

26 Case C-113/77, ECLI:EU:C:1979:91, *NTN Toyo Bearing and Others v Council*; Case T-170/94, ECLI:EU:T:1997:134, *Shanghai Bicycle v Council*; Edmond McGovern, *EU Anti-Dumping supra*, note 2, §5822.

27 As to those who initiated the anti-dumping procedures by submitting a complaint to the Commission, they will typically be found to have standing on the basis of their procedural rights that have been affected by, for example, a Commission decision to not pursue the procedure. This falls outside the scope of this article. See *supra*, note 3

28 Joined Cases 239/82 and 275/82, ECLI:EU:C:1984:68, *Allied Corporation and Others v Commission,* at paras. 11 to 12; Case C-75/92, ECLI:EU:C:1994:279, *Gao Yao* v *Council*, at para. 27; Case T-147/97, ECLI:EU:T:1998:266, *Champion Stationery and Others v Council*, at para. 35 Note that in some of those cases, this is explained on the basis that the party in question will be able to show that they were identified in the measures adopted by the Commission or the Council, or that they were concerned by the preliminary investigations.

29 Case C-205/87, ECLI:EU:C:1987:485, *Nuova Ceam* v *Commission*; Joined cases C-133/87 and C-150/87, ECLI:EU:C:1990:115, *Nashua Corporation and others v Commission and Council*, at para. 15; Case T-7/99, ECLI:EU:T:2000:175, *Medici Grimm KG v Council and Commission*

30 C-156/87, *ECLI:EU:C:1990:116, Gestetner Holdings v Council and Commission,* at paras. 20 to 23; Case T-596/11, ECLI:EU:T:2014:53, *Bricmate AB v Council,* at para. 28

which distinguishes that undertaking from all other traders".[31]

Various categories of litigants would not fall within the three groups considered above.[32] The most pertinent for our purposes is that of unrelated importers, in other words, importers who cannot show that their data was used in the calculation of the duties but nonetheless are adversely affected by them. For those parties, the general test of individual concern was understood to refer to a tightly defined circumstance based on three specific criteria. As per *Extramet,* involving duties on calcium metal originating in the People's Republic of China and the Soviet Union, these criteria were that

a) The independent importer is the largest importer and end-user of the product,
b) Its business activities were contingent on the affected imports, and
c) It was seriously affected by the measures given the limited number of manufacturers and difficulty of sourcing the product in the EU. [33]

On the facts of *Extramet* this was satisfied because a) it was the largest importer of calcium metal and processed it as well b) that metal was essential to its business which involved the production of pure calcium pellets c) the only other producer based in the EU was Extramet's main business rival. The Court has recognised that the Extramet situation is not the only way for an independent importer to demonstrate that they are individually concerned, but it is nonetheless very rare that a party can show its position is so different from other importers that the regulation in question affected them as if they were directly addressed in it.[34] The vast majority of independent importers therefore fail in their direct challenges.[35]

V. Standing to Challenge Anti-Dumping Measures post-Lisbon

Three General Court cases will be examined: *Bricmate,*[36] *FESI,*[37] and *SolarWorld.*[38]

1. *Bricmate*

Bricmate involved a Swedish importer challenging anti-dumping measures on ceramic tiles from China. It could not satisfy the second head of standing, as it was not individually concerned. The determination of the duties was based on an average of seven importers, and not solely by reference to Bricmate's figures,[39] nor did Bricmate fall within the situation described in *Extramet,* above.[40] In short, it could show no "particular situation" that set it apart from other market operators.[41]

The General Court then turned to the third head. As to the question of whether the regulation was a *regulatory measure,* it first considered that it was *not a legislative act* given that it was adopted on the basis of Art 9 of the basic Regulation and not under the legislative procedures in the TFEU adverted to above. This must be correct, given the CJEU's clear definition of what constitutes a legislative measure.

Whether it was of *general application* is more interesting. As a number of commentators have noted, anti-dumping measures impose both discrete, individual obligations on specific undertakings, but also duties that apply to all targeted goods imported from a third-country.[42] As a result, it is open to interpretation whether the measures are sufficiently general in

31 Case T-598/97, ECLI:EU:T:2002:52, *British Shoe Council and Others v Council,* at para. 61; T-301/06, ECLI:EU:T:2008:495, *Lemaître Sécurité SAS*, para. 22; *Bricmate*, supra note 30, para. 37

32 See, e.g. Van Bael and Bellis, *EU Anti-Dumping, supra* at note 2, pp. 607-613

33 Case C-358/89, ECLI:EU:C:1991:214, *Extramet v Council*

34 *British Shoe Council, supra* note 31, at para. 56

35 Case T-597/97, ECLI:EU:T:2000:157, *Euromin v Council,* paras. 49 to 52; Case T-598/97, ECLI:EU:T:2002:52, *British Shoe Council, supra* note 31; *Bricmate, supra* note 30; Case T-134/10, ECLI:EU:T:2014:143, *FESI v Council*.

36 *Bricmate, supra* note 30

37 *FESI, supra* at note 37

38 Case T-507/13, ECLI:EU:T:2015:23, *SolarWorld AG and Others v Commission*. The appeal to the CJEU concerned solely the question of direct concern, and, contrary to the decision in the General Court, does not shed light on the notions of "regulatory acts" or "not entailing implementing measures". Given that it also confirms the General Court's analysis, it is therefore of limited relevance. See Case C-142/15 P, ECLI:EU:C:2016:163 *SolarWorld v Commission*

39 *Bricmate, supra* note 30, at para. 36

40 ibid, at para. 48

41 ibid, at para. 59

42 Alexander Kornezov, "Shaping the new architecture of the EU system of judicial remedies; comment on Inuit", 39 *European Law Review* (2014), pp. 251 *et sqq,* at pp. 256-7; Albertina Albors-Lorens, "Remedies against the EU institutions after Lisbon: an era of opportunity?" 71 *CLJ* (2012), pp. 507 *et sqq*, at pp. 525-526; See also Van Bael and Bellis, *EU Anti-Dumping, supra* at note 2, at p. 606.

order to produce legal effects "in respect of persons envisaged generally and in the abstract", as required by the courts' definition of regulatory act. Indeed, on the facts of *Bricmate,* duties were tailored to specifically listed companies, in addition to a general duty imposed on all other companies.[43]

The General Court's consideration of the matter is terse. It simply says that it is of general application because it applies to objectively determined situations and produces legal effects with respect to categories envisaged in general and in the abstract.[44] In the relevant paragraph, the Court somewhat enigmatically refers back to a previous paragraph in which it is stated that anti-dumping Regulations can be of individual concern to a given undertaking. It is difficult to see how the fact that a regulation can be of individual concern to an undertaking means that it applies generally. It is a shame that the Court does not address in greater detail what "general" means in this context, as its interpretation poses difficulties in other areas. In the field of State aid, for example, it has not been straightforward to identify how this notion applies. The duty to recover unlawfully granted aid is imposed on one Member State, suggesting that it might be sufficiently general to qualify as regulatory, but affects only a small handful of undertakings, suggesting that it might be too specific to so qualify.[45] One gets the impression from here that the Court found contested norm to be of general application because it was of general application. This tautology is a rather unhelpful guide to the interpretation of "general application" in other anti-dumping cases, or those in other fields of EU law.

As to whether it *entailed implementing measures,* the Court recalled that under Article 14 of the basic Regulation, the duties are collected by national customs authorities. As per the Community Customs Code, Art 217(1) and Art 221(1), the national customs authorities calculate the amount of duty and communicate it, respectively, to the debtor. For that debtor, the anti-dumping order does not automatically give rise to legal effects; it is only after the duty is calculated by the national authorities, and then communicated to them, that the sums become due. Thus, held the Court, the contested regulation entails implementing measures in order to give rise to legal effects *vis-à-vis* the debtor.[46]

The General Court also stressed that there would be a right to challenge the measure in question by bringing proceedings in national courts under Art 243 to 246 of the Code. They would not therefore be in the position whereby they would have to contravene the regulation in order to challenge it.[47] Their right to an effective remedy, guaranteed by Art 47 of the Charter of Fundamental Rights of the European Union, was thus preserved, and Bricmat'es challenge was inadmissible for lack of standing.

2. *FESI*

FESI follows the *Bricmate* case closely, although it deals with the different context of leather footwear imported from China, Vietnam and Macao. Again, *FESI,* a trade association for the sportswear industry whose members engage in the import of such products, could not show that they were individually concerned.[48] The second head was therefore of no avail.

As to the third head, again, the definition of general application is repeated, and we are told that the regulation is of general application. The Court, as it did in *Bricmate*, held that they are implementing measures, again, by reference to Art 217 and 221 of the Customs Code.[49]

3. *SolarWorld*

In *SolarWorld,* the litigants did not seek to challenge definitive anti-dumping duties imposed by the Council. They rather sought to challenge, *inter alia,* the

43 *Bricmate, supra* note 30, see table at para. 2

44 ibid, at para. 65

45 See discussion in Opinion of Advocate General Kokott in Case C-274/12 P, ECLI:EU:C:2013:204, *Telefónica SA v European Commission*; Opinion of Advocate General Mengozzi, Case C-33/14 P, ECLI:EU:C:2015:409, *Mory,* para. 167; Case C-33/14 P, ECLI:EU:C:2015:609, *Mory,* at para. 92 (where the CJEU seems to conclude that the State aid Decision was not of general application because it was addressed solely to the Republic of France, whereas the Advocate General in his Opinion seems to suggested that it was not of general application because the contested measure concerned only the question of economic continuity between Sernam – a business rival of the claimant Mory who was granted State aid – and the third party company that bought it after it went into administration)

46 *Bricmate, supra* note 30, at paras. 68 to 71

47 ibid, at para. 73

48 *FESI, supra* at note 37, at para. 75

49 See also Case T-551/11, ECLI:EU:T:2013:60, *Brugola Service International v Council* (French and Italian only)

Commission Decision accepting undertakings by specific Chinese producers of solar panels. This had the consequence of conferring an exemption on the products of those Chinese producers from the duties. Unlike the litigants in *Bricmate* and *FESI,* these litigants were EU producers competing against cheaper Chinese imports and had a vested interest in seeing the duties imposed rather than lifted. Their claim failed on all three criteria of the third head.

The General Court held that the applicants were not *directly concerned*. The undertakings bound only those Chinese producers who had given them. They did not produce legal effects *vis-à-vis* the EU producers.[50] As such, this precluded reliance on the second head (requiring direct concern and individual concern) and on the third head.

However, the Court went on to discuss whether the contested provision entailed *implementing measures* and whether it was of general application. As regard the first, it was held that the acceptance of the undertakings did not exempt the solar panels from provisional dumping duties. Rather, that exemption stemmed from provisions adopted by the Commission or those by the Council in the definitive anti-dumping provisions.[51] In either hypothesis, implementing measures would have been required.

As regards the *regulatory act* criterion, the Court held that the acceptance of the undertakings was not of general application. Again, it repeated the definition of regulatory act, citing *FESI* and *Bricmate,* but this time it explained its reasoning in slightly greater detail. It explained that the contested decision related to the acceptance of undertakings by the Commission, and is addressed only to the companies who offered those undertakings. It, therefore, did not give rise to legal effects in general and in the abstract, but only in respect of individualised operators.[52]

VI. Art 263(4) and Anti-Dumping: An Assessment

In all the cases above, none of the claimants successfully relied on the third head; they fared no better than they would have prior to the Lisbon reforms. The consequences of this position, both at a general level and in relation to anti-dumping, elicit four comments.

1. The Breadth of Implementing Measures

The notion of "not entailing implementing measures" is very broadly defined, to the extent of frustrating the very purpose behind the reforms. Presently, it seems that any step taken by a Member State to implement a regulatory act precludes reliance on the third head. This poses problems for those seeking to challenge customs and anti-dumping duties, where the calculation and communication of those duties by national authorities have been held to constitute implementing measures. Indeed, as a rule, the courts' restrictive interpretation would seem to preclude any direct challenge to EU customs duties based on the third head. As was recently put by the CJEU in *Kyocera*:

> "The customs system, as instituted by the Customs Code and of which the contested regulation forms part, provides that the receipt of duties fixed by the latter regulation is carried out, *in all cases*, on the basis of measures adopted by the national authorities"[53]

This strikes out any application of the third head in this area, with the result that the pre-Lisbon situation prevails. The restrictive approach is repeatedly confirmed in cases from other fields. In *T and L,* for example, the claimants sought to challenge emergency measures regulating the EU sugar markets.[54] Operators were to submit import licence applications, which would be granted or refused based on the tightly circumscribed powers in the contested norms, and on the basis of the allocation coefficients set out by the Commission. The Member States acted as mere agents for the system that was in every respect the design of the EU Commission. The General Court and CJEU nonetheless held that there were implementing measures. This was because national authorities were required to administer the scheme, and, by that

50 *SolarWorld, supra* at note 38, at para. 46

51 ibid, at para. 62

52 ibid, at para. 64

53 Case C-553/14 P, ECLI:EU:C:2015:805, *Kyocera Mita Europe*, at para. 49 (emphasis added). See, also, C-552/14 P, ECLI:EU:C:2015:804, *Canon Europa v Commission*; C-84/14 P, ECLI:EU:C:2015:517, *Forgital Italy v Council and Commission* (both failed challenges to customs duties)

54 Case C-456/13 P, ECLI:EU:C:2015:284, *T and L Sugars and another v Commission,* see, *infra* at note 95 for further discussion of what, precisely, was challenged in the CJEU appeal.

token, the contested norm was found to "produce their legal effects vis-à-vis the appellants only through the intermediary of acts taken by the national authorities"[55]

This was so, even though the applicants did not challenge the scheme at the national, administrative level. Rather, they contested the broader legality of the scheme as a whole, arguing that it was contrary to their legitimate expectations and unfairly discriminated against them in comparison to sugar beet producers. No regard was given to this in the CJEU's analysis, let alone the fact that the national administrative measures were purely ancillary and entirely dictated by the contested EU norm. The interpretation of implementing measures is not thus only very broad but rigidly formalistic.

More broadly, the large number of claimants who succeed on the basis of the second head and not the third puts the narrowness of the courts' interpretation of the third head into sharp relief. [56] This is, in itself, somewhat absurd: a party can shoehorn their case within the traditionally restrictive second head, but fail to overcome the hurdles of the supposedly liberal third head. Thus, it is sometimes easier to satisfy the notion of individual concern than the criteria of "not entailing implementing measures". Lest the irony be lost, in some cases, the third head is *even worse* than the pre-Lisbon position. This has been the case in a number of anti-dumping challenges, and presents the courts' current interpretation of the third head as thoroughly unsatisfactory.[57]

It is worth stressing, however, that it is entirely possible to construe "not entailing implementing measures" in a way that does not frustrate the purpose of relaxing standing rules in the Lisbon Treaty. The courts could, and should, conduct a more substantive inquiry into the nature of the implementing measures in question such that not *all* national acts carried out in pursuance of the contested norm will constitute implementing measures.[58] In anti-dumping, for example, one could consider that the calculation and the communication of the duties automatic and immediate consequences of the Council or Commission having imposed them. Member States have no discretion in the calculation or imposition of those duties; their national customs authorities act, in effect, as agents of the EU. The national measures are, in that sense, purely ancillary or accessory measures to the contested norm. In this light, anti-dumping measures could easily be seen as satisfying the notion of "not entailing implementing measures". As shall be seen in the next section, more credence is given to this analysis on the basis that the EU courts, in the past, have readily found that applicants can be directly concerned by anti-dumping duties – which, as above, requires the contested measure to give rise to legal effects *vis-à-vis* the applicant automatically without intermediate rules. It is thus entirely possible, and coherent, to mould the notion of not entailing implementing measures to the overarching purpose of the Lisbon reforms.

This approach will necessarily raise some difficult "threshold" questions, and the dividing line between implementing measures and non-substantive national acts, however defined, will have to be established in subsequent case law. However, this should not be an insuperable problem. First, the need for further definition ought not come as a surprise. Given that the drafters of the Treaty included a novel and undefined criterion in Art 263(4), surely some process of judicial refinement could have been anticipated. Second, the nuanced meanings of individual concern in different sectors of EU law were the product of many years of case law.[59] Fleshing out the more detailed application of "implementing measures" in various areas of EU law would hardly be out of line with other past developments. Third, in any event, this case-by-case approach is surely more in line with the purpose of liberalising the standing rules rather than shutting the General Court's doors to vast majority of litigants who come knocking.

2. The Difficult Relationship between Direct Concern and Not Entailing Implementing Measures.

It is difficult to see the relationship between the second half of direct concern and the notion of "imple-

55 ibid, at para. 40

56 Case T-385/11, ECLI:EU:T:2014:7, *Castelnou*; Case T-287/11, ECLI:EU:T:2016:60, *Heitkamp BauHolding GmbH;* Case T-620/11, ECLI:EU:T:2016:59, *GFKL Financial Services AG;* Case T-614/13, ECLI:EU:T:2014:835, *Romonta v Commission*; Case C-132/12 P, ECLI:EU:C:2014:100, *Stichting Woonpunt and Others v European Commission*

57 Case T-643/11, ECLI:EU:T:2014:1076, *Crown Equipment*; Case T-57/11, ECLI:EU:T:2014:102, *BP Products*

58 See AG Cruz Villalón, *supra* note 15 .

59 K. Lenaerts, et al., *EU Procedural Law*, *supra* at note 5

menting measures". If the former requires the implementation of the contested measure to be "purely automatic, resulting from Union norms *without the application of other intermediate rules*", what role does the notion of "not entailing implementing measures" play? Given the purpose of liberalising the standing rules, there is considerable force in the contention that "not entailing implementing measures" is merely an explanation of the second element of direct concern rather than a separate criterion, as the courts have held.[60]

However, there is strong judicial opposition to this contention. In all three cases, the General Court insists that the two notions are separate. We are told repeatedly throughout the three cases above that they are "distinct"[61] or "cumulative"[62]. However, this asseveration still does not explain the difference between the two criteria, or indicate how they might relate to each other. They are simply asserted as being different. The same criticism can be levelled at the courts' other attempts to maintain the distinction. We are told that the fact there is no discretion exercised on behalf of national authorities is not a relevant factor in relation to the criteria of not entailing implementing measures, but is, it seems, relevant in relation to the second half of direct concern.[63] It is never made clear why discretion is *only* relevant to the second half of direct concern; indeed, it would logically be possible for the absence of discretion to be relevant to *both* that second half and the criterion of "not entailing implementing measures". Additionally the CJEU in *T and L* maintains that the mechanical nature of the contested norm is not relevant.[64] However, a state mechanistically carrying out the strictures of an EU provision seems like a prime example of a provision not entailing implementing measures. The point is also made that it cannot have been the intention of the drafters for "not entailing implementing measures" to be a mere explanation of the second element of direct concern, given that they used two different expressions.[65] However, this argument fails to take into consideration the clear intention of the framers to liberalise standing rules, and, again, it offers no meaningful guidance on *how* the two expressions might be distinct.

This is of particular importance in the field of anti-dumping, which, at present, is excluded from the liberalising potential of the third head. It was readily accepted in the pre-Lisbon jurisprudence that, for example, an importer would be directly concerned by a duty in respect of the products they import.[66] This logically means that the Court accepted that the duty ultimately payable was "purely automatic, resulting from Union norms without the application of other intermediate rules". Indeed, a number of cases can be found where the Court explicitly reasons that the levying of the duties "...is purely automatic. It occurs not in pursuance of intermediate national rules but of Community rules only".[67] It is therefore highly confusing that the courts, today, refuse to find that anti-dumping duties entail implementing measures.

One example, *ISO,* is of particular relevance.[68] In that case, the sole importer of ball bearings made by the four major Japanese producers sought to challenge the definitive anti-dumping duties on those products

The Council maintained that the applicant was not individually concerned, and further argued that the substance was to "measures adopted in implementation of that article which may possibly be adopted by the national authorities". The intervener argued that the challenge should have been brought by way of referral from the national courts, after challenging the collection of the provisional duty before the national authorities. The dispute between the parties can thus clearly be seen as replicating a common debate in the application of the third head of Art 263(4). The applicant maintains that they have standing to directly challenge the measures before the EU courts, and, against this, it is ar-

60 See Opinion of AG Wathlet in Case C-132/12 P, ECLI:EU:C:2013:335, *Stichting Woonpunt and others v Commission*, at paras. 69 to 76; Opinion of AG Kokott in Case C-274/12 P, ECLI:EU:C:2013:204, *Telefónica SA v European Commission*, at paras. 60 to 62

61 *Bricmate, supra* note 30 at para. 74

62 *SolarWorld, supra* at note 38, at para. 36

63 See also *FESI, supra* at note 37, at para. 30, *Bricmate, supra* note 30, at para. 74

64 *T and L, supra* at note 54, para. 41

65 *Bricmate, supra* note 30, para. 74

66 *Supra* at note 26

67 T-155/94, ECLI:EU:T:1996:118, *Climax Paper Converters v Council*, at para. 53; C-118/77, ECLI:EU:C:1979:92, *ISO v Council*, at para. 26; Case 121/77 ECLI:EU:C:1979:95 *Fujikoshi and Others v Council*, at para. 11; Opinion of AG Jacobs in Case C-239/99, ECLI:EU:C:2000:639, *Nachi v Council,* at para. 73

68 Case C-118/77, ECLI:EU:C:1979:92, *Import Standard Office v Council of the European Communities*

gued that there are implementing measures which can be challenged before national courts and, if necessary, referred to the CJEU. The analysis presented in Part V above suggests that the courts would have given the applicant's argument short shrift, and have sent them back to the national courts. However, the CJEU in *ISO* did not. Rather, it held that they were directly concerned in that the contested norm was "purely automatic and, moreover, in pursuance not of intermediate national rules but of Community rules alone".[69] ISO's challenge was therefore admissible.

The case illustrates vividly the difficulty with the courts' approach to anti-dumping measures. On the one hand, the CJEU, in the past, has accepted that an applicant is directly concerned by anti-dumping measures. As *ISO* clearly shows, this means the legal effects of those measures are "purely automatic" and come into being without the need for "intermediate national rules". On the other, it also now holds that there are implementing measures in the form of the calculation and communication of the duties. The only way the two sit together is if we accept that "implementing measures" are supposed to somehow be different from "intermediate national rules", and that "purely automatic" implementation can still entail implementing measures. This is a highly problematic position, and one would expect the court to at least explain how one is supposed to reconcile the two manifestly inconsistent ideas – if not for the benefit of the cogency of the law in this area, then at least for majority of litigants who are sent on what otherwise seems a wild goose chase[70] before national courts before they are, hopefully, afforded their day in the CJEU.

3. The Inadequacy of Indirect Challenges

Leaving the inconsistencies in the standing rules to one side, and focussing on their narrowness, one might respond that, in any case, the parties can contest the domestic implementing measures in national courts. To that extent, the parties are not forced to breach EU law in order to challenge it. However, two points should be made, the first general, and the second more practical.

First, it is open to question whether it is always possible for national judiciaries to fashion access to the domestic courts so as to eradicate the dilemma addressed above. In this regard, the CJEU often stresses that the Lisbon Treaty also included an additional sentence in Art 19(1) TFEU that requires Member States to "provide remedies sufficient to ensure effective legal protection in the fields covered by Union law".[71] It is argued that it was the intention of the framers of the Treaty to plug the gap in the dilemma referred to above, not by allowing direct challenges when the parties are on the horns of dilemma, but by ensuring the party could mount an indirect challenge in domestic courts.

The point is not that convincing. *It proves too much* because, if the argument held true, there would be no point in reforming Art 263(4). If Art 19(1) was the "solution" to the dilemma referred to above, there would be no need at all to attempt to relax the standing rules by adding a third head. The point is strengthened when we consider that the framers of the Treaty may well have considered Art 19(1) to be a codification of existing jurisprudence,[72] a point that seems to have been accepted in the case law.[73] It is therefore highly questionable whether this article is the panacea that the courts have pretended it to be. It also *proves too little*. The sentence in question imposes a *general* obligation on *Member States* to ensure the effectiveness of EU law. The argument, however, does not address how this co-operative duty could *specifically* require a *domestic court* to disregard any and every national provision that might prevent the bringing of an indirect challenge.[74] One might draw an analogy with the jurisprudence on Art 4(3) TEU, which imposes a strict interpretative obligation on national courts, but not one that would require it to

69 ibid, at para. 26

70 See, *infra* notes 77 – 112.

71 See, *Inuit Tapiriit Kanatami, supra* at note 7, at paras. 99 to 107; *Telefónica*, *supra* at note 7; Case T-312/14, ECLI:EU:T:2015:472, *Federcoopesca and Others v Commission,* at paras. 27 to 31; Case T-541/10, ECLI:EU:T:2012:626, *ADEDY v Council,* at para. 93; Kornezov, "Comment on Inuit", *supra* at note 42, at pp 260-261

72 R. Barents, "The Court of Justice after the Treaty of Lisbon", 47 *CMLR* (2010) pp. 709 *et sqq.*, at p. 725.

73 See also *Inuit,* supra at note 7, "neither the FEU Treaty nor Article 19 TEU intended to create new remedies before the national courts to ensure the observance of EU law"

74 Opinion of AG Wathlet in Case C-132/12 ECLI:EU:C:2013:335, *Stichting Woonpunt and others v Commission* ("the duty of genuine cooperation cannot extend so far as to require the Member States to create access to national courts where no State measure is at issue"); Kornezov, *supra* at note 42, at 28 (noting that this imposes a "formidable task" on national courts)

adopt a *contra legem* interpretation of the provision in question.[75] It is, in any case, a tall order to expect every permutation on the dilemma in all 28 Member States to find a solution, almost as if by "Treaty magic", in Art 19(1).[76]

Second, the point assumes that the *only* problem with standing pre-Lisbon was the possibility that a party would have to break the law in order to challenge it. This, however, was not the case.[77] The very equivalence, in terms of effective judicial protection, of indirect challenges to direct challenges has been repeatedly questioned, and the strict standing rules give rise to a wide range of pernicious consequences. These include, for example, the delay and expense associated with the need to commence national proceedings before the matter is referred to the CJEU[78]. These proceedings are, as far as the applicant is concerned, ultimately devoid of purpose given that national courts cannot provide them with the remedy that they seek – the annulment of the contested EU measure.[79] On top of this, it is not guaranteed that the court will refer the dispute to the CJEU, and the litigant must keep on appealing the decision in the hopes that a higher court might be more indulgent.[80] Even if the court does refer the matter to the CJEU, it is no way given that it will refer *all* of the challenges to the contested measure, and least of all refer it in the manner that they sought to challenge it in the national courts.[81] Further, there are considerable institutional problems with preferring indirect challenges to direct challenges given that it concentrates disputes in an overloaded CJEU. It would be preferable, surely, for what are in effect direct challenges raising localised points of law to be heard by the General Court, especially given that it has been recently doubled in size in order to alleviate the workload of the CJEU.[82] Moreover, there are procedural and remedial advantages in direct challenges, allowing, for example, for the EU institutions and the litigants to reply to each other's submissions, and allowing for EU-wide interim measures to be granted instead of the national remedies that are necessarily geographically limited.[83] In any case, it is questionable to what extent the essentially *remedial* mechanism of the action for annulment before EU courts can be adequately replaced by Art 267 – a mechanism whose purpose is to ensure the uniform application of EU law.[84] Direct challenges also have the added benefit of avoiding the uncertainties surrounding the application of the *TWD* rule, which precludes a person with standing to challenge the legality of a decision or regulation outside a two-month time limit; unless, somewhat enigmatically, they would have undoubtedly have satisfied the individual concern requirement, where they may bring proceedings in national courts and seek a reference for a preliminary ruling under Art 267 TFEU.[85] The application of the rule has given rise to a number of difficulties and its application

75 Case C-106/89, ECLI:EU:C:1990:395, *Marleasing v La Comercial Internacional de Alimentacion*; Case C-282/10, ECLI:EU:C:2012:33, *Dominiguez v Centre informatique du Centre Ouest Atlantique and Others*

76 In *T and L, supra* at note 54 for example, the claimants argued that it was not possible to contest the national application of the EU emergency measures as they were not public (given the confidential business information they were based on) or *ultra vires* measures (given that they sought to challenge the scheme itself and not its administration). The General Court seems to have accepted that there was no possibility of national redress, see AG Cruz Villalon, *supra* note 15, at para. 14

77 As Koch, "Locus Standi of Private Applicants", *supra* at note 14, at p. 515 notes, there were two "groups" of arguments against the restrictive standing rules. The first focused on situations where there would be a "complete denial of remedy" (as in the dilemma canvassed above). The second argued that the indirect enforcement mechanism was a "denial of an effective remedy".

78 See CJEU Press Release, "Statistics concerning judicial activity in 2014". Available on the internet at http://curia.europa.eu/jcms/upload/docs/application/pdf/2015-03/cp150027en.pdf (last accessed 12th April 2016); Van Malleghem and Baeten, "Before the Law", *supra* at note 16, at p. 1215

79 Case C-314/85, ECLI:EU:C:1987:452, *Foto-Frost v Hauptzollamt Lübeck-Ost*; Van Malleghem and Baeten, "Before the Law", *supra* at note 16, at p. 1214; Koch, "Locus Standi of Private Applicants", *supra* at note 14, at p. 515

80 See Morten Broberg and Niels Feuger, *Preliminary References to the European Court of Justice,* 2nd Ed., (OUP, 2010), Chapter 6

81 Roberto Mastroianni and Andrea Pezza, Striking the Right Balance: Limits on the Rights to Bring an Action under Article 263(4) of the Treaty on the Functioning of the European Union 30 *American University International Law Review* (2015) at pp. 743 *et sqq,* at pp. 771-774

82 Craig, "Structure of Legal Argument", *supra* at note 9, at pp. 503-4. Note, also, in the context of anti-dumping, the comment by AG Jacobs in *Extramet, supra* at note 13, at para. 71 that the EU courts are better equipped to decide the matter in light of their expertise in EU law. See also, *infra,* notes 91 92.

83 Roberto Mastroianni and Andrea Pezza, *supra* at note 81, at pp 778-780; See Art 278 TFEU; AG Jacobs in *Extramet, supra* at note 13, at para. 74

84 Ewa Biernat, "The *Locus Standi* of Private Applicants", *supra* at note 9 at pp. 27-28; Morten Broberg and Niels Feuger, *Preliminary References to the European Court of Justice* (OUP, 2010),, at p. 279 ("The preliminary reference procedure does not as such constitute a dispute resolution procedure; rather it is a non-contentious stage in the procedure before the national court. Article [267] does not provide a judicial remedy for the parties to the main proceedings."); *Extramet,* supra at note 13, at para. 71 (noting the "serious disadvantages" in the Art 267 procedure)

85 Case C-188/92, ECLI:EU:C:1994:90, *TWD Textilwerke Deggendorf GmbH v. Bundesrepublik Deutschland*

is both uncertain and unsatisfactory,[86] as has been noted specifically in the context of anti-dumping measures.[87] Finally, the restrictive standing rules are politically problematic in light of the perceived weakness of the EU's democratic credentials, and perhaps hypocritical in light of its aspirations to be closer to the citizenry it influences.[88]

In short, the fact that one manifest gap has been plugged, or, rather, might have been plugged, in no way addresses the broader ills in the standing rules.

4. Broad Standing Rules and the Fears of Overloading the Courts

One must be wary of the argument that the relaxing of standing rules will lead to an unmanageable increase in direct challenges. I note at the outset that more detailed statistical evidence is required in this area[89], and shall limit myself to three observations.

First, if there is a relaxation of standing rules, the number of cases to the CJEU may well *decrease*. This is because indirect challenges are heard by the CJEU, as they take the form of preliminary references from national jurisdictions under Art 267 TFEU[90]. However, direct challenges are heard, first, by the General Court, and can only be appealed on a point of law.[91] By allowing for an increase in direct challenges, it is highly probable that what would have otherwise been heard before the CJEU will be heard by the General Court. This body has recently been doubled in size,[92] and was specifically designed to alleviate the workload of the CJEU and deal with factual issues.[93] Institutionally, this could represent a very important advantage over the present position, and is a serious argument in favour of the relaxation of standing rules.[94]

One might respond that the reduction in preliminary references could be offset by a corresponding increase in appeals to the CJEU. However, if there is a genuine appeal on a point of law it surely is the responsibility of the CJEU to decide it, given the Court's position as the ultimate interpreter of EU law. To argue otherwise comes close to suggesting that the CJEU should shirk this responsibility on account of expediency, a distinctly uncomfortable and unsatisfactory contention. In any case, one must consider the next two observations.

Second, it should not be forgotten that the third head is not *always* satisfied and still remains a filter in ensuring that only those parties whose legal position is affected are able to challenge directly a provision of EU law. The application of this criterion, after Lisbon, shows that it can be an effective triage mechanism. For example, in *T and L,* there were challenges to two emergency measures imposed on the sugar market.[95] One of them consisted of controls on the release of out-of-quota sugar, imposed on sugar *producers* who were approved under Art 57 of Regulation No 1234/2007. The applicants, as sugar *refiners* were not directly concerned and the challenge was inadmissible. A similar situation occurred in *Confederazione Cooperative Italiane.*[96] The appli-

86 See, in particular Opinion of Advocate General Ruiz-Jarabo Colomer in Joined Cases C-346/03 and C-529/03 ECLI:EU:C:2005:256 *Atzori and Others v Regione Autonoma della Sardegna*, at para. 88 " The rule in *Deggendorf* is highly questionable and at some point the Court of Justice must resolve to formulate it more precisely or overrule it, since it is open to significant objections"; Broberg and Feuger, *supra* at note 84, at pp. 214 – 222 ("Perhaps the better solution would be to consider other ways of preventing circumvention of the time limit laid down in Art 230(5) than that provided by the *TWD* doctrine")

87 Opinion of AG Jacobs in Case C-239/99, ECLI:EU:C:2000:639, *Nachi v Council,* at paras. 55 to 60

88 Anthony Arnull, *The European Union and its Court of Justice,* (OUP, 1999), p. 47; Carol Harlow, "Toward a Theory of Access for the European Court of Justice" 12 *Yearbook of European Law* (1992), at pp 213 *et sqq.,* at p. 248; Mariolina Eliantonio and Nelly Stratieva "From Plaumann, through UPA and Jégo-Quéré, to the Lisbon Treaty: The Locus Standi of Private Applicants under Art 263(4) EC Through a Political Lens", Maastricht Faculty of Law Paper 2009/13; See also Art 10(3) Treaty on the European Union.

89 Note, for example, the well-known argument made by Judge Dehousse in his report on the reforms to the General Court that challenges the extent to which the Courts are overworked. Franklin Dehousse and Benedetta Mariscola, *The Reform of the EU Courts: Abandoning the Management Approach by Doubling the General Court,* (2016) can be accessed online http://egmontinstitute.be/wp-content/uploads/2016/03/ep83.pdf.pdf (Last retrieved 5th May 2016), in particular 5.1.1 and 5.1.2

90 Art 267 TFEU "The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings (…)"

91 Art 256 TFEU; Protocol (No 3) on the Statute of the Court of Justice of The European Union, OJ C 83/210, Art 56

92 Parliament and Council Regulation 2015/2422 amending Protocol No 3 on the Statute of the Court of Justice of the European Union, Art 1

93 Niamh Shuibhne, "The Court of Justice of the European Union", in John Peterson and Michael Shackleton, eds., *The Institutions of the European Union,* 3rd Ed (2012, OUP) at p. 149

94 See Craig, "Structure of Legal Argument", *supra* at note 9, at pp. 503-4

95 Case C-456/13 P, ECLI:EU:C:2015:284, *T and L Sugars and another v Commission*

96 Joined Cases C-455/13 P, C-457/13 P and C-460/13 P, ECLI:EU:C:2015:616, *Confederazione Cooperative Italiane and Others v Commission*

cants sought to challenge a provision that changed certain flat rates applicable to various categories of fruit and vegetables. These flat rates were used to calculate the Value of Marketed Production, which, in turn, bore on the amount of Community financial aid granted to the operational programmes of food producers. The challenge failed because the applicants, as industrial *processors* of food, could not show that they were directly affected by measures that affect the amount of aid that could be granted to *producers* of food[97]. There is thus an effective means to weed out, in English legal parlance, "busybodies" who are challenging inconvenient measures that do not bear directly on their legal position.[98] In such cases, indirect enforcement mechanisms are entirely justified, and appropriate. In such a hypothesis, proceedings in national courts can act as a legitimate filter, separating the chaff to be left on the threshing floor of national courts from the wheat that should be referred to the CJEU. They are moreover justified in light of the fact that, if successful, a claimant who is otherwise not directly affected by an EU measure nonetheless may still contest it before the CJEU.

Third, there are more proportionate responses to potential increases in workload. First, it is not only standing that operates as a pre-filter to reduce the need, where appropriate, to have to examine the merits of a case. For example, a party must also have an interest in the proceedings.[99] This is a separate requirement to that of standing, and could be used to dispose of effectively academic cases or those that would not bring any advantage to the person bringing the claim.[100] Given that there is authority that a party may not satisfy this requirement where they simply use the products subject to anti-dumping measures, this could potentially be a useful way to stem hypothetical or pointless challenges to anti-dumping measures.[101] Second, there is a range of procedural mechanisms for dealing with cases so as to dispose of them as the underlying (de)merits of the case require, or on the grounds of inadmissibility. Article 99 of the Rules of Procedure allows for the merits of the case to be dealt with by reasoned order, without the need for an Advocate General's Opinion or oral hearing, where there is, *inter alia,* no reasonable doubt as to the answer. In a similar vein, Article 53(2) allows the Court, where the questions referred are manifestly inadmissible, to simply say so in an order dismissing the action. In the context of appeals, Article 181 provides a mechanism for disposing of appeals that are inadmissible or unfounded. If the former, the case is dismissed without examining the merits, and, in the latter, the Court fleshes out the main reasons why the appeal fails without going into forensic details. Finally, recent developments give greater scope for the Advocate General to assist in such orders, drafting a 'proposal', which is then incorporated into the order as prepared by the reporting judge.[102]

More broadly, if the additional workload flowing from the Union judicature assuming its responsibility as the ultimate body of interpretation of EU law is unmanageable, there are many other viable options. Here is not the place to re-open the very sensitive debates on institutional reform of the Union courts, but, surely, there are many more preferable solutions to the volume of cases than narrow standing rules. For example, in the 2015 reforms to the Rules of Procedure of the General Court, there are provisions for the dispensation of hearings when the parties agree to it,[103] and the possibility of one judge alone to determine certain disputes.[104] Other proposals for the future could include increasing the number of *référendaires* for the judges,[105] modifying practices relating to the size of the Chambers in the courts, reducing the internal report for the hearing (*rapport*

97 ibid, at para. 48. See also Case T-334/12, ECLI:EU:T:2015:376, *Plantavis*; Case T-694/14, ECLI:EU:T:2015:915, *EREF*; Case T-670/14, ECLI:EU:T:2015:906, *Milchindustrie-Verband* (both failed on the grounds of lacking direct concern)

98 See, e.g., *Walton v Scottish Ministers* [2012] UKSC 44

99 See Opinion of AG Mengozzi in Case C-33/14 P, ECLI:EU:C:2015:409, *Mory v Commission,* paras. 22 to 30

100 Case C-362/05 P, ECLI:EU:C:2007:322, *Wunenburger* v *Commission*, at para. 42; Case T-28/02, ECLI:EU:T:2005:357, *First Data and Others* v *Commission*, at para. 35 to 38

101 Case T-537/08, ECLI:EU:T:2010:514, *Cixi Jiangnan Chemical Fiber v Council,* at paras. 16 to 19. This was a case concerning whether a party had an interest in the proceedings such that they could act as an intervener in those proceedings under Art 40 of the Rules of Procedure of the General Court 19 June 2013 (OJ L 105 of 23.4.2015, p. 1). However, the test applied was the same as that in relation to whether a party has a sufficient interest in the proceedings to bring the claim (compare with cases in preceding footnote)

102 Case C-653/15 P, ECLI:EU:C:2016:277, *Bopp v EUIPO,* for an example.

103 Rules of Procedure, *supra* note 101, Art 106(2)

104 Ibid, Art 14 and Art 29

105 Note that presently, Advocate Generals are allowed four référendaires, but the Judges at the CJEU are only allowed three. See Marc Abenhaïm, "Follow-Up Note on Another Missed Opportunity for the Administration of Justice Across Europe" 16th December 2014, accessible online at http://kluwercompetitionlawblog.com/2014/12/16/follow-up-note-on-another-missed-opportunity-for-the-administration-of-justice-across-europe/ (last retrieved 6th May 2016)

préalable), eliminating oral hearings in certain cases, and implementing stricter productivity control programmes.[106] The point here is not that these reforms should be carried out. It is rather that, contrary to the stout opposition of the Union judicature, it is entirely possible to conceive of a workable judicial architecture with broader standing rules.

VII. Conclusion

Given the courts' reasoning that the calculation and communication of duties by national customs authorities constitute implementing measures, this effectively strikes out any application of the third head in this area. As a consequence, broad standing rules allowing for more liberal access to the EU courts are not on the horizon. This is entirely a situation of the Court's own making. It is possible, coherent, and, indeed, desirable to adopt more liberal standing provisions. These could be entirely in keeping with both the wording of Art 263(4) and the need to ensure that the courts' time is not wasted on the pleas of meddlesome litigants. One can also readily find other filters to weed out unmeritorious claims, and procedures to dispose of other cases rapidly. Nonetheless, the courts remains ensconced in a restrictive view of standing, and this will not only forestall any hopes of judicial relaxation of the rules, but also frustrate external reform to the heads of standing.

Overall, the Lisbon reforms to Art 263(4) have thus brought little change to this area. Relying on the third head generally means that the challenge will be dismissed for the presence of implementing measures rather than the absence of individual concern. In some cases, the third head may even be worse than the pre-Lisbon position.[107]

From the perspective of those seeking to challenge anti-dumping duties, it might be tempting to resort to the cliché that the reforms were "much ado about nothing". In reality, the converse is true. They were "nothing ado about much": the Court did nothing about an area of EU law that was in desperate need for reform. One waits hopefully for the EU courts to do something about it; although the chances are that, rather like a litigant attempting to directly challenge EU law, we will be waiting for quite some time.

106 Franklin Dehousse and Benedetta Mariscola, *supra* at note 89, Chapter 5.

107 See, *supra*, note 56 for cases where the third head was not satisfied, but the second head was.