



ARTICLES

SPECIAL SECTION – THE NEW FRONTIERS OF EU ADMINISTRATIVE LAW: IS THERE AN ACCOUNTABILITY GAP IN EU EXTERNAL RELATIONS?

EXTERNAL PARTICIPANTS V. INTERNAL INTERESTS: PRINCIPLES OF EU ADMINISTRATIVE LAW IN ANTI-DUMPING INVESTIGATIONS

EMILIA KORKEA-AHO* AND SUVI SANKARI**

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ABSTRACT: Anti-dumping policy is key among the EU trade defence instruments. Although formally a political regime to restrict cheap imports to the EU, its daily operations target individual companies, predominantly from third countries. Finding a balance between multilateral trade rules and the individualised and international decision-making requires a well-functioning administrative procedure to protect the rights of the defence. Anti-dumping decision-making is exercised according to WTO-compliant rules laid down in the Basic Regulation (i.e. Regulation (EU) 2016/1036) which governs the Commission’s exercise of discretion. The EU has put in place a procedurally elaborated and territorially blind administrative framework, which invites external participation and promotes reciprocity in third-country procedures for EU producers. The framework extends beyond the rights of the defence for those affected by the decisions, to a broader participation. Formally respecting the rights of participants, including their interests, and treating them equally regardless of geographical origin does not negate the fact that certain interests weigh more than others. The disparity is not created by inadequacies or limitations of administrative law, but rather by the overall framing of the process to cater to the needs of domestic EU industry and political tit-for-tat thinking. The lack of soft law rules further augments executive discretion in anti-dumping decision-making, and accountability for Commission choices is difficult to enforce. In addition to insisting on transparency and the rights of the defence, a

* Research Fellow, Faculty of Law, University of Helsinki, emilia.korkea-aho@helsinki.fi.

** Postdoctoral Researcher, Faculty of Law, University of Helsinki, suvi.sankari@helsinki.fi.

complementary way to increase and improve accountability would be to acknowledge a more substantive duty to state reasons in anti-dumping policy-making.

KEYWORDS: trade defence instruments – anti-dumping procedure – external interests – EU administrative law – rights of the defence – equal treatment.

I. INTRODUCTION

Trade policy interests of both the EU and its Member States are promoted within the Common Commercial Policy (CCP). The CCP covers “both unilateral measures adopted by the Union institutions and conventional measures negotiated with third countries and international organisations”.¹ Unilateral measures include a whole host of instruments, amongst which are – as described by Art. 207 TFEU – “measures to protect trade such as those to be taken in the event of dumping and subsidies”. From the start, European Economic Community law has followed and applied General Agreement on Tariffs and Trade (GATT) rules on anti-dumping. In other words, this part of the CCP, which dates back to the original Treaty, is derived from GATT. Dumping is a situation where producers from a third country export their goods to the EU at prices below the cost of production or the domestic price of the product.

As a policy area, the CCP differs from other external relations policy fields, such as the Common Foreign and Security Policy or development policy, because the EU has exclusive competence to act. In one of the earliest important CCP cases, the Court talks about “the common interests of the Community, within which the particular interests of the member states must endeavour to adapt to each other”,² and the exclusivity of the CCP serves this idea of the common interest. The Council adopts CCP measures by a qualified majority (Art. 207, paras 2 and 4, TFEU) following a proposal by the Commission, according to the ordinary legislative procedure.

Since the early days, EU institutions have had wide discretion to promote the common interest in the CCP, a conclusion forcefully asserted by the Court of Justice in the 1970s. In its view,

“the proper functioning of the Customs Union justifies a wide interpretation of Articles 9, 27, 28, 111 and 113 [the latter two appearing in the ex-chapter headed Commercial Policy] of the Treaty and of the powers which these provisions confer on the institutions to allow them thoroughly to control external trade by measures taken both independently and by agreement”.³

¹ P. KOUTRAKOS, *EU International Relations Law*, Bloomsbury: Bloomsbury Publishing, 2015, p. 19.

² Court of Justice, opinion 1/75 of 11 November 1975, pp. 1363-1364.

³ Court of Justice, judgment of 12 July 1973, case 8/73, *Hauptzollamt Bremerhaven v. Massey-Ferguson GmbH*, para. 4.

In a subsequent case, the Court linked the two more explicitly, arguing that the breadth of executive discretion and the lack of substantive policy prescriptions in the Treaty serve the promotion of the common interest.⁴

Beyond Court jurisprudence, there is little guidance on CCP policy-making. The EU Treaties do not elaborate on the administration of the CCP, noting only that it “shall be conducted in the context of the principles and objectives of the Union’s external action”.⁵ Specific CCP objectives are rare, except for the commitment to liberalisation in Art. 206 TFEU. Has this traditional starting point been altered by the objectives and principles introduced as general external objectives in Art. 21 TEU and in Art. 3, para. 5, TEU? Both are defined broadly and in universal terms, including “free and fair trade” (Art. 3, para. 5), “sustainable economic, social and environmental development” and “integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade” (Art. 21, para. 2, let. d) and e)).

Besides these manifold and possibly contradictory objectives, Art. 21 states that, in the context of implementing the CCP, the most relevant guiding principles are the rule of law, the universality and indivisibility of human rights and fundamental freedoms, the principle of equality, and observance of international law. The Union is also encouraged to develop relations and partnerships with third countries including giving preference to multilateral solutions where available. Finally, the EU must ensure consistency between external actions and its other policies (Art. 21, para. 3, TEU).

The current set of broadly defined goals does not easily translate into guiding EU action in the CCP generally, or anti-dumping policy-making more specifically. However, it gives an idea of the complex interests involved when deciding whether imposing anti-dumping duties is in the Union interest. The depiction of the anti-dumping regime as free from substantive treaty-based policy constraints or as primarily technical decision-making is thus misleading, and anti-dumping policy is “trade policy”,⁶ involving contestations between economic and political systems.⁷ One such tension relates to the conceptualisation of the anti-dumping regime.⁸ Is anti-dumping decision-making perceived as an illustration of, or an exception to, free and fair trade? Anti-dumping investigations can, on the one hand, be seen as measures to protect trade (Art. 207 TFEU) from unfair trading practices. On the other hand, free and fair trade can be seen as “fair” in the

⁴ Court of Justice, judgment of 19 November 1998, case C-150/94, *UK v. Council*, see e.g. paras 53-55, 64 and 67.

⁵ Art. 207, para. 1, TFEU.

⁶ N. PALMETER, *Editorial: The Antidumping Emperor*, in *Journal of World Trade*, 1998, p. 7. For the historical overview, see F. SNYDER, *The Origins of the ‘Nonmarket Economy’: Ideas, Pluralism and Power in EC Anti-dumping Law about China*, in *European Law Journal*, 2001, p. 369 *et seq.*

⁷ F. SNYDER, *The Origins of the ‘Nonmarket Economy’*, *cit.*, p. 390.

⁸ For an overview, see P. MAVROIDIS, *The Regulation of International Trade: Volume 2, The WTO Agreements on Trade in Goods*, Cambridge: MIT Press, 2016, pp. 175-184.

sense of equitable and inclusive trade, where anti-dumping measures ultimately serve the treaty goals of “integration of all countries into the world economy” and “sustainable economic, social and environmental development”.⁹ This example suffices to show how quite run-of-the-mill decisions in anti-dumping investigations may lead to decision-making that either undermines or promotes free and fair trade: in other words, decision-making that cannot be purely technical in nature.

Anti-dumping policy is closely linked to the internal market policies via EU competition law, because both are concerned with “unfair” conduct in the market as well as the economic interests of individuals. Furthermore, many procedural rights were first established in competition law cases,¹⁰ before being applied to the anti-dumping context,¹¹ and together they can be thought of as leading the way for the development of administrative procedures in other policy areas.¹² But there are also some interesting differences that centre around executive discretion. Competition law decision-making is non-discretionary in the sense that certain behaviours are “automatically” banned in the absence of an applicable exception. In contrast, there is no obligation to impose an anti-dumping duty if dumping is found, hence, discretion exists in how the exception is applied. Moreover, trade defence measures, unlike competition law proceedings, are not regulated at the level of primary law, but are “a legislative creation”.¹³ Although secondary legislation constrains executive discretion, there always remains a residual discretion as to whether or not to impose anti-dumping duties.

Different ideological approaches to fair trade and wide discretion are not the only relevant challenges. The context of anti-dumping policy-making is international and political, where the majority of cases pursued affect the EU’s key trading partners.¹⁴ Currently, most EU anti-dumping investigations involve Chinese companies, in particular in the contexts of chemicals and metals. In December 2016, there were 95 anti-dumping measures in force, out of which 66 were against China, followed by Indonesia (8), Malaysia (8), and Russia (7). In 2016, the EU initiated a total of nine new investigations, and

⁹ On such understanding, see especially Court of Justice, opinion 2/15 of 16 May 2017, para. 146.

¹⁰ See, e.g., Court of Justice, judgment of 25 October 1977, case 26/76, *Metro SB-Großmärkte GmbH & Co. KG v. Commission*.

¹¹ For instance, Court of Justice, judgment of 20 March 1985, case 264/82, *Timex Corporation v. Council and Commission*.

¹² H. NEHL, *Principles of Administrative Procedure in EC Law*, Oxford: Hart Publishing, 1999, pp. 6-7.

¹³ P. EECKHOUT, *Administrative Procedures in EU External Trade Law*, Briefing Note prepared by request of European Parliament’s Committee on Legal Affairs, March 2011, p. 10.

¹⁴ In December 2016, some provisions in China’s Protocol of Accession to WTO expired, leading China to insist on “market economy status”. Disappointed by lukewarm reactions of its trading partners, China has requested the establishment of a panel to decide on whether the use by the EU (and US, ds515) of non-market economy methodology in anti-dumping proceedings involving China is consistent with WTO law. See WTO DSB, *EU – Price Comparison Methodologies*, case no. ds516, pending, www.wto.org. In an effort to lobby the EU, China has threatened to set restrictions targeting German auto industry and used climate change policies as a leverage against the EU. The DSB decision is expected by the end of 2017.

China was again at the top of the list with five opened files.¹⁵ What is more, there are always different interests at play in anti-dumping proceedings. The most significant axis of interests links the complainants (EU industry also referred to as EU producers) and Member State governments, whereas the second axis is comprised by importers, third-country producers (also referred to as exporters), consumers, and third-country governments. All parties have specific individual as well as bilateral interests – and may have procedural rights – which have to be balanced both legally and politically in a way that furthers Union interest.

As with the CCP in general, institutions' discretionary choices also provide the starting point for many analyses and Court judgments in the field of anti-dumping. Wide discretion is considered necessary given "the complexity of the economic, political, and legal situations" which Union institutions have to examine.¹⁶ However, discretion is not unfettered but is limited by the respect of rights guaranteed by the EU legal order, which encompasses the requirement that discretion must be exercised carefully and in accordance with the established principles of administrative law. In the anti-dumping context, those principles include, according to Lenaerts *et al.*, "the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case and to give an adequate statement of reasons".¹⁷ More generally, specific constraints upon the exercise of administrative powers include rights of the defence (right to be heard), right to an adequately reasoned decision, and right to effective remedy, whereas the rights of the defence can be broken down to the right to be informed of the commencement and material object of proceedings, right to be advised and assisted by counsel, and the right of access to the file.¹⁸

The administration of the anti-dumping regime takes place in the context of Anti-Dumping Regulation EU 2016/1036 (Basic Regulation).¹⁹ The Regulation, the present

¹⁵ European Commission, Anti-Dumping Anti-Subsidy Safeguard, *Statistics covering 2016*, 28 February 2017, trade.ec.europa.eu, pp. 6-7, 46 *et seq.* According to the Directorate General for Trade website search-engine, there are currently altogether 205 (of which 148 on anti-dumping) cases of trade defence investigations or measures in force by third countries against the EU and its Member States, of which 20 (17) are by China, 8 (0) by Indonesia, 3 (0) by Malaysia, 1 (1) by Russia – compared to, for example, 33 (28) by the US: see trade.ec.europa.eu.

¹⁶ K. LENAERTS, I. MASELIS, K. GUTMAN, *EU Procedural Law*, Oxford: Oxford University Press, 2014, p. 399. See also, e.g., Court of Justice, judgment of 16 February 2012, joined cases C-191/09 P and C-200/09 P, *Council and Commission v. Interpipe*, para. 63.

¹⁷ K. LENAERTS, I. MASELIS, K. GUTMAN, *EU Procedural Law*, cit., pp. 399-400. Footnotes in the original omitted here.

¹⁸ J. BAST, *Of General Principles and Trojan Horses: Procedural Due Process in Immigration Proceedings under EU Law*, in *German Law Journal*, 2010, pp. 1011-1012; J. SCHWARZE, *European Administrative Law*, London: Sweet & Maxwell, 2006, pp. CXLVIII-CLIV.

¹⁹ Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union (codification). This is the latest of a long line of regulations originally started with Regulation (EEC) 459/68 of the Council of 5

version of which the Council originally adopted in 2009, was codified in 2016, rather than modernised. It provides an administrative law framework for individually examining the pricing policies of exporting companies, which are alleged to be dumping. An interesting aspect is that the Basic Regulation does not operate at the level of general administrative principles, rather, it builds on very detailed provisions that govern the investigation, determination and application of anti-dumping duties. Much of the Regulation's content owes itself to Art. VI of GATT 1994 and the Agreement on Implementation of Art. VI of GATT 1994, commonly known as the Anti-Dumping Agreement (ADA).

The individual character of anti-dumping investigations explains the significance of rights of the defence in controlling the powers of administration. But the geographically concentrated statistics together with the trade political "tit-for-tat" nature of anti-dumping also raise the question of rights protection in an international environment. Is the application of rights of the defence in anti-dumping procedures affected by the fact that addressees of those rights are outside the EU? Is Union discretion wider or exceptionally circumscribed in the implementation of anti-dumping measures due to the indirect "extraterritorial" effects of EU anti-dumping decisions? While the topic of anti-dumping and, especially, rules applicable to the calculation of anti-dumping margins, have been subject to much scholarship, fewer studies have been undertaken in relation to administrative law aspects, which are at the core of this *Article*. Such an in-depth study is warranted. First, many of administrative law principles applicable to the external relations field originate in anti-dumping policy-making. Second, whilst anti-dumping procedures are different from other areas of external relations law, they are similar to "cousin" procedures in internal market competition law, both in terms of the Commission powers and interests involved, making it a useful case study in the typology of administrative procedures. The present focus is on administrative law aspects, therefore the evolution of anti-dumping legislation is excluded.²⁰ Similarly, other trade defence instruments, i.e. countervailing duties and safeguard measures, are not analysed in this article, because anti-dumping investigations are more common and have some specific characteristics. Safeguards intended to temporarily shield domestic industry from excess imports are not targeted, and no individual decisions are taken by the EU, whereas in the case of subsidies it is a third country which is targeted and not an exporter.

The *Article* is organised as follows. Section 2 shortly introduces the fundamental tension between discretion and rules, the tension which characterises both the evolution and

April 1968 on protection against dumping or the granting of bounties or subsidies by countries which are not members of the European Economic Community.

²⁰ Modernisation of trade defence legislation has been an arduous task. For the recent effort to overhaul the system, see F. HOFFMEISTER, *Modernising the EU's Trade Defence Instruments: Mission Impossible?*, in C. HERRMANN, B. SIMMA, R. STREINZ (eds), *European Yearbook of International Economic Law: Trade Policy between Law, Diplomacy and Scholarship. Liber Amicorum in Memoriam Horst G. Krenzler*, Heidelberg: Springer, 2015, p. 365 *et seq.*

application of the EU anti-dumping regime. Section 3 focuses on different substantive interests involved in anti-dumping investigations, whereas Section 4 analyses how these different interests play out in participatory processes and what function they have from the perspective of external application of EU rules on administration. Finally, we conclude.

II. DISCRETION OR CLEAR RULES? THE “FUNDAMENTAL IMPORTANCE” OF THE ADMINISTRATIVE LAW FRAMEWORK

As indicated above, the Treaties provide few benchmarks for developing and applying the EU anti-dumping regime, conferring wide discretion on the institutions to interpret and apply the rules. The Court has consistently held that the powers which the institutions have under the Treaties must be interpreted widely in order to ensure the proper functioning of the CCP policy-making. Discretion exercised by the institutions in the external policy field has been broad, encompassing both substantive aspects of the policy as well as procedural questions.²¹

Anti-dumping decision-making involves two parts: first, the anti-dumping investigation and, second, the imposition of anti-dumping duties. The decision-making process gives rise to preparatory measures adopted by the Commission that cannot be challenged as well as (final) measures that have legal effects and can be challenged by bringing an action for annulment. Definitive anti-dumping duties adopted by the Commission as Commission implementing regulations since 2014, as well as the decision not to impose them, are both challengeable acts.²² The Basic Regulation does not qualify the level of the duty to state reasons, hence the general “hybrid” procedural-substantive principle in Art. 296, para. 2, TFEU applies to anti-dumping decisions.²³

Annulment jurisprudence provides an interesting context from which to offer perspective into EU anti-dumping decision-making. Drawing on extensive case law in the area, Hartley has characterised anti-dumping measures as “acts of quasi-judicial nature” and anti-dumping policy-making as a field “in which the Union institution adopting the act is bound by clear rules”.²⁴ He argues that “the final determination depends largely

²¹ Generally on exercise of discretion in external policy field, see M. CREMONA, P. LEINO, *Introduction: The New Frontiers of EU Administrative Law and the Scope of Our Inquiry*, in *European Papers*, 2017, Vol. 2, No 2, www.europeanpapers.eu, p. 467 *et seq.*

²² According to Lenaerts *et al.*, also the following decisions are challengeable: decision rejecting a request for initiation of partial interim review and decision to impose provisional duties. See K. LENAERTS, I. MASELIS, K. GUTMAN, *EU Procedural Law*, cit., p. 299.

²³ On hybridity, see H. NEHL, *Principles of Administrative Procedure*, cit., pp. 104, 120. For recent case law on the duty, see Court of Justice, judgment of 10 March 2016, case C-247/14, *HeidelbergCement AG v. Commission*, para. 16 (and the cases it refers to). On WTO standard of review, see P. MAVROIDIS, *The Regulation of International Trade*, cit., p. 167 *et seq.*

²⁴ T. HARTLEY, *The Foundations of European Union Law*, Oxford: Oxford University Press, 2014, p. 371.

on questions of fact, and a semi-judicial procedure is followed".²⁵ For Hartley, determinations of anti-dumping measures are not discretionary acts, but rather decisions based on fact and law, something which the Court has reflected in its jurisprudence by adopting, as shown below, a rather liberal approach to standing.

How can a policy area simultaneously be characterised by wide discretion and clear prescriptive rules? In order to answer the question, it is necessary to look into the role of the Court, whose influence has been the most decisive for the development of the policy area and is still strongly felt in the field. The Court's influence on policy choices and administrative procedures has been critical. In the early versions of the Basic Regulation little was said about procedures, offering the Court an unprecedented opportunity to make its mark through jurisprudence.²⁶

An indicative example can be found as early as in the 1980s, when the Court allowed non-privileged applicants (complainants and third-country exporters) to challenge anti-dumping duties that are, technically speaking, regulations and usually non-challengeable due to their general character. In the *Japanese Ball-Bearing* case, in addition to interpreting direct concern more generously than had been past practice, the Court held that third-country exporters fulfill the conditions of individual concern if they had been named in the regulation.²⁷ A few years later, the Court went further, establishing that exporters could also challenge the anti-dumping duties where they "were concerned by the preliminary investigations".²⁸ The Court granted standing to third-country exporters who had actively participated in the proceedings although they were affected by the measure only as members of an open category of actors. This was an anomaly in the doctrinal understanding of standing for non-privileged applicants, suggesting that the Court allowed a larger circle of applicants to challenge duties in return for a more decisive role in shaping the EU anti-dumping regime. Although it certainly appears to be possible that relaxation of standing had something to do with the non-EU origin of exporters, proving such an assertion would be extremely difficult. The international *quid*

²⁵ *Ibid.*

²⁶ See however the repealed Regulation (EEC) 2423/88 of the Council of 11 July 1988 on protection against dumped or subsidized imports from countries not members of the European Economic Community, especially its Arts 7, para. 1, let. a) and b), and para. 4, preceding Regulation (EC) 1225/2009 of the Council of 30 November 2009 on protection against dumped imports from countries not members of the European Community, and now codified into Regulation EU 2016/1036. The repealed Regulation had express provisions especially on the right to be heard. However, the Court influenced its content. See on this J. MENDES, *Participation in European Union Rule-Making. A Rights-Based Approach*, Oxford: Oxford University Press, 2011, p. 171.

²⁷ Court of Justice, judgment of 29 March 1979, case 113/77, *NTN Toyo Bearing Company Ltd v. Council*.

²⁸ Court of Justice, judgment of 21 February 1984, joined cases 239/82 and 275/82, *Allied Corporation et al. v. Commission*, para. 12. The relaxation favoured also complainants, but the situation of (independent) importers was, and still is, ambiguous. They have been treated differently on the basis that they, as subjects to import duty, can challenge the measure in national courts. See T. HARTLEY, *The Foundations of European Union Law*, cit., p. 380 *et seq.*

pro quo was part of the consideration, as the Commission supported the admissibility of the exporters' action on the basis that EU exporters might otherwise not be able to challenge similar measures in the US.²⁹

Given the international context, administrative law benchmarks could not be developed in a vacuum. GATT law in anti-dumping (the 1994 ADA) lays down detailed procedure on how to open anti-dumping investigations, how to conduct the investigations and how often to include the interested parties during the investigation procedure. The CJEU has recognised and accepted GATT law in anti-dumping, using it both as an inspiration as well as evidence of a general practice in international trade law.³⁰ In this regard, judicial recognition reflects EU policy more broadly. In a recent report, the Commission explicitly states that:

“Since the beginning, considerable efforts have been made to harmonise the rules relating to trade instruments. During the last GATT round [...] much of the attention was focused on the procedural and material conditions to be fulfilled before measures can be adopted. The EU played an active role in the *negotiation of these relevant criteria which are reflected in its own legislation*”.³¹

In which direction did the Court take the EU anti-dumping regime? Early anti-dumping case law demonstrates that the Court limited itself to reviewing the institutions' discretion from a procedural perspective, with the focus of review upon determining whether or not there was a manifest error of appraisal or misuse of powers, with no assessment of the substantive policy choices.³² It is, nevertheless, interesting that dissimilarly to other fields of external relations – where the institutions have discretion even on procedural questions – the Court was never shy to review procedural choices in anti-dumping policy-making. The rationale is likely two-fold. On the one hand, the Court may have wanted to align the EU anti-dumping policy with similar areas in the internal market fields, where policy-making has not escaped the Courts' critical scrutiny. On the other hand, the Court may have taken inspiration from rules and jurisprudence related

²⁹ *Allied Corporation*, cit., para. 6.

³⁰ Note also that as an exception to the WTO system more generally, WTO anti-dumping standards are taken into account by the Courts in two situations. First, where the EU intends to implement a particular WTO provision, and second, where the EU law instrument refers to a specific WTO provision. See e.g. Court of Justice, judgment of 7 May 1991, case C-69/89, *Nakajima v. Council*, paras 29-32. For an excellent recent introduction to the issue, see Court of Justice, judgment of 16 July 2015, case C-21/14 P, *Commission v. Rusal Armenal* [GC], paras 38-55, especially para. 41.

³¹ Staff Working Document COM(2016) 661 final of 18 October 2016 of the Commission accompanying the 34rd Annual Report from the Commission to the European Parliament and the Council on the EU's Anti-Dumping, Anti-Subsidy and Safeguard activities (2015), p. 7 (emphasis added).

³² Court of Justice: judgment of 22 October 1991, case C-16/90, *Nölle v. Hauptzollamt Bremen-Freihafen*; judgment of 7 May 1987, case 240/84, *NTN Toyo Bearing Company Ltd et al. v. Council*; Order of the President of the Court of 17 December 1984, case 254/84 R, *Nippon Seiko KK v. Council*.

to anti-dumping investigations at the WTO level, which clearly have guided the procedural evolution of EU law.³³ In this context, the fundamental importance of the administrative law framework is portrayed as a protective element against the excesses of wide discretion exercised by the institutions.

In more recent case law, there are indications that the Court is growing concerned about the EU institutions' "extremely broad discretion".³⁴ In one case, the four US producers of bioethanol challenged the imposition of duties on the basis that, in 2013, the EU had failed to calculate individual dumping margins, alleging also an infringement of several articles of the Basic Regulation (rights of the defence, breach of the principles of non-discrimination and sound administration and failure to provide adequate reasons). The Court annulled the regulation, rejecting the institutions' argument that it would have been impracticable for them to establish individual margin, pointing out that permitting such an argument would have resulted in an extremely broad discretion. The applicants were less fortunate with respect to enforcing their procedural rights (see *infra*, Section IV).

There is another issue that emerges from the analysis of the Court's jurisprudence. Early case law perceived wide discretion ultimately as a policy choice made by the Treaties. It was the task of the Court to safeguard such discretion in decision-making involving complex societal considerations.³⁵ In subsequent jurisprudence, however, wide discretion emerges in a different light, as a result of practical difficulties and a lack of (reliable) information. The following two cases demonstrate this well. At the WTO level, the Dispute Settlement Body (DSB) recently ruled that in failing to calculate the cost of production of the product on the basis of the records kept by the Argentinian producers, the EU had failed its obligations under ADA.³⁶ In the above-mentioned bioethanol case, the Court of Justice rejected the argument regarding difficulties in calculating individual margins, limiting institutional discretion to deviation from the rules only when there are difficulties in implementing them.³⁷ Neither of the review bodies was convinced of the severity of problems, suggesting that wide discretion will in the future be subject to more stringent control.

From the perspective of discretion, anti-dumping law in the EU is characterised by two features that differentiate it from other areas of external relations. First, decision-making is structured by and exercised according to rules laid down in the Basic Regulation, narrowing the institutions' discretion from what it is usually in the field of external relations. Second, and relatedly, unlike in similar areas of competition law and state aid, there is very little soft law guidance in anti-dumping to curtail institutional discretion,

³³ See *supra*, footnote 31. See also Court of Justice, judgment of 9 June 2016, case T-276/13, *Growth Energy and Renewable Fuels Association v. Council*, para. 179, under appeal.

³⁴ *Growth Energy and Renewable Fuels Association v. Council*, cit., para. 228.

³⁵ See *supra*, footnote 32.

³⁶ WTO DSB, panel report of 29 March 2016 and the appellate body report of 6 October 2016, case no. ds473, *European Union – Anti-dumping Measures on Biodiesel from Argentina*, agreed on this issue.

³⁷ *Growth Energy and Renewable Fuels Association v. Council*, cit., para. 238.

and “anti-dumping is mostly governed by hard law”.³⁸ With the power to impose definitive duties shifted from the Council to the Commission in 2014, it seems likely that further constraints on the latter’s discretion will emerge, either via soft law, the courts, or both, reproducing development similar to that in competition law.

III. INTERESTS INVOLVED IN ANTI-DUMPING POLICY-MAKING

Administrative decision-making is often perceived as a formalised exercise intended to balance conflicting interests of individuals or groups, where the role of administrative law is to ensure that these decisions are made openly and fairly. The group of actors whose interests must be balanced in anti-dumping proceedings is large and varies depending on the stage of the proceedings. Rights of participation do not cover only the right of those directly affected to be heard but, in the spirit of open and “fair” administrative decision-making, opportunities are also extended to those who are interested in contributing.

III.1. DECISION TO INITIATE INVESTIGATIONS

Art. 5 of the Basic Regulation establishes the requirements for the initiation of investigations. Anti-dumping procedures have a slightly unusual point of initiation, as they are ordinarily commenced in response to a complaint lodged by EU producer (lobby) groups, thereby involving the key interest group from the early stages of the process.³⁹ The duty of complainants is to bring forward evidence to justify the initiation of an investigation, if such evidence is “reasonably available” to the complainant.⁴⁰ The Commission is required to examine “the accuracy and adequacy” of the evidence in order to determine whether there is “sufficient evidence” to justify the opening of the proceedings.⁴¹ A decision not to initiate an investigation cannot be challenged.⁴² Reading the

³⁸ P. EECKHOUT, *Administrative Procedures*, cit., p. 5. In connection with the latest 2013 effort to modernise trade defence legislation, the Commission prepared four draft guidelines on the choice of the analogue country, injury margin, expiry review and length of measures and Union interest, trade.ec.europa.eu. The draft guidelines were never officially adopted, as the whole reform process stalled due to institutional disagreements. See F. HOFFMEISTER, *Modernising the EU’s Trade Defence Instruments*, cit., p. 375.

³⁹ See also Art. 5 ADA that specifies that investigations should generally be initiated on the basis of written request submitted “by or on behalf of” a domestic industry.

⁴⁰ Art. 5, para. 2, of the Basic Regulation.

⁴¹ *Ibid.*, Art. 5, para. 3.

⁴² K. LENAERTS, I. MASELIS, K. GUTMAN, *EU Procedural Law*, cit., pp. 298-299; the General Court’s case law on inadmissibility predates the Commission taking over from the Council as to imposing of definitive duties, however, the conclusion is not only based on the decision being preparatory (both provisional and definitive measures posing duties can be challenged) but also on that initiating a procedure neither affects the legal positions nor requires cooperation from companies concerned. See General Court: order of 14 March 1996, case T-134/95, *Dysan Magnetics Ltd and Review Magnetics (Macao) Ltd v. Commission*, para. 27; order of 10 December 1996, case T-75/96, *Söktaş v. Commission*, paras 39, 41-42.

Regulation's text and taking into account its open-ended terms, it seems that Commission discretion is at its widest in the period running up to the initiation decision, as the Regulation does not give the interested parties an opportunity to participate.⁴³ In fact, the authorities (including also national ones) must avoid publishing information about the complaint, with the exception that the third-country government must be formally notified once the complaint has been received by the Commission.⁴⁴

Once the Commission has appraised the evidence, it communicates the decision (including also a decision to not open an investigation) to the third-country exporters and importers including their representative associations as well as third-country representatives and the complainants, attaching the full text of the complaint.⁴⁵ In addition to individually informing all exporters and importers known to be concerned by the procedure, the Commission publishes a public notice in the Official Journal announcing the initiation of proceedings and requesting "interested parties" to make themselves known with a view to being able to present their views and submit information (notification procedure).⁴⁶ The Regulation does not contain a definition of "interested parties", but the reference is likely to be, in addition to the groups of actors mentioned above, to EU consumers and civil society actors.

Pursuant to Art. 5, para. 10, of the Basic Regulation, the notification procedure involves the interested parties making a written request for hearing, submitting evidence on how they are likely to be affected and what the particular reasons are for their inclusion in the investigation.⁴⁷ The Commission does not make an administrative decision on notifications of interests, rather, the procedural rights, such as the right to be heard and the right to inspect all information made available by any party, are created through the notification itself. Participation by interested parties as such cannot be barred by the Commission, but evidence or information can be rejected, in accordance with Art. 18 of the Basic Regulation on non-cooperation (see *infra*, section IV.1).

III.2. DECISION ON ANTI-DUMPING DUTIES

Following the initiation of proceedings, the Commission begins its investigation in accordance with rules enshrined in Art. 6 of the Basic Regulation. It is still the main actor, although the Regulation assumes that during this decision-making stage, the Commission acts together with national authorities that may, for instance, be called upon to assist the Commission in collecting and verifying information. Four conditions must be present and satisfied for the EU to impose anti-dumping duties, namely, the Commis-

⁴³ Note also that the decision to initiate procedure cannot be challenged.

⁴⁴ Art. 5, para. 5, of the Basic Regulation.

⁴⁵ *Ibid.*, Art. 5, para. 11.

⁴⁶ *Ibid.*, Art. 5, para. 10.

⁴⁷ *Ibid.*, Art. 6, para. 5.

sion must demonstrate that *a*) dumping exists, *b*) it has caused injury to EU industry, *c*) there is a causal link between dumping and injury, and *d*) acting is in the EU's interests.⁴⁸ Duties are imposed in the form of (directly applicable) regulations, as they aim at setting the anti-dumping duties, which are collected by national customs officials who directly rely upon the regulation. However, although not formally addressed to whom they affect, the titles of anti-dumping regulations identify the imports concerned by name of country of origin or even company.

Prior to 2014, provisional duties were set by the Commission, whereas definitive duties were imposed by the Council. According to changes introduced by the Lisbon Treaty, the Council is no longer involved in the process and has granted to the Commission the powers to set definitive measures by adopting Commission implementing regulations.⁴⁹ Provided that the Commission adopts all major decisions in competition and state aid, this change in anti-dumping seems a natural extension of powers in a functionally similar field.⁵⁰ However, the Trade Defence Committee (TDI), composed of national representatives and chaired by the Commission, ensures – as it also did before – that Member States' interests are not neglected, with the ultimate possibility to override the Commission with respect to the imposition of definitive measures.⁵¹ From an administrative law perspective, the strict confidentiality of consultations that comes with the use of comitology is problematic from the point of view of accountability and rights of the defence.⁵²

Member State interests are not the only ones to which the Commission heeds in deciding whether to impose anti-dumping duties, with several other interests vying for the Commission's attention. The original complainants remain in anti-dumping proceedings, not least because they are perceived to have a special task in giving a "human" face to the whole policy area. One of the aims of Union trade policy is to protect

⁴⁸ *Ibid.*, Art. 9, para. 4. Similarly, ADA establishes requirements for evidence of dumping, injury, and causality.

⁴⁹ See Art. 291, para. 3, TFEU; Recitals 1-2 of Regulation (EU) 37/2014 of the European Parliament and of the Council of 15 January 2014 amending certain regulations relating to the common commercial policy as regards the procedures for the adoption of certain measures (the "Amending Regulation"); and Regulation (EU) 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (the "Comitology Regulation").

⁵⁰ T. SCHARF, *Decision-Making in EU Trade Defence Cases After Lisbon: An Institutional Anomaly Addressed?*, in C. HERRMANN, B. SIMMA, R. STREINZ (eds), *Trade Policy between Law, Diplomacy and Scholarship*, cit., pp. 396-397.

⁵¹ The committee delivers its opinion either through an advisory procedure (simple majority, not binding on the Commission) on whether or not to impose provisional measures or initiate expiry review, or through an examination procedure (qualified majority, binding on the Commission) on imposing definitive measures and amending or extending them. See Arts 2-5 of Comitology Regulation.

⁵² As usual with comitology committees, all aspects of TDI Committee consultations are confidential. On confidentiality and access to documents specifically, see Arts 11-13 of the Rules of Procedure for the Trade Defence Instruments Committee, adopted by the TDI Committee.

domestic industries, and this “protection aim of trade policy is translated into a central administrative role for the complainants, which must represent the EU industry”.⁵³ Due to globalised supply chains, EU producers are increasingly divided. Those who produce exclusively within the EU demand a strong anti-dumping policy, whereas those with production both inside and outside the EU are – in growing numbers – sceptical of the benefits of such an approach, rendering the “protection aim” of anti-dumping policy an increasingly contested goal.⁵⁴

Third-country exporters comprise another important interest group, since the decision to impose anti-dumping duties significantly affects these actors beyond EU borders. Their interest is, of course, commercial in the sense that they are seeking to avoid the imposition of duties altogether, or at the very least to have them reduced to the lowest possible level. As they are potentially facing negative consequences, their interest has also a distinct procedural value: the right to be heard is an important right in case of potential negative effects.⁵⁵ EU-based importers are the third main group of actors in anti-dumping decision-making. Importers are divided into two distinct yet related categories. Importers may be associated with exporters, which means that they can bring their views forward through third-country exporters, or they can be individual importers, in which case they have an individualised interest to participate in anti-dumping decision-making on their own behalf.⁵⁶

The views of these parties, as well as those of other interested parties, shall be taken into account during the investigation, provided that they have made themselves known to the Commission. Participation does not occur solely through written means, and the main parties can request the Commission to organise a meeting, “so that opposing views may be presented and rebuttal arguments offered”.⁵⁷ EU consumer organisations are barred from making such a request. The right to inspect information is again granted to a wider circle, and, in addition to the main actors, representative associations, users and consumer organisations are also allowed to inspect the information.⁵⁸

Additional procedural rules concern the determination of the Union’s interest.⁵⁹ According to Art. 21 of the Basic Regulation, this determination must be based on an appreciation of all the various interests taken as a whole. Inclusion is in fact a legal re-

⁵³ P. ECKHOUT, *Administrative Procedures*, cit., p. 9.

⁵⁴ See D. DE BIÈVRE, J. ECKHARDT, *Interest Groups and the Failure of EU Antidumping Reform*, Paper presented for the ECPR Joint Sessions of Workshops, Lisbon, 14-19 April 2009, ecpr.eu.

⁵⁵ H. NEHL, *Principles of Administrative Procedure*, cit., p. 75.

⁵⁶ This distinction between independent and associated importers has relevance in jurisprudence concerning standing. See, e.g. T. HARTLEY, *The Foundations of European Union Law*, cit., p. 381.

⁵⁷ Art. 6, para. 6, of the Basic Regulation.

⁵⁸ *Ibid.*, Art. 6, para. 7. Similar provisions are contained in Art. 6 ADA.

⁵⁹ The Union interest comes through at several stages: initiating proceedings; imposing provisional duties; terminating investigation or proceedings and imposing definitive duties as well as suspending measures.

quirement, as the provision reads that the determination “shall only be made where all parties have been given the opportunity to make their views known”.⁶⁰ Art. 21, para. 2, enumerates the actors entitled to participate in the Union interest evaluation, including complainants, importers and their representative associations, representative users and representative consumer organisations. The information submitted by the parties is made available by the Commission, with the possibility given to the interested parties to provide comments. The Commission is obliged to organise a hearing upon request, so long as the request is made within the time limit set in the initial notification and the reasons for organising the hearing are detailed.⁶¹ The Commission is also required to disclose the information (facts and considerations) on which the final decision on Union interest is to be based to the interested parties.⁶²

The wording of Art. 21 suggests that Union interest is considered after dumping and injury have been established. Hence, information given to the Commission on Union interest relates only with respect to concluding that “it is not in the Union’s interest to apply such measures”⁶³ – an issue where the Commission’s discretion remains wide. According to Mavroidis, “consumer’s rights have not proved to be a formidable obstacle to imposition of AD duties” in the EU as they have not been invoked (in court) and when invoked, “the Court of Justice has been quite reluctant to interpret the ‘Union interest’, leaving [...] the Commission with substantial discretion in this respect”.⁶⁴ In practice, the results of some empirical studies suggest that concerns of consumer representatives, importing, and user industries over “price increases, supply shortages or anti-competitive effects” of duties are categorically ignored by the Commission.⁶⁵ However, it remains to be seen how the 2014 change of definitive duty-setting power from the Council to the Commission reflects upon the ultimate determination of Union interest.

As seen above, there is a diversity of interests at play, local and foreign, particular and general, institutional and individual. Substantive interests involved in anti-dumping procedures can also be represented in different ways, and professional interest representation is among them.⁶⁶

⁶⁰ Art. 21, para. 1, of the Basic Regulation.

⁶¹ *Ibid.*, Art. 21, para. 3.

⁶² *Ibid.*, Art. 21, para. 6.

⁶³ *Ibid.*, Art. 21, para. 1.

⁶⁴ P. MAVROIDIS, *The Regulation of International Trade*, cit., p. 112.

⁶⁵ Empirical evaluation of 32 cases sampled for 2005-2008 for the Union interest test revealed that in all 32 cases their concerns were refuted by the Commission. See L. DAVIS, *Anti-dumping investigation in the EU: How does it Work?*, in *ECIPE Working Paper*, no. 4, 2009, p. 6.

⁶⁶ For third-country participation (lobbying) in EU policy-making, see E. KORKEA-AHO, ‘Mr Smith Goes to Brussels’: *Third Country Lobbying and the Making of EU Law and Policy*, in *Cambridge Yearbook of European Legal Studies*, 2016, p. 45 *et seq.* The search for anti-dumping on the EU’s Transparency Register returns with 11 hits. There are seven in-house lobbyists and trade/business/professional associations, including one Turkish organisation. Furthermore, four professional consultancies/law firms/self-employed consult-

IV. THREE FUNCTIONS OF PARTICIPATION

One part of the legal framework is participation opportunities provided to a range of actors. The main interested parties come in four categories: producers, exporters, (independent) importers – including their representative associations – and governments of the exporting country.⁶⁷ Moreover, beyond requirements of the ADA, the Basic Regulation includes an additional category: EU consumers and the associations that represent them. Wide participation possibilities prior to decision-making increase the amount of information on which the decision is based (information-based decision-making) as well as safeguard the rights of the defence (procedural fairness). Moreover, opportunities for participation have the potential to add to the (democratic) accountability of the EU decision-making process on anti-dumping.⁶⁸ Below each is studied in turn, paying close attention to the treatment of external participants.

IV.1. MECHANISM TO COLLECT EXPERTISE AND INFORMATION

Anti-dumping investigations are expertise-driven processes, where measures are based on information obtained and analysed during anti-dumping investigations. In addition to the Commission (together with Member States) searching for and putting together information, the process relies on participants providing information. However, information cannot be provided by just anyone. The Basic Regulation builds on the premise that only those perceived as “insiders” to the process can participate by providing their comments. The insider status can be gained in two ways: either by reference to the Regulation’s text (producers, importers, exporters, and third-country representatives are specifically mentioned) or by notification to the Commission (Art. 6, para. 5, of the Basic Regulation). Statuses are not defined in the Regulation except for producers that are defined by reference to “Union industry” in Art. 4 of the Basic Regulation.

Much attention is placed in the Basic Regulation on the validity and accuracy of the information that participants provide to the Commission. It, e.g., states that “the information which is supplied by interested parties and upon which findings are based shall be examined for accuracy as far as possible”.⁶⁹ The Commission is primarily responsible for ensuring that the information used in determinations of anti-dumping duties is correct. This obligation can be inferred from the Regulation’s text *de facto* forbidding the

ants indicate anti-dumping as their professional interests, two law firms and two consultants. One law firm represents especially Chinese interests in anti-dumping procedures. The search was conducted on 31 May 2017.

⁶⁷ For the definition of “interested parties” in WTO law, see Art 6.11 ADA.

⁶⁸ Opportunities for participation as such do not of course result in accountable policy-making, which ultimately depends on who participates and what effect is given to participation. See J. MENDES, *Participation and the Role of Law after Lisbon: A Legal View on Article 11 TEU*, in *Common Market Law Review*, 2011, pp. 1859-1860, 1876.

⁶⁹ Art. 6, para. 8, of the Basic Regulation.

Commission from using information which is not “supported by actual evidence which substantiates its validity”.⁷⁰ However, the Commission cannot disregard verifiable information submitted to it by an interested party although it is not “ideal in all respects” as long as, among other things, the party has “acted to the best of its ability”.⁷¹ Refusal to accept evidence or information submitted requires, first, that the Commission offers the party a chance to provide further explanations and, second, if still not accepted the Commission must state reasons for its rejection.⁷² However, the Commission may replace missing or false information with available facts.⁷³ Actors themselves are also in a position to check the accuracy of the arguments presented by others. For instance, Art. 6, para. 6, of the Basic Regulation stipulates that hearings may be organised to ensure that “opposing views may be presented and rebuttal arguments offered”.

Do authorities have the right to collect information from possibly reluctant actors or can actors refuse to participate? This is a relevant consideration, as it may be related to the parties’ right not to divulge information that would be crucial to establishing the existence of dumping. Whilst the Basic Regulation does not establish a general right of non-participation, Art. 18 contains detailed provisions on the effects of “non-cooperation”. The main principle is voluntary cooperation, and actors are encouraged to provide necessary information by reminding them of the consequences of non-cooperation. Although it is not clarified what those consequences are, presumably they relate to making the decision on the basis of available facts,⁷⁴ which is mentioned in the same provision.

The information collected during the anti-dumping proceedings is – with some exceptions related to confidentiality and professional and business secrecy – available to all parties to the proceedings. In practice, however, the Trade Hearing Officer (discussed in more detail below) who can access confidential files at the request of interested parties,⁷⁵ argues that the EU declares a large amount of files confidential, especially when it comes to information relating to calculation of dumping and injury margins.⁷⁶

⁷⁰ *Ibid.*, Art. 21, para. 7.

⁷¹ *Ibid.*, Art. 18, para. 3. The Basic Regulation seems to suggest that verification means that facts are checked against information from independent sources, including information provided by other parties to the proceedings, see Art. 18, para. 5.

⁷² *Ibid.*, Art. 18, para. 4.

⁷³ *Ibid.*, Art. 18, para. 1. See, for example, General Court, judgment of 9 June 2016, case T-277/13, *Marquis Energy v. Council*, para. 163, referring to WTO DSB, panel report of 22 April 2003, case no. ds241, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, para. 7.263, stating that in case “an investigating authority [...] receives [...] information that is not usable or is unreliable [...] the substantive provisions in the AD Agreement [...] expressly allow investigating authorities to complete the data”.

⁷⁴ P. MAVROIDIS, *The Regulation of International Trade*, cit., p. 154-157.

⁷⁵ Art. 15 of the Decision 2012/199/EU of the President of the European Commission of 29 February 2012 on the function and terms of reference of the hearing officer in certain trade proceedings.

⁷⁶ Annual Report of the Hearing Officer for Trade Proceedings 2015/2016, 12 June 2017, trade.ec.europa.eu, p. 21.

The right of access to the file allows the parties to acquaint themselves with the evidence so that they can express their views effectively. Access to the file is an integral part of the right to be heard, and, as shown in the next subsection, both are protected as part of the procedural rights guaranteed pursuant to Art. 41 of the Charter of Fundamental Rights of the European Union (Charter). Formally, the right of access to information in anti-dumping measures is enshrined in secondary legislation.⁷⁷ The only statutory exception to disclosure of information occurs in the early stages of the proceedings, where the authorities are advised (however, not forbidden) not to publish information relating to the complaint (Art. 5, para. 5). Despite legislative backing, the CJEU have also done their share of cementing the right. In *Timex*, the Court of Justice held that all non-confidential information irrespective of the source must be disclosed in order to enable the complainant to see whether the facts had been correctly applied in the case.⁷⁸ In the *Al-Jubail* case a few years later, the right of access to information was perceived and treated by the Court as part of the right to be heard. The institutions must act with all due diligence in performing their duty to provide all the information that is necessary for the parties' successful defence.⁷⁹ The effectiveness of the protection deriving from the duty to provide information was underpinned by the link made with the principle of care, that is, the "duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case".⁸⁰ Whilst the power to collect information ensures efficient implementation of policies, the principle of care "aims to provide individual protection in administrative proceedings [...] which applies as soon as the administration is empowered to decision-making liable to affect the interests of citizens, and *a fortiori*, if it enjoys a margin of discretion in that regard".⁸¹

As parties to the proceedings, third-country actors enjoy comparable rights to those internal to the EU. The only limitations might occur in relation to right of public access to European Parliament, Council and Commission documents enshrined in Art. 42 of the Charter, which is relevant with regard to keeping abreast of general policy and legislative development. Unlike the right to have access to the file, public access to documents is in principle territorially limited to "any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State".⁸² Although in practice this is interpreted more broadly, the formal limitation may be the reason why

⁷⁷ See e.g., Arts 20 and 21 of the Basic Regulation.

⁷⁸ *Timex Corporation v. Council and Commission*, cit., paras 25-27.

⁷⁹ Court of Justice, judgment of 27 June 1991, case C-49/88, *Al-Jubail Fertilizer Company (Samad) et Saudi Arabian Fertilizer Company (Safco) v. Council*, para. 17.

⁸⁰ Court of Justice, judgment of 21 November 1991, case C-269/90, *Technische Universität München v. Hauptzollamt München-Mitte*, para. 14.

⁸¹ H. NEHL, *Principles of Administrative Procedure*, cit., p. 110 (emphasis in the original).

⁸² Art. 42 of the Charter; see also Art. 15, para. 3, TFEU. Note that territorial restrictions found in the Charter are of more recent origin than public access to documents rights found in the Basic Regulation.

specific procedural rights, especially the right of access to institutions' documents, are also retained in the Basic Regulation.⁸³ A specific provision is needed, as third-country actors would not otherwise be able to enforce their right of access to documents pursuant to principles laid down in the Treaties.

IV.2. PARTICIPATION AS CONSTRAINING THE EXERCISE OF ADMINISTRATIVE POWERS

By relying on information provided by the parties, the Basic Regulation aims at the efficient enforcement of EU anti-dumping rules. However, from the point of view of constraining the exercise of administrative powers, the right to obtain information must be balanced with respect for the parties' rights. According to Bignami, wide participation in Commission proceedings goes beyond a traditional continental understanding of what is required to guarantee the right to a fair hearing (i.e. rights of the defence) – contesting the administrative decision via judicial review after it has been made – and is instead closer to a common law understanding, where the fairness of administrative acts requires that the defendant is able “to engage in a quasi-judicial process at the time of its adoption”.⁸⁴ In anti-dumping issues, fair hearing requirements extend to the investigative process prior to the process of adopting measures,⁸⁵ and businesses involved in anti-dumping proceedings before the Commission enjoy rights of the defence which safeguard their interests.⁸⁶ According to the recent judicial formulation, the protection of the rights of the defence is a fundamental principle in trade proceedings:

“respect for the rights of the defence is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of EU law which must be guaranteed even in the absence of any rules governing the proceedings in question. That principle requires that the addressees of decisions which significantly affect their interests should be placed in a position in which they may effectively make known their views”.⁸⁷

This is the second goal pursued by participation: the inclusion of different views serves the fundamental principle of the right to defend oneself. From the perspective of protecting interests, the rights granted to importers should be of key importance, as the

⁸³ For instance, Art. 21, para. 6, of the Basic Regulation lays down that “the parties [...] may request that the facts and considerations on which final decisions are likely to be taken be made available to them. Such information shall be made available to the extent possible and without prejudice to any subsequent decision taken by the Commission”.

⁸⁴ On this difference, the British influence more broadly, as well as on how such an approach first developed in competition law during the 1980s, see F. BIGNAMI, *Three Generations of Participation Rights Before the European Commission*, in *Law and Contemporary Problems*, 2004, p. 63 *et seq.*

⁸⁵ *Al-Jubail Fertilizer Company (Samad) et Saudi Arabian Fertilizer Company (Safco) v. Council*, cit., para. 15.

⁸⁶ For rights of the defence in EU administrative law, see *supra*, footnote 18.

⁸⁷ *Growth Energy and Renewable Fuels Association v. Council*, cit., para. 250. See also *Technische Universität München v. Hauptzollamt München-Mitte*, cit., para. 25.

imposition of anti-dumping duties (collected by customs from the importer at the point of goods entering the common customs Union) will most immediately and adversely affect their interests, rather than those of third-country exporters (producers).⁸⁸ However, from a fair hearing perspective, it is significant that the rights of Union producers are emphasised in many of the provisions instead of importers. For instance, in situations where the EU reviews the duties, Union producers are provided with “the opportunity to amplify, rebut or comment on the matters”.⁸⁹

Among several rights collected under “the rights of the defence”, the right to be heard is the most significant. Although the right to be heard was enshrined in early Regulations,⁹⁰ the Court of Justice has emphasised its role and operationalised it in anti-dumping determinations. The crucial case is the above-mentioned *Al-Jubail*, which established that the right to be heard

“must be observed not only in the course of proceedings which may result in the imposition of penalties, but also in investigative proceedings prior to the adoption of anti-dumping regulations which, despite their general scope, may directly and individually affect the undertakings concerned and entail adverse consequences for them”.⁹¹

Hence “the highest standards of procedural protection” are applied in anti-dumping procedures.⁹² In establishing such a right, the Court had to square the circle between the general nature of the anti-dumping determinations, formally applicable to an indeterminate number of persons, and their individualised character.⁹³ In *Al-Jubail*, the highest standards included also, for the first time in anti-dumping jurisprudence, the protection of the right to be heard as a fundamental right.⁹⁴ Despite the generous reading of “the highest standard of procedural protection”, the number of beneficiaries remained limited, as procedural protection benefited only those with financial or economic interests at stake. This limitation proved fatal to independent importers in the subsequent

⁸⁸ On the right to be heard, limiting it to decisions that affect somebody in a negative manner, how this might be difficult to establish at the outset, and how the issue has been discussed in the context of the horizontal exercise, see P. LEINO, *Efficiency, Citizens and Administrative Culture. The Politics of Good Administration in the EU*, in *European Public Law*, 2014, p. 704.

⁸⁹ Art. 11, para. 2, of the Basic Regulation.

⁹⁰ E.g., in the first EU anti-dumping regulation.

⁹¹ *Al-Jubail Fertilizer Company (Samad) et Saudi Arabian Fertilizer Company (Safco) v. Council*, cit., para. 15. The importance of the right to be heard was recognised by AG Warner in the first major anti-dumping case before the Court. See Opinion of AG Warner delivered on 14 February 1979, case C-113/77, *NTN Toyo Bearing v. Council*.

⁹² H. NEHL, *Principles of Administrative Procedure*, cit., p. 75.

⁹³ J. MENDES, *Participation in European Union Rule-Making*, cit., pp. 170-174.

⁹⁴ *Al-Jubail Fertilizer Company (Samad) et Saudi Arabian Fertilizer Company (Safco) v. Council*, cit., para. 15. For the importance of the right to be heard as a fundamental right in anti-dumping procedures, see also General Court, judgment of 4 March 2010, case T-409/06, *Sun Sang Kong Yuen Shoes Factory (Hui Yang) Corp. Ltd v. Council*, para. 132.

Nölle case, where the applicant could not enforce its right to be heard. Instead, the General Court granted the equivalent protection under the “principle of care”, establishing that the applicant as an interested party can rely on this principle in order to protect its interests in anti-dumping proceedings.⁹⁵

The Court’s formulation in *Nölle* is not as elegant as one might have hoped, as it introduced a superficial distinction between parties, depending on the role of the party to the proceedings. Whereas key interested parties can rely on the right to be heard, the interests of “third parties”, i.e., those who do not have direct (or as such accepted by the Court) economic interests at stake, are looked after under the principle of care.

Be that as it may, the existing case law has emphasised that the institutions need to carefully and impartially examine all the relevant aspects of the individual case and guarantee respect for the rights of the defence.⁹⁶ The applicant, on the other hand, is required to substantiate the claim and produce evidence that the EU has disregarded its obligations and that that disregard has negative implications for the applicant’s possibilities to defend itself.

The scope and effectiveness of procedural protection depends on the existence of financial interests, not on the geographical location of the applicant. There are, however, some additional considerations that need to be taken into account when enforcing EU law against third-country actors. For example, rights of the defence may be compromised if there is a surprise moment to the investigative measure, and unannounced visits to examine company records cannot be taken in case of companies not based in the EU.⁹⁷ Possible complex questions relate to the exercise of investigative powers in anti-dumping investigations by national and EU authorities, as the Basic Regulation does not provide any guidance on how investigative powers, including *inter alia* verification visits,⁹⁸ should be exercised and what the rights of companies are.⁹⁹ How are powers enforced if they are exercised overseas? There is bound to be ambiguity regarding whose responsibility – that of EU institutions or that of Member States – should prevail with regard to protecting the company’s rights of the defence, right of access to the file as well as the confidentiality of the information provided. This is a serious issue with respect to legal certainty.

To ensure the rights of the defence, the EU anti-dumping regime contains an administrative innovation: the Trade Hearing Officer (the Officer). Since 2007, its role has

⁹⁵ General Court, judgment of 18 September 1995, case T-167/94, *Detlef Nölle v. Council*, para. 73; cf. also *Technische Universität München v. Hauptzollamt München-Mitte*, cit., para. 15.

⁹⁶ General Court, judgment of 12 December 2014, case T-643/11, *Crown Equipment (Suzhou) and Crown Gabelstapler v. Council*, para. 46, and the case law cited.

⁹⁷ Art. 16, para. 1, of the Basic Regulation. See also P. Eeckhout, *Administrative Procedures*, cit., p. 5.

⁹⁸ Verification visits aim to verify information already gathered are mandated either by Art. 16 of the Basic Regulation or Art. 6.11 ADA.

⁹⁹ It is possible that the Commission relies, by way of analogy, on Regulation (EC) 1/2003 of the Council of 16 December on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

been to ensure that the rights of the parties to the proceedings are protected in trade defence investigations – in particular that due consideration is given to all relevant facts and arguments, confidential treatment of business secrets is respected, and access to the investigation file is granted. The Officer can, upon request, organise hearings, make decisions on certain issues concerning the rights of parties (including confidentiality) as well as provide policy advice to the Commissioner and the Directorate General for Trade.¹⁰⁰ It acts upon reasoned requests of interested parties involved in trade proceedings, including third-country authorities and Commission services. During 2010-2015, on average 40 per cent of 50 annual intervention requests came from exporters in third countries.¹⁰¹ The Officer intervenes in 20-30 proceedings, which is one third of all ongoing trade proceedings. For example, in 2015 most requests related to “product definition, choice of analogue country or requests for individual examination”,¹⁰² which points toward transparency issues in access to the (non-disclosed parts, such as calculations) file. In its 2015 Report, the Officer concluded that it was not consulted on policy change initiatives as agreed; cooperation from the Commission’s trade defence services was unsatisfactory; certain Commission representatives tend not to attend hearings; progress as to improving access to information for interested parties is slow; the EU’s trade defence system is not transparent (nor becoming more so); and reported “growing concerns about consistent and correct application of the established rules and procedures for anti-dumping and anti-subsidy proceedings”.¹⁰³

IV.3. DEMOCRATIC ANTI-DUMPING REGIME: PARTICIPATION AS CONTRIBUTING TO ACCOUNTABILITY?

Unlike the instrumental functions of participation mentioned above – in the sense that they promote certain widely recognised aims such as expertise-based and rule-bound decision-making – participation promotes accountable decision-making through ensuring equal representation of interests and legitimising decisions, in which case it has a more normative dimension entailing a strong democratic commitment. Participation is crucial, perhaps even critical, in ensuring that decision-makers are accountable for their actions and responsive to different interests. What could this more normative dimension involve? In his 1999 analysis of anti-dumping case law, Nehl argued that the CJEU have often given great weight to the core rule of law elements – which together he refers to as “the principle of care” – than to administrative efficiency. He viewed this judicial approach as attempting to move closer to the US style of review, critiquing, however, the EU style as lacking “a democratic dimension” and not using the possibility to fur-

¹⁰⁰ Decision 2012/199.

¹⁰¹ Annual Report of the Hearing Officer, cit., p. 9.

¹⁰² *Ibid.*, p. 12.

¹⁰³ *Ibid.*, pp. 20-22.

ther “the democratic impetus”.¹⁰⁴ A decade later, Eeckhout echoed similar sentiments, noting that it “is at the level of rights protection and democratic participation that perhaps further work needs to be done” in anti-dumping.¹⁰⁵

What would the democratic impetus involve in anti-dumping decision-making and how could it be furthered, judicially and otherwise? In keeping with the focus of this *Special Issue*, we discuss the matter by adopting an external perspective, based on two different sets of considerations. We will first focus on the narrower answer, framed in terms of what is legally required of the EU in the administrative process with regard to third country actors, before moving on to discuss the representation of external interests from the perspective of the principles of non-discrimination and democratic accountability.

As is clear from the previous sections, geographical location does not seem to be a relevant concern for the Basic Regulation, and actors can participate and exercise their rights from anywhere in the world. From the face of the Basic Regulation, the only exception to the equal treatment of third-country actors occurs at the stage of initiating the complaint.¹⁰⁶ Territorial considerations do not feature anywhere else in the text, and especially *inter alia* the exporters’ rights of the defence, the right to participate, the right to receive information, the right to comment and so on, are implemented in the Regulation without regard to a recipient’s nationality or place of establishment.

Similarly, little concern over nationality or place of establishment is evident in the Charter. The Commission is required to respect fundamental rights during the administrative procedure, which include the right to good administration enshrined in Art. 41 of the Charter, collecting together a series of specific rights.¹⁰⁷ Art. 41, though placed under the Title “Citizens’ Rights” is not restricted to the citizens of the Union, as its wording adopts a universal tone with regard to persons and their location: “*Every person* has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union [...] right of *every person* to be heard [...] right of *every person* to have access to his or her file”. This ascertains the conclusion reached above on the basis of the Basic Regulation: that is, the basic principles of EU administrative law apply to legal persons as well as to natural persons and participants physically and/or legally within and outside the EU, the latter often being the case in anti-dumping proceedings. Any deficiencies in the procedure affect the legality of the final decision and constitute grounds for judicial review of the decision, similar to cases involving EU actors. The CJEU has accepted this and held that rights protection, especially in terms of the right to be heard, afforded by EU law equally concerns EU and non-EU citizens. Alt-

¹⁰⁴ H. NEHL, *Principles of Administrative Procedure*, cit., p. 164.

¹⁰⁵ P. EECKHOUT, *Administrative Procedures*, cit., p. 8.

¹⁰⁶ Under “special circumstances” the Commission may initiate an investigation without a complaint on behalf of the Union industry, see Art. 5, para. 6, of the Basic Regulation.

¹⁰⁷ General Court, judgment of 4 October 2006, case T-193/04, *Tillack v. Commission*, para. 127.

though the case often referred to in this respect is *Kadi*,¹⁰⁸ it is important to realise that one of the earliest recognitions of the right to be heard occurred in anti-dumping case law, involving third-country nationals.¹⁰⁹

As outlined above, no restrictions exist which prevent non-EU actors from seeking judicial redress, and mechanisms of judicial accountability are equally available both to external and internal actors. In order to bring a case before the CJEU, that is, to have standing, third-country actors must demonstrate the existence of an interest, communicating to the court that the action is likely to procure an advantage to the party bringing it,¹¹⁰ but in practice this has never amounted to a hurdle.

The broader democratic question is whether the EU is obliged to promote the interests of those situated beyond Union borders in ongoing anti-dumping investigations and legitimise to them the decisions it makes? No easy answers to the question exist. Decision-making in national communities, or in the EU, is liable to exclude many who are affected by their actions simply because they are not part of the *demos* as usually understood.¹¹¹ However, the Basic Regulation's provisions seem, at times at least, worded to assuage the concerns of third-country actors, assuring them of appropriateness and overall fitness of the administrative law framework for EU anti-dumping decision-making. The provisions seem to welcome participation and thereby interest representation from third-country actors. For instance, the Basic Regulation stipulates that requests for confidentiality "shall not be arbitrarily rejected",¹¹² or that when the Commission organises meetings, it shall take account of confidentiality and "the convenience to the parties".¹¹³ These and other such provisions do not have precedent in general EU administrative law, raising a question of whether these can be traced back to the ADA (in a bid to avoid WTO dispute settlement proceedings), or if they are a product of the Union interest in ensuring due respect for external rights and interests in anti-dumping investigations (hoping this is reciprocated by third countries). Underpinning

¹⁰⁸ Court of Justice, judgment of 3 September 2008, joined cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v. Council and Commission*.

¹⁰⁹ See *supra*, Section IV.1.

¹¹⁰ See e.g. *Growth Energy and Renewable Fuels Association v. Council*, cit., para. 159. See also E. KORKEA-AHO, 'Mr Smith Goes to Brussels', cit., p. 64.

¹¹¹ N. KOMESAR, M. POIARES MADURO, *Governance Beyond the States: A Constitutional and Comparative Institutional Approach for Global Governance*, in N. KOMESAR, M. POIARES MADURO, W. WAGNER, G. SHAFFER, A. BAKARDJEVA-ENGLBREKT (eds), *Understanding Global Governance: Institutional Choice and the Dynamics of Participation*, Robert Schumann Centre for Advance Studies, March 2014, p. 12. For the same problem from the point of view of economic efficiency, see G. DAVIES, *International Trade, Extraterritorial Power, and Global Constitutionalism: A Perspective from Constitutional Pluralism*, in *German Law Journal*, 2012, pp. 1208-1209.

¹¹² Art. 19, para. 3, of the Basic Regulation.

¹¹³ *Ibid.*, Art. 6, para. 6.

these considerations is the issue of discrimination, which occasionally features in anti-dumping investigations.

Is the principle of non-discrimination relevant here? In principle, anti-dumping as a policy is about discrimination justified by the GATT as a defence against unfair trade. EU trade law does not contain a general principle of non-discrimination, and to the extent that non-discrimination plays a role in anti-dumping it is a consequence of GATT compliance. Though central for both EU and WTO law in general,¹¹⁴ it is hardly even mentioned in the Basic Regulation,¹¹⁵ and according to a long-established principle of external relations law, the EU is not obliged to treat third countries equally. The Court of Justice has recently reaffirmed this principle in *Swiss International Air Lines AG*, where it emphasised broad discretion in external relations policy decisions, providing that “the treatment of one third country [may] differ[s] from that of other third countries”.¹¹⁶ Although the EU is not required to treat third countries equally under EU trade rules, the administrative law principle of equal treatment may still be significant in anti-dumping proceedings. Equal treatment is a general principle of EU law, the corollary of which is the prohibition of discrimination under Art. 18 TFEU, necessitating in the internal market context that nationals or legal persons of one Member State must be treated on a similar footing in another Member State.¹¹⁷ The scope and relevance of the notion in connection with the application of the administrative process involving EU and non-member actors has remained unclear despite occasional references to the principle in Court jurisprudence. In one case, the US actors claimed that the complainant (EU lobby organisation ePure) had released the news on the decision already on 20 December, although the formal announcement was made on 21 December, which, according to the complaint, indicated that they, together with Member State representatives in the TDI Committee, had received information before anyone else had.

The EU institutions are, according to the Court, in breach of this principle if they are shown to have treated like cases differently, placing some operators at a disadvantage,

¹¹⁴ See T. COTTIER, M. OESCH, *Direct and Indirect Discrimination in WTO and EU Law*, and K.E. SØRENSEN, *Non-discriminatory Restrictions on Trade*, both in S. GAINES, B.E. OLSEN, K.E. SØRENSEN (eds), *Liberalising Trade in the EU and the WTO: A Legal Comparison*, Cambridge: Cambridge University Press, 2014, pp. 141 *et seq.* and 176 *et seq.*

¹¹⁵ Non-discrimination appears once, in Art. 9, para. 5, of the Basic Regulation, concerning appropriate amounts of anti-dumping duties.

¹¹⁶ Court of Justice, judgment of 21 December 2016, case C-272/15, *Swiss International Air Lines AG.*, para. 24. See also Court of Justice: judgment of 22 January 1976, case 55/75, *Balkan-Import-Export*, para. 14; judgment of 28 October 1982, case 52/81, *Offene Handelsgesellschaft in Firma Werner Faust v. Commission*, paras 54-62.

¹¹⁷ For the principle in situations involving judicial remedies, see K. LENAERTS, I. MASELIS, K. GUTMAN, *EU Procedural Law*, cit., p. 112.

without being able to justify it by the existence of substantial objective differences.¹¹⁸ The Court correctly notes that applicants and Member States are not in a comparable situation, and the disclosure of information to the Member States is not governed by Art. 20 of the Basic Regulation, but rather by Art. 15 concerning Committee procedure. However, the more relevant comparison that was disregarded by the Court would have been between the applicants and the complainants (ePure), not with national authorities.

The ruling suggests two findings, which are indicative of the whole policy field generally. First, territorial considerations do not play much of a role, and the anti-dumping regime appears to have been built on the premise that all interests, irrespective of their geographical origin, are equally and fairly represented. Provided that some of the provisions in the Basic Regulation seem to have been specifically created to take into account the interests of external actors, it would appear extremely difficult for any of the key external actors in the process to adduce evidence for the breach of the principle of non-discrimination.¹¹⁹ Second, and as far as the administrative law framework is concerned, actors' formal opportunities for participation are many and generally available throughout the anti-dumping procedure. Intensity of participation is sometimes invoked as a reason for the Court's "soft touch" review of the more substantive duty to state reasons. The reality, however, indicates a disparity of influence between EU industry and non-EU industry interests. It is not created by inadequacies or limitations of administrative law, but rather by political tit-for-tat thinking and the overall framing of the process to cater to the needs of domestic EU industry. The inclusive, transparent and – therefore, to an extent – democratic nature of interest representation in anti-dumping procedures does little by way of balancing their outcomes in favour of other than EU industry interests.

V. CONCLUDING DISCUSSION: DO ADMINISTRATIVE LAW PRINCIPLES PROTECT EQUALLY?

The EU's anti-dumping measures are different from many other trade policy instruments in that, rather than regulating imports and exports at a general (legislative) level, anti-dumping measures are administrative measures aimed at regulating certain imports to the EU. Moreover, they are undoubtedly complex and political decisions. Formally, since 2014 anti-dumping decision-making in the EU has become less intergovernmental, however, substantively the Member States continue to play an important role in the procedure, and anti-dumping decision-making provides them with the procedural weaponry to "protect trade".

¹¹⁸ General Court, judgment of 23 October 2003, case T-255/01, *Changzhou Hailong Electronics & Light Fixtures and Zhejiang Yankon v. Council*, para. 60.

¹¹⁹ Crucial question is the role of civil society and non-commercial actors that seem to be playing no role whatsoever. For instance, only actors acting on behalf of the EU industry, rather than EU interests, can initiate a complaint, see Art. 5, para. 1, of the Basic Regulation.

Whilst the EU's anti-dumping regime targets individual companies which are predominantly from third countries, effects are felt widely, from EU companies and importers to consumers as well as third-country governments. In terms of administrative procedure, detailed secondary legislation is in place, securing respect for the rights of the defence and other procedural guarantees. Fine-tuning concerning participation, rights of the defence, the duty of care, and accountability has continued to be triggered by the Court of Justice as well as by the Trade Hearing Officer since 2007 – benefiting both third-country participants and their interests as well as other interested parties. Their input is critical, as the proposals to modernise anti-dumping policy and legislation have not succeeded.

The procedural soundness of anti-dumping decision-making as well as territorial blindness can be seen to invite participation and guarantee reciprocity in third-country procedures for EU producers. However, formally respecting the rights and including the interests of participants and treating them equally regardless of geographical origin does not negate the fact that certain interests are weighted more heavily than others, and the anti-dumping policy area is heavily ruled by substantive discretion of the Commission. Considering the broad and conflicting objectives of the framework (global free trade and protection of EU producers), accountability for Commission choices is difficult to enforce. Accountability in the exercise of discretion is usually measured against the objectives for which it has been granted, but things get more complicated when discretion also extends to choosing which of the conflicting objectives one wishes to pursue.¹²⁰ In other words, as participation and the rights of the defence in this context seem to mainly guarantee that decision-makers are accountable for their procedural decisions, the procedure fails to ensure that all interests involved would substantively be taken into account. For this reason, anti-dumping measures create less democratic added value both within and outside the EU than would be hoped.

An example of such a missed opportunity is the definition and evaluation of Union interest. One of the most crucial stages of anti-dumping decision-making involves the determination of whether or not it is in the Union interest to “strike back”. It is also a key point at which certain internal and external interests that are institutionally underrepresented, or otherwise non-influential because of the design of the procedure, might align to create a more democratically responsive process. Any improvement in this respect would likely have to come from the CJEU by way of more substantive review, as impetus to improve will not come from the WTO, as ADA does not require public interest review. Even though the CJEU has in many respects been crucial to ensuring an accountable anti-dumping regime, they have their own blind spots, too. One accountability omission by the CJEU concerns importers whose rights, unlike those of oth-

¹²⁰ On structuring discretion in decision-making, see J. MENDES, *Discretion, Care and Public Interests in the EU Administration: Probing the Limits of Law*, in *Common Market Law Review*, 2016, p. 422.

er actors, are better protected in the administrative procedure than before Courts. Should the CJEU be inspired to rethink their review in response to the Commission's new role, these two opportunities should not be missed again.

The procedure is also lacking in transparency, something that the proposed anti-dumping modernisation package partly aimed to tackle. One important milestone would have been the adoption of soft law guidance, which would have made the Commission discretion, for instance in evaluating Union interest, more transparent and accountable. While soft law in many contexts tends to blur lines of accountability, thereby creating problems for the application of administrative law principles, in the anti-dumping context non-binding guidance could have the potential of increasing accountability and transparency. Telling in this respect is also the fact that the duty to state reasons, despite its seminal importance in EU administrative law generally, has not become a substantive principle in anti-dumping investigations.¹²¹ In the post-Council phase, the Court may now be more inclined to demand reasons from the Commission – to enable courts to assess the reasons underlying anti-dumping decisions – and the Commission to give them.

In sum, although administrative principles protect more or less equally, anti-dumping is currently such a tightly-rigged ship that it is difficult to foresee where democratic innovation or intervention could take root. And so, we wish to conclude by paraphrasing Mavroidis, who enunciates the conclusion one is compelled to draw: “Judges are not legislators, of course, so WTO panels cannot put into question the rationale for AD: the distortion lies in the law itself. This is the elephant in the room”.¹²²

¹²¹ Cf. *UK v. Council*, cit., paras 29-39.

¹²² P. MAVROIDIS, *The Regulation of International Trade*, cit., p. 184.