Reports of Cases

JUDGMENT OF THE GENERAL COURT (First Chamber, Extended Composition)

1 March 2023 *

(Subsidies – Imports of continuous filament glass fibre products originating in Egypt – Implementing Regulation (EU) 2020/870 – Definitive countervailing duty and definitive collection of the provisional countervailing duty – Rights of the defence – Attributability of the subsidy – Manifest error of assessment – Import duty drawback scheme – Tax treatment of foreign exchange losses – Calculation of the undercutting margin)

In Case T-540/20,

Jushi Egypt for Fiberglass Industry SAE, established in Ain Sokhna (Egypt), represented by B. Servais and V. Crochet, lawyers,

applicant,

v

European Commission, represented by P. Kienapfel, G. Luengo and P. Němečková, acting as Agents,

defendant,

supported by

Association des producteurs de fibres de verre européens (APFE), established in Ixelles (Belgium), represented by L. Ruessmann and J. Beck, lawyers,

intervener,

THE GENERAL COURT (First Chamber, Extended Composition),

composed, at the time of the deliberations, of H. Kanninen, President, M. Jaeger, N. Półtorak, O. Porchia and M. Stancu (Rapporteur), Judges,

Registrar: M. Zwozdziak-Carbonne, Administrator,

having regard to the written part of the procedure,

further to the hearing on 22 March 2022,

* Language of the case: English.

gives the following

Judgment [1]

1 By its action under Article 263 TFEU, the applicant, Jushi Egypt for Fiberglass Industry SAE, seeks annulment of Commission Implementing Regulation (EU) 2020/870 of 24 June 2020 imposing a definitive countervailing duty and definitively collecting the provisional countervailing duty imposed on imports of continuous filament glass fibre products originating in Egypt, and levying the definitive countervailing duty on the registered imports of continuous filament glass fibre products originating in Egypt (OJ 2020 L 201, p. 10; 'the contested implementing regulation') in so far as it concerns the applicant.

I. Background to the dispute

2 The applicant is a company formed in accordance with the laws of the Arab Republic of Egypt whose shareholders are Chinese entities. The applicant's business consists in the production and export of certain woven and/or stitched glass fibre fabrics ('GFF') and continuous filament glass fibre products ('GFR'), the latter being the main raw material used to produce GFF. Those products are sold in particular within the European Union.

A. The China-Egypt Suez Economic and Trade Cooperation Zone

3 The applicant is established in the China-Egypt Suez Economic and Trade Cooperation Zone ('the SETC-Zone'). The SETC-Zone was set up together by the Arab Republic of Egypt and the People's Republic of China. Its history goes back to the 1990s. In 1997, the Prime Ministers of China and Egypt signed a memorandum of understanding, in which the two countries agreed to 'cooperate in developing the free economic zone in the north of the Gulf of Suez'.

4 In 2002, a wider geographical area of 20 km^2, which included the SETC-Zone, was classified as a special economic zone by the Government of Egypt, thereby making Egyptian Law No 83/2002 on Economic Zones of a Special Nature ('Law No 83/2002') applicable to the SETC-Zone.

5 Next, Chinese and Egyptian public entities set up Egypt TEDA Investment Co. ('Egypt TEDA'), 80 % of whose shares are held by the Government of China and the remaining 20% by the Government of Egypt.

6 In 2012, during a visit by the Egyptian President to China, that president described the SETC-Zone as a key project for bilateral cooperation between the two countries. He also hoped that more and more Chinese undertakings would invest in the SETC-Zone and thus participate in Egypt's Recovery program.

7 In 2013, the SETC-Zone was extended by 6 km^2 under a contract between Egypt TEDA and the Egyptian authorities. Also as of 2013, the SETC-Zone was developed under the umbrella of the Chinese 'Belt and Road' initiative. That initiative, according to the Guiding Opinions of the Chinese State Council on the Promotion of International Production Capacity and Equipment Manufacturing Cooperation of 13 May 2015, includes the possibility for undertakings 'going

[1] Only the paragraphs of the present judgment which the Court considers it appropriate to publish are reproduced here.

abroad' to benefit from fiscal and tax support policies, concessional loans, financial support through syndicated loans, export credits, and project financing, equity investment and export credit insurance.

8 In 2015, the special economic zone referred to in paragraph 4 above, of which the SETC-Zone formed part, was officially incorporated into the wider Suez Canal Economic Zone ('the SCZone'), comprising the area around the Suez Canal. The SCZone was governed by Law No 83/2002, in the context of the 'Suez Canal Corridor Development Plan' launched by Egypt.

9 In 2016, the Chinese and Egyptian Presidents officially inaugurated the SETC-Zone 6 km^2 expansion project and, on 21 January 2016, signed an agreement between the Government of China and the Government of Egypt ('the 2016 Cooperation Agreement'), which clarified the significance and legal status of the SETC-Zone.

10 According to the 2016 Cooperation Agreement, the governments of the two countries are to develop jointly the SETC-Zone. They are to do so in line with their respective national strategies, namely the 'Belt and Road' Initiative for China on the one hand, and the Suez Canal Corridor Development Plan for Egypt on the other hand. For that purpose, the Government of Egypt provides the land, the labour and certain tax breaks, whereas the Chinese companies operating in the zone run the production facility with their assets and managers. Compensating for a lack of Egyptian funds, the Government of China also supports this project by making the necessary financial means available to Egypt TEDA and to the Chinese firms operating in the SETC-Zone.

B. The procedure leading to the adoption of the contested implementing regulation

11 On 24 April 2019, the Commission received a complaint from the Association des producteurs de fibres de verre européens (APFE) on behalf of producers representing 71% of total EU production, alleging that imports of GFR originating in Egypt were being subsidised and causing injury to EU industry.

12 Following that complaint, the Commission, on the basis of Article 10 of Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union (OJ 2016 L 176, p. 55; 'the basic anti-subsidy regulation'), on 7 June 2019, initiated an anti-subsidy investigation concerning imports of GFR and, more specifically, as is apparent from point 2 of the notice of initiation of that investigation, chopped glass fibre strands, of a length of not more than 50 mm, glass fibre rovings, excluding glass fibre rovings which are impregnated and coated and have a loss on ignition of more than 3% (as determined by the ISO Standard 1887) and mats made of glass fibre filaments excluding mats of glass wool.

13 The investigation of subsidisation and injury covered the period from 1 April 2018 to 31 March 2019, whereas the examination of trends relevant for the assessment of injury covered the period from 1 January 2016 to the end of the investigation period.

14 During the investigation period, the applicant sold GFR to unrelated customers both in Egypt and abroad. It also sold GFR to three related customers in the European Union, namely Jushi Spain SA, Jushi France SAS and Jushi ltalia Srl as well as to Hengshi Egypt Fiberglass Fabrics SAE ('Hengshi'), also located in the SETC-Zone.

15 The applicant submitted its comments to the Commission regarding subsidisation and injury on 24 June 2019 and filed its responses to the anti-subsidy questionnaire in July 2019. The Commission also carried out a verification visit at the applicant's premises.

16 On 7 August 2019, the Government of Egypt also filed its responses to the anti-subsidy questionnaire.

17 On 12 February 2020, the Commission amended the notice of initiation of 7 June 2019 since it had found additional evidence relating to subsidies to be taken into account in the anti-subsidy investigation, namely preferential lending allegedly provided by Chinese State-owned or State-controlled banks to the applicant, and took the view that it was justified to include those subsidies within the scope of the ongoing investigation, in accordance with Article 10(7) of the basic anti-subsidy regulation. The Commission added that it would also further investigate whether the cooperation between the Government of Egypt and the Government of China had influenced other subsidy programmes.

18 After having amended the notice of initiation, on 12 February 2020 the Commission sent the applicant and the Government of Egypt a request for information regarding the additional subsidy programmes included in the scope of the investigation.

19 On 14 February 2020, the Commission sent its pre-disclosure document, informing the applicant of its intention to impose provisional countervailing measures on imports of GFR. On the same date, the Commission also published Implementing Regulation (EU) 2020/199 of 13 February 2020 making imports of continuous filament glass fibre products originating in Egypt subject to registration (OJ 2020 L 42, p. 10). The applicant submitted its comments on pre-disclosure on 19 February 2020.

20 On 17 February 2020, the Government of Egypt submitted its comments in response to the Commission's request for information, in which it asked that that request for information be withdrawn since it had no legal authority to coordinate the response of Chinese entities located outside its sovereign territory. On 20 February 2020, the Commission responded to the Government of Egypt's letter and insisted that the requested information could be provided by the Government of Egypt alone or in cooperation with the Government of China. On 27 February 2020, the Government of Egypt sent an additional letter reiterating its demand that the Commission withdraw its request for information on the ground that the actions of Chinese entities could not lawfully be attributed to the Government of Egypt and that the Commission infringed its rights of defence. In that letter, the Government of Egypt also requested a hearing with the Hearing Officer, which was held on 1 April 2020.

21 The Government of Egypt and the applicant eventually submitted their responses to the Commission's request for information on 5 March 2020.

22 On 4 March 2020, the Commission sent its provisional disclosure to the applicant. The following day, it adopted Implementing Regulation (EU) 2020/379 imposing a provisional countervailing duty on imports of continuous filament glass fibre products originating in Egypt (OJ 2020 L 69, p. 14; 'the provisional implementing regulation'). That implementing regulation was published on 6 March 2020 in the *Official Journal of the European Union* and imposed a provisional countervailing duty of 8.7% on the applicant.

23 By letter of 18 March 2020, the Commission informed the applicant that, on the basis of its responses to the request for information, it had to consider applying Article 28 of the basic anti-subsidy regulation with respect to some of the information requested. The applicant replied to that letter on 20 March 2020.

24 On 18 March 2020 also, the applicant submitted its comments on the provisional implementing regulation and a hearing concerning that implementing regulation was subsequently held with the Commission.

25 On 29 April 2020, the Commission sent its final disclosure to the applicant, on which it submitted its comments on 9 May 2020. A hearing concerning that disclosure was subsequently held with the Commission.

26 On 24 June 2020, the Commission adopted the contested implementing regulation. That implementing regulation imposes a definitive countervailing duty of 13.1% on the applicant's imports of GFR into the European Union.

II. Forms of order sought

27 The applicant claims that the Court should:

– annul the contested implementing regulation in so far as it concerns the applicant;

– order the Commission to pay the costs;

– order the intervener to bear its own costs.

28 The Commission and the intervener contend that the Court should:

– dismiss the action as unfounded;

– order the applicant to pay the costs.

III. Law

…

A. The first plea, alleging infringement of Article 2(a) and (b), Article 3(1)(a), Article 4(2) and (3), and Article 28(1) of the basic anti-subsidy regulation

…

2. The second part of the first plea, alleging infringement of Article 2(a) and (b) and Article 3(1)(a) of the basic anti-subsidy regulation

38 The applicant puts forward three main complaints in support of this part. First, in its submission, the Commission's interpretation of Article 3(1)(a) of the basic anti-subsidy regulation is not justified under EU law. Second, the Commission's reliance on World Trade Organization (WTO) law to interpret Article 3(1)(a) of that regulation is unfounded. Third, the Commission's interpretation of Article 1.1(a)(1) of the Agreement on Subsidies and Countervailing Measures ('the SCM Agreement') does not comply with WTO case-law and public international law.

39 In support of the first complaint, the applicant submits that it follows from a literal interpretation of Article 3(1)(a) of the basic anti-subsidy regulation, the wording of which is clear and precise, and there being no need to also interpret it in the light of the Vienna Convention on the Law of Treaties of 23 May 1969 ('the Vienna Convention') and of the Draft articles on the Responsibility of States for Internationally Wrongful Acts, as adopted in 2001 by the International Law Commission of the United Nations ('the ILC Articles'), that, not only the government granting the financial contribution, but also the financial contribution itself must be within the territory of the country of origin or export. That interpretation is supported by the overall context of the basic anti-subsidy regulation, in particular Article 10(7) and Article 13(1) thereof.

40 In support of the second complaint, the applicant submits that the Commission was wrong to interpret Article 3(1)(a) of the basic anti-subsidy regulation in the light of WTO law. It states that, while, according to the case-law, the EU Courts may review the legality of an EU measure in the light of WTO rules where the European Union intends to implement a particular obligation assumed in the context of the WTO, in the present case, an interpretation in the light of WTO law cannot be relied upon in relation to provisions of the basic anti-subsidy regulation which differ from those of the SCM Agreement. According to the applicant, the wording of the SCM Agreement is clearly different from that used in that regulation with regard to the definition of 'subsidy'.

41 In support of its third complaint, the applicant argues that, even if WTO law should be taken into account in order to interpret the term 'government' in the basic anti-subsidy regulation, the Commission's interpretation of Article 1.1(a)(1) of the SCM Agreement is still incorrect, as it disregards Article 31(1) and (3) of the Vienna Convention. It is clear from that article of the SCM Agreement that the actions of governments of third countries cannot be attributed to the government of the country of origin or export. That interpretation is confirmed by other provisions of that agreement, such as Article 13(1), (2) and (4) and Article 18(1)(a).

42 Moreover, Article 11 of the ILC Articles is not a 'relevant' rule of international law within the meaning of Article 31(3)(c) of the Vienna Convention for the purposes of interpreting the term 'government' in Article 1.1(a)(1) of the SCM Agreement. The WTO Appellate Body did not rule otherwise in the case 'United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China' (WT/DS 379/AB/R). In the reply, the applicant adds that, if the applicable law in that investigation had been the SCM Agreement rather than the basic anti-subsidy regulation, the Commission could have classified as subsidies, within the meaning of Article 1.1 of the SCM Agreement, the financial contributions granted by Chinese entities to the applicant, without having to 'attribute' those financial contributions to the Government of Egypt on the basis of Article 11 of the ILC Articles. Article 11 of the ILC Articles in any event is not applicable in the present case since it is intended to govern the conduct of a State which becomes part of another State following the acquisition of a territory, which is attributable to the

succeeding State, or the subsequent adoption by a State of a private wrongful act which has been committed or is still ongoing. The applicant states that it is Articles 16 to 18 of the ILC Articles which govern the responsibility of the State in connection with the act of another State, and not Article 11 of those articles.

43 The Commission, supported by the intervener, disputes those arguments.

44 As is apparent from paragraph 39 above, according to the applicant, the Commission's interpretation of Article 3(1)(a) of the basic anti-subsidy regulation, in particular the concept of 'government' of the country of origin or export, is not justified under EU law.

45 In order to address that issue, it should be recalled that, according to the case-law, each provision of EU law must be placed in its context and interpreted in the light of the provisions of EU law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied (see, to that effect, judgment of 28 July 2016, *Association France Nature Environnement*, C-379/15, EU:C:2016:603, paragraph 49 and the case-law cited).

46 In that regard, first, it should be recalled that Article 3 of the basic anti-subsidy regulation provides that a subsidy is deemed to exist if the conditions in paragraphs 1 and 2 are fulfilled, that is to say if there is a 'financial contribution' by a government in the country of origin or export and if a 'benefit' is thereby conferred.

47 Article 2(b) of that regulation defines the term 'government' as a government or any public body within the territory of the country of origin or export.

48 The definition of 'government' in that article merely interprets the term 'government' as including the government or public bodies of the country of origin or export. However, that provision does not rule out the possibility that the financial contribution may be attributed to the government of the country of origin or export of the product concerned, on the basis of the specific evidence available.

49 Second, it should be noted that recital 5 of that regulation states that 'in determining the existence of a subsidy, it is necessary to demonstrate that there has been a financial contribution by a government or a public body within the territory of a country, or that there has been some form of income or price support within the meaning of Article XVI of the GATT 1994, and that a benefit has thereby been conferred on the recipient enterprise'.

50 The words 'within the territory of a country' used in that recital do not imply that the financial contribution must come directly from the government of the country of origin or export. On the contrary, the use of those words, as the Commission points out, does not preclude the possibility of concluding that the financial contributions may be attributed to the country of origin or export of the product concerned.

51 Thus, the basic anti-subsidy regulation does not rule out the possibility that, even if the financial contribution does not come directly from the government of the country of origin or export, that contribution may be attributed to it.

52 The foregoing conclusion is all the more relevant in the specific context of the SETC-Zone, in which the applicant is located.

53 In the first place, the Commission took into consideration, in recital 78 of the contested implementing regulation, two statements made by two Egyptian Presidents relating to the SETC-Zone. The first statement, from 2012, referred to that zone as a key project of the bilateral cooperation between Egypt and China. The second statement, from 2014, related to the 'Belt and Road' initiative and specified, inter alia, that that initiative provided a significant opportunity for Egyptian recovery and that the Egyptian authorities were ready for active involvement and to provide their support. The Egyptian authorities wished to cooperate with China in developing inter alia the projects of the Suez Canal Corridor, the SETC-Zone, and in attracting Chinese undertakings to invest in Egypt.

54 In that regard, recital 79 of the contested implementing regulation states that the characteristics of the Chinese 'Belt and Road' initiative are public knowledge and that, according to the Guiding Opinions of the Chinese State Council on the Promotion of International Production Capacity and Equipment Manufacturing Cooperation of 13 May 2015, the policy support which undertakings 'going abroad' can receive include fiscal and tax support policies, concessional loans, financial support through syndicated loans, export credits, and project financing, equity investment, and finally export credit insurance.

55 In the second place, the Commission took into consideration, in recital 81 of the contested implementing regulation, the fact that the SETC-Zone was the subject of the 2016 Cooperation Agreement between the Government of China and the Government of Egypt. That agreement provides inter alia, according to Article 1 thereof, that the People's Republic of China may apply certain of its laws within the SETC-Zone. Article 4(1) of that agreement provides that 'the Chinese Government identifies the [SETC-Zone] as China's overseas economic and trade cooperation zone' and that 'the Cooperation Zone, during the construction, business attraction and operation, is entitled to relevant policy support and facilitation provided by the Chinese Government for overseas economic and trade cooperation zones'. Article 5(1) of that agreement also provides that the Government of China is to support the Cooperation Zone by 'encouraging relevant financial institutions to provide financing facility for … investment projects located within the Cooperation Zone, provided that the lending conditions and the loan use requirements are met'.

56 In the third place, recital 48 of the contested implementing regulation states that, in order to ensure the implementation of the 2016 Cooperation Agreement, the Government of China and the Government of Egypt established a three-level consultation mechanism, including a cooperation agreement for the creation of an Administration Commission for the SETC-Zone, a Management Committee for the zone, and subsequently reporting on problems and difficulties by Egypt TEDA and the Egyptian counterparts. It is moreover apparent from recital 40 of that regulation that Egypt TEDA is 80% owned by the Government of China and 20% owned by the Government of Egypt and is intended to drive the development of the SETC-Zone in Egypt.

57 Lastly, it is apparent from recital 173 of the contested implementing regulation that the financial support granted to the applicant was particularly significant.

58 The Government of China and the Government of Egypt therefore worked closely together to establish the SETC-Zone as a zone with special legal and economic features which enabled the government authorities of China to confer directly all the facilities inherent in China's 'Belt and Road' initiative on the Chinese undertakings established in that zone.

59 In those circumstances, it cannot be accepted that an economic and legal construct such as that of the SETC-Zone, conceived in close collaboration between the Government of China and the Government of Egypt at the highest level, is not covered by the basic anti-subsidy regulation, without this undermining that regulation's effectiveness or its purpose and objectives.

60 Third, contrary to what is claimed by the applicant, the Commission's interpretation of Article 3(1)(a) of the basic anti-subsidy regulation is not contrary to either Article 10(7) or Article 13(1) of that regulation. As regards Article 10(7), the basic anti-subsidy regulation in no way precludes the possibility of the government of the country of origin or export from being consulted on the financial contributions attributable to it. In the present case, it is also apparent from the file that the Commission did indeed invite the Government of Egypt for consultations on issues such as the preferential loans granted by Chinese entities.

61 As regards Article 13(1) of that regulation, which allows, inter alia, the country of origin or export to eliminate or limit the subsidy or take other measures concerning its effects, such a possibility remains valid where the financial contribution may be attributed to the government of the country of origin or export. In the present case, it was open to the Government of Egypt to stop the close cooperation with the Government of China in relation to the financial contributions or to propose measures to limit the effects of the subsidies at issue.

62 In the light of the foregoing, it must be concluded that neither Article 3(1)(a) of the basic anti-subsidy regulation nor the general scheme of that regulation precludes a financial contribution granted by the government of a third country from being attributed to the government of the country of origin or export in a case such as that at issue in the present case, in the light of the specific evidence available as set out in paragraphs 53 to 58 above.

63 Furthermore, contrary to what the applicant claims, that conclusion is supported by the provisions of Article 1 of the SCM Agreement, in the light of which the basic anti-subsidy regulation must be interpreted. In that regard, it should be recalled that, where the European Union intended to implement a particular obligation assumed in the context of the WTO, or where the EU measure refers expressly to precise provisions of the WTO agreements, it is for the Courts of the European Union to review the legality of the EU measure in question in the light of the WTO rules (see, by analogy, judgment of 14 July 2021, *Interpipe Niko Tube and Interpipe Nizhnedneprovsky Tube Rolling Plant* v *Commission*, T-716/19, EU:T:2021:457, paragraph 95 and the case-law cited).

64 It is apparent from recital 3 of the basic anti-subsidy regulation that the purpose of that regulation is, inter alia, to 'reflect' in EU legislation the rules of the SCM Agreement 'to the best extent possible'.

65 Moreover, it has already been established by the case-law that Article 3 of the basic anti-subsidy regulation, entitled 'Definition of a subsidy', and Article 1 of the SCM Agreement are largely identical in their wording and fully identical in terms of their substance (see, to that effect, judgment of 10 April 2019, *Jindal Saw and Jindal Saw Italia* v *Commission*, T-300/16, EU:T:2019:235, paragraph 99).

66 Furthermore, no intention on the part of the legislature to depart from the substance of Article 1.1(a)(1) of the SCM Agreement is apparent from the recitals of the basic anti-subsidy regulation. On the contrary, as is apparent from recital 3 of that regulation cited in paragraph 64 above, the legislature did indeed intend to implement a particular obligation assumed in the context of the SCM Agreement within the meaning of the case-law cited in paragraph 63 above.

67 Thus, contrary to what the applicant claims, the provisions of the basic anti-subsidy regulation must be interpreted, as far as possible, in the light of the corresponding provisions of the SCM Agreement (judgment of 10 April 2019, *Jindal Saw and Jindal Saw Italia* v *Commission*, T-300/16, EU:T:2019:235, paragraph 101). The same is true of Article 3 of that regulation, which seeks to implement the content of Article 1 of the SCM Agreement (judgment of 10 April 2019, *Jindal Saw and Jindal Saw Italia* v *Commission*, T-300/16, EU:T:2019:235, paragraph 102).

68 As regards Article 1.1(a)(1) of the SCM Agreement, it should be noted, first, that the latter defines a subsidy as a financial contribution by a government or any public body within the territory of 'a' Member of the WTO. That wording does not therefore preclude the possibility that a financial contribution granted by a third country may be attributed to the government of the country of origin or export, since it is sufficient that the financial contribution of the government or any public body is within the territory of 'a' Member of the WTO.

69 In the second place, Articles 13 and 18 of the SCM Agreement, which relate to consultations and undertakings respectively, do not call into question the foregoing considerations. The wording and purpose of those provisions do not exclude situations in which the financial contribution is attributed to a WTO member, since, first, members whose products may be investigated may be consulted on financial contributions attributable to them and, second, members whose products may be investigated may impose limitations on the subsidies attributable to them.

70 In the light of the foregoing, it must be held that, since the Commission correctly interpreted the basic anti-subsidy regulation in the light of the SCM Agreement, the question whether or not it took Article 11 of the ILC Articles into account is irrelevant. Consequently, it is also necessary to reject the third complaint of the present part of the plea and, therefore, that part in its entirety.

...

On those grounds,

THE GENERAL COURT (First Chamber, Extended Composition)

hereby:

1. Dismisses the action;

2. Orders Jushi Egypt for Fiberglass Industry SAE to bear its own costs and to pay those incurred by the European Commission;

3. Orders the Association des producteurs de fibres de verre européens (APFE) to bear its own costs.

Kanninen Jaeger Półtorak

Porchia Stancu

Delivered in open court in Luxembourg on 1 March 2023.

[Signatures]