Reports of Cases

OPINION OF ADVOCATE GENERAL
PITRUZZELLA
delivered on 14 July 2022 [1]

Joined Cases C-439/20 P and C-441/20 P

European Commission
v
Jiangsu Seraphim Solar System Co. Ltd (C-439/20 P)
and
Council of the European Union
v

Jiangsu Seraphim Solar System Co. Ltd (Case C-441/20 P)

(Appeal – Dumping – Subsidies – Imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China – Regulation (EU) 2016/1036 – Article 8(1), (9) and (10) and Article 10(5) – Regulation (EU) 2016/1037 – Article 13(1), (9) and (10) and Article 16(5) – Breach of an undertaking – Effects of withdrawal of acceptance of an undertaking – Implementing Regulations (EU) No 1238/2013 and No 1239/2013 – Admissibility of a plea of illegality – Implementing Regulation (EU) 2016/2146 – Invalidation of undertaking invoices)

1. After the acceptance of an undertaking has been withdrawn by the Commission because the undertaking has been breached by the exporting producer that has entered into it, do the definitive anti-dumping and countervailing duties already imposed apply to the imports corresponding to the breached undertaking made from the moment they are imposed, or do they apply only to imports after that undertaking has been withdrawn? In this context, can the Commission invalidate the invoices corresponding to the imports corresponding to the breached undertaking and order the national authorities to collect the definitive duties for those imports?

2. These are essentially the principal questions arising in the present joined cases concerning two appeals lodged by the European Commission, in Case C-439/20 P, and by the Council of the European Union, in Case C-441/20 P [2] respectively (jointly: 'the institutions'), by which the institutions are requesting that the judgment of the General Court of the European Union of 8 July 2020, *Jiangsu Seraphim Solar System* v *Commission* (T-110/17, EU:T:2020:315, 'the

[1] Original language: Italian.

[2] The two cases in question were joined by a decision of the President of the Court of Justice of 7 January 2021.

judgment under appeal') be set aside. That judgment upheld the action brought by Jiangsu Seraphim Solar System Co. Ltd ('Jiangsu') seeking partial annulment of Implementing Regulation (EU) 2016/2146 [3] ('the regulation at issue'), in so far as it concerned that company.

I. Regulatory context

3. On the date of the regulation at issue, the adoption of anti-dumping measures by the European Union was regulated by 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 [4] ('the basic anti-dumping regulation').

4. Article 8 of that regulation, entitled 'Undertakings', provided as follows in paragraphs 1, 9 and 10:

'1. On the condition that a provisional affirmative determination of dumping and injury has been made, the Commission may, in accordance with the advisory procedure referred to in Article 15(2), accept satisfactory voluntary undertaking offers submitted by any exporter to revise its prices or to cease exports at dumped prices, if it is satisfied that the injurious effect of the dumping is thereby eliminated.

In such a case and as long as such undertakings are in force, provisional duties imposed by the Commission in accordance with Article 7(1), or definitive duties imposed in accordance with Article 9(4), as the case may be, shall not apply to the relevant imports of the product concerned manufactured by the companies referred to in the Commission decision accepting undertakings, as subsequently amended.

…

9. In the case of breach or withdrawal of undertakings by any party to the undertaking, or in the case of withdrawal of acceptance of the undertaking by the Commission, the acceptance of the undertaking shall be withdrawn by Commission Decision or Commission Regulation, as appropriate, and the provisional duty which has been imposed by the Commission in accordance with Article 7 or the definitive duty which has been imposed in accordance with Article 9(4) shall automatically apply, provided that the exporter concerned has, except where that exporter has withdrawn the undertaking, been given an opportunity to comment. …

…

10. A provisional duty may be imposed in accordance with Article 7 on the basis of the best information available where there is reason to believe that an undertaking is being breached, or in the case of breach or withdrawal of an undertaking, where the investigation which led to the undertaking has not been concluded'.

[3] Commission Implementing Regulation of 7 December 2016 withdrawing the acceptance of the undertaking for two exporting producers under Implementing Decision 2013/707/EU confirming the acceptance of an undertaking offered in connection with the anti-dumping and anti-subsidy proceedings concerning imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China for the period of application of definitive measures (OJ 2016 L 333, p. 4).

[4] OJ 2016 L 176, p. 21.

5. Article 10 of that regulation, headed 'Retroactivity', provided as follows in paragraph 5:

'In cases of breach or withdrawal of undertakings, definitive duties may be levied on goods entered for free circulation no more than 90 days before the application of provisional measures, provided that the imports have been registered in accordance with Article 14(5), and that any such retroactive assessment shall not apply to imports entered before the breach or withdrawal of the undertaking'.

6. On the date of the regulation at issue, the adoption of anti-subsidy measures by the European Union was regulated by 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 [5] ('the basic anti-subsidy regulation').

7. The basic anti-subsidy regulation lays down provisions on undertakings and retroactivity drafted in terms substantially identical to the corresponding provisions of the basic anti-dumping regulation. Thus, in particular, Article 13(1) (first and second subparagraphs), (9) and (10) and Article 16(5) of the basic anti-subsidy regulation essentially correspond to Article 8(1) (first and second subparagraphs), (9) and (10) and Article 10(5) respectively of the basic anti-dumping regulation (the two regulations will be referred to jointly in the remainder of this Opinion as 'the basic regulations'). [6]

II. The facts and the regulation at issue

8. Jiangsu is a company that manufactures crystalline silicon photovoltaic modules in China and exports them to the European Union.

9. After having imposed a provisional anti-dumping duty on imports of crystalline silicon photovoltaic modules and key components (i.e. cells and wafers) originating in or consigned from the People's Republic of China ('the products in question'), [7] by Decision 2013/423/EU of 2 August 2013, [8] the Commission accepted a price undertaking ('the undertaking') offered by the China Chamber of Commerce for Import and Export of Machinery and Electronic Products on behalf of Jiangsu, inter alia.

10. On 2 December 2013, the Council adopted Implementing Regulation (EU) No 1238/2013, [9] which imposed a definitive anti-dumping duty and collected definitively the provisional duty imposed on imports of crystalline silicon photovoltaic modules and key components (i.e. cells)

5 OJ 2016 L 176, p. 55.

6 Furthermore, the relevant provisions of the basic regulations are substantially identical to those of Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community (OJ 2009 L 343, p. 51, and corrigendum in OJ 2016 L 44, p. 20), which was applicable on the date when the anti-dumping duties in question were imposed, and Council Regulation (EC) No 597/2009 of 11 June 2009 on protection against subsidised imports from countries not members of the European Community (OJ 2009 L 188, p. 93), which was applicable on the date when the countervailing duties in question were imposed. Consequently, for the purposes of examining the present appeals, as in the judgment under appeal, reference will be made to the basic regulations, save where Regulations No 1225/2009 and No 597/2009 differ from those texts or where the context so requires.

7 See references to paragraph 2 of the judgment under appeal.

8 Commission Decision accepting an undertaking offered in connection with the anti-dumping proceeding concerning imports of crystalline silicon photovoltaic modules and key components (i.e. cells and wafers) originating in or consigned from the People's Republic of China (OJ 2013 L 209, p. 26).

9 Council Implementing Regulation imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China (OJ 2013 L 325, p. 1).

originating in or consigned from the People's Republic of China. On the same day, the Council also adopted Implementing Regulation (EU) No 1239/2013,[10] which imposed a definitive countervailing duty on imports of those products.

11. Article 3(2)(b) of Implementing Regulation No 1238/2013 and Article 2(2)(b) of Implementing Regulation No 1239/2013 state as follows, using the same wording:

'2. A customs debt shall be incurred at the time of acceptance of the declaration for release into free circulation:

…

(b) when the Commission withdraws its acceptance of the undertaking pursuant to [the basic regulations][11] in a Regulation or Decision which refers to particular transactions and declares the relevant undertaking invoices as invalid'.

12. By Implementing Decision 2013/707/EU of 4 December 2013,[12] the Commission confirmed its acceptance of the undertaking offered by the Chinese exporting producers.

13. On the basis of Article 3(1) of Implementing Regulation No 1238/2013 and of Article 2(1) of Implementing Regulation No 1239/2013, the imports covered by the undertaking and falling under Implementing Decision 2013/707 are exempt from the anti-dumping and countervailing duties imposed by those regulations.

14. However, having subsequently found that Jiangsu had breached the undertaking, the Commission adopted the regulation at issue. In Article 1 of that regulation, the Commission withdrew its acceptance of the undertaking for Jiangsu, inter alia. In Article 2 of that regulation, the Commission declared the undertaking invoices listed in Annex I to that regulation invalid, in subparagraph 1 thereof, and decided that the 'anti-dumping and countervailing duties due at the time of acceptance of the customs declaration for release into free circulation under Article 3(2)(b) of Implementing Regulation (EU) No 1238/2013 and Article 2(2)(b) of Implementing Regulation (EU) No 1239/2013 shall be collected'.

III. Procedure before the General Court and the judgment under appeal

15. By application lodged at the General Court Registry on 18 February 2017, Jiangsu brought an action seeking annulment of Article 2 of the regulation at issue. That action relied on a single plea in law alleging a breach of various provisions of the basic regulations, based on a plea of illegality under Article 277 TFEU in respect of Article 3(2)(b) of Implementing Regulation No 1238/2013 and Article 2(2)(b) of Implementing Regulation No 1239/2013.

16. In the judgment under appeal, the Court first – in paragraphs 28 to 64 – rejected the pleas raised by the Commission, supported by the Council, in relation to the admissibility of the action and the admissibility of the plea of illegality.

[10] Council Implementing Regulation imposing a definitive countervailing duty on imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China (OJ 2013 L 325, p. 66).

[11] See footnote 6 above.

[12] Commission Implementing Decision confirming the acceptance of an undertaking offered in connection with the anti-dumping and anti-subsidy proceedings concerning imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China for the period of application of definitive measures (OJ 2013 L 325, p. 214).

17. Then, in paragraphs 65 to 160 of the judgment under appeal, the Court upheld the single plea in law and the plea of illegality raised by Jiangsu on the merits and, therefore, annulled Article 2 of the regulation at issue in so far as it concerned Jiangsu.

IV. Forms of order sought by the parties

18. By its appeal in Case C-439/20 P, the Commission, supported by the Council, is asking the Court of Justice to set aside the judgment under appeal, declare the application at first instance inadmissible or, in the alternative, reject the application at first instance, and order Jiangsu Seraphim to pay the costs.

19. By its appeal in Case C-441/20 P, the Council, supported by the Commission, is asking the Court of Justice to set aside the judgment under appeal, reject the application at first instance and order Jiangsu Seraphim to pay the costs, or, in the alternative, refer back the case to the General Court for reconsideration and reserve the decision as to the costs of the proceedings at first instance and on appeal.

20. Jiangsu is asking the Court of Justice to reject the appeals and order the Commission and the Council to pay the costs.

V. Analysis of the appeals

21. The Commission relies on four grounds of appeal in support of its action in Case C-439/20 P. Those grounds overlap to a large extent with the two grounds of appeal asserted by the Council in support of its action in Case C-441/20 P. The two actions should therefore be examined jointly.

A. The first grounds of appeal, relating to admissibility

22. By their first grounds of appeal, the institutions maintain that the General Court committed an error of law in analysing the admissibility of Jiangsu's action (first part) and in analysing the admissibility and effectiveness of the plea of illegality raised by that party (second part).

1. The first part of the first grounds of appeal, relating to Jiangsu's standing and interest in bringing proceedings

23. In the first part of their first grounds of appeal, the institutions contest the General Court's analysis in respect of Jiangsu's standing and interest in bringing proceedings in relation to the appealed provision of the regulation at issue, namely Article 2 thereof.

(a) Whether directly affected

24. First, the institutions allege that the General Court committed various errors of law in paragraphs 37, 38, 44 and 45 of the judgment under appeal in considering that Jiangsu was directly concerned under the fourth paragraph of Article 263 TFEU, in relation to the appealed provision of the regulation at issue. The institutions argue that it was not Jiangsu, in the capacity of exporting producer, but rather the related importer Seraphim Solar System GmbH that made the customs declarations relating to the products for which the invoices have been invalidated by

means of that regulation. Consequently, it is that latter company and not Jiangsu that is the debtor for the anti-dumping and countervailing duties due as a consequence of the invoices issued by Jiangsu having been invalidated. The creation of that customs debt constituted a change in the legal situation resulting from Article 2 of the regulation at issue. It therefore follows that the legal position of Jiangsu, as exporting producer, was not changed by Article 2 of the regulation at issue and that, therefore, it was not directly concerned under the fourth paragraph of Article 263 TFEU.

25. On that point, in accordance with settled case-law, the condition under the fourth paragraph of Article 263 TFEU whereby a natural or legal person must be directly concerned by the measure being challenged requires two cumulative criteria to be met, namely, first, the contested measure must directly affect the legal situation of that person and, secondly, it must leave no discretion to its addressees who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from EU rules alone without the application of other intermediate rules. [13]

26. In the present case, Jiangsu has challenged Article 2 of the regulation at issue in its entirety. As can be inferred from point 14 above and as noted by the General Court in paragraph 44 of the judgment under appeal, by that provision the Commission invalidated, inter alia, the undertaking invoices issued by Jiangsu corresponding to certain specific transactions, in paragraph 1 thereof, and ordered that the definitive duties due with regard to the transactions covered by the invoices had to be collected, in paragraph 2 thereof. At that point of the judgment under appeal, the General Court concluded that the contested provisions thus had a direct effect on Jiangsu's legal position.

27. In this respect, I consider that a measure invalidating invoices issued by a party is an act that is capable of directly affecting its legal position. Indeed, by eliminating the invoices, that measure affects the contractual relationship relating to the specific transactions covered by the invalidated invoices, in this case the relationship between Jiangsu and the importer, and is also likely to affect the relationship between the party issuing the invoices and the tax authorities. [14] Consequently, the institutions cannot, in my view, validly claim that the General Court committed an error of law in concluding that Jiangsu was directly concerned by Article 2 of the regulation at issue, at least with regard to paragraph 1 of that provision.

28. With regard to paragraph 2, it is true – as asserted by the institutions – that the customs debt arising as a result of the invalidation of the invoices was created vis-à-vis the importer, namely Seraphim Solar System GmbH, a company legally distinct from, although related to, Jiangsu. However, in the context of the present case, that circumstance is not, in my opinion, capable of rendering Jiangsu's appeal inadmissible because it is not directly affected.

29. In fact, first, the creation of the customs debt is the immediate and direct consequence of the invalidation of the invoices in question, and, as is clear from the regulation at issue itself, [15] the invalidation of those invoices constitutes the necessary prerequisite for the creation of that debt. The invalidation of the invoices relating to the undertaking transactions and the creation of the customs debt in respect of those transactions are therefore closely related effects of the same

[13] See, inter alia, judgment of 28 February 2019, *Council* v *Growth Energy and Renewable Fuels Association* (C-465/16 P, EU:C:2019:155, paragraph 69 and the case-law cited).

[14] For examples of cases before the EU courts on questions relating to the invalidation of invoices, see, inter alia, judgment of 21 October 2021, *Wilo Salmson France* (C-80/20, EU:C:2021:870), or the judgment of the General Court of 2 October 2014, *Spraylat* v *ECHA* (T-177/12, EU:T:2014:849, in particular paragraph 21).

[15] See recital 32 and, *a contrario*, the final sentence of recital 33 of the regulation at issue.

measure, and it would therefore be artificial to separate them. Moreover, the customs debts relate precisely to the specific transactions covered by the invoices, and they therefore necessarily affect those transactions, to which Jiangsu is a party, and thus its legal position.

30. It follows from the above that, in my opinion, contrary to the position asserted by the institutions, the Court did not err in law in concluding that Jiangsu was directly concerned by Article 2 of the regulation at issue.

(b) Jiangsu's interest in bringing proceedings

31. The institutions maintain, in the alternative, that the General Court's analysis in respect of Jiangsu's interest in bringing proceedings to challenge Article 2 of the regulation at issue is vitiated by errors of law.

32. In that respect, the General Court has noted in paragraph 47 of the judgment under appeal that the admissibility of an exporting producer's action against measures withdrawing acceptance of an undertaking and imposing a definitive anti-dumping duty on the products which it manufactures and exports to the EU market is, implicitly but necessarily, accepted by case-law.[16] The General Court inferred from that that, in a similar situation, such an exporting producer must also be considered to be entitled to contest the imposition of that duty on products which it has already exported and in respect of which the undertaking invoices have been invalidated by the Commission. In paragraph 48 of the judgment under appeal, the General Court has also held that the contested provisions, in so far as they contribute to raising the import price of Jiangsu's products, have negative repercussions on its commercial relations with the importer of the products in question. The action, if successful, would alleviate those repercussions.

33. The institutions argue that that analysis is vitiated by errors of law. The considerations stated in paragraph 47 of the judgment under appeal are irrelevant as they refer to standing and are based on an incorrect interpretation of the fourth paragraph of Article 263 TFEU. The case-law analogy made in that paragraph is therefore incorrect, as it does not refer to a situation such as the one in the present case. Contrary to the case-law, the General Court interprets, in paragraph 48 of the judgment under appeal, the notion of interest in bringing proceedings as if it were sufficient to demonstrate a simple economic advantage resulting from the action being upheld, when in fact a change in the applicant's legal position is required. Jiangsu contests the arguments raised by the institutions.

34. On that point, the settled case-law of the Court of Justice holds that an action for annulment brought by a natural or legal person is admissible only in so far as that person has an interest in having the contested act annulled. Such an interest requires that the annulment of that act must be capable, in itself, of having legal consequences and that the action may therefore, through its outcome, procure an advantage to the party which brought it. An applicant's interest in bringing proceedings must be vested and current and may not concern a future and hypothetical situation.[17]

[16] The General Court refers to the judgment of 9 September 2010, *Usha Martin* v *Council and Commission* (T-119/06, EU:T:2010:369), upheld on appeal by judgment of 22 November 2012, *Usha Martin* v *Council and Commission* (C-552/10 P, EU:C:2012:736).

[17] See, inter alia, judgments of 17 September 2015, *Mory and Others* v *Commission* (C-33/14 P, EU:C:2015:609, paragraphs 55 and 56 and the case-law cited), and of 27 March 2019, *Canadian Solar Emea and Others* v *Council* (C-236/17 P, EU:C:2019:258, paragraphs 91 and 92 and the case-law cited, 'the judgment in *Canadian Solar*').

35. In the present case, the reasoning developed by the General Court in the judgment under appeal is not exempt from criticism. Indeed, on the one hand, the scope of the analogy made by the General Court in paragraph 47 of that judgment appears doubtful. It does not specifically address the requirement for an interest in bringing proceedings and its relevance is in no way substantiated. Moreover, the considerations, in paragraph 48 of the judgment under appeal, concerning the negative repercussions on the commercial relations between Jiangsu and its importer do not appear sufficient on their own to demonstrate that the annulment of the measure would produce such positive effects on Jiangsu's legal situation as to justify an interest in bringing proceedings as outlined in the case-law cited in point 34 above.

36. Nevertheless, those errors should not, in my opinion, result in the judgment under appeal being set aside, because the conclusion that Jiangsu had a legal interest in obtaining the annulment of Article 2 of the regulation at issue is correct. [18]

37. As noted in point 26 above, in the present case, by means of Article 2 of the regulation at issue, the Commission on the one hand invalidated the undertaking invoices issued, inter alia, by Jiangsu and on the other ordered that the definitive duties due in relation to the transactions covered by the invoices were to be collected.

38. In such circumstances, the annulment of the said provision of the regulation at issue would result in the elimination of the invalidation of the invoices issued by Jiangsu, which would therefore have legal consequences under the case-law cited in point 34 above. The elimination of the legal consequences for Jiangsu, specifically in its contractual relations relating to the transactions covered by the invalidated invoices, stemming from the invalidation of those invoices, is an advantage Jiangsu would derive from the action being upheld. That annulment would then invalidate the order to collect the definitive duties due in respect of the transactions covered by the invoices, transactions to which, as noted above in point 29, Jiangsu was a vendor party. It follows, in my view, from those considerations that Jiangsu had a legal interest in the annulment of the contested provision of the regulation at issue. It follows that that complaint by the institutions must also be rejected.

2. The second part of the first grounds of appeal, relating to the admissibility and effectiveness of the plea of illegality raised by Jiangsu

39. The second part of the first grounds of appeal raised by the institutions is intended to challenge the General Court's analysis conducted of paragraphs 57 to 64 of the judgment under appeal, in which it held that the plea of illegality raised by Jiangsu, under Article 277 TFEU, against Article 3(2)(b) of Implementing Regulation No 1238/2013 and Article 2(2)(b) of Implementing Regulation No 1239/2013 (jointly: 'the provisions subject to the plea of illegality') is admissible.

40. On the basis of that analysis, the General Court concluded that, since it did not have an interest in bringing proceedings against those provisions, Jiangsu cannot be considered to have been entitled to challenge them, under Article 263 TFEU, directly following their adoption and that therefore that company could challenge them in a plea of illegality under Article 277 TFEU. [19]

[18] Indeed, it is clear from the case-law that, if the grounds of a judgment of the General Court disclose an infringement of EU law but its operative part is shown to be well founded on other legal grounds, such an infringement is not capable of bringing about the setting aside of that judgment, and a substitution of grounds must be made. See, inter alia, judgment of 11 May 2017, *Dyson* v *Commission* (C-44/16 P, EU:C:2017:357, paragraph 55 and the case-law cited).

[19] See paragraph 64 of the judgment under appeal.

41. The institutions believe that the General Court's analysis is vitiated by various errors of law and is, in particular, contrary to the case-law resulting from the judgments in *Solar World* and in *Canadian Solar*.[20] The Commission also challenges the effectiveness of the plea of illegality.

42. On this point, we should first note that, according to settled case-law, Article 277 TFEU gives expression to a general principle conferring upon any party to proceedings the right to challenge, for the purpose of obtaining the annulment of a decision of direct and individual concern to that party, the validity of previous acts of the institutions which form the legal basis of the decision which is being attacked, if that party was not entitled under Article 263 TFEU to bring a direct action challenging those acts by which it was thus affected without having been in a position to ask that they be declared void.[21] The remedy of the plea of illegality is open only in the absence of any other available remedy.[22] It follows, moreover, from the wording of Article 277 TFEU itself that any upholding of the plea entails the mere incidental finding that the act is unlawful and the consequent inapplicability *inter partes* of the provisions declared unlawful, and not therefore their annulment.[23]

43. As a preliminary point, furthermore, it is appropriate to note that in the judgment in *SolarWorld*, the Court of Justice held that Article 2 of Implementing Regulation No 1239/2013 is a provision that is not severable from the remaining provisions of that regulation and that the annulment of that provision would necessarily affect the substance of the regulation.[24] In light of that observation, the Court of Justice upheld the order of the General Court declaring inadmissible an action seeking the annulment of solely that provision and not the regulation in its entirety. The Court of Justice relied on the settled case-law whereby the partial annulment of an EU act is possible only if the elements whose annulment is sought may be severed from the remainder of the act.[25] In the judgment in *Canadian Solar*, the Court of Justice essentially extended those considerations to cover Article 3 of Implementing Regulation No 1238/2013.[26]

44. In that context, we must first determine whether – as the institutions assert – the conclusion reached by the General Court whereby Jiangsu did not have an interest in bringing proceedings against the provisions subject to the plea of illegality is vitiated by errors of law.

45. On that point, it should be pointed out that in paragraphs 61 and 62 of the judgment under appeal, the General Court stated, first of all, that when those provisions were adopted, the question of whether they would apply to Jiangsu remained purely hypothetical. The General Court noted, next, that Jiangsu's interest in bringing proceedings against the abovementioned provisions could not be based on the mere possibility that the Commission might withdraw its acceptance of the undertakings, followed by a withdrawal of undertaking invoices.

[20] Judgment of 9 November 2017, *SolarWorld* v *Council* (C-205/16 P, EU:C:2017:840, 'the judgment in *SolarWorld*') and the judgment in *Canadian Solar*, cited in footnote 17 above.

[21] See judgments of 6 March 1979, *Simmenthal* v *Commission* (92/78, EU:C:1979:53, paragraph 39), and, most recently, of 17 December 2020, *BP* v *FRA* (C-601/19 P, not published, EU:C:2020:1048, paragraph 26 and the case-law cited).

[22] See, inter alia, judgment of 15 February 2001, *Nachi Europe* (C-239/99, EU:C:2001:101, paragraph 37), and the other case-law cited in paragraph 56 of the judgment under appeal.

[23] On the necessary difference between an incidental finding of illegality and an annulment judgment, see the relevant discussion on page 195 of the Opinion of Advocate General Trabucchi in Joined Cases *Kortner and Others* v *Council and Others* (15/73 to 33/73, 52/73, 53/73, 57/73 to 109/73, 116/73, 117/73, 123/73, 132/73 and 135/73 to 137/73, not published, EU:C:1973:164).

[24] See paragraphs 44, 55 and 57 of the judgment in *SolarWorld*. The Court of Justice specifically ruled, in paragraph 46 of that judgment, that the EU legislature, when adopting that regulation, put in place trade defence measures constituting a set or a 'package'. That regulation imposes two separate and complementary measures which seek to achieve a common goal, namely the removal of the injurious effect on the EU industry of Chinese subsidies relating to the products at issue, while safeguarding the interests of that industry.

[25] See the judgment in *SolarWorld*, paragraph 38 and the case-law cited.

[26] See paragraph 64 of the judgment in *Canadian Solar*.

46. In my view, those considerations of the General Court are not in error. Indeed, when Implementing Regulations No 1238/2013 and No 1239/2013 were adopted, the application of the provisions subject to the plea of illegality – which, as noted in point 11 above, established that a customs debt would be incurred if the Commission were to withdraw its acceptance of the undertaking in a regulation or decision which refers to particular transactions and were to declare the relevant undertaking invoices invalid – was purely hypothetical and depended on a circumstance – namely that the undertaking has been breached – which had not yet occurred and which might not have occurred.

47. The General Court's considerations are, therefore, in line with the Court of Justice's settled case-law according to which an applicant's interest in bringing proceedings must be vested and current, may not concern a future and hypothetical situation and must, in the light of the purpose of the action, exist at the stage of lodging the action, failing which the action will be inadmissible.[27] Moreover, it should also be noted that, in their appeals, the institutions do not really contest those considerations of the General Court contained in the abovementioned paragraphs of the judgment under appeal.

48. It follows that, in my view, the General Court did not err in holding that, in the absence of a finding that the undertaking had been breached, Jiangsu had no interest in bringing an action against the provisions subject to the plea of illegality, at the time when the two abovementioned regulations were adopted and during the subsequent period when it could have challenged them.

49. The institutions submit, second, that the General Court erred in law by not declaring the plea of illegality inadmissible because, by reason of the non-severable nature of the provisions subject to that plea from the remainder of Implementing Regulations No 1238/2013 and No 1239/2013, in the light of the judgments in *SolarWorld* and *Canadian Solar*, Jiangsu could have challenged the entirety of those regulations and claimed, in that context, the illegality of any provision of those regulations. Since Jiangsu had not challenged those regulations within the time limit for appeal, the possibility of raising a plea of illegality was now precluded.

50. On that basis, I should note, however, that irrespective of the question of the severability of the provisions in question from the rest of the regulations, it follows from the considerations made in points 45 to 47 above that, even if Jiangsu had challenged Implementing Regulations No 1238/2013 and No 1239/2013 in their entirety within the time limit for appeal, it still would not have had, in any event, a legal interest in challenging the provisions subject to the plea of illegality.

51. Indeed, it emerges from the case-law that the principles mentioned in point 47 above concerning the necessary concrete, vested and non-hypothetical character of the interest in bringing proceedings also apply to the individual pleas in law.[28] In the light of the General Court's considerations in point 45 above, Jiangsu could not have challenged the provisions in question on the grounds of a lack of interest in bringing proceedings even if it had challenged Implementing Regulations No 1238/2013 and No 1239/2013 in their entirety. The institutions cannot therefore argue that the General Court has committed an error of law in that respect.

[27] See, inter alia, judgments of 17 September 2015, *Mory and Others* v *Commission* (C-33/14 P, EU:C:2015:609, paragraph 56), and the judgment in *Canadian Solar* (paragraphs 91 and 92 and the case-law cited).

[28] Specifically in the judgment in *Canadian Solar*, the Court of Justice held that a plea for annulment is inadmissible on the ground of a lack of interest in bringing proceedings where, even if it were well founded, annulment of the contested act on the basis of that plea would not give the applicant satisfaction. See that judgment, paragraph 93 and the case-law cited.

52. That said, it is necessary, however, third, to examine the Commission's argument that the General Court erred in law in considering that the plea of illegality was admissible, since, by reason of the non-severable nature of the provisions subject to the plea of illegality in relation to the remainder of Implementing Regulations No 1238/2013 and No 1239/2013 – recognised in the judgments in *SolarWorld* and *Canadian Solar* – Jiangsu could not have raised such a plea solely in respect of the provisions subject to the plea of illegality, but should have raised it against the entirety of those regulations.

53. The Commission bases its argument on the assumption that the principle discussed in point 43 above, expressed by the case-law in relation to actions for annulment under Article 263 TFEU, whereby the partial annulment of an EU act is possible only if the elements whose annulment is sought may be severed from the remainder of the act,[29] can be transposed to the scope of a plea of illegality under Article 277 TFEU. It follows that a plea of illegality raised only against provisions that cannot be severed from the remainder of the act is not admissible.

54. Irrespective of the issue of whether the provisions in question can be severed from the remainder of the regulations, which is contested by the parties,[30] I am not, in any case, convinced that that assumption is correct.

55. Indeed, the principal reason underlying the case-law, whereby the partial annulment of an EU act is possible only if the elements whose annulment is sought may be severed from the remainder of the act, is the need to avoid a situation where, after the act has been partially annulled, as sought by the applicant, the substance of the act in question would be altered.[31] That would imply a review of the act, which would go beyond the powers of the EU judicature in the context of an action for annulment, and would constitute a ruling *ultra petita*.[32]

56. However, that reasoning does not apply to a plea of illegality. Indeed, as stated in point 42 above, in the context of such a remedy, it is possible to claim only that the act incidentally contested is inapplicable, not that it should be annulled.[33] Simply establishing incidentally that the provisions subject to a plea of illegality are unlawful and that the provisions declared unlawful cannot therefore apply *inter partes* in the current proceeding is a merely declarative process and does not create a right. Such an incidental finding cannot therefore result in a change to the substance of the act comparable to the change that would occur if the provisions themselves were annulled.

57. Thus, for example, in the present case, even if we were to accept that the provisions subject to the plea of illegality are not severable from the remainder of the act, the incidental finding by the General Court, in paragraph 158 of the judgment under appeal, that they are unlawful and the consequent declaration of non-applicability to Jiangsu did not result in a substantive change to Implementing Regulations No 1238/2013 and No 1239/2013. It follows that the reasoning and

[29] See the judgment in *SolarWorld*, paragraph 38 and the case-law cited.

[30] Jiangsu alleges that the judgments in *SolarWorld* and *Canadian Solar* referred in general to Articles 3 and 2, respectively, of Implementing Regulations No 1238/2013 and No 1239/2013 and not specifically to the provisions of paragraph 2 of those articles, which it argues are, however, severable from the remainder of the article. The institutions contest that reading of the provisions in question.

[31] On that point, see, inter alia, judgments of 16 February 2022, *Hungary* v *Parliament and Council* (C-156/21, EU:C:2022:97, paragraph 293 and the case-law cited), and the judgment in *SolarWorld*, paragraph 38 and the case-law cited.

[32] See, to that effect, judgment of 28 June 1972, *Jamet* v *Commission* (37/71, EU:C:1972:57, paragraphs 11 and 12), and Opinion of Advocate General Bot in *Spain* v *Council* (C-442/04, EU:C:2008:58, point 83).

[33] On that point, see footnote 23 above and the Opinion of Advocate General Bot in *Spain* v *Council* (C-442/04, EU:C:2008:58, point 83).

conclusion developed by the Court of Justice in the judgments in *SolarWorld* and *Canadian Solar* whereby the annulment of those provisions would necessarily affect the substance of those regulations does not apply in this case.

58. It follows from all of the above that, in my view, the General Court did not commit any error of law in considering Jiangsu's plea of illegality admissible, even though it was not raised against the entirety of Implementing Regulations No 1238/2013 and No 1239/2013.

59. Fourth, the Commission alleges that the General Court committed an error of law in paragraph 63 of the judgment under appeal by considering that the provisions subject to the plea of illegality are general provisions. In the Commission's view, however, those provisions only apply to companies that have offered undertakings and therefore constitute individual decisions against them.

60. On that point, it is clear from Article 277 TFEU that the remedy of a plea of illegality applies in proceedings in which 'an act of general application' is at issue. The result is thus a negative delimitation of the acts against which the remedy is available, excluding acts of individual application against which the applicant could have brought an action for annulment under the fourth paragraph of Article 263 TFEU. The purpose of that condition is to prevent a plea of illegality being used to circumvent the admissibility requirements of an action for annulment and, therefore, to call into question the legality of an act beyond the conditions laid down in Article 263 TFEU.

61. On that point, it should be recalled that, according to settled case-law of the Court of Justice, an act is of general application if it applies to objectively determined situations and produces legal effects with respect to categories of persons envisaged in a general and abstract manner. [34]

62. In my opinion, that is not the case for the provisions subject to the plea of illegality. Indeed, as can be seen from paragraph 1 of the two articles in question, those provisions apply not to categories of persons envisaged in a general and abstract manner but solely to the 'companies from which undertakings are accepted by the Commission and whose names are listed in the Annex to Implementing Decision 2013/707/EU'.

63. I therefore agree with the Commission when it asserts that the General Court has thus committed an error of law in classifying the provisions in question as acts of general application in paragraph 63 of the judgment under appeal.

64. Nonetheless, I consider that, in a specific case such as the present one, an operator such as Jiangsu, which, as is clear from points 45 to 47 and 50 above, does not have the opportunity to challenge those provisions in an action brought under Article 263 TFEU, must be granted the opportunity to challenge the legality of those provisions incidentally.

65. Indeed, the general principle established in the case-law mentioned in point 42 above and expressed by Article 277 TFEU is intended to confer upon any party to proceedings the right to challenge, for the purpose of obtaining the annulment of an act of direct and individual concern to that party, the validity of previous acts of the institutions which form the legal basis of the act which is being attacked, if that party was not entitled under Article 263 TFEU to bring a direct action challenging those acts by which it was thus affected without having been in a position to

[34] See judgment of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori and Commission* v *Ferracci*, (C-622/16 P to C-624/16 P, EU:C:2018:873, paragraph 29 and the case-law cited).

ask that they be declared void. In my opinion, that general principle must be applied in a case such as the present one, as described in the previous point. It follows that, despite the error of law mentioned in point 63 above, the General Court's conclusion as to the possibility for Jiangsu to challenge the legality of the provisions subject to the plea of illegality incidentally is, in my opinion, correct.

66. Fifth and last, the Commission also asserts, still in the alternative, that the single plea in law raised at first instance by Jiangsu was ineffective because it was directed against provisions that do not constitute the legal basis of the regulation at issue. That regulation was based in fact on Article 8 of the basic anti-dumping regulation and Article 13 of the basic anti-subsidy regulation. Furthermore, the institutions argue that the General Court misinterpreted the single plea in law raised by Jiangsu as containing a plea alleging that the regulation at issue directly breaches the relevant provisions of the basic regulations, when that action did not include that plea. The General Court therefore ruled *ultra petita*.

67. Those arguments must be rejected. As is clear from a textual analysis of the action at first instance, the single plea in law raised by Jiangsu before the General Court is based explicitly on a breach of Article 8(1), (9) and (10) and Article 10(5) of the basic anti-dumping regulation and Article 13(1), (9) and (10) and Article 16(5) of the basic anti-subsidy regulation, in connection with a plea of illegality raised against Article 3(2)(b) of Implementing Regulation No 1238/2013 and Article 2(2)(b) of Implementing Regulation No 1239/2013. It follows that the General Court did not misinterpret Jiangsu's action and did not rule *ultra petita*. As to the lack of effectiveness of the plea of illegality, I note that there is indeed some overlap between the single plea in law, alleging infringement of the abovementioned provisions of the basic regulations, and that plea. Indeed, upholding the single plea in law would already, of itself, result in the annulment of the regulation at issue. However, first, the abovementioned relevant provisions of the basic regulations and the provisions subject to the plea of inadmissibility are closely linked, meaning that – in the opinion of the institutions, the legality of which is challenged by Jiangsu – the latter constitute the implementation of the former, that implementation being given specific expression to in the regulation at issue. In that context, it is therefore clear that Jiangsu raised a plea of illegality against those provisions. Second, it is also not disputed that simply establishing incidentally the illegality of the provisions of Implementing Regulations No 1238/2013 and No 1239/2013 subject to the plea of illegality for infringement of the abovementioned provisions of the basic regulations would result in the annulment of the regulation at issue vis-à-vis Jiangsu. In my view, it follows that the above plea has no effect.

68. On the basis of all of the foregoing, the first grounds of appeal raised by the institutions must be rejected.

B. The grounds of appeal relating to the merits

69. By the second, third and fourth grounds of appeal raised by the Commission and the second ground of appeal raised by the Council, the institutions are contesting the merits of the reasoning by which the General Court annulled Article 2 of the regulation at issue vis-à-vis Jiangsu. Those grounds can be divided into two parts.

1. The grounds of appeal relating to the infringement of the basic regulations

70. The second and third grounds of appeal asserted by the Commission and the first part of the second ground of appeal asserted by the Council seek to address the part of the judgment under appeal (paragraphs 115 to 152) in which the General Court concluded that the basic regulations did not form a sufficient legal basis for adopting Article 2 of the regulation at issue.

(a) The judgment under appeal

71. In the judgment under appeal the General Court held, in paragraphs 115 to 118, that the situation in the present case was not subject to application of either the provisions laid down in Article 8(10) of the basic anti-dumping regulation and Article 13(10) of the basic anti-subsidy regulation or those laid down in Article 10(5) of the basic anti-dumping regulation and in Article 16(5) of the basic anti-subsidy regulation.

72. The General Court considered that those provisions were the only ones that govern, in the basic regulations, the question of the temporal imposition of the anti-dumping and anti-subsidy duties which would have been due in the absence of an undertaking which in the meantime had been breached or withdrawn, and that the situation in the present case did not correspond to any of the situations expressly provided for in the basic regulations in that regard. In such circumstances, it was necessary to assess whether there was no other legal basis for the adoption of Article 2 of the regulation at issue. [35]

73. The General Court then asserted that the general scheme and objectives of the basic regulations referred to show, first, the legislature's intention to legislate on the procedures which may be used to give due effect to the Commission's withdrawal of acceptance of an undertaking and, second, that that intention of the legislature was put into effect by means of the abovementioned (two pairs of) provisions indicated in point 71 above. The General Court therefore excluded the possibility that other provisions of the basic regulations could be used to support the competence of the EU institutions to require, when exercising the power to implement the basic regulations, that the companies concerned pay all duties due in respect of the transactions covered by undertaking invoices, which by that point had been invalidated. [36]

74. In particular, in paragraph 138 of the judgment under appeal, the General Court excluded the possibility that such power could be inferred from the wording of Article 8(9) of the basic anti-dumping regulation and Article 13(9) of the basic anti-subsidy regulation, according to which duties are to apply automatically following the withdrawal of acceptance of undertakings. According to the General Court, such an automatic application is only provided for within the limits expressly laid down by the provisions of the basic regulations mentioned in point 71 above. In the following paragraphs 139 to 151 of the judgment under appeal, the General Court then rejected the other arguments raised by the institutions.

[35] See paragraphs 119 and 130 of the judgment under appeal.

[36] See paragraphs 132 to 137 of the judgment under appeal.

(b) Arguments of the parties

75. The institutions are contesting the General Court's interpretation of the relevant provisions of the basic regulations and its conclusion that there is no legal basis in those regulations for the collection of duties on imports made in breach of the undertaking prior to its formal withdrawal. In particular, the General Court allegedly completely ignored the changes to the undertaking system resulting from the amendments introduced by Regulation (EC) No 461/2004. [37]

76. First, [38] the institutions allege that the General Court committed errors of law in so far as it qualified, in the present case, the collection of duties on the abovementioned imports as 'retroactive'. On the one hand, the General Court did not provide any reasons for this supposed retroactivity. On the other hand, such an assumption would infringe the notion of retroactivity as interpreted in case-law [39] and constitute a breach of Article 10(1) of the basic anti-dumping regulation and of Article 16(1) of the basic anti-subsidy regulation.

77. Second, the Commission, supported by the Council, [40] is arguing that the judgment under appeal is vitiated by errors of law in terms of the interpretation of Article 8(1), (9) and (10) and Article 10(5) of the basic anti-dumping regulation and Article 13(1), (9) and (10) and Article 16(5) of the basic anti-subsidy regulation. Those provisions of the basic regulations, as resulting from the amendments to the anti-dumping rules through Regulation No 461/2004, provide a sufficient legal basis for the collection of duties on imports found to have breached the undertaking.

78. Jiangsu is contesting those grounds of appeal. First, the regulation at issue imposes duties retroactively that go beyond what the basic regulations allow. The General Court therefore rightly concluded that those regulations do not constitute a sufficient legal basis for the adoption of the provisions of the regulation at issue.

79. Second, in the case of a breach of the terms of an undertaking, it follows from Articles 8(9) and 13(9) of the basic anti-dumping regulation and the basic anti-subsidy regulation, respectively, that the duties which did not apply as a consequence of the acceptance of the undertaking will automatically apply to imports made from the date on which the undertaking was withdrawn and not to earlier imports. According to Jiangsu, as considered by the General Court, in the system created by the basic regulations, duties for breach of undertakings may not be imposed retroactively outside the procedural limits set by the provisions mentioned in point 71 above. EU law would in no way authorise the Commission to invalidate invoices and order customs authorities to levy duties retroactively on previous imports released for free circulation in the absence of registration and imposition of provisional duties. According to Jiangsu, the changes made in 2004 had the sole purpose, on the one hand, of allowing the withdrawal of an undertaking and the application of the duty by means of a single legal act, putting an end to the burdensome double procedure previously in force involving the intervention of both the Commission and the Council, and, on the other hand, of setting mandatory deadlines for the completion of investigations into alleged breaches of undertakings.

[37] Council Regulation of 8 March 2004 amending Regulation (EC) No 384/96 on protection against dumped imports from countries not members of the European Community and Regulation (EC) No 2026/97 on protection against subsidised imports from countries not members of the European Community (OJ 2004 L 77, p. 12).

[38] See the Commission's second ground of appeal and the first part of the Council's second ground of appeal, which concern paragraphs 119, 129 to 132, 138, 140 to 147 and 151 of the judgment under appeal.

[39] The institutions refer to the judgments of 15 March 2018, *Deichmann* (C-256/16, EU:C:2018:187, paragraph 78), and of 19 June 2019, *C & J Clark International* (C-612/16, not published, EU:C:2019:508, paragraphs 52 to 58).

[40] See the third ground of appeal in case C-439/20 against paragraphs 119, 130 to 138, 140 to 147 and 151 of the judgment under appeal.

(c) Legal analysis

80. As a preliminary point, it should be noted that in the undertaking system created by Article 8 of the basic anti-dumping regulation and Article 13 of the basic anti-subsidy regulation, according to paragraph 1 of those articles, that, on the condition that a provisional affirmative determination of dumping or subsidisation and injury has been made, the Commission may accept an undertaking offer submitted by an exporter, if it is satisfied that the injurious effect is thereby eliminated. [41]

81. The effects of the acceptance of the undertaking are governed explicitly in the second subparagraph of those provisions. Those provisions establish that, in such a case and as long as such undertakings are in force, provisional duties imposed by the Commission or definitive duties, as the case may be, '*shall not apply*' to the relevant imports of the product concerned manufactured by the companies referred to in the Commission decision accepting undertakings. [42]

82. Paragraph 9 of the abovementioned articles of the basic regulations governs situations involving breach or withdrawal of an undertaking by one of the parties to that undertaking, or withdrawal of acceptance of the undertaking by the Commission. Those provisions establish that, in such cases, the acceptance of the undertaking is to be withdrawn by the Commission and the provisional or, as relevant to our case, '*definitive*' (anti-dumping or countervailing) duty '*imposed*' by the Commission '*shall (automatically) apply*'. [43]

83. Those provisions of the basic regulations, in their current form, are the result of a reform implemented by the abovementioned Regulation No 461/2004.

84. The central question in the present cases concerns the exact scope of the effects of the Commission's withdrawal of acceptance of the undertaking, in particular in the event of a breach of that undertaking by the company which entered into it. That question calls for clarification of the scope of the provisions, laid down in Article 8(9) of the basic anti-dumping regulation and Article 13(9) of the basic anti-subsidy regulation, according to which, in such a case, the definitive (anti-dumping and countervailing) duty imposed by the Commission 'shall apply' automatically. The clarification of the scope of those provisions is intended to determine whether, following such withdrawal, the definitive duties already imposed apply *ab initio* to the exporter's imports corresponding to the breached undertaking made at the time when the definitive duties were imposed (the institutions' argument) or only to imports made after the formal withdrawal of the undertaking (Jiangsu's argument, upheld by the General Court).

85. That issue has a fundamental impact on the contested provision of the regulation at issue, namely Article 2, because if, as Jiangsu claims, the definitive anti-dumping and countervailing duties apply only for the future, and thus only for imports made from the time when the Commission withdrew acceptance of the undertaking, the Commission could not have invalidated the undertaking invoices relating to imports prior to the withdrawal and could not, in the absence of any legal basis for doing so, have ordered the collection of the anti-dumping and countervailing duties as imposed in Implementing Regulations No 1238/2013 and No 1239/2013.

41 The undertaking is therefore in principle accepted before the definitive anti-dumping or countervailing duties are imposed.

42 My emphasis.

43 In actual fact, only Article 8(9) of the basic anti-dumping regulation uses the adverb 'automatically'.

86. In that context, the provisions laid down in Article 8(9) of the basic anti-dumping regulation and Article 13(9) of the basic anti-subsidy regulation must therefore be interpreted specifically. On that point, it is important to remember that, pursuant to settled case-law, in interpreting a provision of EU law, it is necessary to consider not only its wording, but also the context in which it occurs and the objectives pursued by the rules of which it is part. [44] The origins of a provision of EU law may also provide information relevant to its interpretation. [45]

87. From a literal point of view, a reading of the relevant provisions does not provide a decisive answer to the central question indicated in point 84 above, namely whether, following the withdrawal of acceptance of the undertaking, definitive duties apply *ab initio* or apply only to imports following the withdrawal. Those provisions, in fact, merely state that the duties apply (automatically), without further clarification.

88. From a literal point of view, however, a combined reading of the provisions of Article 9(4) (which provides that the definitive duty will be '*imposed*' by the Commission), the second subparagraph of Article 8(1) (which provides that definitive duties '*shall not apply*' to the relevant imports as long as such undertakings are in force), and Article 8(9) (which provides that in the case of withdrawal of acceptance of the undertaking the definitive duty '*shall automatically apply*') of the basic anti-dumping regulation appears to be completely compatible with an interpretation whereby the application of the definitive duty initially '*imposed*' would be suspended due to acceptance of the undertaking ('*shall not apply*'). If acceptance is withdrawn because of a breach of that undertaking, that suspension would no longer be justified for the imports associated with the breach, to which, therefore, the duty already imposed, application of which has been suspended, '*shall automatically apply*'. The same reasoning applies to the corresponding provisions of the basic anti-subsidy regulation.

89. It is then appropriate to briefly address the genesis of those provisions, which the parties discussed at length. As noted above, the versions of the provisions of Article 8(1) and (9) of the basic anti-dumping regulation and Article 13(1) and (9) of the basic anti-subsidy regulation relevant in the present cases are the result of the reform implemented through Regulation No 461/2004.

90. In that context, recital 18 of Regulation No 461/2004 is relevant. That recital establishes pertinent guidance for interpretation in relation to the provisions introduced by that regulation and later confirmed in subsequent versions of the basic regulations. [46]

[44] See, inter alia, judgment of 2 December 2021, *Commission and GMB Glasmanufaktur Brandenburg* v *Xinyi PV Products (Anhui) Holdings* (C-884/19 P and C-888/19 P, EU:C:2021:973, paragraph 70 and the case-law cited).

[45] See, most recently, judgment of 2 June 2022, *SR (Translation costs in civil proceedings)* (C-196/21, EU:C:2022:427, paragraph 33 and the case-law cited).

[46] That recital states that 'Article 8(9) of the Basic Anti-Dumping Regulation [previously in force] stipulates, inter alia, that in case of withdrawal of undertakings by any party, a definitive duty is to be imposed in accordance with Article 9 on the basis of the facts established within the context of the investigation which led to the undertakings. This provision has led to a time-consuming double-proceeding consisting of both a Commission Decision withdrawing the acceptance of the undertaking and a Council Regulation re-imposing the duty. Taking into account that this provision does not leave any discretion to the Council as to the introduction of a duty to be imposed following the breach or withdrawal of an undertaking or as to its level, it is considered appropriate to modify the provisions in Articles 8(1), (5) and (9) in order to clarify the Commission's responsibility and to allow withdrawal of an undertaking and application of the duty by one single legal act'. I therefore consider the General Court's rejection of the relevance of that recital in paragraph 144 of the judgment under appeal to be in error.

91. It follows from that recital that the reform was intended to simplify a tortuous procedure which, in the case of withdrawal of acceptance of the undertaking, involved the adoption of two legal acts, one by the Commission (the withdrawal) and one by the Council (the imposition of duties).

92. However, a careful reading of that recital shows that the reform has actually resulted in a substantial change. Whereas in the previous system the duty was 're-imposed' by the Council following the withdrawal of acceptance of the undertaking, in the post-reform system the duty already exists and it is simply its application that is recognised by the new single act from the Commission. It follows that, whereas in the previous reform system it was clear that the duty which had to be imposed and therefore did not exist at the time when the acceptance of the undertaking was withdrawn could not objectively be applied to imports made prior to that withdrawal (since it was not even imposed), in the post-reform system this is no longer the case. In the post-reform system, the duty already exists and it is simply its application that is recognised by that single act following the withdrawal of acceptance of the undertaking.

93. On that basis, the genesis of the provisions in question not only appears to be compatible with the interpretation of those provisions indicated in point 88 above, but even appears to militate in favour of such an interpretation.

94. With regard to the analysis of the context in which the provisions in question are inserted, this played a fundamental role in the analysis carried out by the General Court. Indeed, in the judgment under appeal, the General Court based its conclusion about the absence of any legal basis in the basic regulations for adoption of Article 2 of the regulation at issue essentially on the finding that the issue raised in the present case – namely, in its view, 'the temporal imposition of the anti-dumping and anti-subsidy duties which would have been due in the absence of an undertaking which in the meantime had been breached or withdrawn' – is exclusively governed by the provisions of the basic regulations indicated in point 71 above, namely Article 8(10) and Article 10(5) of the basic anti-dumping regulation and Article 13(10) and Article 16(5) of the basic anti-subsidy regulation.[47] It was on this basis that the General Court then rejected, in paragraph 138 of the judgment under appeal, the interpretation of the provisions in the case mentioned in point 88 above.

95. However, I do not find the reasoning applied in that regard by the General Court convincing.

96. In that regard, I should note, first of all, that the conclusion reached by the General Court has, in my opinion, no basis in the recitals of the basic regulations indicated in paragraphs 133 to 136 of the judgment under appeal. First, as rightly argued by the Commission, those recitals cannot refer to the changes introduced by the reform implemented by Regulation No 461/2004 as they were already present in the basic regulations before that reform. Some of them, by contrast, refer to the provisions mentioned in point 94 above and provide guidance for their interpretation.

97. With regard to Article 8(10) of the basic anti-dumping regulation and the corresponding Article 13(10) of the basic anti-subsidy regulation, as reflected, respectively, in recitals 14 and 12 of the basic regulations, they explicitly apply in two cases: in cases of 'suspected violation' or 'where further investigation is necessary to supplement the findings'. In such cases those provisions allow the imposition of provisional duties. Contrary to the General Court's finding, those provisions do not regulate the retroactive imposition of the anti-dumping and anti-subsidy

[47] See paragraphs 130, 137 and 141 of the judgment under appeal.

duties which would have been due in the absence of an undertaking which in the meantime had been breached or withdrawn. [48] They are simply provisions which, in the two situations mentioned above, allow the imposition of provisional measures on what could be called a 'precautionary' basis. Proof that those provisions do not regulate the retroactive application of duties lies in the fact that they are not included in the articles of the regulations dedicated to retroactivity, namely Article 10 of the basic anti-dumping regulation and Article 16 of the basic anti-subsidy regulation. It follows that, contrary to the General Court's view, such provisions cannot realise 'the legislature's intention to legislate on the procedures which may be used to give due effect to the Commission's withdrawal of acceptance of an undertaking'. [49]

98. By contrast, the provisions of Article 10(5) of the basic anti-dumping regulation and the corresponding Article 16(5) of the basic anti-subsidy regulation explicitly regulate the retroactive application of duties in case of breach or withdrawal of an undertaking. Those provisions allow – as an exceptional measure and by reason of the breach or withdrawal of the undertaking – the retroactive application of definitive duties to imports made before the imposition of provisional duties, subject to a limit of 90 days and provided that such imports have been registered. Those provisions therefore allow – as an exceptional measure and by reason of the breach or withdrawal of the undertaking – definitive duties to be applied not only before the point in time when they are imposed, but well before, and even 90 days before the application of *provisional duties*. It follows that those provisions not only do not preclude the interpretation of Article 8(1) and (9) of the basic anti-dumping regulation and Article 13(1) and (9) of the basic anti-subsidy regulation mentioned in point 88 above, but even appear to militate in favour of such an interpretation. Indeed, in the event of breach or withdrawal of the undertaking, they allow the retroactive application of definitive duties to a point in time well before the time when they are imposed. From a systemic point of view, it follows that a fortiori the abovementioned paragraphs 1 and 9 should be interpreted as meaning that, in the event of a breach of the undertaking, the definitive duties are to be considered applicable from the moment they are imposed.

99. It follows from the foregoing considerations that there are errors of law that vitiate the interpretation of Article 8(10) and Article 10(5) of the basic anti-dumping regulation and Article 13(10) and Article 16(5) of the basic anti-subsidy regulation applied in paragraphs 130, 137, 138, 141 and 144 of the judgment under appeal.

100. That said, the argument that makes me lean decisively towards the interpretation of Article 8(1) and (9) of the basic anti-dumping regulation and Article 13(1) and (9) of the basic anti-subsidy regulation along the lines mentioned in point 88 above is a teleological one.

101. I believe that the interpretation of those provisions proposed by Jiangsu and upheld by the General Court results in the loss of the effectiveness of the system of undertakings provided for in the basic regulations, substantially reducing the economic consequences for companies that enter in the undertaking in the event of a breach thereof. In that case, those companies would only be affected for the future and not for the past. Such an interpretation substantially reduces the deterrent effect that the negative consequences of breaching an undertaking should have on the companies offering such undertakings and thus greatly reduces their incentives to comply with such undertakings. What interest can a company have in fulfilling an undertaking if it knows that in any case it will not suffer any consequences for the past if it breaches that undertaking?

[48] See paragraph 130 of the judgment under appeal.

[49] See paragraph 137 of the judgment under appeal.

102. I therefore disagree with the General Court's statement in paragraph 151 of the judgment under appeal, supporting Jiangsu's argument,[50] whereby the withdrawal of an undertaking is, in itself, a sufficient penalty for a breach thereof. On the contrary, I agree with the Commission that, in the present case, the exporting producer and the importer were fully aware of the breach, and that there is therefore no reason to protect them against the imposition of duties.

103. Moreover, the case-law has already clearly shown, on the one hand, that the fundamental objective of the provisions of the basic regulation on undertakings is to guarantee the elimination of the injurious effects of dumping suffered by the EU industry and, on the other hand, that that objective is based primarily on the exporter's obligation to cooperate and the monitoring of the proper fulfilment of the undertaking given by the exporter, in the context of the relationship of trust on which the Commission's acceptance of such an undertaking is based.[51]

104. An interpretation of the provisions of the basic regulations which, by significantly reducing the consequences in the event of a breach of the undertaking entered into, substantially reduces the incentives to fulfil the undertaking entered into and to cooperate in the context of a relationship of trust with the Commission is therefore, in my opinion, incompatible with the abovementioned case-law.

105. On the basis of the above, in my view, the provisions laid down in Article 8(1), second subparagraph, and (9) of the basic anti-dumping regulation and Article 13(1), second subparagraph, and (9) of the basic anti-subsidy regulation should be interpreted to the effect that the definitive anti-dumping or countervailing duties imposed under Article 9(4) of the basic anti-dumping regulation or Article 15(1) of the basic anti-subsidy regulation, respectively, are suspended in respect of imports corresponding to the undertaking by reason of the Commission's acceptance of the undertaking. If that acceptance is withdrawn by the Commission because of a breach of that undertaking, that suspension is no longer justified for the imports associated with the breach, and the duty already imposed, but application of which has been suspended, will automatically apply. It follows from the foregoing that the withdrawal of acceptance of the undertaking following a breach has the effect of rendering the definitive duties originally imposed automatically applicable to the imports corresponding to the breached undertaking, so that the definitive anti-dumping and countervailing duties relating to such imports become automatically due *ab initio*.

106. That interpretation is, in my view, not called into question by the argument raised by Jiangsu whereby if it were to be accepted, the *ab initio* collection of definitive duties after withdrawal of the undertaking would be possible not only in cases where the undertaking has been breached by the company, but also in cases where the Commission decides – within the broad discretion granted to it by the case-law – to withdraw the undertaking for other reasons, such as where it is no longer practicable, or even where it is the exporting producer that wishes to withdraw the undertaking.

107. I would point out in this connection that, although, as is clear from the case-law,[52] the Commission enjoys discretion for the purpose of determining whether it is necessary to withdraw acceptance of the undertaking, that same case-law also makes it clear that that discretion must be exercised in the light of the principle of proportionality. That implies that the

[50] See paragraph 151 of the judgment under appeal, which refers to paragraph 125 of that judgment.

[51] See, with reference to Article 8 of the basic anti-dumping regulation, judgment of 22 November 2012, *Usha Martin* v *Council and Commission* (C-552/10 P, EU:C:2012:736, paragraph 36 in relation to paragraph 24).

[52] See judgment of 22 November 2012, *Usha Martin* v *Council and Commission* (C-552/10 P, EU:C:2012:736, paragraph 32).

(negative) consequences of exercising that discretion must be proportionate to the interest for which it is exercised. In the present case, as can be seen from the considerations discussed in points 101 to 104 above, it would be proportionate to collect *ab initio* the definitive duties on imports corresponding to the breached undertaking, by reason of the breach of that undertaking by the company offering it.

108. In conclusion, on the basis of all the foregoing considerations, first, in the light of the interpretation proposed in point 105 above, in the present case, following the withdrawal of acceptance of the undertaking offered by Jiangsu because of the breach of that undertaking, there was no retroactive application of definitive anti-dumping and countervailing duties. It follows that paragraphs 129 to 132, 138 and 141 of the judgment under appeal are vitiated by errors of law and that the Commission's second ground of appeal and the first part of the Council's second ground of appeal must be upheld.

109. Second, the judgment under appeal is vitiated by errors of law in terms of the interpretation of Article 8(1), (9) and (10) and Article 10(5) of the basic anti-dumping regulation and Article 13(1), (9) and (10) and Article 16(5) of the basic anti-subsidy regulation, and the third ground of appeal raised by the Commission must also be upheld.

2. The grounds of appeal relating to the plea of illegality

110. By the fourth ground of appeal raised by the Commission and the second part of the second ground raised by the Council, the institutions are contesting paragraphs 153 to 158 of the judgment under appeal in which the General Court upheld the plea of illegality raised by Jiangsu against Article 3(2)(b) of Implementing Regulation No 1238/2013 and Article 2(2)(b) of Implementing Regulation No 1239/2013, declaring those provisions inapplicable in the present case. In particular, in paragraph 157 of the said judgment, the General Court upheld that plea on the basis of two arguments referring to the reasoning discussed in paragraphs 128 to 140 of that judgment.

111. In a first argument, the General Court held that the provisions subject to the plea of illegality do not fall within the situations covered by the provisions indicated in point 94 above, which exclusively govern the imposition of the anti-dumping and anti-subsidy duties which would have been due in the absence of an undertaking which in the meantime had been breached or withdrawn. On that point, however, it is clear from points 95 to 99 above that that analysis by the General Court is, in my view, vitiated by errors of law. It follows that it cannot form the basis of the plea of illegality. For the same reasons, the second argument developed in the same paragraph of the judgment under appeal, based on the general scheme of the basic regulations, must also be rejected. That argument also is based on the analysis previously carried out by the General Court, which was vitiated by errors of law.

112. Instead, I consider that, as the Commission contends, the authorisation to adopt the provisions subject to the plea of illegality falls within the scope of the power to determine, in the regulation establishing the basic anti-dumping or countervailing duties, the 'other criteria' relating to the collection of such duties, as provided for in Article 14(1) of the basic anti-dumping regulation and Article 24(1) of the basic anti-subsidy regulation, as interpreted by the case-law. [53]

[53] See, in relation to Article 14(1) of the basic anti-dumping regulation, judgment of 15 March 2018, *Deichmann* (C-256/16, EU:C:2018:187, paragraphs 57 to 60).

113. It follows from all of the discussion above that the fourth ground of appeal raised by the Commission and the second part of the second ground of appeal raised by the Council must be upheld and that the judgment under appeal must therefore be set aside in its entirety.

VI. The action at first instance

114. In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, if the Court of Justice quashes the decision of the General Court, it may itself give final judgment in the matter, where the state of the proceedings so permits.

115. I believe that to be the case in the present situation. In fact, it is clear from all the considerations stated and in particular from the interpretation of Article 8(1) and (9) of the basic anti-dumping regulation and Article 13(1) and (9) of the basic anti-subsidy regulation that I have proposed in point 105 above, that contrary to the General Court's ruling, the single plea in law raised by Jiangsu at first instance, relating to the infringement of Article 8(1), (9) and (10) and Article 10(5) of the basic anti-dumping regulation and Article 13(1), (9) and (10) and Article 16(5) of the basic anti-subsidy regulation, based on the plea of illegality raised against Article 3(2)(b) of Implementing Regulation No 1238/2013 and Article 2(2)(b) of Implementing Regulation No 1239/2013, must be dismissed.

VII. Costs

116. Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to the costs. Under Article 138(1) of those rules, which apply to the procedure on appeal pursuant to Article 184(1) of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. In those circumstances, since the Commission and the Council have claimed that Jiangsu should be ordered to pay the costs, I propose that the Court order Jiangsu, the unsuccessful party, to pay the costs incurred both at first instance and in the present appeal by the Commission and the Council.

VIII. Conclusion

117. In the light of the foregoing considerations, I suggest that the Court should:

– Set aside the judgment of the General Court of the European Union of 8 July 2020, *Jiangsu Seraphim Solar System* v *Commission* (T-110/17, EU:T:2020:315);

– Dismiss the action brought by Jiangsu Seraphim Solar System Co. Ltd before the General Court in Case T-110/17;

– Order Jiangsu Seraphim Solar System Co. Ltd to pay the costs incurred by the European Commission and the Council of the European Union both at first instance and in the present appeal.