JUDGMENT OF THE COURT (Fifth Chamber)
29 May 1997 *

In Case C-26/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Finanzgericht Hamburg (Germany) for a preliminary ruling in the proceedings pending before that court between

Rotexchemie International Handels GmbH & Co.

and

Hauptzollamt Hamburg-Waltershof

on the validity of Council Regulation (EEC) No 1531/88 of 31 May 1988 imposing a definitive anti-dumping duty on imports of potassium permanganate originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty imposed on those imports (OJ 1988 L 138, p. 1),

THE COURT (Fifth Chamber),

composed of: J. C. Moitinho de Almeida, President of the Chamber, L. Sevón, C. Gulmann, J.-P. Puissochet (Rapporteur) and P. Jann, Judges,

* Language of the case: German.

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— Rotexchemie International Handels GmbH&Co., by Ulrich Eggers, Rechtsanwalt, Hamburg,

— the Spanish Government, by Rosario Silva de Lapuerta, Abogado del Estado, of the Department for Community Legal Matters, acting as Agent,

— the Council of the European Union, by Yves Crétien, Legal Adviser, and Antonio Tanca, of its Legal Service, acting as Agents, assisted by Hans-Jürgen Rabe and Georg M. Berrisch, Rechtsanwälte, Hamburg,

— the Commission of the European Communities, by Nicholas Khan, of its Legal Service, acting as Agent, assisted by Hans-Jürgen Rabe and Georg M. Berrisch,

having regard to the Report for the Hearing,

after hearing the oral observations of Rotexchemie International Handels GmbH&Co., represented by Ulrich Eggers; of the Spanish Government, represented by Santiago Ortiz Vaamonde, Abogado del Estado, acting as Agent; of the Council, represented by Antonio Tanca, assisted by Georg M. Berrisch; and of the Commission, represented by Nicholas Khan, assisted by Georg M. Berrisch, at the hearing on 6 February 1997,

after hearing the Opinion of the Advocate General at the sitting on 6 March 1997,

gives the following

Judgment

1 By order of 10 January 1996, received at the Court on 30 January 1996, the Finanzgericht (Finance Court) Hamburg referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the validity of Council Regulation (EEC) No 1531/88 of 31 May 1988 imposing a definitive anti-dumping duty on imports of potassium permanganate originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty imposed on those imports (OJ 1988 L 138, p. 1).

2 The question was raised in proceedings between Rotexchemie International Handels GmbH&Co. ('Rotexchemie') and Hauptzollamt Hamburg-Waltershof ('the Hauptzollamt') concerning definitive anti-dumping duties imposed by the latter on imports of potassium permanganate from China.

3 Between 21 July 1988 and 31 October 1989, Rotexchemie applied, primarily to the Hauptzollamt, for the release into free circulation of 667 tonnes of potassium permanganate which came under tariff heading 2841 60 00 0100 of the Combined Nomenclature and which, it claimed, originated in Taiwan. On release into free circulation, Rotexchemie paid customs duties at the rate of 6.9%. When the customs authorities discovered, following an enquiry, that the product in question came from the People's Republic of China, the Hauptzollamt issued amended notices of assessment under Regulation No 1531/88, claiming from Rotexchemie an anti-dumping duty of DM 1 495 170.

4 Having unsuccessfully lodged an administrative complaint against the amended notices of assessment in question, Rotexchemie brought an action against the Hauptzollamt's decision rejecting the complaint. In its action Rotexchemie no longer denied that the potassium permanganate originated in the People's Republic of China, but disputed the validity of Regulation No 1531/88 in the light of Community rules of a higher order and, in that respect, put forward four pleas in law.

5 In those circumstances the national court referred to the Court for a preliminary ruling the question whether Regulation No 1531/88 was valid.

6 The order for reference shows that the national court bases its doubts concerning the validity of Regulation No 1531/88 on the applicant's first plea. It is uncertain whether or not the choice of the United States of America as the reference country constitutes an infringement of Article 2(5)(a) of Council Regulation (EEC) No 2176/84 of 23 July 1984 on protection against dumped or subsidized imports from countries not members of the European Economic Community (OJ 1984 L 201, p. 1; 'the basic regulation'). The Finanzgericht points out that, whereas the choice of reference country depends in particular upon whether the prices charged in that country are the result of normal market forces, the American market for potassium permanganate has only one producer, which is not exposed to any competition. The United States of America charges on imports from China, which are far from negligible, an anti-dumping duty which is higher than that set by the Community, and may exceed the dumping margin in question.

7 The national court also states that, should it prove to be the case that the United States of America also imposes an anti-dumping duty on potassium permanganate imports from Spain, that duty would be unjustified and intended only to protect the American producer. Moreover, the prices charged by the latter are higher than those of the sole Community producer. Finally, the national court is not convinced by the reasons which led the Community institutions to reject the alternative choices of India or Brazil as reference countries.

8 Article 2(5)(a) of the basic regulation provides:

'In the case of imports from non-market economy countries ... normal value shall be determined in an appropriate and not unreasonable manner on the basis of one of the following criteria:

(a) the price at which the like product of a market economy third country is actually sold:

(i) for consumption on the domestic market of that country; or

(ii) to other countries, including the Community ...'.

9 The aim of Article 2(5) of the basic regulation is to prevent account from being taken of prices and costs in non-market-economy countries which are not the normal result of market forces (see the judgments in Joined Cases C-305/86 and C-160/87 *Techmashexport* v *Commission and Council* [1990] ECR I-2945, paragraph 26, and in Case C-16/90 *Nölle* v *Hauptzollamt Bremen-Freihafen* [1991] ECR I-5163, paragraph 10).

10 The choice of reference country falls within the discretion enjoyed by the institutions when analysing complex economic situations.

11 The exercise of that discretion is not, however, exempt from judicial review. It is settled case-law that, in the context of such review, the Court is to verify whether the relevant procedural rules have been complied with, whether the facts on which the choice is based have been accurately stated and whether there has been a manifest error of appraisal or a misuse of powers (see the judgments in Case 240/84 *Toyo* v *Council* [1987] ECR 1809, paragraph 19, in Case 258/84 *Nippon Seiko* v *Council* [1987] ECR 1923, paragraph 21, and in *Nölle*, cited above, paragraph 12).

12 As regards in particular the choice of reference country, it should be verified whether the institutions neglected to take account of essential factors for the purpose of establishing the appropriate nature of the country chosen and whether the information contained in the documents in the case was considered with all the care required for the view to be taken that the normal value was determined in an appropriate and not unreasonable manner (see *Nölle*, cited above, paragraph 13).

13 Sharing the doubts expressed in that regard by the national court, Rotexchemie submits that the normal value was not determined in accordance with that case-law, since the prices charged in the United States of America do not result from the rules of a market economy. The American market in potassium permanganate consists of only one producer, which is protected from foreign competition by anti-dumping duties.

14 The Council and the Commission maintain, on the contrary, that the fact that there is a sole producer is irrelevant, since there is no price control and competition is sufficient because of imports from other countries. The imposition of anti-dumping duties on Chinese and Spanish imports does nothing to invalidate that conclusion, since there is nothing to suggest that those duties are intended solely to consolidate the position of the American producer, rather than to prevent injury. The two institutions also maintain that the Commission established that the prices charged by the American producer, which are in reality lower than those of the Community producer, enabled it to make a reasonable and not excessive profit.

15 It should be pointed out that the mere fact that there is only one producer in the reference country does not in itself preclude the prices there from being the result of genuine competition, since such competition may just as well result, in the absence of price controls, from the presence of significant imports from other countries. As may be seen from the 11th recital in the preamble to Regulation No 1531/88 — and this has not been contested — the American market in potassium permanganate receives substantial imports from other countries.

16 Similarly, the choice of a reference country with a market economy cannot be called into question merely because that country makes imports from certain other countries subject to anti-dumping duties. Dumping is regarded by Article VI of the General Agreement on Tariffs and Trade, to which the second recital in the preamble to the basic regulation refers, as a practice which is to be condemned if it causes or threatens material injury to an established industry in an importing country. The imposition of anti-dumping duties is thus intended not to protect the market of the importing country from any external competition, but to re-establish fair and normal competition between national producers and the foreign producers concerned. The mere fact that the reference country imposes anti-dumping duties on imports from certain other countries does not, therefore, support the conclusion that the prices charged in that country do not result from genuine competition.

17 The national court has, however, put forward the hypothesis that the anti-dumping duties imposed by the United States of America on imports of potassium permanganate from China and Spain might have been intended less to prevent injury than to protect the position of the American producer on its national market.

18 The Council and the Commission have maintained, however, that there is nothing to provide a basis for that suspicion, and nothing has arisen in the course of these proceedings that is capable of casting doubt on that assertion. Moreover, the information supplied by those institutions and by the Spanish Government show that the anti-dumping duties imposed on imports from Spain were not levied in 1987, and their amount was significantly reduced in subsequent years. Finally, the national court's hypothesis conflicts with the statement in the 11th recital in the preamble to Regulation No 1531/88 to the effect that the prices charged by the American producer allow it to make a reasonable but not excessive profit.

19 The national court is also not convinced by the reasons which led the Community institutions to reject the alternative choices of India and Brazil as reference country. It states that various anti-dumping regulations, both before and after Regulation No 1531/88 and concerning the same product, show that India was rejected

on the ground that the prices there were considerably higher than those in the United States of America, but without the Commission or the Council having carried out any verifications in that regard. The national court also states that those institutions took the paucity of Indian production into account, whereas, according to the Court's case-law, that is not a decisive factor in the choice of a reference country. Finally, according to the national court, it was not possible to determine the reasons which led to Brazil being rejected at the time when Regulation No 1531/88 was adopted.

20 For their part, the Council and the Commission point out that the United States of America had already been chosen as reference country in a previous proceeding initiated in 1986 concerning the same product, and that the choice of that country once again, in the procedure for adopting Regulation No 1531/88, was made in agreement with the Community industry, without any objection being raised by either the Chinese exporter specifically referred to in the regulation or any Community importer. In those circumstances, they consider that they were not required to consider whether a more appropriate reference country existed or, in particular, to verify whether their information concerning India was still correct. According to information gathered in the course of the previous proceeding, India was the only other country with a market economy producing potassium permanganate, production methods there were on a cottage industry basis, total production capacity was very low and prices were actually higher than those charged on the American market. Finally, the Council and the Commission state that, although they did learn in 1994 of the existence of a potassium permanganate production site in Brazil, it has been shown that that site was not yet operational in that year.

21 Whilst the Council and the Commission are not in principle required to consider every reference country proposed by the parties during an anti-dumping proceeding, they are required to examine in greater depth the proposals submitted to them if they have doubts, or ought to have had doubts, concerning the country of their choice (see *Nölle*, cited above, paragraph 32).

22 In this case, however, the Council and the Commission did not, during the proceeding leading to the adoption of Regulation No 1531/88, receive any alternative proposal to the choice of the United States of America as reference country, even though that country had already been chosen in an earlier proceeding concerning the same product and the Chinese exporters and Community importers of potassium permanganate would not have failed, had they considered it necessary, to suggest a more appropriate country. In those circumstances, those institutions cannot be criticized for not having carried out a detailed examination of other potential reference countries.

23 The Council and the Commission have, moreover, convincingly explained their reasons for not opting for countries like India or Brazil, and Rotexchemie has not adduced the slightest evidence capable of casting doubt on their analysis. As regards the case of India in particular, whilst it is true, as the national court states, that the size of the domestic market is not in principle a factor capable of being taken into consideration in the choice of a reference country, it is also necessary for that market to be representative in relation to the exports in question (see *Neotype Techmashexport* v *Commission and Council*, cited above, paragraph 31). In this case, the characteristics of the Indian market in potassium permanganate put forward by the Council and the Commission abundantly demonstrate that that was not so. More generally, as the Advocate General points out in paragraph 30 of his Opinion, everything in this case points to the conclusion that the United States of America was indeed the only country with a market economy capable of being chosen as the reference country.

24 It follows from all the foregoing considerations that the normal value was determined 'in an appropriate and not unreasonable manner' within the meaning of Article 2(5)(a) of the basic regulation.

25 The answer to be given to the national court must therefore be that consideration of the question referred has revealed no factor of such a kind as to affect the validity of Regulation No 1531/88.

Costs

26 The costs incurred by the Spanish Government, the Council of the European Union and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the Finanzgericht Hamburg by order of 10 January 1996, hereby rules:

Consideration of the question referred has revealed no factor of such a kind as to affect the validity of Council Regulation (EEC) No 1531/88 of 31 May 1988 imposing a definitive anti-dumping duty on imports of potassium permanganate originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty imposed on those imports.

Moitinho de Almeida Sevón Gulmann

Puissochet Jann

Delivered in open court in Luxembourg on 29 May 1997.

R. Grass
Registrar

J. C. Moitinho de Almeida
President of the Fifth Chamber