JUDGMENT OF THE COURT (Fifth Chamber)
13 December 1989 *

In Case C-26/88

REFERENCE to the Court under Article 177 of the EEC Treaty by the Hessisches Finanzgericht (Finance Court, Hessen) for a preliminary ruling in the proceedings pending before that court between

Brother International GmbH, whose registered office is in Bad Vilbel, Federal Republic of Germany,

and

Hauptzollamt (Principal Customs Office) **Gießen**

on the interpretation of Articles 5 and 6 of Regulation (EEC) No 802/68 of the Council of 27 June 1968 on the common definition of the concept of the origin of goods (Official Journal, English Special Edition 1968 (I), p. 165),

THE COURT (Fifth Chamber)

composed of: Sir Gordon Slynn, President of Chamber, M. Zuleeg, R. Joliet, J. C. Moitinho de Almeida and G. C. Rodríguez Iglesias, Judges,

Advocate General: W. Van Gerven
Registrar: J. A. Pompe, Deputy Registrar

after considering the observations submitted on behalf of

Brother International GmbH, by G. Laule, Rechtsanwalt, Frankfurt am Main,

* Language of the case: German.

the French Government, by E. Belliard and C. Chavance, acting as Agents,

the Netherlands Government, by H. J. Heinemann, acting as Agent,

the Commission of the European Communities, by its Legal Adviser, J. Sack, assisted by R. Wagner, acting as Agents,

having regard to the Report for the Hearing and further to the hearing on 16 February 1989,

after hearing the Opinion of the Advocate General delivered at the sitting on 16 March 1989,

gives the following

Judgment

1 By an order of 17 December 1987, which was received at the Court on 25 January 1988, the Hessisches Finanzgericht referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of Articles 5 and 6 of Regulation (EEC) No 802/68 of the Council of 27 June 1968 on the common definition of the concept of the origin of goods (Official Journal, English Special Edition 1968 (I), p. 165).

2 Those questions were raised in proceedings between Brother International GmbH (hereinafter referred to as 'Brother') and Hauptzollamt Gießen (hereinafter referred to as 'the Hauptzollamt') on the question of the post-clearance recovery of anti-dumping duties.

3 In 1984 and 1985 Brother imported electronic typewriters from Taiwan into the Federal Republic of Germany and declared them to originate in Taiwan.

4 In December 1985 the Commission initiated anti-dumping proceedings in relation to the importation of electronic typewriters originating in Taiwan (Official Journal 1985, C 338, p. 7). Those proceedings were terminated by the Commission decision of 23 May 1986 (Official Journal 1986, L 140, p. 52) on the ground that the goods did not originate in Taiwan. In the latter decision the Commission stated *inter alia* 'that the operations carried out in Taiwan were not sufficient to confer Taiwanese origin on the products within the meaning of Council Regulation (EEC) No 802/68'.

5 Brother Industries Ltd of Japan, Taiwan Brother Industries Ltd of Taiwan and Brother International Europe Ltd of the United Kingdom brought an action before the Court of Justice for a declaration that the aforementioned Commission decision was void and challenged the Commission's decision not to recognize the Taiwanese origin of the goods. The action was dismissed as inadmissible by Order of 30 September 1987 in Case 229/86 [1987] ECR 3757 on the ground that the contested decision did not adversely affect the applicants since the decision on origin was a matter for the national authorities in respect of which there might be a reference for a preliminary ruling.

6 Following an inspection carried out at Brother's premises in September 1986 the German authorities concluded that electronic typewriters imported by Brother from Taiwan must be regarded as originating in Japan and that they therefore came within the scope of Council Regulation (EEC) No 1698/85 of 19 June 1985 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan (Official Journal 1985, L 163, p. 1). Accordingly the Hauptzollamt, by a post-clearance recovery decision of 12 May 1987, claimed from Brother arrears totalling DM 3 210 277.83 as anti-dumping duty.

7 Brother lodged an objection to that decision and applied to the Hauptzollamt for a stay of enforcement. Following the rejection of its request, Brother brought proceedings before the Hessisches Finanzgericht for a stay of enforcement of the decision ordering post-clearance recovery of duty and, if appropriate, for its annulment. In support of its application, it essentially stated that there was a fully equipped factory in Taiwan in which separate parts manufactured mainly in Japan and imported into Taiwan had been assembled into ready-to-use typewriters. It considers that the typewriters in question must therefore be deemed to originate in

Taiwan. In its view there can be no question of evasion of the law if only because the factory in Taiwan had already been in existence before the rules laying down anti-dumping duties entered into force and typewriters manufactured in that factory had been exported to the Federal Republic of Germany since 1982.

8 The Hauptzollamt considered that Brother's factory in Taiwan was a 'screwdriver factory' which did no more than unpack and assemble separate parts. In its view such an operation does not constitute a substantial process or operation that is economically justified and determines origin. Even if the process were deemed to determine origin there were grounds in the Hauptzollamt's opinion for levying anti-dumping duty since the transfer of the final assembly from Japan to Taiwan fully justified the presumption that the sole object of the transfer was to circumvent the rules on anti-dumping duties.

9 The Hessisches Finanzgericht considered that its decision depended on the interpretation of Articles 5 and 6 of Regulation (EEC) No 802/68 and by order of 17 December 1987 referred the following questions to the Court for a preliminary ruling:

'Is Article 5 of Regulation (EEC) No 802/68 of the Council of 27 June 1968 on the common definition of the concept of the origin of goods (Official Journal, English Special Edition 1968 (I), p. 165) to be interpreted as meaning that even the mere assembly of imported, previously manufactured, individual parts into a new article, as the last substantial process or operation that is economically justified, determines the origin of the article, or, apart from assembly, is a separate intellectual contribution also necessary for assembly to determine the origin?

If the mere assembly of previously manufactured, individual parts determines the origin for the purposes of Article 5 of Regulation (EEC) No 802/68, is Article 6 thereof to be interpreted as meaning that the mere fact that exports are diverted using existing manufacturing premises justifies the presumption that the object of the diversion is to circumvent the applicable provisions on anti-dumping duty?'

10 Reference is made to the Report for the Hearing for a fuller account of the facts of the main proceedings, the course of the procedure and the observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The interpretation of Article 5 of Regulation (EEC) No 802/68

11 In its first question the national court is essentially asking under what conditions the mere assembly of previously manufactured parts originating in a country other than that of assembly suffices to confer on the resulting product the origin of the country where the assembly took place.

12 Article 5 of Regulation (EEC) No 802/68 provides:

'A product in the production of which two or more countries were concerned shall be regarded as originating in the country in which the last substantial process or operation that is economically justified was performed, having been carried out in an undertaking equipped for the purpose, and resulting in the manufacture of a new product or representing an important stage of manufacture'.

13 Brother considers that the conditions set out in Article 5 are of a technical nature and that an assembly constitutes a classic processing operation for the purposes of that provision in so far as it consists, as in the present case, of assembling a large number of parts to form a new coherent whole. An implementing regulation adopted under Article 14 of Regulation No 802/68 laying down the conditions for conferring origin might define the economic criteria of an assembly but not criteria in relation to its intellectual content.

14 The Commission considers on the other hand that the mere assembly of previously manufactured parts should not be regarded as a substantial process or operation within the meaning of Article 5 of the regulation where, in view of the work involved and the expenditure on materials on the one hand and the value added on the other, the operation is clearly less important than other processes or operations carried out in another country or countries.

15 It is clear from Article 5 as interpreted in previous judgments of the Court that the decisive criterion is that of the last substantial process or operation. That view is moreover confirmed by Rule 3 of Annex D.1 to the International Convention on

the simplification and harmonization of customs procedures (the Kyoto Convention), which was accepted on behalf of the Community by Council Decision 77/415/EEC of 3 June 1977 (Official Journal 1977, L 166, pp. 1 and 3). Rule 3 reads 'Where two or more countries have taken part in the production of the goods, the origin of the goods shall be determined according to the substantial transformation criterion'.

6 Article 5 of Regulation No 802/68 does not specify to what extent assembly operations may be regarded as a substantial process or operation. Rule 6 of the Kyoto Convention states that

'operations which do not contribute or which contribute to only a small extent to the essential characteristics or properties of the goods, and in particular operations confined to one or more of those listed below, shall not be regarded as constituting substantial manufacturing or processing:

...

(c) simple assembly operations;

...'.

17 'Simple assembly operations' means operations which do not require staff with special qualifications for the work in question or sophisticated tools or specially equipped factories for the purposes of assembly. Such operations cannot be held to be such as to contribute to the essential characteristics or properties of the goods in question.

18 The Kyoto Convention confines itself to excluding from the concept of substantial process or operation simple assembly operations without specifying the conditions

under which other types of assembly may constitute a substantial process or operation. For such other types of assembly it is necessary to determine in each case and on the basis of objective criteria whether or not they represent a substantial process or operation.

19 An assembly operation may be regarded as conferring origin where it represents from a technical point of view and having regard to the definition of the goods in question the decisive production stage during which the use to which the component parts are to be put becomes definite and the goods in question are given their specific qualities (see the judgment of 31 January 1979 in Case 114/78 *Yoshida* v *Industrie und Handelskammer Kassel* [1979] ECR 151).

20 In view however of the variety of operations which may be described as assembly there are situations where consideration on the basis of technical criteria may not be decisive in determining the origin of goods. In such cases it is necessary to take account of the value added by the assembly as an ancillary criterion.

21 The relevance of that criterion is moreover confirmed by the Kyoto Convention the notes of which in relation to Rule 3 of Annex D.1 state that in practice the substantial transformation criterion can be expressed by the *ad valorem* percentage rule, where either the percentage value of the materials utilized or the percentage of the value added reaches a specified level.

22 As regards the application of that criterion and in particular the question of the amount of value added which is necessary to determine the origin of the goods in question, the basis should be that the assembly operations as a whole must involve an appreciable increase in the commercial value of the finished product at the ex-factory stage. In that respect it is necessary to consider in each particular case whether the amount of the value added in the country of assembly in comparison with the value added in other countries justifies conferring the origin of the country of assembly.

23 Where only two countries are concerned in the production of goods and examination of technical criteria proves insufficient to determine the origin, the mere assembly of those goods in one country from previously manufactured parts originating in the other is not sufficient to confer on the resulting product the origin of the country of assembly if the value added there is appreciably less than the value imparted in the other country. It should be stated that in such a situation value added of less than 10%, which corresponds to the estimate put forward by the Commission in its observations, cannot in any event be regarded as sufficient to confer on the finished product the origin of the country of assembly.

24 The origin of goods which have been the subject of assembly operations must be determined on the basis of the abovementioned criteria without it being necessary to determine whether the assembly involves any intellectual contribution, that criterion not being envisaged in Article 5.

25 In view of the foregoing, the answer to the first question must be that the mere assembly of previously manufactured parts originating in a country different from that in which they were assembled is sufficient to confer on the resulting product the origin of the country in which assembly took place, provided that from a technical point of view and having regard to the definition of the goods in question such assembly represents the decisive production stage during which the use to which the component parts are to be put becomes definite and the goods in question are given their specific qualities; if the application of that criterion is not conclusive, it is necessary to examine whether all the assembly operations in question result in an appreciable increase in the commercial, ex-factory value of the finished product.

The interpretation of Article 6 of Regulation (EEC) No 802/68

26 In its second question the national court is asking whether the transfer of the assembly from the country of manufacture of the component parts to a country where use is made of already existing factories in itself justifies the presumption that the sole object of the transfer was to circumvent the applicable provisions, and in particular the application of anti-dumping duties, within the meaning of Article 6 of the Regulation.

27 Article 6 provides that

'any process or work in respect of which it is established, or in respect of which the facts as ascertained justify the presumption, that its *sole* object was to circumvent the provisions applicable in the Community or the Member States to goods from specific countries shall in no case be considered, under Article 5, as conferring on the goods thus produced the origin of the country where it is carried out'.

28 The transfer of the assembly from the country where the parts are manufactured to another country where use is made of factories already in existence is no ground in itself for such a presumption. There may be other reasons to justify such a transfer. Where however the transfer of the assembly coincides with the entry into force of the relevant rules, the trader concerned must prove that there were reasonable grounds, other than avoiding the consequences of the provisions in question, for carrying out the assembly operations in the country from which the goods were exported.

29 The answer to the second question put by the national court must therefore be that the transfer of assembly from the country in which the parts were manufactured to another country in which use is made of existing factories does not in itself justify the presumption that the sole object of the transfer was to circumvent the applicable provisions unless the transfer of assembly coincides with the entry into force of the relevant regulations. In that case, the manufacturer concerned must prove that there were reasonable grounds, other than avoiding the consequences of the provisions in question, for carrying out the assembly operations in the country from which the goods were exported.

Costs

30 The costs incurred by the French and Netherlands Governments and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the proceedings 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 questions referred to it by the Hessisches Finanzgericht, by order of 17 December 1987, hereby rules:

(1) **The mere assembly of previously manufactured parts originating in a country different from that in which they were assembled is sufficient to confer on the resulting product the origin of the country in which assembly took place, provided that from a technical point of view and having regard to the definition of the goods in question such assembly represents the decisive production stage during which the use to which the component parts are to be put becomes definite and the goods in question are given their specific qualities; if the application of that criterion is not conclusive, it is necessary to examine whether all the assembly operations in question result in an appreciable increase in the commercial, ex-factory value of the finished product.**

(2) **The transfer of assembly from the country in which the parts were manufactured to another country in which use is made of existing factories does not in itself justify the presumption that the sole object of the transfer was to circumvent the applicable provisions unless the transfer of assembly coincides with the entry into force of the relevant regulations. In that case, the manufacturer concerned must prove that there were reasonable grounds, other than avoiding the consequences of the provisions in question, for carrying out the assembly operations in the country from which the goods were exported.**

Slynn Zuleeg

Joliet Moitinho de Almeida Rodríguez Iglesias

Delivered in open court in Luxembourg on 13 December 1989.

J.-G. Giraud
Registrar

Gordon Slynn
President of the Fifth Chamber