REPORT FOR THE HEARING
delivered in Case C-26/88 *

I — Facts and procedure

In 1984 and 1985 Brother International GmbH (hereinafter referred to as 'Brother') imported electronic typewriters from Taiwan into the Federal Republic of Germany. Brother declared the typewriters as being goods originating in Taiwan and had them cleared for storage in non-bonded warehouses and, from the beginning of 1985, for release into free circulation.

An anti-dumping proceeding concerning imports of electronic typewriters originating in Taiwan, opened by the Commission in December 1985 (Official Journal 1985, C 338, p. 7) was terminated by a Commission Decision of 23 May 1986 (Official Journal 1986, L 140, p. 52). In the preamble to the decision it was indicated *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'.

Brother Industries Ltd of Nagoya, Taiwan Brother Industries Ltd and Brother International Europe Ltd brought proceedings for a declaration that that decision was void. On 30 September 1987 the Court dismissed their application as inadmissible (Case 229/86 [1987] ECR 3757).

In the course of an inspection carried out at Brother's premises in September 1986, the German authorities came to the conclusion that the electronic typewriters imported by Brother from Taiwan were to be regarded as goods originating in Japan and therefore falling under Council Regulation No 1698/85 of 19 June 1985 (Official Journal 1985, L 163, p. 1), which imposed a definitive anti-dumping duty on imports of electronic typewriters originating in Japan. Thereupon, the Hauptzollamt Gießen issued a notice of assessment of 12 May 1987 in which it demanded that Brother pay DM 3 210 277.83 by way of anti-dumping duty. Brother lodged an objection against that notice on the grounds that there was a fully equipped factory in Taiwan in which individual parts which had been manufactured in Japan were assembled and that the typewriters were therefore of Taiwanese origin. At the same time Brother also asked for a stay of enforcement of the notice of assessment. The Hauptzollamt Gießen rejected its application whereupon Brother applied to the Hessisches Finanzgericht to stay or annul the enforcement of the notice of assessment.

The Finanzgericht takes the view that its decision is dependent on the interpretation of Articles 5 and 6 of Regulation No 802/68 under which the origin of the goods in question is to be determined. The Finanz-

* Language of the case: German

gericht expresses doubt as to whether mere assembly in so-called screwdriver plants can serve to determine the origin, especially when, as in this case, all the individual parts are delivered and merely assembled, or whether some intellectual input is also necessary. It may also be necessary to clarify whether the use of existing manufacturing capacities and the diversion of patterns of trade justify a presumption that the object pursued is to circumvent the applicable provisions within the meaning of Article 6 of Regulation No 802/68. In the light of the foregoing the Finanzgericht, by order of 17 December 1987 which was received at the Court Registry on 25 January 1988, referred the following questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

'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?'

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities, written observations were submitted by Brother, represented by Rechtsanwalt G. Laule, avocat, by the Government of the French Republic, represented by E. Belliard and C. Chavance, acting as Agents, by the Netherlands Government, represented by H. J. Heinemann, acting as Agent, and by the Commission of the European Communities, represented by its Legal Adviser, J. Sack, assisted by R. Wagner, a German judge seconded to the Commission in the context of the exchange with national civil servants.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry and, under Article 95(1) of the Rules of Procedure, assigned the case to the Fifth Chamber.

II — Written observations submitted to the Court

1. *Interpretation of Article 5 of Regulation No 802/68*

(a) Brother takes the view that the assembly of electronic typewriters is a classic case of an 'operation' within the meaning of Article 5 of Regulation No 802/68 since a new integral whole is made out of a number of individual parts. It is not possible to

introduce criteria of origin which go beyond the wording of Article 5, such as the requirement that there be an intellectual or creative input. The decisive factor in deciding which country is to be regarded as the country of origin is simply that the last substantial process or operation that was economically justified was carried out there in an undertaking equipped for that purpose, and that it led to the manufacture of the new product or an important stage of manufacture.

The Court's case-law (judgments in Case 114/78 *Yoshida* v *IHK Kassel* [1979] ECR 151 and in Case 49/76 *Gesellschaft für Überseehandel* v *Handelskammer Hamburg* [1977] ECR 41) indicates that the condition in Article 5 is to be interpreted as a technical test. Essentially, a comparison must be made between the new product and the raw material, and operations will only be recognized as conferring a particular origin if the input of labour, capital and resources justifies attributing the relevant goods to the economy of the country where the operation takes place. In contrast, the criterion of the economically justified process or operation is of minor significance and is fulfilled whenever the production of a profit-making undertaking is involved, which must be assumed to engage in economically justified activity.

In Brother's view, even the Commission and the Committee on Origin employ exclusively technical criteria in the assessment of assembly operations under Article 5. More economic criteria may only be introduced in the context of a regulation under Article 14 of Regulation No 802/68 but not to the extent that an assembly is measured according to its intellectual or creative content. The same applies for the criterion of the substantial operation which must also be assessed in the light of criteria of a technical nature. Under the rule in Article 5, origin is also essentially determined according to the technical characteristics of the operation in the place to which the origin is to be attributed. On the other hand, there is no basis in the wording of Article 5 for the requirement of intellectual or creative input in connection with assembly operations. Furthermore, such an interpretation is not compatible with the principles of legal certainty and the protection of legitimate expectation since such an indeterminate criterion would enable the rules of origin to be applied arbitrarily to individual production processes.

(b) In the view of the French and Netherlands Governments the mere assembly of electronic typewriters from imported, previously manufactured parts cannot be regarded as the last substantial process or operation that is economically justified and thereby serves to determine the origin of the product within the meaning of Article 5.

The Netherlands Government further observes that it is not decisive whether or not some intellectual input accompanies the assembly; the question must be assessed whether the qualities of the relevant product have been significantly altered and whether the costs involved in that operation represent a major part of the total cost of the product. In cases such as the present the

assembly may only be regarded as the last substantial process or operation if it entails more than a mere putting together of individual parts following a plan, if a reasonable proportion of the important components originate in the country of assembly and if the economic significance of the processes and operations can be shown by a reasonable added value. In that context, the Netherlands Government refers to the Kyoto Convention on the simplification and harmonization of customs procedures and in particular to Annex D.1 concerning rules of origin whereby simple assembly operations are not regarded as substantial processes or operations (Official Journal 1977, L 166, p. 3).

(c) The Commission takes the view that in principle the assembly of goods does not constitute a process or operation determining the origin of those goods since assembly does not create any specific new qualities which are not already present in the parts. This assessment is also consistent with Rule 2(a) of the general rules for the interpretation of the nomenclature of the Common Customs Tariff which states that any reference to a finished article also includes that article incomplete or unfinished.

Only assembly entailing considerable technical or time-consuming work can constitute a substantial process or operation within the meaning of Article 5 in which case two closely linked criteria must be applied, namely the input in labour and materials and the added value. Consequently, an assembly may determine origin when it is practically as costly as the production of the other components in a different country or when its significance is not appreciably less than that of the other manufacturing processes. Any other interpretation of Article 5 would remove the point of the link between measures of commercial policy and origin.

Valuable guidance regarding the assessment of the requisite added value may be found in Regulation (EEC) No 2632/70 of the Commission of 23 December 1970 on determining the origin of radio and television receivers (Official Journal, English Special Edition 1970 (III), p. 911) and Regulation (EEC) No 861/71 of the Commission of 27 April 1971 on determining the origin of tape recorders (Official Journal, English Special Edition 1971 (I), p. 243) which provide that where radios, televisions or tape recorders are assembled from previously manufactured parts an increase in value of at least 45% of the ex-works invoice price is required in a particular country before that country can be regarded as the country of origin.

The Commission suggests that the answer to the first question should be that the mere assembly of previously manufactured parts of a machine should not be regarded as a substantial process or operation within the meaning of Article 5 if, taking into account the input of labour and materials and the increase in value, this process is significantly less important than the other processes or operations carried out in another country or other countries.

2. *Interpretation of Article 6 of Regulation No 802/68*

(a) Brother takes the view that the diversion of exports using existing manufacturing premises does not *per se* justify the

presumption that there has been a circumvention of the applicable provisions within the meaning of Article 6. In the context of an international economy in which multinationals in particular are increasingly allocating work to different countries, such conduct might be attributable to a number of reasons such as, for example, a better use of capacity, cutting production costs or as a reaction to certain public administrative measures. If several such factors come into play, the conditions of Article 6 are not fulfilled since that article requires that the facts as ascertained justify the presumption that the *sole* object was to circumvent the applicable provisions. Finally, since that provision constitutes a derogation, it must be narrowly interpreted.

(b) The French Government observes essentially that it may be concluded that there has been a circumvention of the applicable provisions within the meaning of Article 6 when there is a strong presumption that the assembly took place in an undertaking which was not specially equipped for the manufacture of the products in question and when the corresponding trade statistics show a sharp increase in imports of that product, at the same time as a drop in the imports of the products which are normally manufactured in the same undertaking.

(c) The Commission favours a narrow interpretation of Article 6, namely that the circumvention of the applicable provisions must be the exclusive purpose of the process or operation in another country, not just one reason amongst many.

M. Zuleeg
Judge-Rapporteur