Appeal number: UT/2019/0022

CUSTOMS DUTY – Anti-dumping duty – origin of solar modules – whether Commission Implementing Regulation No 1357/2013 arguably invalid – reference made to CJEU

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

RENESOLA UK LTD **Appellant**

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL **THE HONOURABLE MR JUSTICE MARCUS SMITH**
JUDGE JONATHAN RICHARDS

Sitting in public at The Rolls Building, Fetter Lane, London on 11 and 12 February 2020

George Peretz QC and Yves Melin respectively instructed by, and of, Reed Smith LLP for the Appellant

Mark Fell instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The Appellant appeals against a decision (the "Decision") of the First-tier Tribunal (Tax Chamber) (the "FTT") released on 5 November 2018. In the Decision, the FTT dismissed the Appellant's appeal against HMRC's decision to impose anti-dumping duty of £836,411.95 and countervailing duty of £180,132.59 on imports of solar modules into the UK. Significantly for these proceedings, in reaching that decision, the FTT refused the Appellant's application for a reference to the Court of Justice of the European Union (the "CJEU", an abbreviation that we will also use to refer to the predecessor European Court of Justice) for a preliminary ruling on the question of validity of the Commission Implementing Regulation No 1357/2013 (the "Contested Regulation").

Background

2. Solar "modules" are assembled from solar "cells", individual units that are capable of generating electricity from sunlight. Ultimately solar modules are incorporated into solar photovoltaic systems ("PV systems") which can be connected and used in domestic electrical systems.

3. This appeal involves the competing rules potentially applicable to the determination of the place of origin of solar modules for customs duty purposes. It was common ground that the general rule applicable to the origin of goods is found in Article 24 ("Article 24") of Council Regulation 2913/92 (the "Customs Code") which provides as follows:

> **Article 24**
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> Goods whose production involved more than one country shall be deemed to originate in the country where they underwent their last, substantial, economically justified processing or working in an undertaking equipped for that purpose and resulting in the manufacture of a new product or representing an important stage of manufacture.

4. The Commission has power under Article 247 of the Customs Code to make regulations regarding the origin of goods. In the Contested Regulation, the Commission sought to exercise that power in relation to solar modules by specifying that the place of origin of solar modules is to be determined by reference to the place of origin of their constituent solar cells.

5. The Appellant imports solar modules into the UK. The solar modules are assembled in India, but contain (at least in the case of the modules here in issue) solar cells manufactured in China. Applying the Contested Regulation, HMRC determined that the solar modules originated in China, and calculated anti-dumping duty and countervailing duty accordingly. The Appellant, however, considers that an application of Article 24 would result in the solar modules being deemed to originate in India, so that no such duty is payable. Accordingly, the Appellant appealed to the FTT against HMRC's determination with its primary argument before the FTT being that the Contested Regulation produced an outcome that was, at least arguably, at odds with the provisions of Article 24 and that the FTT should make a reference to the CJEU to

determine whether the Contested Regulation was valid according to European Union law. The FTT dismissed the Appellant's appeal and, in doing so, declined to make any reference to the CJEU.

The Decision

6. The parties had different perspectives on the reasoning that the FTT applied in the Decision. Therefore, in this section, we will set out at, a reasonably high level, our conclusions on the decision that the FTT made and its principal reasons for coming to that decision. References in square brackets in this section are to paragraphs of the Decision unless we state otherwise.

7. The FTT started by directing itself on the relevant law ([8] to [13]). Neither party suggests that the FTT made any error of law in this section. In particular, both parties were agreed on the following propositions of law to which the FTT made reference:

> (1) The Commission has power to make the Contested Regulation so as to define the abstract concepts of Article 24 of the Customs Code with reference to specific processes or operations.
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> (2) In exercising its power to make the Contested Regulation, the Commission has a "margin of discretion". It is entitled to draw a line in a "grey area". However, it is not entitled to use the Contested Regulation to provide a determination of the origin of goods that is so at odds with Article 24 as to amount to a determination that "black is white".
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> (3) No UK court or Tribunal (including the FTT) has the power to declare the Contested Regulation invalid. If the FTT were satisfied that any challenge to the validity of the Contested Regulation is unfounded, it could quite properly make a decision to that effect. However, if the FTT considered that the Contested Regulation was invalid, it could not of itself make such a finding. A holding of invalidity falls within the exclusive jurisdiction of the CJEU. Accordingly, if the FTT considered that it could not decide that the Contested Regulation was valid, because it was of the view that the Contested Regulation was arguably invalid, it had the power to refer that question to the CJEU.

8. The FTT heard evidence from Mr Xu Zhongyu, a senior quality manager of the Appellant in China. At [17] to [48], the FTT summarised aspects of Mr Xu's evidence together with the submissions of the parties both as to conclusions that should be drawn from the evidence and matters of law.

9. The essence of the Appellant's case (see [26] to [30]) was that the process of manufacturing solar modules caused the resulting solar modules to be significantly and qualitatively different from their constituent solar cells. Therefore, at least arguably, the manufacture of solar modules (in India) represented the "last, substantial, economically justified processing or working" and was either an "important stage of manufacture" or resulted in a "new product". Accordingly, in the Appellant's submission, it was at least arguable that an application of Article 24 of the Customs Code would result in the solar modules being treated as originating in India. In those circumstances the Appellant

submitted that, even acknowledging the Commission's "margin of discretion" it was at least arguable that the Commission was not entitled to adopt measures set out in the Contested Regulation that resulted in the goods being treated as originating in China ([24]). Therefore, the Appellant argued that, before determining the appeal, the FTT should exercise its power to refer a preliminary question of validity of the Contested Regulation to the CJEU.

10. The Appellant's case, therefore, involved it making some assertions of fact (involving the process of manufacturing solar modules and the extent of relevant differences between the solar modules and their constituent solar cells) and some propositions of law (as to the extent of the Commission's power to provide, in the Contested Regulation, for a treatment different from that set out in Article 24 of the Customs Code).

11. The essence of HMRC's case was first (see [35]) that it was within the Commission's margin of discretion to define the abstract concepts in Article 24 by stipulating that, in the specific case of solar modules, those modules' origin should be determined by reference to the place of manufacture of the constituent solar cells. In addition (see [36] to [42]), HMRC were challenging some of the Appellant's factual assertions as to the extent of any relevant difference between solar cells and solar modules.

12. Having summarised the parties' respective cases, in the "Discussion" section, the FTT set out its conclusions and reasons. It started that section with the following paragraphs which prefaced an examination of the Appellant's assertions of fact:

> 49. In order to determine, in the first instance, whether the Commission has exceeded its margin of discretion it is necessary to consider whether the manufacturing of the module represents the "last substantial transformation" in producing the goods.
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> 50. ReneSola submits that it does because, firstly (and in summary), the cells do not generate electricity but the modules do and, secondly, the modules are weatherproofed and so more durable than the cells in use. The manufacturing of the modules therefore represents the point at which the use of the cells becomes definite and the particular qualities of the end product are established.

13. The FTT then reached the following factual conclusions that are relevant in this appeal.

14. It concluded (at [54]) that an individual solar cell does produce electricity. At [55], it made a finding that a solar module does not "itself" produce electricity. This finding has to be understood in context. Read as a whole, the FTT's conclusion was that, insofar as it was a collection of solar cells, a solar module did produce electricity, but it was not necessary for solar cells to be incorporated into a module in order for the individual cells to generate electricity. The FTT summarised its overall conclusion on this issue as follows:

> 57. I find that the characteristic of electricity production is, therefore, established when the cell is produced and not when a module is produced. The specific qualities of the product, being the generation of electricity from sunlight, are therefore established in the manufacture of the cells and not the manufacture of the modules.

15. At [58] to [61] the FTT dealt with the issue of lamination of solar cells as part of the process of manufacturing solar modules. It found (at [58]) that the process of laminating solar cells does not "change the cells", but rather simply makes those cells more durable. At [59], the FTT sought to address the extent of additional protection that a solar cell obtained from being incorporated in a solar module observing:

> 59. Although it was clear that cells can be readily broken when knocked against something else, no evidence was provided to show how quickly cells degrade in the environment in which they are normally used.

16. At [60], the FTT considered alternative ways in which solar cells could be protected saying:

> 60. There was no evidence provided to show that an installer could not create their own protective installation for cells where necessary; in particular, no evidence was supplied to show that the specific form of encapsulation used by ReneSola was required rather than (for example) placing the cells within a glass surround.

17. Having reached these conclusions, the FTT decided at [61] that:

> 61…the encapsulation, or weather-proofing, element of the module manufacturing provides convenience for users and so is a presentational change which does not result in a "real objective distinction in material qualities" of the cells.

18. At [62] to [65], the FTT considered the Appellant's evidence to the effect that the manufacturing process was complicated and expensive. However, having noted (at [63]) that, on the Appellant's case, the process of combining solar cells into solar modules produced only a 3% increase in the "essential function of electricity production", the FTT decided (at [64]):

> 64. Having considered the case law put to me, it is clear that whilst assembly activities may create a new product (as set out in *Brother*), it is because that assembly process is the production stage at which the use of the raw materials becomes definite and the goods in question are given their specific qualities. The complexity, or otherwise, of the assembly process does not define whether or not the goods are given their specific qualities at that stage. As I have already found that the use and specific qualities are determined at the cell manufacturing stage, it follows that the complexity or otherwise of the module manufacturing process does not make it the "last substantial transformation" for the purposes of Article 24.

19. At [66] to [77], the FTT dealt with other submissions made to it, the majority of which we do not need to address. For present purposes, we observe only that, at [68] and [69], the FTT returned to its theme (set out at [58] to [61]) of the significance of its

finding that solar cells could be used in a PV system without being incorporated in a solar module saying:

> 68. Mr Xu also stated after checking with colleagues in China that that cells could be used to generate a useable electrical current and did not offer any further evidence or reason why a person setting up a PV system would not be able to use cells to do so, other than the durability point which is considered elsewhere.
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> 69. I find therefore that it is not the case that cells cannot be used to create a photovoltaic system. It may that modules are easier to utilise in a PV system than the cells which are incorporated into the modules does not mean that modules are a new product or represent an important stage of manufacture for the purposes of the legislation. This is, in effect, similar to the position in *Hoesch* which found that, where there was no significant qualitative change in the raw material, there could not have been a substantial process or operation.

20. In its final section headed "Decision", the FTT pulled together its findings and reasoning as follows:

> **Decision**
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> 78. On the evidence put to me, the principal result of module manufacturing is that a number of cells are linked together in an array and to that array a weather-proofed enclosure has been added. Whilst this clearly involves complex processes, I find that the end result does not change the cells themselves nor does it represent the "last substantial process or operation", as follows.
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> 79. The linking together of the cells is, I find, a presentational change: the process collects the output of the cells but does not alter the characteristics of the cells. The weather-proofing of the cells is, I also find, a presentational change: it does not change the essential characteristic of the cells, being the production of electricity from sunlight. Both processes clearly make it easier for purchasers to use the cells but the essential characteristic of the product – the production of electricity from sunlight – is achieved at the cell production stage.
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> 80. I find, therefore, that the manufacturing of the modules is not the "last substantial process or operation" for the purposes of Article 24. Instead, I find that the manufacture of the solar cells is the "last substantial process or operation" as it is the process in which the use of the cells is fixed and the specific qualities of the final goods are established.
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> …
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> 82. I find, therefore, that the Appellant has not put forward a reasonably arguable case that the Commission exceeded its powers in the Contested Regulation so as to require me to refer the question of validity of the contested Regulation to the CJEU.
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> 83. The appeal is therefore dismissed.

21. The parties' written and oral submissions before us were concerned, to a significant extent, with the FTT's conclusion, at [82], to the effect that it would not refer a question to the CJEU with much of the focus being on whether the FTT had applied the correct approach in coming to that conclusion. However, as we explained to the parties during the hearing, this focus ran the risk of overlooking other important issues that the FTT had decided.

22. Significantly, at [80], the FTT decided on the basis of its findings of primary fact earlier in the Decision that an application of Article 24 alone would result in the solar modules having a place of origin in China, where the solar cells were manufactured. That was precisely the result that would arise from the application of the Contested Regulation. In other words, on the FTT's reasoning, the validity or otherwise of the Contested Regulation could never alter the outcome of the appeal. The same outcome pertained, whether Article 24 was applied or whether the Contested Regulation was applied. Even if, as the Appellant argued, the Contested Regulation was invalid, the question of origin would fall to be determined under Article 24 alone and, given the FTT's conclusion at [80], this would still lead to the appeal being dismissed.

23. We have set out our understanding of the FTT's reasoning in some detail because we consider – reading the Decision as a whole – that it was this identity of outcome as between Article 24 and the Contested Regulation that rendered (in the FTT's eyes) otiose the need for any consideration of the validity or otherwise of the Contested Regulation and so otiose the need for any reference to the CJEU. This, as it appears to us, was the logic of the FTT's decision and we have that point firmly in mind when considering the various challenges to the Decision that the Appellant advances.

The grounds of appeal

24. The Appellant has obtained permission to appeal on seven grounds. For reasons that we will come to, we do not consider that it is necessary to address all of those grounds. What is more, we consider that a number of the grounds of appeal can be elided and considered together. We summarise the Appellant's grounds of appeal, in the order that we consider them, as follows:

> (1) *Ground 4(ii): factual findings that overlooked evidence.* In deciding, at [59] to [61], that the incorporation of solar cells within solar modules represented a mere "presentational change" to the solar cells, the FTT erred in law by failing to take into account relevant evidence before it. Obviously, questions of fact are, in the first instance, questions for the FTT; and appeals to this Tribunal are on points of law alone. Nevertheless, where the FTT ignores evidence, an error of law is indicated. This was the substance of Ground 4(ii).
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> (2) *Grounds 1 and 6: error of law in the FTT's approach to the Contested Regulation.* The FTT erred in law by asking itself whether the Appellant's claim that the Contested Regulation is invalid was correct, rather than (as it should have done) whether the Appellant's contention was arguable. Specifically, the FTT should have realised that there were clear indications

on the face of both the Contested Regulation and other provisions of EU law (including decisions of the CJEU) that, at least arguably, the Contested Regulation was vitiated by errors of law.

(3) *Grounds 2, 3, 4(i), 5 and 7: application of the wrong test when determining "origin".* The FTT (at least arguably) applied the wrong test in deciding whether the incorporation of the solar cells into solar modules resulted in a "substantial transformation" or a mere "presentational change" or, alternatively, applied the test incorrectly to the facts that it found.

Ground 4(ii): failing to take into account relevant evidence

25. In response to a request by HMRC for further and better particulars prior to the hearing before the FTT, the Appellant confirmed that, in the FTT proceedings, it would be relying on what came to be referred to as the "durability argument". In essence, that argument relied on the proposition that, on their own, solar cells were fragile but that the process of manufacturing solar modules caused those modules, and their constituent solar cells, to have a technical characteristic of "durability", which the individual solar cells lacked. Specifically, the Appellant asserted that the process resulted in the cells incorporated within a module having greater resistance to ultra-violet light, greater loading strength and greater resistance to oxidisation and corrosion than they would have had on their own. This durability was, the Appellant argued, an essential feature of photovoltaic technology and meant that the "last substantial processing" for the purposes of Article 24 took place when the modules were manufactured and not at the earlier stage when the cells were produced.

26. In response to the durability argument, HMRC submitted that jurisprudence of the CJEU in, for example, *Zentrag* (Case C-49/76), *Gesellschaft für Überseehandel mbH v Handelskammer Hamburg* (Case 49/76) and *Hoesch Metals and Alloys GmbH v Hauptzollamt Aachen* (Case C-373/08) demonstrated that activities that amount to a mere "presentational change" in a product, without bringing about a significant qualitative change, do not constitute a "substantial processing" that is capable of conferring origin for the purposes of Article 24. HMRC argued that the process of manufacturing modules was nothing more than a presentational change.

27. At [58] to [61], the FTT was setting out its conclusions on the durability argument. Since the durability argument was an important part of the Appellant's case, those paragraphs are of corresponding significance to the Decision.

28. The Appellant's first criticism relates to the FTT's conclusion, at [59], that "no evidence was provided to show how quickly cells degrade in the environment in which they are normally used". The Appellant contended that there was ample evidence on this issue in a document annexed to Mr Xu's witness statement that explained the various stages in the manufacture of a solar module. One page in that document was headed "Why do we encapsulate solar cells?" and explained that, if a single cell is left exposed in the air without any protection, it can "easily" be oxidised or corroded, or "easily" destroyed by external forces such as wind, hail or snow. For that reason, the document explained that cells needed to be encapsulated within modules so as to "help

reduce the degradation of cells" and that, when so encapsulated, the cell could perform for "more than 25 years".

29. It was common ground that HMRC did not, in cross-examination, challenge the factual statements referred to in paragraph 28 above. Nevertheless, HMRC support the FTT's conclusion at [59], arguing that the FTT's conclusion was as to the absence of evidence as to how quickly cells degrade "in the environment in which they are normally used". Solar cells are normally used in PV systems. Therefore, HMRC submit, the Appellant should have provided specific technical evidence on the technical characteristics of cells, modules and PV systems to enable the FTT to reach a conclusion on the "durability argument" from a "technical point of view".

30. We reject this attempt to justify the Decision and we accept the Appellant's submission that, in reaching its conclusion at [59], the FTT was ignoring important and uncontested evidence that was properly before it. Solar cells are located in PV systems which, since they are designed to produce electricity from sunlight, are necessarily located outdoors where they are exposed to the elements. Mr Xu's evidence indicated that enclosing solar cells within solar modules offered material protection from the elements since whereas, as on their own they were fragile and "easily" corroded, once enclosed within a solar module, they could last for 25 years. He said explicitly in his witness statement that:

> It is only after lamination that modules acquire their basic properties such as UV resistance, mechanical loading strength, and anti-oxidisation and corrosion resistance.

31. Of course, the significance of that evidence needed to be assessed, but we reject HMRC's submission that there was "no evidence" as to how quickly cells degrade in the environment in which they are normally used or that some better "technical" evidence was needed.

32. In a similar vein, we agree with the Appellant that the FTT overlooked relevant evidence at [60] of the Decision. In that passage, the FTT concluded that "there was no evidence provided" to show that someone wishing to use solar cells could not simply create their "own protective installation" by (for example) simply placing cells within a glass surround. Yet the Appellant had led evidence that, because solar cells were fragile, but needed to be used in PV systems that were exposed to the elements, they adopted a technically difficult manufacturing process involving, for example, lamination of cells being conducted in a vacuum, in order to protect those cells. That a manufacturer of solar cells chose to adopt such a difficult process was at least some evidence that a person wishing to use fragile solar cells in an outdoor environment would not find it straightforward to create a suitably robust protective environment by enclosing the cells within a glass surround. The significance of that evidence, which was again uncontested, needed to be evaluated. The FTT did not do so, and thereby disregarded relevant evidence: the conclusion that there was "no evidence" on this point is unsustainable.

33. As we have observed, [58] to [61] of the Decision were important. In those paragraphs, the FTT was rejecting important aspects of the Appellant's argument on

"durability", which were themselves important strands of its submissions to the FTT on "origin". Moreover, given the decisions of the CJEU in, for example, *Zentrag*, the FTT's conclusion that the process of manufacturing cells involved a mere "presentational change" necessarily compelled a conclusion that the solar modules in question had an origin in China. We appreciate that the test for the country of origin of a given product involves a "multifactorial" approach that itself involves weighing different strands of evidence. It is a process in which an appellate tribunal ought to be slow to interfere. However, where a material aspect of this "multifactorial" approach is either overlooked or misstated, the conclusion reached by the fact finder cannot be permitted to stand as it is vitiated by an error of law consisting of a failure properly to take into account a relevant consideration or considerations.

Our approach to the Decision in the light of our decision on Ground 4(ii)

34. Given that we have identified an error of law in the Decision, our powers under section 12 of the Tribunals, Courts and Enforcement Act 2007 are as follows:

> **12 Proceedings on appeal to Upper Tribunal**
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> (1) Subsection (2) applies if the Upper Tribunal, in deciding an appeal under section 11, finds that the making of the decision concerned involved the making of an error on a point of law.
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> (2) The Upper Tribunal—
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> (a) may (but need not) set aside the decision of the First-tier Tribunal, and
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> (b) if it does, must either—
>
> (i) remit the case to the First-tier Tribunal with directions for its reconsideration, or
>
> (ii) re-make the decision.

35. We are in no doubt that we should exercise our power under section 12(2)(a) to set aside the Decision. Our reasoning is as follows:

> (1) As we noted in paragraphs 22 and 23 above, significant parts of the Decision turned on the coincidence of outcome between the application of Article 24 and the application of the Contested Regulation. Because the FTT found that the country of origin was the same, in the case of the modules, whichever test applied, the need for a reference in relation to the Contested Regulation was not apparent.
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> (2) The error of law we have identified was material to the FTT's decision, and it is entirely possible, absent this error, that the FTT would have concluded that the application of Article 24 and the application of the Contested Regulation give rise to different outcomes in the case of the solar modules here in issue.
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> (3) In these circumstances, it is appropriate that we should exercise our power under section 12(2)(a) to set aside the Decision. The more difficult question, particularly given the EU law dimension that arises if there is a

divergence in outcome between Article 24 and the Contested Regulation, is how we should dispose of the appeal, having set aside the FTT's decision.

36. The following options are open to us:

(1) We could remit the appeal back to the FTT for reconsideration and, in doing so, give the FTT guidance as to the principles of Article 24 to address the points made by the Appellant in this appeal. That would enable the FTT to examine again whether an application of the test of origin set out in Article 24 would produce a different outcome from that given by the Contested Regulation. If it would, the FTT could consider exercising its power to refer the question of validity of the Contested Regulation to the CJEU. By contrast, if the FTT considered that Article 24 and the Contested Regulation produced the same conclusion on origin, it might decide that no reference was necessary.

(2) This Tribunal could make a reference to the CJEU[1] requesting clarification of questions of EU law and, in the light of the CJEU's response to those questions, decide whether to remake the Decision or remit it to the FTT.

(3) We could remake the Decision without referring any preliminary question of EU law to the CJEU.

37. Without re-examining the question of how Article 24 would apply, it is impossible to determine which of these courses is the most appropriate. Accordingly, we turn to consider the question of how Article 24 would apply in relation to the country of origin of the solar modules here in issue. In setting out our conclusions on the application of Article 24 we are not, at this stage, necessarily re-making the Decision. What we are doing is seeking to determine which of the above three courses is the most appropriate in all the circumstances.

An initial application of Article 24 to the facts of this appeal

38. For the reasons set out below, applying Article 24 to the facts of this appeal as found by the FTT[2] could – and, based on our preliminary views would – lead to the conclusion that the solar modules do not have the same origin as their constituent solar cells, with the result that the Contested Regulation does produce a different outcome, in the circumstances of this appeal, from the outcome produced by Article 24 alone.

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[1] The parties were agreed that Article 86(2) of the Withdrawal Agreement concluded between the EU and the UK has direct effect in the UK by virtues of sections 1A and 7A of the European Union (Withdrawal) Act 2018 and permits this Tribunal to refer questions to the CJEU until the end of the transition period specified in the Withdrawal Agreement. This transition period will not end before 31 December 2020.

[2] After making due allowance for the aspects of the FTT's factual findings that we have determined to be flawed in our decision on Ground 1.

39. We did not understand the parties to differ significantly in their approach to the application of Article 24. In *Brother International GmbH* (Case C-26/88), the CJEU explained how the predecessor to Article 24 (Article 5 of Regulation (EEC) No 802/68) fell to be applied in determining whether the assembly of a product from constituent parts constituted a "substantial process". Two criteria were identified.

40. The CJEU identified the primary criterion as being of a technical nature saying, at [19] of its judgment:

> 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 judgement of 31 January 1979 in Case 114/78 *Yoshida v Industrie und Handelskammer Kassel* [1979] ECR 151).

41. The CJEU identified an ancillary criterion, framed in terms of the "value added" by the assembly operation in the following terms:

> 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.

42. The Court also gave some guidance as to how the ancillary criterion based on value added should be applied:

> 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.
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> 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 .

43. The FTT found as a fact that a solar cell does, on its own, produce electricity from sunlight (see [54]). The FTT went on to find (at [55]) that a solar module has no

electricity-generating function beyond that of its constituent solar cells. As a consequence of those findings, the FTT concluded at [57] that, in the words used by the CJEU in *Brother*, the "specific qualities" of the product, being the generation of electricity from sunlight, are established in the manufacture of the cells and not the manufacture of modules.

44. The FTT's findings of fact at [54] and [55] are not contested. Nevertheless, in our judgment, the totality of the facts demonstrates that the "specific qualities" of the solar module are only established when the solar cells are incorporated into modules and subjected to a technically difficult process of lamination, encapsulation and weather-proofing which confers durability and makes possible the practical generation of electricity in usable form. In particular:

> (1) While solar cells could still generate an electrical current from sunlight without being subjected to that process, it would not be practicable to use solar cells on their own outdoors given their fragility. By contrast, by incorporating solar cells in solar modules and subjecting them to an exacting process of lamination, encapsulation and weather-proofing, the solar cells can continue to produce electricity for up to 25 years (see the unchallenged evidence referred to in paragraph 28 above).
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> (2) The process of laminating, encapsulating and weather-proofing the cells is technically difficult. It involves soldering by high accuracy machines under a high uniformity of soldering temperature. Lamination of cells is conducted in a vacuum.[3] From this, we infer, in disagreement with the FTT, that it would not be possible for an ordinary consumer to use solar cells on their own in a PV system (which will necessarily be located outdoors) so as to generate a sustainable electrical current from sunlight. The solar cells are simply too fragile for that purpose and an ordinary consumer, without access to the sophisticated manufacturing techniques employed to encapsulate solar cells in solar modules, would not be able to devise a satisfactory method of protecting solar cells used directly in a PV system. That, we consider, indicates that there is a qualitative difference (namely durability) between solar modules and their constituent solar cells.
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> (3) An individual solar cell can produce relatively little electricity (just 0.62v)[4] which is clearly not suitable for the domestic production of electricity. A solar module does not itself produce electricity as the electricity output of a solar module is all generated by the modules'

[3] This is referred to at [62] of the Decision in a section summarising the Appellant's submissions. However, Mr Xu made similar statements in paragraph 22 of his witness statement. Since there is no suggestion that Mr Xu's evidence in this regard was challenged, we take it to be uncontroversial fact.

[4] See [36] of the Decision. Strictly, this figure appears in the FTT's summary of HMRC's submissions and is not, therefore, a finding of fact by the FTT. However, both parties appeared agreed that the figure was correct.

constituent solar cells. Nevertheless, it remains the case that the output of a solar module (at around 40v) is suitable for the domestic production of electricity. In part, of course, that is because a solar module contains a large number of solar cells. However, the FTT concluded that a solar module produces approximately 3% more electricity than the same number of cells linked in series (see [63]). We do not agree with the FTT's view that 3% is such a small figure that it should be ignored. Rather, in the circumstances of this appeal it provides a further reason why a solar module is something more than the sum of its parts.

(4) We acknowledge that neither solar cells nor solar modules themselves produce electricity in a form that can be used in domestic electrical systems. Solar cells produce a direct current, but domestic electrical systems require an alternating current. An "inverter box" is required to convert the direct current into an alternating current and the inverter box forms part of a PV system (rather than a solar module).[5] However, we do not consider that this reduces the force of the point at paragraph 44(3) above. The "specific quality" of a solar module remains the production of electricity from sunlight by means of a structure that offers the solar cells robust and necessary protection from the elements and the force of that conclusion is not diminished by the fact that a solar module needs to be connected to an inverter box in order for the electricity generated to be used in domestic electrical systems.

(5) The FTT concluded, at [71], that solar cells can be used in products that do not involve the production of electricity for use in electrical systems such as irradiance meters and light sensitive switches. The fact that there are other uses for such cells in our view points against the conclusion that a solar module acquires its "specific qualities" at the point of manufacture of its constituent solar cells.

45. We have reflected on the conclusions set out above in the light of the jurisprudence of the CJEU to the effect that a mere "presentational change" in a product cannot involve a "substantial process" for the purposes of Article 24 and so cannot confer origin. For example, in *Überseehandel*, the CJEU considered whether the process of grinding casein was origin-conferring. The Court said at [6] and [7] of its judgment:

> 6. Therefore, the last process or operation referred to in Article 5 of the regulation is only 'substantial' for the purposes of that provision if the product resulting therefrom has its own properties and a composition of its own, which it did not possess before that process or operation….
>
> 7. The grinding of a raw material such as raw casein to various degrees of fineness cannot be considered as a process or operation for the purposes of Article 5 of Regulation No 802/68 because the only effect of doing so is to change the consistency of the product and its

[5] See [22(4)] and [69] of the Decision

> presentation for the purposes of its later use; it does not bring about a significant qualitative change in the raw material.

46. The Appellant invited us to conclude that there is a common thread running through the decisions of the CJEU that a "presentational change" necessarily involves the division of a product into smaller parts and its packaging for sales. In addition to the decision in *Uberseehandel*, it referred to *Zentrag* (which dealt with the slicing and packaging of meat) and *Hoesch Metals* (which was concerned with the crushing of silicon blocks).

47. We do not agree that the cases referred to above set out a separate principle applicable to situations where a raw material is crushed, sliced or ground. Rather, we regard those cases as setting out a straightforward principle namely that if a process merely changes the presentation of a product that process is not "substantial" as the resulting product does not have "properties and a composition of its own which it did not possess before". The slicing of a product into smaller pieces is an example of such a situation, but the principle is not limited to such cases.

48. In a similar vein, we reject HMRC's submission that, since the CJEU determined at paragraph [14] of its decision in *Zentrag* that a "certain increase" in the time that meat will keep (as a consequence of being sliced and packaged) was insufficient to prevent the slicing and packaging being a "presentational change", it necessarily followed that increases in "durability" are inevitably presentational changes. The increase in "durability" conferred by the process of manufacturing modules is both more substantial than that identified in *Zentrag* and also is qualitatively different as it enables the cells to perform their desired function: the production of electricity from sunlight in an outdoors environment in a robust and sustainable way.

49. In our judgment, the points we make at paragraph 44 above demonstrate why the manufacture of solar modules does not involve a mere presentational change: solar modules have properties and a composition that the individual solar cells did not possess.

50. For the reasons we have given above, we consider that first technical criterion that the CJEU identified in *Brother* is decisive and results in the conclusion that the process of manufacturing solar modules was origin-conferring. It follows that we would answer the question of country of origin differently according to whether Article 24 or the Contested Regulation applies.

51. Returning, then, to the three options set out in paragraph 36 above, it is clear to us that neither we, nor the FTT, can remake the Decision without referring a preliminary question of EU law to the CJEU. In our judgment, a preliminary reference is obviously necessary:

> (1) We have reached the clear, if provisional, conclusion that the answer to the question of origin arising in this case is different, in a fairly fundamental way, according to whether Article 24 or the Contested Regulation applies.
>
> (2) Whilst it is possible that this difference in outcome is justifiable by reference to the Commission's margin of discretion in defining – by way of

the Contested Regulation – the abstract concepts in Article 24 more specifically, in our judgment whether this difference in outcome falls within or without the margin of discretion is *par excellence* a question for the CJEU, and not one for us.

(3) A preliminary reference of this question will determine, therefore, whether it is lawful to apply the Contested Regulation in this case or whether resort must be had to Article 24 alone. It is also highly likely, in our judgment, that the CJEU's answer to this question will shed further light on the conclusion we have reached on a preliminary basis that the subsequent work done to cells to render them into modules is not mere presentational change.

(4) For that reason, we end our consideration of Article 24 at this point. It is not necessary, at this stage, for us to consider the ancillary criterion involving "value added", and we do not do so.

Going forward

52. Of the options set out in paragraph 36 above, we reject the third for the reasons just given. We do not consider that we can properly determine this appeal without making a preliminary reference.

53. Nor do we consider that it is appropriate – at least at this stage – to remit the matter to the FTT. While the FTT did make errors of law in its evaluation of the facts, we do not consider that a full rehearing is necessary to correct those errors. That points against the first of the three options we have described.

54. That leaves the second approach: for us to make a reference to the CJEU. That is the course we have determined upon. It is obviously desirable that the reference be made to the CJEU as soon as practicable. We will only determine whether, and if so how, we should re-make the Decision once we have received the response from the CJEU to the questions we have decided we should refer. We do not consider that this renders our consideration of Article 24 in the context of this case either unnecessary or premature. Our purpose in setting out our views on Article 24 at this stage was (i) to explain why we consider that there are questions that should be referred to the CJEU and (ii) to provide a factual context to assist the CJEU in answering the questions we refer. If, once we have a response from the CJEU, any party wishes to suggest that our approach to Article 24 is flawed in the light of the conclusions that the CJEU expresses, we will listen to such submissions as part of our formal determination of this appeal.

55. It follows that we are satisfied that a preliminary question as to the validity of the Contested Regulation should be referred to the CJEU. We consider that, in light of this conclusion, it would be inappropriate to consider, or even set out, the other arguments presented to us most ably by the parties.

Disposition and the terms of the question referred

56. As we have said, we have identified errors of law in the Decision and the Decision is set aside. We will not at this stage re-make the Decision but instead will stay this

appeal pending the response of the CJEU to the preliminary question we are going to refer to it.

57. At this stage, we consider that the appropriate preliminary question to be referred is that set out in the skeleton argument of Mr Peretz QC and M. Melin:

> Is Commission Implementing Regulation 1357/2013/EU, to the extent that it purports to determine the country of origin of solar modules manufactured from materials coming from several jurisdictions by ascribing origin to the country where the solar cells were manufactured, contrary to the requirement in Article 24 of Council Regulation 2913/92/EEC (the Uniform Customs Code), namely that goods whose production involves more than one country shall be deemed to originate in the country where they underwent their last substantial economically justified processing or working in an undertaking equipped for that purpose and resulting in the manufacture of a new product or representing an important stage of manufacture, and hence invalid?

58. Within 6 weeks of release of this decision, by which time it should be clear whether there is to be any application for permission to appeal against our decision, both parties should make an application to the Tribunal (which should be agreed to the extent possible) addressing the following points:

(1) Whether the proposed question should be modified.

(2) Whether any other directions are required in connection with the making of the reference or whether it is sufficient for the appeal simply to be stayed pending the response of the CJEU.

(Signed on original)

MR JUSTICE MARCUS SMITH

JUDGE JONATHAN RICHARDS

RELEASE DATE: 4 March 2020