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REM 03/07

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 3-11-2008
COM(2008)6317 final

COMMISSION DECISION

Of 3-11-2008

**finding that post-clearance entry in the accounts of import duties is justified and
remission of those duties is not justified in a particular case**
(Only the Spanish text is authentic)

(Request submitted by the Kingdom of Spain)

(REM 03/07)

FR

COMMISSION DECISION

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(Only the Spanish text is authentic)

(Request submitted by the Kingdom of Spain)

(REM 03/07)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code¹,

Having regard to Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code²,

Whereas:

- (1) By letter of 4 June 2007, received by the Commission on 15 June, the Kingdom of Spain asked the Commission to decide whether, under Article 239 of Regulation (EEC) No 2913/92, the remission of import duties was justified in the following circumstances.
- (2) A Spanish firm (hereinafter "the interested party") imported for release for free circulation between 2002 and 2005 textile products falling under Chapter 61 of the Combined Nomenclature which were declared to have originated in Jamaica.
- (3) In accordance with Protocol I attached to Annex V to the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000 ("the Cotonou Agreement")³, the products in question, which originated in Jamaica, were at the time imported into the Community free of import duties upon presentation of EUR.1 movement certificates ("EUR.1 certificates").

¹ OJ L 302, 19.10.1992, p. 1.

² OJ L 253, 11.10.1993, p. 1.

³ OJ L 317, 15.12.2000, p. 3.

- (4) In the case in point, the interested party presented an EUR.1 certificate in support of each customs declaration for release for free circulation. The Spanish customs authorities accepted the declarations and granted preferential tariff treatment.
- (5) Following a mission to Jamaica carried out by representatives of several Member States and the European Commission from 7 to 24 March 2005 with a view to determining the origin of products exported under cover of EUR.1 certificates issued by the Jamaican authorities, it was found that the products in question exported by the interested party's supplier and by other Jamaican exporters under cover of EUR.1 certificates had not originated in Jamaica within the meaning of the rules of the Cotonou Agreement and were therefore subject to a customs duty of 12.4% in 2002, 12.2% in 2003 and 12% in 2004 and 2005. The materials imported from China had not been sufficiently processed within the meaning of the rules of preferential origin. Moreover, quantitative restrictions had applied to textile products traded between China and the Community up until the end of 2004.
- (6) The products in question had not been manufactured using only yarn, which is the condition for acceptance under the preferential tariff regime. In most cases, they had been made from clothing parts which came from the People's Republic of China, and in some cases finished clothing was simply being re-exported from China.
- (7) It was noted in particular that, in order to mislead the Jamaican authorities, the Jamaican exporters involved, including the interested party's supplier, generally declared the consignments imported into Jamaica from China as consisting basically of yarn and some pullovers whereas, in fact, they consisted basically of pullovers and secondarily of yarn. All the documents presented to customs when bringing the goods into the Garmex and Kingston free zones contained the same information and were therefore consistent. The firms involved then claimed to have manufactured the pullovers declared for export from the alleged imported yarn. The Jamaican exporters involved were all established in the Garmex and Kingston free zones.
- (8) In view of these facts and in the light of the conclusions reached by the mission, the Jamaican customs authorities decided to invalidate all the EUR.1 certificates for the textile products being investigated which were issued between 1 January 2002 and 30 December 2004.
- (9) As a result, the Spanish authorities initiated post-clearance recovery of the amount of the duties, namely EUR XXXXX, the sum for which the firm is applying for remission, invoking the existence of a special situation within the meaning of Article 239 of Council Regulation (EEC) No 2913/92.
- (10) In support of the request by the Spanish authorities, the interested party, acting pursuant to Article 905(3) of Regulation (EEC) No 2454/93, stated that it had taken note of the file which the Spanish authorities had sent to the Commission and it had made comments which had been annexed to the request sent to the Commission.
- (11) By letter of 14 November 2007, the Commission asked the Spanish authorities for additional information. The Spanish authorities replied by letter of 26 May 2008, received by the Commission on 16 June. Examination of the request was thus suspended between 15 November 2007 and 16 June 2008.

- (12) By letter of 28 July 2008, received by the interested party on 29 July, the Commission informed the interested party that it intended to adopt an unfavourable decision with respect to it, explaining the reasons for its objections.
- (13) By letter of 28 August 2008, received by the Commission on the same day, the interested party set out its position concerning the Commission's objections.
- (14) In accordance with Article 907 of Regulation (EEC) No 2454/93, the nine-month period within which a decision has to be taken by the Commission was, therefore, extended by one month.
- (15) In accordance with Article 907 of Regulation (EEC) No 2454/93, a group of experts composed of representatives of all the Member States met on 23 September 2008 within the framework of the Customs Code Committee (Repayment Section) to examine the case.
- (16) According to the request sent by the Spanish authorities to the Commission and the letter from the interested party dated 28 August 2008, remission was justified for the following reasons:
- the Jamaican authorities failed to fulfil their inspection obligations;
 - the Jamaican authorities were aware or should have been aware that the products exported to the Community did not satisfy the conditions for entitlement to the preferential treatment between the Community and the ACP countries;
 - the Commission had made an error in not informing the importers of the doubts it had concerning the validity of the EUR.1 certificates issued by the Jamaican authorities;
 - the interested party had always acted in good faith and no deception or obvious negligence could be attributed to it.
- (17) Since the request by the interested party is based essentially on the fact that, in its view, the competent Jamaican authorities committed an error within the meaning of Article 220(2)(b) of Regulation (EEC) No 2913/92, the Commission feels that it is appropriate to examine the request first under this Article and then under Article 239 of Regulation (EEC) No 2913/92.

I – Examination of the request under Article 220(2)(b) of Regulation (EEC) No 2913/92

- (18) Pursuant to Article 220(2)(b) of Regulation (EEC) No 2913/92, there can be no post-clearance entry in the accounts where the amount of duty legally owed failed to be entered in the accounts as a result of an error on the part of the customs authorities which could not reasonably have been detected by the person liable for payment, the latter for his part having acted in good faith and having complied with all the provisions laid down by the legislation in force as regards the customs declaration.

A - Condition concerning an error on the part of the customs authorities

- (19) In this particular case, the granting of preferential tariff treatment was subject to the presentation of EUR.1 certificates. As already stated, these certificates have now been invalidated by the Jamaican authorities.
- (20) Article 220(2)(b) of Regulation (EEC) No 2913/92 states that, where the preferential status of the goods is established on the basis of a system of administrative cooperation involving the authorities of a third country, the issue of a certificate by those authorities, should it prove to be incorrect, constitutes an error which could not reasonably have been detected by the person liable for payment who had acted in good faith.
- (21) The issue of an incorrect certificate does not, however, constitute an error where the certificate was based on an incorrect account of the facts provided by the exporter.
- (22) It emerges from the file that the Jamaican exporters provided an incorrect account of the facts in order to obtain EUR.1 certificates. It must therefore be presumed that the authorities in question did not commit an error.
- (23) Under Article 220(2)(b), however, this presumption does not apply if it is clear that the authorities issuing the certificate were aware or should have been aware that the goods did not satisfy the conditions governing entitlement to preferential treatment.
- (24) As a result, in order to establish an error on the part of the Jamaican authorities, the interested party bears the burden of proving that it was evident that the authorities which issued the certificate were aware or should have been aware that the goods did not satisfy the conditions governing entitlement to [preferential treatment](#)⁴.
- (25) It is therefore necessary to examine the arguments put forward by the interested party to determine whether the competent Jamaican authorities were aware or should have been aware that the goods for which they had issued EUR.1 certificates did not, in fact, satisfy the conditions laid down in the Cotonou Agreement.

1. The Jamaican authorities failed to comply with their inspection obligations.

- (26) The interested party puts forward three arguments:
- (a) the Jamaican authorities did not fulfil the obligations laid down in national law;
 - (b) the Jamaican authorities did not carry out the inspections they should have when they received requests for post-clearance checks;
 - (c) the Jamaican authorities had been paid for services that they had not in fact provided.
- a) Compliance by the Jamaican authorities with their inspection obligations.
- (27) In its letter of 9 May 2006, annexed to the request sent by the Spanish authorities, the interested party takes the view that the Jamaican authorities did not comply with the provisions of Jamaican law stating that, once goods arrive on the quay, the competent authorities must remove seals, examine the content of containers, compare the content

⁴ Judgment of 9 March 2006 in *Beemsterboer* (Case C-293/04), paragraph 45.

with the description given in the shipping and import documents, and seize all containers which do not comply with the description. The firm also mentions an Internet site which indicates that the customs authorities failed to fulfil their obligations.

- (28) There is no indication whatsoever in the documents in Annex 7 to the interested party's letter or on the said Internet site that the authorities must conduct the checks in question. The texts simply indicate a number of duties that the authorities can decide whether or not to perform. The "Guidelines for officers authorised to sign preferential certificates" drawn up by the Jamaican authorities do not contradict this assessment as they do not make it compulsory to carry out systematic physical checks; instead they provide support for administrative services as regards any checks that are conducted.
- (29) The interested party uses the statements by Mr Owens, a customs employee who carried out the customs formalities for the Jamaican firms and in particular for the interested party's supplier, to support its assertion that the authorities had not fulfilled their inspection obligations. According to these statements, the Jamaican authorities rarely removed the seals from raw material containers, were almost never present to carry out an inspection of consignments and only very rarely went to the premises of the firms involved to check whether the yarn was actually being knitted there and hence to verify compliance with the rules on preferential origin.
- (30) In this respect, it must be pointed out once again that the customs authorities are not required to conduct systematic checks. Moreover, the fact that the consignments arrived in the free zone with the seals intact simply proves that these consignments were not handled before they entered the free zone. Lastly, the customs authorities were not obliged to check systematically that the knitting actually took place in the factories of the interested party's supplier. It is not in fact unusual for customs authorities to conduct mainly document-based checks and to carry out physical checks only occasionally.

b) Checks carried out following a request for post-clearance checks

- (31) In its letter of 9 May 2006, the interested party stated that, when the Member States' customs authorities asked the Jamaican authorities to check the accuracy of the EUR.1 certificates, the latter conducted only a few such checks or inspections of the activities engaged in by the firms concerned. The fact that in these cases the Jamaican authorities had replied to the Member States' authorities using a standard letter was also questionable.
- (32) It emerges from Article 32(3) of the above-mentioned Protocol that the authorities of the exporting country carry out any verifications they consider necessary, except when the importing country raises a question in the context of a request for a post-clearance check as this would require a special inspection (which was not the case here).
- (33) It is very clear from the case that a large number of requests for post-clearance checks concerned the validity of the stamps on the EUR.1 certificates. It is quite normal in such cases for the competent authorities to check whether the stamp used was in fact valid without carrying out more in-depth inspections. The use of standard letters is a practical way of replying to repeated requests.

(34) Lastly, the interested party considers that, since there were reasonable doubts concerning the validity of the EUR.1 certificates, the Jamaican authorities were required to carry out more thorough physical inspections of the manufacturing activities of the Jamaican firms. Before the 2005 mission there was nothing that could lead the Jamaican authorities to reasonably suspect that there were specific reasons for doubting the information provided by the firms. It is also clear from the report by the European Anti-Fraud Office (OLAF) that the Jamaican authorities were carrying out thorough documentary checks and that at least one inspection had been carried out on a consignment of goods in October 2004 (see point 2b) below). The same reasoning can be applied following the Commission's letter to the Jamaican authorities on 13 September 2004 proposing that they carry out an investigation in Jamaica. The arguments invoked by the Commission were in fact based on suspicions of fraud which needed to be substantiated by a subsequent investigation. Consequently, the fact that the Jamaican authorities issued EUR.1 certificates after receiving the Commission's letter of 13 September 2004 does not constitute an error on their part. It also emerges from the file that it is not possible to conclude that a random physical inspection or any inspection of the premises of the firms involved would have resulted in the fraud being detected. The Jamaican firms involved always imported yarn as well, and the pullovers exported were in fact made from yarn. Lastly, the factories had a large workforce and were well equipped, including with sewing-machines.

c) Payment for services that were not provided

(35) The interested party alleges that invoices were sent by the customs authorities to the Jamaican firms as evidence of the amount paid for *additional work carried out by their customs officers*. In fact, these invoices concerned only simple telephone conversations made by the officers to calculate the factories' working hours. The Jamaican authorities had therefore charged for an activity that was, in any event, compulsory.

(36) On this last point, the invoices in Annex 10 to the letter of 9 May 2006 do not mention which services are referred to. According to interviews that OLAF held with Mr Owens, customs officers must remain on duty in free zones outside the normal opening hours of customs offices. It seems, therefore, that, while the costs relate to normal inspection activities, these activities were conducted outside normal working hours, and this justifies the invoicing of the costs. In any case, this fact is not sufficient to prove an inspection error on the part of the Jamaican authorities or to indicate that the latter were aware or should reasonably have been aware that the goods in question did not satisfy the conditions set out in the Cotonou Agreement.

(37) Accordingly, the Commission considers that it cannot be deduced that the Jamaican authorities failed to comply with their inspection obligations. Above all, even if confirmed, none of the three arguments would contradict the fact that the exporter presented the facts incorrectly. Nor do they provide grounds for establishing that the competent authorities should have known that all the customs and commercial documents were inaccurate and that they could not issue EUR.1 certificates for the goods in question.

2. The Jamaican authorities were aware or should have been aware that the products exported to the Community did not satisfy the conditions governing

entitlement to preferential treatment between the Community and the ACP countries.

- (38) The interested party feels that there is sufficient evidence that the Jamaican authorities were aware or, at least, should have been aware that the manufacturers in question were not complying with the rules on preferential origin. The arguments invoked must be examined one by one.
- a) The Jamaican authorities should have been aware of the differences between production capacity and level of exports.
- (39) First, the interested party considers that the customs authorities relied on the inspections carried out by JAMPRO (Jamaican Promotion Bureau) and the Trade Board with a view to issuing EUR.1 certificates.
- (40) This is not, in fact, correct. As a result of the documentary inspections carried out by them when goods entered and left the free zone, the customs authorities had the necessary information to issue EUR.1 certificates. What made the documentary inspections pointless was the fact that the firms involved communicated erroneous but consistent information to one another.
- (41) Second, the interested party points out that JAMPRO conducted an audit of two of the factories in Jamaica in July 1998, including its supplier's factory. In both cases, JAMPRO noted that *it was clear that the firm's exports exceeded its production capacity* (but it cannot be deduced from this, however, that the exports in question were based on products made from imported raw material rather than, for instance, the sale of manufactured goods by other firms in the same group).
- (42) It should be pointed out here that the reports in question (Annex 11 to the above-mentioned letter of 9 May 2006) were drawn up following visits to the two firms concerned in July 1998 and cannot, therefore, be extrapolated to cover the period in question, viz. 2002-2004. Moreover, it emerges from the documents in Annexes 12 and 13 to the letter of 9 May 2006 that the Jamaican authorities had reached the conclusion that the differences between the level of exports and the production capacity of the two firms concerned arose from the fact that their actual working hours had not been taken into account by the competent departments. It cannot therefore be concluded that the authorities were aware or should have been aware that they could not issue EUR.1 certificates for the goods in question.
- b) The Jamaican authorities should have been aware of the incorrect descriptions given in the import declarations for the raw materials.
- (43) In this respect, the interested party refers to the statements by Mr Owens to the effect that the Jamaican authorities had conducted very few inspections of containers at the time of importation, yet they had noticed on several occasions that the description of the goods on the import declarations did not match the actual content of the containers. However, even when they had noticed such discrepancies, the authorities had handed the containers over to the Jamaican firms without imposing the slightest restriction. Lastly, the products made from the goods in the containers had been exported under cover of EUR.1 certificates.

- (44) These statements suggest that the Jamaican authorities very rarely checked imports and, when they carried out an inspection and discovered an irregularity, they did not take any further action. The interested party states in its letter of 28 August 2008 that, following the inspection in October 2004, after which a "notice of detention" was drawn up by the Jamaican authorities, the latter were in a position to detect the fraud. However, the fact that, following this inspection, the goods were handed back to the operator concerned cannot be criticised since the goods were being sent to the free zone and were not subject to customs duties while they remained there. Moreover, the importer in question (who was not the interested party's supplier) produced a letter containing credible explanations about the circumstances of the infringement. It is possible that this inspection was carried out after OLAF expressed doubts about the practices of the Jamaican firms concerned. It is important to point out that there is no evidence that an EUR.1 certificate was issued for the goods in question or that they were exported to the Community.
- (45) Lastly, the interested party refers to the conclusions of 23 March 2005 relating to the OLAF mission to back up its claim that the Jamaican authorities should have been able to detect the fraud on the basis of the documentary inspection (comparison of the Transshipment Shipping Bill or C36 and the supplier's invoice).
- (46) This is not correct as can be seen very clearly from the OLAF report of 9 September 2005. In order to conceal the exact nature of the goods imported from China into the free zone, the Jamaican firms constantly gave the impression that the imported goods were primarily yarn and secondarily a few samples of sweaters, whereas in fact the proportions were the reverse. Moreover, the description of the goods on the customs declarations mirrored the description of the goods on the shipment and commercial documents. Thus it would not have been possible to detect the fraud from a thorough check of these documents. It was only at the end of 2004 and for only six consignments that discrepancies were found in the declarations made by certain Jamaican firms (but not in those made by the interested party's supplier).
- c) The official statistics for imports and exports show that Jamaica's yarn imports were not sufficient to produce the quantities of finished products exported.
- (47) In its letter of 9 May 2006, the interested party stated that the Jamaican authorities should have seen from the import and export statistics produced by the Jamaican Ministry of Foreign Affairs and Foreign Trade that Jamaica's yarn imports were not sufficient to produce the quantity of finished products subsequently exported to the EU. It also considers that OLAF's report of 23 March 2005 corroborates this.
- (48) These statements are in fact based on a misinterpretation of the said report. The Jamaican statistics show clearly that only some of the goods exported from China were released for free circulation in Jamaica. The remainder were placed in a free zone in Jamaica and were not included in the statistics. And so it was only by comparing the export statistics for Chinese yarn with the export statistics for Jamaican clothing that it was possible for OLAF to establish that the products exported by Jamaica had not in fact been manufactured from yarn, this being a condition of eligibility for preferential treatment under the Cotonou Agreement. Despite the contrary view expressed by the interested party in its letter of 28 August 2008, the Commission considers that the Jamaican authorities cannot be criticised for not having had access to the Chinese statistics.

- (49) Since the Jamaican authorities did not possess the necessary information, it cannot therefore be concluded that they were aware or should have been aware, on the basis of the available statistics, that the products in question were not entitled to preferential treatment.
- (50) In addition, the interested party maintains that the Jamaican authorities did not in fact need the Chinese statistics to discover the fraud. In support of this, it refers to two letters from the Jamaican authorities, one sent to the United Kingdom authorities on 24 February 2000 and the other one to the Italian authorities on 23 February 2000. Apart from the fact that these two letters refer to a period prior to the recovery period in question here, it should be noted that in both letters the Jamaican authorities conclude that the EUR.1 certificates in question are valid and state that the differences discovered during an audit arose from differences in the basis of calculation used. It is not therefore possible, on the basis of these documents, to take the view that the Jamaican authorities should have known about the fraud committed by the Jamaican firms.
- (51) As a result, there is no point in comparing this case with those covered by the Commission decisions in REC 03/03, REM 21/02 and REM 28/01 (textiles from Bangladesh). It is very clear from those decisions, and in particular from recitals 22 to 25 to the Commission decision in REC 03/03, that they were founded on a set of arguments (policy followed by the country, request for derogation from the rules of origin applicable, etc.) that do not apply to this case.
- d) The Jamaican authorities were aware of the nature of the manufacturing activities of the Jamaican firms.
- (52) The interested party considers that there is evidence to show that the Jamaican authorities knew about the true nature of the manufacturing activities of the firms concerned. This evidence allegedly consists of reports on visits to its supplier and to the port authority of the Garmex free zone, where the firm was located, which clearly indicate that the customs officers in the free zone knew that the products in question were not manufactured from yarn.
- (53) It is true that some employees in the Garmex free zone (viz. "gate officers" who are security agents responsible for checking goods entering and leaving the zone) declared that the factories in question imported knitted and crocheted fabrics in order to finish off the clothing and also did some knitting⁵. It was on this basis that the Spanish tax administration official who took part in the Community mission of 30 March 2005 wrote in his report that officials in the free zone had indicated that no knitting was done in these factories, only sewing of fabrics that came from China⁶. The fact that two people responsible for checking movements into and out of the zone made the same statement does not mean, however, that the authorities were aware of the actual activities of the firms concerned. Thus, during the visit by the mission to the Jamaican port authority, the person responsible for the Kingston free zone stated that the firms concerned were "knitting companies". There are no grounds, therefore, for believing

⁵ See Annex 15 to the interested party's letter of 9 May 2006.

⁶ See Annex 16 to the interested party's letter of 9 May 2006. It should be noted that the employees in question were not government officials ("*funcionarios*"), contrary to what is stated in the Spanish report, but free-zone employees.

that the Jamaican authorities were aware of the true nature of the manufacturing activities of the Jamaican firms.

3. Other factors pointing to an error on the part of the Jamaican authorities

(54) The interested party puts forward in support of its claim four other arguments which are examined below one by one.

a) The minutes of the meetings held by the Jamaican authorities on 18 and 19 January 2006 to discuss the issues raised following the OLAF investigations

(55) It is true that the minutes of the meetings held by the Jamaican authorities in January 2006 indicate that they were concerned about the follow-up to the Community mission in 2005. It is also clear that these concerns deepened as a result of Mr Owens' affidavit. However, despite the fact that the authorities present at those meetings expressed the view that some of the allegations might be correct, in order to confirm or reject this view, the authorities concerned were asked to do some research, notably in relation to the documents presented to customs and the goods seized. Thus the minutes do not contain any specific analysis of the situation and are simply confined to raising a number of questions. They do not provide any grounds whatsoever for concluding that the competent Jamaican authorities were aware or should reasonably have been aware when they stamped the EUR.1 certificates that the goods exported did not satisfy the conditions governing entitlement to the preferential tariff regime set out in the Cotonou Agreement. The information concerning the goods which is mentioned in the minutes is the same information that became available to the Jamaican authorities after the Community mission in 2005.

b) Existence of an investment promotion policy in Jamaica, in particular in the textile sector

(56) With regard to Jamaica's export promotion policy, the interested party refers in particular to a JAMPRO website. This argument is by no means conclusive since it emerges from the above that the Jamaican authorities could not have known that the exported goods did not satisfy the conditions governing entitlement to the preferential tariff regime in question because of the fraud mechanism set up by the exporters. Moreover, a large number of countries have a similar export promotion policy, yet this does not undermine the quality of management of customs transactions.

c) The signing of a memorandum of understanding between the Jamaican Ministry of Foreign Affairs and OLAF in March 2005

(57) The draft memorandum of understanding (which was never signed) between the Jamaican Ministry of Foreign Affairs and Foreign Trade and OLAF dated March 2005⁷ was prepared on the initiative of the Jamaican authorities, who wanted to improve cooperation with OLAF precisely with a view to making it easier for them in future to detect the kind of fraud uncovered in this case.

d) The judgment of 27 January 2006 by the Milan Tax Court and the decision of 9 May 2008 by the Milan Regional Taxation Commission (Italy)

⁷ See Annex 17 to the interested party's letter of 9 May 2006.

- (58) The above judgment and decision do not contain any new factors likely to challenge the assessment set out above.
- (59) As already emphasised, the Jamaican authorities were misled by the exporters involved and, despite the inspections carried out, they could not detect the fraud committed because of the practices engaged in by the exporters. In this light of this, the Commission considers that there is no evidence that the Jamaican authorities were aware or should have been aware that the goods did not satisfy the conditions governing entitlement to preferential treatment. It must therefore be concluded that they did not commit an error within the meaning of Article 220(2)(b) of Regulation (EEC) No 2913/92.

4. The Commission allegedly committed an error by not informing the importers of the doubts about the validity of the EUR.1 certificates issued by the Jamaican authorities.

- (60) The interested party considers that the amount should not be entered in the accounts on the grounds that the Commission committed an error by not informing Community importers of the doubts it harboured regarding the validity of the EUR.1 certificates issued by the Jamaican authorities for the goods in question.
- (61) It must be pointed out first and foremost that there is no provision in Community law which explicitly obliges the Commission to warn importers when it has doubts as to the validity of customs transactions carried out by the latter under a preferential treatment regime. In accordance with the case law, the Commission can be obliged, under its general duty of diligence, to issue a general warning to Community importers only when it has serious doubts as to the legality of a large number of exports effected under a system of [preferential treatment](#)⁸.
- (62) However, at the time of the imports at issue, it was not established that the textile products imported from Jamaica originated in China. As stated in the OLAF letter of 13 September 2004, there were suspicions concerning the validity of the EUR.1 certificates issued by the Jamaican authorities, but these doubts needed to be substantiated by more thorough research which was conducted in the context of the joint mission of February 2005.
- (63) Thus the Commission did not commit any error as a result of a failure to provide information to importers.

B - Conditions regarding the good faith of the interested party and compliance with the rules in force as regards customs declarations

- (64) Since there is no error on the part of the competent authorities, there is no need to check whether the other two conditions under Article 220(2)(b) of Regulation (EEC) No 2913/92 are met.
- (65) Accordingly, the entry in the accounts of the amount of the duties is justified.

⁸ See the judgment of 11 July 2002 in *Hyper Srl* (Case T-205/99).

II – Examination of the request under Article 239 of Regulation (EEC) No 2913/92

- (66) Under Article 239 of Regulation (EEC) No 2913/92, import duties may be remitted in situations other than those referred to in Articles 236, 237 and 238 of this Regulation if they result from circumstances in which no deception or obvious negligence can be attributed to the person concerned.
- (67) It emerges from the case law of the Court of Justice of the European Communities that this provision constitutes a general equity clause and that the existence of a special situation is established where it is clear from the circumstances of the case that the person liable is in an exceptional situation as compared with other operators engaged in the same business and that, in the absence of such circumstances, he would not have suffered the disadvantage caused by the entry in the accounts a posteriori of customs duties⁹.

A. The condition concerning the existence of a special situation

- (68) It is appropriate to check in the case at issue whether the interested party's situation has to be regarded as an exceptional situation as compared with other operators engaged in the same business.
- (69) The interested party bases itself on the principle that the Jamaican authorities should have uncovered the fraud and would have done so had they made use of all the means available to them. It emerges from the above that the Jamaican authorities issued EUR.1 certificates for goods that did not satisfy the conditions governing entitlement to preferential treatment because the exporter concerned had provided an incorrect account of the facts. Hence the Jamaican authorities cannot be criticised for not having uncovered the fraud committed during the period in question as they had set up an effective documentary inspection system and as it is established that the firms concerned were operating a large business and were in fact also importing yarn. It is not possible, therefore, to consider that the firm was placed in a special situation within the meaning of Article 239 of Council Regulation (EEC) No 2913/92.
- (70) Furthermore, the Commission has not identified any other factors likely to constitute a special situation.

B. The condition concerning the absence of deception or obvious negligence

- (71) If there is no special situation, it is not necessary to verify whether the second condition referred to in Article 239 of Regulation (EEC) No 2913/92 is met.
- (72) The remission of import duties requested is therefore not justified,

⁹ Judgment of 10 May 2001 in *Kaufring AG* (Cases T-186/97, T-190/97 to T-192/97, T-211/97, T-216/97 to T-218/97, T-279/97, T-280/97, T-293/97 and T-147/99), ECR II-1337.

HAS ADOPTED THIS DECISION:

Article 1

1. The import duties amounting to EUR XXXXX which were the subject of the request from the Kingdom of Spain on 4 June 2007 must be entered in the accounts.
2. The remission of the import duties amounting to EUR XXXXXX requested by the Kingdom of Spain on 4 June 2007 is not justified.

Article 2

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 3-11-2008

For the Commission
László KOVÁCS
Member of the Commission