REM 03/05

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 7-5-2007
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NOT FOR PUBLICATION

COMMISSION DECISION

of 7-5-2007

finding that the remission of import duties is not justified in a particular case

(Only the French text is authentic)
(Request submitted by France)
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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 Code,[1] as last amended by Regulation (EC) No 1791/2006,[2]

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,[3] as last amended by Regulation (EC) No 214/2007,[4] and in particular Article 907 thereof,

1 OJ L 302, 19.10.1992, p. 1.
2 OJ L 363, 20.12.2006, p. 1.
3 OJ L 253, 11.10.1993, p. 1.
4 OJ L 62, 1.3.2007, p. 6.

Whereas:

(1) By letter dated 14 September 2005, received by the Commission on 16 September 2005, France asked the Commission to decide, under Article 239 of Regulation (EEC) No 2913/92, whether the repayment of import duties was justified in the following circumstances.

(2) Between 1 February 2000 and 29 August 2002 a French company (hereinafter referred to as "the interested party") imported a number of colour television receivers (hereinafter referred to as CTVs) made in Thailand.

(3) In November 1992, following a complaint from European television manufacturers, the Commission announced the initiation of an anti-dumping investigation concerning imports into the Community of colour television sets exported from or originating in Malaysia, China, Korea, Singapore, Thailand and Turkey. In its capacity as a Community producer, an importer into the Community of products manufactured in its factories in Thailand and Singapore and a producer/exporter in Thailand and Singapore through its Thai and Singapore subsidiaries, the interested party was both a complainant and a subject of investigation. Accordingly, in the course of the investigation, numerous contacts took place with the Commission's Directorate-General for Trade.

(4) Following the investigation, the Commission adopted Commission Regulation (EC) No 2376/94 of 27 September 1994 imposing a provisional anti-dumping duty on imports of colour television receivers originating in Malaysia, the People's Republic of China, the Republic of Korea, Singapore and Thailand.[5] A definitive anti-dumping duty was subsequently imposed under Council Regulation (EC) No 710/95 of 27 March 1995.[6]

(5) From 1994 to 2002 the interested party systematically declared the CTVs it imported from Thailand as originating in that country, thereby benefiting from a reduced anti-dumping duty of 3% (individual rate stipulated for its Thai subsidiary). It should be

[5] OJ L 255, 1.10.1994, p. 50.

[6] OJ L 73, 1.4.1995, p. 3. Regulation as last amended by Council Regulation (EC) No 2584/98 of 27 November 1998 (OJ L 324, 2.12.1998, p. 1).

pointed out in this connection that, for the purposes of applying the anti-dumping regulations, the origin of a product is determined on the basis of the provisions governing the non-preferential origin of the goods (Articles 22 to 26 of Regulation (EEC) No 2913/92). Furthermore, under the normal customs duty arrangements, imports into the Community of the relevant CTVs originating in Thailand qualified for preferential treatment under the System of Generalised Preferences. Under Article 81 of the aforesaid Commission Regulation (EEC) No 2454/93, if the products were covered by a Form A certificate issued by the competent Thai authorities, they were eligible for preferential tariff treatment when they were released for free circulation.

(6) In the rest of this Decision, save where explicitly stated to the contrary, the term "origin" refers to the non-preferential origin.

(7) Following the publication of a notice of impending expiry of the anti-dumping measures in force on imports of CTVs originating in Malaysia, China, Korea, Singapore and Thailand, an expiry review of the measures in force was requested by the manufacturers of television receivers in the Community. It was concluded in the course of the review that the CTVs exported to the Community by the interested party's Thai subsidiary during the investigation period (1 January to 31 December 1999) did not originate in Thailand but in Korea or Malaysia. The investigation culminated in the adoption of Council Regulation (EC) No 1531/2002 of 14 August 2002 imposing a definitive anti-dumping duty on imports of colour television receivers originating in the People's Republic of China, the Republic of Korea, Malaysia and Thailand and terminating the proceeding regarding imports of colour television receivers originating in Singapore.[7] This Regulation, which entered into force on 30 August 2002, attributes to the CTVs manufactured by the interested party's Thai subsidiary a rate of anti-dumping duty equivalent to 0% in the case of CTVs originating in Korea and Malaysia and a rate of 3% for CTVs originating in Thailand.

(8) On the occasion of an OLAF (European Anti-Fraud Office) mission to Thailand in February 2003, it was established that the CTVs imported into the Community from

[7] OJ L 231, 29.8.2002, p. 1. Regulation as last amended by Council Regulation (EC) No 511/2006 of 27.3.2006 (OJ L 93, 31.03.2006, p. 26).

the interested party's Thai subsidiary between 1 February 2000 and 29 August 2002 incorporated tubes of Malaysian and Korean origin; since no individual rate of anti-dumping duty was stipulated for that period for CTVs originating from those two countries and manufactured by the aforesaid subsidiary, the so-called residual rate of anti-dumping duty stipulated for those two countries (i.e. 23.4 % for Malaysia and 15.1 % for Korea) was therefore payable.

(9) In this connection, on 22 February 2005, the French authorities called on the interested party to pay back the amount of €XXXXX (i.e. €XXXXX for imports of CTVs recognised as originating in Malaysia and €411 403 for imports of CTVs recognised as originating in Korea), corresponding to the amount in respect of which the interested party had sought remission on the basis of Article 239 of the aforesaid Regulation (EEC) No 2913/92. Following the letter from the French authorities of 28 March 2007 in response to the Commission's letter of 10 January 2007, the amount in question was reduced to €XXXX (i.e. €XXXXX for imports of CTVs recognised as originating in Malaysia and €XXXXX for imports of CTVs recognised as originating in Korea).

(10) In support of the request for remission submitted by the French authorities, the interested party indicated, in accordance with Article 905 of Regulation (EEC) No 2454/93, that it had seen the dossier the authorities had sent to the Commission and it had nothing to add.

(11) Specifically, the interested party cited as likely to constitute a situation referred to in Article 239 of Regulation (EEC) No 2913/92 the fact that the Commission had allegedly modified, with effect from 2001, its attitude to the interpretation of the legal provisions concerning the origin of products; at the time of drafting of the 1994 and 1995 Regulations the Commission allegedly chose not to apply, at least as far as the interested party was concerned, the rules specific to origin as set out in Annex 11 to Regulation (EEC) No 2453/93, after which, from 2001 onwards, it allegedly adopted a different approach and sought to apply the aforementioned rules retroactively. The national authorities were said to have also subscribed to the Commission interpretation. The interested party claims that this behaviour constitutes a failing on the part of the Commission and the national customs authorities concerned. It also denies any deception or obvious negligence on its part.

(12) By letter of 28 October 2005 the Commission requested certain additional information from the French authorities. This information was sent to the Commission by letter dated 23 May 2006 and received on 29 May 2006.

(13) The administrative procedure was therefore suspended, in accordance with Articles 905 and 907 of Regulation (EEC) No 2454/93, between 29 October 2005 and 29 May 2006.

(14) By letter dated 4 October 2006, received by the interested party on 5 October 2006, the Commission notified the interested party of its intention to withhold approval and explained the reasons for this.

(15) After consulting the file on 19 October 2006 on Commission premises, the interested party stated its position on these objections and made a number of comments on the contents of the file by letter dated 3 November 2006 and received by the Commission on 4 November 2006.

(16) In accordance with Article 907 of Regulation (EEC) No 2454/93, the period of nine months within which the Commission decision must be taken was extended by one month.

(17) By letter of 1 December 2006 received by the interested party on 4 December 2006, the Commission addressed a reply to some of the comments made by the interested party by letter of 3 November 2006 together with an invitation to consult any documents not consulted on the occasion of the interested party's visit on 19 October 2006.

(18) After once more consulting the file on 13 December, the interested party made clear, by letter dated 20 December 2006 and received at the Commission the same day, that it was sticking to the position it had already adopted in its previous correspondence.

(19) By letter of 10 January 2007 the Commission found it necessary to ask the French authorities to verify the amount of anti-dumping duties that had been recovered and in respect of which remission had been requested in the present case. The detailed figures requested were sent to the Commission by letter dated 28 March 2007 and received at the Commission on 3 April 2007.

(20) The administrative procedure was therefore suspended, in accordance with Articles 905 and 907 of the aforementioned Regulation (EEC) No 2454/93, between 11 January 2007 and 3 April 2007.

(21) In accordance with Article 907 of Regulation (EEC) No 2454/93, a group of experts composed of representatives of all the Member States met to consider the case on 16 March 2007 within the framework of the Customs Code Committee (Repayment Section).

(22) Article 239 of Regulation (EEC) No 2913/92 allows import duties to be repaid or remitted in situations other than those referred to in Articles 236, 237 and 238 of that Regulation if they result from circumstances in which no deception or obvious negligence is attributable to the interested party.

(23) It follows from the case-law of the Court of Justice of the European Communities that this provision represents a general principle of equity designed to cover an exceptional situation in which an operator, which would not otherwise have incurred the costs associated with post-clearance entry in the accounts of customs duties, might find itself compared with other operators carrying out the same activity.

(24) As regards the arguments relating to a failing on the part of the Commission, the following points should be made.

(25) To begin with, the interested party maintains that throughout the period in question, and from the month of November 1993 at least, the Commission had all the information enabling it to know that the CTVs imported from Thailand by the interested party incorporated tubes of a value conferring ─ in accordance with Regulation (EEC) No 2632/70 of the Commission of 23 December 1970 on determining the origin of radio and television receivers,[8] and with effect from 1 January 1994, in accordance with Annex 11 to Regulation (EEC) No 2454/93 ─ Malaysian or Korean non-preferential origin on those imported CTVs, but that the Commission nevertheless waited until the findings of the review were presented in August 2001 to clearly draw that conclusion.

[8] OJ L 279, 24.12.1970, p. 35.

(26) This change in practice is said to have come about for either of the following two reasons: either the Commission had initially accepted the Thai origin of the CTVs incorporating Malaysian or Korean tubes produced by the interested party's Thai subsidiary and imported by the interested party and had knowingly prevented the application of the rules of origin laid down in Annex 11 to Regulation (EEC) No 2454/93 before changing its interpretation on the basis of the information letter addressed to the interested party on 1 August 2001 ("General disclosure document" – Annex 6 to the request), the underlying tactics of which were confirmed by Regulation (EC) No 1531/2002; or, alternatively, the Commission had wrongly interpreted the applicable rules thereby leading the interested party to believe incorrectly that Thai origin could be declared for CTVs incorporating Malaysian or Korean tubes, before correcting its approach at the time of the review enquiry opened in April 2000.

(27) Against this background, before completion of the enquiry and the introduction of provisional anti-dumping duty in October 1994, the interested party is said to have sent the Commission information, mainly purchase invoices and a memo on its procurement policy (prepared by its International Sourcing Manager), showing that its Thai subsidiary had changed its tube sourcing policy.

(28) In this connection, the following points should be made.

(29) In order to be considered relevant, the data provided by the interested party needed to cover the initial investigation period (1 July 1991 to 30 June 1992) and to involve CTVs exported to the Community; however, the investigation's findings, published in Regulations (EC) Nos 2376/94 and 710/95, clearly show that, during the investigation period, the interested party's Thai subsidiary did not use tubes originating in Korea or Malaysia. Furthermore, the 27th recital of Regulation (EC) No 2376/94 states very clearly that the investigation's findings as far as origin is concerned "are restricted to the investigation period and may well be different from the origin of the CTVs concerned before or after the investigation period". Through this provision, the Commission served clear notice on the operators concerned, including therefore the interested party, that they themselves would need to exercise great caution and vigilance in the event of any changes to the conditions under which such products are procured. The Commission therefore feels that, through this

provision, it has done enough to alert the operators concerned and therefore cannot be accused of having contributed to any misunderstanding on the part of the interested party.

(30) In addition, it should be noted that Article 1(2) of Regulation (EC) No 2376/94 states very clearly that the 3.1% rate mentioned in point (d) of the second table applies only to "CTVs originating in Thailand and manufactured by" the interested party's Thai subsidiary, thereby ruling out any ambiguity about the fact that this level of duty is applicable only if the CTVs concerned actually originate in Thailand. The same is true of Regulation (EC) No 710/95 imposing a definitive rate of anti-dumping duty of 3.0% applicable to CTVs originating in Thailand and manufactured by the interested party's Thai subsidiary. Furthermore, Article 2 of Regulation (EC) No 2376/94 states that the parties affected by the Regulation "may make known their views in writing and ask to be heard orally by the Commission within one month of the date of entry into force" of this Regulation. However, the interested party has not asked to be heard by the Commission either on the question of the change in sourcing in the post-investigation period or on the method of determining the origin of the CTVs.

(31) As regards the memo referred to in recital 27 and the purchase invoices for tubes mentioned by the interested party, it should be noted that these documents do not appear in the files of the anti-dumping investigation which resulted in the adoption of Regulations (EC) Nos 2376/94 and 710/95. Moreover, the Commission could not have deduced from them that the interested party was going to diversify all or a major part of its supplies. Moreover, even if this had been the case, it was up to the interested party to invoke the review procedures specifically provided for such situations[9], in order to fix an individual anti-dumping duty for its CTVs of Korean and Malaysian origin, and this it omitted to do.

(32) As for the change of approach concerning the application of the rules of origin, the Commission has found no evidence in the dossier to support this claim.

(33) First of all, it should be pointed out in this connection that the 32nd recital of Regulation (EC) No 2376/94 clearly states that the Commission had concluded with

[9] See Article 11 of Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community (OJ L 56, 6.3.1996, p. 1), Regulation as last amended by Regulation (EC) No 2117/2005 (OJ L 340, 23.12.2005, p. 17).

regard to the market-economy countries subject to the measures that "the most appropriate approach was to establish duties for these countries according to the origin of the products determined in accordance with Article 39 of and Annex 11 to Regulation (EEC) No 2454/93". This proves beyond all doubt that the Commission intended to apply the provisions in question and was therefore not seeking to disregard them.

(34) As far as the application of these rules is concerned, it should be noted that, as is apparent from a reading of Regulations (EC) Nos 2376/94 and 1531/2002, the interested party's Thai subsidiary changed its sources of supply between the initial investigation and the review. The same rules were indeed applied in an identical manner but, taking into account the change in sources of supply, the ensuing consequences are of course different. This fact cannot constitute a special situation.

(35) As for the claim that the competent Commission departments had misled the interested party by giving the impression that CTVs incorporating Malaysian or Korean tubes could be declared as originating in Thailand, it needs to be pointed out that the interested party has failed to come up with any factual evidence in support of this argument.

(36) Secondly, the interested party claims that it knew with certainty that their approach was correct, not only on account of the Commission's attitude but also in view of its familiarity with the methodology employed by the competent Commission departments when calculating the rate of anti-dumping duty for its Thai subsidiary. Specifically, the rate of 3% was determined on the basis of the "injury margin" of that subsidiary, itself based on its undercutting margin. The interested party would have been justified in considering that - taking into account the knowledge that it had of its own pricing policy, which was determinant in the context of calculating the undercutting margin of its Thai subsidiary - differentiated calculations based on considerations of origin could only result in establishing injury margins and therefore rates of anti-dumping duty that were extremely close (3%). On that basis, it would have been legitimate for the interested party to think that the Commission had considered that, for practical reasons, precise determination of the origin of the CTVs exported by the interested party's Thai subsidiary was not essential; the false declarations of origin made by the interested party would therefore have had no

impact on the rate of duty that would have been applicable to CTVs manufactured by their Thai subsidiary *on the assumption that* the latter had requested a review and obtained, before February 2000, distinct rates of anti-dumping duty, depending on the place of origin conferred on their CTVs through the incorporation of tubes originating in Korea or Malaysia.

(37) To accept such a rationale would be tantamount to admitting that a specific situation could be caused by a failure on the part of the interested party or its Thai subsidiary to request a review of the anti-dumping Regulation of 1995. Such an argument could only be regarded as relevant if the interested party was in a position to establish a causal link between, on the one hand, its own failure to act (or that of its subsidiary) and, on the other, the Commission's behaviour. No evidence whatsoever has been adduced to show that the Commission has contributed in any way to the interested party's incorrect reading of the situation whereby it could be prompted to declare as originating in Thailand the total Community production of CTVs by its Thai subsidiary and whereby it was not required to envisage the submission of a request for review in the event of any changes in its tube sourcing situation. On the contrary, recital 27 to the aforementioned Regulation (EC) No 2376/94 constituted a clear warning from the Commission that it considered a strict determination of the origin of the CTVs to be crucial.

(38) In the present case, therefore, there is no evidence of any failing associated with the Commission's behaviour that is likely to constitute a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.

(39) After presenting its arguments relating to the Commission's change of approach to the application of the rules set out in Annex 11 to Regulation (EEC) No 2454/93, the interested party also stresses that its situation was aggravated by the fact that an exceptionally long period of one year elapsed between the communication of the review's findings, in August 2001, and the initiation of the revised measures in August 2002, to the extent that during that period – which corresponds to a not inconsiderable portion of the period covered by the present recovery – the interested party was prevented from benefiting from the 0% duty to which it knew it was entitled for its imports from Thailand of CTVs of Malaysian and Korean origin.

(40) First, as demonstrated above, the interested party could have requested a review of Regulation (EC) No 710/95 in order to fix a specific anti-dumping duty for its CTVs as soon as it started using Korean and Malaysian tubes in its CTVs. If it had invoked the review procedure the proper rate would have been applied well before August 2001.

(41) Second, this argument fails to take account of the legislative procedure for adopting anti-dumping regulations. After the review investigation, which was completed on 31 December 1999, the Commission analysed the data it had collected during that period. Once it had completed its analysis it presented a written disclosure to the operators concerned, including the interested party, in accordance with the procedure laid down in Article 20 of Regulation (EC) No 384/96. This informed them of the conclusions of the investigation, and in particular the rates of anti-dumping duty, and invited them to submit any comments within a specified period, before the Commission submitted its proposal for the future Regulation (EC) No 1531/2002 to the Council. The Commission's proposal, taking account of any comments submitted by the operators concerned (which may lead the Commission to amend the rates of anti-dumping duty set out in the disclosure - as it did in the case of the interested party as regards the rate of anti-dumping duty indicated in the disclosure for CTVs from Thailand), is then sent to the Council for adoption. The Council is free to decide not to adopt the regulation. It is therefore incorrect to state, as the interested party does, that the communication by the Commission of the provisional results in August 2001 created some sort of entitlement for the interested party. The disclosure is only one of the steps in the procedure for drafting the proposal for an anti-dumping regulation, which the Commission then presents to the Council for adoption. Anti-dumping duties are fixed in a regulation and are applicable only once this regulation has been adopted and has entered into force. This is an essential aspect of the procedure which the interested party could not ignore.

(42) Finally, the interested party is using this argument to contest, in part or in whole, the very existence of the customs debt. However, such claims do not fall within the scope of the procedure for remission or repayment under Article 239 of Regulation (EEC) No 2913/92. It is for the Member States, not the Commission, to determine whether a debt has been incurred and, if so, the amount of the debt. Moreover, it has been

consistently ruled that Commission decisions under procedures for not taking a posteriori account or for remission/repayment in equity are not intended to adjudicate on the existence or amount of customs debt.[10] An operator not accepting the existence of a customs debt must challenge the decision establishing the said debt before the national courts, in accordance with Article 243 of Regulation (EEC) No 2913/92.

(43) With regard to any possible failings on the part of the national authorities, the interested party invokes the following arguments.

(44) The interested party considers that during the period 1994-99 the national customs authorities had displayed a lack of curiosity regarding the non-preferential origin of the CTVs exported by its Thai subsidiary. According to the interested party, a special situation was constituted by the fact that several national customs authorities – including the French authorities – regularly carried out, during the years preceding the period concerned by the present recovery, checks on the preferential origin of the CTVs which it imported, without expressing either interest in, or concern about, their non-preferential origin. According to the interested party, on the basis of the detailed information on components provided to the customs officers, it should have been clear at the time of those checks that the non-preferential origin of the CTVs in question could not be Thai. The prolonged lack of attention on the part of the national administrations regarding the non-preferential origin declared is said to have helped to reassure the interested parties that they were acting correctly, thereby allowing the situation to persist and hence leading to the present recovery, which is claimed to cause the interested party harm beyond normal commercial risk.

(45) In this connection, in their letter of 29 May 2006 in reply to the request for further information from the Commission, the French authorities indicated, with regard to the checks carried out by the National Customs Information and Investigation Directorate in 1998, that the documents which were found "establish that the checks related to various products imported by the interested party, including televisions from Thailand and Singapore, in respect of which all the information making it

[10] See following judgments: "Sportgoods" (Case C-413/96 – 24.9.1998), "Kia Motors" (T-195/97 – 16.7.1998) and "Hyper Srl" (T-205/99 – 11.7.2002).

possible to verify the compliance of the origin declared was requested by the investigators" and that "while the enclosed documents do not refer to the possibility that the televisions could have been subject to anti-dumping duty, the absence of an infringement notification at the end of the checks led the interested party to believe that the disputed goods had been correctly declared". However, it should be noted that, because neither the competent authorities nor the interested party kept the documents on which the checks were carried out, it cannot be established whether the relevant investigating department could have seen documents clearly indicating that the CTVs imported by the interested party were of Malaysian or Korean origin and that therefore these authorities were, on this occasion, guilty of a failing likely to place the interested party in a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92. It should be stressed that no blame can attach to the French customs authorities for not preserving the documents in question, given that those authorities were not required to keep such documents for more than three years.

(46) As regards the two checks carried out on the consignments covered by declarations of release for free circulation lodged with the customs office at Le Havre, it should be noted that, in both instances, the place of origin declared by the interested party was accepted without further verification and that there was no reason why the documents accompanying the declarations should have caused the competent authorities to entertain any doubts as to the correctness of the information supplied. Accordingly, these two checks cannot have placed the interested party in a special situation within the meaning of the aforesaid Article 239.

(47) As for the checks carried out by the Belgian and Italian authorities (Annex 11 to the request), the documents submitted clearly show that these authorities wanted to check whether the imported CTVs qualified for preferential treatment under the arrangements in force with the third countries concerned and that, accordingly, they had sent the authorities in those countries a number of Form A certificates. In this regard there is no evident failing constituting a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.

(48) Lastly, no document has been submitted by the interested party concerning any audit carried out by the UK authorities "between 1996 and 1998, and probably in 1997". In

this regard there is no evident failing constituting a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.

(49) The interested party also refers to three items of correspondence (documents Nos 4, 5 and 12 accompanying the request), of which the interested parties were said to have been aware or which were addressed to them and which likewise supposedly contributed towards reassuring them that they were acting correctly.

(50) As for the two letters of 1998 (Annexes 4 and 5 to the request), in which, according to the interested party, the Commission confirmed that the CTVs manufactured by the interested party's Thai subsidiary qualified for the individual rate of 3%, it should be pointed out that those letters in fact confine themselves to suggesting to the Spanish authorities how to interpret "products manufactured and sold for export to the Community" in Article 1 of Regulation (EC) No 710/95. Moreover, it is clear from the subject of those letters that they concern CTVs "originating in Thailand".

(51) As regards the letter of 7 October 1999 addressed by the French Directorate-General for Customs to the interested party (Annex No 12 to the request), it must be noted that this letter, which refers to the application of Regulation (EC) No 710/95 to CTVs "originating in Thailand", actually shows that the interested party's major concern was not the interpretation of the relevant provisions of Annex 11 to Regulation (EEC) No 2454/93, but rather of the words "sold for export to the Community" (Article 1(2) of Regulation (EC) No 710/95), in relation to the invoicing system under which customs clearance in the Community was to be obtained by the interested party on the basis of an invoice issued by an intermediary established in Hong Kong.

(52) In the present case, therefore, there is no evidence of any failing associated with the behaviour of the national authorities that is likely to constitute a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.

(53) In the light of the foregoing, the circumstances of this case do not constitute a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.

(54) Concerning the second condition referred to in Article 239 of Regulation (EEC) No 2913/92 (absence of deception or obvious negligence), the Court of Justice of the

European Communities has consistently taken the view that account must be taken, in particular, of the complexity of the law and the interested party's experience and the diligence it has shown.

(55) It should be noted at the outset that the Commission considers that the interested party did not engage in deception.

(56) Regarding the criterion of the rules' complexity, it should be pointed out that the rules on determining the CTVs' non-preferential origin cannot as such be considered particularly complex. Moreover, those rules were in fact only apparently new in 1994, to the extent that their source was the aforementioned Commission Regulation (EEC) No 2632/70 of 23 December 1970. As far as implementation goes, this Regulation had not presented any particular difficulties in the past, notably for the interested party, which had been importing large quantities of CTVs for years.

(57) Lastly, the fact that different thresholds apply under the non-preferential origin rules (45% and 35%, cf. Annex 11 to Regulation (EEC) No 2454/93) and under the preferential origin rules (40% and 20%, cf. Annex 15 to Regulation (EEC) No 2454/93) does not justify the argument that this legislation is complex.

(58) Regarding the criterion of the interested party's experience, it should be noted that at the time of the events the interested party had already for some years been engaged in the production of and, in some cases, in the export and import of various items of electronic equipment, such as CTVs, and therefore had detailed knowledge of the rules governing international trade in those products. The interested party must therefore be regarded as an experienced operator.

(59) Furthermore, the interested party was necessarily informed of certain subtleties involved in the determination of the origin of the CTVs. For instance, it could not be unaware that its Thai subsidiary had to supply the Thai authorities with highly detailed data in order to be issued with Form A certificates. In this context, it is difficult to believe that this subsidiary was not aware that its accounting data clearly showed added value in Thailand of a low and, above all, insufficient level for obtaining recognition of Thai origin, either preferential or non-preferential.

(60) Indeed, the interested party's Thai subsidiary ought to have known that only by adding in the costs corresponding to components originating in other ASEAN countries (Association of South-East Asian Nations) could the CTVs' production costs show added value in Thailand above the threshold required under Annex 15 to Regulation (EEC) No 2454/93. It was in fact more complicated for the interested party and its Thai subsidiary to establish the CTVs' preferential origin, given the impact of regional cumulation, than to apply the value added thresholds in order to determine correctly those same CTVs' non-preferential origin.

(61) Lastly, as regards the interested party's reference to Article 5 of Council Regulation (EC) No 1541/98 of 13 July 1998,[11] the wording of which is claimed to testify to the complexity of the rules, it should be pointed out that this wording refers to certain textile products and in no case to CTVs. This text, therefore, cannot establish that the rules applicable in this instance are to be considered complex per se.

(62) Regarding the criterion of the diligence demonstrated by the interested party, the following point should be made.

(63) It is true, as the French authorities state in their letter of 14 September 2005, that the interested party is one of the operators which requested the launch of the investigation aimed at establishing the existence of dumping practices in 1992 and which, in that context, cooperated with the Commission. However, that behaviour constitutes the normal attitude of an operator which requests the launch of an anti-dumping investigation. That does not therefore enable the interested party's behaviour to be described as "diligent".

(64) The interested party should have suspected that the origin of the CTVs might be affected by a change in the source of supplies of cathode ray tubes. During the initial anti-dumping investigation (1 July 1991 – 30 June 1992) it had supplied the Commission with information about the Thai origin of the cathode ray tubes. The Commission consequently proposed individual anti-dumping duties based on this information. The interested party never subsequently requested a review of the anti-

[11] Council Regulation (EC) No 1541/98 of 13 July 1998 on proof of origin for certain textile products falling within Section XI of the Combined Nomenclature and released for free circulation in the Community, and on the conditions for the acceptance of such proof (OJ L 202, 18.7.1998, p. 11).

dumping Regulation by the Commission (which it could have done under Article 11(3) of the basic anti-dumping Regulation) to take account of the diversification of its sources of supply for cathode ray tubes from Korea and Malaysia.

(65) Moreover, after the disclosure of August 2001 the interested party could not have been in any doubt as to the origin of the CTVs it was importing. Recital 45 of Regulation (EC) No 1531/2002, which is identical in this respect to the disclosure, clearly states that "*The investigation showed that for all exports […] to the Community […], the 45% added value rule was not met. Therefore, the origin had to be determined on the basis of the 35% value rule of the non-originating parts/materials. In this respect, it was also found that the origin of the CTVs would virtually be determined by the origin of the CPTs, which represented, in all but one case, at least 35% of the ex-works price of the CTVs*". The interested party could not fail to be aware at this point that the customs declarations stating that the CTVs originated in Thailand were incorrect. Yet it failed to take any action to regularise the situation and continued to produce customs declarations giving a country of origin that it must have known was incorrect.

(66) After learning of exchanges of correspondence between the Spanish authorities and the Commission (Annexes 4 and 5 to the application), the interested party is said to have asked the French administration for further details on the anti-dumping duty applicable to the CTVs manufactured by its Thai subsidiary; the reply to this request had taken the form of the letter from the French authorities dated 7 October 1999 already referred to. However, as has already been explained above, it is clear from the reply that these authorities felt that, rather than seeking to obtain an interpretation of the relevant provisions of Annex 11 to Regulation (EEC) No 2454/93, the interested party's real purpose was to establish whether, once the relevant CTVs had been released for free circulation, the interested party could submit an invoice drawn up by an intermediary in Hong Kong. To the extent that the main purpose of this request was not to obtain an interpretation of the provisions at issue in this instance, it can therefore hardly be considered as proof of diligence on the part of the interested party.

(67) In the light of all the foregoing, the interested party must be deemed to have provided clear evidence of negligence within the meaning of Article 239 of Regulation (EEC) No 2913/92.

(68) Remission of import duties is therefore not justified in this case,

HAS ADOPTED THIS DECISION:

Article 1

The remission of import duties in the sum of €XXXX requested by France on 14 September 2005 is hereby deemed not justified.

Article 2

This Decision is addressed to the French Republic.

Done at Brussels, 7-5-2007

For the Commission
László KOVÁCS
Member of the Commission