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REM 07/02



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 28-5-2003

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NOT FOR PUBLICATION

COMMISSION DECISION

of 28-5-2003

**finding that remission of import duties is justified in a particular case and authorising
Spain, Italy, the Netherlands and France to repay or remit duties in cases involving
comparable issues of fact and law**

(Only the English, Spanish, Italian, Dutch and French texts are authentic.)

(Request submitted by the United Kingdom of Great Britain and Northern Ireland)

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(REM 07/02)

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 2700/2000,²

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 444/2002,⁴ and in particular Article 907 thereof,

¹ OJ L 302, 19.10.1992, p. 1.

² OJ L 311, 12.12.2000, p. 17.

³ OJ L 253, 11.10.1993, p. 1.

⁴ OJ L 68, 12.3.2002, p. 11.

Whereas:

- (1) By letter dated 18 April 2002, received by the Commission on 24 April 2002, the United Kingdom asked the Commission to decide, under Article 239 of Regulation (EEC) No 2913/92, whether the remission of import duties is justified in the following circumstances.
- (2) Between June 1992 and March 1994 a UK firm imported fishery products (canned tuna) from Ecuador.
- (3) Imports into the Community of this type of product originating in Ecuador qualified for preferential arrangements under the Generalised System of Preferences (GSP). When covered by a Form A origin certificate issued by the competent Ecuadorian authorities, the products were eligible for preferential tariff treatment on release for free circulation.
- (4) In the case in point, the firm presented Form A certificates issued by the competent Ecuadorian authorities in support of its customs declarations for release for free circulation. The UK customs authorities accepted the declarations and granted preferential tariff treatment.
- (5) In March and October 1994 representatives of several Member States and the European Commission travelled to Ecuador to check that the authorities were issuing Form A origin certificates for fishery products exported to the Community properly. Their inquiries revealed that the fishing vessels used by the firm's supplier to catch the fish canned for export to the Community did not comply with the origin rules laid down by Commission Regulation (EEC) No 693/88 of 4 March 1988 on the definition of the concept of originating products for purposes of the application of tariff preferences granted by the European Economic Community in respect of certain products from developing countries.⁵

⁵ OJ L 77, 22.3.1988, p. 1.

- (6) After a thorough examination and a number of exchanges of information, it was established that the only origin criterion the fishing vessels used by the firm's supplier had failed to satisfy was that concerning the nationality of the crews, which had to be met, not globally, but on each voyage. Though the firm's supplier had practised separate storage (separating fish considered eligible for preferential treatment from others), that system did not take account of the criterion of the crews' nationality, thereby making it impossible to establish the origin of the fish used to produce the finished products exported to the Community.
- (7) The upshot of these inspections was that the finished goods exported to the Community by the firm's supplier in the period in question were not eligible for preferential treatment under the GSP and that the Form A origin certificates issued by the Ecuadorian authorities for tuna imported into the Community by the firm between June 1992 and March 1994 had therefore been wrongly issued by the Ecuadorian authorities. The Ecuadorian authorities, while arguing that their country, like the firm's supplier, had enough originating fish to cover the entirety of its deliveries to the Community, accepted the investigators' findings by countersigning their final reports in July 1995.
- (8) Since the products imported into the United Kingdom were no longer eligible for preferential tariff treatment, the UK authorities asked the firm to pay import duties in the sum of XXXXXX, for which remission is being requested in this case.
- (9) It appears from the UK authorities' letter of 18 April 2002 that the Ecuadorian authorities, by issuing origin certificates that later proved to be incorrect, committed an error such as to constitute a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92. In support of the existence of a special situation, the letter also argues that the Commission at no time informed the importers of any doubts about the correctness of certificates issued by the Ecuadorian authorities for fishery products.
- (10) The UK authorities also point out in their letter of 18 April 2002 that there was no deceit or obvious negligence on the part of the firm in question.

- (11) In support of the request made by the competent UK authorities, under Article 905 of Regulation (EEC) No 2454/93 the firm stated that it had seen the file submitted to the Commission by the UK authorities and had nothing to add.
- (12) By letter of 26 September 2002 the Commission asked the UK authorities for further information. This information was provided by letter dated 6 February 2003, received by the Commission on 12 February 2003. The administrative procedure was therefore suspended, in accordance with Articles 905 and 907 of Regulation (EEC) No 2454/93, between 27 September 2002 and 12 February 2003.
- (13) 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 5 March 2003 in the framework of the Customs Code Committee (Section for General Customs Rules/Repayment) to consider the case.
- (14) 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 resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned.
- (15) The Court of Justice of the European Communities has consistently taken the view 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.
- (16) In the case in point, preferential tariff treatment could only be granted for the imports in question if correct Form A origin certificates were presented in support of the declarations for release for free circulation.
- (17) As has already been explained, the Ecuadorian authorities have admitted mistakenly issuing the Form A origin certificates for exports of canned tuna by the firm's supplier.
- (18) Reliance on the correctness of the issue of such certificates is not normally protected, as this is considered part of the importer's normal commercial risk and therefore the responsibility of the person liable for payment.

- (19) The Court of Justice has consistently ruled that the legitimate expectations of a trader are protected only if the competent authorities themselves gave rise to the expectation.
- (20) In this connection, the firm pursues two lines of argument, one based on the alleged failings of the Ecuadorian authorities and the other based on an alleged failure on the part of the Commission to exercise due diligence, in that it did not publicly notify Community importers of doubts it allegedly harboured, before the March 1994 investigation, as to the correctness of certificates issued by the Ecuadorian authorities for fishery products.
- (21) As regards the second argument, though the Commission did indeed harbour suspicions that the vessels supplying raw materials to Ecuadorian canneries might not necessarily comply with the origin rules, these suspicions could not, prior to the 1994 inspections, be described as "serious doubts" within the meaning of the [case-law](#)⁶ and were not, therefore, such as to oblige the Commission to publish "reasonable doubts" as to the propriety of tuna exports from Ecuador.
- (22) If the Commission judged it necessary, before the inspection of March 1994, to ask the principal Member States of import to carry out checks with the help of the Ecuadorian authorities, it was precisely because its suspicions had yet to be substantiated. The unsubstantiated nature of the suspicions is borne out by the fact that it took two missions to Ecuador to clarify the situation and, still more, by the fact that the conclusion drawn from these missions was that Form A origin certificates for some or all finished products manufactured by a number of Ecuadorian exporters had been properly issued. It would not, therefore, have been appropriate for the Commission to publish its suspicions before the completion of the inspections conducted in Ecuador in March and October 1994, especially since doing so would have caused needless disturbance on the market, to which traders might justifiably have objected.
- (23) The firm's argument that a special situation arose because the Commission allegedly failed in its duty to warn Community importers of the doubts it harboured as to the correctness of Form A certificates issued by the Ecuadorian authorities for fishery products cannot therefore be accepted.

⁶ Case T-205/99 *Hyper Srl v Commission* [2002] ECR II-3141.

- (24) As for the firm's main argument, which concerns alleged failings on the part of Ecuador's competent authorities, it is also necessary to examine whether the authorities themselves gave rise to the firm's expectations concerning the certificates' correctness; if they did, such expectations would, under the case-law, be entitled to protection, and such failings would constitute a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.
- (25) In this instance, the exporters declared on the certificates of origin that the goods they covered met the conditions for obtaining the certificates.
- (26) However, in the light of [recent rulings](#) of the Court of First Instance of the European Communities,⁷ the fact that the competent Ecuadorian authorities may have been misled by the exporter does not necessarily mean that the circumstances of the case could not constitute a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.
- (27) In any case, the fact that the exporters had confirmed on the Form A certificates that the conditions for obtaining them had been met is not in itself proof that the competent Ecuadorian authorities were misled. It is necessary to ascertain whether the exporters made these declarations on the assumption that the competent authorities were acquainted with all the facts necessary to apply the rules in question and whether the authorities, despite their knowledge, raised no objection to the declarations.
- (28) In the case in point, there is evidence that the competent Ecuadorian authorities knew or, at the very least, should reasonably have known that the goods for which they were issuing Form A certificates did not fulfil the conditions laid down for preferential treatment. The competent Ecuadorian authorities can also be blamed for a number of failings liable to constitute a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.
- (29) At least until the first inspection mission, in March 1994, the Ecuadorian authorities misinterpreted and misapplied the rules for determining the origin of fishery products for GSP purposes.

⁷ “Turkish televisions” judgment of 10 May 2001, Joined Cases T-186/97, T-187/97, T-190/97 to T-192/97, T-210/97, T-211/97, T-216/97 to T-218/97, T-279/97, T-280/97, T-293/97 and T-147/99 ([2001] ECR II-1337).

- (30) The Ecuadorian authorities do not seem to have attached importance to the nationality of the crews, still less to the need to monitor compliance whenever vessels left port, rather than just generally. Thus, the authorities were not misled by the firm's supplier, but, though acquainted with all the facts necessary to apply the rules in question, believed they were justified in issuing the Form A certificates in question. They seem to have been perfectly in accord with the firm's supplier, as their initial reluctance to accept the conclusions of the inspection missions of March and October 1994 attests.
- (31) It appears, moreover, that the authorities knew that the firm's supplier, while operating a system of separate storage which enabled the vessels that caught fish to be identified, was unable to determine on which voyage fish had been caught. Unaware that such traceability would have permitted origin to be checked certificate by certificate, the authorities raised no objections in that respect.
- (32) The file also shows that in January and February 1991, during information visits carried out in Ecuador by the Commission to make sure that the special preferential arrangements granted to the Andean countries under the GSP were properly understood, the Ecuadorian authorities, like a number of chambers of commerce and traders, were informed in Spanish of the rules applicable.
- (33) Though it cannot be established with certainty that officials responsible for Form A origin certificates for fishery products received that information, its existence, prior to the exports in question, bears out the view that the Ecuadorian authorities cannot be held to have been misled by the firm's supplier but knew, or should reasonably have known, the provisions which, had they been correctly interpreted, would have prevented them mistakenly issuing Form A certificates to the firm's supplier.
- (34) Lastly, by publishing instructions in June 1994 and then officially certifying, in June 1995, that the products exported with Form A certificates by various companies, among them the firm's supplier, now met the origin rules applicable under the GSP, the Ecuadorian authorities implicitly acknowledged that there had been failings on their part and that these failings had seriously affected the issue of Form A certificates over a period of years, during which the exports in question took place.

- (35) The fact that the Ecuadorian authorities issued Form A certificates for the export of such products when they knew, or should reasonably have known, that they did not satisfy the conditions of origin necessary to benefit from preferential tariff treatment must therefore be considered a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.
- (36) The circumstances of this case are therefore such as to constitute a special situation within the meaning of Article 239 of Regulation (EEC) No 2913/92.
- (37) These circumstances do not involve deception or obvious negligence on the part of the firm.
- (38) The Court of Justice has ruled that the negligence of importers has to be measured *inter alia* against the period of time during which the competent authorities persisted in their behaviour. In the case in point, the competent Ecuadorian authorities issued Form A origin certificates for goods that did not qualify for such certificates for at least the three-year period covered by the inspections of March and October 1994.
- (39) Furthermore, the firm involved has to be absolved of any obvious negligence since there is no evidence that it deviated from normal business practice when concluding its purchase contracts and carrying out the imports concerned.
- (40) Lastly, until the conclusions of the inspections carried out in March and October 1994 had been finalised, importers could not be properly informed of the Ecuadorian authorities' failings nor warned of the risks they ran in importing fishery products from Ecuador.
- (41) Thus, the fact that the UK authorities wrote to the firm in July 1993 to inform it that they had received reports that certain canned tuna originating in Ecuador did not comply with the preferential origin rules cannot be held against the firm and taken as proof of obvious negligence.

- (42) As pointed out above, the inspections carried out in Ecuador in March and October 1994 resulted in the conclusion that Form A origin certificates for some or all finished products manufactured by a number of Ecuadorian exporters had been properly issued. Thus, though the competent Ecuadorian authorities were incontestably involved in the occurrence of the irregularities in this case, the irregularities never involved all Ecuadorian exporters. Accordingly, it has to be accepted that only very partial, provisional and non-specific information was available in the period July 1993-March 1994, and it cannot therefore be concluded that the firm displayed obvious negligence in continuing to purchase canned tuna from its Ecuadorian supplier until March 1994.
- (43) The firm concerned therefore acted in good faith and committed no deception or obvious negligence.
- (44) Remission of import duties is therefore justified in this case.
- (45) Where special circumstances warrant repayment or remission, Article 908 of Regulation (EEC) No 2454/93 allows the Commission, under conditions that it may determine, to authorise one or more Member States to repay or remit duties in cases involving comparable issues of fact and law.
- (46) Spain, Italy, the Netherlands and France have requested the Commission's authorisation to repay or remit import duties in cases involving issues of fact and law comparable to the present case.
- (47) Such authorisation may be granted to the Member States concerned on condition that it is used only in cases strictly comparable in fact and law to the cases in question. Authorisation should therefore cover repayment or remission requests lodged within the legal deadlines and concerning import operations covered by Form A origin certificates issued to the importer's supplier by the Ecuadorian authorities no later than 31 March 1994, the final day of the month during which representatives of several Member States and the Commission conducted the first inspection to reveal the irregularities involved in this case. There must, moreover, be no deception or obvious negligence on the part of the importers,

HAS ADOPTED THIS DECISION:

Article 1

The remission of import duties in the sum of XXXX requested by the United Kingdom on 18 April 2002 is justified.

Article 2

Spain, Italy, the Netherlands and France are authorised to repay or remit antidumping duties on imports in cases involving issues of fact and law comparable to the case that is the subject of the request submitted by the United Kingdom on 18 April 2002.

The authorisation covers repayment or remission requests lodged within the legal deadline and concerning import operations covered by Form A certificates issued to the supplier of the person concerned by the request referred to in the previous subparagraph by the Ecuadorian authorities on 31 March 1994 at the latest.

Article 3

This Decision is addressed to Spain, Italy, the Netherlands, France and the United Kingdom.

Done at Brussels, 28-5-2003

For the Commission

Frits Bolkestein

Member of the Commission