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REM 18/02



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 28-05-2003

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NOT FOR PUBLICATION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)

(Dossier REM 18/02)

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(Request submitted by the United Kingdom of Great Britain and Northern Ireland)
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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 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 12 August 2002, received by the Commission on the same day, 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 October 1993 and September 1994 two UK firms imported fishery products (canned tuna) from Colombia.
- (3) Imports into the Community of this type of product originating in Colombia qualified for preferential arrangements under the Generalised System of Preferences (GSP). When covered by a Form A origin certificate issued by the competent Colombian authorities, the products were eligible for preferential tariff treatment on release for free circulation.
- (4) In the case in point, the firms presented Form A certificates issued by the competent Colombian authorities in support of their customs declarations for release for free circulation. The UK customs authorities accepted the declarations and granted preferential tariff treatment.
- (5) In November 1994 representatives of several Member States and the European Commission travelled to Colombia 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 which had delivered to the firms' supplier the tuna 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) The origin rule not fulfilled was the one requiring the fishing vessels used by the firms' supplier to be sailing "under the flag of a beneficiary country". The inspection team was able to check the dates when the vessels concerned were registered in Colombia and cross-check these with the dates when the fish subsequently exported to the Community had been landed. In each case, the vessel had landed its fish only shortly after obtaining the right to fly the Colombian flag. The firms' supplier accepted that most, if not all, the catches of the vessels involved had been made while those vessels were under the Vanuatu flag. However, the supplier stated that, as the vessels were under the Colombian flag when they arrived in port, the fish they had landed there had been deemed to originate in Colombia, an opinion shared by the Colombian authorities.
- (7) The upshot of this inspection was that the finished goods exported to the Community by the firms' 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 Colombian authorities for tuna imported into the Community by the firms between October 1993 and September 1994 had therefore been wrongly issued by the Colombian authorities. The authorities accepted this conclusion by countersigning the inspection team's final report.
- (8) Since the products imported into the United Kingdom were not eligible for preferential tariff treatment, the UK authorities asked the firms to pay import duties in the sum of XXXXX and XXXXX respectively, for which remission is being requested in this case.
- (9) It appears from the UK authorities' letter of 12 August 2002 that the Colombian 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 Colombian authorities for fishery products.
- (10) The UK authorities also point out in their letter of 12 August 2002 that there was no deceit or obvious negligence on the part of the firms in question.

- (11) In support of the request made by the competent UK authorities, under Article 905 of Regulation (EEC) No 2454/93 the firms stated that they had seen the file submitted to the Commission by the UK authorities and had nothing to add.
- (12) By letter of 19 December 2002 the Commission asked the UK authorities for further information. This information was provided by letter dated 10 January 2003, received by the Commission on the same day. The administrative procedure was therefore suspended, in accordance with Articles 905 and 907 of Regulation (EEC) No 2454/93, between 20 December 2002 and 10 January 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 Colombian authorities have admitted mistakenly issuing the Form A origin certificates for exports of canned tuna by the firms' 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 firms pursue two lines of argument, one based on the alleged failings of the Colombian 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 November 1994 inspection, as to the correctness of certificates issued by the Colombian authorities for fishery products.
- (21) As regards the second argument, though the Commission did indeed harbour suspicions that the vessels supplying raw materials to Colombian canneries might not necessarily comply with the origin rules, these suspicions could not, prior to the November 1994 inspection, 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 Colombia.
- (22) If the Commission judged it necessary, before the inspection of November 1994, to ask the principal Member States of import to carry out checks with the help of the Colombian 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 the conclusion drawn from the inspection was that Form A origin certificates for some or all finished products manufactured by a number of Colombian 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 Colombia in November 1994, especially since doing so would have caused needless disturbance on the market, to which traders might justifiably have objected
- (23) The firms' 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 Colombian 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 firms' main argument, which concerns alleged failings on the part of Colombia's competent authorities, it is also necessary to examine whether the authorities themselves gave rise to the firms' 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 Colombian 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 Colombian 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 Colombian 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 Colombian 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) For at least a significant part of the period investigated by the November 1994 mission the Colombian 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) In the matter of ships and their flags in particular, the Colombian authorities applied their national legislation, which differed substantially from the GSP rules. Thus, the authorities were not misled by the firms' 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.
- (31) Finally, upon completion of the November 1994 mission, the Colombian authorities accepted that they were fully responsible for the failures and had seriously affected the procedure for issuing the said certificates for the period during which the exports in question had been made.
- (32) The fact that the Colombian authorities issued Form A certificates for the export of products manufactured by the firms' supplier 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.
- (33) 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.
- (34) These circumstances do not involve deception or obvious negligence on the part of the firms concerned.
- (35) 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 this case, the competent Colombian authorities issued Form A certificates for goods not complying with the conditions for obtaining such certificates during a significant period of approximately two years covered by the November 1994 investigation.
- (36) Furthermore, the firms involved have to be absolved of any obvious negligence since there is no evidence that they deviated from normal business practice when concluding their purchase contracts and carrying out the imports concerned.
- (37) Lastly, until the conclusions of the inspection carried out in November 1994 had been finalised, importers could not be properly informed of the Colombian authorities' failings nor warned of the risks they ran in importing fishery products from Colombia.

- (38) The firms concerned therefore acted in good faith and committed no deception or obvious negligence.
- (39) Remission of import duties is therefore justified in this case.
- (40) 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.
- (41) 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.
- (42) 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 importers' supplier by the Colombian authorities no later than 30 November 1994, the final day of the month during which representatives of several Member States and the Commission conducted the inspection that revealed 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 sums of XXXX and XXXX requested by the United Kingdom on 12 August 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 12 Aug 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 persons concerned by the request referred to in the previous subparagraph by the Colombian authorities on 30 November 1994 at the latest.

Article 3

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

Done at Brussels, 28-05-2003

For the Commission

Frits Bolkestein

Member of the Commission