JUDGMENT OF THE COURT OF FIRST INSTANCE
(Fifth Chamber, Extended Composition)

21 September 2004 *

In Case T-104/02,

Société française de transports Gondrand Frères SA, established in Paris (France), represented by M. Famchon, lawyer, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by C. Durand, B. Stromsky and X. Lewis, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for annulment of Commission Decision C(2002) 24 final of 14 January 2002 finding there to be no grounds for remission of import duties in a particular case,

* Language of the case: French.

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES
(Fifth Chamber, Extended Composition),

composed of: P. Lindh, President, R. García-Valdecasas, J.D. Cooke, P. Mengozzi and M.E. Martins Ribeiro, Judges,

Registrar: I. Natsinas, Administrator,

having regard to the written procedure and further to the hearing on 18 December 2003,

gives the following

Judgment

Legal framework

1 Recital 39 in the preamble to Council Regulation (EC) No 3319/94 of 22 December 1994 imposing a definitive anti-dumping duty on imports of urea ammonium nitrate solution originating in Bulgaria and Poland, exported by companies not exempted from the duty, and collecting definitively the provisional duty imposed (OJ 1994 L 350, p. 20), which is found in Title H, entitled 'Anti-Dumping Measures', provides:

'Given the material injury suffered by the Community industry in the form of financial losses, in view of the possibility of the absorption of an *ad valorem* duty with a detrimental effect on the price situation in the Community market for this

seasonal and highly price sensitive product and given the existence of a number of import channels via third country companies, it is considered appropriate to impose a variable duty at the level which would permit the Community industry to raise its prices to profitable levels for imports invoiced directly by Bulgarian or Polish producers or by parties which have exported the product concerned during the investigation period and a specific duty on the same basis for all other imports in order to avoid the circumvention of the anti-dumping measures.'

2 Article 1(3) of Regulation No 3319/94 establishes the following definitive anti-dumping duty:

'The amount of anti-dumping duty for imports originating in Poland shall be the difference between the minimum import price of ECU 89 per tonne product and the [cost, insurance and freight (cif)] Community frontier price plus the [Common Customs Tariff (CCT)] duty payable per tonne product in all cases where the cif Community frontier price plus the CCT duty payable per tonne product is less than the minimum import price and where the imports put into free circulation are directly invoiced to the unrelated importer by the following exporters or producers located in Poland:

...

— Zaklady Azotowe Pulawy, Pulawy,

— (TARIC additional code: 8793).

For imports put into free circulation which are not directly invoiced by one of the above exporters or producers located in Poland to the unrelated importer the following specific duty is set:

for the product ... certified to be produced by Zaklady Azotowe Pulawy ... the specific duty ... [of] ... ECU 19 per tonne product (TARIC additional code: 8795).'

3 Article 236 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1; 'the Customs Code') provides for import duties or export duties to be repaid in so far as it is established that when they were paid the amount of such duties was not legally owed or that the amount had been entered in the accounts, contrary to Article 220(2) of the Code. However, no repayment or remission of duty is granted when the facts which led to the payment or entry in the accounts of an amount which was not legally owed are the result of deliberate action by the person concerned.

4 Article 239 of the Customs Code ('the fairness clause') reads as follows:

'1. Import duties or export duties may be repaid or remitted in situations other than those referred to in Articles 236, 237, and 238:

— to be determined in accordance with the procedure of the committee;

— resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned. The situations in which this provision may be applied and the procedures to be followed to that end shall be defined in accordance with the Committee procedure. Repayment or remission may be made subject to special conditions.

2. Duties shall be repaid or remitted for the reasons set out in paragraph 1 upon submission of an application to the appropriate customs office within 12 months from the date on which the amount of the duties was communicated to the debtor. However, the customs authorities may permit this period to be exceeded in duly justified exceptional cases.'

5 Article 905(1) of 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 Code (OJ 1993 L 253, p. 1), ('the implementing regulation') provides:

'Where the decision-making customs authority to which an application for repayment or remission under Article 239(2) of the Code has been submitted cannot take a decision on the basis of Article 899, but the application is supported by evidence which might constitute a special situation resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned, the Member State to which this authority belongs shall transmit the case to the Commission to be settled under the procedure laid down in Articles 906 to 909. ...'

6 Article 399 of the French Customs Code defines 'persons concerned' in a fraud as those who have been involved in any way whatsoever in an offence of smuggling or an offence of importing or exporting without a declaration. Persons concerned in a fraud are liable to the same penalties as those who committed the offence and, furthermore, to the penalties depriving them of rights laid down by Article 432 of the Code.

Facts of the dispute

7 The applicant is a French company which carries on business as an authorised customs agent. On 22 and 23 August 1996 and 17 September 1996, it released for free circulation, at the customs office at Rouen (France), three consignments of urea ammonium nitrate solution originating in Poland on behalf of three French companies, namely UNCAA, Champagne Fertilisants and EFI Trade ('the consignee companies').

8 Those goods had been purchased from the Polish company Zaklady Azotowe Pulawy ('ZAP') by the French company Evertrade. The goods were first invoiced by ZAP to Evertrade, which then invoiced the consignee companies (invoices of 12 August 1996, Nos 96.00230 and 96.00231 to Champagne Fertilisants and No 96.00232 to UNCAA, and invoices of 21 August 1996, Nos 96.00243, 96.00244, 96.00245 and 96.00246 to EFI Trade).

9 The customs declarations lodged by the applicant included a request for exemption from anti-dumping duties on the basis of Article 1(3) of Regulation No 3319/94. The goods were accepted by the customs authorities at the Rouen customs office ('the competent customs authority'), which stamped those declarations 'ACD' ('admis conforme sur documents' (conformity accepted on basis of documents)) when they were presented on 22 and 23 August 1996 and 17 September 1996. The seven invoices issued by Evertrade (see paragraph 8 above) were included with those declarations.

10 By letter of 4 July 1997, the chief collector for customs and indirect duties at the interregional customs headquarters in Rouen, informed the applicant that, following post-clearance verification of the customs declarations, he had found that the imports concerned had not been directly invoiced to the three consignee companies by ZAP. He therefore took the view that a specific duty of ECU 19 per tonne product

should have been imposed in this instance and that the applicant had to discharge a debt of FRF 1 757 175 in respect of anti-dumping duty and of FRF 96 643 in respect of value added tax (VAT), making a total of FRF 1 853 818 ('the anti-dumping debt').

11 By letter of 3 August 2000 to the Director-General of Customs (Rouen), the applicant applied, on the basis of Article 236(1) and Article 239(1) of the Customs Code, for remission of the anti-dumping duties claimed from it. On 12 December 2000, the Directorate-General of French customs and indirect duties informed it that its application for remission of duty had been forwarded to the Commission on the basis of Article 239 of the Customs Code.

12 The Commission rejected the application by Commission Decision C(2002) 24 final of 14 January 2002 finding there to be no grounds for remission of import duty in the particular case ('the contested decision').

Procedure and forms of order sought

13 By application lodged at the Court Registry on 8 April 2002, the applicant brought the present action.

14 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber, Extended Composition) decided to open the oral procedure without undertaking measures of inquiry.

15 As the applicant did not enter an appearance at the hearing on 18 December 2003, the Registrar confirmed that notification of the hearing had been sent to the applicant's address for service in Luxembourg and that acknowledgement of that notification had been returned to the Court Registry. Following consultation with the Commission over the possibility of a stay of proceedings, the Court decided to continue with the hearing, the Commission having left that question to the Court's discretion.

16 The Commission presented oral argument and answered questions put to it by the Court at the hearing.

17 The applicant claims that the Court should:

— declare the action admissible;

— annul the contested decision;

— grant the applicant a remission of the anti-dumping duties imposed on it.

18 The Commission contends that the Court should:

— dismiss the action as unfounded;

— order the applicant to pay the costs.

Admissibility of the claim that the Court should grant the applicant a remission of the anti-dumping duties imposed on it

Arguments of the parties

19 The Commission pleads inadmissibility of the applicant's claim that the Court should grant the applicant a remission of the anti-dumping duties demanded from it. The Commission submits that the Court cannot assume the role of the administrative authorities responsible for taking decisions relating to remission.

Findings of the Court

20 It is settled case-law that the Court of First Instance is not entitled, in an action for annulment of a measure under Article 230 EC, to issue directions to the Community institutions or to assume the role assigned to them. If the Court annuls the contested measure, it is for the institution concerned to take, under Article 233 EC, the measures required to give effect to the judgment ordering annulment (Case T-67/94 *Ladbroke Racing* v *Commission* [1998] ECR II-1, paragraph 200, and Joined Cases T-133/95 and T-204/95 *IECC* v *Commission* [1998] ECR II-3645, paragraph 52). Therefore, the applicant's claim that the Court should grant it remission of the anti-dumping duties imposed on it must be rejected as inadmissible.

Substance

21 In support of its action, the applicant puts forward three pleas in law alleging, first, that there is no anti-dumping debt, second, manifest error of assessment, and, third, failure of the contested decision to comply with the requisite formalities.

First plea: no anti-dumping debt

Arguments of the parties

22 The applicant denies that a debt is due in respect of anti-dumping duty. It maintains that the price invoiced by ZAP to Evertrade, and *a fortiori* by Evertrade to the consignee companies, was considerably higher than the minimum import price of ECU 89 referred to in the first subparagraph of Article 1(3) of Regulation No 3319/94 and that, as a consequence, it was not a dumped price. The applicant submits that imposing on the customs agent the financial burden of anti-dumping duties in respect of imports which, quite clearly, were neither dumped nor part of a scheme to circumvent anti-dumping measures is unacceptable both as a matter of fact and as a matter of law and equity.

23 The Commission contends that the applicant cannot put forward the argument that no anti-dumping debt exists in order to challenge the validity of the contested decision. Decisions which it takes in respect of remission on grounds of fairness are not intended to settle the question as to whether a customs debt exists (Case C-413/96 *Sportgoods* [1998] ECR I-5285, paragraphs 39 to 43, and Case T-195/97 *Kia Motors and Broekman Motorships* v *Commission* [1998] ECR II-2907, paragraph 36).

Findings of the Court

24 The Court notes that Article 239 of the Customs Code constitutes a 'general fairness clause'. That provision and Article 905 of the implementing regulation are intended to deal with an exceptional situation in which the trader concerned may find himself, as compared with other traders engaged in the same business (see, to that effect, Case C-86/97 *Trans-Ex-Import* [1999] ECR I-1041, paragraph 18, and Case C-61/98 *De Haan* [1999] ECR I-5003, paragraph 52). The fairness clause and Article 905 of the implementing regulation are, in particular, intended to apply where the circumstances characterising the relationship between the trader concerned and the administration are such that it would not be equitable to require that trader to bear a loss which it normally would not have incurred (Case T-42/96 *Eyckeler & Malt* v *Commission* [1998] ECR II-401, paragraph 132). Repayment or remission of import or export duties, which may be granted only under certain conditions and in cases specifically provided for by the abovementioned provisions, constitutes an exception to the normal import and export procedure (see, to that effect, Case C-156/00 *Netherlands* v *Commission* [2003] ECR I-2527, paragraph 91).

25 It follows that applications made to the Commission under the fairness clause in conjunction with Article 905 of the implementing regulation do not concern the question as to whether or not an anti-dumping debt exists but seek solely to establish whether or not there are special circumstances which may justify, from an equitable point of view, repayment of import or export duties (see, by analogy, the judgments in *Sportsgoods*, cited above, paragraphs 39 to 43, and *Kia Motors and Broekman Motorships* v *Commission*, cited above, paragraphs 36 and 37). The making of such an application to the Commission presupposes that the debt in question exists, since the applicant has other legal remedies to challenge the existence of the debt, in particular under Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community (OJ 1996 L 56, p. 1), as amended.

26 Therefore, it must be held that the applicant cannot in these proceedings challenge the existence of the anti-dumping debt.

27 It follows that the first plea must be rejected.

Second plea: manifest error of assessment

28 This plea is divided into two parts. First, the applicant complains that the Commission has made a manifest error of assessment in refusing to acknowledge that there is a 'special situation' in the present case. Second, the applicant maintains that it cannot be accused of any deception or obvious negligence.

The first part of the plea

— Arguments of the parties

29 In the first place, the applicant maintains that its alleged non-compliance is 'purely formal' and had no significant effect on the proper operation of the applicable customs rules for the purposes of Article 204 of the Customs Code.

30 In the second place, it argues that making the imports concerned liable to anti-dumping duty solely on the ground that the exporter's invoice to the first consignee established in the Community does not allow the importer to show that there was no circumvention of anti-dumping measures goes far beyond the objectives pursued by the relevant legislation. The objectives of Regulation No 3319/94, as described in the preamble thereto, are not compatible with the text of the regulation. The aim pursued by the Community legislature, set out in recital (39) in the preamble to Regulation No 3319/94, was to prevent anti-dumping measures being circumvented by the establishment of import channels including the involvement of intermediary companies in non-Member countries. That is not the case in this instance, since the first purchaser from the Polish exporter was a French company. In the applicant's submission, if the Community legislature had wished to exclude all forms of triangular arrangements, the recitals in the preamble to Regulation No 3319/94 would not have restricted the definition of the objective pursued to 'import channels via third country companies' alone.

31 The applicant disputes the Commission's contention, set out in paragraph 50 below, that, by voluntarily removing itself from commercial channels 'visible' to the customs authorities, Evertrade regained absolute freedom in relation to the price invoiced to it, thereby depriving the competent customs authority of any right to check whether there was a subsequent discount. If that authority had had doubts as to the price which Evertrade paid ZAP, it could have checked the price pursuant to Article 65 of the French Customs Code. The argument concerning Evertrade's scope for obtaining a subsequent discount is irrelevant. First, the risk of fraud is the same, regardless of whether or not the direct purchaser in Poland is the designated importer. Second, in a case of fraud, Evertrade would be liable to the same penalties, on the basis of Article 399 of the French Customs Code, either as principal if the customs declarations had been executed in its name or as a person concerned in a fraud in the case of imports in the name of its own purchaser.

32 Furthermore, the applicant puts forward the fact that Article 1(3) of Regulation No 3319/94 is difficult to interpret and that a great number of operators and customs authorities in the Member States have misinterpreted it. It states that the letter of 12 December 2000 from the French Directorate-General of customs and

indirect duties informing it that its application for remission of duties had been forwarded to the Commission (see paragraph 11 above) acknowledged that there was a special situation in this instance because the import price of the goods was not lower than the minimum price laid down by Regulation No 3319/94 and because the fact that the goods were released to the market in the name of the final consignee, with an invoice issued by the French intermediary, alone provided grounds for imposing a specific duty.

33 The applicant submits that the Commission interprets Article 1(3) of Regulation No 3319/94 as establishing two distinct duties. First, it provides for a variable duty equal to the difference between the minimum import price, set at ECU 89, and the cif free-at-Community frontier price plus the CCT duty payable per tonne product where the cif price is lower than ECU 89 and the imports are directly invoiced by ZAP to the unrelated importer. Second, it provides for a specific duty of ECU 19 per tonne where ZAP has not directly invoiced the importer. However, Article 1(3) does not provide for a method of calculating the dumping margin where the price invoiced by ZAP is higher than ECU 89 per tonne. The applicant asserts that there is no proper foundation for the Commission's interpretation, by virtue of which, in such a situation, anti-dumping duty is payable, since the Polish exporter did not invoice the importer directly. In fact, the provision can also be interpreted as drawing a distinction only in respect of the case in which the cif price is less than the minimum price of ECU 89 and recital (39) in the preamble to Regulation No 3319/94 does not make it clear, since it refers to 'a level which would permit the Community industry to raise its prices to profitable levels' and indicates that the specific duty is calculated so as 'to avoid the circumvention of the anti-dumping measures'. Recital (39) also refers to 'the existence of a number of import channels via third country companies', which is not the situation in this case.

34 The applicant adds that the microfiche of the customs tariff concerning the tariff headings at issue maintains this confusion.

35 The applicant submits that there is thus a special situation consisting in the fact that, by virtue of a 'common error of interpretation' in respect of Article 1(3) of Regulation No 3319/94, it applied for exemption from anti-dumping duties for goods which fulfilled all the objective conditions to be eligible for that exemption, choosing to release the goods for free circulation in the name of the final consignees whereas it ought to have applied for release for free circulation in Evertrade's name, and that the competent customs authority, which registered the declarations only after an examination of the goods and the accompanying documents, had taken the view that the choice of the TARIC additional code and the consequent exemption were warranted.

36 In its reply the applicant rebuts the Commission's argument that there could not be a special situation in this instance, since an indefinite number of traders were in the same situation. The applicant submits that its situation is special because the cif Community frontier price at which the imported goods were sold by ZAP was clearly higher than the minimum import price cited in Article 1(3) of Regulation No 3319/94 and the goods were invoiced by ZAP to a French company, Evertrade, the accounts of which could be freely examined by French customs inspectors. Such circumstances are not common to an indefinite number of traders.

37 In the third place, the applicant submits that, when the goods were imported, the customs declarations were accepted subject to no restrictions by the competent customs authority, which knew perfectly well under what conditions the goods had been imported.

38 In support of that proposition, the applicant explains that the goods had been through 'circuit 1' (as is shown by the fact that the declarations are stamped 'CIR1'), which means that the goods themselves and the accompanying documents had been inspected. The competent customs authority saw that the applicant had signed the declarations completing the tariff headings with a reference to TARIC additional code 8793, corresponding to imports eligible for exemption from anti-dumping

duties, not to TARIC additional code 8795, which applies to ZAP's imports which are not eligible for such an exemption. In the applicant's submission, the fact that the competent customs authority stamped the declarations 'ACD' rather than 'reconnu' (acknowledged) means that it had checked the documents included with the declarations.

39 Accordingly, the competent customs authority should have found, first, that ZAP, which appeared as the consignor on the declaration, and the company which had issued the invoice included with the declaration, namely Evertrade, were not one and the same person and, second, that the additional TARIC code given could not be accepted given that there was an invoice from Evertrade and that the declared value derived from that invoice. The authority itself was in error when it agreed, in those circumstances, to grant the goods exemption from anti-dumping duties.

40 The applicant submits that the Commission cannot, without contradicting itself, maintain that the competent customs authority was not required to check that the customs declarations complied with the legislation, thus waiting until post-clearance verification to check that the declarations complied with the most basic requirements, and, at the same time, assert that the fact that Evertrade is not stated to be the direct importer could have allowed it to circumvent the legislation. It would have been sufficient, at the time of the post-clearance verification, to check the price actually paid by Evertrade in order to discount that hypothesis. Moreover, in this case Evertrade had sent the invoices concerned to the competent customs authority when it was first asked for them.

41 The fact that the competent customs authority accepted the first declaration, filed on 22 August 1996, without comment, could only lead the applicant to file the subsequent declarations in the same way.

42 Finally, the applicant adds in its reply that Article 220(2)(b) of the Customs Code also militates in favour of a remission of duty.

43 The Commission denies that the applicant was in a special situation.

44 As regards, first, the allegedly formal nature of the non-compliance, the Commission asserts inter alia that the applicant cannot properly rely on Article 204 of the Customs Code. It reaffirms that 'its decisions in respect of remission on grounds of fairness are not intended to settle the question as to whether a customs debt exists'. Article 204 determines one of the ways in which a customs debt is incurred.

45 Second, the Commission disputes the relevance of the applicant's arguments that making the imports concerned liable to anti-dumping duty goes beyond the objectives of Regulation No 3319/94 and that Article 1(3) of that regulation gives rise to difficulties of interpretation.

46 It argues in that regard that the following two 'basic principles' govern the grant of remissions on grounds of fairness. First, in the Commission's submission, a situation of an objective nature, which applies to an indefinite number of traders, does not constitute a special situation for the purposes of the fairness clause (Case 58/86 *Coopérative agricole d'approvisionnement des Avirons* [1987] ECR 1525, paragraph 22). Second, any errors or omissions on the part of the administrative authorities cannot give rise to the application of the fairness clause unless such errors or omissions imposed upon a trader a financial obligation which he had no legal means of contesting (Joined Cases 244/85 and 245/85 *Cerealmangimi and Italgrani* v *Commission* [1987] ECR 1303, paragraph 17).

47 The Commission contends that any incompatibility between the objectives of Regulation No 3319/94, as stated in the recitals in its preamble, and the text of the regulation cannot constitute a special situation for the purposes of Article 905 of the implementing regulation.

48 The Commission argues to the same effect that any difficulties in the interpretation of Regulation No 3319/94 do not place the applicant in an exceptional situation as compared with other traders carrying on the same activity, since any such difficulties affect an indefinite number of traders.

49 The applicant's argument that the objective of the alternative method of calculating anti-dumping duty has no bearing on the sort of transactions with which it is concerned must be rejected, since 'all triangular arrangements bringing an intermediary into play entail a risk that "variable" anti-dumping duty (based on a minimum price) will be circumvented'.

50 The Commission adds that the applicant's argument that the price at which ZAP invoiced Evertrade was higher than the minimum import price is irrelevant. Applying the specific anti-dumping duty was justified, since there was some uncertainty as to the price paid to the producer or the exporter. It states that 'by voluntarily removing itself from commercial channels "visible" to the customs authorities (by not clearing customs itself), Evertrade regained absolute freedom in relation to the price invoiced to it, thereby depriving the import customs authority of any right to examine any subsequent discount which [it] might have asked for and obtained from the Polish supplier'.

51 Third, the Commission contends that the applicant cannot base any argument on the fact that the competent customs authorities accepted the customs declarations at issue. It denies that the authorities themselves were in error in the present case, putting forward a number of arguments.

52 First, the Commission asserts that, when the goods were imported, contrary to the applicant's claim, the customs declarations were not accepted unreservedly by the competent customs authority. In support of that assertion, it maintains that it is 'materially inaccurate' to claim that the fact that the letters 'ACD' were marked on

the customs declarations means that the documents included with the declarations were inspected. Such letters merely mean that the declarations were accepted as being in conformity with the requirements of customs legislation. The Commission notes that where a declaration is accepted as being in conformity, the competent customs authority merely checks that the parts of the declarations which must be completed actually have been and that the documents which it is mandatory to include with the declaration are also there. In this instance, the competent customs authority thus confined itself to checking that the documents were present but did not check their contents. At the time of customs clearance those documents were not thoroughly reviewed, nor were the goods actually inspected.

53 The Commission submits that the fact that the customs declarations are marked 'circuit 1' does not belie those findings but, on the contrary, lends support to them. With 'circuit 1', customs may certainly carry out a physical inspection of the goods but did not do so in this instance, as is shown by the letters 'ACD'. A thorough documentary inspection would be carried out if the 'circuit 2' procedure were used, which was not the case here.

54 Second, the Commission states that only errors attributable to acts of the competent authorities, or to their culpable failure to act, where minimum action would have revealed an irregularity, give rise to an entitlement not to proceed to post-clearance recovery of customs duty. That excludes errors caused by incorrect declarations on the part of the person liable (Case C-348/89 *Mecanarte* [1991] ECR I-3277, paragraphs 23 and 26).

55 Accordingly, the mere acceptance by the competent customs authority of a customs declaration recognised as being in conformity does not constitute a special situation, even though the authority was in possession of all the factors indicating that the declaration did not comply with customs legislation at the time of acceptance.

56 Third, the Commission contends that the applicant cannot base any argument on the fact that the Rouen customs office accepted the first declaration without making any comment on it. A person may not plead a breach of the principle of the protection of legitimate expectations unless the administration has given him precise assurances (Case T-571/93 *Lefebvre and Others* v *Commission* [1995] ECR II-2379, paragraph 72). The Commission also contends that the applicant, as a customs agent, could not have had any doubts as to the meaning of the letters 'ACD' and thus could not have founded any legitimate expectation on the initial acceptance of its customs declarations.

— Findings of the Court

57 It is clear from the wording of Article 905 of the implementing regulation that the repayment of import duties is dependent on the fulfilment of two concurrent conditions, (i) the existence of a special situation and (ii) the absence of obvious negligence or deception on the part of the person concerned. As a consequence, repayment of duties must be refused if either of those conditions is not met (see, to that effect, Case T-290/97 *Mehibas Dordtselaan* v *Commission* [2000] ECR II-15, paragraph 87).

58 It should be noted that the Court of Justice has held that factors 'which might constitute a special situation resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned' for the purposes of Article 905 exist where, in view of the objective underlying the fairness clause, factors liable to place the applicant in an exceptional situation as compared with other operators engaged in the same business are found to exist (*Trans-Ex-Import*, cited above, paragraph 22, and Case C-253/99 *Bacardi* [2001] ECR I-6493, paragraph 56).

59 As regards the applicant's argument that Article 1(3) of Regulation No 3319/94 raises difficulties of interpretation (see paragraphs 32 to 35 above) and that a very large number of operators and customs authorities in the Member States have misinterpreted that provision, the Court finds that the wording of Article 1(3) does not present any particular difficulty.

60 In that regard, it must be observed that Article 1(3) of Regulation No 3319/94 provides for the establishment of, first, a variable anti-dumping duty which is imposed where imports put into free circulation are directly invoiced to an unrelated importer by certain exporters or producers located in Poland, including ZAP, in so far as the cif Community frontier price plus the CCT duty is less than the minimum import price of ECU 89 per tonne product and, second, a fixed or specific duty which applies where the imports put into free circulation are not directly invoiced to the unrelated importer.

61 It is clear from Regulation No 3319/94 that, unlike the variable duty provided for by the first subparagraph of Article 1(3) of the regulation, the specific duty, provided for in the second subparagraph of that provision, is imposed irrespective of the difference between the cif Community frontier price and the minimum import price set at ECU 89, where the imports put into free circulation are not directly invoiced to the unrelated importer.

62 The imposition of a specific duty stems from the Community legislature's intention, as it is made clear by recital (39) in the preamble to Regulation No 3319/94, to prevent whatever the case circumvention of the anti-dumping measures by means of imports which have not been directly invoiced by the designated exporters or producers to an unrelated importer. The second subparagraph of Article 1(3) of Regulation No 3319/94 is thus aimed at situations in which the exporter or producer has not directly invoiced an unrelated importer, in order to exclude all forms of triangular arrangement, which could entail a risk that the anti-dumping measures would be circumvented.

63 In the present case, it is clear from the documents before the Court that the three consignments put into free circulation by the applicant on 22 and 23 August 1996 and 17 September 1996 were not directly invoiced by ZAP to the consignee companies, but were first invoiced by ZAP to Evertrade before being invoiced by Evertrade to the consignee companies. Since ZAP did not directly invoice the consignee companies for the goods, the situation consequently falls clearly within the scope of the second subparagraph of Article 1(3) of Regulation No 3319/94.

64 That finding is not undermined by the applicant's argument that to make the imports in question liable for anti-dumping duty would go beyond the objectives of Regulation No 3319/94, since, in its submission, there was no circumvention of the anti-dumping measures in this case and the price paid by Evertrade could be checked.

65 First, the Court observes that the applicant cannot in these proceedings raise the question as to whether the anti-dumping debt exists. It follows that the arguments put forward by the applicant for the purposes of this plea regarding the price which Evertrade actually paid to ZAP are immaterial.

66 Second, as has been stated at paragraphs 59 to 62 above, the rule laid down by Article 1(3), second subparagraph, of Regulation No 3319/94 presents no particular interpretative difficulty and was imposed in order to ensure the effectiveness of the regulation, the aim being to prevent the risk of circumvention of the anti-dumping measures by recourse being had to triangular import arrangements, which would be especially apt to inflate the cif Community frontier prices artificially by allowing the variable duty imposed by the first subparagraph of Article 1(3) of the regulation to be avoided. In that connection, the Court's view is that it is not necessary to establish circumvention of the anti-dumping measures for the second subparagraph of Article

1(3) of Regulation No 3319/94 to apply. However, it follows from Regulation No 3319/94 that the risk of circumvention is taken as established where imports are not directly invoiced by the producer or the exporter to the unrelated importer. In those circumstances, the specific duty of ECU 19 per tonne of the product certified by ZAP, to which that provision refers, was certainly payable.

67 Even if the alleged difficulties in interpreting Article 1(3) of Regulation No 3319/94, which the applicant invokes, were established, they would not show that circumstances existed such as to create a special situation with regard to the applicant. Such difficulties would affect in the same way all traders importing urea ammonium nitrate solution from Poland and would not place the applicant in an exceptional situation by comparison with many other traders.

68 Accordingly, the applicant has not established that circumstances existed such as to constitute a special situation for the purposes of Article 905 of the implementing regulation.

69 As to the applicant's argument concerning the purely formal nature of its alleged non-compliance, the Court finds that in view of the wording and purpose of Article 1(3) of Regulation No 3319/94, the condition that the exporter or producer must directly invoice the unrelated importer in order for variable anti-dumping duty to be imposed, is not purely formal in nature, contrary to the applicant's contention. In fact, failure to comply with that condition would have a significant effect on the correct operation of the customs rules, since where there are a number of import channels, there may be an increased risk of the anti-dumping measures being circumvented.

70 Furthermore, as the Commission has rightly maintained, the failure to invoice directly is not included among the instances of non-compliance having no significant effect on the correct operation of the customs rules concerned, which are laid down by Article 859 of the implementing regulation, in the light of which Article 204 of the Customs Code must be read (see, to that effect, Case C-48/98 *Söhl & Söhlke* [1999] ECR I-7877, paragraph 43).

71 The applicant then claims that the declarations at issue should not have been accepted by the competent customs authority, since the Polish company shown as the consignor on the declarations and the company which issued the invoices included with the declarations were not one and the same.

72 In the Court's view, this argument is based on a misunderstanding of the way in which the French authorities dealt with the documents, namely marking the letters 'ACD' on the declarations. As the Commission explained in its defence (see paragraphs 52 and 53 above), those letters merely mean that the sections of the customs declaration which must be completed were actually completed and that the documents which it is compulsory to include with the declarations were present. Therefore, the fact that the three consignments were released for free circulation after the documents had been stamped with those letters does not amount to confirmation by the French customs authorities that the information on the declarations concerned or the documents included with them was either correct or accurate and did not prevent them from undertaking post-clearance verification of that information in the light of the conditions relating to the TARIC code given by the applicant on behalf of the importer.

73 In any event, it must be borne in mind that ZAP, which is one of the Polish exporters or producers specifically referred to by Article 1(3) of Regulation No 3319/94 on whose products variable anti-dumping duty could be imposed when certain conditions were met, was identified on the declarations as the exporter and companies established in France were named as the consignees. Furthermore, the TARIC code 8793 (applicable where the imports put into free circulation were directly invoiced to an importer unrelated to one of the exporters or producers

referred to by Regulation No 3319/94 and located in Poland) appears on the declarations in question. Therefore, the Court holds that the irregularity relating to compliance with the conditions necessary for variable anti-dumping duty under Article 1(3) of Regulation No 3319/94 to apply lies in the fact that no direct invoices between ZAP and the consignee companies were included with the customs declarations.

74 It is also appropriate to point out that it is not the case here that the wrong invoices were submitted in error instead of the relevant ones, namely direct invoices between the Polish exporter and the consignee companies. Indeed, ZAP did not issue invoices to the consignee companies, since the transactions in this case took place in two stages (see paragraph 8 above).

75 The Court therefore finds that the French customs authorities were under no obligation to reject the declarations concerned in such circumstances and that they did not themselves make an error when they marked the declarations 'ACD' before going on to conduct a thorough examination of the information provided in the declarations and of the consistency of that information with that disclosed by an examination of the invoices included with the declarations. It must be stated that the importer and the customs agent acting on its behalf are answerable for the information in the declarations at issue. Thus, if it became apparent, following a thorough examination, that the information in question was wrong, that would still not mean that the French customs authorities, inasmuch as they had marked the declarations 'ACD', made an error when the products concerned were released for free circulation.

76 As regards the applicant's complaint that the French customs authorities, by accepting its first declaration without comment on 22 August 1996, led it to lodge the subsequent declarations under the same conditions (see paragraph 41 above), it must be borne in mind that only three declarations were lodged in this case over a period of less than one month, namely between 22 August and 17 September 1996

(see paragraph 9 above). The Court finds that that period was too short, as a matter of fact, for the French authorities to carry out a thorough review of the first declaration and, accordingly, to discover the error there before the subsequent declarations were lodged.

77 In any event, even if the French customs authorities had carried out a more thorough review of the documents lodged by the applicant at the time when the three consignments were released for free circulation and had detected the error which the applicant had made in the forms about the TARIC code used, that fact would not have changed either the reality of the commercial transactions in this case or the fact that the consignments were invoiced twice, first between ZAP and Evertrade and then between Evertrade and the consignee companies, and that a fixed anti-dumping duty was therefore payable. It must therefore be concluded that the Commission did not make a manifest error of assessment in finding that the circumstances of the present case did not constitute a special situation for the purposes of the fairness clause and Article 905 of the implementing regulation.

78 In the light of the foregoing considerations, the first part of this plea must be rejected.

79 Since one of the concurrent conditions laid down by Article 905 of the implementing regulation for the repayment of import duties is not fulfilled, there is no need to examine the other part of this plea.

80 Accordingly, the second plea is rejected.

Third plea: the contested decision does not comply with the requisite formalities

Arguments of the parties

81 The applicant claims that the contested decision does not comply with the requisite formalities, since it does not make any reference to the applicant. The only indication that the decision applies to the applicant is that the amount of duty referred to by the contested decision is very similar to the amount in respect of which remission was applied for. That is particularly damaging for the applicant since this is an individual decision which is not general in nature.

82 The Commission submits that the contested decision does comply with the requisite formalities and that there has been no infringement of essential procedural requirements.

Findings of the Court

83 It must be stated that, as the Commission rightly points out, no provision of Article 905 et seq. of the implementing regulation, which lay down the procedure relating to the remission of duty pursuant to the fairness clause, requires the Commission to state the name of the person applying for remission in the decision adopted at the end of the procedure. It is clear from those provisions that it is the Member State of the decision-making customs authority which transmits the case to the Commission so that the case may be settled. After that, the Commission's decision as to whether or not there is a special situation is notified to the Member State concerned.

84 In any event, the applicant did not deny that the contested decision was notified to it by the French customs authorities. Furthermore, it is evident from the documents before the Court that the Commission, by letter of 27 September 2001, informed the applicant that it had received its application for remission of import duty, forwarded by the French authorities, and informed the applicant of its assessment of the case in order that the applicant could exercise its rights of defence. The Commission also stated in that letter that the application for remission had been registered with reference number REM 06/01, that is to say, the same reference number as that given in the contested decision. Therefore, that number allowed the applicant in full certainty to make a connection between the application for remission forwarded by the French authorities to the Commission and the contested decision.

85 It follows that this plea is unfounded and must accordingly be rejected.

86 Since none of the pleas raised against the contested decision has been successful, the application must be dismissed.

Costs

87 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber, Extended Composition)

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to bear its own costs and to pay those of the Commission.**

Lindh García-Valdecasas Cooke

Mengozzi Martins Ribeiro

Delivered in open court in Luxembourg on 21 September 2004.

H. Jung P. Lindh

Registrar President