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CUSTOMS CODE COMMITTEE

Repayment Section

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**Guidelines on the consequences of the
Judgment of the Court of 9 March 2006 in Case C-293/04
“Beemsterboer”**

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Judgment of the Court of 9 March 2006 in Case C-293/04
“Beemsterboer”**

1. With a view to allowing the application of Article 220(2)(b) of the Code in accordance with the requirements of the Court of Justice, Member States are requested to add to requests for subsequent verification of certificates the following request for assistance:

“The EC legislation establishes that the importer can only be held responsible for the import duties which have not been recovered as a result of the presentation of a certificate of origin which appears to be invalid, where it can be established that the issuance of the certificate was based on incorrect information supplied by the exporter. The European Court of Justice has decided that the burden of proof lies with the customs authorities of the EC Member States. We therefore request you to provide us with the following additional information.

Should the certificate covered by this request have been issued for products not meeting the requirements for being considered as originating in (country, group of countries or territory) or should the competent authorities of your country be unable to confirm that originating status, would you please indicate in your reply:

- 1. Whether the issue of the incorrect certificate is the result of an incorrect account of the facts provided by the exporter.*
- 2. Whether the authorities of your country competent for verifying the certificate were given access by the exporter to the documents and information necessary for the post clearance verification of the originating status of the products.”*

This procedure is applicable only:

- a) to new requests made in future and
- b) where an initial request has been sent, no answer has been received, and a reminder has to be sent to the third country concerned.

It will be used for requests for verification already carried out (completed) only where a new fact has subsequently arisen.

2. Approach to be followed if the non-member country consulted does not reply to a request for subsequent verification or if the reply does not provide the requested information.

2.1. Preliminary observation: situations for which the Beemsterboer judgment has no effect:

* situations in which the customs authorities of the Member State of importation may not accept the documents of origin because they do not comply with the rules (certificate not signed or not stamped) or because they are not applicable to the goods declared - this obviously being established without post-clearance verification with third country authorities;

* situations in which the request to third country authorities for post-clearance verification is based on "reasonable doubt" about the formal authenticity of the document (false or forged document). The Beemsterboer judgment does not cover this situation, and the question of whether or not the exporter gave an incorrect account of the facts to the third country authorities is redundant.

2.2. According to some customs provisions, if the authorities consulted do not reply within four months following a second notification of reasonable doubt, the customs authorities of the importing Member State must refuse entitlement to tariff preferences except in exceptional cases¹.

As a result of the judgment, unless there is proof that the exporter gave an incorrect account of the facts to obtain a preferential certificate of origin, and provided the person liable for payment acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration, the customs authorities of the importing Member State cannot recover the duty involved.

The fact that no reply has been received from the authorities consulted is in itself an acknowledgement that the certificate is incorrect and it cannot be concluded on the basis of this fact that the exporter has given an incorrect account of the facts in order to obtain a document showing that the goods fulfilled the conditions for entitlement to preferential treatment.

Consequently if no reply is received from the authorities consulted, or the reply received from those authorities does not provide information about whether the exporter gave an incorrect account of the facts, and the customs authorities of the importing Member State do not possess any other proof that the exporter has given an incorrect account of the facts, it must be concluded that, firstly, tariff preference should be refused (except in

¹ See Articles 94(5) and 122 of Regulation (EEC) No 2454/93, Article 32(6) of the Protocol to the EEA Agreement on rules of origin, Article 133 of the Pan-Euro-Mediterranean Protocols on the definition of originating products and methods of administrative cooperation, Article 32(6) of Protocol No 1 in Annex V to the Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000.

exceptional cases) and, secondly, provided the person liable for payment acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration, non-entry in the account (or remission or repayment) is justified.

Entry in the accounts can be considered to be justified only if the customs authorities of the importing Member State:

- either establish, on the basis of other proof (e.g. OLAF or national investigation), that the certificate in question had been drawn up on the basis of an incorrect account of the facts by the exporter and if the authorities of the non-member country were not in a position to know whether the goods fulfilled the conditions conferring originating status,
- or establish that the person liable for payment did not act in good faith or did not comply with all the provisions laid down by the legislation in force as regards the customs declaration.

2.3. Implications for ongoing recovery procedures:

* Ongoing recovery procedures should be stopped where they have not complied with the principles set out in the Beemsterboer judgment. Ongoing procedures must not be interrupted where the Member State has demonstrated that the person liable for payment did not act in good faith or did not comply with all the provisions laid down by the legislation in force as regards the customs declaration and/or that the certificate was issued on the basis of an incorrect account of the facts given by the exporter.

* Unless a new fact has subsequently arisen, a decision may be taken to waive post-clearance entry in the accounts or grant repayment or remission without sending a new request to the third country for the information referred to in point 1 above to establish whether the exporter gave an incorrect account of the facts. Sending such a request would both squander resources and slow down the procedure a great deal, particularly where the third country concerned has failed to reply to the first and second requests for post-clearance verification.

Obviously, the termination of ongoing recovery procedures does not apply to cases in which the request for post-clearance verification was based on "reasonable doubt" about the formal authenticity of the preferential document (case referred to in point 2.1 above).