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EC TRADE REPORT

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I. WTO

Appellate Body Report in the EC/United States Foreign Sales Corporations Dispute

On February 13, the Appellate Body upheld the findings of the compliance Panel with respect to the United States' tax treatment of so-called "Foreign Sales Corporations" (FSC).[1] The original Panel and Appellate Body had found that these measures constituted a prohibited export subsidy under the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement) and the Agreement on Agriculture.[2] The Dispute Settlement Body (DSB) therefore ordered that the United States bring the FSC measures into conformity with its WTO obligations, and that the FSC subsidies found to be prohibited export subsidies be withdrawn without delay, pursuant to Article 4.7 of the SCM Agreement.

In response to that request, the United States promulgated the FSC Repeal and Extraterritorial Income Act (ETI Act). However, the EC considered that the ETI Act did not comply with the DSB recommendations and rulings and as a result had recourse to Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), which allows for the possibility to refer to a panel a disagreement as to consistency with WTO rules of measures adopted to comply with DSB recommendations. The Article 21.5 Panel proceedings concluded that the ETI Act was inconsistent with the United States' obligations under the SCM Agreement, the Agreement on Agriculture, and the GATT 1994. In addition, it held that by indefinitely making available the FSC benefit for certain transactions by virtue of Section 5(c)(B) of the ETI Act, the United States had not fully withdrawn the FSC subsidies found to be prohibited export subsidies in the original proceedings.

In a further attempt to meet its WTO obligations, the United States enacted the American Jobs Creation Act (Jobs Act) repealing the tax exclusion of the ETI Act. The EC considered that the Jobs Act was deficient, however and as a result, had recourse to Article 21.5 DSU for a second time for the following reasons: (i) the Jobs Act contains a "transition provision," pursuant to which the ETI tax scheme remains available, on a reduced basis, for certain transactions until December 31, 2006; (ii) the Jobs Act contains a "grandfathering provision", pursuant to which the ETI tax scheme remains available indefinitely with respect to certain schemes; and (iii) the Jobs Act does not repeal or otherwise make reference to Section 5 of the ETI Act, which indefinitely "grandfathered" FSC subsidies with respect to certain provisions.

On September 30, 2005, the second compliance Panel found that the ETI benefits that had been identified by the first compliance Panel as being inconsistent with the United States' WTO obligations remained available by virtue of the

[1] WT/DS 108/AB/RW2 of September 25, 2005 and EC Trade Report July-September 2005, p. 3.

[2] Articles 3.1(a) and 3.2 SCM Agreement and Articles 10.1 and 8 of the Agreement on Agriculture.

transition provision, the grandfathering provision contained in the Jobs Act, and the indefinite grandfathering of the original FSC subsidies through the continued operation of Section 5 of the ETI Act.

On appeal, the United States submitted that (i) Section 5 of the ETI Act was not within the terms of reference of the second compliance Panel. With regards to the first ground of appeal, the Appellate Body held that submissions and statements made during the course of panel proceedings, as well as the entirety of the panel request itself, may be consulted to confirm the subject matter of a dispute and the Panel's terms of reference. The Appellate Body concluded that, while it would have been preferable for the EC to have explicitly articulated its challenge to the continued operation of Section 5 of the ETI Act, it had specifically referred to a failure by the United States to withdraw its prohibited subsidies as required by Article 4.7 SCM Agreement in its Panel request and had, in its first written submission to the Panel, made clear that it was challenging Section 5 of the ETI Act. The Appellate Body concluded that the EC's panel request referred to the entirety of the prohibited subsidies, including the continued operation of Section 5 of the ETI Act, and that this provision was therefore within the Panel's terms of reference.

The Appellate Body found that the United States' appeal that the Panel had erroneously found non-compliance with the DSB's recommendations rested on two distinct grounds: (i) as to the FSC subsidy, the Panel was wrong to find non-compliance because Section 5 was not within the Panel's terms of reference, and (ii) as to the ETI subsidy, the Panel was wrong to find non-compliance because there had been no recommendation by the DSB in respect of this provision, and an Article 21.5 Panel was not entitled to make a new recommendation pursuant to Article 4.7 of the SCM Agreement. As the Appellate Body had found that Section 5 was within the Panel's terms of reference, this left only the second issue to be determined.

The Appellate Body held that an Article 4.7 recommendation remains in effect until the Member concerned has fulfilled its obligation by fully withdrawing the prohibited subsidy. The obligation remains in effect even if several proceedings under Article 21.5 become necessary. The relevant recommendations adopted by the DSB in the original proceedings, and those in subsequent Article 21.5 proceedings, form part of a continuum of events relating to compliance with the DSB recommendations in the original proceedings. In this case, the Appellate Body upheld the Panel's finding that, in maintaining prohibited FSC and ETI subsidies, the United States continued to fail to implement the DSB recommendations in the original proceedings.

As a result of the finding, the EC announced that it would re-impose trade sanctions, temporarily lifted last year after the U.S. Congress adopted the Jobs Act to replace the ETI Act, at the rate of 14 percent duty on the same range of U.S. imports previously covered. The rate will rise by one percentage point a month to a maximum of 17 percent percentage points. The duties are to take effect 60 days after the ruling is formally adopted.

Appellate Body Report in the Mexico Sweetener Dispute

On March 6, the WTO Appellate Body rejected Mexico's appeal in a case concerning Mexican tax measures on soft drinks and other beverages.[3] A Panel had previously found that Mexico's 20 percent tax on the sale and distribution of beverages made with imported sweeteners, including high-fructose corn syrup (HFCS) and beet sugar, is discriminatory and contrary to GATT rules that require treatment for imported products to be no less favorable than that for similar domestic products.[4] Before this Panel, Mexico had submitted that the measures in question had been adopted in response to the United States' foreclosure of Mexican cane sugar importers from its national market, and that the dispute more rightly fell within the ambit of a NAFTA Arbitral Panel; Mexico claimed that the WTO Panel was therefore not the appropriate forum for the hearing, and that the Panel should therefore have exercised its "implied jurisdictional power" to decline jurisdiction. Mexico further submitted that as the measures had been adopted to force the United States to fulfill certain NAFTA obligations, they constituted measures taken "to secure compliance with laws or regulations," and were therefore justifiable under Article XX(d) of GATT 1994.[5]

The Appellate Body upheld the Panel's conclusions that (i) it had no discretion to decide whether or not to exercise its jurisdiction in a case properly before it; (ii) Mexico's measures did not constitute measures "to secure compliance with laws or

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[3] WT/DS 308/AB/R.

[4] WT/DS 308/R of October 7, 2005.

[5] Article XX(d) of GATT 1994 exempts measures applied in a manner which would not constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or where those measures are necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of GATT 1994.

regulations" within the meaning of Article XX(d) of GATT 1994; and (iii) Mexico had not established that the challenged measures were justifiable under Article XX(d) of GATT 1994. The Appellate Body therefore also rejected Mexico's claim that the Panel had failed to fulfill its obligations under Article 11 of the Dispute Settlement Understanding (DSU) in finding that Mexico had not established that its measures contributed to securing compliance in the circumstances of the case.

While the Appellate Body agreed that there is a measure of discretion inherent in the adjudicative function of a Panel, Article 11 of the DSU obliges a Panel to make an objective assessment of a matter that has been rightly brought before it by a Member. The Appellate Body found it hard to see how a Panel would fulfill that obligation if it declined to exercise validly established jurisdiction, and abstained from making any finding on the matter rightly before it. The Appellate Body declined to express a view on whether there may be other circumstances in which legal impediments could exist that would preclude a Panel from ruling on the merits of the claims before it. However, it was noted that Mexico had not taken issue with the Panel's finding that the subject matter and the respective positions of the parties were not identical in the NAFTA and WTO disputes and that Mexico had stated that it could not identify a legal basis that would allow it to raise the market access claims it was pursuing under the NAFTA in a WTO dispute settlement proceeding. It was furthermore undisputed that no NAFTA panel had at that time decided the "broader issue" between the parties that Mexico had alluded to. Finally, Mexico had not exercised the so-called "exclusion clause" of Article 2005.6 of the NAFTA.[6]

Referring to the ruling of the Permanent Court of International Justice in *Factory at Chorzów*, Mexico submitted that the "applicability" of its WTO obligations towards the United States would be "called into question" as a result of the United States having prevented Mexico, by an illegal act (namely, the alleged refusal by the United States to nominate panelists to the NAFTA panel), from having recourse to the NAFTA dispute settlement mechanism.[7] The Appellate Body rejected this argument concluding that, even assuming *Factory at Chorzów* was authority for such a principle, a pre-condition of its application would be a determination that the United States had acted inconsistently with its NAFTA obligations. There was no basis in the DSU for panels and the Appellate Body, however, to adjudicate non-WTO disputes.

Turning to Article XX(d) of GATT 1994 and referring to its previous decision in *Korea – Various Measures on Beef*, the Appellate Body explained that two elements must be shown for a measure to be justified under this provision: (i) the measure must be one designed to "secure compliance" with laws or regulations which are not themselves inconsistent with some provision of the GATT 1994, and (ii) the measure must be necessary to secure such compliance.[8] The Appellate Body also explained that a Member who invokes Article XX(d) as a justification has the burden of demonstrating that these two requirements are met.

Applying the first limb of the test, the Appellate Body found that "laws and regulations" do not include obligations of another WTO Member under an international agreement. These terms, rather, refer to rules that form part of the domestic legal system of a WTO Member, including rules deriving from international agreements that have been incorporated into the domestic legal system or have direct effect according to that Member's legal system. This line of reasoning was supported by the fact that the illustrative list of "laws or regulations" provided in Article XX(d) does not include international obligations or agreements, despite these obligations and agreements being expressly referred to in other parts of the GATT 1994.

Applying Mexico's interpretation of the GATT *ad absurdum*, the Appellate Body held that Mexico's broad interpretation of "laws or regulations" would allow WTO Members, relying on Article XX(d), to adopt WTO-inconsistent measures based on a unilateral determination that another Member had breached its WTO obligations. Even if the terms did not go so far as to encompass WTO agreements, Mexico's interpretation would imply that WTO Panels and the Appellate Body would have to

[6] Article 2005.6 of the NAFTA provides that "once dispute resolution procedures have been initiated under Article 2007 or dispute settlement proceedings have been initiated under the GATT, the forum selected shall be used to the exclusion of the other, unless a party makes a request pursuant to paragraph 3 or 4."

[7] Permanent Court of International Justice, *Factory at Chorzów (Germany v. Poland),* 1927, PCIJ Series A, No.9, p.31.

[8] WT/DS 161/AB/R and WT/DS 169/AB/R of December 11, 2000.

assume that there had been a violation of the relevant international agreement, or would have to assess whether such a violation had taken place. This would constitute an unacceptable extension of the function of these tribunals.

Applying the second limb of the test, the Appellate Body corrected the Panel's determination that the phrase "to secure compliance" required a guarantee that the measure in question would achieve its result with absolute certainty, and that the use of coercion was a component of such a measure. Rather, Article XX(d) required only that the measure be designed to secure compliance. As Mexico had failed to satisfy the first limb of the test, however, the Appellate Body upheld the Panel's conclusions and requested that it bring the measures that had been found to be inconsistent with the GATT 1994 into conformity with its obligations under that Agreement.

Arbitrator's Award in Chicken Cuts Dispute

On February 20, the Arbitrator adopted his award in the dispute opposing Brazil and Thailand to the European Communities (EC) over the customs classification of frozen boneless chicken cuts.[9]

A Panel had previously decided, and the Appellate Body confirmed, that the EC, through a change to its EC tariff classification, had imposed customs duties on frozen boneless chicken cuts that were inconsistent with the correct classification of these imports, and had thus infringed Articles II:1(a) and II:1(b) of the GATT 1994.[10] The Arbitrator had been appointed to determine the reasonable period of time for implementation of the Dispute Settlement Body (DSB) rulings.

The EC submitted that the implementation of the recommendations and rulings of the DSB was a two-stage process. The EC claimed that, as the implementation required it to go behind previous judgments of the ECJ, it was necessary first to seek a decision from the World Customs Organization (WCO).[11] Once a decision had been given by the WCO, the EC would then be required to adopt a Commission Regulation amending its Combined Nomenclature. The EC claimed that the two-stage process would require 26 months from the date of adoption by the DSB of the Panel and Appellate Body Reports.

The Arbitrator set out four general principles that should be applied in order to establish the duration of a "reasonable period of time": (i) the period should be the shortest period of time possible within the legal system of the implementing Member; (ii) the Member is expected to use whatever flexibility is available within its legal system in its efforts to fulfil its WTO obligations, but this need not necessarily include recourse to extraordinary measures; (iii) the particular circumstances of the dispute may be taken into account; and (iv) an implementing Member seeking to go outside its domestic decision-making processes bears the burden of establishing that this external element of its proposed implementation is necessary for, and therefore indispensable to, that Member's full and effective implementation of the recommendations and rulings of the DSB.

On the facts, the Arbitrator found that the EC claim that recourse to the WCO was indispensable relied on a finding that was a contradiction between the Panel and the Appellate Body's understandings of the customs classification system and previous ECJ judgments. In the absence of such a contradiction, the EC could proceed to adopt an amending Regulation without consulting the WCO. The Arbitrator found that neither the Panel nor the Appellate body had made definitive findings as to the ECJ judgments, but they had expressed "considerable skepticism" about the EC's interpretation of these cases. He therefore concluded that the EC had not shown to his satisfaction that the ECJ judgments were inconsistent with the recommendations and rulings of the DSU, and he found no reason to account for the allowance of time for a WCO decision in his determination of the reasonable period of time.

Turning to the determination of the time required by the EC to pass an amending Regulation, the Adjudicator held that the time period would ordinarily be determined according to the standard practices in an implementing Member's legal system. Where time periods are asserted for a particular proposed step, but are not supported by evidence, the submissions of the parties will be evaluated bearing in mind that implementation should occur in the shortest period of time possible within the legal system of the implementing member.

Rejecting Brazil's submission that his determination of a reasonable period of time should be affected by the fact that Brazil was a developing country, the Adjudicator concluded that a "reasonable period" for the EC to implement the DSB recommendations

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9 WT/DS 269/13 and WT/DS 286/15.

10 WT/DS 269/R and WT/DS 286/R of May 30, 2005 and WT/DS 269/AB/R and WT/DS 286/AB/R of September 12, 2005. See also EC Trade Report April-June 2005, p. 3 and EC Trade Report July-September 2005, p. 2.

11 See Case C-175/82 *Dinter v Hauptzopllamt Köln-Deutz* and Case C-33-92 Gausepohl-*Fleisch GmbH v Oberfinanzdirektion Hamburg*

and rulings was nine months, expiring on June 27, 2006. [12]

II. EU Commercial Policy

A. Case Law

Court of First Instance Ruling on the Community's Liability under Article 288(2) EC.

On January 26, the Court of First Instance rendered a judgment concerning the Community's non-contractual liability for monetary damages under Article 288(2) EC.[13]

The applicant before the Court, Medici Grimm KG, is an importer of leather handbags originating in China, which are manufactured by Lucci Creation Ltd, a company located in Hong Kong with factories in China. The leather handbags are produced exclusively for Medici Grimm in the Community.

In August 1997, the Council imposed definitive anti-dumping duties on imports of leather handbags originating in China.[14] Neither Medici Grimm nor Lucci Creation participated in the anti-dumping investigation. Lucci Creation's imports into the Community were therefore subject to the residual duty of 38%.

Following the imposition of the definitive duties, a large number of producers and exporters in China contacted the Commission to request individual treatment. As the period prescribed in the original investigation for submitting their request had lapsed, the Commission could no longer consider such requests. The Commission nevertheless published a notice in the Official Journal in which it requested producers and exporters to submit evidence warranting the initiation of an interim review of the anti-dumping measures imposed by the Council.[15]

In December 1997, the Commission formally initiated an interim review of the anti-dumping measures, despite the fact that the time limit after which importers or exporters may submit a request for an interim review to the Commission had not expired, and that there was no change in circumstances that could have justified a review procedure.[16] The Commission stated however, that the scope of the review was limited to the issue of individual treatment of producers and exporters. Moreover, the investigation period was the same as that covered under the original investigation. During the Commission's interim review procedure, imports of handbags that had not received individual treatment remained subject to the residual duty rate.

The review proceedings showed that there was no dumping in relation to Lucci Creation. Lucci Creation therefore qualified for an individual anti-dumping duty of 0%. Moreover, Medici Grimm argued in the course of the review proceedings that the regulation to be adopted should have retroactive effect, mainly because the review investigation covered the same period of time as the original investigation. However, Regulation 2380/98, which the Council subsequently adopted, did not have retroactive effect.[17]

In a first case before the Court of First Instance, Medici Grimm asked the Court to annul Council Regulation 2380/98 because it did not have retroactive effect. The Court held that the Council had not conducted a review investigation but had re-opened the initial investigation. First, there were no changes in circumstances that could have justified initiating a review investigation. Second, the investigation period was the same as that of the initial investigation. Moreover, the Court held that the conditions for imposing anti-dumping measures were not met, as Lucci Creation had not engaged in

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12 Brazil had relied on Article 21.2 of the DSU which states: " Particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement."

13 Case T-364/03, *Medici Grimm KG v. Council*, judgment of January 26, 2006, not yet published.

14 Council Regulation 1567/97 of August 1, 1997 imposing a definitive anti-dumping duty on imports of leather handbags originating in the People's Republic of China and terminating the proceeding concerning imports of plastic and textile handbags originating in the People's Republic of China, OJ 1997 L 208/31.

15 OJ 1997 C 278/4.

16 OJ 1997 C 378/8.

17 Council Regulation 2380/98 of November 3, 1998, amending Regulation 1567/97 imposing a definitive anti-dumping duty on imports of leather handbags originating in the People's Republic of China, OJ 1998 L 296/1.

dumping during the investigation period. The Court thus partly annulled Council Regulation 2380/98.[18]

In the present action, Medici Grimm claims damages of € 168,315 from the Council on the basis of Article 288(2) EC, which requires (i) a sufficiently serious breach of a rule of law intended to confer rights on individuals, (ii) the existence of damages, and (iii) a causal link between the unlawful conduct and the damages suffered. The main issue before the Court concerned the question of whether there was a sufficiently serious breach of Community law. According to settled case law, this is the case where the Community institution concerned manifestly and gravely disregarded the limits of its discretion. Where the institution has only a considerably reduced discretion, or no discretion at all, the mere breach of Community law may be sufficient to establish the existence of a sufficiently serious breach.

The Court held that the Council did not have any discretion and was bound to give retroactive effect to the amendment of the anti-dumping measures. In particular, because the Council found that Lucci Creation had not engaged in dumping during the investigation period, it was not entitled to impose an anti-dumping duty on its imports.

However, lack of discretion does not mean that there is *per se* a sufficiently serious breach of Community law. The Court must also take into account "*the complexity of the situation to be regulated, the difficulties in the application or interpretation of the legislation, the clarity and precision of the rule infringed, and whether the error of law made was inexcusable or intentional*".[19] As regards the present case, the Court held that the Council made an excusable error. First, the case concerned difficult legal questions without any precedents in case law. Second, the refusal to give retroactive effect was based on the fact that the Council was under the (incorrect) impression that it conducted a review procedure, which is prospective in nature. Third, it was not established that the Council misused its powers. In particular, the applicant could not establish that the Council refused to give retroactive effect with the exclusive purpose of achieving an end other than that stated.

B. Policy Developments

Anti-dumping investigation into Chinese and Vietnamese leather shoes – gradual phasing in of anti-dumping duties

The European Commission's investigation into allegations of dumping of leather footwear in Europe by China and Vietnam has found evidence of state intervention, dumping and injury to the Community industry. On February 23, Trade Commissioner Mandelson thus recommended to Member States and to his Commission colleagues that a provisional anti-dumping duty of 19.4% for China and 16.8% for Vietnam be introduced. Moreover, Commissioner Mandelson took the unprecedented step of recommending that the duties be phased-in over a period of six months.

The proposal to gradually phase-in the duties, starting at about 4%, aims to take into account the long lead-time between the purchase of the leather shoes and their delivery (for example, in cases where goods have already been bought and placed in transit). Moreover, it gives retailers and importers a grace period to adapt their commercial behavior to the new situation.

III. EU Customs Policy

Court of Justice Judgments on the Interpretation of Articles 220 and 221 of the Community Customs Code

During the fist quarter, the Court of Justice rendered three noteworthy judgments with respect to the interpretation of Articles 220 and 221 of the Community Customs Code (CCC)[20] regarding post-clearance recovery of import duties.

Article 128 provides that: "Where a customs debt is incurred as a result of the acceptance of the declaration of goods for a customs procedure (…) the amount corresponding to such customs debt shall be entered in the accounts as soon as it has been calculated and, at the latest, on the second day following that on which the goods were released".

Where the amount has not been entered in the accounts within the time limit, or has been entered

[18] Case T-7/99, *Medici Grimm v. Council*, judgment of June 29, 2000 [2000] ECR II-2671.

[19] Para. 87 of the judgment.

[20] Council Regulation 2913/92 of October 12, 1992 establishing the Community Customs Code, OJ 1992 L 302/1.

in the accounts at a level lower than the level legally owed (*e.g.,* because of a mistake or a fraud), Article 220 CCC provides that the amount of duty to be recovered must be entered in the accounts within 2 days of the date on which the customs authorities (i) become aware of the situation, (ii) are in a position to calculate the amount owed and (iii) can identify the debtor.

Pursuant to Article 221 CCC, the amount of duty owed by the debtor must be communicated to him as soon as it is entered in the accounts, and at the latest within 3 years from the date the debt is incurred.

Commission v. Spain.[21] In a judgment rendered on February 23, the Court of Justice condemned Spain for failure to observe the mandatory time limits for entry in the accounts of Article 220 CCC and to pay corresponding late payment interests. As explained above, the amount to be recovered subsequently (*i.e*., post-clearance) must be entered in the accounts within 2 days of the date where the conditions of Article 220 of the Customs Code are met. Due to its national customs procedure, however, Spain was systematically late in entering customs debt in the accounts. Under Spanish law, where the authorities find that a customs debt must be recovered following an inspection, they issue a report of the inspection where they propose the amount to be recovered. The Spanish authorities argued that the proposed amount was not the amount that should not be entered in the accounts ,since the inspection report was not the final document ordering recovery and only opened the formal procedure (giving the debtor the opportunity to be heard and to respond to the inspection report). The Court found that national procedural rules, and in particular the respect of the rights of defence, must not delay the entry in the accounts. Consequently, pursuant to Article 220 CCC the amount of the customs debt must be entered into accounts as soon as the authorities can calculate the amount owed (*i.e*., when the inspection report is issued).

Belgium v. Molenberg.[22] In a judgment of February 23, the Court of Justice gave a preliminary ruling concerning the export of videotapes from Macao to Belgium via Hong Kong. The goods had originally been exempted from customs duties because of a special regime with Macao. However, the authorities later discovered that the videotapes actually originated in China and that, consequently, customs duties had to be recovered from the customs agent.

First, the Belgian court asked whether the Customs Code, and in particular Article 221, was applicable to a customs debt incurred before its entry into force on January 1st, 1994, but recovery of which was not initiated prior to January 1st, 2004. The Court recalled that, according to settled case-law, procedural rules are generally held to apply to all proceedings pending at the time when they enter into force, whereas substantive rules are usually interpreted as not applying, in principle, to situations existing before their entry into force (*i.e*., retroactively). The Court found that the 3-year time limit for the recovery of customs debts as provided by Article 221(3) CCC must be considered a substantial rule, since the expiry of this period has the effect of extinguishing the debt. Consequently, Article 221 CCC cannot be applied to a debt incurred before January 1st, 1994.

Second, the Belgian court asked whether the notification of the amount of customs duties to the debtor required by Article 221(1) CCC might take place before the entry in the accounts. The Commission considered that recovery (*i.e.,* the notification to the debtor) could be initiated before the entry in the accounts. However, the Court confirmed that the entry in the accounts was a necessary procedural step before the notification to the debtor.

Third, the Court was asked whether Member States are required to determine special procedures for the notification of the amount of duties to the person liable for the customs debt, pursuant to Article 221 CCC. The agent argued that Member States must set out such procedure to duly notify the amount of duty to the debtor. The Court found however that, pursuant to Article 10 EC Treaty, when Member States implement Community rules and in the absence of specific Community provisions, they act in accordance with their procedural and substantive rules. Therefore, Member States are not required to adopt specific procedural rules on the manner in which communication of the amount of duties is to be made to the debtor, provided the debtor receives adequate information.

[21] Cases C-546/03, *Commission v. Spain,* judgment of February 23, 2006, not yet published.

[22] C-201/04, *Belgium v. Molenberg* , judgment of February 23, 2006, not yet published.

Beemsterboer Coldstore. On March 9,[23] the Court of Justice gave a preliminary ruling in a case referred to it by a Dutch Court with respect to the interpretation of Article 220 CCC regarding post-clearance recovery of customs duties. Normally, the amount of duty to be subsequently recovered must be entered in the accounts within two days of the date on which the customs authorities (i) become aware of the situation, (ii) are in a position to calculate the amount owed and (iii) can identify the debtor. However, it is accepted that an exception exists if the remaining debt was not recovered as a result of a mistake by the customs authorities, which could not reasonably have been detected by the debtor. The exception applies, for example, when the customs authorities have issued an incorrect certificate, although the exporter provided them with correct information. In its judgment, the Court clarified that an importer can not rely on the exception if it is uncertain whether the certificate was incorrect and that the person who relies on the exception must provide the necessary evidence.

IV. EU External Relations

A. Case Law

European Court of Justice Strict Interpretation of 1992 Embargo Regulation Prohibiting Trade with Serbia and Montenegro

In response to a request for a preliminary ruling issued by the Higher Regional Court of Cologne on the interpretation of Council Regulation 1432/92 prohibiting trade with the Republics of Serbia and Montenegro (Embargo Regulation),[24] the Court of Justice, following Advocate General Jacobs' opinion,[25] adopted a broad interpretation of the Embargo Regulation's prohibiting of commercial carriage of persons to or from Serbia and Montenegro.[26]

The Embargo Regulation in question prohibited, among other actions, the provision of non-financial services whose object or effect was, directly or indirectly, to promote the economy of the Republics of Serbia and Montenegro.

In this case, Mr. Aulinger, a bus operator established in Germany, acted as a subcontractor for a travel agency established in Germany. His job was to transport immigrant workers, in particular Serbian and Montenegrin nationals, to the vicinity of the border of the territory covered by the embargo. From there passengers were transferred and carried onwards to a final destination in Serbia and Montenegro by a bus undertaking established in the territory covered by the embargo. The inverse journey from Serbia and Montenegro to Germany proceeded in a similar manner. That practice is referred to by the national court as "split transport". The travel agency organized the entire bus trip between departure points in Germany and arrival points in Serbia and Montenegro, and vice versa, and issued single "through tickets" for the whole itinerary.

Mr. Aulinger's defense argued that the service merely consisted of the carriage of passengers in an area, namely the Community, which was not covered by the Embargo Regulation. The Court, however, instead adopted a broader view to hold that split transport amounted to the provision of a non-financial service to natural persons established in Serbia and Montenegro and was consequently prohibited under the Embargo Regulation, regardless of whether the service was provided by a succession of carriers. The Court based its approach on the fact that the Embargo Regulation is a measure implementing a Security Council Resolution, and that therefore the interpretation of the Embargo Regulation should be conducted taking into account the wording and the purpose of that resolution. Moreover, the Court went on to state that in the absence of such an interpretation, the effectiveness of the Embargo Regulation would easily be undermined by means of cooperation agreements concluded between Community undertakings and Serbian or Montenegrin undertakings. Thus, in reply to the national court's ruling, it found that Mr. Aulinger's activity was in breach of the Embargo Regulation.

[23] C-293/04, *Beemsterboer Coldstore Services,* judgment of March 9, 2006, not yet published.

[24] Council Regulation 1432/92 of June 1, 1992 prohibiting trade between the European Economic Community and the Republics of Serbia and Montenegro, OJ 1992 L 151/4.

[25] Case C-371/03, *Aulinger,* opinion of November 17,2005, not yet published, and EC Trade Report October-November 2005, p. 5.

[26] Case C-371/03 *Aulinger*, judgment of March 9, 2006, not yet published.

B. Policy Developments

Commission Annual Report on U.S. Barriers to Trade and Investment

On March 1, the Commission issued its annual report on U.S. trade barriers.[27] The Commission noted that the European Union and the United States are each other's main trading partners, accounting for the largest bilateral trade relationship in the world. The relations between the European Union and the United States are continually improving, as shown by the launch of the Transatlantic Economic Initiative in 2005.

A number of obstacles still remain, though, in the transatlantic trade and investment relationship. According to the report, non-tariff barriers are now the major obstacle to increasing EU-U.S. trade. In particular, the EU remains concerned about the wide variety of discriminatory "*Buy America*" provisions that still exist, to which other federally funded infrastructure programs are being added. The broad use of "national security" exceptions such as the 1988 Exon-Florio Amendment, and subsequent legislation to restrain foreign investment in, or ownership of, businesses relating even tangentially to national security seems to be far more trade restrictive than necessary.

In addition, the United States' failure to comply with a number of World Trade Organization (WTO) dispute settlement findings continues to be a major EU concern. For instance, the repeal of the U.S. Foreign Sales Corporations (FSC) scheme still provides for transitional and grandfathering provisions, which are WTO incompatible. Similarly, unfair anti-dumping measures taken by the United States against the EU continue to be a major trade irritant, even though many of these already have been found to be incompatible with WTO rules.

[27] IP/06/250, Commission Press release of March 1, 2005.

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