OPINION OF ADVOCATE GENERAL

BOT

delivered on 29 October 2009 [1]

1. This reference for a preliminary ruling concerns the interpretation of the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part, [2] and of the Euro-Mediterranean Interim Association Agreement on trade and cooperation between the European Community, of the one part, and the Palestine Liberation Organisation (PLO) for the benefit of the Palestinian Authority of the West Bank and the Gaza Strip, of the other part. [3]

2. It arises from the fact that the company Brita GmbH [4] has contested the customs duties imposed on it by the German authorities for importing drink-makers for sparkling water manufactured in the West Bank for which the Israeli customs authorities issued a movement certificate attesting to the Israeli origin of those products.

3. The Finanzgericht (Finance Court), Hamburg (Germany), asks the Court whether, under the EC-Israel Agreement, the German customs authorities are bound by the result of the subsequent verification of origin of those products carried out by the Israeli customs authorities.

4. The national court also seeks to ascertain whether the German customs authorities were required to bring the dispute between them and the Israeli customs authorities before the Customs Cooperation Committee established by that agreement.

5. Finally, the Court is asked to rule on whether the EC-Israel Agreement or the EC-PLO Agreement can be applied without distinction to goods certified as being of Israeli origin but which prove to originate in the occupied territories, more specifically the West Bank.

6. In this Opinion, I shall propose that the Court rule that, in so far as the dispute

1 — Original language: French.
2 — OJ 2000 L 147, p. 3, the 'EC-Israel Agreement'.
3 — OJ 1997 L 187, p. 3, the 'EC-PLO Agreement'.
4 — 'Brita'.

between the customs authorities of the States parties to the EC-Israel Agreement relates to the extent of the territorial scope of that agreement, the customs authorities of the importing State are not bound by the result of the subsequent verification carried out by the customs authorities of the exporting State.

7. Next, I shall ask the Court to declare that the German customs authorities were not under an obligation to submit the dispute between them and the Israeli customs authorities to the Customs Cooperation Committee.

8. Finally, I shall set out the reasons why I take the view that goods certified by the Israeli customs authorities as being of Israeli origin but which prove to originate in the occupied territories, more specifically the West Bank, are not entitled either to the preferential treatment under the EC-Israel Agreement or to that under the EC-PLO Agreement.

I — Legal framework

A — *Community law*

9. The Euro-Mediterranean Ministerial Conference held in Barcelona on 27 and 28 November 1995 provided an opportunity to give specific expression to the policies already defined by previous European Councils, namely to establish a partnership with the countries of the Mediterranean basin. Twelve non-member States were involved at that time. These were the People's Democratic Republic of Algeria, the Republic of Cyprus, the Arab Republic of Egypt, the State of Israel, the Hashemite Kingdom of Jordan, the Lebanese Republic, the Republic of Malta, the Kingdom of Morocco, the Syrian Arab Republic, the Republic of Tunisia, the Republic of Turkey and the Palestinian Authority.

10. This new partnership comprises three chapters. The 'political and security' chapter seeks to establish a common area of peace and stability. The second chapter, the 'economic and financial' chapter, is intended to facilitate the creation of an area of shared prosperity. Finally, the 'social, cultural and human' chapter is aimed at developing human resources and promoting understanding between cultures and exchanges between civil societies.

11. Bilateral agreements were then concluded between the European Commu-

nity and the Member States, of the one part, and the Mediterranean countries, of the other part. Those agreements follow a single format comprising the aforementioned three chapters together with a protocol of agreement relating to the definition of the concept of 'originating products' and methods of administrative cooperation, which have to do in particular with the method for the issue and subsequent verification of certificates attesting to the origin of products.

12. Accordingly, the Community and the Member States signed the EC-Israel Agreement on 20 November 1995, and the EC-PLO Agreement on 24 February 1997, in Brussels.

13. Those agreements were approved, respectively, by Decision 2000/384/EC, ECSC of the Council and the Commission of 19 April 2000 [5] and Council Decision 97/430/EC of 2 June 1997. [6]

1. The EC-Israel Agreement

14. The EC-Israel Agreement entered into force on 1 June 2000. The preamble to that agreement provides that 'the Community, its Member States and Israel wish to strengthen [the existing traditional links between them] and to establish lasting relations based on reciprocity and partnership and promote a further integration of Israel's economy into the European economy'.

15. The preamble to the EC-Israel Agreement also states that the parties have concluded that agreement in the light of 'the importance [which they] attach to the principle of economic freedom and to the principles of the United Nations Charter, particularly the observance of human rights and democracy, which form the very basis of the Association'.

16. Under Article 7 of that agreement, the provisions of the EC-Israel Agreement are to apply to products originating in the Community and in Israel. Article 8 of the Agreement provides that 'customs duties on imports and exports, and any charges having equivalent effect, shall be prohibited between the Community and Israel. This shall also apply to customs duties of a fiscal nature'.

17. Article 67 of the EC-Israel Agreement provides for the establishment of an Association Council responsible for examining any major issues arising within the framework of the Agreement and any other bilateral or international issues of mutual interest.

5 — OJ 2000 L 147, p. 1.
6 — OJ 1997 L 187, p. 1.

18. Under Article 75(1) of the agreement, each of the parties may refer to the Association Council any dispute relating to the application or application of the EC-Israel Agreement.

19. Article 79(2) of that agreement also states that a party is entitled to take appropriate measures if it considers that the other party has failed to fulfil an obligation under that agreement, provided that, before so doing, it supplies the Association Council with all relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the parties.

20. The territorial scope of the EC-Israel Agreement is defined in Article 83 of that agreement. Under that article, the agreement is to apply to the territories in which the Treaties establishing the European Community and the European Coal and Steel Community are applied and under the conditions laid down in those Treaties and to the territory of the State of Israel.

21. Under Article 2(2)(a) and (b) of Protocol 4 to that agreement, concerning the definition of 'originating products' and methods of administrative cooperation, products originating in Israel are defined as products wholly obtained in Israel within the meaning of Article 4 of that protocol [7] and products obtained in Israel which contain materials not wholly obtained there, provided that the said materials have undergone sufficient working or processing in Israel within the meaning of Article 5 of that protocol.

22. Protocol 4 to the EC-Israel Agreement also lays down the rules relating to proof of origin of products. Thus, Article 17(1)(a) of that protocol provides that originating products within the meaning of that protocol are to benefit from the EC-Israel Agreement upon submission of a EUR.1 certificate for the movement of goods. [8] Under Article 18(1) of Protocol 4 to the EC-Israel Agreement, that certificate is to be issued by the customs authorities of the exporting State on application having been made in writing by the exporter or, under the exporter's responsibility, by his authorised representative.

23. Article 32 of that protocol establishes administrative cooperation between the State of Israel and the Member State concerned. Accordingly, where the customs authorities of the importing State have doubts as to the

7 — Article 4 lists the products considered as wholly obtained in the Community or in Israel. These include mineral products extracted from their soil or from their seabed, vegetable products harvested there or live animals born and raised there.

8 — 'EUR.1 certificate'.

origin of products, they may request subsequent verification of the EUR.1 certificates. In such circumstances, the former authorities are to return the certificates concerned to the customs authorities of the exporting State and give the reasons of substance or form for an inquiry.

24. Article 32(3) of that protocol provides that verification is to be carried out by the customs authorities of the exporting State. Article 32(6) of Protocol 4 to the EC-Israel Agreement states that, '[i]f in cases of reasonable doubt there is no reply within 10 months or if the reply does not contain sufficient information to determine the authenticity of the document in question or the real origin of the products, the requesting customs authorities shall, except in the case of force majeure or in exceptional circumstances, refuse entitlement to the preferences'.

25. Finally, the first paragraph of Article 33 of that protocol provides that, 'where disputes arise in relation to the verification procedures of Article 32 which cannot be settled between the customs authorities requesting a verification and the customs authorities responsible for carrying out this verification or where they raise a question as to the interpretation of this Protocol, they shall be submitted to the Customs Cooperation Committee'.

26. The question of the rule governing origin and the extent of the territorial scope of the EC-Israel Agreement has been the subject of a dispute between the Community and the State of Israel for many years. The Community takes the view that products originating in the occupied territories of the West Bank and the Gaza Strip are not entitled to the preferential regime established by the EC-Israel Agreement, while the State of Israel takes the view that this is not the case.

27. As long ago as 1997, the Commission of the European Communities, in a notice to importers, [9] expressed its doubts about the validity of EUR.1 certificates submitted on importation into the Community of orange juice from Israel and complained of inadequate administrative cooperation between the State of Israel and the Community. According to the Commission, those doubts were capable of calling in question the validity of those certificates.

28. On 12 May 1998, the Commission, in a communication to the Council and the European Parliament, [10] reported on the difficulties encountered in implementing Protocol 4 to the EC-Israel Agreement, which was applicable pending ratification of the agreement itself by the Community.

9 — Notice to importers — Importations from Israel into the Community, 8 November 1997 (OJ 1997 C 388, p. 13).

10 — Implementation of the interim agreement on trade and trade-related matters between the European Community and Israel [SEC(1998) 695 final].

29. In that communication, it stated that two obstacles to the correct implementation of that agreement remained. Those obstacles concerned exports to the Community of goods certified as originating in Israel but actually produced in the occupied territories.

30. Furthermore, at the second meeting of the EU-Israel Association Council, [11] the Commission had bemoaned the continuing differences of interpretation in relation to the territorial scope of the [EC-Israel] Agreement. It had also stated that it was legally bound to guarantee the implementation of that agreement and to protect the European Union's own resources. [12] Accordingly, the Commission had announced the publication of a new notice. [13]

31. In that notice, the Commission informed importers that 'arising from the results of the verification procedures carried out, it is now confirmed that Israel issues proofs of origin for products coming from places brought under Israeli administration since 1967, which, according to the Community, are not entitled to benefit from preferential treatment under the [EC-Israel Agreement]'. It goes on to say that 'Community operators presenting documentary evidence of origin with a view to securing preferential treatment for products originating from Israeli settlements in the West Bank, Gaza Strip, East Jerusalem and the Golan Heights are informed that they must take all the necessary precautions and that putting the goods in free circulation may give rise to a customs debt'.

2. The EC-PLO Agreement

32. The EC-PLO Agreement entered into force on 1 July 1997. The preamble to the agreement states that the parties have concluded the agreement in the light of 'the importance which the parties attach to the principles of the United Nations Charter, particularly the observance of human rights, democratic principles and political and economic freedoms which form the very basis of their relations'. The agreement was also concluded in the light of 'the difference in economic and social development existing between the parties and the need to intensify existing efforts to promote economic and social development in the West Bank and the Gaza Strip'.

33. Under Article 1(2) of the EC-PLO Agreement, the objectives of the agreement are, in particular, to contribute to the economic and

11 — See the draft minutes of the second meeting of the EU-Israel Association Council of 20 November 2001 (available on the website of the Council of the European Union).

12 — Page 4.

13 — Notice to importers — Imports from Israel into the Community, of 23 November 2001 (OJ 2001 C 328, p. 6).

social development of the West Bank and the Gaza Strip and to encourage regional cooperation with a view to the consolidation of peaceful coexistence and economic and political stability.

34. Article 5 of that agreement provides that '[n]o new customs duty on imports, or any other charge having equivalent effect, shall be introduced on trade between the Community and the West Bank and Gaza Strip'. Article 6 of the Agreement goes on to state that '[i]mports into the Community of products originating in the West Bank and the Gaza Strip shall be allowed free of customs duties and of any other charge having equivalent effect and free of quantitative restrictions and of any other measure having equivalent effect'.

35. The concept of 'originating products' is defined in Protocol 3 to the EC-PLO Agreement concerning the definition of the concept of 'originating products' and methods of administrative cooperation. Article 2(2)(a) and (b) of that protocol define as products originating in the West Bank and Gaza Strip products wholly obtained in the West Bank and Gaza Strip [14] and those obtained there and incorporating materials which have not been wholly obtained there, provided that such materials have undergone sufficient working or processing in the West Bank and Gaza Strip.

36. In the event of a dispute between the parties relating to the interpretation or application of the EC-PLO Agreement, Article 67 of that agreement provides that either party may refer the dispute to the Joint Committee for settlement.

37. Finally, Article 73 of the agreement states that it is to apply to the territories of the West Bank and the Gaza Strip.

B — *The Israeli-Palestinian Interim Agreement*

38. The Madrid Process, started in 1991, seeks to establish lasting peace in the Middle East. As part of that process, the State of Israel and the PLO, on 28 September 1995 in Washington, signed the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip. [15] That agreement, which, according to its preamble, replaces the Agreement on the Gaza Strip and the Jericho Area, [16] the Agreement on Preparatory

14 — Article 4 of Protocol 3 to the EC-PLO Agreement defines as products wholly obtained in the West Bank and Gaza Strip, inter alia, mineral products extracted from their soil or from their seabed, vegetable products harvested there and products from live animals raised there.

15 — The 'Israeli-Palestinian Agreement'.

16 — Agreement signed at Cairo in May 1994.

Transfer of Powers and Responsibilities [17] and the Protocol on Further Transfer of Powers and Responsibilities, [18] has the objective, inter alia, of 'establish[ing] [an] elected Council … and [an] elected Ra'ees (Head) of the Executive Authority for the Palestinian people in the West Bank and the Gaza Stripa … leading to a permanent settlement based on [United Nations] Security Council Resolutions 242 and 338. [19]

39. The preamble also states that the elections of the elected Council and of the Ra'ees of the Executive Authority will constitute 'a significant interim preparatory step toward the realisation of the legitimate rights of the Palestinian people and their just requirements and will provide a democratic basis for the establishment of Palestinian institutions'.

40. In order to achieve that objective, the Israeli-Palestinian Agreement provides that the State of Israel is to transfer the powers and responsibilities of the Israeli military government and civil administration to the elected Council and that it is to continue to exercise the powers and responsibilities which have not been transferred. [20]

41. Following the first phase of redeployment, [21] three areas were established, Areas A, B and C. Since the products at issue in the main proceedings come from a territory in Area C, I shall focus exclusively on that area.

42. In that area, the State of Israel retains exclusive competence in matters of security.

43. Under Article IX(5)(b)(1) of the Israeli-Palestinian Agreement, the PLO may conduct negotiations and sign economic agreements with States or international organisations.

44. Furthermore, Article XI(2)(c) of that agreement provides that '[i]n Area C, during the first phase of redeployment, Israel will transfer to the Council civil powers and responsibilities not relating to territory, as set out in Annex III'.

17 — Agreement signed at Erez on 29 August 1994.
18 — Protocol signed at Cairo on 27 August 1995.
19 — See the preamble to the Israeli-Palestinian Agreement.
20 — See Article I(1) of the Agreement.

21 — Article X of the Agreement provides that 'the first phase of the Israeli military forces redeployment will cover populated areas in the West Bank — cities, towns, villages, refugee camps and hamlets — as set out in Annex I [of the Israeli-Palestinian Agreement], and will be completed … 22 days before the day of the elections,' the elections for the elected Council having taken place on 20 January 1996 [see the websites of the European Institute for Research on Mediterranean and Euro-Arab Cooperation (http://www.medea.be) and the United Nations (http://www.un.org)].

45. Article IV of Annex III to that agreement makes special provisions for the territories in Area C.

46. It thus states that, in relation to those territories, in the first phase of redeployment, powers and responsibilities relating to the fields listed in Appendix I will be transferred to and assumed by the elected Council in accordance with the provisions of that appendix.

47. Article 6 of that appendix provides that commerce and industry are among the spheres transferred to the elected Council. It states that the sphere of commerce and industry includes, inter alia, import and export. The economic aspects of that sphere are contained in Annex V to the Israeli-Palestinian Agreement.

48. Article IX (concerning industry) (6) of that annex states that Palestinians will have the right to export their industrial produce to external markets without restrictions, on the basis of certificates of origin issued by the Palestinian Authority.

II — Facts and dispute in the main proceedings

49. Brita is a company established in Germany. It imports drink-makers for sparkling water including accessories and syrups manufactured by the company Soda-Club Ltd, [22] based in Mishor Adumin in the West Bank, to the east of Jerusalem.

50. Under the Israeli-Palestinian Agreement, that territory, which was occupied by the State of Israel in 1967, is among the territories in Area C.

51. Between February and June 2002, Brita applied for release into free circulation of the goods supplied by Soda Club. To that end, it filed 62 customs declarations stating that the State of Israel was the country of origin for those goods. The invoices produced by Soda-Club also stated that the products at issue in the main proceedings originated in Israel.

52. The German customs office, provisionally, allowed Brita's application and granted the preferential tariff to those products, in accordance with the EC-Israel Agreement. At

22 — 'Soda-Club'.

the same time, it requested subsequent verification of the proof of origin of the products.

53. That request was made following a ministerial order of 6 December 2001 stating that requests for subsequent verification must be made in relation to all preferential certificates issued in Israel where there was good reason to suspect that the deliveries of goods concerned might be from Israeli-occupied settlements in the West Bank, the Gaza Strip, East Jerusalem or the Golan Heights.

54. The request for subsequent verification was forwarded to the Israeli customs authorities. In reply, the latter told the German customs authorities that '[the] verification [which they had carried out had] proven that the goods in question originate in an area that is under Israeli Customs responsibility. As such, they are originating products pursuant to the Israel-EU … Agreement and are entitled to preferential treatment under that agreement'.

55. Taking the view that the information provided by the Israeli customs authorities was insufficient within the meaning of Article 32(6) of Protocol 4 to the EC-Israel Agreement, the German customs authorities, by letter of 6 February 2003, again asked the Israeli customs authorities to indicate, by way of supplementary information, whether the goods referred to in the preferential certificates had been manufactured in Israeli-occupied settlements in the West Bank, the Gaza Strip, East Jerusalem or the Golan Heights.

56. The Israeli customs authorities failed to reply to that request. Consequently, by notice of 25 September 2003 addressed to Brita, the Hauptzollamt (Principal Customs Office), Hamburg-Hafen, refused to grant entitlement to preferential treatment on the ground that it could not be established conclusively that the imported goods fall within the scope of the EC-Israel Agreement.

57. Post-clearance recovery of customs duties in the amount of EUR 19 155.46 was therefore sought. Brita brought an appeal against that recovery before the Hauptzollamt, Hamburg-Hafen. That appeal was dismissed by decision of 21 June 2006 as being unfounded.

58. On 10 July 2006, Brita brought an action before the referring court. Being uncertain as to how to interpret the EC-Israel Agreement,

that court stayed its proceedings and referred a number of questions to the Court of Justice for a preliminary ruling.

III — The questions referred

59. The following questions are put to the Court:

'(1) Should the importer of goods which originate in the West Bank be granted the preferential treatment requested in any event in light of the fact that preferential treatment is provided under two agreements which come under consideration in the present case — namely the [EC-Israel Agreement] and the [EC-PLO Agreement] — for goods originating in the territory of the State of Israel or in the West Bank, even if only a formal certificate of origin from Israel is submitted?

If Question 1 is to be answered in the negative:

(2) Is the customs authority of a Member State bound under the [EC-Israel Agreement], vis-à-vis an importer who is requesting preferential treatment for goods which have been imported into Community territory, by a proof-of-origin certificate issued by the Israeli authority — and the verification procedure under Article 32 of Protocol 4 to the [EC-Israel Agreement] has not been opened — as long as the customs authority has no doubt as to the originating status of the goods other than that as to whether the goods originate in an area which is merely under Israeli control — that is, pursuant to the terms of the [Israeli-Palestinian Agreement] — and as long as no dispute-settlement procedure was carried out pursuant to Article 4 to the [EC-Israel Agreement]?

If Question 2 is to be answered in the negative:

(3) May the customs authority of the country of importation refuse automatically to grant preferential treatment for the following reason alone, namely that, pursuant to its request for verification under Article 32(2) of Protocol 4 to the [EC-Israel Agreement], it was confirmed by the Israeli authorities (only) that the goods were manufactured in an area which is subject to Israeli customs jurisdiction and that they were for that reason of Israeli origin, and where the subsequent request by the customs authority of the country of importation for further specification by the Israeli authorities remained unanswered, in particular without the actual origin of

the goods having to be taken into account?

If Question 3 is to be answered in the negative:

(4) May the customs authorities refuse automatically to grant preferential treatment under the [EC-Israel] Agreement in the case where — as has become clear in the meantime — the goods originate in the West Bank, or should preferential treatment also be granted under the [EC-Israel Agreement] for goods originating in that area, in any event as long as no dispute-settlement procedure has been carried out under Article 33 of Protocol 4 to the [EC-Israel Agreement] concerning the interpretation of the expression "territory of the State of Israel" used in the [EC-Israel Agreement]?'

IV — Analysis

60. First of all, with regard to the Court's jurisdiction to interpret the association agreements at issue in this case, I wish to point out that, on the subject of the Agreement establishing an association between the European Economic Community and Turkey, [23] the Court held in *Demirel* [24] that an agreement concluded by the Council under Articles 228 and 238 of the EC Treaty, [25] is, as far as the Community is concerned, an act of one of the institutions of the Community within the meaning of Article 177, first paragraph, subparagraph (b), of the EC Treaty, [26] that the provisions of such an agreement form an integral part of the Community legal system, and that, within the framework of that system, the Court has jurisdiction to give preliminary rulings concerning the interpretation of such an agreement. [27]

61. In my view, the questions referred can be dealt with as follows.

62. By its second and third questions, the referring court asks whether, under Article 32 of Protocol 4 to the EC-Israel Agreement, the customs authorities of the importing State are bound by the result of the subsequent verification of proof of origin carried out by the customs authorities of the exporting State.

23 — Agreement signed at Ankara on 12 September 1963 by the Republic of Turkey, of the one part, and by the Member States of the EEC and the Community, of the other part. That agreement was concluded, adopted and confirmed on behalf of the Community by Council Decision 64/732/EEC of 23 December 1963 (OJ 1977 L 361, p. 29).

24 — Case 12/86 [1987] ECR 3719.

25 — Article 228 of the EC Treaty (now, after amendment, Article 300 EC) and Article 238 of the EC Treaty (now Article 310 EC).

26 — Now Article 234, first paragraph, subparagraph (b), EC.

27 — See *Demirel*, paragraph 7. See also Case C-162/96 *Racke* [1998] ECR I-3655, paragraph 41.

63. It also seeks to ascertain whether, in order to settle the dispute between them and the customs authorities of the exporting State, the customs authorities of the importing State were required, under Article 33 of that protocol, to submit the dispute to the Customs Cooperation Committee before taking measures unilaterally.

64. Finally, by the first and fourth questions, the Court is asked to give a ruling on whether goods certified by the Israeli customs authorities as originating in Israel and produced in the occupied territory of the West Bank are entitled without distinction either to the preferential treatment under the EC-Israel Agreement or to that established by the EC-PLO Agreement.

A — *Whether the customs authorities of the importing State are bound by the result of the subsequent verification carried out by the customs authorities of the exporting State*

65. First of all, I think it is worth reminding ourselves of the relevant provisions of the EC-Israel Agreement concerning verification of a product's origin.

66. In order to be entitled to preferential treatment, the exporter must, under Article 17 of Protocol 4 to the EC-Israel Agreement, submit a EUR.1 certificate. That certificate is issued by the customs authorities of the exporting State, who must take any steps necessary to verify the originating status of the product and the fulfilment of all the other requirements laid down by that protocol. [28]

67. That certificate is then submitted to the customs authorities of the State into which the product is imported. If those authorities have reasonable doubt as to the authenticity of the EUR.1 certificate, the originating status of the product concerned or the fulfilment of the other requirements laid down by that protocol, a subsequent verification of that certificate is carried out. [29]

68. The customs authorities of the importing State then return the certificate to the customs authorities of the exporting state and explain, where appropriate, the reasons of substance or form for an inquiry. The latter authorities carry out the verification and must inform their counterparts within 10 months at the latest of the result of that verification. They must indicate whether the documents are authentic, whether the product concerned can be considered as an originating product

28 — Article 18(1) and (6) of Protocol 4 to the EC-Israel Agreement.

29 — Article 32(1) of that protocol.

and whether it fulfils the other requirements of that protocol. [30]

69. If in cases of reasonable doubt there is no reply within 10 months or if the reply from the customs authorities of the exporting State does not contain sufficient information to determine the authenticity of the certificate concerned or the real origin of the product, the customs authorities of the importing State must refuse entitlement to preferential treatment. [31]

70. The administrative cooperation provided for in Article 32 of Protocol 4 to the EC-Israel Agreement was therefore introduced for the purposes of verifying the accuracy of information relating to the origin of a product. Subsequent verification may, for example, serve to ensure that the value of an item not originating in the State of Israel which is a constituent element of the final product for which an EUR.1 certificate has been issued does not exceed 10% of the ex-works price of that product [32] or to establish the processing operations which the product may have undergone. [33]

71. It is appropriate now to ask whether, in the case at issue, the result of the subsequent verification carried out by the customs authorities of the exporting State is binding on the customs authorities of the importing State.

72. The Court has already had occasion to answer this question in the context of other agreements between the Community and third States.

73. In *Les Rapides Savoyards and Others*, [34] concerning the interpretation of the Free-trade Agreement between the European Economic Community and the Swiss Confederation, [35] which contains a protocol similar to that in the EC-Israel Agreement, the Court held that 'the determination of the origin of goods … is based on a division of powers between the customs authorities of the parties to the free-trade agreement inasmuch as origin is established by the authorities of the exporting country and the proper working of that system is monitored jointly by the authorities concerned on both sides'. [36]

74. The Court goes on to say that that mechanism can function only if the customs

30 — See Article 32(2), (3) and (5) of that protocol.
31 — See Article 32(6) of Protocol 4 to the EC-Israel Agreement.
32 — See Article 5(2)(a) of that protocol.
33 — See Article 6 of that protocol.
34 — Case 218/83 [1984] ECR 3105.
35 — Agreement signed at Brussels on 22 July 1972, 'concluded, adopted and confirmed' on behalf of the Community by Council Regulation (EEC) No 2840/72 of 19 December 1972 (OJ English Special Edition 1972(I), p. 190).
36 — See *Les Rapides Savoyards and Others*, paragraph 26.

authorities of the importing State accept the determinations legally made by the customs authorities of the exporting State. [37]

75. More recently, the Court held that 'the customs authorities of the State of import may not unilaterally declare invalid a EUR.1 certificate duly issued by the customs authorities of the State of export. Likewise, in cases of subsequent verification, the same authorities are bound by the results of such verification'. [38]

76. The administrative cooperation mechanism established generally by an association agreement, and in particular by Article 32 of Protocol 4 to the EC-Israel Agreement, is therefore based on mutual trust between the customs authorities of the States parties to the agreement and on mutual recognition of the documents which they issue.

77. However, such mutual recognition is not absolute. The Court has accepted in certain cases that the customs authorities of the importing State are not bound by the result of the subsequent verification carried out by the customs authorities of the exporting State.

78. The Court has thus recognised that, in specific circumstances where the customs authorities of the exporting State are not in a position duly to carry out the subsequent verification envisaged by the protocol in question, the customs authorities of the importing State may themselves check the authenticity and accuracy of the EUR.1 certificate by taking account of other evidence as to the origin of the goods. [39]

79. The Court has also held that, when there is reasonable doubt as to the origin of the goods and there is no reply from the customs authorities of the exporting State within 10 months of the date of the verification request or if the reply given by those authorities does not contain sufficient information to enable the origin to be determined, the certificates which they have issued may be revoked by the customs authorities of the importing State. [40]

80. Furthermore, where the preferential system is established not by an international agreement binding the Community to a non-

37 — Ibid., paragraph 27.
38 — See Joined Cases C-23/04 to C-25/04 *Sfakianakis* [2006] ECR I-1265, paragraph 49.
39 — Case C-12/92 *Huygen and Others* [1993] ECR I-6381, paragraph 27.
40 — *Sfakianakis*, paragraph 38.

member State on the basis of reciprocal obligations but by a unilateral Community measure, the customs authorities of the exporting State do not have the power to bind the Community and its Member States in their interpretation of Community rules. In those circumstances, the findings reached by the Commission in relation to the origin of goods in the course of a mission of enquiry must take precedence over those of the customs authorities of the exporting non-member State. [41]

81. The Court has also held, with regard to the Agreement establishing an association between the European Economic Community and Turkey, [42] that the customs authorities of the importing State retain the right to take action for post-clearance recovery on the basis of the results of checks carried out by the Commission after the import transactions, without being obliged to have recourse to the mechanism for settling disputes provided for by that agreement. [43]

82. It is therefore only in the event of a failure to act on the part of the customs authorities of the exporting State or in the case of an independent Community measure that the customs authorities of the importing State do not have an obligation to recognise the decisions taken by the former authorities.

83. This is explained by the fact that there is a presumption that the customs authorities of the exporting State are in the best position to verify directly the facts which determine the origin of the product. [44]

84. The customs authorities of the importing State are therefore, in principle, bound by the result of the subsequent verification carried out by the customs authorities of the exporting State.

85. It is my view, however, that the circumstances of this case are different from those which the Court has hitherto had occasion to hear and determine.

86. The main proceedings are not concerned with verifying the accuracy of information relating to the product origin that creates entitlement to preferential treatment, since the origin is known and is not contested. They are in fact concerned with ascertaining whether that origin falls within the scope of the EC-Israel Agreement.

41 — See Joined Cases C-153/94 and C-204/94 *Faroe Seafood and Others* [1996] ECR I-2465, paragraphs 24 and 25.

42 — See footnote 23 of this Opinion.

43 — See Case C-251/00 *Ilumitrónica* [2002] ECR I-10433, paragraph 74.

44 — See *Les Rapides Savoyards and Others*, paragraph 26.

87. As I have already said,[45] the dispute between the customs authorities of the importing State and those of the exporting State was raised as long ago as the second meeting of the EU-Israel Association Council of 20 November 2001. I would point out that, under Article 75 of the EC-Israel Agreement, the Association Council is competent to hear disputes relating to the application or interpretation of the Agreement.

88. At that meeting, the Commission, as member of the Association Council,[46] mentioned the dispute relating to the rules of origin and the consequent difficulty of applying the EC-Israel Agreement and announced that it would take measures accordingly. The Commission bemoaned the ongoing differences of interpretation in relation to the territorial scope of that agreement and announced that it would therefore publish a new notice to importers in the *Official Journal of the European Union* clarifying and replacing the 1997 notice.

89. To date, the dispute between the Community and the State of Israel has still not been resolved.

90. The referring court is now faced with this issue in a dispute between a German company which imports products originating in the occupied territories and the German customs authorities. It has therefore now turned to the Court for a resolution of that issue.

91. The dispute between the Community and the State of Israel has, after all, been going on for many years, thus depriving economic operators of any legal certainty as to whether or not the EC-Israel Agreement applies to products originating in the occupied territories.

92. Furthermore, allowing the customs authorities of one of the parties to that agreement, or their courts, to interpret unilaterally whether that agreement applies to products originating in the occupied territories would without any doubt lead to the non-uniform application of the EC-Israel Agreement, which, it should be recalled, forms an integral part of the Community legal order.

93. Specifically, the effect of so doing would be that products from the occupied territories would benefit from the preferential treatment established by the EC-Israel Agreement when exported to one Member State but those same

45 — Points 26 to 31 of this Opinion.
46 — See Article 68 of the EC-Israel Agreement.

products would not be granted such preferential treatment when exported to another Member State.

94. Consequently, I take the view that the presumption that exists with respect to verification of the accuracy of the facts by the customs authorities of the exporting State cannot apply in circumstances such as those in the main proceedings, since, in this case, none of the parties to the EC-Israel Agreement is in the best position to give a unilateral interpretation of the scope of that agreement.

95. I do not therefore see how the German customs authorities could be bound by the result of the subsequent verification carried out by the Israeli customs authorities.

96. In the light of all the foregoing considerations, I take the view that, since the dispute between the customs authorities of the States parties to the EC-Israel Agreement relates not to a question of fact but to the extent of the territorial scope of that agreement, the customs authorities of the importing State are not bound by the result of the subsequent verification carried out by the customs authorities of the exporting State as part of the verification procedure provided for in Article 32 of Protocol 4 to that agreement.

B — *The obligation to refer the matter to the Customs Cooperation Committee*

97. By its second question, the referring court asks whether the German customs authorities were required, before adopting their decision to seek post-clearance recovery of customs duties, to refer the matter to the Customs Cooperation Committee in accordance with the first paragraph of Article 33 of Protocol 4 to the EC-Israel Agreement, which provides that, where disputes arise in relation to the subsequent verification procedures or they raise a question as to the interpretation of that protocol, they are to be submitted to the Customs Cooperation Committee.

98. The issue is, in reality, whether the German customs authorities were entitled to adopt a measure unilaterally, namely the post-clearance recovery of customs duties, without first referring the matter to the Customs Cooperation Council.

99. I do not think that the procedure established by the first paragraph of Article 33 of the Protocol is the appropriate framework for resolving a conflict relating to the scope of the EC-Israel Agreement.

100. That procedure is intended for cases where a dispute arises following a subsequent verification under Article 32 of Protocol 4 to that agreement, the purpose of such verification being to check the accuracy of the information relating to the origin of a product. [47]

101. In my view, however, the dispute between the customs authorities of the importing State and the customs authorities of the exporting State does not relate to the facts determining the origin of the products at issue in the main proceedings but to the interpretation of the scope of that agreement.

102. I am of the opinion that the procedure to be followed in the event of a dispute such as that in the main proceedings, and, indeed, the procedure which *was* followed, is that provided for in Article 75(1) of the EC-Israel Agreement.

103. That provision states that '[e]ach of the parties may refer to the Association Council any dispute relating to the application or interpretation of this Agreement'. I would point out that the Association Council is responsible, under Article 67 of that agreement, for examining any major issues arising within the framework of that agreement and any other bilateral or international issues of mutual interest.

104. Consequently, in the light of the foregoing, I take the view that the German customs authorities were not under an obligation to submit the dispute between them and the Israeli customs authorities to the Customs Cooperation Committee.

C — *The possibility of making an elective determination as to classification*

105. By its first and fourth questions, the referring court essentially wishes to ascertain whether goods certified as being of Israeli origin but which prove to originate in the occupied territories, more specifically the West Bank, are entitled without distinction either to the preferential treatment under the EC-Israel Agreement or to that under the EC-PLO Agreement.

106. The referring court is of the opinion that it does not ultimately matter which customs authorities are competent to issue a EUR.1

47 — See point 70 of this Opinion.

certificate and that products originating in the occupied territories should be granted preferential treatment in any event since both the EC-Israel Agreement and the EC-PLO Agreement provide for such preferential treatment.

107. I do not share that view.

108. I would point out, first of all, that Article 83 of the EC-Israel Agreement provides that '[it] shall apply … to the territory of the State of Israel'.

109. The borders of the State of Israel were defined by the Plan for the Partition of Palestine, drawn up by UNSCOP [48] and approved on 29 November 1947 by United Nations General Assembly Resolution 181. On 14 May 1948, the Head of the Provisional Government of the State of Israel proclaimed the birth of that State on the basis of the borders which had been defined by the Plan for the Partition of Palestine. [49]

48 — United Nations Special Committee On Palestine. Made up of 11 States, this committee, which was set up by the United Nations General Assembly in 1947, was entrusted with the task of finding a solution to the conflict in Palestine, in particular by drawing up a partition plan.

49 — See the websites of the United Nations website (http://www.un.org) and the Ministry of Foreign Affairs of the State of Israel (http://www.mfa.gov.il).

110. Furthermore, the preamble to the EC-Israel Agreement reads as follows:

'Considering the importance which the Parties attach to the principle of economic freedom and to the principles of the United Nations Charter, particularly the observance of human rights and democracy, which form the very basis of the Association.'

111. Under United Nations Security Council Resolution 242 of 22 November 1967, referred to in the preamble to the EC-PLO Agreement, Israeli troops were asked to withdraw from the occupied territories, to terminate all claims or states of belligerency and to respect the sovereignty, territorial integrity and political independence of every State in the area. The United Nations Security Council sought the application of that resolution in another resolution, namely Resolution 338 of 22 October 1973.

112. In the light of the foregoing, the Court cannot but conclude, in my view, that the territories of the West Bank and the Gaza Strip do not form part of the territory of the State of Israel.

113. I would add that, following written question P-2747/00 by Mr Lipietz, European Parliament, [50] relating to the territorial scope of the EC-Israel Agreement, the Council stated that '[r]egarding the territorial scope of [that agreement], Article 83 applies only to the territory of the State of Israel [and that] [t]he term Israel covers the territorial waters, which surround Israel, and under certain conditions also some sea-vessels. No further definition is contained in the [EC-Israel] agreement. The [Community] considers that [that] agreement applies solely to the territory of the State of Israel within its internationally recognised waters in accordance with the relevant United Nations Security Council resolutions'. [51]

114. Furthermore, under Article XI(1) of the Israeli-Palestinian Agreement, the State of Israel and the PLO both view the West Bank and the Gaza Strip as a single territorial unit.

115. In the light of the foregoing, it seems difficult to maintain that a product originating in the West Bank and, more generally, in the occupied territories, is entitled to preferential treatment under the EC-Israel Agreement.

116. It is true that the tension which exists in the relations between the State of Israel and the PLO should not penalise the producers of those territories and preclude their entitlement to preferential treatment.

117. The solution envisaged by the referring court, pragmatic as it is, is none the less not satisfactory in my view, for the following reasons.

118. First of all, the Court has held that the system of generalised preferences is based on the principle of the unilateral grant by the Community of tariff advantages in favour of products originating in certain developing countries with the aim of facilitating the flow of trade with those countries. The benefit of that preferential system is thus linked to the origin of the goods and the verification of that origin is therefore a necessary element of that system. [52]

119. The certificate issued by the customs authorities of the exporting State must therefore be capable of certifying unambiguously that the product in question does indeed come from a given State so that the preferential

50 — OJ 2001 C 113 E, p. 163.
51 — Paragraph 2 of the Council's reply.
52 — See to this effect Case 827/79 *Acampora* [1980] ECR 3731, paragraph 5.

treatment relating to that State can be applied to that product.

120. It is not therefore acceptable, in my view, for the preferential treatment under the EC-Israel Agreement to be applied to a product originating in the West Bank.

121. Moreover, it appears to me that the reason the Community, years after the conclusion of the EC-Israel Agreement and after the annexation of the occupied territories in 1967, took the trouble to conclude the EC-PLO Agreement with a view to granting a tariff preference to products originating in the West Bank and the Gaza Strip was that it considered that those products were not entitled to such a preference under the EC-Israel Agreement.

122. Indeed, it is clear from a note drafted by the Council's 'Mashreq/Maghreb' Working Party setting out the Union's position ahead of the fifth meeting of the EU-Israel Association Council that, pursuant to a technical agreement negotiated between the State of Israel and the Commission, the Israeli customs authorities are required to indicate the place of production on all certificates of origin issued in Israel for products entitled to preferential treatment which are exported to the Union. The purpose of this is to draw a distinction between goods originating in Israel, which are entitled to preferential treatment under the EC-Israel Agreement, and those from the settlement areas, which are not so entitled. [53]

123. It is also clear that, by concluding the EC-PLO Agreement, the Community sought to develop the flow of trade from and to the West Bank and the Gaza Strip. Indeed, it follows from Article 1 of that agreement that its objective is, inter alia, to contribute to the social and economic development of the West Bank and Gaza Strip and to encourage regional cooperation with a view to the consolidation of peaceful coexistence and economic and political stability.

124. In its communication of 12 May 1998, [54] the Commission points out that the purpose of introducing preferential treatment for the territories of the West Bank and the Gaza Strip was to rectify an anomaly, namely that the States neighbouring those territories already enjoyed such treatment but the territories of the West Bank and the Gaza Strip did not. [55]

53 — See the Council's note of 3 December 2004 (15638/04, paragraph 40).
54 — See footnote 10 to this Opinion.
55 — Page 9 of the communication.

125. In 2007, the West Bank and the Gaza Strip ranked only 168th in the classification of the Union's imports trade partners. [56] The EC-PLO Agreement is specifically intended to stimulate trade between those territories and the Union. To accept that products originating in those territories are entitled to preferential treatment under the EC-Israel Agreement and are thus regarded as products of Israeli origin would have the consequence of divesting the EC-PLO Agreement of some of its effectiveness.

126. Finally, Brita considers that the Palestinian customs authorities were in any event unable to issue EUR.1 certificates for products from the West Bank. It is true that, taking into account the situation in the occupied territories, it may seem difficult for exporters in those territories to get those certificates issued by the customs authorities in the West Bank and the Gaza Strip. It might therefore be acceptable, as the referring court appears to maintain, for the Israeli customs authorities to issue those certificates and for the exporters of products originating in those territories to benefit from the preferential treatment established by the EC-PLO Agreement.

127. However, under Article 16(4) of Protocol 3 to the EC-PLO Agreement, responsibility for issuing EUR.1 certificates lies with the customs authorities of the West Bank and the Gaza Strip.

128. Moreover, it is clear from Annex V to the Israeli-Palestinian Agreement, relating to economic relations between the two parties, that the Palestinian authorities are not divested of all powers and responsibilities concerning commerce and the customs sphere. [57]

129. Indeed, under Articles VIII(11) and IX(6) of that annex, Palestinians must be able to export their agricultural and industrial produce without restriction, on the basis of certificates of origin *issued by the Palestinian authorities*. [58]

130. There are indeed, therefore, competent authorities responsible for issuing EUR.1 certificates for products originating in the West Bank and the Gaza Strip. In fact, it would seem that economic operators can request

56 — See the Commission's website (http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_113 382.pdf).

57 — See Article 3 of that annex.

58 — My emphasis. It is worth pointing out that these articles are applicable to the territories in Area C, pursuant to Article XI (2)(c) of the Israeli-Palestinian Agreement, which refers to Annex III to that agreement. Under Article 6 of Appendix I to that annex, the economic aspects of the sphere of commerce and industry relating to the territories in Area C are dealt with in Annex V to the Israeli-Palestinian Agreement.

those certificates from the Palestinian Chamber of Commerce. [59]

131. In my view, therefore, in order to benefit from the preferential treatment established by the EC-PLO Agreement, EUR.1 certificates proving the origin of products must be issued only by the Palestinian customs authorities. It would not be consistent for the preferential treatment established by that agreement to be applied to a product for which a EUR. 1 certificate has been issued by authorities other than the Palestinian authorities.

132. Moreover, that analysis is confirmed, in my opinion, by *Anastasiou and Others*, [60] in which the Court was called upon to hear a case which I consider to be comparable to that in the main proceedings.

133. In the former case, concerning the Agreement of 19 December 1972 establishing an association between the European Economic Community and the Republic of Cyprus [61] and containing a mechanism for the proof of origin of goods similar to the mechanisms established by the EC-Israel Agreement and the EC-PLO Agreement, the Court was asked to rule on whether, on the one hand, the EEC-Cyprus Agreement precluded the customs authorities of the importing State from accepting EUR.1 certificates issued by authorities other than the customs authorities of the Republic of Cyprus or, conversely, required them to do so, and, on the other hand, whether the position would be different if certain circumstances connected with the special situation of the Republic of Cyprus were taken as established.

134. The situation was as follows. Producers and exporters of citrus fruits established in the northern part of Cyprus exported their products to the United Kingdom. The EUR.1 certificates attached to those products were issued by authorities other than those of the Republic of Cyprus.

135. The Court held that,'[w]hile the de facto partition of the territory of Cyprus, as a result of the intervention of the Turkish armed forces in 1974, into a zone where the authorities of the Republic of Cyprus continue fully to exercise their powers and a zone where they cannot in fact do so raises problems that are difficult to resolve in connection with the application of the [EEC-Cyprus] Agreement to the whole of Cyprus, that does not warrant

59 — See paragraph 17 of the Commission's observations.

60 — Case C-432/92 [1994] ECR I-3087.

61 — Agreement annexed to Council Regulation (EEC) No 1246/73 of 14 May 1973 (OJ 1973 L 133, p. 1, the 'EEC-Cyprus Agreement').

a departure from the clear, precise and unconditional provisions of the 1977 Protocol [concerning the definition of the concept of 'originating products' and methods of administrative cooperation [62]]'. 63

136. The Court went on to say that '[a]cceptance of certificates by the customs authorities of the importing State reflects their total confidence in the system of checking the origin of products as implemented by the competent authorities of the exporting State. It also shows that the importing State is in no doubt that subsequent verification, consultation and settlement of any disputes in respect of the origin of products or the existence of fraud will be carried out efficiently with the cooperation of the authorities concerned'. 64

137. According to the Court, such cooperation is 'excluded with the authorities of an entity such as that established in the northern part of Cyprus, which is recognised neither by the Community nor by the Member States; the only Cypriot State they recognise is the Republic of Cyprus'. 65 It also considers that the 'acceptance of certificates [of origin] not issued by the Republic of Cyprus would constitute, in the absence of any possibility of checks or cooperation, a denial of the very object and purpose of the system established by the 1977 Protocol'. 66

138. It is therefore clear, in the light of the Court's analysis in *Anastasiou and Others*, that certificates issued by authorities other than those designated by name in an association agreement cannot be accepted as valid. While it is true that difficult situations in territories such as those of the northern part of Cyprus or the West Bank and the Gaza Strip might argue in favour of a solution such as that proposed by the referring court, I none the less take the view that choosing this course of action would ultimately have the effect of negating the efforts made to set up a system of administrative cooperation between the customs authorities of the Member States and those of the West Bank and the Gaza Strip and to encourage trade with those territories.

139. Consequently, in the light of all of the foregoing, it is my view that goods certified by the Israeli customs authorities as being of Israeli origin but which prove to originate in the occupied territories, more specifically the West Bank, are not entitled either to the preferential treatment under the EC-Israel Agreement or to that established by the EC-PLO Agreement.

62 — Protocol annexed to the Protocol to the EEC-Cyprus Agreement, itself annexed to Council Regulation (EC) No 2907/77 of 20 December 1977 (OJ 1977 L 339, p. 1).

63 — See *Anastasiou and Others*, paragraph 37.

64 — Ibid., paragraph 39.

65 — Ibid., paragraph 40.

66 — Ibid., paragraph 41.

V — Conclusion

140. In the light of the foregoing, I propose that the Court should reply as follows to the Finanzgericht Hamburg:

(1) The customs authorities of the importing State are not bound by the result of the subsequent verification carried out by the customs authorities of the exporting State as part of the verification procedure provided for in Article 32 of Protocol 4 to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part, where the dispute existing between the customs authorities of the States parties to that agreement relates to the extent of the territorial scope of that agreement.

(2) Furthermore, the German customs authorities were not under an obligation to submit the dispute between them and the Israeli customs authorities to the Customs Cooperation Committee.

(3) Goods certified by the Israeli customs authorities as being of Israeli origin but which prove to originate in the occupied territories, more specifically the West Bank and the Gaza Strip, are not entitled either to the preferential treatment under the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part, or to that established by the Euro-Mediterranean Interim

Association Agreement on trade and cooperation between the European Community, of the one part, and the Palestine Liberation Organisation (PLO) for the benefit of the Palestinian Authority of the West Bank and the Gaza Strip, of the other hand.