usual proof of the origin of the goods envisaged by the protocol, are not in a position duly to carry out such a check, the importing State is not definitively bound, for the purpose of demanding payment of unpaid customs duties, by the negative result of such verification, but may take account of other evidence as to the origin of the goods.

Moreover, an importer may, in certain circumstances, rely upon *force majeure* where it is impossible for the customs authorities of the exporting State, by reason of their own negligence, to establish the correct origin of goods by means of subsequent verification. It is for the national court to assess all the facts relied upon in that respect.

REPORT FOR THE HEARING
in Case C-12/92 *

I — Legislative background

1. The EEC-Austria Agreement on free trade (Agreement between the European Economic Community and the Republic of Austria signed in Brussels on 22 July 1972 and concluded and approved on behalf of the Community by virtue of Regulation (EEC) No 2836/72 of the Council of 19 December 1972 (OJ, English Special Edition 1972 (31 December) L 300, p. 3) established preferential arrangements applicable *inter alia* to goods which are either produced in Austria or produced in a Member State of the EEC, then imported into Austria and re-exported to the EEC without undergoing any significant changes.

Protocol 3 to the Agreement concerning the definition of the concept of 'originating products' and methods of administrative cooperation, brought into force in the Community by Council Regulation (EEC) No 3386/84 of 3 October 1984 concerning the conclusion of the Agreement in the form of an exchange of letters consolidating and modifying the text of Protocol 3 to the Agreement between the European Economic Community and the Republic of Austria (OJ 1984 L 323, p. 1) is the legislation which was applicable at the material time. [1]

Article 8(1)(a) of that protocol provides:

'Originating products within the meaning of this protocol shall, on importation into the

1 — Protocol 3 was subsequently amended principally by Council Regulation (EEC) No 1598/88 of 24 May 1988 (OJ 1988 L 149, p. 1) and by Council Regulation (EEC) No 4271/88 of 21 December 1988 (OJ 1988 L 381 p. 1).

* Language of the case: Dutch.

Community or into Austria, benefit from the agreement upon submission of one of the following documents:

(a) an EUR.1 movement certificate, hereinafter referred to as "an EUR.1 certificate", a specimen of which is given in Annex V to this protocol'.

Article 9(1) and (2) and the second subparagraph of Article 9(3) provide:

'1. An EUR.1 certificate shall be issued by the customs authorities of the exporting State when the goods to which it relates are exported. It shall be made available to the exporter as soon as actual exportation has been effected or ensured.

2. The EUR.1 certificate shall be issued by the customs authorities of a Member State or the European Economic Community if the goods to be exported can be considered as products originating in the Community within the meaning of Article 1(1) of this protocol. The EUR.1 certificate shall be issued by the customs authorities of Austria if the goods to be exported can be considered as products originating in Austria within the meaning of Article 1(2) of this protocol.

3. (...)

Where Article 2 and, where appropriate, Article 3 of this protocol are applied, the EUR.1 certificates shall be issued by the customs authorities of each of the countries concerned where the goods have either been held before their re-exportation in the same state or undergone the working or processing referred to in Article 2 of this protocol, upon presentation of the EUR.1 certificates issued previously.'

Article 10(1), (2), (3), (4) and (6) provides:

'1. An EUR.1 certificate shall be issued only on application having been made in writing by the exporter or, under the exporter's responsibility, by his authorized representative, on the form, a specimen of which is given in Annex V to this protocol, which shall be completed in accordance with this protocol.

2. It shall be the responsibility of the customs authorities of the exporting country to ensure that the form referred to in paragraph 1 is properly completed. In particular, they shall check whether the box reserved for the description of the goods has been completed in such a manner as to exclude any possibility of fraudulent additions. To this end, the description of the goods must be given without leaving any blank lines. Where the box is not completely filled a horizontal line must be drawn below the last line of the description, the empty space being crossed through.

3. Since the EUR.1 certificate constitutes the documentary evidence for the application of the preferential tariff and quota arrangements

laid down in the agreement, it shall be the responsibility of the customs authorities of the exporting country to take any steps necessary to verify the origin of the goods and to check the other statements on the certificate.

4. The exporter or his representative shall submit with his request any appropriate supporting document proving that the goods to be exported qualify for the issue of an EUR.1 certificate.

5. (...)

6. Applications for EUR.1 certificates and the EUR.1 certificates referred to in the second subparagraph of Article 9(3) of this protocol, upon presentation of which new EUR.1 certificates are issued, must be preserved for at least two years by the customs authorities of the exporting country.'

Article 12(1) provides:

'An EUR.1 certificate must be submitted, within four months of the date of issue by the customs authorities of the exporting State, to the customs authorities of the importing State where the goods are entered, in accordance with the procedures laid down by that State. The said authorities may require a translation of a certificate. They may also require the import declaration to be accompanied by a statement from the importer to the effect that the goods meet the conditions required for the implementation of the agreement.'

The first subparagraph of Article 16(4) provides:

'Penalties shall be imposed on any person who draws up, or causes to be drawn up, a document which contains incorrect particulars for the purpose of obtaining a preferential treatment for goods.'

Article 17(1) and (3) provides:

'1. Subsequent verifications of EUR.1 certificates and of forms EUR.2 shall be carried out at random or whenever the customs authorities of the importing State have reasonable doubt as to the authenticity of the document or the accuracy of the information regarding the true origin of the goods in question.

2. (...)

3. The customs authorities of the importing State shall be informed of the results of the verification as soon as possible. These results must be such as to make it possible to determine whether the disputed EUR.1 certificate or form EUR.2 applies to goods actually exported, and whether these goods can, in fact, qualify for application of the preferential arrangements.

Where such disputes cannot be settled between the customs authorities of the importing State and those of the exporting State or where they raise a question as to the

interpretation of this protocol they shall be submitted to the Customs Committee.

For the purpose of the subsequent verification of EUR.1 certificates, the customs authorities of the exporting country must keep the export documents, or copies of EUR.1 certificates used in place thereof, for not less than two years.'

II — Facts and procedure

2. The German undertaking Jagenberg Werke had manufactured in 1970 a machine for gluing folding cardboard boxes. That machine was exported to Austria on purchase by the Austrian undertaking Ernst Schausberger & Co GmbH on 25 February 1970. That undertaking in turn sold the machine to the Belgian company Grafimat s. p. r. l. in 1985 and re-exported it from Austria to Belgium. The import formalities were carried out by the Belgian company E. Depaire SA.

On 7 March 1985, Mr Huygen and Mr Verraes, as members of the staff of E. Depaire SA, and Mr Blockeel, as manager of Grafimat s. p. r. l., declared the goods to the Belgian customs at Courtrai. They presented certificate EUR.1 No D 0326846, issued by the Austrian customs, in order to obtain exemption from customs duties in accordance with the preferential arrangements established by the EEC-Austria Agreement and Protocol 3 thereto.

3. After the goods had been imported and on the basis of Protocol 3, the Belgian authorities undertook a subsequent verification of the data appearing on the EUR.1 certificate supplied to them. The Belgian customs sent the Austrian customs a request for information as to the origin of the machine.

The Austrian authorities replied by letter of 26 March 1987 that tangible evidence of the origin of the goods could no longer be provided by the German exporter at the material time. According to that reply, Schausberger had tried to obtain written evidence from Jagenberg, which had replied that all the evidence relating to that machine had been destroyed.

Following the Austrian customs authorities' reply, the Belgian authorities decided that the preferential arrangements could not be applied and that duties envisaged for goods of unknown origin must be imposed upon the goods imported. Consequently the Belgian customs decided to claim payment of the customs duties.

4. Mr Huygen, Mr Verraes and Mr Blockeel were prosecuted before the Correctionele Rechtbank te Kortrijk (Criminal Court, Courtrai) for infringement of Articles 202(1) and (2) and 259 of the Algemene Wet inzake Douane en Accijnzen, consolidated by Royal Decree of 18 July 1977, confirmed by the Law of 6 July 1978, and of Article 8(1)(a), 9(1) and (2) and 10(2) of Protocol 3 to the EEC-Austria Agreement. At the same time the companies Edmond Depaire and Grafimat were involved in the criminal procedure as parties with civil liability.

Following the judgment at first instance, acquitting the accused and dismissing the civil actions against both companies, the Openbaar Ministerie (Public Prosecutor's Office) and the Minister of Finance appealed to the Hof van Beroep te Gent (Court of Appeal, Ghent). By judgment of 20 September 1989, that court upheld the judgment given at first instance. The judgment states that the Austrian customs authorities had not in fact made contact with the Schausberger company and concludes that if the check on the origin of the machine had produced no evidence, that was manifestly owing to the wilful negligence of the Austrian customs authorities. The court therefore decided that the Austrian authorities' failure to act constituted *force majeure* as far as the accused were concerned. The Belgian State decided to appeal in cassation against that judgment to the Hof van Cassatie van België (Belgian Court of Cassation).

5. In those circumstances the Hof van Cassatie decided to stay the proceedings and to refer the following questions of interpretation to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty:

'The Agreement between the EEC and Austria (Regulation No 2836/72 of 19 December 1972 together with Protocol 3 appended thereto) grants a preferential tariff to goods originating in Austria or in the Community. The application of that preferential system is dependent on the origin of the goods and hence verifying the origin of goods forms a necessary part of the system.

1. If the State granted the preferential tariff (in this case, Austria), which is asked to check the "EUR.1" certificate of origin, cannot determine the correct origin of the goods, must it decide that the goods are of unknown origin, which would mean that the "EUR.1" certificate and the preferential tariff were wrongly granted?

2. In the present case, must the importing Member State (Belgium) then demand payment of the customs duties which were not paid upon importation?

3. Does the fact that it was impossible for the Austrian authorities, owing to their own neglect, "wilful" or otherwise, to establish that the origin notified on the "EUR.1" certificate issued by them was correct constitute a situation of *force majeure* for the importer in the Member State into which the goods were imported (in this case, Belgium)?'

6. The order for reference was lodged at the Court Registry on 13 January 1992.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted:

— on 13 April 1992 by the Belgian Government, represented by Ignace Claeys Bouuaert, Advocate at the Court of Cassation;

— on 22 April 1992 by the Commission of the European Communities, represented by Marie-Josée Jonczy, its Legal Adviser, and Ben Smulders, of its Legal Service, acting as Agents.

7. Upon hearing the Report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preliminary inquiry and to assign the case to the Fifth Chamber.

III — Summary of the written observations submitted to the Court

8. According to the *Belgian Government*, the subject of the question submitted to the Court is the concept of *force majeure*. That legal concept has been analysed in a considerable number of judgments given by the Court of Justice. According to that case-law *force majeure* comprises two elements: on the one hand, an objective element, namely abnormal circumstances beyond the control of the person liable to tax; on the other hand, the position must be that the consequences of the fact alleged to constitute *force majeure* could not be avoided despite the exercise of all due care. The latter element involves the duty to take precautions against the consequences of an abnormal event by taking all appropriate measures, without, however, being required to accept excessive sacrifices.

The view of the respondents in the main proceedings is based on the premise that the documentary evidence relating to the origin of the goods in question must be sought and collected only when the procedure for subsequent verification is initiated. But that point of view obviously cannot be endorsed. The data appearing on the EUR.1 document must be checked by the persons filling it in, who must envisage the possibility that one day they may have to justify those data. That is therefore the time at which documentary evidence must be collected.

According to Article 9(1) of Protocol 3, the EUR.1 certificate is issued at the time of the exportation of the goods by the customs authorities of the exporting State. It is not possible for the Belgian authorities to verify subsequently which documents were supplied by the exporter Schausberger to the Austrian customs authorities. Nevertheless, it was Schausberger which provided the data and which was therefore fully aware of the content of the documentary evidence it had supplied.

The fact that the issue of the certificate was arranged between the Austrian customs authorities and Schausberger cannot create a situation of *force majeure* for the Belgian importer. The importer knows that he must be able to establish that he has filled in the certificate correctly; it was precisely at the time of the initial contract that he ought to have taken account of the need to collect the documentary evidence proving the origin of the goods.

That point of view is confirmed by Article 12(1) and Article 15 [2] of the protocol. Article 12(1) provides that the customs authorities may require the import declaration to be accompanied by a statement from the importer to the effect that the goods meet the conditions required for the implementation of the agreement. The importer must therefore be able to justify that declaration and have documentary evidence available. Article 15 [3] of the protocol also provides that the exporter is to submit with his request for an EUR.1 certificate any appropriate supporting document proving that the goods to be exported qualify for the issue of the certificate sought.

2 — It is in fact Article 10(4) of Council Regulation (EEC) No 3386/84 which was applicable at the material time.

3 See previous footnote

There is no provision requiring the customs administration of the exporting country to keep the documents presented to it at the time at which the EUR.1 certificate is drawn up. When a subsequent verification is carried out it is nevertheless possible for it to make inquiries. Since the parties are responsible for keeping the necessary supporting documents, negligence on the part of the authorities, consequently making it impossible for them to check the true origin of the goods, does not constitute a situation of *force majeure* for an importer in the importing Member State.

Consequently neither the objective nor the subjective element of *force majeure* is present in this case. The arrangements for the EUR.1 certificate established by the protocol presuppose that the parties concerned will see to the necessary supporting documents at the time of importation; any difficulties at the time of the subsequent verification cannot be regarded as objectively constituting *force majeure*. Nor is the subjective element of *force majeure* present in this case because both parties to the commercial negotiations must be aware of their obligation to provide the evidence and to supply themselves from the beginning with the necessary supporting documents.

The Belgian Government therefore considers that the answers to the questions referred to the Court should be as follows:

'First question: Where the State entitled to the preferential arrangements applicable to the transaction in question, in this case the Austrian State, is requested to verify the EUR.1 certificate and is not in a position to establish the exact origin of the goods, it should be concluded that they are of unknown origin and that accordingly the EUR.1 certificate and the preferential tariff were wrongly authorized.

Second question: In those circumstances, the importing State, in this case Belgium, must therefore require payment of the customs duties which were not paid upon importation.

Third question: The fact that the Austrian customs authorities, by reason of their negligence, whether or not "wilful", are unable to establish that the origin declared in the EUR.1 certificate issued by them is correct does not constitute a situation of *force majeure* for the importer in the importing State, in this case Belgium.'

9. Before considering the questions raised by the Hof van Cassatie, the *Commission* calls attention to several principles to be taken into account for the purpose of interpreting the EEC-Austria Agreement and Protocol 3 thereto.

On the one hand, as regards the importer's criminal and civil liability, the Commission stresses, first, that an exporter who requests an EUR.1 certificate must be in a position at any time to prove the origin of the goods to which the certificate refers. Secondly, the customs authorities of the exporting country are responsible for checking the preferential origin of the goods. Such a check may be carried out either before or after importation at the request of the customs authorities of the importing country. In the latter case the customs authorities of the exporting country

are actually required to carry out a check and to notify the results to the customs authorities of the country of importation as soon as possible. Thirdly, except in special circumstances (falsification of documents), the importer takes no part in the determination and verification of the origin of goods accompanied by an EUR.1 certificate.

On the other hand, as regards the importer's responsibility in the matter of customs duties, the Commission emphasizes that normally the Austrian customs authorities issue an EUR.1 certificate mentioning the Community as the place of origin of the goods. However, according to Article 9(3) of the protocol, it can do so only upon presentation of the EUR.1 certificates issued previously. But that condition could not be satisfied because in this case the agreement had not entered into force at the time of export to Austria (in 1970). If Article 9(3) of the protocol is interpreted literally in order to assert that the Community origin of the machine could be established only by means of an EUR.1 certificate 'issued previously', the conclusion must be drawn that the Austrian customs authorities were wrong to issue such a certificate. However, the Commission considers that such an interpretation is too formalistic and that if, in a case such as this, the Community origin of the product may be sufficiently established by other means, it is not reasonable to refuse to apply to the machine the preferential arrangements established by the agreement. In such a case the Belgian customs authorities should therefore refrain from collecting import duties.

In those circumstances, as regards the first question referred to the Court, the EUR.1 certificate can be issued only upon application in writing by the exporter, who must be in a position to prove the preferential origin of the goods within the meaning of the agreement. In the event of the customs authorities of the exporting country determining that such proof does not exist, it must deduce that the certificate has been wrongly issued and must inform the country of importation as soon as possible. If such administrative cooperation gives rise to disputes between the authorities they are to be submitted to the EEC-Austria Customs Committee.

With regard to the second and third questions, the Commission states that in this case the Community origin of the machine does not really seem to be contested. In particular the invoice sent in 1970 by the German manufacturer Jagenberg to the Austrian importer Schausberger is evidence of this. In such circumstances it might be unreasonable to refuse to allow the machine the preferential treatment envisaged by the agreement. The suggestion that if a certificate 'issued previously' within the meaning of Article 9(3) of the protocol cannot be presented because the agreement and the protocol were not in force at the material date, the Community origin of the goods in question can never be sufficiently established in any other manner should be rejected. If, however, the origin cannot be established, the customs authorities of the importing country are required to collect customs duties. However, the agreement does not require that in such a case the importer should in addition be held liable in criminal or civil law, or both.

The Commission therefore suggests that the Court should reply to the questions as follows:

'The EEC-Austria Agreement and Protocol 3 annexed thereto should be interpreted as meaning that where

(a) goods are exported from the Community to Austria at a date prior to the entry into force of those instruments and are then re-exported from Austria to the Community at a date subsequent to their entry into force; and

(b) the customs authorities of the exporting country which have issued the EUR.1 certificate on the basis of the aforesaid agreement and protocol and have subsequently determined, at the request of the customs authorities of the importing country, that the exporter can provide no proof of the preferential origin of the goods at issue;

the customs authorities of the importing country are required to claim payment of the customs duties as if the goods were of unknown origin unless the preferential origin can nevertheless be sufficiently established subsequently'.

G. C. Rodríguez Iglesias
Judge-Rapporteur