OPINION OF ADVOCATE GENERAL MAZÁK
delivered on 15 September 2011 [1]

I — Introduction

1. The reference for a preliminary ruling concerns the interpretation of Article 32 of Protocol 1 to Annex V to the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States ('the ACP States') of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000 ('the Agreement'), [2] on the verification of proofs of origin of goods originating in an ACP State and the rules on legitimate expectations contained in Article 220(2)(b) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code ('the Customs Code'). [3]

1 — Original language: English.

2 — OJ 2000 L 317, p. 3. The Agreement was approved on behalf of the Union by Council Decision 2003/159/EC of 19 December 2002; it entered into force on 1 April 2003.

3 — OJ 1992 L 302, p. 1, as last amended at the material time by Regulation (EC) No 2700/2000 of the European Parliament and of the Council of 16 November 2000 amending Council Regulation (EEC) No 2913/92 establishing the Community Customs Code, OJ 2000 L 311, p. 17.

II — Legal context

2. The Agreement provides that during a preparatory period certain products including textiles originating in the ACP States shall be imported into the Community free of customs duties and charges having equivalent effect. [4]

3. Protocol 1 to Annex V to the Agreement concerns the definition of the concept of 'originating products' and methods of administrative cooperation. Article 2 of that Protocol [5] provides:

'1. For the purpose of implementing the trade co-operation provisions of ANNEX V, the following products shall be considered as originating in the ACP States:

(a) products wholly obtained in the ACP States within the meaning of Article 3 of this Protocol;

4 — See, to that effect, Article 1 of Annex V to the Agreement.

5 — Which is found in Title II, Protocol 1 to Annex V to the Agreement, entitled 'Definition of the concept of "originating products"'.

(b) products obtained in the ACP States incorporating materials which have not been wholly obtained there, provided that such materials have undergone sufficient working or processing in the ACP States within the meaning of Article 4 of this Protocol

…'

4. Article 14 of Protocol 1 to Annex V to the Agreement [6] provides:

'1. Products originating in the ACP States shall, on importation into the Community benefit from Annex V upon submission of either:

(a) a movement certificate EUR.1, …'

5. Article 15 of Protocol 1 to Annex V to the Agreement, entitled 'Procedure for the issue of a movement certificate EUR.1', provides:

'1. A movement certificate EUR.1 shall be issued by the customs authorities of the exporting country on application having been made in writing by the exporter or, under the exporter's responsibility, by his authorised representative.

…

3. The exporter applying for the issue of a movement certificate EUR.1 shall be prepared to submit at any time, at the request of the customs authorities of the exporting ACP State where the movement certificate EUR.1 is issued, all appropriate documents proving the originating status of the products concerned as well as the fulfilment of the other requirements of this Protocol.

….'

6. Article 28 of Protocol 1 to Annex V to the Agreement, entitled 'Preservation of proof of origin and supporting documents', provides:

'1. The exporter applying for the issue of a movement certificate EUR.1 shall keep for at least three years the documents referred to in Article 15(3).'

7. Article 32 of Protocol 1 to Annex V to the Agreement, [7] entitled 'Verification of proofs of origin', provides:

'1. Subsequent verifications of proofs of origin shall be carried out at random or

6 — Which is found in Title IV, Protocol 1 to Annex V to the Agreement, entitled 'Proof of Origin'.

7 — Which is found in Title V, Protocol 1 to Annex V to the Agreement.

whenever the customs authorities of the importing country have reasonable doubts as to the authenticity of such documents, the originating status of the products concerned or the fulfilment of the other requirements of this Protocol.

2. For the purposes of implementing the provisions of paragraph 1, the customs authorities of the importing country shall return the movement certificate EUR.1 and the invoice, if it has been submitted, the invoice declaration, or a copy of these documents, to the customs authorities of the exporting country giving, where appropriate, the reasons for the enquiry. Any documents and information obtained suggesting that the information given on the proof [of] origin is incorrect shall be forwarded in support of the request for verification.

3. The verification shall be carried out by the customs authorities of the exporting country. For this purpose, they shall have the right to call for any evidence and to carry out any inspection of the exporter's accounts or any other check considered appropriate.

…

5. The customs authorities requesting the verification shall be informed of the results of this verification as soon as possible. These results must indicate clearly whether the documents are authentic and whether the products concerned can be considered as products originating in the ACP States or in one of the countries referred to in Article 6 and fulfil the other requirements of this Protocol.

…

7. Where the verification procedure or any other available information appears to indicate that the provisions of this Protocol are being contravened, the ACP State on its own initiative or at the request of the Community shall carry out appropriate enquires or arrange for such enquiries to be carried out with due urgency to identify and prevent such contraventions and for this purpose the ACP State concerned may invite the participation of the Community in these enquiries.'

8. Article 220 of the Customs Code provides:

'1. Where the amount of duty resulting from a customs debt has not been entered in the accounts in accordance with Articles 218 and 219 or has been entered in the accounts at a level lower than the amount legally owed, the amount of duty to be recovered or which remains to be recovered shall be entered in the accounts within two days of the date on which the customs authorities become aware of the situation and are in a position to calculate the amount legally owed and to determine the debtor (subsequent entry in the accounts). That time-limit may be extended in accordance with Article 219.

2. Except in the cases referred to in the second and third subparagraphs of Article 217(1), subsequent entry in the accounts shall not occur where:

(a) …

(b) the amount of duty legally owed was not entered in the accounts as a result of an error on the part of the customs authorities which could not reasonably have been detected by the person liable for payment, the latter for his part having acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration.

Where the preferential status of the goods is established on the basis of a system of administrative cooperation involving the authorities of a third country, the issue of a certificate by those authorities, should it prove to be incorrect, shall constitute an error which could not reasonably have been detected within the meaning of the first subparagraph.

The issue of an incorrect certificate shall not, however, constitute an error where the certificate is based on an incorrect account of the facts provided by the exporter, except where, in particular, it is evident that the issuing authorities were aware or should have been aware that the goods did not satisfy the conditions laid down for entitlement to the preferential treatment.

The person liable may plead good faith when he can demonstrate that, during the period of the trading operations concerned, he has taken due care to ensure that all the conditions for the preferential treatment have been fulfilled.

The person liable may not, however, plead good faith if the European Commission has published a notice in the *Official Journal of the European [Union]*, stating that there are grounds for doubt concerning the proper application of the preferential arrangements by the beneficiary country;

(c) the provisions adopted in accordance with the committee procedure exempt the customs authority from the subsequent entry in the accounts of amounts of duty less than a certain figure.'

III — The dispute in the main proceedings and the questions referred for a preliminary ruling

9. Afasia Knits Deutschland GmbH ('Afasia') belongs to a group of companies with its head office in Hong Kong, which established undertakings in Jamaica that produced textiles from materials originating in the People's Republic of China ('China') and exported them to the Union. In 2002, Afasia purchased several consignments of textiles from one of those Jamaican undertakings, namely ARH

Enterprises Ltd ('ARH'). Afasia introduced the textiles into free circulation in the Union, declaring the country of origin to be Jamaica and submitting corresponding movement certificates EUR.1 at duty rate 'free' under the Agreement.

10. According to the order for reference all movement certificates issued in the period from 2002 to 2004 were inspected during a mission to Jamaica carried out in March 2005 by the Commission (European Anti-Fraud Office; 'OLAF'), which was prompted by the suspicion of irregularities. It was found that the Jamaican exporters (including ARH) had infringed the provisions of the Agreement because the exported products had not been produced exclusively from Chinese yarn, as the origin rules required; most or all of the goods exported to the Union had been made from completed knitted or crocheted parts from China or were re-exports of completed textiles originating in China. Since small deliveries of yarn from China had been made, some of the goods exported to the Union may have been produced from these yarns, but the exporters had been unable to prove the exact quantity of products made in this way. According to the Commission, in their applications for movement certificates EUR.1, the Jamaican exporters had made false declarations as to the origin of the goods exported to the Union, which had been difficult for the Jamaican authorities to detect because of the professional manner in which the origin of the goods had been concealed. The Jamaican customs administration had concluded that the movement certificates were genuine, but were not correct as regards the stated origin of the goods and were therefore invalid. However, the investigating team had been able to confirm that the customs administration had acted in good faith and with due care.

11. The mission's findings and the conclusions based on them were set out in a report dated 23 March 2005, which was signed by the members of the mission and by the Permanent Secretary, Ministry of Foreign Affairs and Foreign Trade on behalf of the Jamaican Government.

12. The Hauptzollamt Hamburg-Hafen levied the duty owing on the imported goods.

13. After unsuccessfully lodging an objection with the customs authorities, Afasia brought proceedings, as a result of which the Finanzgericht Hamburg annulled the decision to levy duty and ruled that the movement certificates submitted for the import consignments had not been effectively declared invalid. The Finanzgericht Hamburg took the view that the questionable movement certificates could not be considered invalid, because the results of their subsequent verification were based

not on a verification request to the Jamaican customs administration and the results of its enquiries, as provided for in Article 32 of Protocol 1 to Annex V to the Agreement, but on the enquiries of the Union mission (OLAF). According to that court, the report of 23 March 2005 bore the letterhead of the European Commission and was entitled 'Conclusions of the verification mission'; it therefore did not record the conclusions of the Jamaican Government, even if it was co-signed by a Secretary of the Ministry of Foreign Affairs and Foreign Trade.

14. By contrast, the referring court is inclined to consider that the subsequent examination of the movement certificates issued in Jamaica and the results of the examination are consistent with Article 32 of Protocol 1 to Annex V to the Agreement. Enquiries to establish whether the provisions of Protocol 1 have been complied with can be carried out by the exporting country either on its own initiative or at the request of the Union (Article 32(7) of Protocol 1). Such a request may also be made by the Commission (OLAF). The Union mission to Jamaica was undertaken by OLAF at the invitation of the Jamaican Ministry of Foreign Affairs and Foreign Trade in the context of administrative and investigative cooperation in order to coordinate the investigations into irregularities initiated in nine Member States. The fact that the enquiries were essentially carried out by the Commission (OLAF) and that the Jamaican customs administration merely lent assistance should also not militate against an effective declaration by the Jamaican authorities that the movement certificates EUR.1 are invalid.

15. In the event that the EUR.1 movement certificates are declared invalid on the basis of subsequent verification in accordance with Protocol 1 to Annex V to the Agreement, the referring court considers that the conditions contained in Article 220(1) of the Customs Code have been met and that contrary to the finding of the Finanzgericht Hamburg, it is open to doubt whether Afasia can rely on the protection of legitimate expectations in accordance with Article 220(2)(b) of the Customs Code. The Finanzgericht Hamburg considered that the results of the subsequent verification are not based on actual movement certificates, and hence not on those issued for Afasia's imports, because a certain, albeit small, quantity of Chinese yarn was processed in Jamaica, so that it is at least possible that Afasia's imported goods at issue satisfied the origin rules.

16. Moreover, the referring court considers that the view of the lower court that Afasia could in any event rely on the protection of legitimate expectations in accordance with

Article 220(2)(b) of the Customs Code, on the ground that it is not evident from the results of the mission's enquiries that the incorrect movement certificates were based on false information from the exporter, is based on an interpretation of Union law that is open to doubt.

17. It was in these circumstances, that the Bundesfinanzhof on 29 June 2010 decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Is it compatible with Article 32 of Protocol 1 concerning the definition of the concept of "originating products" and methods of administrative cooperation [attached to Annex V] of the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part, if the European Commission essentially takes it upon itself to undertake the subsequent verification of proofs of origin in the exporting country, albeit with the assistance of the authorities of that country, and does it constitute a result of this verification within the meaning of that article if the results of the verification so obtained by the Commission are recorded in a report that is co-signed by a representative of the government of the exporting country?

(2) If the answer to the first question is in the affirmative, can the person liable for the duty in a case such as the action in the main proceedings – in which the exporting country has declared proofs of preferential origin issued during a particular period to be invalid because the origin of the goods could not be confirmed by subsequent verification even though it could not be ruled out that some export goods satisfied the origin requirements – rely on the protection of legitimate expectations on the basis of the second and third subparagraphs of Article 220(2)(b) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code and claim that the preference certificates presented in his case may have been correct and were therefore based on a correct account of the facts provided by the exporter?'

IV — Proceedings before the Court

18. Written pleadings were submitted by Afasia, the Italian and Czech Governments and the Commission. A hearing was held on 7 July 2011 at which Afasia and the Commission presented oral submissions.

V — Assessment

A — *First question*

19. The first question of the referring court centres on the degree of involvement of the Commission/European Anti-Fraud Office (OLAF) in the subsequent verification of proofs of origin of the textiles in question in the main proceeding and whether the report or minutes of the Commission mission [8] to Jamaica dated 23 March 2005 which were on the headed notepaper of the European Commission/European Anti-fraud Office (OLAF) and co-signed firstly, by the Permanent Secretary, Ministry of Foreign Affairs and Foreign Trade on behalf of the Government of Jamaica and secondly, by a number of other parties for the European Commission/European Anti-Fraud Office (OLAF) and the Member States ('the minutes') complied with Article 32 of Protocol 1 to Annex V to the Agreement. It is clear from the order for reference and the file before the Court that doubts have arisen regarding the legality of the subsequent verification of proofs of origin of the consignments of textiles in question in the main proceedings and legality of the invalidation of the movement certificates EUR.1 relating to those textiles.

20. In accordance with the Agreement, textiles originating in Jamaica benefit from preferential treatment and are thus free from customs duties on importation into the Union upon submission, inter alia, of a movement certificate EUR.1. [9] Protocol 1 to Annex V to the Agreement defines the concept of 'originating products' and establishes a system of administrative cooperation between, inter alia, the Union and its Member States and the ACP States. That system is based on a division of responsibilities together with mutual trust between the authorities of the Member State concerned and those of the ACP State in question. [10]

21. Pursuant to Article 15 of Protocol 1 to Annex V to the Agreement, responsibility for issuing a movement certificate EUR.1 and for verifying the origin of the textiles in question in the main proceedings lay with the Jamaican authorities. The authorities of the Member State of import must accept the validity of the movement certificates EUR.1 attesting to the Jamaican origin of the textiles. [11] Moreover, it is the Jamaican authorities which have

8 — I would note that such missions are not uncommon. See, for example, Joined Cases C-153/94 and C-204/94 *Faroe Seafood and Others* [1996] ECR I-2465, paragraph 16; Case C-97/95 *Pascoal & Filhos* [1997] ECR I-4209, paragraph 15 et seq.; and Case C-442/08 *Commission* v *Germany* [2010] ECR I-6457, paragraph 30.

9 — See Article 14 of Protocol 1 to Annex V to the Agreement.

10 — See, by analogy, *Commission* v *Germany*, cited in footnote 8, paragraph 70, and Joined Cases C-23/04 to C-25/04 *Sfakianakis* [2006] ECR I-1265, paragraph 21.

11 — See, by analogy, *Commission* v *Germany*, cited in footnote 8, paragraph 73, and *Sfakianakis*, cited in footnote 10, paragraph 37.

the responsibility under Article 32 of Protocol 1 to Annex V to the Agreement, of subsequently verifying whether the rules on origin have been observed. The authorities of the Member State of import must also accept the findings made by the Jamaican authorities in a subsequent verification. [12] It is clear therefore that, in accordance with Protocol 1 to Annex V to the Agreement, it is the authorities of the exporting ACP State which are deemed best placed to verify directly the facts which establish the origin of the goods concerned [13] rather than the Commission or importing Member States.

22. In accordance with Article 32(1) of Protocol 1 to Annex V to the Agreement, subsequent verifications of proofs of origin shall be carried out at random or whenever the customs authorities of the importing country have reasonable doubts as regards, inter alia, the originating status of goods. Moreover, pursuant to Article 32(5) of Protocol 1 to Annex V to the Agreement, the customs authorities requesting the verification shall be informed of the results of this verification as soon as possible. These results must indicate clearly whether the documents are authentic and whether the products concerned can be considered as products originating in the ACP States.

23. Article 32(7) of Protocol 1 to Annex V to the Agreement establishes an additional procedure in order to both identify and prevent contraventions of that protocol. Enquiries may be carried out pursuant to Article 32(7) on the basis of any available information which would tend to indicate that the provisions of Protocol 1 to Annex V to the Agreement are being infringed. [14] Moreover, it is clear from Article 32(7) that the ACP State is entitled to carry out itself or arrange for enquiries to be carried out on its behalf in order to identify and prevent such infringements. In addition, pursuant to that same provision, the ACP State may invite the Union to participate in such enquiries.

24. Article 32(7) of Protocol 1 to Annex V to the Agreement does not contain any provision regarding the form in which the results of enquiries carried out pursuant thereto must be presented in order to bind the authorities of

12 — See, by analogy, *Commission* v *Germany*, cited in footnote 8, paragraph 73.

13 — See, by analogy, *Commission* v *Germany*, cited in footnote 8, paragraph 71.

14 — The enquiries are thus not necessarily based on random subsequent verifications or subsequent verifications at the behest of the customs authorities of an importing country.

the Member State of import. I therefore consider that no specific form may be required in such circumstances in order for the authorities of the Member State of import to bring an action for recovery of customs duties. [15] The absence of specific formal requirements does not, however, mean the results do not have to comply with certain minimum standards in order to bind the authorities of the Member State of import. Thus while Article 32(5) of Protocol 1 also does not stipulate the particular form in which the authorities requesting verifications under that provision must be informed of the results of those verifications, those results must clearly indicate, inter alia, whether the products concerned can be considered as products originating in the ACP State. Article 32(7) must, in my view, be construed as imposing an analogous obligation of clarity in the interest of legal certainty and mutual cooperation. [16]

25. I consider that the authorities of an importing Member State may only require the payment of duties on foot of enquiries carried out by third parties other than the authorities of an ACP State in accordance with Article 32(7) of Protocol 1 to Annex V to the Agreement where the results of the enquiries clearly indicate that the products concerned cannot be considered as products originating in the ACP State and that state unequivocally acknowledges in writing that it has adopted as its own those results. The written acknowledgement or endorsement should, in my view, be dated and signed on behalf of the ACP State.

26. As regards the circumstances in the main proceedings, I consider that in accordance with the provisions of Article 32(7) of Protocol 1 to Annex V to the Agreement it is irrelevant whether the Commission/OLAF essentially took it upon itself to undertake the subsequent verification of proofs of origin in Jamaica, albeit with the assistance of the authorities of that state, provided Jamaica arranged for the Commission/OLAF to carry out those enquiries and that state adopted as its own the results of such enquiries.

27. According to the minutes, OLAF carried out a Community administrative and investigative cooperation mission to Jamaica 'following the invitation of the Jamaican Ministry of Foreign Affairs and Foreign Trade', 'with a view to verifying the relevant exportations

15 — See, by analogy, *Pascoal & Filhos*, cited in footnote 8. The Court found in that case that a communication addressed to the authorities of the State of importation by the authorities of the State of exportation on completion of subsequent verification of an EUR.1 certificate, in which the latter authorities merely confirmed that the certificate in question was improperly issued and should therefore be cancelled, without setting out in detail the grounds justifying such cancellation must first be regarded as results of verification under the relevant legislation in that case and that the authorities of the State of importation are entitled to bring an action for recovery of the uncollected customs duties on the basis of such a communication alone, without seeking to establish the true origin of the goods imported.

16 — See also *Commission* v *Germany*, cited in footnote 8, paragraph 78. In that case the Court noted that having carried out the subsequent verification required by certain Member States and by the Commission, the Hungarian authorities *clearly indicated* in their letter of 26 May 1998 that the vehicles imported into Germany and appearing in the relevant documents and files did not comply with the rules on origin and thus *gave the authorities of the State of importation sufficient information for them to consider that the certificates in question had been revoked* (emphasis added).

from Jamaica to the Community'. The minutes state that the Jamaican 'Ministry of Foreign Affairs and Foreign Trade, the Customs Department, the Trade Board and the Jamaica Promotion Corporation (Jampro) co-operated fully with the verification process in accordance with Protocol 1 of the Cotonou Agreement'. Moreover, '[r]epresentatives of the Ministry of Foreign Affairs and Foreign Trade and of the relevant Free Zone Authorities accompanied the Community team on visits to the companies' premises'. Furthermore, the minutes state that the conclusions drawn from those verifications were arrived at by representatives of the Government of Jamaica and OLAF. I would also stress that in addition to an account of the 'joint verifications' [17] and the joint conclusions drawn therefrom, it is stated in the minutes that '[t]he Jamaican Customs Department therefore concludes that the EUR.1 movement certificates issued since 1 January 2002 to date, in respect of the consignments subject to this investigation, are authentic but nevertheless incorrect, in respect of the origin status of the goods concerned, and consequently invalid'.

28. It would thus appear from the minutes, subject to verification by the referring court, that Jamaica arranged for OLAF to carry out the enquiries in question and that the Jamaican authorities to some extent participated in those enquiries and ultimately fully adopted as their own the results of those enquiries. Moreover, subject to verification by the referring court, the Jamaican customs authorities appear to have unequivocally stated that the movement certificates EUR.1 issued from 1 January 2002 to 23 March 2005, in respect of the consignments of textiles in question in the main proceedings were invalid.

29. The minutes were signed on behalf of the Government of Jamaica by the Permanent Secretary, Ministry of Foreign Affairs and Foreign Trade. The fact that the minutes are also signed by a number of other parties for the European Commission/European Anti-Fraud Office (OLAF) and the Member States and are on the headed notepaper of the European Commission/European Anti-Fraud Office (OLAF) does not, in my view, detract from or undermine in any manner the authority of the signature of the minutes by the Permanent Secretary, Ministry of Foreign Affairs and Foreign Trade on behalf of the Government of Jamaica.

30. I would note that Afasia has also claimed that the Permanent Secretary, Ministry of Foreign Affairs and Foreign Trade acted *ultra*

17 — Terminology used in the minutes.

vires his powers pursuant to Jamaican law. [18] There is nothing in the order for reference which would tend to indicate that the Permanent Secretary acted outside the scope of his competence and did not have the authority to bind Jamaica regarding the contents of the minutes. In addition, given that Article 32(7) of Protocol 1 to Annex V to the Agreement makes no reference to any particular body or entity and merely refers to the ACP State, the question of which state body or entity may bind an ACP State pursuant to that provision is thus a matter which must be resolved in accordance with the law of that state and is not a question of Union law. [19] Where the customs authorities of a Member State recovered duties on foot of a document, which was signed by a person who ostensibly has the power to bind the ACP State and they were not on actual notice at the time of recovery that the signatory acted *ultra vires*, such recovery is in my view valid pursuant to Union law. I consider that any possible redress for such alleged *ultra vires* acts must be sought pursuant to the laws of the ACP State in question.

31. In my view, and subject to verification by the national court, the minutes are sufficiently explicit in their content and the manner in which they are presented that there can be no legitimate doubt concerning the legal position of Jamaica and indeed the Jamaican customs authorities regarding the invalidity of the movement certificates EUR.1 in question and the facts and circumstances which led them to adopt such a position. I therefore consider that the principle of legal certainty has been respected. In my view, it would display excessive formalism and breach of the principle of mutual cooperation to require an ACP State or its customs authorities to notify the customs authorities of the Member States directly by means of a particular form of document of the results of enquiries conducted under Article 32(7) of Protocol 1 to Annex V to the Agreement. Such an unnecessarily rigid approach, which has not been established by Article 32(7) of Protocol 1 to Annex V to the Agreement, would risk impairing the system of administrative cooperation between, inter alia, the Union and its Member States and the ACP States set up by Protocol 1 to Annex V to the Agreement.

32. I therefore consider that in accordance with Article 32(7) of Protocol 1 to Annex V to the Agreement the Commission may undertake the subsequent verification of proofs of origin in an exporting ACP State, provided the ACP State arranged for or invited the Commission to carry out that subsequent verification on its behalf and it is

18 — Afasia claims that only the Minister for Industry, Investment and Trade and the Trade Board Limited could adopt such a decision.

19 — I would note that Article 32(3) of Protocol 1 to Annex V to the Agreement for example specifically refers to 'the customs authorities of the exporting country'. Such a reference is clearly absent from Article 32(7) which refers to the 'ACP State' and must, in my view, be considered to have been drafted in this manner in order to reflect the intention of the contracting parties to the Agreement.

clearly indicated by that ACP State, in a written document, dated and signed by a person who ostensibly has the power to bind that state, that the ACP State has endorsed and thus adopted as its own the results of those verifications. Those results may be communicated by the Commission to the customs authorities of the importing Member State.

B — *Second question*

33. The Bundesfinanzhof also referred a second question to the Court concerning the interpretation of Article 220(2)(b) of the Customs Code, in the event that its first question is answered in the affirmative. The question stems from the fact that given that small deliveries of yarn from China were made, some of the goods exported to the Union may have been produced from that yarn and thus be of Jamaican origin and entitled to preferential treatment. The exporters were, however, unable to prove the exact quantity of goods produced in this manner during subsequent verifications. The second question concerns the scope of legitimate expectations enjoyed by an importer pursuant to Article 220(2)(b) of the Customs Code in the absence of proof concerning the origin of all the goods in question.

34. Afasia considers that in the absence of proof to the contrary, the movement certificates EUR.1 should be considered correct and based on a correct account of the facts by the exporter. The importer may not be liable for the duty in accordance with the second and third subparagraphs of Article 220(2)(b) of the Customs Code when the origin of the goods could not be confirmed during subsequent verifications and it cannot be excluded that certain of the exported goods satisfied the rules of origin. Afasia considers that the Hauptzollamt Hamburg-Hafen must prove that ARH made incorrect declarations in respect of each consignment exported. Afasia claims that ARH was not negligent thereby ensuring that the customs authorities could not produce the proof in question. ARH's factories were destroyed in a hurricane in 2004. In such a case of force majeure, the burden of proof continues to lie on the customs authorities.

35. The Czech Government considers that in a case such as that in the main proceedings where preferential certificates issued by the State of exportation have been annulled because the origin of the goods could not be confirmed during subsequent verifications but it cannot be excluded that certain goods comply with the rules of origin, the person liable to pay the duty may rely on the principle

of legitimate expectations in accordance with the second and third subparagraphs of Article 220(2)(b) of the Customs Code only where the national court finds that the failure to identify the origin of the goods does not result from an infringement by the exporter of its obligations and the customs authorities have not produced other evidence showing an incorrect presentation of the facts by the exporter. The obligation of the exporter to preserve documents concerning the origin of the goods is not breached where those documents were destroyed in a natural disaster.

36. The Italian Government considers that where OLAF's enquiries could not confirm the preferential origin of the goods, and even if it cannot be excluded that some of the goods may comply with the rules of origin, the importer may not rely on the principle of legitimate expectations pursuant to the second and third subparagraphs of Article 220(2)(b) of the Customs Code by claiming that in its case the preferential certificates are correct.

37. The Commission considers that the second question should be reformulated. The question seeks to ascertain who bears the burden of proof in a case such as that in the main proceedings where movement certificates delivered over a certain period were annulled as the origin of the goods could not be confirmed during subsequent verifications but it cannot be excluded that certain exported products complied with the rules of origin and the importer claims that the preferential certificates of origin which were submitted in his case were perhaps correct as they were based on a correct presentation of the facts by the exporter.

38. The Commission submits that in such a case, it is the importer, or indeed the exporter, who must prove the correctness of the certificates and not the customs authorities. The burden of proof should be applied in the light of Article 28 of Protocol 1 to Annex V to the Agreement which requires the exporter to keep for at least three years the documents proving the originating status of the products concerned. The Commission considers that in a case such as the present, where the importer belongs to the same group of companies as the exporter, the failure to comply with the obligation to keep the documents and the risk of loss of those documents concerns the group as a whole. The Commission considers that Afasia's submission that it cannot produce the documents due to the hurricane in Jamaica in 2004 is not credible. Thus where the importer claims that the certificates of origin submitted in its case were perhaps correct and based on a correct presentation of the facts by the exporter, the burden of

proof lies on the importer to submit evidence confirming the declarations contained in the certificates.

39. It is settled case-law that the aim of subsequent verification is to check whether the statement of origin in a movement certificate EUR.1 is correct. [20] Where a subsequent verification does not confirm the origin of the goods as stated in the movement certificate EUR.1, it must be concluded that the goods are of unknown origin and that the certificate and the preferential tariff were thus wrongly granted. [21] Import duties are thus owed in respect of those goods which must be recovered by the customs authorities pursuant to Article 220(1) of the Customs Code. [22]

40. According to the order for reference, a small quantity of textiles in the main proceedings may in fact comply with the rules of origin. However, as these textiles, which were produced in Jamaica, appear to have been mixed with and were thus indistinguishable from other textiles of non-Jamaican origin, it must in my view be concluded that incorrect movement certificates EUR.1 were issued in respect of all the textiles in question. [23] In my view, Afasia's claims that Hauptzollamt Hamburg-Hafen must prove that ARH made incorrect declarations in respect of each consignment exported should be rejected. The burden of proof lies on the exporter to demonstrate, by means of all the necessary supporting documents, which consignments of textiles are of Jamaican origin. [24] Where the exporter cannot discharge that burden, import duties are, in principle, owed in respect of all the consignments of textiles in question which must be recovered by the customs authorities pursuant to Article 220(1) of the Customs Code.

20 — Case C-293/04 *Beemsterboer Coldstore Services* [2006] ECR I-2263, paragraph 32.

21 — See Case C-12/92 *Huygen and Others* [1993] ECR I-6381, paragraphs 17 and 18, and *Beemsterboer Coldstore Services*, cited in footnote 20, paragraph 34.

22 — In *Huygen and Others* (cited in footnote 21) the Court stated that, in principle, if the outcome of subsequent verification proves negative the normal consequence is for the importing State to demand payment of the customs duties not paid at the time of importation; see paragraph 19.

23 — See, by analogy, Advocate General Kokott's Opinion in *Beemsterboer Coldstore Services*, cited in footnote 20, points 36 to 44. According to that opinion, where it cannot be unequivocally determined in subsequent verifications whether movement certificates EUR.1 are correct or incorrect, the goods in question are considered of unknown origin and an incorrect certificate is deemed to exist within the meaning of the second subparagraph of Article 220(2)(b) of the Customs Code. In effect by mingling and thus rendering indistinguishable textiles of Jamaican origin with textiles originating from China, the exporters have 'tainted' the textiles in question ensuring that, in principle and in the absence of proof of Jamaican origin of specific consignments of textiles, all the textiles do not benefit from preferential treatment.

24 — See, by analogy, *Faroe Seafood and Others*, cited in footnote 8, where the Court stated, at paragraphs 63 and 64, that where shrimps and prawns of Faroese origin have been processed in a Faroese factory which also processes shrimps and prawns coming from non-member countries, it is for the exporter to show proof, by producing all appropriate supporting documents, that the shrimps and prawns of Faroese origin were physically separated from those of other origins. In the absence of such proof, the shrimps and prawns can no longer be regarded as being of Faroese origin, and the EUR.1 certificate and the preferential tariff must therefore be regarded as having been wrongly granted.

41. Article 220(2) of the Customs Code establishes a number of exceptions to the principle of recovery laid down in Article 220(1). The Court has stated that repayment or remission of import and export duties, which may be made only under certain conditions and in cases specifically provided for, constitutes an exception to the normal import and export procedure and, consequently, the provisions which provide for such repayment or remission must be interpreted strictly. Since 'good faith' is an essential condition of being able to claim repayment or remission of import or export duties, it follows that that term must be interpreted in such a way that the number of cases of repayment or remission remains limited. [25]

42. Under Article 220(2)(b) of the Customs Code, the competent authorities are not to make subsequent entry in the accounts of import duties if three cumulative conditions are satisfied. First, the failure to collect the duties must have been due to an error by the competent authorities themselves; next, their error must be of such a kind that it could not reasonably have been detected by a person liable for payment acting in good faith; and, finally, that person must have complied with all the provisions laid down by the legislation in force as regards his customs declaration. [26] The legitimate expectations of the traders concerned are thus protected under certain conditions in the event of errors on the part of the customs authorities relating to the preferential status of goods.

43. It is the first of those conditions which is in question in the main proceedings and thus whether the customs authorities are considered to have committed an error. Where the origin of the goods referred to in a movement certificate EUR.1 cannot be confirmed following subsequent verification, that certificate must be considered to be an 'incorrect certificate' within the meaning of Article 220(2)(b) of the Customs Code [27] and the customs authorities are considered to have committed an error.

44. However, pursuant to the third subparagraph of Article 220(2)(b) of the Customs Code, the customs authorities are deemed not to have committed an error where they issued movement certificates EUR.1 on foot

25 — See the Order of the Court in Case C-552/08 P *Agrar-Invest-Tatschl* v *Commission* [2009] ECR I-9265, paragraph 53 and the case-law cited.

26 — Case C-499/03 P *Biegi Nahrungsmittel and Commonfood* v *Commission* [2005] ECR I-1751, paragraph 46.

27 — *Beemsterboer Coldstore Services*, cited in footnote 20, paragraph 35.

of incorrect information provided by the exporter. In such circumstances, the customs duties in question may be recovered. The burden of proof lies on the customs authorities which wish to recover import duties to adduce evidence that the issue of incorrect movement certificates EUR.1 was due to an inaccurate account of the facts provided by the exporter. [28]

45. Article 28(1) of Protocol 1 to Annex V to the Agreement imposes an obligation on the exporter to retain the documents evidencing the origin of the goods for a period of three years.

46. Where the exporter fails to retain possession of the appropriate documents proving the originating status of the goods in question, notwithstanding a legal obligation to do so, and it is thus impossible for the customs authorities to adduce the necessary evidence that the movement certificates EUR.1 were based on the accurate or inaccurate account of the facts provided by the exporter, the burden of proving that those movement certificates EUR.1 issued by the authorities of the ACP State in respect of the goods in question were based on an accurate account of the facts lies with the person liable for the duty. [29]

47. It follows, in my view, that where an exporter has failed to retain the documents evidencing the origin of the goods, the person liable for paying the duty, in this case Afasia, may not benefit from the principle of legitimate expectations as provided by the second and third subparagraphs of Article 220(2)(b) of the Customs Code by simply claiming that some of the goods may possibly satisfy the rules of origin and benefit from preferential treatment. Afasia must produce evidence proving that fact.

48. In *Huygen and Others*, the Court stated that the obligation to be in possession of the documents evidencing the origin of the goods rests with the exporter alone. [30] Where the movement certificate EUR.1 cannot be subsequently verified for reasons of force majeure and thus abnormal and unforeseeable circumstances beyond the control of the exporter concerned despite the exercise of all due care, the import duties may not be recovered. [31]

28 — *Beemsterboer Coldstore Services*, cited in footnote 20, paragraph 39.

29 — See, to that effect, *Beemsterboer Coldstore Services*, cited in footnote 20, paragraphs 40 to 46.

30 — Case cited in footnote 21, paragraph 34.

31 — Idem, paragraph 31.

49. It appears from the order for reference that Afasia claims that the relevant documents in Jamaica were lost as a result of a hurricane and that that statement was not contradicted. It is for the national court to establish the veracity of such a claim, whether the circumstances in which the documents were lost constitute force majeure in accordance with the above criteria and the absence of any reasonable possibility whatsoever on the part of the exporter of reconstituting through duplicates or any other evidence the contents of the documents in question.

50. I would note in that regard that, in accordance with the minutes and subject to verification by the national court, ARH sourced its supplies [32] save exceptionally from China. The goods supplied from China were invoiced by Hong Kong based companies which belong to the Afasia Group of companies. Given the apparent very close commercial and other legal links [33] between the companies in the Afasia Group, it is for the national court to verify whether ARH and indeed Afasia could procure evidence from other companies within the same group, for example audited accounting records, which could assist in ascertaining the origin of the textiles in question in the main proceedings.

51. I therefore consider that where an exporter fails to retain possession of the appropriate documents proving the originating status of the goods, notwithstanding a legal obligation to do so, and it is thus impossible for the customs authorities to adduce the necessary evidence that the movement certificates EUR.1 in respect of those goods were based on the accurate or inaccurate account of the facts provided by the exporter pursuant to the third subparagraph of Article 220(2)(b) of the Customs Code, the person liable for paying the duty may not benefit from the principle of legitimate expectations as provided by the second and third subparagraphs of Article 220(2)(b) of the Customs Code by simply claiming that some of the goods may possibly satisfy the rules of origin. That person must, in the absence of force majeure, produce evidence proving that the goods in question comply with the rules of origin.

32 — 'I.e. the textile products, labels and/or similar ancillaries for the making-up/finishing of articles of apparel, the machinery including spare parts …'

33 — It would appear from the minutes that all the companies in the Afasia Group are owned by the same two individuals.

VI — Conclusion

52. Accordingly, I propose that the Court should answer the questions referred by the Bundesfinanzhof (Germany) as follows:

(1) In accordance with Article 32(7) of Protocol 1 to Annex V to the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States ('the ACP States') of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, the European Commission may undertake the subsequent verification of proofs of origin in an exporting ACP State, provided the ACP State arranged for or invited the Commission to carry out that subsequent verification on its behalf and it is clearly indicated by that ACP State, in a written document, dated and signed by a person who ostensibly has the power to bind that state, that the ACP State has endorsed and thus adopted as its own the results of those verifications. Those results may be communicated by the Commission to the customs authorities of the importing Member State.

(2) Where an exporter fails to retain possession of the appropriate documents proving the originating status of the goods, notwithstanding a legal obligation to do so, and it is thus impossible for the customs authorities to adduce the necessary evidence pursuant to the third subparagraph of Article 220(2)(b) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code ('the Customs Code') that the movement certificates EUR.1 in respect of those goods were based on the accurate or inaccurate account of the facts provided by the exporter, the person liable for paying the duty may not benefit from the principle of legitimate expectations as provided by the second and third subparagraphs of Article 220(2)(b) of the Customs Code by simply claiming that some of the goods may possibly satisfy the rules of origin. That person must, in the absence of force majeure, produce evidence proving that the goods in question comply with the rules of origin.