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European Court of Justice: Goods manufactured in West Bank settlement cannot be considered 'made in Israel'

Thursday, March 18, 2010

Court of Justice of the European Union

Case C-386/08 Brita GmbH v Hauptzollamt Hamburg-Hafen, 25 February 2010

Summary

The ECJ held that 1) [T]he customs authorities of the importing member state may refuse to grant the preferential treatment provided for under the EC-Israel Association Agreement where the goods concerned originate in the West Bank; 2) [T]he customs authorities of the importing member state may not grant preferential treatment by leaving the question open as to which agreement is to be taken into account – namely, the EC-Israel Association Agreement and the EC-PLO Association Agreement; 3) Customs authorities of the importing state are not bound by the proof of origin submitted or by the reply given by the customs authorities of the exporting state where that reply does not contain sufficient information, for the purposes of Article 32(6) of the EC-Israel Protocol, to enable the real origin of the products to be determined; 4) [C]ustoms authorities of the importing state are not obliged to refer to the Customs Cooperation Committee set up under Article 39 of that protocol a dispute concerning the territorial scope of the EC-Israel Association Agreement.

Facts

[The case concerns] a customs dispute between Brita GmbH ("Brita"), a company incorporated under German law, and the Hauptzollamt Hamburg-Hafen [a German customs office] concerning the refusal of the Hauptzollamt to grant Brita preferential treatment with regard to the importation of products manufactured in the West Bank.

[Brita] imports drink-makers for sparkling water, as well as accessories and syrups, all produced by an Israeli supplier, Soda-Club Ltd., at a manufacturing site at Mishor Adumin in the West Bank, to the east of Jerusalem. [In 2002 Brita imported some products into Germany]. It stated that the country of origin for those goods was "Israel" and sought the application of the preferential tariff provided for under the EC-Israel Association Agreement on the basis of invoice declarations made out by the supplier confirming that the products concerned originated in Israel.

[The German customs authorities sought further verification]. [T]he Israeli customs authorities replied that "[o]ur verification has 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 [EC-Israel] Association Agreement and are entitled to preferential treatment under that agreement."

In 2003, the German customs authorities asked the Israeli customs authorities to indicate … whether the goods in question had been manufactured in Israeli-occupied settlements in the West Bank, the Gaza Strip, East Jerusalem or the Golan Heights. That letter remained unanswered. [Germany subsequently refused preferential treatment].

Issues

1. [W]hether the customs authorities of the importing member state may refuse to grant the preferential treatment provided for under the EC-Israel Association Agreement where the goods at issue originate in the West Bank.

2. [Whether] customs authorities are free to choose between two substantively equivalent possibilities, leaving open the questions of [1] which of the two agreements applies [EC-Israel or EC-PLO Agreement], and [2] of whether proof of origin falls to be issued by the Israeli authorities or by the Palestinian authorities.

3. [W]hether, for the purposes of the procedure laid down in Article 32 of the EC-Israel Protocol, the customs authorities of the importing state are bound by the proof of origin that is submitted and by the reply given by the customs authorities of the exporting state.

4. [W]hether, in order to settle a dispute that has arisen in relation to the verification of invoice declarations, the customs authorities of the importing state must, pursuant to Article 33 of the protocol, submit that dispute to the Customs Cooperation Committee before adopting measures unilaterally.

Decision:

Israeli-occupied settlements not part of agreement

The aim of [Germany's] subsequent verification was to establish the precise place of manufacture of the imported products, for the purposes of determining whether those products fell within the territorial scope of the EC-Israel Association Agreement. The European Union takes the view that products obtained in locations which have been placed under Israeli administration since 1967 do not qualify for the preferential treatment provided for under that agreement.

Israeli goods from West Bank

[T]he customs authorities of the importing member state may refuse to grant the preferential treatment provided for under the EC-Israel Association Agreement where the goods concerned originate in the West Bank.

Under Article 83 thereof, the EC-Israel Association Agreement applies to the "territory of the State of Israel." Under Article 73 thereof, the EC-PLO Association Agreement applies to the "territories of the West Bank and the Gaza Strip."

[One of the relevant rules is] the general international law principle of the relative effect of treaties, according to which treaties do not impose any obligations, or confer any rights, on third States ("pacta tertiis nec nocent nec prosunt"). That principle of general international law finds particular expression in Article 34 of the Vienna Convention, under which a treaty does not create either obligations or rights for a third state without its consent.

Accordingly, to interpret Article 83 of the EC-Israel Association Agreement as meaning that the Israeli customs authorities enjoy competence in respect of products originating in the West Bank would be tantamount to imposing on the Palestinian customs authorities an obligation to refrain from exercising the competence conferred upon them by virtue of the abovementioned provisions of the EC-PLO Protocol. Such an interpretation, the effect of which would be to create an obligation for a third party without its consent, would thus be contrary to the principle of general international law.

No 'elective determination'

[T]he customs authorities of the importing member state may not make an elective determination, leaving open the questions of [1]which of the agreements to be taken into account – namely, the EC-Israel Association Agreement and the EC-PLO Association Agreement – applies in the circumstances of the case and [2] of whether proof of origin falls to be issued by the Israeli authorities or by the Palestinian authorities.

To allow elective determination simply because both the agreements at issue provide for preferential treatment and because the place of origin of the goods is established by evidence other than that envisaged under the association agreement that is actually applicable would be tantamount to denying, generally, that, in order to be entitled to the preferential treatment, it is necessary to provide valid proof of origin issued by the competent authority of the exporting state.

It is clear, both from Article 17 of the EC-Israel Protocol and from Article 15 of the EC-PLO Protocol, that [the] requirement of valid proof of origin issued by the competent authority cannot be considered to be a mere formality that may be overlooked as long as the place of origin is established by means of other evidence.

Verifying proof of origin

[F]or the purposes of the procedure laid down in Article 32 of the EC-Israel Protocol, the customs authorities of the importing state are not bound by the proof of origin submitted or by the reply given by the customs authorities of the exporting state where that reply does not contain sufficient information, for the purposes of Article 32(6) of the EC-Israel Protocol, to enable the real origin of the products to be determined.

It is clear from Article 32 of the EC-Israel Protocol that the subsequent verification of invoice declarations is carried out whenever the customs authorities of the importing state have reasonable doubt as to the authenticity of such documents or the originating status of the products concerned … If, in cases of reasonable doubt, there is no reply within 10 months or if the reply does not contain sufficient information to enable the authenticity of the invoice declarations or the real origin of the products to be determined, the customs authorities of the importing state are to refuse to grant the preferential treatment.

The letter of 6 February 2003 from the German customs authorities [to verify whether Brita's products came from the West Bank] remained unanswered. In circumstances such as those, it must be held that a reply such as that given by the customs authorities of the exporting State does not contain sufficient information …

In accordance with Article 32(6) of the EC-Israel Protocol, if the reply given by the customs authorities of the exporting state does not contain sufficient information to enable the real origin

of the products to be determined, the requesting customs authorities are to refuse to grant preferential treatment in respect of those products.

Dispute referrals

[C]ustoms authorities of the importing state are not obliged to refer to the Customs Cooperation Committee set up under Article 39 of that protocol a dispute concerning the territorial scope of the EC-Israel Association Agreement.

Under Article 39 of the EC-Israel Protocol, the Customs Cooperation Committee is an administrative body composed of customs experts and officials from the Commission. [I]t is to be entrusted with the performance of any technical task in the customs field. Consequently, it cannot be regarded as having competence to settle disputes concerning questions of law such as those relating to the interpretation of the EC-Israel Association Agreement itself.