OPINION OF ADVOCATE GENERAL SHARPSTON
delivered on 25 January 2007 [1]

1. The present reference from the Finanzgericht (District Tax Court) Düsseldorf, Germany, concerns the correct customs status of used clothes which Euro Tex Textilverwertung GmbH ('Euro Tex') had collected, sorted and packed in Germany and exported to Poland before Poland was a member of the European Union. The customs status of the clothes was governed by the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part, as amended ('the Association Agreement'). [2] The question whether such clothes should be classified as 'originating in the Community' and thus benefit from tariff preferences by virtue of the Association Agreement depends on whether the sorting which they undergo amounts to 'sufficient working or processing' within the meaning of Article 2(1)(b) of Protocol 4 to that Agreement ('Protocol 4') or should rather be considered to fall within the definition of 'simple operations consisting of ... matching (including the making-up of sets of articles)' in Article 7(1)(b) of Protocol 4.

Relevant legislation

The Association Agreement

2. Article 10 of the Association Agreement provides for the abolition or progressive reduction of customs duties on imports applicable in Poland to products originating in the Community.

3. Article 34 states that Protocol 4 lays down rules of origin for the application of those tariff preferences.

1 — Original language: English.

2 — Signed in Brussels on 16 December 1991 (OJ 1993 L 348, p. 2); as amended by Decision No 1/97 (97/539/ECSC, EC, Euratom) of 30 June 1997 of the Association Council, Association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part (OJ 1997 L 221, p. 1).

4. Article 1 of Protocol 4 provides:

'For the purposes of this Protocol:

(a) "manufacture" means any kind of working or processing including assembly or specific operations;

(b) "material" means any ingredient, raw material, component or part, etc., used in the manufacture of the product;

...'

5. Article 2(1) provides:

'For the purpose of implementing the Agreement, the following products shall be considered as originating in the Community:

(a) products wholly obtained in the Community within the meaning of Article 5 of this Protocol;

(b) products obtained in the Community incorporating materials which have not been wholly obtained there, provided that such materials have undergone sufficient working or processing in the Community within the meaning of Article 6 of this Protocol;

...'

6. Article 6 provides:

'1. For the purposes of Article 2, products which are not wholly obtained are considered to be sufficiently worked or processed when the conditions set out in the list in Annex II are fulfilled.

...

3. Paragraph 1 ... shall apply except as provided in Article 7.'

7. Article 7 provides:

'1. Without prejudice to paragraph 2, the following operations shall be considered as insufficient working or processing to confer the status of originating products, whether or not the requirements of Article 6 are satisfied:

...

(b) simple operations consisting of removal of dust, sifting or screening, sorting, classifying, matching (including the making-up of sets of articles), washing, painting, cutting up;

...

(f) simple assembly of parts to constitute a complete product;

(g) a combination of two or more operations specified in subparagraphs (a) to (f);

...

2. All the operations carried out in either the Community or Poland on a given product shall be considered together when determining whether the working or processing undergone by that product is to be regarded as insufficient within the meaning of paragraph 1.'

8. Annex II to Protocol 4 is headed 'List of working or processing required to be carried out on non-originating materials in order that the product manufactured can obtain originating status'. It comprises a table with three column headings: 'HS heading No',[3] 'Description of product' and 'Working or processing carried out on non-originating materials that confers originating status'. Against HS heading number 'ex Chapter 63' and the product description 'Other[4] made-up textile articles; sets; worn clothing and worn textile articles; rags ...' in that table, the following appears: 'Manufacture in which all the materials used are classified within a heading other than that of the product'.

3 — The Nomenclature governed by the Convention on the Harmonised Commodity Description and Coding System, commonly known as 'HS Nomenclature', is an international multipurpose nomenclature administered by the World Customs Organisation.

4 — Presumably, other than the articles of apparel covered by the previous two HS chapters.

9. In the HS Nomenclature itself, Chapter 63 ('Other made-up textile articles; sets; worn clothing and worn textile articles; rags') includes under heading number 6309 'Worn clothing and other worn articles'. Note [5] 3 to Chapter 63 states: 'In order to be classified within this heading, the articles ... must show signs of appreciable wear, and ... be presented in bulk or in bales, sacks or similar packings'.

The Kyoto Convention

10. The International Convention on the simplification and harmonisation of customs procedures ('the Kyoto Convention' or 'the Convention') was originally adopted in 1973. [6]

11. The European Community is a party to the Kyoto Convention.

12. Article 2 of the Convention states that each Contracting Party 'undertakes to promote the simplification and harmonisation of customs procedures and, to that end, to conform, in accordance with the provisions of this convention, to the standards and recommended practices in the Annexes to this convention'.

13. Annex D.1 to the Convention, 'Annex concerning rules of origin', was accepted on behalf of the Community by Council Decision 77/415/EEC. [7] The Court has referred to Annex D.1 when interpreting rules of origin in Community legislation. [8]

14. Standard [9] 3 in Annex D.1 states that where two or more countries have taken part in the production of the goods, the origin of the goods is to be determined according to the substantial transformation criterion, on the basis of which 'origin is determined by regarding as the country of origin the country in which the last substantial manufacturing or processing, deemed sufficient to

5 — The Court has stated that the explanatory notes drawn up by the Harmonised System Committee may be an important aid to the interpretation of the scope of the various tariff headings, although they do not have legally binding force: Joined Cases C-106/94 and C-139/94 *Colin and Dupré* [1995] ECR I-4759, paragraph 21.

6 — The Kyoto Convention was revised in June 1999. The revised Convention entered into force in February 2006. The provisions of the Convention cited in this Opinion are from the original text, applicable at the material time.

7 — Council Decision of 3 June 1977 accepting on behalf of the Community several Annexes to the International Convention on the simplification and harmonisation of customs procedures (OJ 1977 L 166, p. 1). The acceptance did not extend to standards 7 and 8 and recommended practice 10, none of which is however in issue in the present case.

8 — Case C-26/88 *Brother International* [1989] ECR I-4253, paragraphs 15 to 21.

9 — Article 4 of the Kyoto Convention states that standards are 'those provisions the general application of which is recognised as necessary for the achievement of harmonisation and simplification of customs procedures'.

give the commodity its essential character, has been carried out' (definition (c) in Annex D.1).

15. Note [10] 1 to standard 3 states that in practice the substantial transformation criterion can be expressed by a rule requiring a change of tariff heading in a specified nomenclature with lists of exceptions, and/or by a list of manufacturing or processing operations which confer, or do not confer, upon the goods the origin of the country in which those operations were carried out, and/or by the ad valorem percentage rule, where either the percentage value of the materials utilised or the percentage of the value added reaches a specified level.

16. Note 2 to standard 3 states:

'The lists of exceptions may cite:

(a) the manufacturing or processing operations which, although they entail a change in the tariff classification heading, are not regarded as substantial or are regarded as substantial only under certain conditions;

(b) the manufacturing or processing operations which, although they do not entail a change in the tariff classification heading, are regarded as substantial under certain conditions.

The conditions referred to in (a) and (b) may relate either to a type of treatment undergone by the goods or to an ad valorem percentage rule.'

17. Standard 6 in Annex D.1 states:

'Operations which do not contribute or which contribute to only a small extent to the essential characteristics or properties of the goods, and in particular operations confined to one or more of those listed below, shall not be regarded as constituting substantial manufacturing or processing:

(a) operations necessary for the preservation of goods during transportation or storage;

(b) operations to improve the packaging or the marketable quality of the goods or

10 — Article 4 states that notes 'indicat[e] some of the possible courses of action to be followed in applying the standard ... concerned'.

to prepare them for shipment, such as breaking bulk, grouping of packages, sorting and grading, repacking;

(c) simple assembly operations;

(d) mixing of goods of different origin, provided that the characteristics of the resulting product are not essentially different from the characteristics of the goods which have been mixed.'

The main proceedings and the reference to the Court

18. Euro Tex operated a certified waste disposal facility in Germany for collecting, transporting, storing and processing used clothes and textiles.

19. At issue in the present case is the process by which Euro Tex sorted the goods. The order for reference describes that process as follows.

20. The first stage was to remove any waste from the goods which had been collected and to separate them out into usable and unusable items. Unusable clothes were further separated according to the extent to which they could be recycled in some other way (obtaining thread, making cleaning cloths, insulating material).

21. The second stage was of further separation of the goods into clothes, shoes, cleaning cloths and recyclable material, household textiles and women's, men's and children's clothing.

22. The third stage was of more detailed matching: [11] clothes and accessories were matched by reference to quality of material and further criteria according to customer requirements into more than 80 different categories. [12]

11 — I have used the English verb 'to match', and its cognates, where the order for reference uses the German 'sortieren' and its cognates. This usage reflects the term used in Article 7(1)(b) of Protocol 4 for the fifth (counting 'sifting or screening' as a single operation) type of operation there described ('matching' or 'Sortieren'). The third type of operation, 'sorting' in English and 'Aussondern' in German, is only briefly mentioned by the referring court and is not the subject of the question referred.

12 — The order for reference gives by way of example a list of 37 categories of women's clothes. These categories include generic items such as dresses, skirts, trousers and blouses subdivided into further categories (principally according to fabric), together with additional categories such as culottes, girdles, silk headscarves, bikinis and trench coats.

23. Euro Tex employed six to eight people to carry out the matching, all of which was done by hand. The employees were required to seek out first and foremost particularly fashionable items matched according to the customers' categories. Applicants were trained for one to four weeks. They would be given a permanent post only if they could recognise fashion trends.

24. In 1998 and 1999 Euro Tex delivered matched textiles packed in sacks to retailers in Poland. A dispute arose with the defendant tax office as to the origin of the goods. Euro Tex was (unsurprisingly) unable to provide any evidence of that origin. It argued that its operations were sufficient to give the goods Community origin. The matter came before the Finanzgericht Düsseldorf, which has referred the following question to the Court for a preliminary ruling:

'Do the matching operations described in more detail in the present order go beyond simple operations of matching for the purposes of Article 7(1)(b) of Protocol 4 [to the Association Agreement]?'

25. Written observations have been submitted by Euro Tex and the Commission. No hearing was requested and none has been held.

Assessment

26. The referring court asks whether the operations carried out by Euro Tex on discarded clothing which cannot be shown to have wholly originated in the Community are sufficient to confer Community origin on the finished product, namely sorted and matched worn clothing.

27. Article 2(1)(b) of Protocol 4 provides that products which have not been wholly obtained in the Community are to be considered as products originating in the Community provided that they have undergone *sufficient working or processing* in the Community within the meaning of Article 6 thereof. The first subparagraph of Article 6(1) provides that the conditions for being 'sufficiently worked' are as set out in Annex II.

28. Annex II provides that for used articles falling under Chapter 63 of the HS Nomenclature, which includes the goods in question, the working or processing which will confer originating status is any manufacture in which all the materials used are classified within a heading other than that of the product. Article 1(a) of Protocol 4 defines 'manufacture' as 'any kind of working or processing including assembly or specific operations'.

29. At the relevant time — namely when they were exported by the applicant, and hence after they had been sorted and matched by Euro Tex — the used goods at issue in the present case fell under heading 6309 of the HS Nomenclature: worn clothing and other worn articles which show signs of appreciable wear and which are presented in bales, sacks or similar packings. Community origin will therefore be conferred for the purpose of Article 2(1)(b) of Protocol 4 only if all the materials used in the applicant's operations are classified in a heading other than 6309.

30. The referring court states, and it appears to be common ground between the parties, that that is the case: although those materials are themselves worn clothing, they are not packaged in bales, sacks or similar containers before being subjected to Euro Tex's operations, and hence do not fall under heading 6309.

31. The referring court also considers that Euro Tex's operations fall within the broad definition of 'manufacture' in Article 1(a) of Protocol 4, namely *any kind* of working or processing, including specific operations.

32. Although the exported used articles thus prima facie satisfy the requirements for obtaining originating status under Article 6(1) of Protocol 4, Article 7(1)(b) thereof provides that certain operations, including working or processing by 'simple operations consisting of ... sorting [and/or [13]] matching (including the making-up of sets of articles)', are not sufficient to confer that status. It is clear from Article 6(3) that Article 7(1)(b) will override Article 6(1). Thus if Euro Tex's operations fall within Article 7(1)(b), the sorted and matched used clothing will not be regarded as originating in the Community.

33. The referring court appears to accept that the sorting operations carried out by

13 — Article 7(1)(g) provides that a combination of two or more operations specified in subparagraph (b) is not sufficient to confer the status of originating products.

Euro Tex (presumably at the first and second stages described in points 20 and 21 above) are 'simple' sorting operations for the purposes of Article 7(1)(b). There is no suggestion that the parties contest that view. The customs status of the exported goods will thus be determined by whether the matching carried out by Euro Tex at the third stage also falls within the scope of that provision. That, essentially, is the question referred.

34. Euro Tex submits that its matching operations are not 'simple operations consisting of ... matching ...' within the meaning of Article 7(1)(b). The Commission takes the contrary view.

35. As the referring court notes, a literal interpretation of the English version of Article 7(1)(b) [14] suggests that all the operations listed in that provision are of necessity 'simple operations' within its scope. [15] The other language versions, [16] however, could equally mean that only those of the operations listed which are in fact simple rather than complex are covered. [17]

36. The Commission argues in favour of the former interpretation. It submits that there is no distinction between 'simple operations' of matching, referred to in Article 7(1)(b), and more complex matching operations. Operations of 'matching (including the making-up of sets of articles)' are mentioned alongside other activities, namely removal of dust, sifting or screening, sorting, classifying, washing, painting and cutting up. The addi-

14 — And indeed the Swedish ('Enkel behandling bestående i ... hoppassning ...') and Dutch ('eenvoudige verrichingen zoals ... assorteren ...').

15 — Article 7 is among several provisions of Protocol 4 which were replaced with effect from 1 January 2001 by Decision No 4/2000 of the EU-Poland Association Council of 29 December 2000 amending Protocol 4 to the Europe Agreement with Poland concerning the definition of the concept of 'originating products' and methods of administrative cooperation (OJ 2001 L 19, p. 29). Article 7(1)(j), which in part replaces Article 7(1)(b), no longer refers to 'simple operations', covering instead only 'sifting, screening, sorting, classifying, grading, matching; (including the making-up of sets of articles)'. While the preamble to the amending Decision states that some 'technical amendments are in order to correct anomalies between the different language versions of the text' (recital 1), it also notes that the list of insufficient working and processing 'needs to be amended to ensure proper interpretation and to take account of the need to include some operations not covered previously by this list' (recital 2). Decision No 4/2000 does not therefore unequivocally support either interpretation of Article 7(1)(b).

16 — I have considered only those languages which were official languages when Decision No 1/97 (cited in footnote 2), which replaced Protocol 4 of the Association Agreement with the version at issue in this case, was signed (on 30 June 1997).

17 — For example, the French is 'les opérations simples de dépoussiérage, de criblage, de triage, de classement, d'assortiment (y compris la composition de jeux de marchandises), de lavage, de peinture, de découpage' and the German 'einfaches Entstauben, Sieben, Aussondern, Einordnen, Sortieren (einschließlich des Zusammenstellens von Sortimenten), Waschen, Anstreichen, Zerschneiden'.

tion of the adjective 'simple' is merely explanatory. It would undermine legal certainty if the authorities had to distinguish between simple and complex operations of removal of dust, sifting or screening, sorting, classifying, matching etc. Rather, all such activities are considered to be simple and do not therefore confer the status of originating products.

37. I do not agree.

38. With regard to legal certainty, there are other subparagraphs of Article 7(1) of Protocol 4 which are limited to simple operations and thus appear to require the authorities to draw a distinction between simple and complex operations. Article 7(1)(c)(ii), for example, refers to 'simple placing in bottles, flasks, bags, cases, boxes, fixing on cards or boards, etc., and all other simple packaging operations'. Article 7(1)(e) refers to 'simple mixing of products' and Article 7(1)(f) refers to 'simple assembly of parts to constitute a complete product'. I see no reason not to follow what seems to me to be the more natural reading of that provision in the majority of the relevant languages, to the effect that, of the operations there listed, it covers only those which are in fact 'simple'.

39. That narrower interpretation of Article 7(1)(b) is moreover consistent with its status as an exception to the general rule in Article 6(1) that products which are not wholly obtained in the Community are considered to be sufficiently worked or processed when the conditions set out in Annex II are fulfilled.

40. In the present case, that condition is that all the materials used are classified within a heading other than that of the worked or processed product. It is common ground that that condition is satisfied. It follows from the above that whether the matching operations at issue confer originating status depends on whether they are simple or complex. In the former case, they fall within Article 7(1)(b) and do not confer originating status.

41. The Kyoto Convention provides some guidance as to where to draw the dividing line between simple and complex matching operations.

42. It is clear from standard 3 and definition (c) in Annex D.1 that, where more than one country has taken part in the production of

goods, the goods' origin for customs purposes depends on where 'the last substantial manufacturing or processing, *deemed sufficient to give the commodity its essential character*, has been carried out'. [18]

43. It follows from standard 6 in Annex D.1 that 'substantial manufacturing or processing' does not include operations '*which do not contribute or which contribute to only a small extent to the essential characteristics or properties of the goods*'. [19]

44. The examples of such operations which are given in standard 6 include '(b) operations to improve the packaging or the marketable quality of the goods or to prepare them for shipment, such as breaking bulk, grouping of packages, sorting and grading, repacking' and '(d) mixing of goods of different origin, provided that the characteristics of the resulting product are not essentially different from the characteristics of the goods which have been mixed'.

18 — Emphasis added.

19 — Emphasis added.

45. Neither of those examples specifies that the operations concerned must be simple in order to fall within the definition. However, since they are given as examples of a general proposition, they must be interpreted by reference to that proposition. What is relevant, therefore, is whether the operations contribute to more than a small extent to the essential characteristics or properties of the goods.

46. It is for the national court to determine, on the basis of the facts, whether that is so in the present case. If the matching operations at issue contribute to more than a small extent to the essential characteristics or properties of the resulting goods, namely the sorted and matched clothes, they do not fall within example (d) or, more generally, standard 6 in Annex D.1, and hence will not be simple operations within the meaning of Article 7(1)(b).

47. If however, as the order for reference suggests, the matching results in, for example, all items of the same category (such as silk shirts, wool blouses or jeans) being

packaged together, I can see no ground for regarding that operation as contributing to the essential characteristics or properties of the resulting product, since they will remain the same as the essential characteristics or properties of the original discarded goods.

48. The national court is clearly best placed to evaluate Euro Tex's submission [20] that its operations are not simple matching operations for the purpose of Article 7(1)(b) since the recycling involves sorting into numerous categories. Euro Tex considers that a 'simple operation... consisting of ... matching' has a totally different meaning, as is clear from the specification included in that provision '(including the making-up [Zusammenstellen] of sets of articles)', which requires no ability beyond matching blue with blue, etc. Euro Tex claims that its sorting operations, in contrast, involve the ability to distinguish on the basis of fabric, quality and composition [Zusammensetzung], and require a knowledge, for which training is necessary, of fashion trends, the specific needs of different countries and the fabric quality.

49. As the sole judge of fact, the national court must decide whether Euro Tex has succeeded in showing that the matching operations undertaken by its employees are complex rather than simple.

50. Finally, I would like to make a brief point about the question of added value.

51. The referring court states that it was only by means of Euro Tex's processing that the goods it collected, which had no value at that time, acquired any value at all (between approximately DEM 0.70 and 1.00, or EUR 0.36 to 0.51, per kilogramme). In its view, the fact that Euro Tex's matching and

20 — I have not considered Euro Tex's other three submissions since they raise issues which are not relevant to the interpretation of Article 7(1)(b) of Protocol 4, which is the sole subject-matter of the question referred. (Those submissions are essentially that the used clothes are (i) of Community origin *before* being subjected to its operations, by virtue of the change in tariff heading from new to used clothes; (ii) 'waste' within the meaning of Community law, their origin depending on the person who discarded them and his country of residence; and/or (iii) 'used articles collected [in the Community] fit only for the recovery of raw materials ... or for use as waste', which by virtue of Article 5(1)(h) of Protocol 4 are to be considered as wholly obtained in the Community.)

sorting added value to the used clothes confirmed that those operations constituted the decisive production stage.

52. The criterion of 'decisive production stage' comes from the Court's case-law [21] on general Community legislation concerning originating status. [22] I agree with the Commission that that case-law is not directly relevant in the context of the present case. The effect of standard 3 in Annex D.1 to the Kyoto Convention is that contracting parties may express the substantial transformation criterion for determining the origin of goods by a rule requiring a change of tariff heading and/or by a list of manufacturing or processing operations which confer, or do not confer, origin and/or by the ad valorem percentage rule. The operations mentioned in the lists of exceptions may relate either to a type of treatment undergone by the goods or to an ad valorem percentage rule. In the case of worn clothing, the Community has in Protocol 4 opted to express the substantial transformation criterion by a general rule requiring a change of tariff heading (Article 6(1) and Annex II) which is subject to a list of manufacturing or processing operations which do not confer origin (Article 7(1)). It has not opted to express that criterion by the ad valorem percentage rule. The situation was different in the case-law referred to, which concerned the interpretation of legislation [23] which did not prescribe any of those three rules. Although the added value criterion would clearly also be a rational policy choice, in the present case the Community legislature did not make that choice and there is therefore no need to apply that criterion.

53. That interpretation is confirmed in my view by Article 7(1) of Protocol 4, which includes under (f) 'simple assembly of parts to constitute a complete product'. Such assembly, even simple, will almost invariable add value, yet the Community legislator has explicitly ruled out any possibility of such an operation conferring Community origin.

54. I do not therefore consider that the question of added value affects my analysis.

21 — Case 49/76 *Gesellschaft für Überseehandel* [1977] ECR 41 and *Brother International*, cited in footnote 8.

22 — Article 5 of Regulation EEC No 802/68 of the Council of 27 June 1968 on the common definition of the concept of the origin of goods (OJ, English Special Edition 1968 (I), p. 165). Article 5 provides: 'A product in the production of which two or more countries were concerned shall be regarded as originating in the country in which the last substantial process or operation that is economically justified was performed, having been carried out in an undertaking equipped for the purpose, and resulting in the manufacture of a new product or representing an important stage of manufacture'.

23 — See footnote 22.

Conclusion

55. In the light of the above, I am of the view that the Court should answer the question referred by the Finanzgericht Düsseldorf as follows:

— Operations in the categories referred to in Article 7(1)(b) of Protocol 4 to the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part, as amended by Decision No 1/97 (97/539/ECSC, EC, Euratom) of 30 June 1997 of the Association Council, Association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part, will fall within the scope of that provision only where they are simple.

— Such an operation is simple if it does not contribute, or contributes to only a small extent, to the essential characteristics or properties of the goods.

— It is for the competent national court to determine whether the operations described in the order for reference fall within that definition.