JUDGMENT OF THE COURT
12 December 2003*

(Jurisdiction – admissibility – fish products – Protocol 9 to the EEA Agreement – rules of origin – Protocol 4 to the EEA Agreement – Free Trade Agreement EEC-Iceland)

In Case E-2/03,

REQUEST to the Court by the *Héraðsdómur Reykjaness* (Reykjanes District Court) under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice in criminal proceedings brought by

Ákæruvaldið (The Public Prosecutor)

against

Ásgeir Logi Ásgeirsson, Axel Pétur Ásgeirsson and Helgi Már Reynisson

on the interpretation of the rules of origin in trade in fish, as referred to in Protocols 4 and 9 to the EEA Agreement and Protocols 3 and 6 to the Free Trade Agreement between the European Economic Community and the Republic of Iceland of 22 July 1972,

THE COURT,

composed of: Carl Baudenbacher, President and Judge-Rapporteur, Per Tresselt and Thorgeir Örlygsson, Judges,

Registrar: Lucien Dedichen,

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* Language of the Request: Icelandic.

having considered the written observations submitted on behalf of:

– the Ríkislögreglustjóri, acting as Public Prosecutor, by Helgi Magnús Gunnarsson, Police Attorney;

– Ásgeir Logi Ásgeirsson, by Rúna S. Geirsdóttir, District Court Advocate;

– Axel Pétur Ásgeirsson, by Magnús Thoroddsen, Supreme Court Advocate;

– Helgi Már Reynisson, by Lárentsínus Kristjánsson, Supreme Court Advocate;

– the Government of Iceland, by Finnur Þór Birgisson, Legal Officer, Ministry of Foreign Affairs, acting as Agent;

– the EFTA Surveillance Authority, by Per Andreas Bjørgan and Arne Torsten Andersen, Officers, Legal & Executive Affairs, acting as Agents;

– the Commission of the European Communities, by Xavier Lewis, Member of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

having heard oral argument of the Ríkislögreglustjóri, represented by Helgi Magnús Gunnarsson; Ásgeir Logi Ásgeirsson, represented by Rúna S. Geirsdóttir; Axel Pétur Ásgeirsson, represented by Magnús Thoroddsen; the Government of Iceland, represented by Finnur Þór Birgisson; the EFTA Surveillance Authority, represented by Per Andreas Bjørgan; the Commission of the European Communities, represented by Xavier Lewis at the hearing on 24 October 2003,

gives the following

Judgment

I Facts and procedure

1 By a decision dated 27 June 2003, registered at the Court on 9 July 2003, the Héraðsdómur Reykjaness submitted five questions to the Court for an Advisory Opinion in a case pending before it between the Ríkislögreglustjóri (The National Commissioner of the Icelandic Police, acting as Public Prosecutor in this case) and Ásgeir Logi Ásgeirsson, Axel Pétur Ásgeirsson and Helgi Már Reynisson (hereinafter, jointly, the “defendants”). Those questions arose from criminal

proceedings initiated on the basis of a charge issued by the Ríkislögreglustjóri on 20 September 2002.

2 The defendant Ásgeir Logi Ásgeirsson and the defendant Axel Pétur Ásgeirsson were both employed as managing directors of the fish processing company Sæunn Axels ehf ("Sæunn Axels"). The defendant Helgi Már Reynisson was the managing director of the import/export company Valeik ehf ("Valeik"). The principal reproach of the Ríkislögreglustjóri is that the defendants violated the Customs Act (tollalög) and the General Penal Code (almenn hegningarlög)by having conspired to export illegally to five EC countries (namely Spain, Italy, Denmark, France and Greece), on 76 occasions, a total of 803,962 kg of processed cod products. The alleged violations took place between 15 January 1998 and 30 December 1999.

3 The fish had been caught off the coasts of Alaska and Russia by foreign fishing vessels. It was imported frozen by Valeik and the raw materials were subsequently processed by Sæunn Axels. The export of the processed products was undertaken by Valeik. It is alleged that the employees of Valeik made false declarations on invoices and export documents delivered to the Director of Customs and the District Commissioner of Akureyri, stating that the products originated in Iceland. As a result of these declarations, the products enjoyed tariff preferences when imported into the EC countries concerned, in accordance with Protocol 9 to the EEA Agreement, as if they had been of Icelandic origin. It is alleged that the defendants thus circumvented the obligation to pay customs duties on the products on their import. The aggregate customs duties that have allegedly been evaded in this manner total a minimum of ISK 56,976,103.

4 The Héraðsdómur referred the following questions to the Court:

1. *Does the term "trade regimes" in Article 7 of Protocol 9 to the EEA Agreement and Appendix 3 to the same Protocol, extend to the rules of origin contained in the agreement between the European Economic Community and the Republic of Iceland, signed on 22 July 1972, so as to prevail over the rules of origin contained in Protocol 4 to the EEA Agreement?*

2. *If the rules of origin contained in Protocol 4 to the EEA Agreement are, notwithstanding the provisions of Article 7 of Protocol 9 EEA, considered to apply to the circumstances of the case, then does defrosting, heading, filleting, boning, trimming, salting and packing fish that has been imported frozen whole to Iceland from countries outside the EEA constitute sufficient working and processing within the meaning of these rules for the product to be considered of Icelandic origin?*

3. *Irrespective of whether the Court takes a position on the interpretation of Protocol 3 to the Agreement of 1972, interpretation is requested of the rules of origin contained in*

Protocol 4 to the EEA Agreement as to whether defrosting, heading, filleting, boning, trimming, salting and packing fish that has been imported into Iceland frozen whole from countries outside the EEA constitutes sufficient working and processing for the product to be considered of Icelandic origin.

4. *If Article 7 of Protocol 9 to the EEA Agreement is considered to apply to the rules of origin contained in the Agreement between the European Economic Community and the Republic of Iceland referred to in question 1, and if these rules of origin are considered to prevail over the rules of origin contained in Protocol 4 to the EEA Agreement, and if the EFTA Court is competent to provide an opinion on the interpretation of the rules of origin of this agreement, is then the processing of the type described in question 2 sufficient working and processing in the sense of the Protocol in question in order for the product to be considered of Icelandic origin?*

5. *Subject to the same proviso regarding the competence of the EFTA Court to interpret the Agreement between the European Economic Community and the Republic of Iceland which was signed on 22 July 1972, to which member states of the European Union does Protocol 6 to that agreement apply?*

5 By a letter dated 8 October 2003, the Court made a request for clarification to the national court under Article 96(4) of the Rules of Procedure concerning two issues, namely which version of Protocol 4 EEA and Protocol 3 to the Free Trade Agreement the national court considered relevant and the nationality of the vessels that caught the fish. The national court replied to these questions by a letter dated 20 October 2003.

II Legal background

6 Article 2 EEA reads:

> "For the purposes of this Agreement:
>
> (a) the term "Agreement" means the main Agreement, its Protocols and Annexes as well as the acts referred to therein;…"

7 Article 20 EEA reads:

> "Provisions and arrangements that apply to fish and other marine products are set out in Protocol 9."

8 Article 119 EEA reads:

> "The Annexes and the acts referred to therein as adapted for the purposes of this Agreement as well as the Protocols shall form an integral part of this Agreement."

9 Article 120 EEA reads:

> "Unless otherwise provided in this Agreement and in particular in Protocols 41 and 43, the application of the provisions of this Agreement shall prevail over provisions in existing bilateral or multilateral agreements binding the European Economic Community, on the one hand, and one or more EFTA States, on the other, to the extent that the same subject matter is governed by this Agreement."

10 Articles 2(1), 4, 5 and 6 of Protocol 4 to the EEA Agreement ("Protocol 4 EEA"), as replaced by Decision No 71/96 of the EEA Joint Committee of 22 November 1996 (OJ 1997 L 21, p. 12, applying from 1 January 1997) read as follows:

> "Article 2 General requirements
>
> 1. A product shall be considered to be originating in the EEA within the meaning of this Agreement if it has been either wholly obtained there within the meaning of Article 4 or sufficiently worked or processed in the EEA within the meaning of Article 5. For this purpose, the territories of the Contracting Parties to which this Agreement applies, shall be considered as a single territory.
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> Article 4 Wholly obtained products
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> 1. The following shall be considered as wholly obtained in the EEA:
>
> (a) mineral products extracted from their soil or from their seabed;
>
> (b) vegetable products harvested there;
>
> (c) live animals born and raised there;
>
> (d) products from live animals raised there;
>
> (e) products obtained by hunting or fishing conducted there;
>
> (f) products of sea fishing and other products taken from the sea outside the territorial waters of the Contracting Parties by their vessels;
>
> (g) products made aboard their factory ships exclusively from products referred to in subparagraph (f);
>
> (h) used articles collected there fit only for the recovery of raw materials, including used tyres fit only for retreading or for use as waste;
>
> (i) waste and scrap resulting from manufacturing operations conducted there;
>
> (j) products extracted from marine soil or subsoil outside their territorial waters provided that they have sole rights to work that soil or subsoil;

(k) goods produced there exclusively from the products specified in subparagraphs (a) to (j).

2. The terms ‘their vessels’ and ‘their factory ships’ in paragraph 1 (f) and (g) shall apply only to vessels and factory ships:

(a) which are registered or recorded in an EC Member State or an EFTA State;

(b) which sail under the flag of an EC Member State or an EFTA State;

(c) which are owned to an extent of at least 50 % by nationals of EC Member States or of an EFTA State, or by a company with its head office in one of these States, of which the manager or managers, Chairman of the Board of Directors or the Supervisory Board, and the majority of the members of such boards are nationals of EC Member States or of an EFTA State and of which, in addition, in the case of partnerships or limited companies, at least half the capital belongs to those States or to public bodies or nationals of the said States;

(d) of which the master and officers are nationals of EC Member States or of an EFTA State; and

(e) of which at least 75 % of the crew are nationals of EC Member States or of an EFTA State.

Article 5 Sufficiently worked or processed products

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.

The conditions referred to above indicate, for all products covered by this Agreement, the working or processing which must be carried out on non-originating materials used in manufacturing and apply only in relation to such materials. Accordingly, it follows that if a product which has acquired originating status by fulfilling the conditions set out in the list is used in the manufacture of another product, the conditions applicable to the product in which it is incorporated do not apply to it, and no account shall be taken of the non-originating materials which may have been used in its manufacture.

2. Notwithstanding paragraph 1, non-originating materials which, according to the conditions set out in the list, should not be used in the manufacture of a product may nevertheless be used, provided that:

(a) their total value does not exceed 10 % of the ex-works price of the product;

(b) any of the percentages given in the list for the maximum value of non-originating materials are not exceeded through the application of this paragraph.

This paragraph shall not apply to products falling within Chapters 50 to 63 of the Harmonized System.

3. Paragraphs 1 and 2 shall apply except as provided in Article 6.

Article 6 Insufficient working or processing operations

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 5 are satisfied:

(a) operations to ensure the preservation of products in good condition during transport and storage (ventilation, spreading out, drying, chilling, placing in salt, sulphur dioxide or other aqueous solutions, removal of damaged parts, and like operations);

(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;

(c) (i) changes of packaging and breaking up and assembly of packages;

(ii) simple placing in bottles, flasks, bags, cases, boxes, fixing on cards or boards, etc., and all other simple packaging operations;

(d) affixing marks, labels and other like distinguishing signs on products or their packaging;

(e) simple mixing of products, whether or not of different kinds, where one or more components of the mixtures do not meet the conditions laid down in this Protocol to enable them to be considered as originating in the EEA;

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

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

(h) slaughter of animals.

2. All the operations carried out in the EEA 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."

11 Article 2(1) of Protocol 9 to the EEA Agreement on Trade in Fish and other Marine Products ("Protocol 9 EEA") reads as follows:

"The Community shall, upon entry into force of the Agreement, abolish custom duties on imports and charges having equivalent effect on the products listed in Table II of Appendix 2."

12 Article 3 of Protocol 9 EEA reads as follows:

"The provisions of Articles 1 and 2 shall apply to products originating in the Contracting Parties. The rules of origin are set out in Protocol 4 EEA of the Agreement."

13 Article 7 of Protocol 9 EEA reads as follows:

"The provisions of the agreements listed in appendix 3 shall prevail over provisions of this Protocol to the extent they grant to the EFTA States concerned more favourable trade regimes than this Protocol."

14 Appendix 3 to Protocol 9 EEA refers to three Agreements concluded between the Community and individual EFTA States. With regard to Iceland, the Appendix mentions in its third indent:

> "Article 1 of Protocol No 6 of the Agreement between the European Economic Community and the Republic of Iceland signed on 22 July 1972."

15 The Agreement between the European Economic Community and the Republic of Iceland of 22 July 1972 (OJ 1972 L 301, p. 1; Special English Edition December 1972, p. 3; the "Free Trade Agreement") was accompanied by, *inter alia* Protocols 3 and 6. Protocol 3 to the Free Trade Agreement contains the rules of origin and was amended several times, *inter alia* by Decision No 1/96 of the EC-Iceland Joint Committee of 19 December 1996 (OJ 1997 L 195, p. 101).

16 Protocol 6 to the Free Trade Agreement concerning the special provisions applicable to imports of certain fish products into the Community provides in its Article 1:

> "1. As regards the products listed below and originating in Iceland:
>
> (a) no new customs duty shall be introduced in trade between the Community and Iceland,
>
> (b) Article 3(2), (3) and (4) of the Agreement shall apply to imports into the Community as originally constituted, Ireland and the United Kingdom. The date for the first tariff reduction shall, however, be 1 July 1973 and not 1 April 1973.
>
> [the following table refers to certain products under, inter alia, Common Customs Tariff heading No 03.01 - Fish, fresh (live or dead), chilled or frozen: B. Saltwater fish: II:. Fillets: (b) frozen C. Livers and roes – No 03.02 – Fish, dried, salted or in brine; smoked fish, whether or not cooked before or during the smoking process: C. Livers and roes – No 16.04 – Prepared or preserved fish, including caviar and caviar substitutes: Caviar and caviar substitutes]
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> […]
>
> 2. Customs duties on imports into the Community of the following products originating in Iceland:
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> [the following table refers to Common Customs Tariff heading No 03.01 – Fish, fresh (live or dead), chilled or frozen: B. Saltwater fish: I. Whole, headless or in pieces: … (h) Cod (Gadus morrhua or Gadus callarias) …]
>
> shall be adjusted to the following levels:
>
> […]
>
> for products falling within subheadings Nos 03.01 B I h …
>
> [the following table mentions "Rates applicable to imports into the Community as originally constituted and Ireland", as well as to imports into the United Kingdom, Denmark and Norway. The rate applicable as from 1 January 1976 is 3,7.]

> The reference prices established in the Community for imports of these products shall continue to apply."

17 The defendants argue that the 1996 amendment to Protocol 4 EEA as well as the 1996 amendment to Protocol 3 to the Free Trade Agreement were not lawfully published in Iceland. They therefore can not be applied to the case at issue in the main proceedings. This view is essentially shared by the Ríkislögreglustjóri. In response to the request for clarification made by the Court pursuant to Article 96(4) of the Rules of Procedure (see paragraph 5 hereof), the Héraðsdómur Reykjaness declared that it was unable to provide a definitive answer before the final judgment in the case is to be rendered.

18 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

III Findings of the Court

Admissibility of the questions

19 It is contested by the defendant, Mr Helgi Már Reynisson, that the questions referred to the EFTA Court by the Héraðsdómur Reykjaness, with the exception of the first question, fulfil the criterion of being "necessary" in the sense of Article 34(2) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (the "Surveillance and Court Agreement"). This view is shared by the defendant, Mr Axel Pétur Ásgeirsson, with regard to the second and the third questions, and by the Government of Iceland with regard to the first, fourth and fifth questions.

20 Whether an answer to the questions of the Héraðsdómur is necessary within the meaning of Article 34 of the Surveillance and Court Agreement is to be distinguished from the issue of the EFTA Court's competence with regard to provisions of the Free Trade Agreement. The Court will deal with the latter issue in its answer to the first, fourth and fifth questions.

21 The Court refers to its settled case law according to which the procedure provided for by Article 34 of the Surveillance and Court Agreement is a specially established means of judicial co-operation between the Court and national courts with the aim of providing the national courts with the necessary elements of EEA law to decide the case before them. According to Article 34 of the Surveillance and Court Agreement, a national court or tribunal, if it considers it necessary to enable it to render judgment, may request the EFTA Court to give an Advisory Opinion. From the wording, which in essential parts is identical to that in Article 234 EC, it follows that it is for the national court to assess whether an interpretation of the EEA Agreement is necessary for it to give judgment (see Case E-1/95 *Samuelsson* v *Svenska Staten* [1994-1995] EFTA Ct. Rep. 145, at

paragraph 13). It is for the national court to determine, in light of the particular circumstances of the case, both the need for an Advisory Opinion in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (see Case E-5/96 *Ullensaker kommune and others* v *Nille* [1997] EFTA Ct. Rep. 30, at paragraph 12). The Court is bound, under Article 34 of the Surveillance and Court Agreement, to give interpretations of the EEA Agreement where that is considered necessary to enable a national court to give judgment. However, the Court does not answer general or hypothetical questions (see Case E-6/96 *Wilhelmsen* v *Oslo kommune* [1997] EFTA Ct. Rep. 53, at paragraph 40).

22 In the case at hand, the Héraðsdómur essentially seeks to clarify whether the fish products at issue in the main proceedings have to be regarded as being of EEA or Icelandic origin under the rules of origin provided for in either Protocol 4 EEA or Protocol 3 to the Free Trade Agreement. The five questions referred to the Court are phrased in a manner as to cover the issue comprehensively and to include every possible alternative. In this regard, they are closely related to each other and should be dealt with together. The subject matter of the case before the Héraðsdómur concerns the origin of the relevant products. Therefore it may be of relevance to establish whether EEA rules on that matter apply to the case and how they are to be interpreted. In these circumstances, it lies within the discretion of the national court to determine whether an Advisory Opinion is necessary (see, to that effect, Case E-5/96 *Nille*, at paragraph 13). In light of the above, the Court concludes that the questions cannot be regarded as being of general or hypothetical nature.

23 As regards Mr Reynisson's allegation that the reference of the case to the EFTA Court prolongs the duration of proceedings and thereby infringes Article 6 of the European Convention of Human Rights, the Court notes that it is not clear whether this issue has been raised before the national court. The Court adds that it has found on earlier occasions that provisions of the EEA Agreement as well as procedural provisions of the Surveillance and Court Agreement are to be interpreted in the light of fundamental rights (see to that extent, Case E-8/97 *TV 1000 Sverige* v *Norway* [1998] EFTA Ct. Rep. 68, at paragraph 26; Case E-2/02 *Technologien Bau- und Wirtschaftsberatung and Bellona* v *EFTA Surveillance Authority*, judgment of 19 June 2003, not yet reported, at paragraph 37). The provisions of the European Convention of Human Rights and the judgments of the European Court of Human Rights are important sources for determining the scope of these rights. Article 6(1) ECHR grants the right "to a fair and public hearing within a reasonable time". However, the European Court of Human Rights held in a case concerning a delay of two years and seven months due to a reference by the national court to the Court of Justice of the European Communities for a preliminary ruling, that this period of time cannot be taken into consideration in the assessment of the length of a particular set of proceedings. The European Court of Human Rights stated that "[…] to take it into account would adversely affect the system instituted by Article 177 of the EEC Treaty and work against the aim pursued in substance in that Article" (Case *Pafitis and others* v *Greece*, judgment of 26 February 1998, Reports 1998-I, at paragraph 95).

24 The same must apply with regard to the procedure established under Article 34 of the Surveillance and Court Agreement. As a means of inter-court cooperation in cases where the interpretation of EEA law becomes necessary, this procedure contributes to the proper functioning of the EEA Agreement to the benefit of individuals and economic operators. In the present case, the time period from the registration of the request to the delivery of judgment amounts to a little more than five months. There is thus no reason for the Court further to consider the issue in question.

First, fourth and fifth questions

25 By its first, fourth and fifth questions, which shall be considered together, the national court essentially asks whether the rules of origin established under the Free Trade Agreement are applicable to the case at hand in the main proceedings and whether the EFTA Court has jurisdiction to interpret them.

26 Those who have submitted observations to the Court are of the opinion that the EFTA Court has no competence to interpret international agreements other than the EEA Agreement. It is particularly emphasised by the Government of Iceland and the Commission of the European Communities that the Free Trade Agreement does not form a part of the EEA Agreement, and its interpretation or application must consequently be considered as falling outside the scope of EEA law.

27 According to Article 34(1) of the Surveillance and Court Agreement, the EFTA Court has jurisdiction to rule on the "interpretation of the EEA Agreement". Pursuant to Article 1(a) of the Surveillance and Court Agreement, the term "EEA Agreement" includes "the main part of the EEA Agreement, its Protocols and Annexes as well as the acts referred to therein". This definition corresponds to the one given in Article 2(a) EEA. Pursuant to Article 119 EEA, the annexes and protocols to the EEA Agreement shall form "an integral part" of the Agreement. From these provisions it is clear that the EFTA Court is competent under Article 34 of the Surveillance and Court Agreement to interpret the Protocols to the EEA Agreement unless another result clearly follows from the provisions of the Agreement.

28 The free trade agreements concluded between the EFTA States and the then European Economic Community in 1972 and 1973 have not been terminated by the entry into force of the EEA Agreement, but continue to co-exist separately. Whereas the free trade agreements were concluded on a bilateral basis and belong to the sphere of public international law, the conclusion of the multilateral EEA Agreement in 1992 led to a high degree of integration, with objectives which exceed those of a mere free trade agreement (see Court of First Instance of the European Communities in Case T-115/94 *Opel Austria* v *Council* [1997] ECR II-39, at paragraph 107). It created an international treaty *sui generis* which contains a distinct legal order of its own (Case E-9/97 *Sveinbjörnsdóttir* v *Iceland* [1998] EFTA Ct. Rep. 95, at paragraph 59). This legal order as established by the EEA Agreement is characterized by the creation of an internal

market (see the Court of Justice of the European Communities in Case C-452/01 *Ospelt*, judgment of 23 September 2003, not yet reported, at paragraph 29), the protection of the rights of individuals and economic operators and an institutional framework providing for effective surveillance and judicial review. The EFTA Court is an institution established under the EEA Agreement and the Surveillance and Court Agreement. As a point of departure, it has no jurisdiction over the application or interpretation of the Free Trade Agreement.

29 However, exceptions to the general rule of separation between the EEA Agreement and the free trade agreements exist in the form of clauses connecting both sets of law. In that respect, Article 120 EEA provides that the EEA Agreement shall prevail over provisions in bilateral agreements between the European Economic Community and one of the EFTA States on the same subject matter. By way of an exception to this general principle, Article 7 of Protocol 9 stipulates that the provisions of the agreements listed in Appendix 3 shall prevail over Protocol 9 to the extent that they grant to the EFTA States concerned more favourable trade regimes than Protocol 9. Appendix 3 to Protocol 9 mentions, in its third indent, Article 1 of Protocol 6 to the Free Trade Agreement.

30 The Icelandic Government contended in the oral hearing that the EFTA Court does not have competence under Article 34 of the Surveillance and Court Agreement to interpret Article 7 of Protocol 9. This argument was essentially based on Protocol 9 constituting *lex specialis* in EEA law, leading to the conclusion that the EFTA Court does not have competence to interpret Protocol 9 at all. Both the EFTA Surveillance Authority and the Commission of the European Communities expressed another view based on the fact that the protocols to the EEA Agreement form an integral part of the EEA Agreement. The EFTA Surveillance Authority submitted that while certain provisions of Protocol 9 might be covered by separate dispute settlement mechanisms, and therefore be outside the competence of the EFTA Court, this is not the case with regard to the provisions relevant to the present matter.

31 The Court holds that no provision of relevant law concerning its jurisdiction prevents it from interpreting Article 7 of Protocol 9. The arguments put forward by the Icelandic Government with respect to the Court's jurisdiction are thus rejected.

32 With regard to the issue of whether the Court is competent to interpret a provision of the Free Trade Agreement to which the EEA Agreement and its protocols refer, it is to be noted that Article 7 of Protocol 9 is phrased in a way that explicitly calls for an assessment of which of two trade regimes is more favourable in a given factual situation. As the Commission of the European Communities has rightly stated, this scenario is to be distinguished from an interpretation of the Free Trade Agreement.

33 At the core of the first question of Héraðsdómur Reykjaness lies the issue of how far the reference in Article 7 of Protocol 9 and Appendix 3 to the same Protocol reaches, in particular whether it includes only Article 1 of Protocol 6 to the Free

Trade Agreement or whether it also encompasses the rules of origin as established in Protocol 3 to the Free Trade Agreement. This is advocated by the defendants, but disputed by the Ríkislögreglustjóri, the EFTA Surveillance Authority and the Commission of the European Communities.

34 Unlike the reference in the second indent of Appendix 3 to Protocol 9 to the free trade agreement with Norway, the third indent of Appendix 3 to Protocol 9 is restricted to one single provision, namely Article 1 of Protocol 6 to the Free Trade Agreement.

35 In the view of the Court, the wording and scheme of Article 7 of Protocol 9 and Appendix 3 to that Protocol, as well as the fact that Article 7 of Protocol 9 is an exception to Article 120 EEA, speak in favour of a restrictive interpretation thereof. However, it has to be examined further whether the term "trade regime" in Article 7 of Protocol 9 must, in light of its purpose, be understood in a broad manner, i.e. as including the rules of origin.

36 It follows from Article 7 of Protocol 9 that the comparison to be made is one between Protocol 9 on the one side and the provisions of the agreements listed in Appendix 3 on the other. The concept of the term "trade regime" as a basis for the comparison must necessarily be construed in the same manner with respect to both texts. In order to determine the purpose of the term "trade regime" it is thus necessary to establish the main subject matter of Protocol 9 EEA. This Protocol deals as a *lex specialis* with the provisions and arrangements that apply to fish and other marine products, cf. Article 20 EEA. It essentially concerns abolition or reduction of customs duties on certain fish and other marine products by the EFTA States and the Community, cf. Articles 1 and 2 of the Protocol. The Protocol does not lay down rules of origin of the products but refers to Protocol 4 EEA in that respect, cf. Article 3 of Protocol 9 EEA. Consequently the notion of "trade regime" cannot be construed as to cover rules of origin.

37 The answer to the first question must therefore be that the term "trade regime" in Article 7 of Protocol 9 EEA and its Appendix 3 does not extend to the rules of origin contained in the Free Trade Agreement. The rules of origin contained in Protocol 4 EEA therefore apply. Having reached that conclusion, it is not necessary for the Court to answer the fourth and fifth questions posed by the national court.

Second and third questions

38 By its second and third questions, which should be considered together, the national court essentially asks whether under the rules of origin as established under Protocol 4 EEA, defrosting, heading, filleting, boning, trimming, salting and packing can confer EEA originating status on fish of non-EEA origin.

39 Protocol 4 EEA on rules of origin was amended several times since its entry into force together with the main part of the EEA Agreement on 1 January 1994. The version applicable under EEA law at the time of the alleged violations in the case

at issue before the national court is the text as replaced by Decision No 71/96 of the EEA Joint Committee of 22 November 1996, as applied from 1 January 1997. However, the parties to the main proceedings contend that these amendments to Protocol 4 have not entered into force in Iceland due to failure to lawfully publish them and the original Protocol 4 EEA is deemed to apply to the present case. The defendants consider drawing erroneous conclusions as to the applicable rules in such a situation an excusable error of law.

40 The Court notes firstly that the issue of whether the lack of lawful publication leads to a finding of *error juris* or has any other legal consequence under national law is for the national court to decide. It is not prevented from doing so by the provisions and principles of EEA law.

41 With regard to the substance of the questions raised by the Héraðsdómur, it is clear from the answer the Court received from the national court to a request for clarification under Article 96(4) of the Rules of Procedure that the cod at issue in the main proceedings was not fished within the territorial waters of the EEA Contracting Parties, cf. Article 4(1)(e) of Protocol 4 EEA. Nor did it fulfil any of the criteria that Article 4(2) of Protocol 4 sets out in order to make it possible to consider the products as originating in the EEA via the notion of an EEA vessel in the case of fishing undertaken outside EEA territorial waters, cf. Article 4(1)(f) of Protocol 4 EEA. According to the information provided by the national court, most of the fish was caught by vessels sailing under the United States' flag. Therefore, the Court bases itself on the assumption that the cod imported to Iceland was to be considered non-originating in the EEA at the time it entered the territory of the Republic of Iceland.

42 The Court notes that under Part II of the EEA Agreement on the free movement of goods, Article 10 EEA provides that customs duties on imports and exports shall be prohibited between the Contracting Parties. According to Article 8(2) EEA, this rule is contingent upon the precondition that the products in question originate in the Contracting Parties. Article 9(1) EEA provides that the rules of origin are dealt with in Protocol 4 EEA.

43 Pursuant to Article 2 of Protocol 4 EEA, a product that has not been wholly obtained in the EEA within the meaning of Article 4 of Protocol 4 EEA has to be sufficiently worked or processed in the EEA within the meaning of Article 5 of Protocol 4 EEA to be considered as originating in the EEA. Article 5(1) of Protocol 4 EEA stipulates that such products have to fulfil the conditions set out in the list in Annex II in order to be considered to be sufficiently worked or processed. Whether or not the requirements of Article 5 of Protocol 4 EEA are satisfied, the operations listed in Article 6 of Protocol 4 EEA shall be considered as insufficient working or processing to confer the status of originating products. Article 6 of Protocol 4 EEA mentions, *inter alia*, operations to ensure the preservation of products in good condition during transport and storage, such as, among others, ventilation, spreading out, drying, chilling, placing in salt and like operations (litra a); simple operations consisting of, among other things, washing

and cutting up (litra b); or, a combination of two or more operations specified in the aforementioned subparagraphs (litra g).

44 Under Protocol 4 EEA, the list in Annex II is a starting point when determining whether a product that has not been wholly obtained in the EEA has been sufficiently worked or processed to be considered as originating in the EEA. The list in Annex II stipulates that all the materials of Chapter 3 of the EU Harmonized Commodity Description and Coding System, "fish and crustaceans, molluscs and other aquatic invertebrates" used "must be wholly obtained" in order to confer EEA originating status. Working or processing will never lead to conferring originating status on these products under Article 5(1) of Protocol 4 EEA. As the Ríkislögreglustjóri, the Government of Iceland, the EFTA Surveillance Authority and the Commission of the European Communities have rightly stated, fish products must necessarily be wholly obtained within the EEA.

45 The defendant, Mr Ásgeir Logi Ásgeirsson, has contended that the processing of the cod in the present case, in particular the salting, was not simply motivated by the need to preserve it in unfrozen condition. Such processing is in his view to be considered as part of the production process for a specific product, sought-after in many areas of the world.

46 The fact that dried, salted codfish, often referred to as "bacalao" or "bacalhau", is a speciality in countries such as, for instance, Spain and Portugal and can be found on the menus of restaurants serving anything from simple to gourmet cuisine cannot change the result of the legal appraisal with regard to Article 5(1) of Protocol 4 and Annex II thereto. These rules apply regardless of the motives for processing and working. Whether the purpose was to simply preserve the fish or to produce a speciality therefore remains irrelevant.

47 As to the question of whether the processing of the cod at issue may fall under the so called "10% clause" in Article 5(2)(a) of Protocol 4 EEA, the Court notes that according to Article 5(3) of that Protocol, Article 5(2)(a) is only applicable if the processing methods used are not considered insufficient under Article 6 of the Protocol. Article 6(1)(a) of Protocol 4 EEA, in the version applicable under EEA law at the relevant time, generally mentions "drying", "placing in salt" and like operations, as examples of operations to ensure the preservation of products in good condition during transport and storage. These operations have therefore to be considered insufficient working or processing to confer the status of fish products originating in the EEA.

48 The answer to the second and third questions must therefore be that defrosting, heading, filleting, boning, trimming, salting and packing of fish frozen whole that was imported from outside the EEA does not constitute sufficient working and processing within the meaning of Protocol 4 EEA in order for the products to obtain EEA originating status.

IV Costs

49 The costs incurred by the EFTA Surveillance Authority, the Commission of the European Communities and the Republic of Iceland, which have submitted observations to the Court, are not recoverable. In so far as the parties to the main proceedings are concerned, these proceedings are a step in the proceedings pending before the national court. The decision on costs is therefore a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the *Héraðsdómur Reykjaness* by a reference of 27 June 2003, hereby gives the following Advisory Opinion:

1. The term "trade regime" in Article 7 of Protocol 9 to the EEA Agreement and its Appendix 3 does not extend to the rules of origin contained in the Free Trade Agreement between the European Economic Community and the Republic of Iceland, signed on 22 July 1972. The rules of origin contained in Protocol 4 to the EEA Agreement therefore apply.

2. Defrosting, heading, filleting, boning, trimming, salting and packing of fish frozen whole that was imported from outside the EEA does not constitute sufficient working and processing within the meaning of Protocol 4 to the EEA Agreement in order for the products to obtain EEA originating status.

Carl Baudenbacher Per Tresselt Thorgeir Örlygsson

Delivered in open court in Luxembourg on 12 December 2003.

Lucien Dedichen
Registrar

Carl Baudenbacher
President