REPORT FOR THE HEARING
in Case E-2/03

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by the *Héraðsdómur Reykjaness* (Reykjanes District Court), Reykjanes, Iceland, in a case pending before it between

Ákæruvaldið (The Public Prosecutor)

and

Ásgeir Logi Ásgeirsson, Axel Pétur Ásgeirsson and Helgi Már Reynisson

concerning 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 Agreement between the European Economic Community and the Republic of Iceland of 22 July 1972[1] (the "Free Trade Agreement").

I. Introduction

1. By a decision dated 27 June 2003, the Héraðsdómur Reykjaness made a request for an advisory opinion, registered at the Court on 9 July 2003, in a case pending before it between the Ríkislögreglustjórinn (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 (the "defendants").

II. Facts and procedure

2. The questions referred to the Court arise from criminal proceedings initiated on the basis of a charge issued by the Ríkislögreglustjórinn on 20 September 2002. The facts, as described by the Héraðsdómur in its decision of 27 June 2003, can be summarized as follows:

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[1] OJ L 301 31.12.1972, p. 2.

3. 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 is the managing director of the import/export company Valeik ehf ("Valeik").

4. The Ríkislögreglustjórinn's principal reproach is that the defendants violated the Customs Act and the General Penal Code by having conspired to illegally export 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 violations allegedly took place between 15 January 1998 and 30 December 1999.

5. 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. Allegedly, 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, in accordance with Protocol 9 to the EEA Agreement, as if they had been Icelandic. 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 ISK 56,976,103.

6. The case was accepted for trial on 8 April 2003 and proceeded pursuant to Article 131 of Icelandic Act No 19/1991 on Criminal Procedure. The defendants entered a primary plea of not guilty and, alternatively, requested a pardon in the event of conviction. It was argued, *inter alia*, that the rules on origin of products imported and processed in the manner described are so unclear that if their good faith interpretation resulted in violation, it would constitute *error juris* in favour of the defendants.

7. At a hearing on 20 June 2003, the Ríkislögreglustjórinn and the defendants expressed themselves concerning the proposal submitted by the judges to seek the opinion of the EFTA Court. The legal counsel of the defendants objected to the proposal, while the Ríkislögreglustjórinn unequivocally supported it. Subsequently, the Héraðsdómur rendered the decision by which it sought an advisory opinion from the EFTA Court.

III. Questions

8. The following questions were referred to the EFTA 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?

IV. Legal background

The EEA Agreement

9. 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;…"*

10. Article 8(3) EEA reads:

> *"3. Unless otherwise specified, the provisions of this Agreement shall apply only to:*
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> *(a) products falling within Chapters 25 to 97 of the Harmonized Commodity Description and Coding System, excluding the products listed in Protocol 2;*
>
> *(b) products specified in Protocol 3, subject to the specific arrangements set out in that Protocol."*

11. Article 20 EEA reads:

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

12. 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."*

13. 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."*

14. Articles 2(1), 3, 4 and 5 of the original Protocol 4 to the EEA Agreement on rules of origin ("Protocol 4 EEA") read as follows:

“Article 2 Origin criteria

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 or sufficiently worked or processed in the EEA. For this purpose, the territories of the Contracting Parties, including the territorial waters, to which this Agreement applies, shall be considered as a single territory.

Article 3 Wholly obtained products

1. The following shall be considered as wholly obtained in the EEA:

(a) mineral products extracted from its soil or from its seabed;

(b) vegetable products harvested therein;

(c) live animals born and raised therein;

(d) products from live animals raised therein;

(e) products obtained by hunting or fishing conducted therein;

(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 factory ships of the Contracting Parties 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 therein;

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

2. The terms ‘their vessels’ and ‘factory ships of the Contracting Parties’ in paragraphs 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 per cent by nationals of EC Member States or EFTA States, 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 EFTA States 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 EFTA States; and

(e) of which at least 75 per cent of the crew are nationals of EC Member States or EFTA States.

Article 4 Sufficiently worked or processed products

1. For the purposes of Article 2, products which are not wholly obtained in the EEA are considered to be sufficiently worked or processed there when the conditions set out in the list in Appendix II are fulfilled. These conditions indicate, for all products covered by the Agreement, the working or processing which must be carried out on the non-originating materials used in the manufacture of these products, 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 for that product, 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 and except as provided in Article 11(4), non-originating materials which, according to the conditions set out in the list for a given product, should not be used in the manufacture of this product may nevertheless be used, provided that:

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

(b) where, in the list, one or several percentages are given for the maximum value of non-originating materials, such percentages 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 5.

Article 5 Insufficient working or processing operations

1. 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 4 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."

15. The text of Protocol 4 EEA was replaced by Decision No 71/96 of the EEA Joint Committee of 22 November 1996[2] ("Decision No 71/96"). Articles 2(1), 4, 5 and 6 of this version 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.

Article 4 Wholly obtained products

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;

[2] OJ 1997 L 21, p. 12, applying from 1 January 1997.

(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."

16. The text of Protocol 4 EEA was subsequently amended by Decision No 114/2000 of the EEA Joint Committee of 22 December 2000[3] ("Decision No 114/2000"), such that Article 6 was replaced with the following text:

"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) preserving operations to ensure that the products remain in good condition during transport and storage;

(b) breaking-up and assembly of packages;

(c) washing, cleaning; removal of dust, oxide, oil, paint or other coverings;

(d) ironing or pressing of textiles;

(e) simple painting and polishing operations;

(f) husking, partial or total bleaching, polishing, and glazing of cereals and rice;

(g) operations to colour sugar or form sugar lumps;

(h) peeling, stoning and shelling of fruits, nuts and vegetables;

(i) sharpening, simple grinding or simple cutting;

(j) sifting, screening, sorting, classifying, grading, matching (including the making-up of sets of articles);

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

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

(m) simple mixing of products, whether or not of different kinds;

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[3] OJ 2001 L 52, p. 40, entered into force on 1 January 2001.

(n) simple assembly of parts of articles to constitute a complete article or disassembly of products into parts;

(o) a combination of two or more operations specified in subparagraphs (a) to (n);

(p) slaughter of animals.

2. All 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."

17. The latest amendment by Decision No 38/2003 of the EEA Joint Committee of 14 March 2003[4] replaced the then existing text of Protocol 4 EEA.

18. Appendix II to the original Protocol 4 EEA and Annex II to Protocol 4 EEA in the version replaced by Decision No 71/96 contain a "List of working or processing required to be carried out on non-originating materials in order that the product manufactured can obtain originating status". Annex II provides that all the materials of Chapter 3 of the EU Harmonized Commodity Description and Coding System (the "Harmonized System" or "HS"), "Fish and crustaceans, molluscs and other aquatic invertebrates" used "must be wholly obtained" in order to confer originating status.

19. 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."

20. 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."

21. 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."

22. 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:

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[4] OJ 2003 L 137, p. 46, applying from 1 July 2004.

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

The Free Trade Agreement

23. Article 34 of the Free Trade Agreement[5] provides:

"The Annexes and Protocols to the Agreement shall form an integral part thereof."

24. Articles 1, 4 and 5 of Protocol 3 to the Free Trade Agreement, concerning the definition of the concept of 'originating products' and methods of administrative cooperation[6], read as follows:

"Article 1

For the purpose of implementing the Agreement, and without prejudice to the provisions of Articles 2 and 3 of this Protocol, the following products shall be considered as:

…

2. products originating in Iceland:

(a) products wholly obtained in Iceland;

(b) products obtained in Iceland in the manufacture of which products other than those referred to in (a) are used, provided that the said products have undergone sufficient working or processing within the meaning of Article 5. This condition shall not apply, however, to products which, within the meaning of this Protocol, originate in the Community.

…

Article 4

The following shall be considered as wholly obtained either in the Community or in Iceland within the meaning of Article 1 (1) (a) and (2) (a):

(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;

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5 OJ 1972 L 301, p. 2; Special English Edition December 1972, p. 4.

6 OJ 1972 L 301, p. 104; Special English Edition December 1972, p. 106.

(e) products obtained by hunting or fishing conducted there;

(f) products of sea fishing and other products taken from the sea by their vessels;

(g) products made abroad their factory ships exclusively from products referred to in subparagraph (f);

(h) used articles collected there fit only for the recovery of raw materials;

(i) waste and scrap resulting from manufacturing operations conducted there;

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

Article 5

1. For the purpose of implementing Article 1 (1) (b) and (2) (b) the following shall be considered as sufficient working or processing:

(a) working or processing as a result of which the goods obtained receive a classification under a tariff heading other than that covering each of the products worked or processed, except, however, working or processing specified in List A, where the special provisions of that list apply;

(b) working or processing specified in List B.

'Sections', 'Chapters' and 'tariff headings' shall mean the Sections, Chapters and tariff headings in the Brussels Nomenclature for the Classification of Goods in Customs Tariffs.

2. When, for a given product obtained, a percentage rule limits in List A and in List B the value of the materials and parts which can be used, the total value of these materials and parts, whether or not they have changed tariff heading in the course of the working, processing or assembly within the limits and under the conditions laid down in each of those two lists, may not exceed, in relation to the value of the product obtained, the value corresponding either to the common rate, if the rates are identical in both lists, or to the higher of the two if they are different.

3. For the purpose of implementing Article 1 (1) (b) and (2) (b), the following shall still be considered as insufficient working or processing to confer the status of originating product, whether or not there is a change of tariff heading:

(a) operations to ensure the preservation of merchandise in good conditions 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 or dust, sifting or screening, sorting, classifying, matching (including the making up of sets of articles), washing, painting, cutting up;

(c) (i) changes of packing and breaking up and assembly of consignments;

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

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

(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 the to be considered as originating either in the Community or in Iceland;

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

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

(h) slaughter of animals."

25. Protocol 3 to the Free Trade Agreement was amended several times, *inter alia* by Decision No 1/96 of the EC-Iceland Joint Committee of 19 December 1996[7] ("Decision No 1/96"), which entered into force on 1 January 1997. Articles 2(2), 5, 6 and 7 of this version read as follows:

"Article 2 General requirements

2. For the purpose of implementing this Agreement, the following products shall be considered as originating in Iceland:

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

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

Article 5 Wholly obtained products

1. The following shall be considered as wholly obtained in the Community or Iceland:

(a) mineral products extracted from their soil or from their seabed;

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7 OJ 1997 L 195, p. 101.

(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 Community or Iceland 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 in Iceland;

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

(c) which are owned to an extent of at least 50 percent by nationals of EC Member States or of Iceland, 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 Iceland 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 Iceland; and

(e) of which at least 75 per cent of the crew are nationals of EC Member States or of Iceland.

Article 6 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 per cent 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 7.

Article 7 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 6 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 Community or Iceland;

(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 either the Community or Iceland 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."

26. Annex 2 to Protocol 3 to the Free Trade Agreement as amended by Decision No 1/96 corresponds, with regard to products under Chapter 3 HS, to Annex 2 to Protocol 4 EEA.

27. Protocol 6 to the Free Trade Agreement concerning the special provisions applicable to imports of certain fish products into the Community[8] provides in its Article 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]

[…]

2. Customs duties on imports into the Community of the following products originating in Iceland:

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8 OJ 1972 L 301, p. 156; Special English Edition December 1972, p. 158.

[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."

V. Written Observations

28. Pursuant to Article 20 of the Statute of the EFTA Court and Article 97 of the Rules of Procedure, written observations have been received from:

- the Ríkislögreglustjórinn, represented by Helgi Magnús Gunnarsson, Police Attorney;

- the defendant Ásgeir Logi Ásgeirsson, represented by Rúna S. Geirsdóttir, District Court Advocate, Seltjarnarnes;

- the defendant Axel Pétur Ásgeirsson, represented by Magnús Thoroddsen, Supreme Court Advocate, Reykjavik;

- the defendant Helgi Már Reynisson, represented by Lárentsínus Kristjánsson, Supreme Court Advocate, Keflavík;

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

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

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

Ríkislögreglustjórinn

29. Elaborating on the facts, the Ríkislögreglustjórinn states that the cod at issue were of the type Gadus Morhua (Atlantic Ocean cod) and Gadus Macrosephalus (Pacific Ocean cod), which, if originating in Russia and the United States, would have been subject to 13-20% import duty. The customs categories in question are 03053019 and 03056200 in the Harmonized System. It is also submitted that the raw material was fished entirely by vessels owned by and under the control of Russian and American fishing companies.

30. Further information is given with regard to the issue of accessibility of the relevant legal documents in Iceland. The amendments of 1996 and 2000 to Protocol 4 EEA were only published officially as part of an annual list, displaying not the detailed contents but only a reference to the EEA Supplement to the Official Journal of the European Communities. Therefore, it seems likely to the Ríkislögreglustjórinn, that the original Protocol 4 EEA is the one that applies to the defendants, as it was lawfully published. The amendment to Protocol 3 to the Free Trade Agreement by Decision No 1/96 was only published in the Official Journal of the European Communities and was not even referred to in the official Icelandic Gazette. Therefore, it is unlikely to apply to the defendants because it was not lawfully published in Iceland.

31. Regarding the first question, the Ríkislögreglustjórinn remarks that Article 1 of Protocol 6 to the Free Trade Agreement, to which Article 7 of Protocol 9 EEA and its Appendix 3 refer, only addresses import duties and their cancellation, but not the rules on origin. *E contrario*, it was not the intention to let the provisions of the Agreement on origin fall under the term “trade regimes”. The rules of origin are of a different nature than trade regimes.

32. The Ríkislögreglustjórinn further refers to Decision No 1/96, by which the rules of origin of Protocol 3 to the Free Trade Agreement were amended to correspond to the rules in Protocol 4 EEA. Therefore, the first question is considered to be academic in nature. However, given the failure to lawfully publish the amendments in Iceland, the EFTA Court’s opinion on this question may affect the conclusion of the case. Since the Héraðsdómur deems it important to obtain an interpretation of a provision of the EEA Agreement in order to answer the first question, the EFTA Court should respond to the question in light of Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (“SCA”).

33. The Ríkislögreglustjórinn addresses the second and the third question jointly. Articles 4 and 5 of Protocol 4 EEA, as amended by Decision No 71/96, and Annex 2, discuss obtaining and processing products. The products in question do not fulfil the conditions of Article 4, as they are not fished by Icelandic vessels. According to Article 5(1) and Annex 2 to Protocol 4 EEA, processing fish products will never lead to a change in their origin. Since fish products must be wholly obtained under the list in Annex 2, they do not get an

origination status upon processing. As the rules on processing in Protocol 4 EEA are not intended to apply to fish products, an interpretation is of no consequence. The questions are therefore only academic, even though the answers may be of importance to the Héraðsdómur in interpreting the earlier version of Protocol 3 to the Free Trade Agreement. The Ríkislögreglustjórinn invites the Court to dismiss the two questions according to Article 88(1) of the Rules of Procedure.

34. Should the Court, however, be of the opinion that it is in a position to interpret Article 6 of Protocol 4 EEA with respect to fish products, the processing, as described in the second question, is deemed insufficient. Such processing corresponds to what is listed in Article 6 as insufficient working or processing. In this connection, reference is made to Article 6(1)(a), (i), and (o) of Protocol 4 EEA, as amended by Decision No 114/2000. The processing of the fish in the present case simply consisted of parting and salting it for storage in unfrozen condition.

35. With regard to the fourth and the fifth question, the Ríkislögreglustjórinn is of the opinion that the EFTA Court has no jurisdiction to interpret the Free Trade Agreement and suggests these questions be dismissed in accordance with Article 88(1) of the Rules of Procedure. Even if the EFTA Court could deal with international agreements other than the EEA Agreement, e.g. due to their relationship with the EEA Agreement, the EFTA Court may not interpret the earlier version of Protocol 3 to the Free Trade Agreement, which has been invalidated by later amendments. It is not relevant in this respect that later amendments to Protocol 3 were not lawfully published according to Icelandic law. Consequently, the two questions are not considered to carry any logical weight in this case. Should the EFTA Court deem itself competent to address the interpretation of Protocol 3 to the Free Trade Agreement, the Ríkislögreglustjórinn reasserts its opinion that the products were insufficiently processed.

36. The Ríkislögreglustjórinn also refers to the view of one of the defendants, according to which it is sufficient processing in the sense of Articles 1(2)(b) and 5(1)(a) of Protocol 3 to the Free Trade Agreement, if the processed product falls under another customs registration number than the raw material. This is said to be the case for whole-frozen cod on the one hand and salted flattened or filleted cod on the other. This argument pertains to the original Protocol from 1972 and, as the case may be, to the amendment of 1985. The Ríkislögreglustjórinn disagrees and points to Article 5(3) of the original Protocol 3 to the Free Trade Agreement, which stipulates that the processing in litras (a)-(h) is considered insufficient for the purposes of Article 1(2)(b), irrespective of whether or not a product’s customs registration number is changed. Special reference is made to litras (a), (b), (f) and (g).

Ásgeir Logi Ásgeirsson

37. Ásgeir Logi Ásgeirsson contends that a major part of the international law at issue does not apply due to lack of publication. Moreover, information concerning the rules of origin under the EEA Agreement and other free trade agreements or these provisions themselves are difficult to obtain. Despite various requests to several national authorities, Mr Ásgeirsson and his counsel were unable to obtain information on the applicability of those and did not receive the requested instructions and letters issued by the Customs Director. The Icelandic authorities have failed to fulfil the basic prerequisite for enforcing these rules of origin by failing to make them known and accessible to the public in a clear and comprehensible form. The fact that the EFTA Court's advice is sought by the Héraðsdómur on the question of which rules apply underlines the complexity of the issue and the lack of clarity surrounding it. Drawing erroneous conclusions as to the applicable rules in such a situation is considered an excusable error of law.

38. As regards the first question, Mr Ásgeirsson is of the opinion that the more liberal rules of origin in the Free Trade Agreement must prevail over the rules of origin under the EEA Agreement. This follows from Article 7 of Protocol 9 EEA and Annex 3 to this Protocol, which mentions Article 1 of Protocol 6 to the Free Trade Agreement and thus makes it logical to assume that the Free Trade Agreement applies to the present facts.

39. As to the second, third, fourth and fifth question, Mr Ásgeirsson focuses on the so-called 10% rule of Article 4(2)(a) of the original Protocol 4 EEA as the main provision on whether a product originates in the EEA due to sufficient processing. According to this rule, the value of raw materials from outside the EEA may not amount to more than 10% of the factory price of the final product. The complexity of the matter requires an appraisal of the product concerned in each instance. Therefore, there is no universal answer in particular to the second question, which is far too broad in scope. To support his view that the Héraðsdómur's questions do not correctly depict the case before it, Mr Ásgeirsson points to Article 5 of Protocol 4 EEA on insufficient processing. Applying this provision would be inadequate, since the salting of the fish was not intended primarily to prevent it from decay, but is rather part of the production process for a specific product, sought-after in many areas of the world.

40. Those arguments are forwarded with the reservation that, with the exception of the first question, the EFTA Court lacks jurisdiction to deal with questions concerning the Free Trade Agreement and consequently to answer the questions put to it by the national court.

Axel Pétur Ásgeirsson

41. With regard to the first question, Axel Pétur Ásgeirsson contends that the rules of origin contained in the original Protocol 3 to the Free Trade Agreement are more favourable than those contained in Protocol 9 EEA. This is inferred

from the fact that Article 5a of Protocol 3 to the Free Trade Agreement refers to the changing of numbers in the Harmonized System, whereas no such reference is to be found in Protocol 9 EEA. Hence, the rules of the Free Trade Agreement should prevail over those in Protocol 4 EEA.

42. As the rules of origin in Protocol 4 EEA are not considered applicable in the present case, answers from the EFTA Court to the second and third questions are viewed as unnecessary.

43. As to the interpretation of the Free Trade Agreement, Mr Ásgeirsson contests the EFTA Court's jurisdiction to give a ruling in this matter under Article 34(1) SCA. The Court is only competent to interpret the EEA Agreement. Mr Ásgeirsson supports a cautious approach according to which jurisdiction has to be relinquished in all cases where doubt on that matter arises. Otherwise, a special court, such as the EFTA Court, would run the risk of usurpation of power in its judicial functions. Consequently, the interpretation of Protocols 3 and 6 to the Free Trade Agreement, as requested in the fourth and the fifth question, is only for the Icelandic courts.

Helgi Már Reynisson

44. Mr Reynisson also points to the lack of clarity regarding the applicable rules, leading to *error iuris* on the part of the defendants. He claims that the case should be dealt with solely before the national court. He contends that the request does not fulfil the condition of being "necessary" under Article 34(2) SCA in order for the Héraðsdómur to give judgment. The reference of the case to the EFTA Court prolongs the duration of proceedings, which in itself is considered an infringement of Article 6 to the European Convention of Human Rights as well as national constitutional and criminal law. Therefore, Mr Reynisson suggests that all the questions with the exception of the first one should be dismissed for lack of significance to the subject-matter of the main proceedings.

45. The first question, however, should be answered in the affirmative in Mr Reynisson's opinion. Trade terms must largely depend on the applicable rules of origin, as those rules strongly influence which trade terms are offered. The trade regimes under the Free Trade Agreement are considered more favourable with respect to the charges giving rise to the present case. The processing of the products had the effect that they were to be given a new Customs number, which, in turn, resulted in no customs duties being levied. It is further argued that Decision No 1/96, amending Protocol 3 to the Free Trade Agreement in order to conform to Protocol 4 EEA, had not taken effect in Iceland at the time of the alleged violations because it had not been published in conformity with Icelandic law.

46. All defendants request the EFTA Court to order costs in their favour.

The Government of Iceland

47. As to the first question, the Government of Iceland deems it logical that Article 7 of Protocol 9 EEA cannot apply if there is no difference in the substance and content of the provisions of the EEA Agreement and of the provisions in the Agreement referred to in Appendix 3 to Protocol 9 EEA. In this connection, the Government points to Decision No 1/96, linking the EEA Agreement with the Free Trade Agreement by replacing the text of Protocol 3 to the Free Trade Agreement. The Decision entered into force on 1 January 1997, before the acts in question were committed. Following the amendment, the rules of origin contained in Protocol 3 to the Free Trade Agreement cannot be considered to be more favourable to Iceland than the provisions of the EEA Agreement. Article 7 of Protocol 9 EEA therefore cannot have any bearing on the findings of the Héraðsdómur in the case pending before it. The Government submits that an advisory opinion is a specially established means of cooperation between the EFTA Court and national courts aimed at providing the latter with the necessary elements of EEA law to decide cases before them, but not a procedure to answer general or hypothetical questions. The EFTA Court is requested to deem the first question inadmissible.

48. With regard to the second and third question the Government of Iceland refers to Article 5 of Protocol 4 EEA, after being amended by Decision No 71/96, and Annex 2 thereto. Annex 2 states that the products that fall under Chapter 3 of the Harmonized System can only acquire originating status if they are wholly obtained. As a result, defrosting, heading, filleting, boning, trimming, salting and packing of fish products cannot constitute sufficient working and processing for these products to acquire originating status in the EEA, if they fail to meet the conditions laid out in Article 4 of Protocol 4 EEA.

49. As to the fourth and fifth question, the Government of Iceland refers to its observations regarding the first question and states that neither question can have any bearing on the decision of the Héraðsdómur in the case before it. For this reason, it considers these questions inadmissible, pursuant to Articles 88(1) and 96(2) of the Rules of Procedure. Furthermore, the Government points to Article 108(2) EEA and Article 34(1) SCA. These provisions are interpreted to the effect that they exclude the issues raised in the fourth and fifth question from the jurisdiction of the EFTA Court, which is restricted to the interpretation of EEA law. The Free Trade Agreement is a separate Agreement and as such, a distinct instrument under international law. Any questions concerning its interpretation or application fall outside the scope of EEA law.

50. The Government of Iceland suggests that the first, fourth and the fifth question should be found inadmissible and suggests to answer the second and third question as follows:

> *"Defrosting, heading, filleting, boning, trimming, salting and packing of fish products that are not wholly obtained in the EEA, does not constitute*

sufficient working and processing within the meaning of Protocol 4 to the EEA Agreement."

The EFTA Surveillance Authority

51. By way of a general observation regarding the Court's competence in the present case, the EFTA Surveillance Authority infers from Article 2(a) EEA and Article 1 SCA that the Protocols to the EEA Agreement form an integral part thereof. The EFTA Court, under Article 34 SCA, has jurisdiction to rule on the EEA Agreement, which also covers the Protocols to the EEA Agreement, unless the relevant provisions of the Protocols provide otherwise. It follows from Article 8(3) EEA that the products covered by Protocol 9 EEA are not subject to the general provisions of the EEA Agreement. Instead a separate system for these products has been established in Protocol 9 EEA. Disputes regarding these obligations may, in accordance with Article 6 of Protocol 9 EEA, be brought before the Joint Committee. Further, in the event the Joint Committee fails to reach agreement, the parties can apply Article 114 EEA *mutatis mutandis*. When disputes regarding provisions of Protocol 9 EEA are covered by such separate dispute resolution mechanisms, it is for the Contracting Parties and not the EFTA Surveillance Authority and the EFTA Court to resolve the disputes.[9]

52. However, the fact that some provisions of Protocol 9 EEA fall outside the general surveillance and dispute mechanisms of the EEA Agreement does not entail that the EFTA Court's competence under Article 34 SCA is limited with respect to the provisions relevant to the present case. On the contrary, the EFTA Court is competent to rule on the interpretation of all relevant provisions of Protocols 4 and 9 EEA.

53. With regard to the EEA relevance of the argument put forward by the defendants, that the relevant rules of origin are so unclear that a good faith interpretation would constitute *error juris* in their favour, the EFTA Surveillance Authority refers to the case law of the Court of Justice of the European Communities.[10]

54. As regards the first question, the EFTA Surveillance Authority points to the amendments the Free Trade Agreement has undergone in order to create rules of origin similar to those in the EEA Agreement.

55. With regard to the question of whether the rules of origin in the Free Trade Agreement will prevail through the reference in Article 7 of Protocol 9 EEA, the EFTA Surveillance Authority refers to the general rule in Article 120 EEA. Article 7 of Protocol 9 EEA derogates from this provision, providing that

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9 Reference is made to the view submitted by the EFTA Surveillance Authority in Case E-2/94 *Scottish Salmon Growers* [1995] EFTA Court Report 59, concerning the State aid provision in Article 4 to Protocol 9 EEA.

10 Case C-262/99 *Paraskevas Louloudakis* v *Elliniko Dimosio* [2001] ECR I-5547.

specific provisions in other agreements will prevail over the rules in Protocol 9 EEA if they grant the EFTA States more favourable trade regimes. Whether this is the case with respect to Article 1 of Protocol 6 to the Free Trade Agreement, is dealt with under Protocol 3 to the Free Trade Agreement. As Article 7 of Protocol 9 EEA contains no reference to this latter set of rules, the term "Icelandic origin" in Article 1 of Protocol 6 to the Free Trade Agreement should be read in light of the rules of origin in Protocol 4 EEA, i.e. understood as "EEA origin" within the meaning of that Protocol. Had the Contracting Parties intended to include the rules of origin in Protocol 3 to the Free Trade Agreement, they would have made a direct reference thereto.[11] This is not contradicted by the Joint Statement in the Final Act of the EEA Agreement.[12] The Joint Statement only refers to other agreements that are not subject to specific regulation in the EEA Agreement, such as is the case for the Free Trade Agreement.

56. As to the second and third questions, the EFTA Surveillance Authority refers to Article 5 of Protocol 4 EEA, as amended by Decision No 71/96, and Annex II thereto. In order for products classified under HS Chapter 3, all the fish used as raw material must be wholly obtained in accordance with Article 4 of Protocol 4 EEA. Therefore, the fish used as raw material must either be obtained within the territories of the Contracting Parties, including their territorial waters, or taken from the sea outside their territorial waters by their vessels. Fish caught outside the territorial waters of the EEA States by non-EEA vessels cannot obtain originating status by being worked or processed in the EEA.

57. An answer to the fourth question is only necessary, in the view of the EFTA Surveillance Authority, if the Court, in answering the first question, finds that the term "trade regimes" in Article 7 of Protocol 9 EEA extends to the rules of origin contained in Protocol 3 to the Free Trade Agreement. Even in that event, an answer to this question will not influence the result of the main proceedings, since the provisions regarding the rules of origin in Protocol 3 of the Free Trade Agreement have been amended in order to establish principles of origin similar to those laid down in Protocol 4 EEA.

58. Assuming that Protocol 3 of the Free Trade Agreement is covered by the term "trade regimes" in Article 7 of Protocol 9 EEA, the EFTA Surveillance Authority contends that an interpretation of the Free Trade Agreement lies outside the scope of competence of the EFTA Court. This is inferred from Article

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[11] Reference is made to Article 11 of Protocol 2 to the EEA Agreement, which under certain circumstances provides for the application of Protocol 3 of the relevant Free Trade Agreement between the EEC and an EFTA State. Moreover, as for Norway, Appendix 3 to Protocol 9 EEA makes a reference to the entire Agreement between the European Economic Community and the Kingdom of Norway, including Annex I to that Agreement, which contains the rules of origin.

[12] Providing that *"[t]he EEA Agreement shall not affect rights assured through existing agreements binding one or more EC Member States, on the one hand, and one or more EFTA States, on the other, or two or more EFTA States, such as among others agreements concerning individuals, economic operators, regional cooperation and administrative arrangements, until at least equivalent rights have been achieved under the Agreement.*"

34 SCA, pursuant to which the EFTA Court has jurisdiction to give advisory opinions on the interpretation of the EEA Agreement.[13] Comparable to Article 234 EC, this provision must be viewed as exhaustive.

59. Nevertheless, Article 7 of Protocol 9 EEA, a derogation from the general principle laid down in Article 120 EEA, provides for a comparison between the trade regime envisaged by the EEA Agreement and the trade regime set out in the Free Trade Agreement. Consequently, interpretation of the provisions of Protocol 3 to the Free Trade Agreement is necessary in order to determine which provisions prevail. Therefore, if the EFTA Court lacks competence to interpret all the relevant provisions of the Free Trade Agreement to which the EEA Agreement refers, it could only partially decide on what constitutes "more favourable trade regimes" in Article 7 of Protocol 9 EEA.

60. However, in the EFTA Surveillance Authority's opinion such an argument will not take sufficient account of the fact that the Free Trade Agreement is a separate bilateral agreement, not establishing a court, but providing a system for dispute resolution, including on issues concerning the interpretation of that Agreement. According to Articles 23 and 28 of the Free Trade Agreement, it is for a Joint Committee to consider such disputes. Should the EFTA Court also be competent to deliver judgments on that Agreement, situations could occur in which the EFTA Court, in an EEA context, would interpret the Agreement differently than what would may result from the Agreement's own mechanism for dispute resolution.

61. Reference is also made to Article 307 EC, which contains a similar, albeit more extensive derogation, as compared to Article 7 of Protocol 9 EEA. The Court of Justice of the European Communities has explained that the purpose of Article 307 EC is to make it clear, in accordance with principles of international law, that the application of the Treaty does not affect earlier commitments of the Member States to respect the rights of non-member countries and to comply with their corresponding obligations. That Court has further held that in order to determine whether a Member State may rely on that provision in order not to comply with what follows from the Treaty, it is necessary to interpret the older agreements. However, in the context of a preliminary ruling it falls to the national court to ascertain the extent to which those obligations constitute an obstacle to the application of Community law.[14] The Court of Justice of the European Communities thus considers it to be outside its scope of competence to give judgments that could affect such rights of non-member countries.

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13 Reference is made to Case E-6/01 *CIBA* [2002] EFTA Court Report 283, at paragraphs 22-23.

14 Case C-13/93 *Office National de l'Emploi* v *Madeleine Minne* [1994] ECR I-371, at paragraph 18; Case C-158/91 *Jean-Claude Levy* [1993] ECR I-4287, at paragraph 21; Case C-324/93 *Evans Medical Ltd* [1995] ECR I-563, at paragraph 29; Case C-124/95 *Centro-Com Srl* [1997] ECR I-81, at paragraph 58.

62. As both Iceland and the European Community are Contracting Parties to the EEA Agreement, concerns pertaining to interference with non-member countries' rights do not arise in the present case. However, the risk of conflicting interpretations of the content of the Free Trade Agreement exists also in the present case. Therefore, the meaning of the term "Icelandic origin" in Protocol 3 to the Free Trade Agreement should not be determined by the EFTA Court, and any comparison between Protocol 9 EEA and Protocol 3 to the Free Trade Agreement should be carried out by the national court.[15]

63. If the Court decides to answer the fourth question, the EFTA Surveillance Authority suggests that the answer should be that the national court should apply Protocol 3 to the Free Trade Agreement to the extent it grants Iceland a more favourable trade regime than what follows from Protocol 4 EEA. Whether that is the case, falls outside the competence of the EFTA Court.

64. As to the fifth question, viewed against the background that the Free Trade Agreement was concluded in 1972 and thus before the accession of several current Member States to the European Union, the EFTA Surveillance Authority does not deem an answer necessary. This is based on the assumption that the Court follows its suggestion regarding the first question. Moreover, it falls to the national court alone to interpret the content of the Free Trade Agreement and to establish which countries are parties thereto.

65. That being said, the EFTA Surveillance Authority points out that countries joining the EU, as a general rule, automatically become Parties to any international agreements with third countries or other international organisations entered into by the European Community.[16] According to this general rule, Member States that have joined the European Community after 1972 have become parties to the Free Trade Agreement. Therefore, the provisions of that Agreement, including Protocol 6, also apply to these Member States.

66. However, it might be that some provisions of Protocol 6 to the Free Trade Agreement do not apply to all Member States. This is because the tables in Article 1 of Protocol 6 to the Free Trade Agreement only refer to specific Member States. In this respect it is mentioned that transitory rules regarding the reduction of customs duties between Iceland on the one hand and the countries

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15 As to the corresponding lack of competence for the Court of Justice of the European Communities to interpret the EEA Agreement applicable in an EFTA State which at a later stage became a Member State of the European Union, *in casu* Sweden, reference is made to Case C-321/97 *Ulla-Brith Andersson* [1999] ECR I-3551.

16 Reference is made, in the case of Spain and Portugal, to Article 4 of the Act of Accession which states that *"the agreements or conventions entered into by any of the Communities with one or more third States, with an international organization or with a national of a third State, shall, under the conditions laid down in the original Treaties and in this Act, be binding on the new Member State"*. Similar provisions are included in the Accession Acts for other new Member States.

accessing the Community after 1972 on the other, were adopted in additional Protocols to the Free Trade Agreement.[17]

67. The EFTA Surveillance Authority suggests to answer the questions as follows:

> *Question 1:*
>
> *"The term "trade regimes" in Article 7 of Protocol 9 to the EEA Agreement and Appendix 3 to the same Protocol does not 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."*
>
> *Question 2 and 3:*
>
> *"Defrosting, heading, filleting, boning, trimming, salting and packing fish that has been imported frozen whole to Iceland from countries outside the EEA does not constitute sufficient working and processing within the meaning of the rules of origin contained in Protocol 4 to the EEA Agreement in order for the products to obtain originating status."*

The Commission of the European Communities

68. The Commission of the European Communities, by way of general remarks, first contends that the EFTA Court has jurisdiction to interpret Article 7 of Protocol 9 EEA. A reading of Article 8(3)(a) EEA, according to which fish is not a product to which the normal rules on free movement apply, is rejected. Although fish is not covered by the normal rules on free movement contained in Part II of the EEA Agreement, it follows from Article 20 EEA that special rules do apply to fish. Those special rules are contained in Protocol 9 EEA. Moreover, it is clear from Articles 2(a) and 119 EEA that the Protocols form "an integral part" of the EEA Agreement. As a result, Article 34 SCA must mean that the EFTA Court has jurisdiction to give an advisory opinion on the interpretation of Protocol 9 EEA.

69. With regard to the question of whether the EFTA Court is competent to interpret the Free Trade Agreement, the Commission of the European Communities infers from Articles 2(a) and 119 EEA that the Free Trade Agreement does not form "an integral part" of the EEA Agreement. Should the EFTA Court interpret the Free Trade Agreement, the Court would in reality be

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[17] Reference is made to the Additional Protocol to the Free Trade Agreement between the EEC and Iceland consequent on the accession of the Hellenic Republic to the Community signed on 6 November 1980, and the Additional Protocol to the Free Trade Agreement between the European Economic Community and the Republic of Iceland consequent on the accession of the Kingdom of Spain and the Portuguese Republic to the Community signed on 14 July 1986. As for Sweden, Finland and Austria, an additional protocol to the Free Trade Agreement was signed on 26 January 1996 after these countries became members of the European Union.

adjudicating upon the mutual obligations of the European Community and Iceland.

70. However, the Commission of the European Communities is of the view that the EFTA Court is not called upon to interpret the terms of the Free Trade Agreement in the present case. It is asked in the first and fourth questions to determine whether Article 7 of Protocol 9 EEA and its Appendix 3 comprise a reference to Protocol 3 to the Free Trade Agreement in addition to an express reference to Protocol 6 to the Free Trade Agreement. It is an interpretation of the meaning of Protocol 9 EEA which is requested. The EFTA Court is competent to give such an interpretation.

71. The Commission of the European Communities bases its observation on the assumption that the vessels were not registered in the shipping register of any Member State of the Community nor in any country to which Article 3 of Protocol 4 EEA[18] applies. It is further assumed that no mixtures took place between fish captured in the circumstances described in the Héraðsdómur's request and fish which was clearly of Icelandic origin, in the sense that it was captured by Icelandic vessels.

72. In addressing the second and third questions first, the Commission of the European Communities submits that according to Protocol 4 EEA as amended by Decision No 71/96, the cod at issue cannot be considered as having Icelandic origin. To support this, it refers to Article 5 of Protocol 4 EEA and Annex II. For fish to be considered as originating in Iceland, all the materials of HS Chapter 3 must first be wholly obtained in accordance with Article 4 of Protocol 4 EEA. Hence all the fish that is processed must have been caught either in the territorial waters of Iceland (or the territorial waters of a Contracting Party) or be caught by a vessel flying the Icelandic flag (or that of a Contracting Party) if caught outside those territorial waters. As the fish in this case was caught outside any relevant territorial waters by "foreign vessels", it is not "wholly obtained". Processing or working, as described in Article 5 of Protocol 4 EEA, cannot turn that fish into Icelandic fish. In any case, the processing described in the request must, under Article 6 of Protocol 4 EEA, be considered as insufficient to enable non-wholly obtained fish to be considered of Icelandic origin.

73. With regard to the first and the fourth questions, the Commission of the European Communities basically submits that the rules of origin contained in the Free Trade Agreement do not apply in this case.

74. Article 7 of Protocol 9 EEA refers to "provisions of the agreements listed in Appendix 3", not to the agreements listed as a whole. Appendix 3 makes a precise reference to Article 1 of Protocol 6 to the Free Trade Agreement. It does not, in the case of Iceland, refer to a trade regime in Article 7 of Protocol 9 EEA

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[18] As amended by Decision of the EEA Joint Committee No 45/1999 of 26 March 1999 with effect from 1 January 1999, OJ 1999 L 266, p. 53.

as a whole, nor to Protocol 3 to the Free Trade Agreement. Consequently, the reference to a trade regime in Article 7 of Protocol 9 EEA must be taken to mean the provisions of Article 1 of Protocol 6 to the Free Trade Agreement exclusively. The term "trade regime" cannot be construed to mean a trading regime which includes the rules of origin contained in Protocol 3 to the Free Trade Agreement. Had the intention been otherwise, Appendix 3 to Protocol 9 EEA would have referred to the Free Trade Agreement as a whole, not just to one part of it. Appendix 3 contains such a reference to the whole of an agreement when it refers to the analogous agreements concluded between the European Community and Sweden, Switzerland and Norway.

75. Even if the mention of "products originating in Iceland" in Article 1(2) of Protocol 6 to the Free Trade Agreement was understood to mean in a broad sense to refer to the rules of origin in Protocol 3 to the Free Trade Agreement or was to make those rules apply, the fish would still not benefit from Icelandic origin. The wording in force at the relevant time of Protocol 3 to the Free Trade Agreement, as amended by Decision No 1/96, is materially the same as that which is found in Protocol 4 EEA.

76. The Commission of the European Communities is of the opinion that it is not necessary to answer the fifth question in the light of the answer proposed to the first and fourth questions. Nevertheless, it submits that the Free Trade Agreement and in particular its Protocol 6 applied to all Member States of the Community at the time the shipments in question were made in 1998 and 1999, including namely Denmark, Greece and Spain.[19]

77. The Commission of the European Communities suggests to answer the questions as follows:

Questions 2 and 3:

"Protocol 4 to the EEA Agreement should be interpreted as meaning that defrosting, heading, filleting, boning, trimming, salting and packing fish captured by foreign vessels that has been imported into Iceland frozen whole from countries outside the EEA does not constitute sufficient

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19 For Denmark, the Free Trade Agreement entered into force on 1 January 1973, concomitantly with the accession of Denmark to the European Economic Community. For Greece, Article 4 of the Act of Accession to the Community provides that the Hellenic Republic shall be bound by the agreements or conventions entered into by the Community and one or more third State. That Act of Accession entered into force on 1 January 1981. Consequently, Greece was bound by the terms of the Free Trade Agreement at the time the shipments were made. For Spain, Article 4 of the Act of Accession to the Community is materially identical to Article 4 in the Act of Accession for Greece. The Act of Accession for Spain entered into force on 1 January 1986. Consequently, Spain was bound by the terms of the Free Trade Agreement at the time the shipments were made. Additional protocols to the Free Trade Agreement modified the particular provisions of Protocol 6 to the Free Trade Agreement to take account of the accession of new Member States to the Community. An additional protocol signed on 6 November 1980 adapted the timetable for the reduction of customs duties in relation to Greece and a similar additional protocol of 14 July 1986 did likewise in respect of Spain.

working and processing for the product to be considered of Icelandic origin."

Questions 3 and 4:

"The term 'trade regimes' in Article 7 of Protocol 9 to the EEA Agreement and its Appendix 3 does not include the rules of origin of Protocol 3 to the Agreement between the European Economic Community and the Republic of Iceland, signed on 22 July 1972."

Carl Baudenbacher
Judge-Rapporteur