REPORT FOR THE HEARING
in Case E-6/01
– revised[*] –

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 Oslo byrett (Oslo City Court) for an Advisory Opinion in the case pending before it between

CIBA Speciality Chemicals Water Treatment Ltd and Others

and

The Norwegian State, represented by the Ministry of Local Government and Regional Development

on the interpretation of the Agreement on the European Economic Area, specifically

- Articles 92, 93, 98 and 102 EEA;

- Annex II, Chapter XV (Dangerous substances), in particular the provision under point 1 concerning derogation from the Community acts relating to classification and labelling;

- Joint Statement by the EEA Joint Committee adopted on 22 June 1995, concerning the EEA Agreement – Annex II, Chapter XV – regarding the review clauses in the field of dangerous substances,[1] in particular Annex II to that Joint Statement, setting up certain derogations concerning Norway, (hereinafter, the "Joint Statement of 1995" or the "1995 Joint Statement"); and,

- Joint Statement by the EEA Joint Committee adopted on 26 March 1999, concerning the EEA Agreement – Annex II, Chapter XV – regarding the

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[*] Amendments to paragraph 66 and to the name of the defendant. In conformity with the designation of the parties in the case before the national court, the name of the defendant has been amended throughout to read "the Norwegian State."

[1] OJ 1996 C 6, p. 7.

review clauses in the field of dangerous substances,[2] in particular the Annex to that Joint Statement, setting up certain derogations concerning Norway, (hereinafter, the "Joint Statement of 1999" or the "1999 Joint Statement").

I. Introduction

1. By a reference dated 22 August 2001, registered at the Court on 31 August 2001, the Oslo byrett made a Request for an Advisory Opinion in a case pending before it between CIBA Speciality Chemicals Water Treatment Ltd and Others (hereinafter the "Plaintiffs") and the Norwegian State, represented by the Ministry of Local Government and Regional Development (hereinafter the "Defendant").

2. The dispute before the national court involves the issue of whether the EEA Agreement allows the Defendant to require the Plaintiffs to label polyacrylamide as carcinogenic when the content of the residual substance acrylamide exceeds 0.01% by weight. The limit in the rest of the European Economic Area is 0.1% by weight.

3. The Court has on a prior occasion received a request for an advisory opinion in the same case. This was done by reference dated 22 February 2000, registered at the EFTA Court on 25 February of the same year as Case E-2/00, *Allied Colloids* v *The Government of Norway*, judgment of 14 July 2000, not yet reported (hereinafter "*Allied Colloids*"). That request concerned, *inter alia*, the 1995 and 1999 Joint Statements. This will be further described in Chapter II of this Report. Allied Colloids have now been succeeded by CIBA Speciality Chemicals Water Treatment Ltd.

II. Facts and procedure

4. The factual and procedural background of the case before the Oslo byrett is sufficiently described in the Report for the Hearing in *Allied Colloids* and will only be repeated here to the extent necessary for the purpose of this case.

5. In its reference in *Allied Colloids* the Oslo byrett referred the following question to the EFTA Court:

> *Does the Joint Statement adopted at the meeting of the EEA Joint Committee of 22 June 1995 concerning Annex II Chapter XV, Annex II with subsequent amendments, to the EEA Agreement give Norway the power to introduce a labelling requirement for polyacrylamide that contains a concentration of the*

[2] OJ 1999 C 185, p. 6.

residual substance acrylamide which is lower than 0.1%, cf. Council Directive 67/548/EEC of 27 June 1967 with subsequent amendments and Council Directive 88/379/EEC of 7 June 1988, with subsequent amendments?

6. The EFTA Court delivered its judgment on 14 July 2000. The operative part of the judgment reads as follows:

> *Annex II to the Joint Statement adopted at the meeting of the EEA Joint Committee on 22 June 1995 concerning the EEA Agreement – Annex II, Chapter XV – regarding the review clauses in the field of dangerous substances, must be interpreted as not giving Norway the power to require polyacrylamide to be labelled as carcinogenic if it contains acrylamide as a residual substance in a concentration of less than 0.1% by total volume.*
>
> *The Annex to the Joint Statement adopted at the meeting of the EEA Joint Committee on 26 March 1999 concerning the EEA Agreement – Annex II, Chapter XV – regarding the review clauses in the field of dangerous substances, must be interpreted as giving Norway the power to require polyacrylamide to be labelled as carcinogenic if it contains acrylamide as a residual substance in a concentration of equal to or greater than 0.01% by total volume.*

7. In the subsequent proceedings before the Oslo byrett, the Plaintiffs have argued that the EFTA Court's judgment regarding the interpretation of the 1999 Joint Statement gives rise to a supplementary question to clarify the legal basis for that Statement. This is considered relevant to the main proceedings since the Plaintiffs have pleaded that the EEA Joint Committee lacked the authority to adopt for Norway an alleged broadening of the derogations originally provided for in the 1995 Joint Statement.

8. The Plaintiffs submit, *inter alia*, that in the judgment in *Allied Colloids*, the EFTA Court does not address the issue of the authority of the EEA Joint Committee to adopt the derogations provided for in the 1999 Joint Statement. They furthermore challenge the authority of the EEA Joint Committee to permit these derogations.

9. Against this background, the Oslo byrett decided to submit a Request for an Advisory Opinion to the EFTA Court.

III. Legal background

10. The legal background for *Allied Colloids* has been detailed in the Report for the Hearing in *Allied Colloids* and in the judgment of the Court of 14 July 2000. It is not necessary to repeat this here. The details supplied here relate only to what is considered relevant in connection with the supplementary question raised in this case concerning the power of the EEA Joint Committee to adopt the 1999 Statement.

11. The main provisions concerning the EEA Joint Committee are found in Part VII, Section 2 (Articles 92 - 94) EEA and read as follows:

Article 92

1. An EEA Joint Committee is hereby established. It shall ensure the effective implementation and operation of this Agreement. To this end, it shall carry out exchanges of views and information and take decisions in the cases provided for in this Agreement.

2. The Contracting Parties, as to the Community and the EC Member States in their respective fields of competence, shall hold consultations in the EEA Joint Committee on any point of relevance to the Agreement giving rise to a difficulty and raised by one of them.

3. The EEA Joint Committee shall by decision adopt its rules of procedure.

Article 93

1. The EEA Joint Committee shall consist of representatives of the Contracting Parties.

2. The EEA Joint Committee shall take decisions by agreement between the Community, on the one hand, and the EFTA States speaking with one voice, on the other.

Article 94

1. The office of President of the EEA Joint Committee shall be held alternately, for a period of six months, by the representative of the Community, i.e. the EC Commission, and the representative of one of the EFTA States.

2. In order to fulfil its functions, the EEA Joint Committee shall meet, in principle, at least once a month. It shall also meet on the initiative of its President or at the request of one of the Contracting Parties in accordance with its rules of procedure.

3. The EEA Joint Committee may decide to establish any subcommittee or working group to assist it in carrying out its tasks. The EEA Joint Committee shall in its rules of procedure lay down the composition and mode of operation of such subcommittees and working groups. Their tasks shall be determined by the EEA Joint Committee in each individual case.

4. The EEA Joint Committee shall issue an annual report on the functioning and the development of this Agreement.

12. Article 98 EEA reads as follows:

The Annexes to this Agreement and Protocols 1 to 7, 9 to 11, 19 to 27, 30 to 32, 37, 39, 41 and 47, as appropriate, may be amended by a decision of the EEA Joint Committee in accordance with Articles 93 (2), 99, 100, 102 and 103.

13. Article 102 EEA reads as follows:

1. In order to guarantee the legal security and the homogeneity of the EEA, the EEA Joint Committee shall take a decision concerning an amendment of an Annex to this Agreement as closely as possible to the adoption by the Community of the corresponding new Community legislation with a view to permitting a simultaneous application of the latter as well as of the amendments of the Annexes to the Agreement. To this end, the Community shall, whenever adopting a legislative act on an issue which is governed by this Agreement, as soon as possible inform the other Contracting Parties in the EEA Joint Committee.

2. The part of an Annex to this Agreement which would be directly affected by the new legislation is assessed in the EEA Joint Committee.

3. The Contracting Parties shall make all efforts to arrive at an agreement on matters relevant to this Agreement.

The EEA Joint Committee shall, in particular, make every effort to find a mutually acceptable solution where a serious problem arises in any area which, in the EFTA States, falls within the competence of the legislator.

4. If, notwithstanding the application of the preceding paragraph, an agreement on an amendment of an Annex to this Agreement cannot be reached, the EEA Joint Committee shall examine all further possibilities to maintain the good functioning of this Agreement and take any decision necessary to this effect, including the possibility to take notice of the equivalence of legislation. Such a decision shall be taken at the latest at the expiry of a period of six months from the date of referral to the EEA Joint Committee or, if that date is later, on the date of entry into force of the corresponding Community legislation.

5. If, at the end of the time limit set out in paragraph 4, the EEA Joint Committee has not taken a decision on an amendment of an Annex to this Agreement, the affected part thereof, as determined in accordance with paragraph 2, is regarded as provisionally suspended, subject to a decision to the contrary by the EEA Joint Committee. Such a suspension shall take effect six months after the end of the period referred to in paragraph 4, but in no event earlier than the date on which the corresponding EC act is implemented in the Community. The EEA Joint Committee shall pursue its efforts to agree on a mutually acceptable solution in order for the suspension to be terminated as soon as possible.

6. The practical consequences of the suspension referred to in paragraph 5 shall be discussed in the EEA Joint Committee. The rights and obligations which individuals and economic operators have already acquired under this

Agreement shall remain. The Contracting Parties shall, as appropriate, decide on the adjustments necessary due to the suspension.

14. The relevant provision of the EEA Agreement in Annex II Chapter XV Point 1 states *inter alia*:

The Contracting Parties agree on the objective that the provisions of the Community acts on dangerous substances and preparations should apply by 1 January 1995. (…) If an EFTA State concludes that it will need any derogation from the Community acts relating to classification and labelling, the latter shall not apply to it unless the EEA Joint Committee agrees on another solution.

15. The relevant part of the 1995 Joint Statement reads as follows:

Joint Statement concerning the EEA Agreement – Annex II, Chapter XV – regarding the review clauses in the field of dangerous substances.

Point 1: Council Directive 67/548/EEC of 27 June 1967 on the approximation of laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances (OJ No L 196, 16. 8. 1967, p. 1); and

Point 10: Council Directive 88/379/EEC of 7 June 1988, on the approximation of the laws, regulations and administrative provisions of the Member States relating to the classification, packaging and labelling of dangerous preparations (OJ No L 187, 16. 7. 1988, p. 14)

The adaptations to these two acts in the EEA Agreement permit an EFTA State to conclude, as part of the review which took place in 1994, that it will need derogation from the Community acts relating to classification and labelling. If this is the case then the acts will not apply to it.

...

On the basis of the review which has taken place, Norway has concluded that it accepts the existing Community acquis, with effect from 1 July 1995, but with derogations in specific areas. These derogations are listed in Appendix II.

The Contracting Parties take note of these conclusions and agree on the objective that the abovementioned Community acts should apply fully by 1 January 1999. A new review of the situation will take place during 1998. If an EFTA State concludes that it will still need any derogation from the specific area as set out in its Appendix, the provisions shall not apply to it unless the EEA Joint Committee agrees on another solution.

If the Community acquis in this matter should be further amended or otherwise developed before 1 January 1999, the Contacting Parties shall make every effort to find appropriate solutions in order to integrate such acquis into the EEA

Agreement. The procedures laid down in Articles 97 to 104 of the Agreement shall apply.

16. The Joint Statement of 1999 contains similar provisions. The amended paragraphs read as follows:

....

On the basis of the review which has taken place, Norway has concluded that it accepts the existing Community acquis, with effect from 1 January 1999, but with derogations in specific areas. These derogations are listed in the Annex.

The Contracting Parties take note of these conclusions and agree on the objective that the abovementioned Community acts should apply fully by 1 January 2001. A new review of the situation will take place during 2000. If an EFTA State concludes that it will still need any derogation from the specific area as set out in its Appendix, the provisions shall not apply to it unless the EEA Joint Committee agrees on another solution.

It the Community acquis in this matter should be further amended or otherwise developed before 1 January 2001, the Contacting Parties shall make every effort to find appropriate solutions in order to integrate such acquis into the EEA Agreement. The procedures laid down in Articles 97 to 104 of the Agreement shall apply.

IV. Question

17. The following question was submitted to the EFTA Court.

Is the EEA Joint Committee after the adoption of the Joint Statement of 22 June 1995, empowered to decide that Norway may adopt derogations from existing Community acquis, such as the derogations contained in the Joint Statement of 26 March 1999 of the EEA Committee as interpreted by the EFTA Court in *Allied Colloids*?

V. Written Observations

18. 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:

– CIBA Speciality Chemicals Water Treatment Ltd and Others, represented by Counsel Wilhelm Matheson, Wiersholm, Mellbye & Bech;

– the Defendant, The Norwegian State, represented by Thomas Nordby, advocate, Office of the Attorney General (Civil Affairs);

– the Government of Iceland, represented by Magnús K. Hannesson, Legal Adviser, Ministry of Foreign Affairs, acting as Agent;

– the EFTA Surveillance Authority, represented by Peter Dyrberg, Director of its Legal and Executive Affairs, acting as Agent, assisted by Ms. Bjarnveig Eiríksdóttir and Per Andreas Bjørgan, respectively Senior Legal Officer and Legal Officer in the same department; and,

– the Commission of the European Communities, represented by John Forman, Legal Adviser and acting as Agent.

CIBA Speciality Chemicals and Others

19. The Plaintiffs emphasise the EFTA Court's previous finding in *Allied Colloids*, that the 1999 Joint Statement, by its wording, is broader in scope than the former derogation provided for in the 1995 Joint Statement. This, they argue, means, that the 1999 Joint Statement contained a new legal rule and thus altered the level of integration provided for by the 1995 Joint Statement. It is further submitted that the EEA Joint Committee was legally barred from adopting broader exemptions than those adopted in 1995. It is also submitted that the EFTA Court does not appear to have considered the question of lack of authority.

20. The Plaintiffs are of the view that neither under the main provisions of the EEA Agreement, nor under Chapter XV of Annex II, nor under the Joint Statement of 1995 does the EEA Committee derive the power to alter the legal standing which follows from the Joint Statement of 1995 and to introduce the broadening inherent in the interpretation of the wording of the Joint Statement of 1999.

21. The Plaintiffs argue that the authority of the EEA Joint Committee provided for in Articles 98 and 102 EEA must be interpreted narrowly. It is submitted that it follows clearly from said Articles (read in conjunction with the spirit of the whole of Part VII of the EEA Agreement) that said procedure only applies to cases concerning implementation of and adaptation to new Community legislation. The EEA Joint Committee does not have any legislative autonomy outside the scope of Article 102 EEA. Thus, the EEA Joint Committee does not have any authority to create new international law obligations on behalf of the Contracting parties.

22. The Plaintiffs concluded that the EEA Joint Committee, in its 1999 Joint Statement, by broadening the scope of a previous derogation without any corresponding new Community legislation, reversed already integrated Community legislation. This is not covered by the scope of the simplified procedure. It must therefore follow that the Committee did not have the power to act as it had done.

23. It is further submitted by the Plaintiffs that the lack of authority outlined above is neither repaired by any proxy implied in Chapter XV of Annex II nor implied in the 1995 Joint Statement; both of which reflect the efforts to further integration, not to regress therefrom.

24. The Plaintiffs are of the view that the Annex shows, as does the subsequent 1995 Joint Statement, that the Contracting parties, at the time they concluded the EEA Agreement, agreed to achieve the goal of full application of Community legislation within the relevant area in the course of a short time. It was, however, also agreed that an EFTA State Government might be exempted from the provisions of the Community legislation by way of agreement in the EEA Joint Committee. The Annex provides no grounds to derogate at a later stage from those parts of the regulatory framework that had already been integrated as a part of the EEA Agreement.

25. The Plaintiffs also contend that no authority to broaden the scope of the derogation in the 1995 Joint Statement at a later stage can be based on that Statement. In that Statement it is expressly stated that Norway has accepted the relevant Directives with certain specified derogations. No further derogation can now be adopted.

26. Further, it is evident from the 1995 Joint Statement that the objective was for Community legislation to apply fully within the EEA as from 1 January 1999. Its objective was not to take a step back by broadening the earlier derogations and allowing an additional derogation from a regulatory framework, which had already been integrated. Consequently, there is, in the opinion of the Plaintiffs, no basis in the 1995 Joint Statement for maintaining that the parties have agreed by way of the Joint Statement that by way of subsequent revisions it should be possible to alter the integration of the regulatory framework on which agreement had already been reached.

27. Moreover, the Plaintiffs are of the opinion that the supplementary question is admissible. They dispute the Norwegian State's assertion that the question has already been decided. They argue that the EEA Joint Committee's authority was never an issue during the written proceedings of the earlier case, although the point was raised in support of their interpretation.

28. The Plaintiffs submit that the EFTA Court has, pursuant to Article 34 of the ESA/Court Agreement, the express power to interpret the EEA Agreement, including the provisions regarding the authority of the EEA Joint Committee.

The Norwegian State

29. The Norwegian State's main submission is that the question in the request from the Oslo byrett should be declared inadmissible since it contests the validity

of the judgment in *Allied Colloids*. If the Court concludes that the question is admissible, the Norwegian State is of the opinion that the answer may be clearly deduced from existing case law and thus that the Court should give its decision by reasoned order in which reference is made to its previous judgment, cf. Article 97(3) of the Rules of Procedure.

30. The Norwegian State submits that, although it should be possible to request two or more advisory opinions in the same case before the national court, it is not permissible to use this measure to contest the validity of the previously delivered judgment (see *inter alia*, Case 69/85 *Wünsche* v *Germany*, [1986] ECR 947, paragraph 15).

31. The Norwegian State contends that it follows from the reasoning of the Court of Justice of the European Communities that a supplementary request may be justified (1) when the national court encounters difficulties in understanding or applying the judgment, (2) when it refers a fresh question of law to the court, or (3) when it submits new considerations which might lead the court to give a different answer to a question submitted earlier. In the opinion of the Norwegian State, none of these alternatives apply to the case at hand.

32. As to the first alternative, the Norwegian State points out that there is no dispute that, according to the earlier judgment in *Allied Colloids*, Norway has the power to impose the contested labelling requirements.

33. As to the second alternative, the question in the case at hand can not be considered a fresh question of law since all the relevant law, both national and EEA law, was presented to the Court in the earlier case.

34. As to the third alternative, the Norwegian State points out that the scope of the authority of the EEA Joint Committee was undoubtedly discussed during the oral hearing in the previous case. The judgment in that case must therefore be interpreted as meaning that the Court assumed, correctly, that the EEA Joint Committee has the necessary authority. Thus, there are no new considerations in this case that could lead the Court to conclude that the EEA Joint Committee did not have the authority to adopt the 1999 Joint Statement.

35. Furthermore, such a conclusion would, in the view of the Norwegian State, in fact set aside the judgment handed down by the Court in *Allied Colloids*. That being the case, the Norwegian State submits that the request should be declared inadmissible.

36. If the Court concludes that the request is admissible, it is submitted that the Court should give its decision by reasoned order in which reference is made to its previous judgment, in accordance with the procedure laid down in Article 97(3) of the Rules of Procedure, since it is manifestly identical to a question on which the Court has already ruled or given an opinion. A reference is made to the judgment of the Court of Justice of the European Communities in Case C-307/99

OGT Fruchthandelgesellschaft [2001] ECR I-3159 concerning an interpretation of Article 104(3) of the Rules of Procedure for that Court, where it held that a question is manifestly identical when a question can be clearly deduced from existing case law. In such cases it is appropriate to give a decision by reasoned order.

37. The Norwegian State submits that the *de facto* content of the question in *Allied Colloids* is such that the question in the present case can be clearly deduced therefrom.

38. If the main submission is rejected, the Norwegian State's view is that the EEA Joint Committee was authorised to adopt the Joint Statement of 1999. Furthermore, the Norwegian State submits that the EFTA Court lacks the power to set aside the whole or part of the EEA Joint Committee's decision.

39. The Norwegian State contends that it is of no consequence to the case whether the 1999 Joint Statement represents a broadening of the derogations in the 1995 Joint Statement or a clarification thereof. The adoption of the 1999 Joint Statement is within the competence of the EEA Joint Committee.

40. The Norwegian State refers to Article 92 EEA, from which it follows that the EEA Joint Committee has the authority to make legally binding decisions in the areas covered by the EEA Agreement. A decision on a special derogation in connection with the incorporation of a legislative act into the EEA Agreement is clearly within the competence of the EEA Joint Committee.

41. The Norwegian State also refers to Article 98 EEA and submits that the EEA Joint Committee is authorised under international law to amend the annexes to the EEA Agreement including, *inter alia*, a general authority to lay down new EEA provisions within the framework of Article 98 EEA. It is not limited to new legislative acts or purely technical modifications.

42. The Norwegian State also refers to Article 93(2) EEA and submits that it follows from that Article that all decisions taken by the EEA Joint Committee are unanimous. Thus, the Committee is a typical organ of international law, and every new decision made by the Committee creates new obligations under international law for the parties.

43. The Norwegian State refers to Article 102(3) EEA and the Plaintiff's submission that this provision does not introduce the right to reverse the integration already agreed upon unless the conditions for the application of Articles 112 – 113 EEA exist. It argues that on the basis of the wording "agreement on matters relevant" there is no doubt that the Committee was competent to adopt the 1999 Joint Statement. Furthermore, it is argued that the safeguard measures in Articles 112 and 113 EEA are of a completely different nature and do not apply in the case at hand.

44. As to the submission that the authority of the EEA Joint Committee only applies to new Community legislation, the Norwegian State submits that the EEA Joint Committee is competent to amend an Annex to the EEA Agreement independently of whether this has been initiated by the EU and independently of whether this broadens or narrows the scope of a prior decision.

45. The Norwegian State also refers to Article 102(4) EEA where its states that if "agreement on an amendment of an Annex [] cannot be reached, the EEA Joint Committee shall examine all further possibilities to maintain the good functioning of this Agreement and take any decision necessary to this effect, including the possibility to take notice of the equivalence of legislation." In the view of the Norwegian State, this clearly shows that the Contracting Parties may agree on something that is different from incorporating new EC acquis.

46. The Norwegian State further argues that neither the Annex nor the 1995 Joint Statement limit the authority of the EEA Joint Committee. The wording of the Annex does not impose a time limit on an EFTA State's right to consider the need for derogations. It only expresses the aim that the legislation should be applied by 1 January 1995. It is furthermore argued that the Joint Statement of 1995 expressly permits derogations, cf. "If an EFTA State concludes that it will still need any derogation from the specific area as set out in its Appendix, the provisions shall not apply to it unless the EEA Joint Committee agrees on another solution."

47. The Norwegian State submits that in any case, the EFTA Court has no power to set aside in whole or in part the decision of the EEA Joint Committee. The Court's tasks are exhaustively listed in Articles 31 – 41 of the ESA/Court Agreement. The power to set aside the decisions of the EEA Joint Committee can not be derived from these provisions.

48. The Norwegian State submits that the request should be found inadmissible. If it is found admissible, the Norwegian State is of the opinion that the Court should give its decision by a reasoned order in which reference is made to its previous judgment.

49. If the Court is of the opinion that the competence of the EEA Joint Committee is to be considered, the question should be answered as follows:

> *"The EEA Joint Committee was empowered to adopt the Joint Statement of 26 March 1999."*

The Government of Iceland

50. The Government of Iceland supports the submissions made by the Norwegian State to the effect that the EFTA Court is in this case asked to reconsider the foundation and validity of its judgment in *Allied Colloids*. Thus,

the request should be declared inadmissible. Further, the Government of Iceland supports the view that, if the request is admitted, the request is manifestly identical to a question on which the Court has already ruled and that the procedure provided for in Article 97(3) of the Rules of Procedure should be applied.

51. As to the authority of the EEA Joint Committee, the Government of Iceland points out that it is envisaged in Article 102 EEA that the EEA Joint Committee might have to reach an agreement in order to adopt new legislation. It is also emphasised that the Committee shall make every effort to find a mutually acceptable solution when a serious problem arises.

52. The Government of Iceland continues by pointing out that an obvious example of reaching an agreement in cases of disunity would be to allow the EFTA States (partial) exception from the material scope of new Community legislation.

53. The EEA Joint Committee has the general task of ensuring effective implementation and operation of the EEA Agreement. Nothing in the wording of the EEA provisions relating to the Committee, limits its authority in matters such as those at issue in the present case.

54. The Government of Iceland concludes that the EEA Joint Committee has the authority to amend its previously adopted legislation since nothing in the text of the EEA Agreement prevents it from doing so. Thus, the EEA Joint Committee had the authority to adopt the 1999 Joint Statement.

55. As to the competence of the EFTA Court, the Government of Iceland fully subscribes to the view and arguments expressed by the Norwegian State, i.e., that the Court does not have the power to set aside all or part of the EEA Joint Committee's decision.

The EFTA Surveillance Authority

56. The EFTA Surveillance Authority refers to Article 92 EEA and submits that the wording of that provision indicates that the EEA Joint Committee has broad authority. Even so, it is not unlimited since the Committee can only exert the authority that has been assigned to it.

57. The EFTA Surveillance Authority also refers to Article 98 EEA. It submits that on the basis of that provision it must be assumed that the EEA Joint Committee is not entitled to amend, for instance Protocols 8 and 33. On the other hand, all the Annexes to the EEA Agreement may be amended by a decision of the EEA Joint Committee.

58. As regards amendments to an Annex, the EFTA Surveillance Authority submits that Article 102 (1) EEA together with Article 98 EEA contain a general mandate for the EEA Joint Committee to amend Annexes in order to make new Community legislation part of the EEA Agreement. While, as a matter of homogeneity and legal security this should be accomplished as closely as possible to the adoption of the legislation in the Community, there are no specific time limits laid down. Nor are there any provisions preventing the Committee from taking possible adaptation measures when adopting a Community act. Such adaptation may even be adopted subsequent to taking over the Community act concerned. In further support of its position, the EFTA Surveillance Authority refers to the practices of the EEA Joint Committee.

59. The EFTA Surveillance Authority contends that against this background, it must be concluded that under the provisions of the EEA Agreement, the EEA Joint Committee enjoys a broad discretion as to how and when it exerts its authority.

60. As to the authority of the EEA Joint Committee in the present case, the EFTA Surveillance Authority refers to the relevant part of Annex II (cited above in paragraph 14). It is pointed out that the foreseen review resulted in the 1995 Joint Statement and subsequently in the 1999 Joint Statement.

61. Nothing in the text of the Annex or of the Statements appears to indicate that the EFTA State concerned should be prevented from claiming a broadening or clarification of earlier derogations as long as this is in line with the objective. Considerations of legal certainty cannot affect this result – any economic operator has to accept the fact that the legislative environment in which it operates may be modified or abolished by the legislator.

62. As to the EFTA Court's jurisdiction, the EFTA Surveillance Authority offers an analysis of the rules concerning the jurisdiction of the Court of Justice of the European Communities and of the case law of that Court in relation to international agreements, with the aim of establishing whether that Court might have jurisdiction to rule on the validity of the decisions of the EEA Joint Committee.

63. It is *inter alia* pointed out that it is established case law[3] that the Court of Justice of the European Communities has jurisdiction under Article 234 EC to interpret acts adopted by bodies set up under such agreements concluded by the Communities. The same applies to so-called mixed agreements, such as the EEA Agreement. Thus, it is submitted by the EFTA Surveillance Authority that the Court of Justice of the European Communities has, without doubt, the power to interpret the decisions of the EEA Joint Committee.

[3] See for instance, Case C-192/89 *Sevince* [1990] ECR I-3461.

64. As to the question of whether the Court of Justice of the European Communities would have jurisdiction to rule on the validity of international agreements or acts adopted by bodies established by such agreements, there appears to be no relevant case law. The position in legal theory, however, seems to be that the Court of Justice of the European Communities has such jurisdiction.

65. Furthermore, in referring to *France* v *Commission*[4], the EFTA Surveillance Authority submits that this ruling would seem to support the view that in reality the Court seeks to have jurisdiction to review international agreements, while it may formally refrain from pronouncing their invalidity.

66. The EFTA Surveillance Authority submits that if the scheme of *France* v *Commission*, cited above, were to be applied to the scenario where the Court of Justice of the European Communities was confronted with the question as to the validity of a Joint Committee Decision, the outcome could be that the Court, finding that the Decision was not in accordance with the EEA Agreement and that therefore the EEA Joint Committee acted *ultra vires*, could invalidate the implicit decision of the Commission that empowered its officials to participate in the act of making the Decision. The consequence could be that formally the Decision would stand, but it could not be applied within the Community. The EFTA Surveillance Authority refers to this as the "preliminary" approach where the question of the authority of the EEA Joint Committee seems to be preliminary to the question of the authority of the Commission. The EFTA Surveillance Authority extends this reasoning to the case at hand, stating that the authority of the EEA Joint Committee seems to be preliminary to the question of whether the Norwegian authorities were entitled to issue the order attacked by the undertakings in the main proceedings, and arguing that the Norwegian authorities must accept the Decision but may invalidate the Norwegian implementing measures. Moreover, a possible finding by the EFTA Court that the Joint Committee, by adopting a Decision, has acted *ultra vires*, cannot affect the legality of the Community Act, which normally is a part of the Decision, within the Community legal order. Only the Court of Justice of the European Communities can invalidate a Community Act within the Community legal order.

67. The EFTA Surveillance Authority also recalls that in *Foto-Frost* the Court of Justice of the European Communities ruled that a national court that considers setting aside a Community act is obliged to refer the question of validity to the Court.[5] It is alleged that this result was based on the need to ensure uniform application of Community legislation. Likewise, a national court in a Member State that considers setting aside a Joint Committee decision must be obliged to refer the question of the validity of the decision to the Court of Justice.

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[4] Case C-327/91 *France* v *Commission* [1994] ECR I-3641.

[5] Case C-314/85 *Foto-Frost* [1987] ECR 4199.

68. The EFTA Surveillance Authority submits that it follows from the above that it appears likely that the Court of Justice, in reality, may review Joint Committee decisions; that the economic operators in the Community are afforded judicial protection against possible illegal action of the Joint Committee; and, that national courts are offered guidance in deciding whether the Joint Committee has acted *ultra vires*.

69. Furthermore, there are no constraining arguments to the effect that economic operators and national courts in the EFTA States should not be afforded the same protection and guidance from the EFTA Court. On the contrary, it appears sensible that the EFTA Court provides guidance to national courts that are deciding whether the EEA Joint Committee acts outside the scope of its authority.

70. The EFTA Surveillance Authority proposes that the referred question should be answered as follows:

> *The examination of the question submitted has not revealed any element indicating that by adopting the Joint Statement of 26 March 1999 the EEA Joint Committee has acted outside the competences conferred upon it by the EEA Agreement.*

The Commission of the European Communities

71. Firstly, the Commission of the European Communities offers some thoughts regarding the authority of the EEA Joint Committee.

72. By reference to Article 92(1) and 102(1), (3) and (4) EEA, and the EFTA Court's judgment in *Jæger* v *Opel Norge*[6] the Commission of the European Communities submits that the decision-making role of the EEA Joint Committee is not limited to amending the Annexes to the EEA Agreement, but also includes amending a majority of the Protocols, cf. Article 98 EEA.

73. Then the Commission of the European Communities turns to the question of the jurisdiction of the EFTA Court. It points out that Article 34 of the ESA/Court Agreement only provides the EFTA Court with jurisdiction to give Advisory Opinions on the interpretation of the EEA Agreement. There is no equivalent in the EEA Agreement to the act of reviewing the legality of Community acts contained in Article 230 EC. Article 36 of the ESA/Court Agreement extends the jurisdiction of the EFTA Court to reviewing the acts of the EFTA Surveillance Authority.

74. On this basis, the Commission of the European Communities submits that the legality of the decisions of the EEA Joint Committee is not subject to review

[6] Case E-3/97, *Jæger* v *Opel Norge* [1998] EFTA Court Report, 4, paragraph 30.

by the EFTA Court. On the other hand, when a question such as the one in the present case is raised, the EFTA Court is restricted to setting out its position on the interpretation of the EEA Agreement with respect thereto.

75. The Commission of the European Communities contends that the EFTA Court is therefore able to confirm what it decided in its earlier Advisory Opinion as regards the amendments made to Annex II of Chapter XV of the EEA Agreement.

Thór Vilhjálmsson
Judge-Rapporteur