

Carl Baudenbacher
President of the EFTA Court



**Dispute Resolution Under a
Future FTA EU - UK**

First Judicial Summit of the EFTA Pillar, 4 May 2017

A. Introduction

HM Government's Brexit strategy

Two main objectives:

- Regaining control of immigration.
- Terminating the jurisdiction of the ECJ.

Apparent determination to go for hard Brexit.

Reasons:

- UKIP influence; exceptionalism.
- Intransigence of EU (free movement of persons).

B. FTA for goods and services

I. HM Government

As much market access as possible.

Arbitration as dispute settlement mechanism.

Cf. Chapter 30 CETA: No direct effect.

If no satisfactory solution: UK threatens to just walk away.

Will arbitration be acceptable for rEU?

Article 111(4) EEA: Arbitration only with regard to compensation.

B. FTA for goods and services

I. HM Government

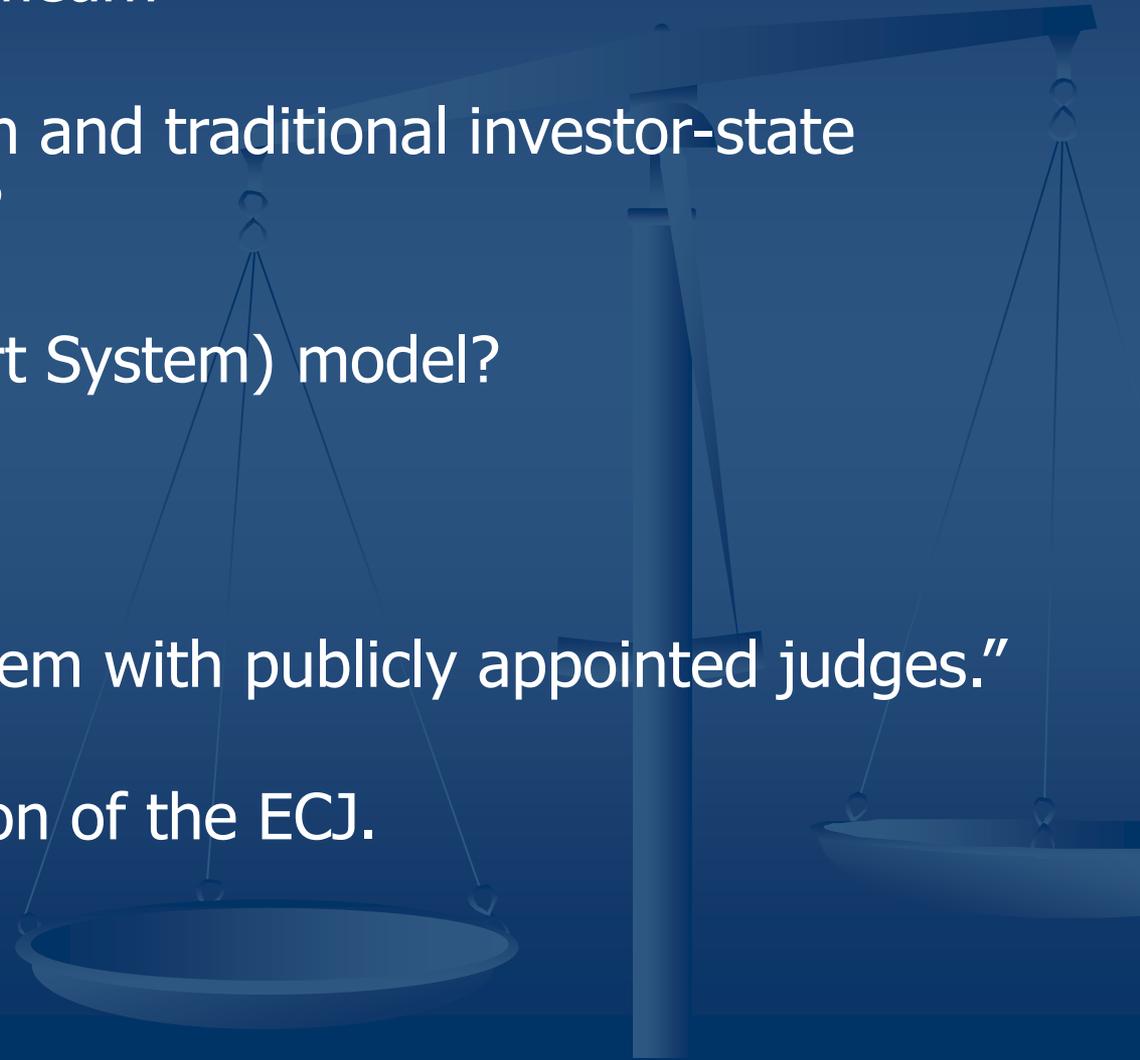
Was does arbitration mean?

Commercial arbitration and traditional investor-state arbitration as models?

ECS (Investment Court System) model?

- A court of law.
- A “public court system with publicly appointed judges.”

Open question: Position of the ECJ.



B. FTA for goods and services

II. EU Council conclusions 2008, 2010, 2012, 2014, 2016/17 concerning the EFTA States

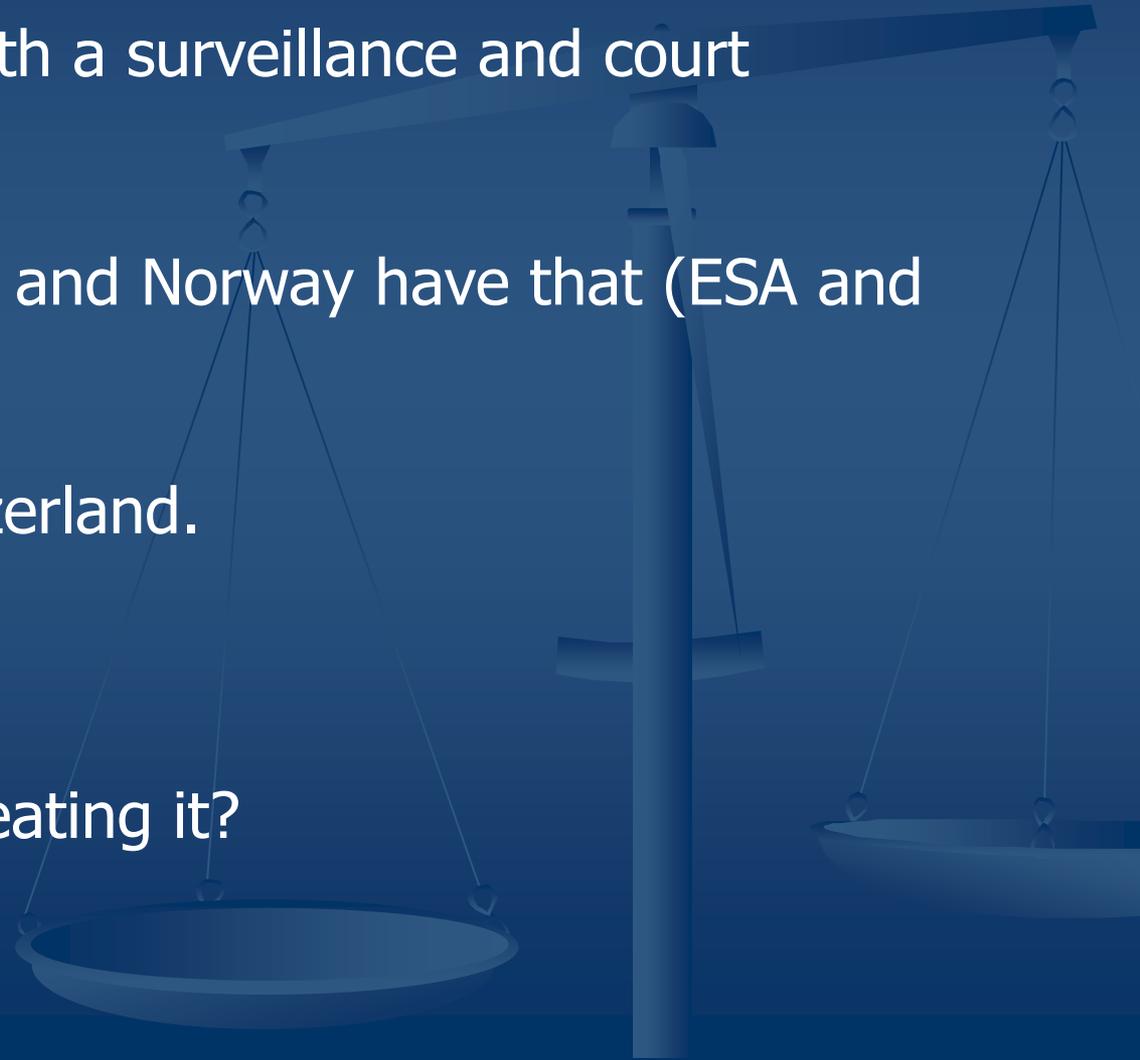
Market access only with a surveillance and court mechanism.

Iceland, Liechtenstein and Norway have that (ESA and EFTA Court).

Directed against Switzerland.

What about the UK?

Having the cake and eating it?



C. Soft Brexit?

I. With access to the Single Market

Governments of Scotland and Wales, and Northern Irish politicians in favour of EEA, possibly modified.

City of London, industry, the 48%.

EEA membership? (EFTA membership as a precondition.)

Renegotiate EEA Agreement (with a new name?).

Docking to ESA and EFTA Court (proposed to Switzerland by the EU, rejected by the Swiss Government out of ignorance)?

Snap election could bring soft Brexit to the fore.

II. EFTA Court instead of ECJ?

EFTA pillar leaves the States and courts more sovereignty.

- Limited internal effect.
- Preliminary reference procedure more partner-like.
- No penalty payments in case of non-implementation of infringement judgments.



C. Soft Brexit?

II. EFTA Court instead of ECJ?

Size of the EFTA Court (you always have your own judge on the bench).

EFTA Court carries no French rucksack.

Judicial style of the EFTA Court has an impact on content (details in the slides "The EFTA Court in its 24th year).

Going first constellation; mature court has self-confidence.

It is hardly possible to interfere with a judgment of the EFTA Court on the political level.

D. Transitional agreement

I. Bilateral Court EU - UK

In my view out of the question.

II. ECJ

Pushed by EU circles.

Also *Sir David Edward*.

Acceptable for the UK? Impartiality?

III. EFTA Court

POLITICO of 13 April 2017.



D. Transitional agreement

IV. NON PAPER ON KEY ELEMENTS LIKELY TO FEATURE IN THE DRAFT NEGOTIATING DIRECTIVES

For a transitional period, the jurisdiction of ECJ should be maintained.

"For the application and interpretation of provisions of the Agreement other than those relating to Union law, an alternative dispute settlement should only be envisaged if it offers equivalent guarantees of independence and impartiality to the Court of Justice of the European Union." (Para. 32.)

D. Transitional agreement

IV. NON PAPER ON KEY ELEMENTS LIKELY TO FEATURE IN THE DRAFT NEGOTIATING DIRECTIVES

"The Agreement should foresee that any reference to concepts or provisions of Union law made in the Agreement must be understood as including the case-law of the Court of Justice of the European Union interpreting such concepts or provisions before the withdrawal date. Moreover, to the extent an alternative dispute settlement is established for certain provisions of the Agreement, a provision according to which future case-law of the Court of Justice of the European Union intervening after the withdrawal date must be taken into account in interpreting such concepts and provisions should be included." (Para. 33.)