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Speech on the occasion of the visit of the Federal Supreme Court of Switzerland on 14 February 2012

A. The EEA Agreement

Mr President; Members of the Swiss Federal Supreme Court; dear colleagues: it's a particular pleasure for me to welcome you here in the EFTA Court's court room. Switzerland was a negotiating party to the EEA Agreement and as I've heard many times, Swiss influence was also particularly strong when it came to drafting the foundations for this Court. These premises are modest: they are designed according to Nordic functionality. But Nordic people are not so different from Swiss people, not in architecture and not in politics. I may quote here *Friedrich Engels*, who wrote in 1847:

> "There are two regions in Europe where old Christian-Germanic barbarism has retained its most primitive form, almost down to acorn-eating-Norway and the High Alps, especially *Ur*-Switzerland. Both Norway and *Ur*-Switzerland still provide us with genuine examples of that breed of men who once beat the Romans to death in good Westphalian style with clubs and flails in the Teutoburg Forest. Both Norway and *Ur*-Switzerland are democratically organised. But there are many varieties of democracy and it is very necessary that the democrats of the civilised countries should at last decline responsibility for the Norwegian and *Ur*-Swiss forms of democracy."[1]

The Swiss were there when the EEA Agreement was drafted, but that was twenty years ago and it has probably been forgotten to a certain extent. That's why I would like to start with some remarks on the agreement itself.

History of the EFTA judicial mechanism

The EFTA judicial mechanism has a peculiar history, and that is also quite interesting for Switzerland these days. In 1991, the original idea was to have a combined court for the EFTA pillar with five judges from the ECJ and three judges from the EFTA countries. The ECJ delivered an Opinion on the planned EEA Agreement on 14 December 1991: Opinion 1/91[2]. Some call it famous, some infamous. And in this

[1] Friedrich Engels, "The Civil War in Switzerland", *Deutsche-Brüsseler-Zeitung*, 14 November 1847.
[2] Opinion 1/91 [1993], ECR I-6079.

Opinion, which was later confirmed in the Opinion on the Aviation Agreement 1/00[3] and in the Patent Court Opinion 1/09,[4] the Court held essentially three things:

First, we cannot have a combined court because that would affect the autonomy of the EU legal order.

Second, we would accept a one pillar system including third countries where we are the only European court.

And third, we are prepared to give preliminary rulings also to national courts outside the EU but only if these rulings are legally binding. Otherwise, the ECJ said, we fear that it could weaken the binding character of our rulings vis-à-vis our own Member States.

After this, the negotiators had to sit down again and they came up with the idea of establishing an EFTA Court separated from the ECJ, without ECJ judges, with seven judges at the time, because there were seven EFTA States, but without an Advocate General. Switzerland had already nominated a judge to this Court; it was the late *Olivier Jacot-Guillarmod* from the University of Neuchâtel. And this second model was then approved by the Court of Justice of the European Union in Opinion 1/92[5]. There, the ECJ said that the EEA two pillar system is compatible with EU law. However, Switzerland pulled out as you all know and Liechtenstein postponed ratification. In 1994 the EFTA Court started to function with five judges nominated by Austria, Finland, Iceland, Norway and Sweden, without an Advocate General. Then the Austrians and the Fins and the Swedes joined the European Union and the judges from these countries were forced to resign. At the same time Liechtenstein joined and so there were three judges again. You need three judges in order to run an international court. But since we are only three, we also have a list of six ad-hoc judges. If one of us were to be disqualified or would fall ill, then we would draw on an ad-hoc judge from the country concerned. I may just mention that in October of last year the EFTA Court submitted a proposal to the States that in major cases we could sit in a 5 judges formation and we could have an Advocate General in important cases.[6]

[3] Opinion 1/00 [2002], ECR I-03493.
[4] Opinion 1/09 [2011], delivered on 2 July 2010, not yet reported.
[5] Opinion 1/92 [1992], ECR I-02821.
[6] <http://www.eftacourt.int/index.php/news/detail/pr_11_11_an_extended_efta_court_the_efta_court_proposes_amendments_to_the_s/> visited 20 February 2012.

Goals and effect

Let me briefly speak about the goals and the effect. The aim of the EEA Agreement is to extend the EU single market to the EEA/EFTA States which participate. It is described as the creation of a "homogeneous and dynamic EEA"[7]. That means that all the four fundamental freedoms are included, plus competition law, plus state aid control and virtually 70% of harmonized EU economic law. The Agreement is based on a two pillar approach with an EU pillar and an EFTA pillar. The law in both pillars is essentially identical in substance and the quintessence of the Agreement is that there is central enforcement. There is a surveillance authority (ESA) and there is judicial control by the EFTA Court.

It quickly turned out that one of the bones of contention was the question of internal effect of EEA law in the legal orders of the EFTA States. The EFTA Court has gone some kind of a middle way here by saying, no direct effect, that is what the Nordic countries have expected, but quasi-direct effect, that means if a regulation or a directive has been implemented into the legal order of an EFTA State, then it has direct effect, quasi-primacy and most importantly, State liability. From our perspective, all these principles follow from EEA law, not from domestic law. Domestic supreme courts would obviously claim that they acknowledge this, but they base it on their national legal orders. I have always been a functionalist, I learned that from my academic mentor *Walter R. Schluep*. I don't care what the construction is as long as the result is ok, I can be happy.

In the Nordic Member States, there is also the principle of EEA law friendly interpretation and in Liechtenstein, which is a monist country, several courts have held that there is also direct effect and primacy, but that follows from domestic law.

B. The EFTA Court

Judicial protection in the EFTA pillar

Now to the EFTA Court. Let me start by reading out Recital 4 of the Preamble to the EEA Agreement which says that the contracting parties have been

> "CONSIDERING the objective of establishing a dynamic and homogeneous European Economic Area, based on common rules and equal conditions of competition and providing for the adequate means of enforcement including at the judicial level, and achieved on the basis of equality and reciprocity" - reciprocity means that judicial protection must essentially be of the same quality in the EFTA pillar as in the EU pillar – "and of an overall balance of benefits, rights and obligations for the Contracting Parties"

[7] EEA Agreement, fourth recital of the Preamble.

The question was from the beginning, how is this goal to be achieved? I mentioned that we opted for quasi-direct effect, quasi-primacy and for State liability.

Structure of the EFTA Court

The guarantor of judicial protection in the EFTA pillar is the EFTA Court together with the EFTA Surveillance Authority. We are a legal person under international law, we are actually on foreign soil here in Luxembourg. That's why we concluded a headquarters agreement with the Grand Duchy of Luxembourg. Our first seat was in Geneva. The plan was that the EFTA Court would remain in Geneva. But when we were downsized to three Member States the seat was moved to Luxembourg. I personally think that was a good thing because for a Court of our size it's quite important to be close to the ECJ, not only because we follow their case-law but also because they follow our case-law in quite a number of cases, as I will explain.

Our structure is a little bit like at the ECJ, we have three cabinets consisting of a judge, a legal secretary and a personal assistant. We added two temporary legal officers on 1 January of this year due to increase in case load. We are organised according to a cabinet system, like the ECJ, unlike the Court in Strasbourg, unlike the WTO Appellate Body, the difference being that we write the judgments in our cabinets. There is a Judge at the European Court of Human Rights, David Thór Björgvinsson, a former legal secretary in this Court, the Icelandic Judge. When I once asked him, what is the major difference between your acting there in Strasbourg, and the acting of the Judges here. He said, "at the EFTA Court the judges write and at the Strasbourg Court the judges read." That means somebody else drafts the judgments. We have a Registry; translation to a large part has been outsourced, but we take care ourselves of finalising the translation which is quite cumbersome sometimes. Our working language is English, it has always been the language of EFTA because the most powerful founding member of EFTA was the United Kingdom. I'm not claiming that we speak real English, it is EFTA English. But then we are all not native speakers which means we are on a level playing field here.

Types of procedure

Our main types of procedure are the:

(1) Infringement action (ESA v EEA/EFTA State) where the EFTA Surveillance Authority sues a Member State. Also another State could sue a Member State, but we never had such a case.

(2) Preliminary reference procedure where a national court refers questions, very similar to the ECJ, and

(3) Action for nullity, in particular; in State aid cases and competition law cases where either a State brings a law suit against ESA or a private operator brings a law suit against ESA.

Cases

We have had years with a low case load, but given the fact that we are only five million people, we have now more cases than the ECJ per capita. We had forty-five incoming cases in the last three years. I have given you some examples of cases where there is no precedent by the Court of Justice of the European Union. For instance[8], and I had occasion to speak about that yesterday, the first case worldwide involving a display ban for tobacco products at the point of sale (E-16/10 *Philip Morris*[9]); the first case in the whole EEA on the legal nature of a website (E-4/09 *Inconsult*[10]); a number of cases on the legal consequences of the downfall of the Icelandic banks in late 2008.[11] And finally a case I will came back to briefly, which is right now in deliberation, on the alleged abuse of a dominant position in which a fine of approximately 13 million Euro was imposed.[12]

C. How can a citizen or economic operator defend his rights against an EEA/EFTA State?

The EEA Agreement created a market, and the main protagonists of a market are not the judges and not the civil servants and not the governments but the operators, the producers, the manufacturers, the consumers, the workers, the investors. The decisive question is: how can these people protect and defend their rights against the states? There are basically two possibilities: either you lodge a complaint with ESA, e.g. if you are an entrepreneur, and you think your government is violating the free movement of goods by maintaining a certain legislation. You can send a complaint to the EFTA Surveillance Authority as you could do in the Union with the Commission. This has certain advantages, it is cost free, it only costs you a stamp, but it also has downsides because ESA is largely free in its discretion in bringing an

[8] An additional example may be seen concerning bid price rules in the Takeover Directive in Case E-1/10 *Periscopus AS v Oslo Børs ASA and Erik Must AS*, EFTA Court Report 2009-2010 p.198.

[9] EFTA Court of 12 September 2011, E-16/10 *Philip Morris Norway AS v Staten ./. Helse- og omsorgsdepartementet,* not yet reported.

[10] Case E-4/09, *Inconsult Anstalt v Finanzmarktaufsicht,* EFTA Court Report 2009-2010 p. 89.

[11] Cases E-16/11 *Icesave;* EFTA Court on 14 December 2011*,* E-3/11 *Pálmi Sigmarsson v Seðlabanki Íslands,* not yet reported; E-18/11 *Irish Bank Resolution Corporation;* E-17/11 *Aresbank S.A.*

[12] Case E-15/10 *Norway Post v ESA.*

infringement case and ESA is pursuing a negotiating policy which may take years and years, up to ten years, so that, you, as a private operator will not get anything.

The second possibility is that you bring a law suit before the competent national court and you ask this court to make a reference to the EFTA Court. I think that ESA and the national judges should be aware of the fact that these are communicating bodies complementing each other. There is some room for improvement, if I may say so, both with ESA and with the national judges. But at the same time, if you look at our geographic situation with Norway up in the north and Iceland halfway to the United States and tiny Liechtenstein down in the Alps, it is also somehow understandable that the awareness is limited or it will take time until we get it. My Court has been quite active in bringing together judges from these countries. We will travel to Iceland in early March and hold a conference there in order to speak about these issues. Our Registrar went to Liechtenstein a couple of weeks ago and spoke with the judges there. Judge Christiansen will travel to Norway shortly now in order to meet the Chief Justice.

It is clear that you can also lodge a complaint with ESA and at the same time bring a case before a national court of an EEA/EFTA State.

D. The infringement procedure

Now to the infringement procedure. Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice states:

> "If the EFTA Surveillance Authority considers that an EFTA State has failed to fulfill an obligation under the EEA Agreement or of this Agreement, it shall, unless otherwise provided for in this Agreement, deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the EFTA Surveillance Authority, the latter may bring the matter before the EFTA Court."

A judgment is binding on the respective EFTA State as we had occasion to point out recently in the case E-18/10, *ESA v Norway.*[13]

E. The preliminary reference procedure

Legal basis

The second type of procedure I would like to focus on is the preliminary reference procedure. The legal basis is Article 34 SCA. We have jurisdiction to give, as the

[13] EFTA Court of 28 June 2011, E-18/10 *ESA v Norway,* not yet reported.

provision says, not preliminary rulings but advisory opinions on the interpretation of the EEA Agreement. Any national court may refer such questions to us, and according to paragraph 3, an EFTA State may limit the right to request such an advisory opinion to courts of last resort. This is what former Chancellor *Helmut Kohl* had been dreaming of. He wanted to limit the right of the lower courts to make a reference to the ECJ because so many labour courts in Germany made references and the ECJ would rule in a way which would not please the conservative Chancellor. So Germany could have joined the EFTA pillar at the time if they really wanted to limit the right of national courts to make such reference.

There are three differences between the ECJ and us when it comes to that.

"Non-binding" character of preliminary rulings

The first difference is that since our rulings are called Advisory Opinions. They are in theory non-binding, but in reality this is not so. They are hardly weaker than the ECJ rulings. First of all we held in an important case, involving a Swiss firm, Case E-6/01 *CIBA*[14], that they enter into validity which translates into "*Rechtskraft*". Secondly, it is quite clear that if a national court were to disregard our opinion, then ESA would most probably bring an infringement suit against the country concerned and an infringement ruling would be legally binding. Most importantly, also our rulings in this preliminary reference procedure have factual *erga omnes* effect. Let me give you an example. When we held that State liability is part of EEA law, we did that in an Icelandic case. That means that the Norwegian Courts and the Liechtenstein Courts were strictly speaking not affected by that ruling but still both the Norwegian Supreme Court[15] and the Liechtenstein Supreme Court[16] took that as a precedent and they followed us on this part. And finally, I may mention that there are numerous reference citations by the courts of the European Union and by the Advocates General to our case-law.[17] I would estimate that in probably ninety cases we gave an answer to a new legal question and this has led to virtually ninety citations by the courts of the European Union.

[14] Case E-6/01 *CIBA Speciality Chemicals Water Treatment Ltd and Others v The Norwegian State,* EFTA Court Report 2002, p.281.
[15] Norwegian Supreme Court on 28 October 2005, Rt. 2005 page 1365, *Finanger II*.
[16] Liechtenstein Supreme Court, VBI 2000/12, *Dr Tschannett III*.
[17] See for example: Case C-522/04 *Commission v Belgium* [2007] ECR I-05701 paragraph 44; Joined cases T-254/00, T-270/00 and T-277/00 *Hotel Cipriani SpA and Others v Commission of the European Communities* [2008] ECR II-03269 paragraph 87; Opinion of Advocate General Trstenjak, Case C-304/08 *Zentrale zur Bekämpfung unlauteren Wettbewerbs eV v Plus Warenhandelsgesellschaft mbH* [2010] ECR I-00217 point 91.

Situation of courts of last resort of the EEA/EFTA States

The second difference is that the courts of last resort are not, according to the text of Article 34 SCA, obliged to make a reference to us. If you give interpretation to Article 34 - the Judge from Latvia yesterday made such a beautiful statement about the methods of interpretation - you would look at the text, the scheme and the purpose.

That the text doesn't mention any obligation would not exclude that it could follow from the scheme or from the purpose. In several academic articles our Registrar has highlighted that national courts are still obliged to behave according to principle of loyalty which is laid down in Article 3 of the Agreement. They should also take into account that EFTA actors have full access to the ECJ in the EFTA pillar. The most famous case here was that of a Liechtenstein lady, who owned agricultural land in Austria, was denied permission to transfer this land to a legal person. She took her case to the highest administrative court in Vienna and the highest administrative court in Vienna which is obliged to make a reference to the ECJ did so and she won the case.[18] So, from a reciprocity perspective an EU citizen should have the same legal position in the EFTA pillar as EFTA citizen have in the EU pillar.

There is still the self-understanding of the courts of last resort, this 'we are free'. 'We are free to refer' and sometimes they even give insufficient reasons or false reasons for not having referred. Norwegian academics and attorneys have complained about that. We have received four references from the Norwegian Supreme Court, six references from the Liechtenstein Supreme Administrative Court, and from the Icelandic Supreme Court three direct references, and ten confirmations of reference decisions made by a district court. And the last remark can only be understood if you take into account the Icelandic special situation. I will come back to that.

But let me first say a word with regard to Norway. There are no empirical data about what their reasons could be for the fact that the number of references from the Norwegian Supreme Court is low. I suspect that there are three reasons. First, Norwegians are stern dualists, they believe international law to be totally separated from domestic law. Then academic literature has always encouraged the courts not to take it too seriously that they should make a reference. Some people seem to have difficulties to accept that they are in the EEA and to accept that the Norwegian people have voted "no" to EU membership. And finally the State Attorney of Norway seems to systematically oppose references to the EFTA Court. The former Norwegian Judge here and now Justice of the Supreme Court, Henrik Bull, a very good friend of ours, has written that obviously the Norwegian government hopes to get a better deal in a Norwegian court than down here before the EFTA Court.

[18] Case C-452/01 *Margarethe Ospelt and Schlössle Weissenberg Familienstiftung*, [2003] ECR I-9743.

The Icelandic EEA Implementation Act

In Iceland, as I alleged, there is a special situation. The Icelanders have made use of the third paragraph of Article 34 and they have installed an appeal system. That means every court can make a reference but, if a lower court makes a reference this decision may be appealed to the Supreme Court. In the early days it was not done so frequently, but since the Icelandic government did not fall in love with our State liability jurisprudence[19], which I can understand as a private citizen, the State Attorney started to challenge every reference decision of a lower court since 2002. The Supreme Court had a tendency to filter the cases. That means, if they felt that an unwarranted answer could come from the EFTA Court they found a reason to say no, this reference we block. The ECJ then rendered a judgment in late 2008 in which it said in the European Union it must be the competence of the trial court to make the decision of whether to refer or not.[20] There was some academic literature claiming that this was also relevant for the EFTA pillar. We are seeing probably not yet a new practice of the State Attorney although the State Attorney has now at least in one case abstained from appealing, but we see clearly a new attitude of the Icelandic Supreme Court. They have referred some five or six cases within a few months now.

F. The European pillar architecture

The EEA two pillar system

Last point, a few words on the European pillar architecture. I said that we have a two pillar system in the EEA. The law is essentially identical in substance but there are different surveillance authorities and different courts. That's why we have these homogeneity provisions. The basic rule is that we shall follow the ECJ and then there is this distinction between old and new ECJ case-law. We shall follow old case-law and we shall take into due account new case-law. In practice this is largely qualified. The goal is to create a level playing field for citizens and economic operators. And if this is the goal it cannot be decisive whether an ECJ judgment is old or new. But in reality we see that in the majority of our cases we have tackled fresh legal questions. The same happens from time to time to the Federal Supreme Court in the area of free movement of persons or in other areas. I am thinking of this case *Ruiz Zambrano*[21] which has caused so much controversy in particular in Germany. Ass Federal Supreme Court Judge Zünd mentioned yesterday the Swiss Federal Supreme Court had given a ruling according along the same lines as the ECJ some years ago.

[19] Case E 4/01 *Karl K. Karlsson hf. v. The Icelandic State,* EFTA Court Report 2002 p. 240.
[20] Case C-210/06 *Cartesio Oktató és Szolgáltató bt* [2008] I-09641.
[21] ECJ of 8 March 2011, C-34/09 *Ruiz Zambrano v Office national de l'emploi (ONEm),* not yet reported.

What we consider an important success of the EFTA States, also from a sovereignty perspective, is that the ECJ has taken a policy decision early on to open a judicial dialogue with us. We are the only court next to the Court of Human Rights in Strasbourg which the ECJ has the grace to cite. You know that judges are not always free of vanity: that holds true for us too. We have also said that the case law of the European Human Rights Court is relevant.

The Brussels/Lugano system

If we compare this EEA two pillar system to a two pillar system where Switzerland is a party, then we could compare it to the Brussels and Lugano system where the law is also essentially identical in substance. But there is no common court of the EFTA States. The individual Supreme Courts of Norway, Switzerland and Iceland have to take care of homogeneity. In theory the ECJ would also be obliged to take into account the case-law of the Supreme Courts of the EFTA States, but in practice the ECJ has become the centre of gravity. There is to my knowledge one single case in which the ECJ has made reference to the Swiss Federal Supreme Court: that is the *Gambazzi* case.[22] No reference has ever been made to either the Supreme Courts of Iceland or Norway.

A Swiss pillar?

Bilateral agreements

And then, still talking about pillars, and I'm now putting on my hat as an academic, one could even think that there is some sort of a "Swiss pillar" in this European architecture. That materializes in particular in the area of the Free Movement of Persons Agreement where there is a provision in Article 16 which is very similar to our homogeneity rules, a homogeneity rule provision with a distinction between old case law and new case law. If I have understood President Meyer correctly, it is also not so decisive for the Swiss Supreme Court whether a judgment of the ECJ is old or new because the goal must be to establish a certain parallelism. I may mention here as an *excursus* that if you look at the area of free movement of persons, and that includes social security and mutual recognition of university diplomas and other diplomas, cases may arise in three different legal contexts and the law is always identical in substance. They may arise on the EU law before the ECJ, they may arise on the EEA law before the ECJ or us and they may arise on the public international law before the ECJ and the Swiss Federal Supreme Court. An example would be the several decisions on the question of whether a so-called helpless' allowance must be exported also to people who spent their working life in the country but their old age

[22] Case C–394/07 *Gambazzi v DaimlerChrysler Canada Inc* [2009] I-02563.

abroad. There the ECJ basically said yes, it must be exported, in three cases.[23] The Liechtenstein Administrative Court said no, it must not be exported.[24] We said then, upon an infringement action by ESA against Liechtenstein, it must be exported,[25] and the Swiss Federal Tribunal said that it must not be exported.[26]

As far as our methods of interpretation are concerned, they are much closer to the ones of the ECJ including the principle of effectiveness, effet utile, than to the rather conservative methods of the Vienna Convention on the Law of Treaties.[27]

Autonomous implementation of EU law in Switzerland

In addition to the bilateral treaties, there is also autonomous implementation of EU law in Switzerland. I think it was the First Civil Division of your Court which held in two famous cases, one concerning transfer of undertakings and the other concerning package tours, that autonomously implemented EU law "in case of doubt" must be interpreted in conformity with European law.[28] It even said that the Swiss judge must "update" autonomously implemented law in view of new ECJ case law.[29] That means if the ECJ goes further than what the Swiss legislature had thought at the time of taking over, the Swiss judge should, in case of doubt, update the law. This is the case law of the First Civil Division, I am aware of other approaches in other divisions of the Swiss Federal Supreme Court.

Professor *Ernst A. Kramer*, one of the leading methodologists in Switzerland, has asked the question: what should the Swiss courts do if there is no relevant case-law of the ECJ? He answered that in such a case, the Swiss court should look to the neighboring EU countries, to Austria, to Germany, to France, to Italy. I am just asking the question: could in such a case the EFTA Court also be a source of inspiration?

Cross-fertilization?

Finally I note that in competition law cases our two courts are applying very similar provisions. The Swiss Competition Act has been amended in 1995, largely in view of European competition law and the EEA competition law provisions are a clone of the EU rules. I spoke with Andreas Zünd during the lunch. It happens so that there are

[23] Under Regulation 1408/71: Cases C-160/96 *Molenaar i.a. v. Allgemeine Ortskrankenkasse Baden-Württemberg* [1998] I-843*;* C-215/99 *Jauch v Pensionsversicherungsanstalt der Arbeiter* [2001] I-1901*;* and C-286/03 *Silvia Hosse v Land Salzburg*[2006] I-1771*.*
[24] Liechtenstein Administrative Court of 12 February 2003.
[25] Case E-5/06, *ESA v Liechtenstein,* EFTA Court Report 2007 p. 296*.*
[26] ATF 132 V 423.
[27] Case E-9/97 *Sveinbjörnsdóttir v Iceland,* EFTA Court Report 1998 p.95*.*
[28] ATF 129 III 335, Consid. 6, and ATF 130 III 182 Consid. 5.5.1.
[29] ATF 129 III 335.

two parallel cases right now, we have *Norwegian* Post[30] on the abuse of a dominant position and the Swiss Federal Supreme Court has the *PubliGroupe SA* case. It seems that in both cases one of the possible precedents – if I may use this word – is probably the *Menarini*[31] case decided by the European Court of Human Rights last September. Mr. President, dear colleagues, I hope that in these 30 minutes I've been able to set out in an understandable way what our activity is about. Thank you very much for your attention.

[30] EFTA Court, E-15/10 *Norway Post v ESA*, pending.

[31] ECHR on 27 September 2011, No. 43509/08 *Menarini Diagnostics S.R.L.v. Italy,* not yet published.