



The EFTA Court and International Law

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Abstract

The EFTA Court has on numerous occasions faced arguments based on international law rules that exist outside the EEA system, and it has dealt with such arguments in disparate ways. The Court is receptive to arguments based on the European Convention on Human Rights, while flatly refusing to engage with arguments based on other treaties. This article outlines the Court's practice in such cases and tries to explain it, with the best explanation being the Court's desire and obligation to maintain homogeneity between the EEA and the EU system. In the future, the Court may be presented with arguments based on the law of the World Trade Organization or the aftermath of the United Kingdom leaving the European Union, and this article suggests how the Court may respond.

Keywords

EFTA Court, international law, EEA, ECHR

1. Introduction

This article examines to what extent the EFTA Court allows its interpretation and application of European Economic Area (EEA) law to be influenced by other parts of international law. The EEA Agreement¹ is a treaty and is itself part of international law. In some cases, other international law rules from outside the EEA system have been invoked by the parties and dealt with by the Court. This article outlines the Court's practice (sections 2–3), attempts to explain the practice (section 4), and suggests some possibilities for the future (section 5). Section 6 concludes.

Article 108 EEA Agreement makes the EFTA Court 'competent' in 'the application of' the EEA Agreement. The Court's competence is further outlined in Articles 31, 32, 34–37, and 39–41 of the Surveillance and Court Agreement (SCA)² Several of these articles describe the EFTA Court's 'jurisdiction', which is limited to claims concerning violations of the EEA Agreement and related instruments. Therefore the Court cannot base a decision on other instruments of international law. It may nonetheless be influenced by such instruments when applying and interpreting EEA law, and the aim of this article is to examine that influence.

1. Agreement on the European Economic Area, 2 May 1992 [1994] OJ L1/4.
2. Agreement between the EFTA States on the establishment of a surveillance authority and a Court of Justice, 2 May 1992 [1994] OJ. See further Carl Baudenbacher, 'The EFTA Court: Structure and Tasks' in Carl Baudenbacher (ed), *The Handbook of EEA Law* (Springer 2016) 139, 149. Article 108(2) EEA Agreement is also relevant here, but it contains a more limited jurisdictional basis than the SCA.

The role of this other international law before the EFTA Court is not regulated in any written instrument. Various international courts and tribunals have relatively comprehensive applicable law clauses, such as Article 38(1) of the Statute of the International Court of Justice,³ Article 293 of the United Nations Convention on the Law of the Sea,⁴ Article 21 of the Rome Statute of the International Criminal Court,⁵ and Article 42 of the Convention on the settlement of investment disputes between States and nationals of other States,⁶ while tribunals of the World Trade Organisation (WTO) do not have an applicable law clause.⁷ The EFTA Court is instructed through Article 3(2) SCA to consider certain judicial decisions (discussed further in section 4.2), but the role of ‘external’ international law is not mentioned or regulated. The question is therefore left to the EFTA Court’s practice, and that practice is explored in this article.

2. The Court’s use of the European Convention on Human Rights

2.1 Introduction

The EFTA Court has cited the European Convention on Human Rights (ECHR)⁸ and related case law from the European Court of Human Rights (ECtHR) on numerous occasions. This section covers the twelve cases where the Court itself has cited the ECHR. Cases where only parties cite the ECHR are excluded,⁹ as are those where the Court cites ECtHR case law without citing the ECHR itself.¹⁰ The EFTA Court cannot and does not apply the ECHR directly to a dispute.¹¹ It rather interprets EEA rules in light of unwritten ‘fundamental rights’ that are part of the EEA system, and uses the ECHR and ECtHR case law in order to find the content of those rights.

While the Court’s overall method of interpreting EEA rules in light of fundamental rights is common to all the twelve cases discussed below, it is possible to distinguish between them. The following sub-sections divide them into four categories.¹² The Court has used the ECHR only as an interpretative aid, as described in section 2.2. In other cases the Court has seemed to assume that EEA law is limited by fundamental rights, whose contents are informed by the ECHR (section 2.3). In two cases, covered in section 2.4, the Court left the determination of conflicts between EEA law and fundamental rights, interpreted in light of the ECHR, to national courts. In one case, discussed in section 2.5, the Court found a violation of a fundamental right, interpreted in light of the ECHR, and even imposed a remedy.

3. Statute of the International Court of Justice, 26 June 1945, UKTS 67 (1946).

4. United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 3.

5. Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 90.

6. Convention on the settlement of investment disputes between States and nationals of other States, 18 March 1965, 575 UNTS 159.

7. Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body* (Oxford University Press 2009) 13.

8. Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221.

9. As in Case E-8/17 *Henrik Kristoffersen v the Norwegian Ski Federation* [2018] para 48; Case E-2/02 *Technologien Bau- und Wirtschaftsberatung GmbH and Bellona Foundation v ESA* [2003] para 28; Case E-10/14 *Enes Deveci and Others v Scandinavian Airlines System Denmark-Norway-Sweden* [2014] para 43.

10. As in Case E-8/97 *TV 1000 Sverige AB v The Norwegian Government represented by the Royal Ministry of Cultural Affairs* [1998] para 26.

11. Although Walter Kälin argues that it should do so: Walter Kälin, ‘The EEA Agreement and the European Convention for the Protection of Human Rights’ (1992) 3 *European Journal of International Law* 341, 351.

12. Robert Spano distinguishes between three categories, but they are different from the ones outlined here. See further Robert Spano, ‘The EFTA Court and Fundamental Rights’ (2017) 13 *European Constitutional Law Review* 475, 483.

2.2 As an interpretative aid

The first category of cases is where the EFTA Court only used the ECHR as an aid in interpreting EEA law.

Arnulf Clauder is a judgment in a case resulting from a referral from a Liechtenstein court in an immigration case.¹³ The EFTA Court was asked to interpret Article 16(1) of Directive 2004/38/EC¹⁴ and found that EEA nationals who receive pension benefits in an EEA member State where they have a right to permanent residence are entitled to family reunification even with family members who also receive welfare benefits.¹⁵ It reached this conclusion through a teleological interpretation,¹⁶ which allowed it to retain homogeneity with European Union (EU) law even though there is no equivalent of EU citizenship in EEA law.¹⁷ The Court discussed various arguments based on EEA law, and finally, just before reaching its conclusion, added that ‘EEA States are parties to the ECHR, which enshrines in Article 8(1) the right to respect for private and family life’, and that ‘provisions of the EEA Agreement are to be interpreted in the light of fundamental rights’.¹⁸ The Court then reached a conclusion about the content of the contested EEA rule ‘[i]n light of the foregoing’.¹⁹ The Court thus used the ECHR as a factor in interpreting EEA law. That the ECHR was mentioned at the very end of a long discussion, almost as an afterthought, suggests that it played a limited role in the Court’s reasoning.

Yankuba Jabbi is similar.²⁰ This was an immigration case involving Norway. The EFTA Court made a result-oriented interpretation of EEA law, where homogeneity with EU law was prioritised over strict fidelity to the wording of the EEA Agreement.²¹ The Court again mentioned Article 8 of the ECHR towards the end of its reasoning, repeating its formula that ‘provisions of the EEA Agreement are to be interpreted in the light of fundamental rights’.²² The Court then reached a conclusion based on EEA law that it may as well have reached without having referred to the ECHR. The ECHR was held up as an interpretative factor, but it is not clear whether it actually influenced the outcome of the case.

Ski Taxi concerned a ‘controversial’ question of competition law in Article 54 EEA Agreement.²³ The Court recalled ‘that it is incumbent on ESA or the competent national competition authority to adduce evidence capable of proving the existence of the circumstances that constitute an infringement of Article 53 EEA’.²⁴ The reference to the ECHR came in the next sentence, where the Court held that ‘[k]eeping in mind the guarantees provided by Article 6(2) of the European Convention on Human Rights, it follows from the principle of the presumption of innocence that the undertakings to which the decision finding an infringement

13. Case E-4/11 *Arnulf Clauder* [2011].

14. Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L229/35.

15. *Clauder* (n 14) paras 46–48.

16. *Ibid* para 34.

17. Halvard Haukeland Fredriksen, ‘General Prohibition of Discrimination on Grounds of Nationality’ in Carl Baudenbacher (ed), *The Handbook of EEA Law* (Springer 2016) 391, 400.

18. *Clauder* (n 14) para 49.

19. *Ibid* para 50.

20. Case E-28/15 *Yankuba Jabbi v The Norwegian Government, represented by the Immigration Appeals Board* [2016].

21. Halvard Haukeland Fredriksen and Gjermund Mathisen, *EØS-rett* (3rd ed, Fagbokforlaget 2018) 53–54 and 85–87.

22. *Yankuba Jabbi* (n 20) para 81.

23. Carl Baudenbacher, ‘Reciprocity’ in Carl Baudenbacher (ed), *The Fundamental Principles of EEA Law: EEA-ities* (Springer 2017) 35, 63.

24. *Yankuba Jabbi* (n 20) para 62.

was addressed must be given the benefit of the doubt'.²⁵ Thus the ECHR was merely 'kept in mind' when interpreting Article 53 EEA, and it was the latter provision that the Court actually applied in its judgment.

Case E-12/10 *ESA v Iceland* concerned Icelandic legislation applicable to foreign workers in Iceland and their employers and the compatibility of this law with Article 36 EEA Agreement and Article 3 of the Posted Workers Directive.²⁶ Iceland argued that the legislation was adopted in order to protect private property, which would be legal under EEA law 'on grounds of public policy'.²⁷ The Court accepted that private property is protected by the ECHR (and the Icelandic Constitution), and repeated its usual statements that 'the EEA Agreement are to be interpreted in the light of fundamental rights' and that the ECHR and ECtHR case law 'are important sources for determining the scope of these rights'.²⁸ The Court did not, however, accept Iceland's argument, which the Court found to 'manifestly deprive the [Posted Workers Directive] of its effectiveness'.²⁹ The Court was thus willing to use the ECHR as an aid when interpreting the EEA Agreement, even though it did not accept Iceland's specific argument in the case.

2.3 As a limit on EEA law

In other cases the EFTA Court has seemed to accept that EEA law can only be applied within the limits of fundamental rights, and that the content of those rights correspond with the ECHR. The Court most often finds that the rights have been respected.

Ásgeirsson is an example the Court invoking Article 6 of the ECHR.³⁰ It is the first case where the Court held that the ECHR and ECtHR case law are important sources to determining the content of fundamental rights in EEA law.³¹ The case is so far the only one where the EFTA Court has interpreted Article 5 and 6 of Protocol 4 to the EEA Agreement, which contains rules of origin.³² The case was a referral from an Icelandic court in a criminal case about fish exports. The defendant in the criminal case argued against referring the case to the EFTA Court, as this would '[prolong] the duration of proceedings' contrary to the right enshrined in Article 6 of the ECHR.³³ The Court once again noted that 'provisions of the EEA Agreement as well as procedural provisions of the Surveillance and Court Agreement are to be interpreted in the light of fundamental rights', and that '[t]he provisions of the European Convention of Human Rights and the judgments of the European Court of Human Rights are important sources for determining the scope of these rights'.³⁴ The EFTA Court cited case law from the ECtHR where time spent on referral to the Court of Justice of the EU (CJEU) was found not to cause a violation of Article 6, and held that '[t]he same must apply' to the EFTA Court.³⁵ The ECHR was not applied directly to the dispute, but in

25. Ibid.

26. Case E-12/10 *EFTA Surveillance Authority v The Republic of Iceland* [2011].

27. Ibid para 60.

28. Ibid.

29. Ibid.

30. Case E-2/03 *Ákærvaldið (The Public Prosecutor) v Ásgeir Logi Ásgeirsson, Axel Pétur Ásgeirsson and Helgi Már Reynisson* [2013].

31. Páll Hreinsson, 'General Principles' in Carl Baudenbacher (ed), *The Handbook of EEA Law* (Springer 2016) 349, 375.

32. Gunnar Thor Pétursson, 'Article 9 [Origin of goods]' in Finn Arnesen and others (eds), *Agreement on the European Economic Area: A Commentary* (Hart Publishing 2018) 281, 284.

33. *Ásgeirsson* (n 30) para 23.

34. Ibid.

35. Ibid para 23–24.

practice, the case was resolved as if the ECHR and jurisprudence from the ECtHR limited the application of EEA rules.

Much the same use of Article 6 ECHR was made in *Konkurrenten*.³⁶ The case concerned a Norwegian aid scheme for a bus company that the ESA had found to be in accordance with EEA law. The EFTA Court found several shortcomings in the ESA's reasoning. The Court refrained from discussing whether there is a difference between aid 'schemes which have been previously assessed and approved by ESA, from schemes which existed prior to the entry into force of the EEA or which became aid, due to the evolution of the EEA'.³⁷ The Court was not persuaded 'that the application of the requirements of Article 36 SCA is in the present case in breach of the fundamental right to effective judicial protection under EEA law, as interpreted in light of the ECHR'.³⁸ This conclusion nonetheless seems to presuppose that the Court could not apply Article 36 SCA, or another EEA rule, in a way that *would* violate fundamental rights that correspond with the ECHR.

Nye Kystlink was a referral from a Norwegian court.³⁹ The case centred on the interpretation of Articles 53 and 54 EEA Agreement and a fine imposed by ESA against a ferry company. The EFTA Court held that fines imposed by the ESA 'fall within the criminal sphere for the purposes of Article 6 ECHR', but that this applied 'when faced with a sanction imposed by ESA' and not 'to a case concerning damages based on a breach that has already been finally established'.⁴⁰ Thus, the EFTA Court seemed to assume that the powers of the ESA were in practice limited by the rights of the ECHR, which are part of the EEA law as 'fundamental rights', but it did not find that the rights had been violated.

In *Schencker I* the ESA had denied three private companies access to certain documents, and the companies sought an annulment of the Authority's decision from the EFTA Court.⁴¹ The ESA had seized the disputed documents from other private companies. The EFTA Court had to balance the importance of transparency and the plaintiff companies' right to access information with the ESA and the other private companies' need for some level of secrecy. The Court found guidance in the ECHR, when it 'recalled [...] that seizure of documents under an administrative investigative procedure may constitute an interference with a company's rights pursuant to Article 8 ECHR'.⁴² Therefore 'the seizure and examination of data does not go beyond what is necessary to achieve the legitimate aim'.⁴³ The Court referred to ECtHR case law, which has drawn up more precise guidelines. The practical consequence of this approach is that in certain respects the ECtHR will determine the limits of what the ESA can do under EEA law, since EEA law contains fundamental rights that correspond with the ECHR, which is in turn authoritatively interpreted by the ECtHR. In the specific case the ESA relied in part on Article 4(1)(b) of its Rules on Access to Documents, and the Court found that this was not a proper basis for rejecting the private companies' request.⁴⁴ The Court did not use Article 8 ECHR to decide the case, but it did mention the ESA had examined all 'documents obtained during the inspection', without providing

36. Case E-1/17 *Konkurrenten.no AS v EFTA Surveillance Authority* [2017].

37. Michael Sánchez Rydelski, 'State Aid' in Carl Baudenbacher (ed), *The Handbook of EEA Law* (Springer 2016) 575, 600.

38. *Konkurrenten* (n 36) para 64.

39. Case E-10/17 *Nye Kystlink AS v Color Group AS and Color Line AS* [2018].

40. *Ibid* para 79.

41. Case E-14/11 *DB Schenker v EFTA Surveillance Authority* [2012] para 55.

42. *Ibid* para 166.

43. *Ibid*.

44. *Ibid* para 169.

‘adequate reasoning’.⁴⁵ This could be taken to mean that the ESA’s approach was inconsistent with fundamental rights or the ECHR.

The Court gave an advisory opinion in *Fred Olsen* on the relationship between Norwegian rules on the taxation of foreign-controlled companies and the EEA’s freedom of establishment and freedom of capital.⁴⁶ The plaintiffs in the case sought to show that Norway’s taxation of the beneficiaries of a Liechtenstein based trust was contrary to EEA law. Among other things the EFTA Court ruled that a Norwegian tax appeals board constituted a ‘court or tribunal’ for the purposes of Article 34 SCA.⁴⁷ The Court also discussed whether ‘the imposition of the wealth tax is contrary to the requirement to respect the fundamental rights’.⁴⁸ It repeated that ‘provisions of the EEA Agreement as well as procedural provisions of the SCA are to be interpreted in the light of fundamental rights’ and that the ECHR and ECtHR case law ‘are important sources for determining the scope of these fundamental rights’.⁴⁹ It added that justifications under EEA law based on ‘overriding requirements in the public interest’ must be ‘compatible with fundamental rights’.⁵⁰ The Court discussed proportionality as a general limitation on exceptions to fundamental rights,⁵¹ an idea that seems to have been inspired by the case law of the ECtHR.⁵² In general it seems that the EFTA Court viewed EEA rules as limited by the fundamental rights corresponding with those found in the ECHR as interpreted by the ECtHR. In the specific case the Court found that ‘an examination of the alleged restriction represented by the national wealth taxation at issue in the main proceedings from the point of view of Articles 31 or 40 EEA Agreement also covers possible limitations on the exercise of the right to property as regards fundamental rights, so that a separate examination is not necessary’.⁵³ It therefore did not test whether the Norwegian legislation complied with the aforementioned rights, but its statements mean that it could well have done so.

In practice, the EFTA Court interprets fundamental rights in EEA law in light of the ECHR, and in practice this seems to mean that the Court will not apply EEA law contrary to the ECHR.⁵⁴ This is in contrast to how it has applied other international agreements, as discussed in section 3. Explanations for this different treatment are explored in section 4.

2.4 Delegating to national courts

In two cases the EFTA Court noted a possible conflict between EEA law and fundamental rights corresponding to the ECHR, but left the issue to national courts.

Holship was referred by a Norwegian court, and concerned a labour dispute.⁵⁵ *Holship* was a private company whose dock workers were boycotted by dock workers in a labour

45. Ibid para 168.

46. Cases E-3/13 and E-20/13 *Fred Olsen and Others v the Norwegian State* [2014].

47. Ibid para 72.

48. Ibid para 224.

49. Ibid.

50. Ibid para 226.

51. Ibid para 229.

52. Carl Baudenbacher and Theresa Haas, ‘Proportionality as a Fundamental Principle of EEA Law’ in Carl Baudenbacher (ed), *The Fundamental Principles of EEA Law: EEA-ities* (Springer 2017) 169, 181.

53. *Fred Olsen* (n 46) para 232.

54. Finn Arnesen and Halvard Haukeland Fredriksen, ‘Preamble’ in Finn Arnesen and others (eds), *Agreement on the European Economic Area: A Commentary* (Hart Publishing 2018) 150, 155.

55. Case E-14/15 *Holship Norge AS v Norsk Transportarbeiderforbund* [2015].

union in Drammen. The purpose of the boycott was to force Holship to become a party to a collective labour agreement. The EFTA Court held that such a boycott could be contrary to EEA competition rules and the freedom of establishment.⁵⁶ It nonetheless agreed with the Norwegian government that '[t]he protection of workers has [...] been recognised as an overriding reason of general interest that may justify restrictions on the freedom of establishment'.⁵⁷ However, the Court added that the 'national measures in question may fall under the exceptions provided for only if they are compatible with fundamental rights', rights which were apparently identical to those found in the ECHR as interpreted by the ECtHR.⁵⁸ The Court left the final determination of this to 'the referring court',⁵⁹ and did not examine the question further. The decision to leave this to the national court may have been partly inspired by the case law of the ECtHR.⁶⁰ The Norwegian Supreme Court followed the EFTA Court and sided with Holship, finding that the boycott violated the freedom of establishment and could not be justified with reference to 'fundamental rights'.⁶¹ The EFTA Court's president (writing in his individual capacity) called this a 'very welcome development', in light of the two courts' previous practice.⁶²

Irish Bank concerned the aftermath of bank failure in Iceland, where the government took control of a bank in which a nationalised Irish bank held bonds.⁶³ Icelandic courts requested an opinion from the EFTA Court. The case turned on the Winding up Directive, where the case was 'the first step' in a broader 'development'.⁶⁴ The Court made a general statement about the relationships between the EFTA Court and EFTA State national courts, which it called 'more partner-like' than the equivalent relationships in the EU.⁶⁵ It also proposed 'new guidelines for the treatment of language issues' in the interpretation of legal texts, which according to one commentator may be 'reverberating far beyond the boundaries of the EEA'.⁶⁶ One issue that the EFTA Court had to decide was whether to answer only questions posed by the Icelandic Supreme Court, or whether it should also answer questions from a lower court. When deciding this, it repeated that the EEA Agreement and SCA are to be read in light on fundamental rights, for which the ECHR and ECtHR case law are important sources.⁶⁷ The Court further held that 'when a court or tribunal against whose decisions there is no judicial remedy under national law refuses a motion to refer a case to another court, it cannot be excluded that such a decision may fall foul of the standards of Article 6(1) ECHR'.⁶⁸ It thus raised the possibility of Iceland's Supreme Court violating the ECHR when referring a case to the EFTA Court. It did not say that the Supreme Court *had* done so, only that it was *possible* to do so. The Court eventually decided to 'answer the question posed by the District Court in its letter of 22 December 2011, and thereby the questions as amended

56. Ibid para 120.

57. Ibid para 122.

58. Ibid para 123.

59. Ibid.

60. Spano (n 12) 491.

61. HR-2016-2554-P paras 95 and 119.

62. Baudenbacher and Haas (n 52) 204.

63. Case E-18/11 *Irish Bank Resolution Corporation Ltd v Kaupþing hf* [2013].

64. Magnus Schmauch, 'Equality' in Carl Baudenbacher (ed), *The Fundamental Principles of EEA Law: EEA-ities* (Springer 2017) 215, 227.

65. *Irish Bank* (n 63) para 57.

66. Francesco A Schurr and Johannes Gasser, 'Financial Services Law' in Carl Baudenbacher (ed), *The Handbook of EEA Law* (Springer 2016) 659, 678.

67. *Irish Bank* (n 63) para 63.

68. Ibid para 64.

by the Supreme Court,⁶⁹ but only after it had reminded national courts of their obligations under the ECHR.

2.5 Imposing a remedy

In one case the EFTA Court went so far as to impose remedy as a result of a violation of fundamental rights mirroring the ECHR. The case, *Posten Norge*, concerned a fine imposed by ESA on a Norwegian company, where the parties before the EFTA Court ‘disagree[d] on the extent to which the guarantees provided for under Article 6 ECHR apply to the present proceedings and the effect, if any, this must have.’⁷⁰ The Court held that ‘the provisions of the EEA Agreement are to be interpreted in the light of fundamental rights’, and that ‘[t]he provisions of the ECHR and the judgments of the European Court of Human Rights are important sources for determining the scope of these fundamental rights.’⁷¹ Further, the Court stated that ‘[t]he principle of effective judicial protection including the right to a fair trial, which is inter alia enshrined in Article 6 ECHR, is a general principle of EEA law.’⁷² The practical consequence of this is that the ESA’s powers under Article 36 SCA must be used in a way that is ‘compatible with Article 6(1) ECHR and Article 2 of Protocol 7 ECHR.’⁷³ Thus, according to the EFTA Court, through the existence of fundamental rights the ECHR will in practice set limits on what an EEA institution can do under EEA law, and the EFTA Court will police those limits.

Later in the judgment the Court referred to Article 13 ECHR, according to which violations of the ECHR require ‘an effective remedy.’⁷⁴ The EFTA Court referred to a case from the ECtHR, and found it appropriate to ‘reduce the basic amount of the fine by 20 %.’⁷⁵ The reduction of the fine was not mandated or indicated by any EEA rule. However, as the Court stated, it had ‘unlimited jurisdiction in reviewing the fine.’⁷⁶ Formally speaking, the reduction of the fine was an exercise of the discretion granted to the Court by EEA law, rather than an application of the ECHR. Even so, the practical effect of the Court’s approach is much the same as if it applied the ECHR directly.

The President of the ECtHR has characterised *Posten Norge* as a ‘landmark’ case in the EFTA Court.⁷⁷ It can be said to have diverged from the practice of the CJEU, which has allowed the European Commission relatively more discretion than the EFTA Court gave the ESA in *Posten Norge*.⁷⁸

3. The Court’s use of other international law

3.1 Introduction

This section presents how the EFTA Court has dealt with arguments based on international law other than the ECHR. Three cases are discussed: *Ásgeirsson*, concerning a free trade agreement (section 3.2); *Holship*, concerning the Dock Work Convention (section 3.3); and

69. Ibid para 66.

70. Case E-15/10 *Posten Norge AS v EFTA Surveillance Authority* [2012] para 84.

71. Ibid para 85.

72. Ibid para 86.

73. Ibid para 91.

74. Ibid para 285.

75. Ibid para 285–286.

76. Ibid para 286.

77. Spano (n 12) 478.

78. Ibid 479.

Fokus Bank, concerning international tax law (section 3.4). The Court's approach in these cases is a clear contrast from how it deals with the ECHR. Why that may be so is explored in section 4.

3.2 A free trade agreement

In the aforementioned *Ásgeirsson* case, the Icelandic court asked the EFTA Court to interpret the Free Trade Agreement between the European Economic Community and the Republic of Iceland, signed on 22 July 1972.⁷⁹ The EFTA Court faced an argument that it had 'no competence to interpret international agreements other than the EEA Agreement' and that 'its interpretation or application' of the free trade agreement in question 'must consequently be considered as falling outside the scope of EEA law'.⁸⁰ The Court agreed to some extent with this, holding that '[a]s a point of departure, it has no jurisdiction over the application or interpretation of the Free Trade Agreement'.⁸¹ It made exceptions for cases where there are 'clauses connecting both sets of law',⁸² but the Court specified that applying such clauses would in principle not be 'an interpretation of the Free Trade Agreement'.⁸³

3.3 The Dock Work Convention

The *Holship* case involved not only an argument based on the ECHR, as discussed in section 2.4, but also a potential conflict between an obligation under the EEA Agreement and the Dock Work Convention, which is the International Labour Organization (ILO) Convention 137.⁸⁴ Norway argued that the national law measures under review by the Court were taken in order to comply with the Convention.⁸⁵ In response to this the Court referred to Protocol 35 to the EEA Agreement, according to which 'in case of a conflict between national law implementing EEA law and other national provisions not implementing EEA law, the EFTA States shall introduce a statutory provision to the effect that national law implementing EEA law shall prevail'.⁸⁶ The Court dismissed Norway's argument, stating that 'a Contracting Party cannot make rights conferred by Article 31 EEA subject to the ILO Convention or other international agreements'.⁸⁷ Thus, while both the ECHR and the Dock Work Convention are 'other international agreements', the Court approaches them differently.

3.4 International tax law

In *Holship* the EFTA Court referred to its own *Fokus Bank* case. In that case Norway was accused of violating EEA law. As a defence, Norway invoked 'a principle of international tax law according to which the avoidance of economic double taxation is a matter for the home state of each taxpayer'.⁸⁸ The Court rejected that argument. It recalled first 'that the basis for its interpretation of Article 40 EEA is the effect of national measures on individuals and economic operators within the EEA'.⁸⁹ Further, it thought that 'permitting derogations

79. *Ásgeirsson* (n 30) para 4.

80. *Ibid* para 26.

81. *Ibid* para 28.

82. *Ibid* para 29.

83. *Ibid* para 32.

84. Convention concerning the Social Repercussions of New Methods of Cargo Handling in Docks, 25 June 1973, 976 UNTS 343.

85. *Holship* (n 55) para 36.

86. *Ibid* para 128.

87. *Ibid*.

88. Case E-01/04 *Fokus Bank ASA v The Norwegian State* [2013] para 31.

89. *Ibid*.

from the fundamental principle of free movement of capital laid down in Article 40 EEA on the grounds of safeguarding the cohesion of the international tax system would amount to giving bilateral tax agreements preference over EEA law.⁹⁰ It is understandable that the Court was sceptical about this, but as shown in section 3, its approach to the ECHR means that that convention will in some sense, at least in practice, have preference over EEA law. Finally, the Court added that '[a] Contracting Party cannot make the rights conferred by Article 40 EEA subject to the contents of a bilateral agreement concluded with another Contracting Party',⁹¹ which is the statement that it repeated in *Holship*.⁹²

4. Explaining the Court's practice

4.1 Introduction

The sections above show a striking contrast between the EFTA Court's treatment of the ECHR and other treaties. This section presents three possible explanations for the Court's practice, summed up in terms of homogeneity, institutional framework, and compatibility.

4.2 Homogeneity

The EFTA Court's openness towards the ECHR seems to be motivated by the need for homogeneity with the CJEU's practice and the EU system. The EU has had the Charter of Fundamental Rights of the European Union since 2000, the legal status of which was formalised and strengthened under the 2009 Lisbon Treaty. The EEA system has no similar instrument. Even before the adoption of the Charter of Fundamental Rights, the CJEU had found unwritten human rights to be part of EU law, and it used the ECHR and practice from the ECtHR when determining the scope of those rights. Writers variously suggest 1969,⁹³ 'the 1970s',⁹⁴ or 1974⁹⁵ as the starting point for that practice.

Homogeneity with the EU is a central aim of the EEA system. Homogeneity means that EEA rules and corresponding EU rules should have the same content.⁹⁶ This is emphasised in the EEA Agreement's Preamble, which mentions 'the objective of establishing a dynamic and homogeneous European Economic Area'. The EFTA Court has mentioned it as a 'fundamental [principle] of EEA law'.⁹⁷ In line with this, the EFTA Court generally follows the CJEU's case law.⁹⁸ The CJEU is also aware of the need for homogeneity, stating in *Ospelt* that it must 'ensure' that EU and EEA rules 'are interpreted uniformly', since the extension of the EU single market to the EFTA States is 'one of the principal aims of the EEA Agreement'.⁹⁹

The EFTA Court follows the CJEU's lead in all areas of law. An example is treaty interpretation, where both the EFTA Court and the CJEU never mention Articles 31–33 of the

90. *Ibid.*

91. *Ibid.*

92. *Holship* (n 55) para 128.

93. Frank Emmert and Chandler Carney, 'The European Union Charter of Fundamental Rights vs. The Council of Europe Convention on Human Rights and Fundamental Freedoms – A Comparison' (2017) 40 *Fordham International Law Journal* 1047, 1101.

94. Steven Greer, Janneke Gerards, and Rose Slowe, *Human Rights in the Council of Europe and the European Union: Achievements, Trends and Challenges* (Cambridge University Press 2018) 298.

95. *Kälín* (n 11) 344.

96. Halvard Haukeland Fredriksen, 'Bridging the widening gap between the EU treaties and the Agreement on the European Economic Area' (2012) 18 *European Law Journal* 868, 881; Baudenbacher (n 2) 145.

97. *E-12/10 ESA v Iceland* (n 26) para 68.

98. Dora Sif Tynes, 'Article 108 [The ESA and the Court: Establishment and competences]' in Finn Arnesen and others (eds), *Agreement on the European Economic Area: A Commentary* (Hart Publishing 2018) 840, 847.

99. Case C-452/01, *Ospelt and Schlössle Weissenberg* (ECLI:EU:C:2003:493) para 29.

Vienna Convention on the Law of Treaties (VCLT)¹⁰⁰ or its customary international law equivalent when interpreting EU and EEA law.¹⁰¹ The CJEU assumed in Opinion 1/91 that the EEA Agreement would be interpreted in accordance with the VCLT,¹⁰² but neither court has followed this in its practice. This is so even though it is difficult to see how the two courts' interpretive approaches are incompatible with the VCLT.¹⁰³

Article 6 EEA Agreement states that EEA rules that are identical to EU rules 'shall [...] be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of this Agreement'. This is '[w]ithout prejudice to future developments of case law'. Article 3(2) SCA requires the ESA and the EFTA Court to 'pay due account to the principles laid down by the relevant rulings by the Court of Justice of the European Communities given after the date of signature of the EEA Agreement', concerning rules that are identical.¹⁰⁴ These provisions 'essentially require EEA rules to be interpreted in conformity with the ECJ case law'.¹⁰⁵ Both of these provisions concern rules that are identical in the EU and the EEA. The Charter of Fundamental Rights has no equivalent in EEA law, and the CJEU's case law on unwritten fundamental rights is not based on any written instrument that has any equivalent in the EEA. Even so, the two institutions apply many of the same underlying rules, and it would be contrary to the aim of homogeneity if the rules were applied differently because one was subject to fundamental rights and the other was not. Therefore, some writers suggest that a teleological interpretation of Article 6 EEA Agreement is a basis for the EFTA Court to draw on the CJEU's case law on fundamental rights.¹⁰⁶ This is a plausible argument.¹⁰⁷ One commentator argues that the EFTA Court's practice on homogeneity has gone beyond the wording of Article 6 EEA Agreement and Article 3(2) SCA and become 'homogeneity sans frontières'.¹⁰⁸ Yet its practice regarding fundamental rights seems necessary in order to preserve true homogeneity between the two systems.

In line with this, the EFTA Court specifically mentioned the Charter of Fundamental Rights in several of the cases discussed in the sections above. In *Arnulf Clauder*, where the

100. Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331.

101. See eg Fredriksen and Mathisen (n 21) 291–292; Pieter Jan Kuijper, 'The European Courts and the Law of Treaties: The Continuing Story' in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press 2011) 256, 260.

102. Opinion 1/91 [1991] para 14.

103. Fredriksen (n 95) 883; Halvard Haukeland Fredriksen, 'EEA law in and beyond the text of the Main Part of the EEA Agreement' in Finn Arnesen and others (eds), *Agreement on the European Economic Area: A Commentary* (Hart Publishing 2018) 124, 135; Fredriksen and Mathisen (n 21) 292.

104. Skouris notes that while these make an apparent distinction between pre- and post-1994 case law, this is not observed by the EFTA Court: Vassilios Skouris, 'The Role of the Court of Justice of the European Union in the Development of the EEA Single Market: Advancement through Collaboration between the EFTA Court and the CJEU' in The EFTA Court (ed) *The EEA and the EFTA Court: Decentred Integration* (Hart Publishing 2015) 3, 5.

105. Pål Wennerås, 'Article 6: Homogeneity' in Finn Arnesen and others (eds), *Agreement on the European Economic Area: A Commentary* (Hart Publishing 2018) 209, 210; similarly Pål Wennerås, 'Article 3: Relevance of ECJ case law' in Finn Arnesen and others (eds), *Agreement on the European Economic Area: A Commentary* (Hart Publishing 2018) 980, 981.

106. Kälén (n 11) 348; David Thor Björgvinsson, 'Fundamental Rights in EEA Law' in EFTA Court (ed), *The EEA and the EFTA Court: Decentred Integration* (Hart Publishing 2015) 263, 279; Nils Wahl, 'Uncharted Waters: Reflections on the Legal Significance of the Charter under EEA Law and Judicial Cross-Fertilisation in the Field of Fundamental Rights' in EFTA Court (ed), *The EEA and the EFTA Court: Decentred Integration* (Hart Publishing 2015) 281, 284.

107. Kälén further argues that this is also supported by the Joint Declaration on the Relation between the EEA Agreement and Existing Agreements adopted by the parties at the conclusion of the EEA Agreement, where they declared that '[t]he EEA Agreement shall not affect rights assured through existing agreements [...] until at least equivalent rights have been achieved under the Agreement': Kälén (n 11) 348.

108. Wennerås 'Article 6: Homogeneity' (n 105) 210.

Court discussed Article 8 ECHR, it mentioned that ‘in the European Union the same right is protected by Article 7 of the Charter of Fundamental Rights’.¹⁰⁹ In *Posten Norge*, it applied Article 6 ECHR and noted that ‘the principle of effective judicial protection is now also given by Article 47 of the Charter of Fundamental Rights of the European Union’.¹¹⁰ The existence of the Charter of Fundamental Rights and the CJEU’s practice regarding the ECHR makes it safer for the EFTA Court to internalise ECHR rules than to internalise other international rules that the CJEU has not already applied. The EFTA Court could face a difficult choice if the CJEU’s Charter-based practice diverges from that of the ECtHR, but that has not yet been an issue.¹¹¹ The Court included a more general statement in *Yankuba Jabbi*, where it explained that ‘[t]he consideration of homogeneity [...] carries substantial weight’,¹¹² while expressing apparent concern with a widening ‘gap’ between EU and EEA law.¹¹³

The contrary approach that the Court has taken to other international agreements also seems to be motivated by a desire to maintain homogeneity with the CJEU. In *Fokus Bank* the EFTA Court cited the judgment of the CJEU in *Commission v France*.¹¹⁴ The latter case concerned the French government’s application of its tax legislation, which the European Commission argued was contrary to Article 169 EEC Treaty because it discriminated between domestic and foreign companies.¹¹⁵ The French government argued, among other things, that its practice was a result of ‘double-taxation agreements’.¹¹⁶ The CJEU responded to this first by noting that the agreements in question were not relevant to the case. It added, as a more general point, that ‘a Member State cannot make respect for’ Article 52 EEC Treaty ‘subject to the contents of an agreement concluded with another Member State’.¹¹⁷ The EFTA Court’s statements in *Fokus Bank* and *Holship* mirror this.

In *ACT Group Litigation* and *Denkavit* the CJEU diverged from the EFTA Court’s decision in *Fokus Bank* regarding the relevance of bilateral tax agreements under the free movement of capital.¹¹⁸ This may be classified as a failure on the part of the EFTA Court to predict future CJEU case law rather than a failure in maintaining homogeneity with EU law,¹¹⁹ and does not detract from the argument presented in this article.

The EU is party to various treaties, and under Article 216(2) of the Treaty on the Functioning of the European Union (TFEU) these are ‘binding upon the institutions of the Union and on its Member States’. The CJEU has stated that they ‘form an integral part’ of EU law.¹²⁰ The CJEU has developed criteria for determining whether international agreements to which the EU is a party should have ‘direct effect’ in EU law,¹²¹ ie whether ‘indi-

109. *Clauder* (n 16) para 49.

110. *Posten Norge* (n 70) para 86.

111. Fredriksen (n 103) 133.

112. *Yankuba Jabbi* (n 20) para 60.

113. *Ibid* para 62.

114. *Fokus Bank* (n 88) para 31 and 37.

115. Case 270/83, *Commission v France* (ECLI:EU:C:1986:37).

116. *Ibid* para 26.

117. *Ibid*.

118. Case C-374/04, *Test Claimants in Class IV of the ACT Group Litigation v Commissioners of Inland Revenue* (ECLI:EU:C:2006:773); Case C-170/05, *Denkavit Internationaal BV, Denkavit France SARL v Ministre de l’Économie, des Finances et de l’Industrie* (ECLI:EU:C:2006:783); Halvard Haukeland Fredriksen, ‘The EFTA Court 15 Years On’ (2010) 59 *International & Comparative Law Quarterly* 731, 746.

119. Fredriksen (n 118) 746.

120. Eg Case 181/73, *R & V Haegeman v Belgian State* (ECLI:EU:C:1974:41) para 5.

121. Eg Allan Rosas, ‘The European Court of Justice and Public International Law’ (23 March 2018) <rm.coe.int/statement-delivered-by-judge-allan-rosas-at-the-55th-cahdi-meeting-55t/16807b3b04> 4–5; Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (6th ed, Oxford University Press 2015) 361–369.

viduals may be able to rely on' them.¹²² Agreements to which only EU member States are parties, and not the EU as such, do not have direct effect in EU law and will not be applied by the CJEU,¹²³ as stated, for example, in the aforementioned case of *Commission v France*. However, Article 351(1) TFEU state that if treaties were concluded before 1 January 1958 or before the State(s) in question joined the EU, the treaties 'shall not be affected by' EU treaties. More generally, Article 3(5) of the Treaty on European Union (TEU) obliges the EU to 'contribute [...] to the strict observance and the development of international law'. The CJEU has stated that 'the European Community must respect international law in the exercise of its powers',¹²⁴ and has been willing to apply customary international law in various cases.¹²⁵

The EFTA Court is in a less complicated position regarding international law. The EFTA as an international organisation is not party to any international agreements. There is, moreover, no equivalent in EEA law of Article 351 TFEU. The EFTA Court is therefore simply following the CJEU's approach when not applying non-EEA treaties.

4.3 Institutional framework

Homogeneity thus seems to be an important factor that the EFTA Court considers when it is faced with an argument based on international law that is external to the EEA system. Another possible factor is the institutional framework surrounding different legal instruments.

The ECHR is part of the internal law of the EEA member States, and is applied by their domestic courts alongside EEA law. It would be artificial for the EFTA Court to apply EEA law in a vacuum, especially in cases of referrals from domestic courts. Instead of leaving EEA law to be harmonised with the ECHR by domestic courts, the EFTA Court has been proactive. *Holship* represents an exception from this trend. As noted above, the EFTA Court in that case only noted that the ECHR applied to the case, but left its concrete application to 'the referring court'. Other international law is generally less integrated in domestic law and less familiar to domestic courts than is the ECHR. It may therefore seem less necessary for the EFTA Court to engage with it.

The ECHR also has a relatively powerful institutional protector in the ECtHR. If the EFTA Court ignores the ECHR, it risks coming into conflict with another international court. Conversely, collegiate cooperation and dialogue between the judges of the ECtHR and the EFTA Court may make it seem natural to take a receptive attitude to each other's legal instruments. The international law rules that the EFTA Court has chosen not to internalise, have no such institutional protectors. An ECtHR judge from Iceland (an EFTA and EEA member State) has argued that the 'human rights protection afforded by the EFTA Court, the Court of Justice and the Strasbourg Court should not differ, but should remain uniform in scope and substance'.¹²⁶ There is no one with a similarly strong institutional mandate to advocate

122. Simon Marsden, 'Invoking Direct Application and Effect of International Treaties by the European Court of Justice: Implications for International Environmental Law in the European Union' (2011) 60 *International & Comparative Law Quarterly* 737, 739.

123. Jan Willem van Rossem, 'Interaction between EU Law and International Law In the Light of *Intertanko* and *Kadi*: The Dilemma of Norms Binding the Member States But Not the Community' (2009) 40 *Netherlands Yearbook of International Law* 183, 199.

124. Case C-286/90, *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp.* (ECLI:EU:C:1992:453) para 9.

125. Craig and Búrca (n 121) 358.

126. Spano (n 12) 492.

for harmony between the EEA Agreement and, say, the Dock Work Convention or international tax law.

4.4 Compatibility

Finally, compatibility could be a factor in the EFTA Court's reasoning. When the Court has internalised the ECHR, it has phrased this as being a matter of 'fundamental rights' that are already part of the EEA system. When it has rejected applying other treaties, it has phrased that as a matter of giving that law 'preference over EEA law'. The EFTA Court may see the ECHR as fundamentally compatible with EEA law, while other international law may not be. However, the EFTA Court has frequently used the ECHR in a way that, *in practice*, gives it preference over EEA law. On several occasions it has assumed that EEA rules may only be applied within limits set by the ECHR. It has also, indirectly, tested whether the ECHR, as reflected in fundamental rights, has been respected. In *Posten Norge*, the Court found that it had not, and reduced the ESA's fine as a result.

Compatibility with the EEA system does not provide a clear basis for distinguishing the ECHR and other international law. The EFTA Court could have rejected application of the ECHR because it would have been given 'preference over EEA law'. Conversely, it could have construed and applied unwritten EEA rules equivalent to the Dock Work Convention and international tax law, as it has done with the ECHR. Homogeneity and institutional frameworks are better explanations for the different approaches.

5. Future challenges

5.1 Introduction

This section considers how the EFTA Court may react to arguments concerning international law in future cases. It does so on the basis of the explanations presented in the previous section.

The CJEU's judgment in *Kadi* is a significant example of a case where EU law conflicted with another international legal instrument.¹²⁷ The CJEU had to consider the relationship between a UN Security Council resolution imposing sanctions against individuals and fundamental rights under EU law. The resolution was binding under the UN Charter, which was concluded before 1958, and is thus covered by Article 351 TFEU, as mentioned in section 4.2 above. The CJEU nonetheless gave priority to fundamental rights, due to their 'constitutional' status in EU law.¹²⁸ A similar conflict is highly unlikely to come before the EFTA Court since the imposition of sanctions is not part of EEA law.

Instead, this section discusses potential conflicts between EEA law and the law of the WTO (section 5.2) and the consequences of the United Kingdom leaving the EU (section 5.3).

5.2 WTO law

The WTO was established by the WTO Agreement. The Agreement has various annexes that regulate different aspects of trade, the most important of which is the General Agreement on Tariffs and Trade (GATT) 1994. Another significant annex is the General Agreement on Trade in Services (GATS). The subject matter of WTO law overlaps to a large extent with EU and EEA law, since both govern international trade. This raises the possibility of conflicts.

127. Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v Council and Commission* (ECLI:EU:C:2008:461).

128. *Ibid* para 285.

WTO law has not been invoked before the EFTA Court, but it has been dealt with by the CJEU.

The latter court has not been receptive to claims based on WTO law. One scholar concludes that the CJEU ‘has continually denied review of the legality of EU law on the basis of WTO law’, even where ‘the EU’s behavior has been explicitly declared inconsistent with WTO obligations’ by the WTO’s own Dispute Settlement Body (DSB).¹²⁹

A clear example is the CJEU’s judgment in the *FIAMM* case.¹³⁰ The case concerned an EU regulation of banana imports, which the DSB had found to be contrary to WTO law in *EC – Bananas*.¹³¹ The DSB allowed the US to impose trade restrictions against the EU. The *FIAMM* case was brought by EU exporting firms that were affected by the US trade restrictions. The CJEU ruled out any possibility of awarding damages under EU law for violations of WTO law.¹³²

If WTO rules were invoked before the EFTA Court, it would presumably follow the CJEU’s lead and refuse to engage with them. This expectation is perhaps also why no such claim has yet been brought before the EFTA Court.

5.3 Brexit

In 2016 the United Kingdom (UK) voted to leave the EU, and after much uncertainty ‘Brexit’ eventually took place on 31 January 2020. The UK activated Article 50 TEU, which allows an EU Member State ‘to withdraw from the Union’. The details of the withdrawal were fixed in a negotiated Withdrawal Agreement between the UK, the EU, and the European Atomic Energy Community.¹³³ Article 126 of the Withdrawal Agreement set out a transition period until the end of 2020 where the UK remained part of the single market. On 30 December 2020 the parties signed the EU–UK Trade and Cooperation Agreement, which will govern their future relationship.¹³⁴

The UK became a party to the EEA Agreement on 1 January 1994, 21 years after it joined the EU. Article 127 EEA Agreement has a withdrawal clause similar to Article 50 TEU, which allows a State party to ‘withdraw from this Agreement provided it gives at least twelve months’ notice’. The UK has not given such notice. It has concluded a Separation Agreement with Norway, Iceland and Liechtenstein which largely mirrors the Withdrawal Agreement with the EU.¹³⁵ The position of the UK, the EFTA, and the President of the European Commission is that the UK ceased to be a party to the EEA Agreement when it left the EU.¹³⁶ This

129. John Errico, ‘The WTO in the EU: Unwinding the Knot’ (2011) 44 *Cornell International Law Journal* 179, 181.

130. Cases C-120/06 P and C-121/06 P, *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM), Fabbrica italiana accumulatori motocarri Montecchio Technologies Inc (FIAMM Technologies), Giorgio Fedon & Figli SpA, Fedon America, Inc. v Council of the European Union, Commission of the European Communities, Kingdom of Spain* (ECLI:EU:C:2008:476).

131. Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (1997).

132. *FIAMM* (n 130) paras 104 and 176.

133. Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2019] OJ C 144 I/1.

134. Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part [2020] OJ L 444/14.

135. Agreement on arrangements between Iceland, the Principality of Liechtenstein, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland following the withdrawal of the United Kingdom from the European Union, the EEA Agreement and other agreements applicable between the United Kingdom and the EEA EFTA States by virtue of the United Kingdom’s membership of the European Union, 28 January 2020.

136. EFTA, ‘Frequently asked questions on EFTA, the EEA, EFTA membership and Brexit’ (undated) <efta.int/About-EFTA/Frequently-asked-questions-EFTA-EEA-EFTA-membership-and-Brexit-328676>; House of Commons Library, ‘The European Economic Area’ (2018) *Briefing Paper* Number 8129, 27–29.

conclusion is based on Article 126 EEA Agreement, which states that ‘[t]he Agreement shall apply to the territories to which the Treaty establishing the European Economic Community is applied and under the conditions laid down in that Treaty’.¹³⁷

An alternative view, taken by some scholars, is that an Article 127 declaration would be necessary in order for the UK to leave the EEA Agreement.¹³⁸ An application based on this argument was dismissed by the English High Court in 2017.¹³⁹ Yet another view is that general international law would be a basis for the UK leaving the EEA Agreement when leaving the EU. Article 62 VCLT allows for the termination of or withdrawal from a treaty in the event of ‘a fundamental change of circumstances’. The departure of the UK from the EU could perhaps constitute a fundamental change of circumstances in respect of the EEA Agreement.¹⁴⁰ The VCLT is not directly applicable because France, Romania and Norway are parties to the EEA Agreement but not the VCLT. However, Article 62 reflects customary international law.¹⁴¹

The question of whether the United Kingdom has successfully left the EEA Agreement despite not giving an Article 127 notification could come before the EFTA Court. The CJEU has applied the customary equivalent of Article 62 VCLT,¹⁴² which means that the EFTA Court should be willing to do so as well. However, the EFTA Court would probably follow the EFTA, EU, and UK’s official positions, and find that the UK left the EEA Agreement due to Article 126. If so there will be no need for the Court to invoke the VCLT or other general international law.

6. Conclusion

This article has examined the EFTA Court’s use of non-EEA international law. There is a clear contrast between how the EFTA Court uses the ECHR on the one hand and other international agreements on the other hand, being highly receptive of the former while not engaging with the latter. The contrast is best explained by the overall goal of homogeneity between the EEA and EU systems, since the EFTA Court’s decisions follow similar decisions of the CJEU. Drawing on the ECHR may also seem natural since it is well integrated in national legal systems, and it has a powerful institutional protector in the ECtHR. In the future, the EFTA Court will probably be unwilling to entertain arguments based on WTO

137. Hillion supports this interpretation: Christophe Hillion, ‘Brexit means Br(EEA)xit: The UK withdrawal from the EU and its implications for the EEA’ (2018) 55 *Common Market Law Review* 135, 139.

138. See eg Michael-James Clifton, ‘The UK’s Creative Ambiguity towards the EEA: Immediate and Future Relationship Problems’ (20 February 2019) <ukconstitutionalaw.org/2019/02/20/michael-james-clifton-the-uks-creative-ambiguity-towards-the-eea-immediate-and-future-relationship-problems>; Gavin Barrett, ‘How Article 127 of the EEA Agreement Could Keep the UK In the Single Market’ (4 January 2017) <blogs.lse.ac.uk/europpblog/2017/01/04/how-article-127-eea-agreement-could-keep-the-uk-in-the-single-market>; Ulrich G Schroeter and Heinrich Nemeček, ‘The (Uncertain) Impact of Brexit on the United Kingdom’s Membership in the European Economic Area’ (2016) 27 *European Business Law Review* 921, 958.

139. Owen Bowcott, ‘Fresh Brexit Legal challenge blocked by high court’ (3 February 2017) <theguardian.com/politics/2017/feb/03/fresh-brexit-legal-challenge-blocked-high-court-article-127>.

140. Barrett (n 139); Panos Koutrakos, ‘Brexit, European Economic Area (EEA) membership, and Article 127 EEA’ (2 December 2016) <monckton.com/brexit-european-economic-area-eea-membership-article-127-eea>. Kaspiarovich and Levrat consider it but are doubtful, as are Schroeter and Nemeček: Yuliya Kaspiarovich and Nicolas Levrat, ‘The UK and EU Mixed Agreements after Brexit: The Case of the EEA’ (24 October 2018) <europeanfutures.ed.ac.uk/the-uk-and-eu-mixed-agreements-after-brexit-the-case-of-the-eea>; Schroeter and Nemeček (n 139) 941.

141. *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ Reports 1997, 7, 38.

142. Case C-162/96, *A Racke GmbH & Co v Hauptzollamt Mainz* (ECLI:EU:C:1998:293) para 46.

law, just like the CJEU. If a claim about the UK's exit from the EU comes before the EFTA Court, it will probably decide the case without having to refer to general international law.

The importance that the EFTA Court apparently gives homogeneity in its application of international law is part of the broader pattern in the Court's practice of seeking to make decisions that have some basis in the existing practice of the CJEU.¹⁴³ The Court's desire to maintain homogeneity is understandable, but at least one writer questions whether the Court may have put too much emphasis on it.¹⁴⁴ For the time being, at least, the Court seems unlikely to change course.

143. See also eg Halvard Haukeland Fredriksen, 'Er EFTA-domstolen mer katolsk enn paven? Noen betraktninger om EFTA-domstolens dynamiske utvikling av EØS-retten og streben etter dialog med EF-domstolen' (2009) 122 *Tidsskrift for Rettsvitenskap* 507, 547; Arnesen and Fredriksen (n 54) 157–158.

144. Fredriksen (n 145) especially 544 and 571.