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Inside and Outside the EFTA Court: Evaluating the Effectiveness of the EFTA Court Through its Structures

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The article attempts to examine the structures of the EFTA Court in order to gain insights into its effectiveness. For this purpose the article relies on a rational system approach developed within social sciences to improve understanding the performance of public organisations and calibrated to examine international courts by the ERC Project Researching Conditions for Effective International Adjudication. Under the conceptual and analytical framework advanced by the Effectiveness Project the article, therefore, examines the main structures of the EFTA Court: for example, the Court's budget, jurisdictional rules, judicial independence and main legal doctrines. The article will also, in relation to some aspects, attempt to conduct a qualitative assessment of how some of these features relate to the effectiveness of the Court.

Keywords: international courts, EFTA Court, EEA Agreement, effectiveness, structures

1. Introduction

1.1 The EEA Agreement and the EFTA Court

The European Free Trade Area (EFTA) Court has the judicial role of interpreting the Agreement on the European Economic Area (the EEA Agreement)[1] with respect to those EFTA states party to the EEA Agreement, namely Iceland, Norway and Liechtenstein.[2] The EEA Agreement came into force in 1994; its aim is to liberalise trade between the EFTA states and the European Union (EU)[3] by integrating the EFTA states into the EU's internal market.[4] This goal entails the

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[1] Agreement on the European Economic Area (entered into force 1 January 1994) 1801 UNTS 3.

[2] The Court of Justice of the European Union (CJEU) fulfils the same role with regard to the pillar of the EEA Agreement as it forms an integral part of the EU's legal order as an international agreement concluded under art 218 (formerly art 300); cf art 216(2) of Consolidated Version of the Treaty on the Functioning of the European Union [2010] OJ C83/144 (TFEU). See Thordis Ingadottir, 'The EEA Agreement and Homogeneous Jurisprudence: The Two Pillar Role Given to the EFTA Court and the Court of Justice of the European Communities' [2002] *The Global Community: Yearbook of International Law and Jurisprudence* 193.

[3] For the sake of convenience this article uses EU as the generic title for the integration process from the 1957 Treaty of Rome (Treaty Establishing the European Economic Community, 25 March 1957, 298 UNTS 3) to the current status. More specifically, differentiation should be made between the European Economic Community (EEC), the European Community (EC), and the European Union (EU). Moreover, the term 'EFTA states' will refer to the EFTA states that are party to the EEA Agreement despite the fact that the fourth EFTA state, Switzerland, is not a party to the Agreement.

[4] The EEA Agreement was part of a trend encouraging regional free trade agreements that developed after the end of the Cold War. It was motivated by an ideological belief in the benefits of liberalisation and the abolition of

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extension of the internal market's legal framework to the EFTA countries – that is, the rules implementing the four freedoms (the free movement of goods, persons, services and capital), competition rules, public procurement, state aid and the so-called 'horizontal issues' (such as gender equality, environmental protection and consumer protection).[5] The EEA Agreement also contains provisions on further cooperation in other areas such as research, education and social policy and on contributions by EFTA states to the EU development fund.[6]

Pursuant to their obligations under the EEA Agreement, the EFTA states concluded a special Agreement between themselves on the Establishment of a Surveillance Authority and a Court of Justice (the SCA Agreement).[7] The EFTA Court is structurally modelled on the Court of Justice of the European Union (CJEU); it applies for the most part analogous substantive norms and its jurisdictional powers are in most respects modelled on its big sister court.[8] Additionally, the EEA Agreement is built around the principle of homogeneity, which aims to mirror the interpretation and application of EEA law within EU law (discussed below). Hence the main characteristic of the EFTA Court's case law is that it is built on CJEU case law.[9]

The EFTA Court is a small international court on any scale; it has only three member states, all of which are relatively small.[10] The Court has a total annual budget of approximately €4 million and only 15 employees. By the end of 2010 it had heard a total of 120 cases: an average of about seven cases per year.[11] Nevertheless, the EFTA Court provides an interesting view of the

barriers to cross-border trade (referred to by some as neo-liberalism). The early 1990s saw the birth, or restoration, of a number of regional entities, including NAFTA and MERCOSUR, to name just two. For an overview of these agreements and a discussion of the possible economic effects see Isidro Soloaga and L Alan Winters, 'Regionalism in the Nineties: What Effect on Trade?' (1995) 12 *The North American Journal of Economics and Finance* 1.

[5] See generally on the scope and structure of the EEA Agreement: Sven Norberg, 'The Agreement on a European Economic Area' (1992) 29 *Common Market Law Review* 1171; Sven Norberg and others, *The European Economic Area, EEA Law: A Commentary on the EEA Agreement* (Fritzes 1993) 73–89; Thérèse Blanchet, Risto Piipponen and Maria Westman-Clément, *The Agreement on the European Economic Area (EEA): A Guide to the Free Movement of Goods and Competition Rules* (Clarendon Press and Oxford University Press 1994) 5–18 and 41–49; Davíð Þór Björgvinsson, *EES-réttur og landsréttur* (Codex 2006) 31–51.

[6] This sharply distinguishes the EEA from other EU preferential trade agreements where funds are generally allocated from the EU but not to it: see L Alan Winters, 'EU's Preferential Trade Agreement: Objectives and Outcomes' in Pitou van Dijck and Gerrit Faber (eds), *The External Economic Dimension of the European Union* (Kluwer 2000) 195, 213.

[7] Agreement between the EFTA states on the Establishment of a Surveillance Authority and a Court of Justice (entered into force 1 January 1994) [1994] OJ L344/1.

[8] See, eg, Carl Baudenbacher, 'The EFTA Court, the ECJ, and the Latter's Advocates General – A Tale of Judicial Dialogue', in Anthony Arnull, Piet Eeckhout and Takis Tridimas (eds), *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs* (Oxford University Press 2008) 90; Leif Sevon, 'The EEA Judicial System and the Supreme Courts of the EFTA States' (1992) 3 *European Journal of International Law* 329, 332.

[9] Carl Baudenbacher, *EFTA Court: Legal Framework and Caselaw* (3rd edn, The EFTA Court 2008) 16.

[10] 'Small' states may be an overstatement as two of the member states, Iceland and Liechtenstein, can be qualified as microstates (population about 320,000 and 40,000 respectively): The World Bank, 'Population, Total' (2011), http://data.worldbank.org/indicator/SP.POP.TOTL.

[11] Thorbjörn Björnsson, 'Report 2/12 on the Effectiveness of the EFTA Court: Usage Rate' (2012), 23, http://www.effective-intl-adjudication.org/admin/Reports/4f46f789be89ecee489aed37ae262f50EFTA-second%20report-toby-final.pdf.

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limits and prospects of international courts as it is not plagued by many of the problems that often afflict such courts, such as insufficient funding and a large backlog of cases.

1.2 GOAL-BASED APPROACH TO EFFECTIVENESS AND THE RELEVANCE OF *STRUCTURES* AND INPUTS

This article is a product of research conducted within the framework of the ERC Project Researching Conditions for Effective International Adjudication (the Effectiveness Project). The Effectiveness Project centres on the rational system approach, which perceives public organisations as 'instruments for the attainment of goals'.[12] Hence, the underlying hypothesis of the Effectiveness Project is that, like other public institutions, international courts are established in order to accomplish certain goals,[13] and that the basis for assessing the effectiveness of those courts should be whether they meet these goals.[14]

The goals of international courts can be of a generic and specific nature. Previous work of the Effectiveness Project has identified the following four generic goals, common to most international courts: (i) promoting compliance with the governing international norms; (ii) resolving international disputes and specific problems; (iii) contributing to the operation of related institutional and normative regimes (regime support); and (iv) legitimising associated international norms and institutions (regime legitimisation).[15] Conversely, the homogeneity objective of the EFTA Court – harmonising EEA law with EU law – is a good example of a goal which is specific to a particular international court.[16]

In order to assess the work of international courts and tribunals the Effectiveness Project, again relying on the rational system approach, differentiates between three distinct aspects of their operations, or operation categories, and seeks to identify those indicators which allow

[12] W Richard Scott, *Organizations: Rational, Natural, and Open Systems* (5th edn, Upper Saddle River and Prentice Hall 2003) 351.

[13] See, for instance, Opinion 1/91 of the CJEU on the goal-related aspect of international adjudication, in which the CJEU rejected the original EEA Agreement set-up of having an EEA Court which would comprise judges from both the EU and the EFTA countries. Its rejection was based on the argument that, although the articles of the underlying agreements founding the two organisations (EEA Agreement and EEC Treaty) were identical in wording, the different goals that they were set up to pursue could lead to different rulings; hence, rulings which would possibly be binding for the CJEU under its own case law might be incompatible with the Treaty: [1991] ECR I-6079 paras 19–21. Also, 'it should be apparent that the "problem solving" "dispute settlement" function is only one aspect of the work of modern international courts. When states create and subject themselves to the jurisdiction of international courts they seek more than just a clarification about the law or facts in dispute so that they can resolve disagreements. They ask international courts to review administrative decision making, to ensure international institutions do not exceed their powers, to enforce international agreements of all kinds so that states can capture the benefits they bargained for so hard have included in them, and even to develop international law': Cesare PR Romano, 'The United States and International Courts: Getting the Cost–Benefit Analysis Right' in Cesare PR Romano (ed), *The Sword and the Scales: The United States and International Courts and Tribunals* (Cambridge University Press 2009) 419, 428.

[14] Yuval Shany, 'Assessing the Effectiveness of International Courts: A Goal-Based Approach' (2012) 106 *American Journal of International Law* 225.

[15] ibid 244–47.

[16] ibid 247.

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measurement of their performance within each of the different operational categories.[17] The three different types of indicator are:

- *Structure* indicators, which are based on the tangible and intangible assets which are available to the organisation and which actually enable it to meet its objectives.[18]
- *Process* indicators, which attempt to establish the quantity and quality of an organisation's outputs by assessing the process leading thereto. Accordingly, process indicators focus on the quality of activities carried on by the organisation rather than their effect.[19]
- *Outcome* indicators, which are meant to assess the court's effectiveness under the rational system approach by reference to its outcomes.[20] Outcomes are therefore the court's actual impacts on its social environment, and are to be distinguished from outputs, which are the direct products of the court's operation (such as judgments)

Only the third type of indicator (outcomes) is directly related to evaluation of whether an organisation actually meets its goals (that is, whether it is effective). Still, it must be acknowledged that quantifying the public goods that international courts (like other public organisations) create is extremely difficult.[21] Further, in light of the degree to which international courts depend on their external environment for the influence they can exert, it may be especially difficult to establish causation between the *outcomes* they produce and real life developments.[22] A better understanding of *structure* and *process* can, for instance, help in assessing the feasibility of effective outcomes, because these two variables support diagnosis, by way of reverse engineering, of what led to ostensibly sub-optimal performance on the part of the evaluated organisation.[23] In short, measuring outcomes will tell us whether a particular court is effective, but we need to study *structure* and *process* to tell us why it is or is not effective.

In an effort to facilitate such an understanding, this article focuses on *structural* indicators of the EFTA Court. Such indicators may, for instance, help us to evaluate whether the Court has the capacity to meet its goals.[24] *Structural* indicators are also important for comparative research as they include two variables that render many international courts incomparable: substantive rules (such as trade rules, criminal law and human rights), and jurisdictional rules which govern, inter alia, issues of standing (whether the court is accessible only to states or to individuals, etc.). Note that even when these variables are similar – for instance, in the case of the CJEU and the EFTA Court, or the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) – other variables may render such courts very different in practice. Still, when courts can be compared, such comparisons, even if limited, may offer interesting insights into the respective institutions.

[17] ibid 238.
[18] ibid.
[19] Scott (n 12) 366.
[20] Scott defines outputs as indicators that 'focus on specific characteristics of materials or objects on which the organization has performed some operation': ibid 363.
[21] For reflections on the 'public good' creation function of the international judiciary see Romano (n 13) 433–36.
[22] Shany (n 14) 248–49.
[23] ibid 239.
[24] ibid 251.

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The current discussion will take a descriptive approach to *structure* by describing the Court's internal and external anatomy: that is, its main features, legal and material, as well as the regime within which it operates. It will also attempt to conduct a qualitative assessment of how some of these features relate to the EFTA Court's effectiveness. Such a broad approach may also assist readers attempting to familiarise themselves with the Court. However, it is not the objective to provide an exhaustive list of *structural* indicators that might be relevant for the operation of the EFTA Court. For clarification it should be noted that this article will not be able to offer a definitive conclusion as to whether the EFTA Court is effective or not, as such a conclusion would require a much more extensive analysis of the goals of the Court than is possible here, as well as a much more developed methodology to assess the quality of the structural factors of international courts in general. This article will nonetheless set out some views on the development of such a methodology.

This article is structured as follows. In the next section, the EEA Agreement and two EEA–EFTA institutions will be introduced briefly as their functions closely intertwine with the EFTA Court's operation (Section 2). The following section (3) will describe objective structural factors relating to the EFTA Court's infrastructure and operation – namely the Court's seat, its judges, its staff, its language regime and its budget. The focus will then shift to several relevant factors of a legal nature – namely, EEA law (the EEA Agreement), the Court's jurisdictional rules, enforcement mechanisms for obtaining compliance with judgments, independence, and the main legal doctrines developed by the Court through its case law (Section 4). The article will then look into factors that do not fit neatly within the previous two categories, such as geographic, demographic and sociological factors (Section 5). Finally, the article will summarise its findings, offer some observations on its subject, and discuss its relevance to future research (Section 6).

2. EEA INSTITUTIONS

2.1 THE EEA JOINT COMMITTEE

The EEA Joint Committee, which meets every month, is made up of ambassadors of the EFTA states and representatives from the EU Commission. Representatives of EU member states may also attend meetings of the Joint Committee, but they do not generally participate. The Committee is responsible for the day-to-day management and overall execution of the EEA Agreement. It provides a forum for the exchange of views and the making of decisions regarding the incorporation of EU legislation into the EEA Agreement.[25]

[25] See the EFTA website on the structure and functions of the EEA Joint Committee, 'EEA Institutions: EEA Joint Committee', http://www.efta.int/eea/eea-institutions/eea-joint-committee.aspx. The Rules of Procedure of the EEA Joint Committee are laid down in Decision of the EEA Joint Committee No 1/94 of 8 February 1994 adopting the rules of procedure of the EEA Joint Committee [1994] OJ L85/60, as amended by Decision of the EEA Joint Committee No 24/2005 of 8 February 2005 amending the rules of procedure of the EEA Joint Committee [2005] OJ L161/54.

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Decisions of the EEA Joint Committee are taken by consensus. This means that each EFTA state has a formal veto power over the incorporation of EU internal market legislation into the EEA Agreement.[26] The actual exercise of veto can still be seen as unrealistic, as vetoing incorporation could put the future of the Agreement at serious risk.[27] In addition, the Joint Committee is authorised to make approved derogations for the EFTA states with respect to legislation that is unsuitable for them for some reason; in practice, however, such derogations are rarely granted.[28]

The Joint Committee is not formally subject to the jurisdiction of the EFTA Court.[29] However, this did not stop the Court in the *CIBA* case from reviewing the EEA Joint Committee's authority to adopt a Joint Statement permitting certain derogations for Norway in respect of the relevant Community rules concerning the classification and labelling of dangerous substances.[30]

2.2 The EFTA Surveillance Authority (ESA)

The ESA represents the executive branch of the EEA Agreement for the EFTA states. Like the EFTA Court, it was founded through the SCA Agreement. The institution monitors compliance by the EFTA states with their obligations under the EEA Agreement and oversees their implementation of secondary legislation, thereby ensuring a level playing field for EU and EFTA states throughout the single market. The ESA is based in Brussels with a staff of about 60 officials.[31]

The ESA is led by a College consisting of three members, each appointed by each of the three participating EFTA states for a period of four years. Despite their appointment by the states, College members are mandated to undertake their functions independently and free from political

[26] EEA, art 102 sets a formal procedure for resolving serious problems when amending annexes to the Agreement (implementing EU law instruments). It states that a decision, which parties must make every effort to achieve, must be reached within six months from the date of referral; at the end of that period the respective annex is suspended (EEA, art 102(5)) unless both parties agree otherwise. The suspension does not affect the rights and obligations which individuals and economic operators have already acquired under the Agreement (EEA, art 102(6)). Art 103 sets up an analogous process in case individual EFTA states fail to incorporate legislation into their domestic legal orders. See Norberg and others (n 5) 142–47.

[27] cf 'The right to veto has never been exercised and [sic] in the EEA and can be compared to an atomic bomb; excellent in theory but hopeless in practice. A chain reaction would be initiated by it and the result would be extremely uncertain': Eirikur Bergmann, 'Deeply Inside the European Project', in Anamaria D Segesgten and others (eds), *Negotiating Europe: Foundations, Dynamics, Challenges* (Centre for European Studies, Lund University 2007), http://starfsmenn.bifrost.is/Files/Skra_0032584.pdf.

[28] See Government Offices of Iceland, 'Handbók stjórnarráðsins um EES' (The Manual of the Icelandic Governmental Offices on the EEA Agreement) 22–23, http://www.utanrikisraduneyti.is/media/Utgafa/HandbokEES.pdf (in Icelandic). The numbers and nature of derogations may still be underestimated in practice: see Björnsson (n 11).

[29] Ingadottir (n 2) fn 12.

[30] cf Case E-6/01 *CIBA and Others v The Norwegian State* [2002] EFTA Court Report 281, para 33 (rejecting arguments that the Articles giving the EEA Joint Committee jurisdiction in the EEA Agreement were exhaustive).

[31] The ESA website, 'About the Authority: The EFTA Surveillance Authority at a Glance', http://www.eftasurv.int/about-the-authority/the-authority-at-a-glance-/.

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intervention.[32] All decisions which formally bind the Authority are taken by the College, which usually meets once a week.[33]

The ESA may investigate possible infringements of EEA provisions, either on its own initiative or in response to complaints lodged by private parties.[34] If the Authority believes that an EFTA state has violated its obligations under EEA law, it may initiate proceedings against that state before the EFTA Court. Although EFTA states have not delegated as much power to the ESA as EU member states have delegated to the Commission, it is nonetheless clear that in certain areas the institution has supranational characteristics.[35] For example, ESA decisions (including those reached in cases involving fines exacted from private parties) may not be contested before the national jurisdictions of the EFTA states; furthermore, within certain fields of EEA law (such as state aid), the ESA has the exclusive power to bring cases against EFTA states involving infringement of their EEA obligations.[36]

As a counterpart to the Commission, the ESA has powers that correspond with those of the Commission; close contacts and ongoing cooperation similarly are maintained between the Commission and the ESA.[37] Still, a number of important differences remain. In particular, the Commission plays an important role in EU legislative processes and is therefore a political organ, whereas the ESA is limited to a surveillance function.

The EEA Agreement has set up a single market with a two-pillar enforcement and judicial system, with the CJEU and the Commission serving EU countries while the EFTA Court and the ESA serve EFTA countries.[38] However, in certain areas, the division of economic activity between the two communities may not be clear cut. For instance, the Commission and ESA

[32] SCA (n 7) art 8.

[33] A matter of concern is that whereas the Commission has its own dedicated officials, ESA relies on civil servants seconded from national ministries, and who may thus be reluctant to take action against their own governments. See Jim Brundsen, 'Are National Interests Weakening the EFTA Court?' *European Voice*, special issue on the European Free Trade Association, 19 August 2012, http://www.europeanvoice.com/folder/europeanfreetradeassociation/84.aspx?artid=62708. See also Carl Baudenbacher, *The EFTA Court in Action: Five Lectures* (German Law Publishers 2010) 13.

[34] Information about the nature of the complaints procedure, together with a standard form for submitting complaints, are available on the ESA website, 'Complaint: To the EFTA Surveillance Authority Concerning Failure to Comply with EEA Law', http://www.eftasurv.int/media/internal-market/Complaint_form.pdf. Private parties use this process both to lobby the ESA into taking cases against national governments in instances where judicial remedies may be available at the national level, as well as in instances (eg state aid) where the only path to challenging an alleged infringement is at the international level. Complaints may also be brought by EFTA or EU states and institutions.

[35] Icelandic Foreign Ministry, 'Handbók um EES-samninginn, 2. kafli: Tveggja stoða kerfi EES-samningsins' (Manual on the EEA Agreement, 2nd chapter: The Two Pillar system of the EEA Agreement) 31, http://www.utanrikisraduneyti.is/media/Skyrslur/2kafli.pdf (in Icelandic).

[36] Private parties may request the ESA to take up cases, and challenge the decision not to take a case before the EFTA Court, provided that they fulfil the criterion of locus standi: SCA (n 7) art 36(2).

[37] Ulf Sverdrup, 'Compliance and Styles of Conflict Management in Europe' (2003) Arena Working Paper 08/3 14–15, https://www.sv.uio.no/arena/english/research/publications/arena-publications/workingpapers/workingpapers2003/wp03_8.pdf.

[38] The CJEU noted in its Opinion 1/00 that 'the EEA Agreement is based on the twin pillar of the Communities on the one hand and the EFTA on the other': [2002] ECR I-3493 para 7.

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have mixed competencies in the area of competition law.[39] As a result of the overwhelming share of EU-based companies in the single market vis-à-vis companies based in the EFTA states, mixed competency cases will typically be handled by the Commission.

From a methodological perspective, it is difficult to isolate the Court's functions from those of the other institutions with which it interacts, especially the ESA. This is because the ESA sometimes has sole discretion as to whether to bring cases against member states for infringing the EEA Agreement.[40] Hence, the Court's effectiveness is linked to the actual effectiveness demonstrated by the ESA. This relationship mirrors the reciprocal empowerment of the CJEU and the Commission within the EU context.[41]

3. Material Factors

3.1 Seat of the Court

The EFTA Court began to function, in Geneva, on 4 January 1994. It moved to Luxembourg on 1 September 1996, after Switzerland declined to ratify the EEA Agreement.[42] The Court leases its Luxembourg facilities from the International Chamber of Commerce.

The Court, in its own capacity, has concluded a special agreement with the Grand Duchy of Luxembourg, delineating the privileges and immunities necessary for the exercise of its functions in Luxembourg (Headquarters Agreement between the EFTA Court and the Grand Duchy of Luxembourg).[43]

The EFTA Court is located within walking distance of its big sister court, the CJEU. This geographical proximity is considered to have facilitated the attainment of its homogeneity goal

[39] EEA, art 56 on competition within the single market (eg cartels (EEA, art 53) and abuse of dominant market position (EEA, art 54) restricts the competence of the ESA to cases where trade between EFTA states is affected and, in mixed cases, if the companies concerned achieve more than 33 per cent of their turnover in EFTA states even if trade between EC member states is unaffected. In terms of EEA, art 57 (mergers), the Commission has sole discretion over the cases falling under Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004] OJ L24/1. On EEA mergers see Commission Paper, 'Case Referrals under EEA' (EEA Referrals: 14/10/2004), http://ec.europa.eu/competition/mergers/legislation/eea_referral.pdf.

[40] In respect of the CJEU, see article by Francis Snyder in which the effectiveness of European law is approached, inter alia, on the basis of the interplay between the Commission and the CJEU: 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques' (1993) 56 *Modern Law Review* 19.

[41] 'The empowerment of the European Commission to initiate infringement proceedings (Article 226 EC) rendered the ECJ's function as an intergovernmental court much more effective than it would have been possible under purely inter-state infringement proceedings (Article 227 EC)': Ernst-Ulrich Petersmann, 'Judging Judges: From "Principal–Agent Theory" to "Constitutional Justice" in Multilevel "Judicial Governance" of Economic Cooperation among Citizens' (2008) 11 *Journal of International Economic Law* 827, 850.

[42] See, eg, Carl Baudenbacher, 'The EFTA Court – An Example of the Judicialisation of International Economic Law' (2003) 28 *European Law Review* 880, 881; Thorgeir Örlygsson, 'Hvernig hefur Ísland brugðist við ákvörðunum EFTA-dómstólsins?' (2004) 54 *Tímarit lögfræðinga* 375, 381.

[43] An extract of the Headquarters Agreement is available in *EFTA Court Texts: Relating to the Organization, Jurisdiction and Procedure of the Court* (The EFTA Court 2008) 143, http://www.eftacourt.int/images/uploads/EFTA_Court_Texts_E_2008.pdf.

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as it has allowed the development of professional and private contacts between the judges and staff of the two courts in addition to informal exchanges of information.[44]

3.2 JUDGES

The EFTA Court originally had five judges, from Austria, Finland, Iceland, Norway and Sweden. Following the accession of Austria, Finland and Sweden to the EU on 1 January 1995, the judges appointed by these countries resigned on 30 June 1995, in accordance with their term lengths as prescribed in the transitional agreements, and the number of judges was reduced accordingly.[45] Since Liechtenstein joined the EEA on 1 June 2005 and was appointed a judge to the EFTA Court on 6 September 1995, the number of judges has been limited to its current number of three.[46]

The judges are to be appointed by common accord, reached by the member states.[47] In practice, however, each member state has full discretion regarding the judge to be appointed on its behalf.[48] The member states also appoint two ad hoc judges who can be called when a judge is disqualified for a particular case or is unable to carry out the required functions for other reasons.[49] Judges are appointed for terms of six years and are eligible for reappointment.[50] Judges elect the President of the Court amongst themselves. At the time of writing, the President of the Court is Professor Carl Baudenbacher, a Swiss national appointed by Liechtenstein, serving his fourth term from 1 January 2012 to 31 December 2014.

It is obvious that when it comes to evaluating the quality of the resources of a particular court, the quality and quantity of the judges are imperative factors to consider.[51] It could be argued that

[44] Vassilios Skouris, 'The ECJ and the EFTA Court under the EEA Agreement: A Paradigm for International Cooperation between Judicial Institutions' in Carl Baudenbacher, Per Tresselt and Thorgeir Örlygsson (eds), *The EFTA Court: Ten Years On* (Hart 2005) 123, 128; Carl Baudenbacher, 'The Legal Nature of EEA Law in the Course of Time: A Drama in Six Acts, and More May Follow' in Davíð Þór Björgvinsson and others (eds), *Afmælisrit: Þór Vilhjálmsson sjötugur* (Orator 2000) 36, 48; Carl Baudenbacher, 'Facets of an EEA Constitutional Order' in Ninon Colneric and others (eds), *Une communauté de droit, Festschrift für Gil Carlos Rodriguez Iglesias* (Berliner Wissenschafts-Verlag 2003) 343, 359. There are two factors that can be added in respect of the geographical location of the EFTA Court: (1) It is probably helpful for the Court to operate in Luxembourg which is experienced in hosting international organisations, which makes it easier to access specialised staff and other material inputs needed for the operation of the Court (for example, the Court leases it facilities from another international organisation); (2) the location of the EFTA Court provides for a completely neutral forum as Luxembourg is not a member of EFTA.

[45] Carl Baudenbacher, 'The EFTA Court Ten Years On' in Baudenbacher, Tresselt and Örlygsson (n 44) 13; Baudenbacher, 'The Legal Nature of EEA Law in the Course of Time' (n 44) 39–40.

[46] Carl Baudenbacher, 'Between Homogeneity and Independence: The Legal Position of the EFTA Court in the European Economic Area' (1996–97) 3 *Columbia Journal of European Law* 169, 175.

[47] SCA (n 7) art 30.

[48] Ingadottir (n 2) 195; Baudenbacher (n 42) 886.

[49] See list of current ad hoc judges on the EFTA Court website, 'The Court: Jurisdiction – Organization', http://www.eftacourt.int/index.php/court/mission/introduction/.

[50] The tenure of EFTA Court judges is the same as that of CJEU judges. The European Court of Human Rights (ECtHR) also had six-year terms, but after the adoption of Protocol No 14 to the European Convention of Human Rights there is now a non-renewable nine-year term.

[51] 'The effectiveness of international courts depends, for a start, on the quality of the men and women who ascend to the bench': Daniel Terris, Cesare PR Romano and Leigh Swigart, *The International Judge: An Introduction to the Men and Women who Decide the World's Cases* (Oxford University Press 2007) 15. See also Weiler's

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the quality of the judges is especially important in a small court, such as the EFTA Court, since the small number of judges exponentially increases the potential impact of each judge. While it is not the intention of this article to assess the individual qualifications of the EFTA Court judges, it should be mentioned that all three current judges have impressive professional and academic records.[52]

Nonetheless, one criterion that could be considered when discussing the quality of judges, as well as their independence, is the appointment process. It should be noted in this regard that the appointment of judges to the EFTA Court is not a very transparent process and that the relatively short time passed since the EEA Agreement entered into force (at least when compared with the Treaty of Rome establishing the EEC/EC)[53] means that limited experience has been accumulated with regard to the associated difficulties.[54] Still, as a starting point for such an assessment, we can look into the wording of the SCA:[55]

> The Judges shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognized competence.

In practice each government makes a ministerial level decision on appointments to the EFTA Court. This reflects the practice within the EU at the time of the drafting of the EEA Agreement,[56] but it can be criticised on a number of grounds. As has previously been pointed out, it is not transparent and does not ensure diversity in the Court's composition, including adequate gender representation (the fact that all judges appointed to the EFTA Court have been men may be particularly embarrassing for Norway and Iceland, which have long championed the cause of gender equality[57]). Moreover, the procedure provides no assurance that the most qualified candidate is awarded the position of judge.

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arguments on the importance of the number of judges and their qualifications with respect to the CJEU: JHH Weiler, 'Epilogue: The Judicial Après Nice' in Gráinne De Búrca and JHH Weiler (eds), *The European Court of Justice, Collected Courses of the Academy of European Law – Vol X/1* (Oxford University Press 2001) 215.

[52] The judge appointed by Iceland, Páll Hreinsson, is a former judge of the Supreme Court of Iceland and was the dean of the University of Iceland's Faculty of Law. The judge appointed by Liechtenstein, Carl Baudenbacher (of Swiss nationality), holds the Chair of Private, Commercial and Economic Law at the University of St Gallen and was an expert adviser to the Liechtenstein government on EEA matters from 1990 to 1994. The judge appointed by Norway, Per Christiansen, is a former professor of the University of Tromsø, former registrar of the EFTA Court and has held various positions within the Norwegian administration. This brief review indicates the current trend of appointing judges to the EFTA Court who have had mixed careers as academics and high-level civil servants. For a more detailed overview of the careers of the EFTA Court judges see the EFTA Court website, 'The Court: Members – Staff, Judges and Staff', http://www.eftacourt.int/index.php/court/members/judges_staff.

[53] n 3.

[54] Little information is commonly available about the internal proceedings leading to the appointment of international judges: see Terris, Romano and Swigart (n 51) 15.

[55] SCA (n 7) art 30(1).

[56] See Baudenbacher (n 42) 886.

[57] The assumption that equal gender representation among judges ensures, is linked to or increases effectiveness may be very difficult to prove; this article does not make such an assertion. Still, it should be noted that Iceland and Norway (representing 99% of the total population of the three states within the EFTA Court's jurisdiction) are quite possibly the two countries in the world closest to obtaining gender equality in practice (these countries

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Indeed, the appointment procedure for the CJEU has been changed with the adoption of the Treaty on the Functioning of the European Union (TFEU) and there is now an advisory committee which assesses the competence of national appointments for positions of Advocates-General and judges for both the European Court of Justice and the General Court.[58] In 2011 the EFTA Court proposed to the EFTA states an amendment to the Court's Statute, which included the setting up of a five-member committee responsible for evaluating the competence of potential judges 'in line with Article 255 TFEU'.[59] At the time of writing no decision has been taken on the Court's proposed amendments. A second alternative would be to adopt the appointment procedure of the European Court of Human Rights (ECtHR) whereby each member state nominates three candidates who are then interviewed by a parliamentary panel composed primarily of legal experts. This panel presents its recommendations on candidate selection, which are almost always followed in the subsequent elections held by the Parliamentary Assembly.[60]

It is difficult to assert that a change in procedure, whether modelled on the CJEU or the ECtHR,[61] would in fact enhance the quality of the judges. In the author's personal opinion, such changes would probably not have much impact on the actual quality of the EFTA Court judges, mainly because the EFTA states are already highly motivated to select high-quality judges in order to project an image of professionalism towards their trading partner, the EU.[62] It can also be considered that allowing governments to choose their preferred judges may facilitate the transfer of knowledge about the EEA

occupy the top two places in Ricardo Hausmann, Laura D Tyson and Saadia Zahidi, 'The Global Gender Gap Report 2010' (World Economic Forum 2010). Examples of legal measures meant to achieve gender equality are already being scrutinised by the Court and it is not unlikely that such cases will be brought before the Court once more. It might be helpful for the perceived legitimacy of the judgments in those cases if they were not decided solely by male judges. For comparative discussion on the role of the CJEU within the gender spectrum of EU law, specifically on the bench's gender composition within the Court, see Jo Shaw, 'Gender and the Court of Justice' in De Búrca and Weiler (n 51) 87.

[58] TFEU art 255. The current composition of the Committee is as follows: Jean-Marc Sauvé (Vice-President of the Council of State of the French Republic, President of the Committee), Peter Jann (former ECJ judge), Lord Mance (judge of the UK Supreme Court), Torben Melchior (President of the Supreme Court of Denmark), Péter Paczolay (President of the Constitutional Court of Hungary), Ana Palacio Vallelersundi (former Member of the European Parliament), and Virpi Tiili (former judge of the General Court). Council Decision of 25 February 2010 Appointing the Members of the Panel Provided for in Article 255 of the Treaty on the Functioning of the European Union [2010] OJ L50/20. Note that this committee has already rejected the eligibility of certain candidates. See Bilyana Petkova, 'Structural Changes and Decision-Making at the European Court of Justice after the Eastern Enlargement', ECPR Conference on EU Politics, Dublin, 30 August–1 September 2010, http://www.ecpr-net.eu/databases/conferences/papers/357.pdf.

[59] EFTA Court, 'Press Release 11/11: An Extended EFTA Court? The EFTA Court Proposes Amendments to the SCA', 2011, http://www.eftacourt.int/index.php/news/detail/pr_11_11_an_extended_efta_court_the_efta_court_-proposes_ amendments_to_the_s.

[60] Geir Ulfstein, 'The International Judiciary' in Jan Klabbers, Anne Peters and Geir Ulfstein (eds), *The Constitutionalization of International Law* (Oxford University Press 2009) 126, 129–30.

[61] It can be noted that the Caribbean Court of Justice (CCJ) also has a judicial selection committee which is responsible for setting its own procedure for appointments and is not bound to elect a judge from each of the Caribbean Community States. Thus, it has gone even further than the two European Courts to ensure the independence of its judges. See, on the CCJ appointment process, Ruth Mackenzie and others, *Selecting International Judges: Principle, Process, and Politics* (Oxford University Press 2010) 147–49.

[62] cf the conclusion of a study by Eric Voeten on the motives for judicial appointment to the ECtHR, which concluded that governments with favourable views towards European integration tended to appoint more activist judges. Essentially wider political aims, such as regional politics, can be seen as influential factors when it

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system back to the national governments/judiciary. This possibility rests on the notion that such judges may later assume positions within the local legal or political system upon conclusion of their tenures. To illustrate, in 2010 the EFTA Court judge from Norway was appointed to the Norwegian Supreme Court, and in 2011 the judge from Iceland was appointed to the Icelandic Supreme Court and was replaced by a judge from the Supreme Court.

Even if a different method of selection does not increase the individual or collective ability of the judges, a different procedure may alter the EFTA Court's current image. Although the general public may not be very interested in the precise details of the appointment procedure, some circles – such as academics and NGO activists (women's rights movements, for example) – might perceive the Court more favourably were its appointment process to improve. A better view of the Court by such groups may enhance its legitimacy and increase the prospects for bringing new cases before the Court.

At the same time, it should be acknowledged that possible changes in the appointment procedure, entailing limitations on the freedom of states to appoint judges at their own discretion, might result in a loss of government trust in the EFTA Court – in turn making the states more hesitant to entrust the Court with broader jurisdictional powers. This issue is linked to the broader question of the relationship between the effectiveness of international courts and their independence, an issue that has received considerable attention within the academic literature.[63]

3.3 STAFF

Each of the three EFTA Court judges has a cabinet with two assistants. In addition, the Court appoints a Registrar (currently Gunnar Selvik, a Norwegian national). The Registrar has an important role in the Court's daily management. Examples of the Registrar's responsibilities include maintaining the files of pending cases, translations of documents as provided for in the Rules of Procedure, and publications of the Court – including reports of cases and submissions to the Official Journal of the European Union.[64] The Court has five other staff members who assist with its general operation – a grand total of 15 employees.[65]

comes to judicial appointments: 'The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights' (2007) 61 *International Organization* 669.

[63] See, on the one hand, Eric A Posner and John C Yoo, 'Judicial Independence in International Tribunals' (2005) 93 *California Law Review* 3, 6–7, 27, 72; and on the other, Laurence R Helfer and Anne-Marie Slaughter, 'Why States Create International Tribunals: A Response to Professors Posner and Yoo' (2005) 93 *California Law Review* 899, 906–07, 942–43. Yuval Shany has recently contributed to this debate by pointing to the lack of empirical evidence for both competing claims – ie that judicial independence enhances or lessens international court effectiveness. Furthermore, in recognition of the issue's complexities, Shany notes that '[s]ince international courts have distinct goals and operate in unique institutional and political settings, the need for judicial independence may vary across legal contexts': 'Judicial Independence as an Indicator of International Court Effectiveness: A Goal-Based Approach', 254, http://www.effective-intl-adjudication.org/admin/Reports/1e1b35f6296fbda531d87a32c066707bChapter%2016%20-%20Shany.pdf.

[64] See further in 'Instructions to the Registrar', adopted by the EFTA Court on 7 April 1994. Subsequently amended by the Decision of the EFTA Court to amend its Instructions to the Registrar of 22 August 1996, available in *EFTA Court Texts* (n 43) 133.

[65] Other employees are responsible for such tasks as finance, reception and linguistics (numbers from 2009).

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In interviews conducted by the author in Luxembourg, it was pointed out that the Court's small size is a factor that contributes to its smooth functioning because staff members work closely together and are able to familiarise themselves with one another. Yet the small staff size has hindered the Court in achieving specialisation in selected fields of EEA law.[66]

The EFTA Court is a member of the Administrative Tribunal of the International Labour Organization (ILO), a body with jurisdiction over disputes between staff members and the Court.[67] In this respect the EFTA Court, like other EFTA institutions, differs from EU institutions, which have their own special Civil Service Tribunal for handling cases involving disputes between EU institutions, including the CJEU, and their employees (Civil Service Tribunal judgments may, in some instances, be appealed to the European Court of Justice (ECJ)).

3.4 LANGUAGE REGIME

The drafters of the EFTA Court's constitutive instruments decided to have English as the Court's official language.[68] The English language rule covers all of the Court's procedures, including deliberations, minutes and decisions. The choice of English as a working language provides a neutral playing ground as none of the EFTA states have English as their first language.[69] The EFTA Court differs from the two other European courts in this respect as the CJEU uses French and the ECtHR both English and French as official languages.

There is an exception within the language regime of the EFTA Court, as national courts are entitled to send requests for advisory opinions in their own language.[70] Parties to the national court proceedings are also entitled to submit documents and to address, and be addressed by, the Court in their own language.[71] The report for the hearing and the advisory opinion will be written in the language of the request in addition to English, with the advisory opinion being authentic in both languages.[72]

It is difficult to link the language regime in place with the effectiveness of the EFTA Court. However, the following two factors should be considered.

[66] Interview with Carl Baudenbacher, President of the EFTA Court, and Skúli Magnússon, then Registrar of the EFTA Court (Luxembourg, 13 January 2009).
[67] See list of membership of the Administrative Tribunal of the ILO on the organisation's website, 'Administrative Tribunal: Membership (TRIB)', http://www.ilo.org/public/english/tribunal/membership/index.htm.
[68] Rules of Procedure of the EFTA Court (amended 2008), art 25, *EFTA Court Texts* (n 43) 94.
[69] A practical explanation for taking this direction is that English was (and is) EFTA's working language and that the negotiations towards the EEA Agreement were conducted in English. Additionally, Nordic nationals are not generally fluent in French. As the EEA negotiations were conducted in English, the EFTA Court gives particular weight to the English language version of the EEA Agreement. See John Forman, 'The EEA Agreement Five Years On: Dynamic Homogeneity in Practice and its Implementation by the Two EEA Courts' (1999) 36 *Common Market Law Review* 751, 771–72; Case E-9/97 *Erla María Sveinbjörnsdóttir v Iceland* [1998] EFTA Court Report 95, paras 25–31.
[70] Rules of Procedure (n 68) art 27.
[71] Baudenbacher (n 9) 11.
[72] ibid.

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First, it is safe to assume that allowing national courts to communicate with an international court in their own language increases the possibility of a constructive interplay between the national judiciaries and the international court. Had national judges been required to translate all relevant documents before requesting an advisory opinion, the attractiveness of such a course of action would undoubtedly have been reduced. Moreover, it is well known that EEA/EU law is full of specialised vocabulary, which implies that national judges in EFTA states might find it difficult to optimise the impact of such opinions if delivered in English (notwithstanding that domestic judges may have considerable proficiency in the language).

Second, it is understandable why the advisory opinion procedure allows individuals to participate in their own language in that access to the EFTA Court could otherwise be hindered by a lack of knowledge of English. Access to justice would be more expensive if the use of English was required in advisory proceedings as parties might consider it necessary to hire more expensive international lawyers instead of domestic lawyers.[73] Hence, it is difficult to understand the reasons for not allowing private parties who are parties to cases against the ESA (challenging a decision or an omission on behalf of the ESA) to communicate with the Court in their own language, as do their counterparts under the advisory opinion procedure.

3.5 BUDGET

The availability (or shortage) of funds is obviously a critical factor that affects the operation of an international court.[74] Monetary resources can influence the quantity and quality of staff that an international court can attract and hire, as well as the acquisition of the material resources necessary for efficient operation, such as technical and office equipment. These factors directly influence the number of cases the court can handle and, in the long term, might even affect the quality of the judgments themselves.

The EFTA Court is funded by the EFTA states, with funding obligations divided according to economic strength.[75] Thus, Norway pays 89 per cent, Iceland pays 9 per cent and Liechtenstein pays 2 per cent of the Court budget,[76] which reached about €3.6 million in 2007 and €4 million in 2008.[77]

All in all, it appears that the Court is very well funded in light of its needs. In fact, the Court has been known to return some of its unexpended funds. Yet it remains dependent on the member

[73] The Registrar of the EFTA Court confirmed in an interview that it is much more common to use international law firms in direct action than in advisory opinion cases: Baudenbacher and Magnússon (n 66).
[74] For example, Principle 6 of the Burgh House Principles on the Independence of the International Judiciary identifies adequate resources as one of the factors necessary for courts to operate effectively: 'The Burgh House Principles on the Independence of the International Judiciary' (2004) adopted by the Study Group of the International Law Association on the Practice and Procedure of International Courts and Tribunals, in association with the Project on International Courts and Tribunals, http://www.ucl.ac.uk/laws/cict/docs/burgh_final_21204.pdf.
[75] SCA (n 7) art 48.
[76] EFTA Court, 'Financial Statements 2008: Member States Accounts as of 31 December 2008', 25 March 2009, http://www.eftacourt.int/images/uploads/FS_2008_Member_States_Accounts.pdf.
[77] EFTA Court, 'Financial Statements 2008: Income and Expense Summary', 25 March 2009, http://www.eftacourt.int/images/uploads/FS_2008_Income,_Expense_summary.pdf.

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states' annual approval of its budget as the EEA/EFTA has no independent sources of income to finance its operation. The shortage of independent sources of income can be seen as a factor that potentially makes the Court more vulnerable to outside influence.[78]

4. LEGAL FACTORS

4.1 EEA AGREEMENT

The EEA Agreement governs trade between the EFTA states and the EU, and internal trade between the EFTA states.[79] It contains 129 articles as well as 22 annexes and 49 protocols. In addition, a number of declarations are attached to the Agreement.[80] The annexes refer to the EU norms which are to be applicable in the EEA;[81] the protocols include provisions on specific issues such as rules of origin, trade in fish, transition periods for EFTA states in specified fields, simplified customs procedures matters and certain institutional questions.[82] The EEA Agreement originally provided for the adoption of over 1,600 secondary EU legislative acts.[83] Article 6 of the EEA Agreement also incorporates the entire CJEU case law relating to the fields covered by the Agreement up to the date of signing.[84]

In addition, the EEA Agreement sets up a framework for its own continuous development through monthly decisions by the EEA Joint Committee to incorporate into the EEA Agreement a number of EU law instruments.[85] After their incorporation by the Joint Committee, EFTA states are obliged to introduce the said legislation into their domestic legal orders.[86]

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[78] One possible alternative to enhance independence is the CCJ system, which establishes a trust fund. The revenues from the fund, obtained through financial markets, are to cover the expenses of the Court's operation: see Revised Agreement Establishing the Caribbean Court of Justice Trust Fund, http://www.caribbeancourtofjustice.org/wp-content/uploads/2011/11/ccj_rev_trustfund.pdf.

[79] Trade between EFTA states members of the EEA Agreement and Switzerland is governed by the Vaduz Convention from 2001 (as amended 20 September 2010), http://www.efta.int/~/media/Documents/legal-texts/efta-convention/efta-convention-texts/efta-convention-consolidated.pdf, which updated the EFTA Convention from 1960 (the Stockholm Convention).

[80] There are 30 joint declarations of the contracting parties, two declarations of the governments of the EU member states and nine declarations made by one or more contracting parties. These declarations may have limited value regarding the application of the EEA Treaty. See Björgvinsson (n 5) 36–37. See also Case E-1/94 *Ravintoloitsijain Liiton Kustannus Oy Restamark* [1994–95] EFTA Court Report 15, para 42; Case E-1/01 *Hörður Einarsson v Iceland* [2002] EFTA Court Report 1, para 44.

[81] Björgvinsson (n 5) 34; EFTA, 'The European Economic Area (EEA): Fact Sheet of the European Free Trade Association – November 2007', http://www.efta.int/~/media/Files/Publications/Fact%20sheets/EEA%20fact-sheets/FS_EEA.ashx.

[82] Blanchet, Piipponen and Westman-Clément (n 5) 13; Björgvinsson (n 5) 34–35.

[83] The secondary legislation (regulations, directives and decisions) comprise the Agreement's annexes. However, there are protocols that refer to secondary legislation as well: Blanchet, Piipponen and Westman-Clement (n 5) 5, fn 21.

[84] On the subject matter of art 6 see Norberg and others (n 5) 189–92.

[85] See the discussion on changes and additions to the EEA Agreement in Björgvinsson (n 5) 53–66.

[86] EEA, art 7.

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The technical objective of the EEA Agreement is to transpose the law of the single market into trade relations between the EFTA states and the EU.[87] In all areas possible, the provisions of the EEA Agreement have been formulated to mirror, as closely as possible, the corresponding provisions found in EU law (in particular, that of the EEC) for the purpose of ensuring homogeneous interpretation.[88] However, major substantive differences between the EEA Agreement and the EU legal order remain. The most notable of these is that, unlike the EU constitutive instruments, the EEA Agreement has been constructed as an agreement under public international law, deliberately excluding the supranational character of community law.[89] Although this difference has been significantly blurred by the development of the EFTA Court's case law, identical provisions in EEA law and EU law do not necessarily invite the same effects as the EU constitutional rules are not part of the EEA Agreement.[90]

As noted earlier, the EEA agreement is monitored, enforced and adjudicated through a twin pillar system – one for the EU member states and another for the EFTA member states.[91] The existing EU institutions (the Commission, the Court of First Instance (CFI) and the ECJ) were assigned their tasks with respect to the EU member states, whereas the EFTA Court was established by the EFTA states in accordance with Article 108 of the EEA Agreement for the same purpose and with respect to the designated states.[92] The role, functions and composition of the EFTA Court are determined by the SCA, particularly by Part IV (Articles 27–41) and Protocol 5, which sets out the Statute of the EFTA Court.[93] This Statute and its Rules of Procedure are in turn modelled on those of the CJEU.[94]

The EEA Agreement and EEA law are structural factors which affect the ability of the EFTA Court to achieve its goals. Methodologically, it is extremely difficult to evaluate how the EEA Agreement affects the effectiveness of the Court and, in fact, how to conduct such an evaluation without engaging in a general consideration of the effectiveness of EEA law – a question that can and must be analytically separated from the effectiveness of the EFTA Court. At the same time, it is obvious that the substantive rules of the agreements applied by each international court – particularly in respect of their coherence, quality of drafting and relationship to institutional capabilities – affect its ability to achieve its goals.

[87] Norberg and others (n 5) 177–80; Hans P Graver, 'The Effects of EFTA Court Jurisprudence on the Legal Orders of the EFTA States' in Baudenbacher, Tresselt and Örlygsson (n 44) 79.
[88] Norberg and others (n 5) 174.
[89] Graver (n 87) 79, 91.
[90] ibid 91–96.
[91] See, eg, Ingadottir (n 2) 193; Baudenbacher (n 42) 881.
[92] The Commission does not often bring infringement cases against the EU states for violations of their obligations under the EEA Agreement. This is because of the legal structure of EFTA/EU relations as the obligations of the EU member states are mostly in the form of EU law rather than the analogous EEA law. Still, it is clear that the EU member states have obligations under the EEA Agreement as well. If member states fail to fulfil such obligations, the Commission has the competence to bring infringement proceedings against them before the CJEU. cf Case C-13/00 *Commission v Ireland* [2002] ECR I-2943, concerning the failure of Ireland to adhere to the Berne Convention for the Protection of Literary and Artistic Works within the period prescribed in the EEA Agreement.
[93] Baudenbacher (n 9) 8.
[94] Baudenbacher (n 8) 90; Sevon (n 8) 332; Baudenbacher (n 9) 3; Davíð Þór Björgvinsson and Dóra Guðmundsdóttir, 'Starfsemi EFTA-dómstólsins' (1996) 46 *Tímarit lögfræðinga* 142, 146.

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The characteristics of the substantive rules of the EEA Agreement are, however, most certainly not the only way in which the Agreement affects the effectiveness of the EFTA Court. Many of the factors discussed below derive from the EEA Agreement and the SCA themselves.

4.2 JURISDICTION

4.2.1 GENERAL

The EFTA Court has *ratione materiae* jurisdiction over:

- the EEA Agreement (together with its annexes and protocols);[95]
- the SCA (together with its protocols, including Protocol 5 of the Statute of the EFTA Court);
- its own Rules of Procedure; and
- secondary legislation implemented into the sphere of the EEA Agreement by the EEA Joint Committee.

It has *ratione personae* jurisdiction in cases against member states, brought by either the ESA or another EFTA state, and in cases against the ESA brought by member states, or by private parties from one of the EEA countries. Furthermore, in cases involving questions of EEA law that are pending before national courts, individuals and other legal persons have access to the EFTA Court through the advisory opinion procedure (it should be noted that actual application of a national law implementing the relevant EEA law remains in the hands of the national court). The EFTA Court's jurisdictional rules are set out in Articles 31–37 and 39 of the SCA and are based on the CJEU's jurisdictional rules (with certain exceptions, explained below). These rules have been classified in the literature in a number of different ways[96] although, in practice, there are two main categories of case: (i) direct action cases, and (ii) advisory opinions, as discussed below.

4.2.2 DIRECT ACTION CASES

The SCA provides jurisdiction for the EFTA Court in three types of direct action case:

[95] Case E-2/03 *Ákæruvaldið (The Public Prosecutor) v Ásgeir Logi Ásgeirsson, Axel Pétur Ásgeirsson and Helgi Már Reynisson* [2003] EFTA Court Report 185, para 27.

[96] For instance, Thordis Ingadottir has stated ((n 2) 195–96) that the EFTA Court has jurisdiction over three types of case: (i) claims brought against EFTA states for violations of the EEA Agreement or the ESA/Court Agreement, brought by EFTA states or by the Surveillance Authority; (ii) claims against the Surveillance Authority for acts or failure to act, brought by EFTA states or any natural or legal person; (iii) advisory opinions on the interpretation of the EEA Agreement, requested by a court or tribunal in an EFTA state. Alternatively, Björgvinsson and Guðmundsdóttir ((n 94) 144–45) state that the Court has jurisdiction in five types of case: (i) cases brought by the ESA against EFTA states on the ground of alleged infringements of the EEA Agreement; (ii) cases between the EFTA states regarding the interpretation or application of the EEA Agreement; (iii) cases brought by EFTA states, or private parties from EFTA states, challenging ESA decisions; (iv) cases brought by EFTA states against the ESA for its omission regarding the bringing of infringement proceedings before the Court; and (v) cases brought against the ESA on the basis of the contractual liability of the organisation. A third example can be found in Ruth Mackenzie, Cesare PR Romano and Yuval Shany (with Philippe Sands), *The Manual on International Courts and Tribunals* (2nd edn, Oxford University Press 2010) 9.2.5.

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1. *Infringement proceedings taken against EFTA states by the ESA*.[97] There is no exhaustive definition of what such obligations entail, but they include the implementation of directives and compliance with decisions of the ESA.[98] In the event of failure to do either, the ESA, acting as a neutral third party, enforces the obligations of the EFTA states.[99] If a country is found to have breached the EEA Agreement, it is obligated to modify its internal legislation so as to comply with the judgment.[100] Unlike the CJEU, however, the EFTA Court does not have the power to impose fines in the event that an EFTA state is found to have breached its obligations under the EEA Agreement.[101]
2. *The settlement of disputes between two or more EFTA states over the interpretation or application of the EEA Agreement*.[102] This option has not been utilised to date, although its availability may deter states from infringing their obligations towards other EFTA states.[103]
3. *Cases brought against the ESA* (the EFTA Court has exclusive jurisdiction in assessing the lawfulness of ESA decisions). The Court may hear cases for annulment of ESA decisions brought by a member state, or a natural or legal person if the decision in question is addressed to them or is of direct and individual concern to them.[104] It may also hear cases based on the ESA's failure to act and claims for damages brought on the basis of non-contractual liability.[105]

4.2.3 Advisory Opinions

The advisory opinion procedure allows the national courts of EFTA states to refer questions regarding the interpretation of EEA law to the EFTA Court. The notion behind the procedure

[97] EEA, art 108(2)(a) and SCA (n 7) art 31.
[98] Sverdrup ((n 37) 9–11) has explained that there are basically five types of breach that may occur: (i) violations of treaty provisions, regulations and decisions; (ii) non-transposition of directives; (iii) incorrect legal implementation of directives; (iv) improper application of directives; and (v) non-compliance with European court decisions. Sverdrup stipulated that non-compliance with court decisions was not applicable in the EEA legal order, but in light of recent developments of the case law of the EFTA Court it is questionable that this still holds true. See, eg, Margrét Einarsdóttir, 'Bótaábyrgð vegna brota á EES-rétti sem rekja má til æðstu dómstóla' (2011) 61 *Tímarit lögfræðinga* 5.
[99] As an enforcement institution within the EEA regime, the role of the ESA is different from that of the EU Commission as countries need not complain to the ESA before initiating infringement proceedings against another EFTA state, and EFTA countries may settle disputes between them using a judicial mechanism other than the EFTA Court (unlike the EU countries, which are bound to use the CJEU). See Sevon (n 8) 334.
[100] SCA (n 7) art 33.
[101] The Treaty Establishing the European Community [2006] OJ C321 E/145 (TEC) added a provision (to art 228) enabling the CJEU to fine member states for failure to comply with an enforcement ruling (now TFEU (n 2) art 260(3)).
[102] EEA, art 108(2)(c) and SCA (n 7) art 32.
[103] On the nature of infringement proceedings on behalf of an EFTA state against another EFTA state vis-à-vis infringement proceedings between states in the EU law context, see Sevon (n 8) 334.
[104] See SCA (n 7) art 36(2) on the standing requirement that natural or legal persons may only institute nullity procedures if the decision concerned is addressed to them or is of direct and individual concern to them. Such a procedure must be instituted within two months of coming to the addressee's knowledge. On the high threshold to challenging decisions not directly addressed to an applicant, see Case E-2/02 *Technologien Bau- und Wirtschaftsberatung GmbH and Bellona Foundation v ESA* [2003] EFTA Court Report 52, in which an environmental association was not allowed to challenge an ESA decision as the decision was addressed to Norway.
[105] SCA (n 7) arts 37 and 39.

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is that national judges should to be able to request directions on how to interpret the relevant elements of EEA legislation raised in cases before them. The procedure is designed, inter alia, to ensure the homogeneous application of the EEA Agreement.[106]

Although the advisory opinion procedure of the EFTA Court is modelled on the CJEU's preliminary ruling procedure, significant differences remain between the two processes.[107] Unlike the EU,[108] the courts of last resort in EFTA national jurisdictions are not obligated to refer questions on EEA law to the EFTA Court.[109] Furthermore, advisory opinions are not, strictly speaking, legally binding.[110] Hence, they are referred to in the SCA as advisory opinions and not as preliminary rulings. The differences between the two procedures may be less pronounced in reality than initially assumed given the general scholarly view that not following an advisory opinion would be a violation of the EEA Agreement. Advisory opinions therefore tend to be considered as binding on the requesting court.[111]

Two instances of lack of jurisdiction need to be mentioned. First, the EFTA Court does not have formal authority to assess the legitimacy of decisions taken by the EEA Joint Committee.[112] In consequence, a major political institution exists within the EEA–EFTA institutional structure that is free from the scrutiny imposed by judicial review; this state of affairs differs from the EU, where the CJEU has the authority to scrutinise measures adopted by the Council, the Parliament and the Commission.[113] In addition, the EFTA Court has no jurisdiction over EU member states in the event of a dispute between an EFTA state and an EU member state. This is one of the Court's inherent weaknesses, especially because the trading partners of the largest EFTA states are not other EFTA states but, rather, EU states.[114] This raises the question of why EFTA states should increase the effectiveness of

[106] The original aim of art 177 of the Treaty of Rome (n 3), which obligated the highest courts of EU member states to refer cases to the CJEU, was to 'make sure that the interpretation of European law was uniform throughout the Community', its model being the Italian Constitutional system. See Morten Rasmussen, 'The Origins of a Legal Revolution – The Early History of the European Court of Justice' (2008) 14(2) *Journal of European Integration History* 77, 89. The EFTA Court's advisory opinion procedure, modelled on the preliminary ruling procedure, also serves the purpose of ensuring uniform application of EEA law in EFTA countries (although other aims may possibly also be achieved by the procedure). See Björgvinsson (n 5) 339.

[107] Baudenbacher, 'The EFTA Court Ten Years On' (n 45) 35.

[108] cf TEC (n 101) art 234 (now TFEU (n 2) art 267).

[109] See, eg, Baudenbacher (n 42) 882; Graver (n 87) 81; Baudenbacher (n 46) 187–90.

[110] Baudenbacher, 'The EFTA Court Ten Years On' (n 45) 34.

[111] Baudenbacher 895 (n 42); Baudenbacher, 'The Legal Nature of EEA Law in the Course of Time' (n 44) 46; Skúli Magnússon, 'Fordæmi Hæstaréttar og EFTA-dómstólsins: nokkur orð um dóm Hæstaréttar 25. október 2001' (2002) 55 *Úlfljótur* 191, 201–02.

[112] cf Skúli Magnússon, 'Judicial Homogeneity in the European Economic Area and the Authority of the EFTA Court. Some Remarks on an Article by Halvard Haukeland Fredriksen' (2011) 80 *Nordic Journal of International Law* 507, fn 52: 'The fundamental difference with regard to judicial protection remains, of course, the fact that the EFTA Court is not competent to rule on the validity of EU acts incorporated into the Annexes of the EEA.'

[113] TFEU (n 2) art 263 (formerly art 230). For a review of legality by the CJEU see Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (4th edn, Oxford University Press 2008) 502–06.

[114] On the general topic of dispute settlement between the parties of the opposite sides of the EEA Agreement see Sevon (n 8) 335; Norberg and others (n 5) 278–84.

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a court that has jurisdiction only to enforce norms on themselves and not on their major trading partners?[115]

4.3 Enforcement/Compliance Procedures

An international court's enforcement powers are made up of the mechanisms through which it forces states to comply with its judgments. The EEA Agreement is equipped with a special surveillance institution (the ESA) obligated, inter alia, to monitor compliance with EFTA Court judgments. If an EFTA state fails to comply with a judgment declaring it to have infringed the EEA Agreement, this could lead to termination by the EU of the Agreement with respect to that state.[116] Otherwise, it would be possible for EFTA states to pick and choose the obligations they wished to abide by, based on a cost–benefit analysis of the EU's anticipated counter-measures[117] – a situation that would cause significant damage to the credibility of the single market and to the homogeneity objective of the EEA Agreement. It may be underlined that termination of the Agreement would be a drastic measure and, in all probability, would involve diplomatic efforts aimed at securing compliance with the disputed judgment before such a step is attempted.

Advisory opinions present a rather problematic enforcement phenomenon as they are again, strictly speaking, not binding. But, as previously mentioned, in practice it is expected that they will be followed. In the event that a national court in an EFTA state refuses to follow an advisory opinion from the EFTA Court, such a decision would probably result in infringement proceedings being taken against that member state, and could eventually lead to the termination of the EEA Agreement with respect to that state. Such a procedure would clearly not be formally aimed at non-compliance with an advisory opinion but at the underlying violation of EEA law. It is important to note here that infringement of the EEA Agreement by one of the EFTA states has no automatic consequences: EU counter-measures or termination of the EEA Agreement, in whole or in part, would result from a political decision made on behalf of the EU.

In reality, the true enforcement power of the EEA Agreement lies in the benefits brought by the single market. The ideology of linking markets is to make the member states' economies dependent upon one another. Termination of the EEA Agreement would thus have drastic economic outcomes for each country – a long-term threat that induces compliance. This weighing of considerations was illustrated in Icelandic parliamentary discussions on modifying Icelandic law in order to comply with

[115] From this perspective it is worth noting that in 2001 the EFTA countries updated the EFTA Convention from 1960 (the Stockholm Convention) and signed the Vaduz Convention (n 79), which uses arbitration as a mode of dispute resolution – without even foreseeing the possibility of using the EFTA Court's facilities for hosting such an arbitration. This choice sheds light on the EFTA states' lack of dedication to the EFTA Court.

[116] Baudenbacher and Magnússon (n 66).

[117] An example of such a position can be found in the World Trade Organization US/EU hormone dispute. It appears that the EU prefers to accept counter-measures by the US and Canada (suspension of concessions) to allowing beef which has been treated with certain hormones to be imported for consumption within its member states: WTO *EC – Measures Concerning Meat and Meat Products* (*Hormones*), Appellate Body Report adopted 5 January 2008, WT/DS26/AB/R.

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an EFTA Court judgment. When the Prime Minister was asked whether Iceland was obligated to comply with the EFTA Court's judgment, his answer was simple: 'No. As no legislative power was transferred by the EEA Agreement, Iceland is free to legislate in any way it chooses to. However, noncompliance would, in all likelihood lead to protective measures being taken by the EU'.[118] Furthermore, as explained above, protective measures could culminate in termination.

The EEA regime differs in this respect from that of the EU, which bans all forms of self-help measures as a response to violations of EU law; EU member states have to rely on the built-in EU enforcement process (including the monetary fines imposed by the CJEU).[119] A ban on self-help is more in line with the idea of the rule of law/*Rechstaat* (where a centralised mechanism monopolises the use of force and thereby reduces the threat of force or sanctions applied in an arbitrary or disproportionate manner). It may be tempting to assume that a regime enforcing such a ban, along with an effective surveillance mechanism (such as the Commission) would be more effective than a regime where member states can unilaterally adopt enforcement measures. The relevant academic literature still does not seem to describe the enforcement power inherent in the EU framework as more effective in practice than that of the EEA. This is perhaps because the threat of termination of the EEA Agreement is much more credible than parallel threats that exist in the EU context, where member states are aware that isolated instances of non-compliance would not lead to their expulsion from the EU.[120]

It remains necessary to connect the structure of enforcement mechanisms with the motivations of the EFTA states in complying with their EEA obligations. We can expect EFTA states to be interested in maintaining good relations with the EU and a favourable image regarding their dedication to the single market project, thereby ensuring continued EU perception of the EEA Agreement as worth retaining (implying acceptance of EFTA states as equal partners devoted to the single market). EFTA states may also want to keep open the option of joining the EU at some point; having a good track record in terms of EEA obligations might be an important factor in EU readiness to allow such accession.[121] In this context it can also be noted that the EU and EFTA nations are culturally entwined to some extent and that the latter's institutions draw inspiration from the operation of EU institutions (for example, Iceland and Norway regularly look to other Nordic countries when it comes to developing their laws). Thus, even in areas

[118] Alþt. 2001–02 (*The Law Gazette*), B-division, Case 315, meeting 122 (Davíð Oddsson) 6562–63. (translation by author).

[119] See Math Noortmann, *Enforcing International Law: From Self-help to Self-contained Regimes* (Ashgate 2005) 149–51.

[120] Examples of non-compliance by EU states are well known. See, eg, Tanja A Börzel, Tobias Hofmann, and Diana Panke, 'Who's Afraid of the ECJ? Member States, Court Referrals, and (Non-) Compliance', draft of 9 April 2005 (paper prepared for the ECPR Joint Sessions, Granada, 14–19 April 2005, http://userpage.fu-berlin.de/~europe/forschung/docs/BoerzelHofmannPanke_ECPR2005.pdf.

[121] ie, Iceland applied to join the EU in July 2009. See Communication from the Commission to the European Parliament and the Council: Commission Opinion on Iceland's Application for Membership of the European Union, which emphasises that the country is already, to a large extent, integrated into the EU economy through the EEA Agreement, and that it has a satisfactory track record in implementing its obligations under the Agreement: COM(2010) 62, 24 February 2010, http://ec.europa.eu/enlargement/pdf/key_documents/2010/is_opinion_en.pdf.

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not covered by the EEA Agreement, EFTA states will often unilaterally adapt their legislation to the legislation applicable in the EU.[122]

In addition to infringement proceedings, the EEA Agreement also employs the remedies available in the sphere of national law to induce compliance by the EFTA states. The EEA Agreement, which is meant to be incorporated into national legal orders, also includes the obligation to make any future legal instruments introduced into EEA law part of the legal orders of the EFTA states. In addition, the EEA Agreement includes Protocol 35, which addresses the following stipulations to EFTA states:[123]

> For cases of possible conflicts between implemented EEA rules and other statutory provisions, the EFTA States undertake to introduce, if necessary, a statutory provision to the effect that EEA rules prevail in these cases.

This rule is meant to afford individuals and economic operators the option of utilising rights afforded to them by the EEA Agreement within national courts even if those rights appear to be negated by national rules. EFTA Court case law has given special weight to this important function of EEA law. It has thus introduced several doctrines, such as state liability, to increase the effectiveness of the remedies available to individuals when seeking to enforce their EEA rights.[124]

4.4 COURT INDEPENDENCE

The independence of international courts can be seen as a *structural* indicator of effectiveness. In this respect, the previous work of the Effectiveness Project has differentiated between judicial independence, institutional independence, and reputation for impartiality.[125] There is, of course, a sizeable academic literature on the need for national judiciaries to be independent of political actors and other branches of government. Yet it is questionable whether these notions can be applied, *mutatis mutandis,* to the international judiciary.[126] There is similarly no consensus as

[122] ie, both Norway and Iceland have adjusted their legislation on foreigners to include the protections described in Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or Persons Otherwise Needing International Protection [2004] OJ L304/12.

[123] On the implementation of Protocol 35 in each of the Nordic EFTA countries, see Björgvinsson (n 5) 111–28.

[124] 'The EEA Agreement has created a single market for the benefit of those who intend to act as producers, distributors and consumers in that market. The cardinal point of EEA law is therefore the protection of individuals and economic operators. The EFTA Court has consistently held that the provisions of the EEA Agreement are, to a great extent, intended for the benefit of individuals and economic operators throughout the EEA. The proper functioning of the EEA Agreement is dependent on those individuals and economic operators being able to rely on the rights thus intended for their benefit before national courts of EEA/EFTA states' [footnote omitted]: Baudenbacher, 'Facets of an EEA Constitutional Order' (n 44) 347–48.

[125] Shany (n 14).

[126] Ruth Mackenzie and Philippe Sands, 'International Courts and Tribunals and the Independence of the International Judge' (2003) 44 *Harvard International Law Journal* 271, 275–76.

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to whether independence per se necessarily increases effectiveness when it comes to international courts.[127]

We should also note in this context that it may be extremely complicated to measure judicial independence on an objective scale. There are still certain factors, such as court funding and methods of judicial selection, which, as discussed above, obviously should be included in such an assessment. As a possible starting point for this analysis, we can turn to a five-point scale for assessing international court independence, introduced by Eric Posner and John Yoo:[128]

- compulsory jurisdiction;
- no right to a judge being a national of a party to the dispute;
- permanent body;
- judges having fixed terms; and
- the right of third parties to intervene.

Applying this scale to the EFTA Court would produce good results. The Court has compulsory jurisdiction in some cases; it is a permanent body; the judges have fixed terms and third parties have the right to intervene (four out of five). However, the scale proposed by Posner and Yoo is designed to evaluate *all* international tribunals and arbitration courts, so it may be overly simplistic when applied to a particular court having unique features that the scale fails to capture. Moreover, as perhaps cannot be avoided, these indicators can lead to conflicting results in terms of other effectiveness indicators. The right to have a judge from each state party may be considered an absolute necessity for a court such as the EFTA Court, which frequently conducts an in-depth analysis of national law and thus requires the participation of experienced jurists on the bench in order to ensure detailed understanding of that country's law and practice.[129] Not having a national judge on the bench could also leave room for criticism in the countries involved on the grounds that the court had failed to understand fully the domestic legal or factual context at hand; this may, in turn, contribute to a process which could lead to either delayed compliance or non-compliance on the part of the losing state.

Individual judges may possibly feel that they owe some allegiance to their home state. They may also seek to be reappointed by that country after the end of their term, at least within the context of the EFTA Court.[130] The quite effective EFTA Court response to these concerns has

[127] See n 63.

[128] Posner and Yoo (n 63) 52 (Table 6).

[129] Weiler has suggested ((n 51) 224) that when deciding a preliminary ruling referred by the highest courts of the member states, the CJEU deciding panel should have an ad hoc judge from the national court in question, inter alia, in order to 'ensure the fullest possible consideration of all national sensibilities'.

[130] 'The need for representativeness would not in itself threaten the independent character of the Court, but rather bring in useful diversity in experience. It is more difficult to accept a requirement that the judges shall come from designated countries. In a regional setting, it has been required that all states should be represented by a judge, such as in the European Court of Human Rights. The judges obviously act in their individual capacity, but their independence may in such circumstances be questioned': Ulfstein (n 60) 131. See also the conclusion of a study conducted by Eric A Posner and Miguel FD De Figueiredo on ICJ voting patterns: 'Judges vote for their home states about 90 per cent of the time. When their home states are not involved, judges vote for states that are similar to their home states – along the dimensions of wealth, culture, and political regime': 'Is the International Court of Justice Biased?' (2005) 34 *Journal of Legal Studies* 599, 624.

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been to construct a procedure that dictates that voting is to be executed by secret ballot and to disallow individual opinions (both factors being common with the CJEU).[131] Hence, at least in theory, states are unaware of whether or not the judge they appointed has ruled in their favour.[132] The EFTA Court has thus been able to insulate its judges from many of the pressures related to their reappointment by showing a homogeneous face to the world.[133]

With regard to institutional independence, two additional factors must be considered. The first is the special status of the CJEU vis-à-vis the EFTA Court. The EFTA Court is de facto bound by the CJEU's interpretation of EU law (which EEA law mirrors).[134] The EFTA Court is consequently not truly an independent court. At the same time, the protective shadow of the CJEU ensures the Court's independence vis-à-vis EFTA states as the justification it provides for making difficult decisions is found in its duty of allegiance to the jurisprudence of the CJEU.[135]

Second, the EU Commission has the right to intervene in cases before the EFTA Court; it is also a party to the EEA Joint Committee, a body called into action once a conflict arises between EFTA Court case law and the CJEU. Hence, a political entity within the EEA regime is ranked above the Court but does not fall within its jurisdiction. This is not unique within the structure of international organisations (the International Court of Justice (ICJ) has limited power to review Security Council decisions and the WTO's Appellate Body rulings may be blocked by the General Council in the form of the Dispute Settlement Body).[136] Still, what is perhaps unique in the case of the EFTA Court is the Commission's participation in every proceeding before the Court. The Commission then participates in the Joint Committee (where it is by far the most powerful player) in order to review the EFTA Court's case law. In other words, the Commission has two opportunities to impact on the outcomes of EEA

[131] The Icelandic Foreign Ministry, 'Staða Íslands í Evrópusamstarfi: Skýrsla Halldórs Ásgrímssonar utanríkisráðherra til Alþingi' (*Iceland's Position within European Cooperation: Report of Halldór Ásgrímsson, Minister of Foreign Affairs, to the Althing*) (2000) 80, http://www.utanrikisraduneyti.is/media/Skyrslur/skyrsla.pdf.

[132] However, Weiler has stated ((n 51) 225) that in order to ensure the impartiality of judges in the CJEU, they should be allowed to sit for one term only.

[133] Baudenbacher (n 42) 886.

[134] Note that the EEA Agreement differentiates between judgments given by the CJEU before and after the signing of the EEA Agreement (2 May 1992). According to art 6 EEA, the EFTA Court is bound by precedents of the CJEU prior to the date of signing. Under SCA (n 7) art 3(2), the EFTA Court is required to take due account of all CJEU jurisprudence adopted after the EEA signing date. The EFTA Court treats both types of precedent as binding, demonstrated by the fact that it has never differentiated between the two types in over 15 years of operation and over 100 cases decided. This obligation is not applicable in instances where differences exist between either the scope or legal nature of EU and EEA law. See reservations towards the position that CJEU judgments are binding on the EFTA Court in Magnússon (n 112), especially 516.

[135] By way of explanation, the EFTA Court can be said to be involved in a twofold constitutional sphere: one involving the EU legal order – the primary actor being the CJEU – and the second being its relationship with the EFTA states, which are its formal source of power. Primarily, the EFTA Court has used the EU sphere to increase its power vis-à-vis the EFTA states. Under the conceptual framework of political science, the constitutionalisation process of the EFTA Court can be described as a move towards the EFTA Court being an agent of the CJEU instead of the EFTA states.

[136] The former Chairman of the Appellate Body of the WTO, Claus-Dieter Ehlermann, has argued that because of the shortage of structural independence, inter alia, the option of blocking reports, the DSB functions as a quasi-judicial body: 'Experiences from the WTO Appellate Body' (2003) 38 *Texas International Law Journal* 469, 478.

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law – by influencing judicial interpretation and by participating in a political process designed to override it.

With respect to the EFTA Court's reputation for impartiality, nothing in the research conducted by the author revealed any indication that contradicts the notion that the Court is very professional in its work; judged on a qualitative basis the Court must be considered as fulfilling all the basic requirements for judicial independence.

4.5 MAIN DOCTRINES

This article is intended to analyse the organisational inputs (*structures*) of the EFTA Court rather than its actual practice. Nevertheless, three doctrines – direct effect, primacy and state liability – must be considered here as they have become important parts of the Court's legal structure and may significantly affect the power attributed to its judgments.[137] These doctrines parallel the EU doctrines from which they are derived (direct effect, primacy and state liability), as the EFTA Court bases its interpretation and legal methodology on CJEU approaches to the respective issues.[138] However, there are several differences between the respective EFTA Court and CJEU doctrines.[139]

This section provides a very brief description of these three doctrines[140] in order to explain how they may be viewed as *structural* factors capable of influencing the possible impacts of EFTA Court judgments. Before discussing the doctrines the homogeneity principle will be considered. Homogeneity in the context of the EEA Agreement is a unique umbrella concept that describes the Agreement's main objective of ensuring equal conditions of competition among EEA member states, together with a number of legal remedies and institutional processes designed to advance this objective.

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[137] The EFTA Court's introduction of these doctrines into the sphere of EEA law has effectively created an EEA Constitutional Order: see Baudenbacher, 'Facets of an EEA Constitutional Order' (n 44) 343–57. In contrast to the EFTA Court, see the writings of Laurence R Helfer, Karen J Alter and M Florencia Guerzovich, who have argued in terms of the Andean Court that one of the factors that has limited its effectiveness is that the Court has refused to interpret Andean rules purposively so as to promote the integration of regional markets: 'Islands of Effective International Adjudication: Constructing an Intellectual Property Rule of Law in the Andean Community' (2009) 103 *American Journal of International Law* 1, 4.

[138] Despite the fact that the EEA Agreement is a treaty falling under public international law, the EFTA Court has not followed the interpretative rules found in the Vienna Convention on the Law of Treaties (VCLT) as it applies the CJEU's methods of interpretation. See Baudenbacher (n 9) 19; Baudenbacher (n 42) 887–89. It can be noted that the Norwegian government argued in the *Wilhelmsen* case that art 44 VCLT was applicable in terms of interpretation on the relationship between the main part of the EEA Agreement and one of its protocols: see Case-6/96 *Tore Wilhelmsen AS v Oslo Kommune* [1997] EFTA Court Report 53, para 29.

[139] On the content of the doctrines' 'primacy', 'direct effect' and 'state liability' in EEA law and a comparison of their content and function with their counterparts in EU law, see Björgvinsson (n 5) 139–204; Walter van Gerven, 'The Genesis of EEA Law and the Principles of Primacy and Direct Effect' (1992–93) 16 *Fordham International Law Journal* 955; Ólafur Börkur Thorvaldsson, 'Direct Effect, Supremacy and State Liability – A Comparison between EC Law and the EEA Agreement' (Master's Thesis, Lund University 2002); M Elvira Méndez-Pinedo, *EC and EEA Law: A Comparative Study of the Effectiveness of European Law* (Europa Law Publishing 2009) 145–57, 179–205, 221–49, 275–93.

[140] In respect of other principles of EEA law, see Baudenbacher (n 9) 27–30; Björgvinsson (n 5) 241–99.

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4.5.1 HOMOGENEITY

It should be noted that the EU has concluded a number of preferential trade agreements with neighbouring countries and other regional organisations.[141] The EEA is unique among these agreements as it incorporates the tool of homogeneity to achieve the objective of identical legal status within the two legal orders (and continuous export of the EU norms to EFTA states). Pursuant to this objective, the EEA Agreement obligates EFTA states to incorporate voluminous legislation in diverse yet important sectors outside the province of local democratic institutions (crucially, although focused on economic matters, the respective EEA legislation addresses many other spheres, such as environment protection and workers' rights).[142] In return for these weighty obligations the EFTA states have been allowed to participate in the EU single market on the same basis as EU member states – a privilege not yet extended to other free trade agreements.[143]

Several elements can be found in the EEA Agreement (and in EFTA Court practice) that seek to advance homogeneity. In order to explain the content and objective of this principle, it is helpful to differentiate between five different manifestations of homogeneity within the EEA Agreement:

1. *The manifestation of homogeneity as a goal in recitals to the EEA Agreement and its main parts.* The initial constructs of homogeneity are found in the EEA Agreement provisions describing this aim and the means by which it should be maintained.[144] The other elements are safeguards put in place to ensure fulfilment of this objective.
2. *The technical legislative objective of identical – or similar – wording of the texts of the EEA Agreement and EU law instruments.* The technical objective of the EEA Agreement is to transpose the law of the single market into trade relations between EFTA states and the EU.[145] Consequently, in all possible areas, the provisions of the EEA Agreement have been formulated to mirror, as closely as possible, the corresponding provisions of EU law (in particular the EEC) so as to ensure homogeneous interpretation and application.[146]

[141] For example, the ACP–EU cooperation, the Euro-Mediterranean Free Trade Area and the 1972 free trade agreements with Switzerland.

[142] Sieglinde Gstöhl has argued that the closer the ties a third country has with the EU's internal market the more likely it is that such cooperation will raise legitimacy concerns for the country concerned: 'Political Dimensions of an Externalization of the EU's Internal Market' (2007) College of Europe, Department of EU International Relations and Diplomacy Studies: EU Diplomacy Papers 3/2007, http://www3.coleurope.eu/file/content/studyprogrammes/ird/research/pdf/EDP%203-2007%20Gstohl.pdf.

[143] Roman Petrov, 'Exporting the *Acquis Communautaire* into the Legal Systems of Third Countries' (2008) 13 *European Foreign Affairs Review* 33, 37.

[144] cf EEA, art 1(1), recitals 4 and 15. Recital 15 states: 'Whereas, in full deference to the independence of the courts, the objective of the Contracting Parties is to arrive at, and maintain, a uniform interpretation and application of this Agreement and those provisions of Community legislation which are substantially reproduced in this Agreement and to arrive at an equal treatment of individuals and economic operators as regards the four freedoms and the conditions of competition.'

[145] Graver (n 87) 79.

[146] Norberg (n 5) 1174; Norberg and others (n 5) 177–79; Leif Sevon and Martin Johansson, 'The Protection of the Rights of Individuals under the EEA Agreement' (1999) 24 *European Law Review* 373, 374.

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3. *Statutory safeguards.* There are also certain statutory rules aimed at helping to attain homogeneity. These rules include Article 6 of the EEA Agreement and Article 3(2) of the SCA. Under Article 6 of the EEA Agreement, the EFTA Court is bound by the CJEU precedents established prior to the signing of the EEA Agreement on the interpretation of EEA law (2 May 1992), identical in substance to EU law. Under Article 3(2) of the SCA, the EFTA Court is required to take due account of CJEU jurisprudence adopted after the signing of the EEA. The crux of the arrangement agreed upon is that the EFTA Court must abide by pre-existing CJEU case law on common substantive rules, but needs only to take into account the subsequent development of CJEU case law. The EFTA Court does not, however, differentiate in practice between these two types of precedent.[147]
4. *Institutional safeguards.* Homogeneity safeguards are also found in the form of institutional mechanisms facilitating the achievement of homogeneity by both the Commission and the EEA Joint Committee. First, the Commission has the right to intervene in all cases that are brought before the EFTA Court,[148] and has exercised this right in all cases adjudicated by the EFTA Court to date.[149] As a result of the Commission's extensive capacity and specialised knowledge, it is capable of ensuring that all relevant EU law sources, including CJEU case law, are brought to the attention of the EFTA Court.[150] Second, the EEA Joint Committee has a broad role in preventing conflicting jurisprudences between the two EEA Courts. On the one hand, it has the general obligation to review the case law of both courts;[151] on the other, it has the obligation to react to situations of conflicting case law. In the event of such a conflict, the Joint Committee may reach a political settlement,[152] but if the Committee has not succeeded in doing so within two months, it may seek a binding interpretation from the CJEU under Article 111(3) (conditional on the conflict involving a provision identical to Community law).[153] No such conflict has arisen so far.[154] Finally, the Committee is responsible for establishing a system for the exchange of information on case law between the EEA Courts.[155] This function draws inspiration from the Lugano Convention.[156]

[147] Baudenbacher (n 9) 13; Ingadottir (n 2) 199; Davíð Þór Björgvinsson 'Þýðing fordæma dómstóla EB við framkvæmd og beitingu EES-samningsins' in Ármann Snævarr and others (eds), *Afmælisrit til heiðurs Gunnari G Schram sjötugum, 20 febrúar 2001* (Almenna bókafélagið 2002) 103–05; Icelandic Foreign Ministry (n 131) 81; Forman (n 69) 771.

[148] EU member states also have right to intervene (Statute of the EFTA Court, art 36(1)) [1994] OJ L344/71) or submit written observations (ibid, art 20). See Baudenbacher (n 9) 14–15.

[149] ibid 15.

[150] Forman (n 69) 773.

[151] EEA, art 105(2).

[152] EEA, arts 105, 112–14; Norberg (n 5) 1189–91.

[153] See Norberg (n 5) 1188.

[154] Baudenbacher (n 9) 15. The EEA Joint Committee did review the compatibility between two cases regarding exhaustion of trademark rights (Case E-2/97 *Mag Instruments Inc v California Trading Company Norway, Ulsteen* [1997] EFTA Court Report 127 and Case C-355/96 *Silhouette International Schmied v Hartlauer Handelsgesellschaft* [1998] ECR I-4799). The Joint Committee concluded that the rulings were not contradictory. See Ingadottir (n 2) fn 33.

[155] EEA, art 106.

[156] Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 16 September 1988, 1659 UNTS 13. See Norberg (n 5) 1179.

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5. *Judicial safeguards.* Two different judicial safeguards allow the EEA Joint Committee to ask the CJEU questions on the appropriate interpretation of the EEA Agreement. First, under Article 105(3) of the EEA Agreement, the EEA Committee may respond to differences in case law between the EFTA Court and the CJEU. Second, in the event of a dispute between the Contracting Parties on issues regarding the mirror legislation (that is, EEA law identical in substance to EU law), the Joint Committee has the authority under Article 111(3) of the EEA Agreement to ask the CJEU for a ruling on the interpretation of the said rules. An additional component of the dispute resolution mechanism of the EEA Agreement that may be considered in this context is the availability of a special arbitration procedure referred to in Article 111(4) of the EEA Agreement (under the procedure laid down in Protocol 33 to the Agreement), to assess the scope or duration of a safeguard measure, but this process cannot involve the interpretation of mirror legislation.

4.5.2 DIRECT EFFECT

The question of direct effect arose during proceedings related to the first case coming before the Court, *Restamark*. A Finnish customs authority (the *Tulliluatakunta*) requested an advisory opinion regarding the compatibility of the Finnish alcohol monopoly with EEA law requirements. One of the questions asked was whether Articles 11 and 16 of the EEA Agreement could have direct effect within the national legal orders of the EFTA states. The Court responded that, following from Protocol 35 to the EEA Agreement, individuals and economic operators are entitled to invoke and to claim any rights at the national level that could be derived from EEA Agreement provisions and had been implemented into the respective national legal order – provided that such rights are unconditional and sufficiently precise in nature.[157]

The EFTA Court clarified the scope of its direct effect doctrine in its 2002 *Einarsson* judgment, a case concerning an Icelandic VAT (value added tax) rule that differentiated between books in Icelandic and those in foreign languages.[158] In that case, the Court stated that, according to Protocol 35, an EEA Agreement provision that is unconditional and sufficiently precise takes precedence over a conflicting provision of national law, provided that the former has been implemented into national law.[159] The EFTA Court observed in *Karlsson* that EEA law does not entail the transfer of legislative powers and concluded that EEA law does not require individuals and economic operators to rely directly on non-implemented EEA rules before a national court.[160] National courts should still consider any relevant element of EEA law when reaching a judicial decision, whether implemented or not.[161] The direct effect of the EEA Agreement within the EU legal order was

[157] *Restamark* (n 80) para. 77.
[158] *Hörður Einarsson v Iceland* (n 80).
[159] ibid, paras 52–53.
[160] Case E-4/01 *Karl K Karlsson hf v Iceland*, [2002] EFTA Court Report 240, para 28.
[161] ibid.

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confirmed by the CFI (now the General Court) in *Opel Austria*, a judgment that stressed the goal of homogeneity within the judicial system put in place by the EEA Agreement.[162]

4.5.3 PRIMACY

In *Restamark*, the EU Commission had claimed that the EEA Agreement included the doctrine of primacy; yet the EFTA Court did not address that question in its decision.[163] A few years later, the Commission no longer maintained that position, but the EFTA Court did embrace it in its most well-known judgment, *Erla María Sveinbjörnsdóttir*, in which the EFTA Court claimed the *quasi*-supremacy of EEA law. The judgment itself concerned an Icelandic rule that precluded Ms Sveinbjörnsdóttir from access to payments from a fund that guaranteed wages in the event of insolvency arising from a sibling relationship with her employer. In the Court's own words:[164]

> The Court concludes from the foregoing considerations that the EEA Agreement is an international treaty *sui generis* which contains a distinct legal order of its own. The EEA Agreement does not establish a customs union but an enhanced free trade area, see the judgment in Case E-2/97 Maglite [1997] EFTA Court Report 127. The depth of integration of the EEA Agreement is less far-reaching than under the EC Treaty, but the scope and the objective of the EEA Agreement goes beyond what is usual for an agreement under public international law.

The wording and substance of this statement must be considered in context together with the aforementioned Protocol 35 to the EEA Agreement, where EFTA states undertook to ensure under their national legislation the precedence of EEA law in cases of conflict between rules of the two bodies of law,[165] and Article 7 of the EEA Agreement, which stipulates that future legislative acts shall be incorporated into the sphere of national law in order to take effect – thus excluding a direct link between the EEA legal order and the national legal order. The interplay between Article 7 and Protocol 35 created a mechanism that allowed the Nordic states to maintain their formal dualist approach to international law.[166] Still, the essence of the *Sveinbjörnsdóttir* judgment is that the supremacy of EEA law derives from EEA law and not from the national legislation that implements Protocol 35.[167] This conclusion may be inferred

[162] Case T-115/94 *Opel Austria v Council* [1997] ECR II-39.
[163] Baudenbacher, 'Facets of an EEA Constitutional Order' (n 44) 348.
[164] *Sveinbjörnsdóttir* (n 69) para 59. Baudenbacher has stated (ibid 351) that there were three core arguments for the EFTA Court's finding: (i) the homogeneity objective of EEA law; (ii) the objective to ensure equal treatment for individuals and economic operators; and (iii) equal conditions of competition, and the duty of the Contracting Parties to take all appropriate measures to ensure fulfilment of their obligations laid down in art 3, the provision mirroring EC, art 10.
[165] Petrov (n 143) 36.
[166] cf Opinion 1/91 (n 13) paras 27–28.
[167] Baudenbacher and Magnússon (n 66) (comment by Baudenbacher). See also Baudenbacher, 'Facets of an EEA Constitutional Order' (n 44) 357–58: '[i]t follows from the above considerations that facets of an EEA constitutional order are in fact visible' and that '[a]t the same time, the EEA Agreement, being an international agreement *sui generis,* obliges the national courts to go as far as possible in interpreting national law in an EEA-friendly way. This obligation follows from the EEA Agreement itself'. See also Carl Baudenbacher, 'The Implementation

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from the fact that the Court does not rely in its judgment on Protocol 35 as a basis for state liability (contrary to its conclusion in *Restamark*). Furthermore, if the doctrine of state liability had been included in the EEA Agreement, there would have been no need to emphasise the far-reaching and *sui generis* nature of the Agreement as these effects would already be guaranteed by the implementing legislation. *E contrario,* as state liability did not have any foundation in the EEA Agreement, its basis must have been found in the supremacy of the EEA law.

The EFTA Court still maintained that the EEA Agreement did not entail the transfer of legislative powers from the EFTA states to any of the EEA institutions. This argument has led academics to term the EFTA Court doctrine as reflective of *quasi*-supremacy.[168] The conclusion of the *Sveinbjörnsdóttir* judgment later gained support from the EU pillar of the EEA as it was subsequently cited with approval by the CJEU in *Rechberger*.[169]

4.5.4 STATE LIABILITY

The doctrine of state liability was also established in the *Sveinbjörnsdóttir* judgment,[170] in which the EFTA Court stated[171] that

> the principle of state liability must be seen as an integral part of the EEA Agreement as such. Therefore, it is natural to interpret national legislation implementing the main part of the Agreement as also comprising the principle of state liability.

The EFTA Court did not directly cite CJEU case law on this issue but it is considered to have fully integrated the EU law doctrine of state liability into EEA law.[172]

The principle of state liability under EEA law stipulates that infringement of EEA law on behalf of member states causing damage to individuals or economic operators obligates those

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of Decisions of the ECJ and of the EFTA Court in Member States' Domestic Legal Orders' (2004–05) 40 *Texas International Law Journal* 383, 386–87. See, however, para 63 of *Sveinbjörnsdóttir* (n 69) on the limits of the supremacy doctrine: 'It follows from Article 7 EEA and Protocol 35 to the EEA Agreement that the EEA Agreement does not entail a transfer of legislative powers. However, the principle of state liability must be seen as an integral part of the EEA Agreement as such. Therefore, it is natural to interpret national legislation implementing the main part of the Agreement as also comprising the principle of state liability.' See also para 28 of Opinion 1/91 (n 13), which states that the principles of supremacy and direct effect were 'irreconcilable with the characteristics of the [EEA] agreement'.

[168] For example, Baudenbacher (n 45) 26; Méndez-Pinedo (n 139) 147–50.

[169] Case C-140/97 *Walter Rechberger and Renate Greindl, Hermann Hofmeister and Others v Austria* [1999] ECR I-3499, para 39.

[170] 'It follows from all the foregoing that it is a principle of the EEA Agreement that the Contracting Parties are obliged to provide for compensation for loss and damage caused to individuals by breaches of the obligations under the EEA Agreement for which the EFTA states can be held responsible': *Sveinbjörnsdóttir* (n 69) para 62.

[171] ibid para 63.

[172] EEA law still differentiates as to the scope of the doctrine, which is both narrower in the sense that EEA law does not cover all the areas of EU law and broader in the sense that state liability applies in instances wherein the EU law doctrine of direct effect would apply. Nevertheless, the substantive content (conditions for liability) is the same. For discussion on state liability in EEA law, and similarities and differences with EU law see Méndez-Pinedo (n 139) 275–95; Stefán Már Stefánsson, 'State Liability in Community Law and EEA Law' in Baudenbacher, Tresselt and Örlygsson (n 44) 145.

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member states to pay compensation, provided that the breach is sufficiently serious, and that there is a causal link between the infringement and the damage sustained.[173]

There are several additional factors which can be noted on EEA law state liability. Before the *Sveinbjörnsdóttir* judgment was cited in the CJEU in *Rechberger*, the possibility of applying state liability was rejected in the Advocate-General's Opinion in the *Andersson* case, which was issued about a month after the EFTA Court gave its judgment.[174] It can also be noted that the *Sveinbjörnsdóttir* case involved the same directive considered by the CJEU in *Francovich* which established the doctrine of state liability in the sphere of EU law.[175] State liability for failure to implement directives was then applied by the Icelandic Supreme Court,[176] and was later recognised by the Norwegian Supreme Court in *Finanger II.*[177]

5. OTHER FACTORS

To understand the effectiveness of international courts, it is evidently necessary to examine the non-legal factors which impact on the real life results generated by such courts. These factors include cultural, political and geographical factors related to the court as an institution, as well as to the member states that adhere to its jurisdiction. It may not be possible to provide an exhaustive list of such factors but what follows is a brief discussion of some of the major non-legal factors which are relevant for an assessment of the EFTA Court's effectiveness.

The cultural environment in which a court operates is an important and complex variable that must be taken into account while assessing the effectiveness of international courts. Academics have suggested, for example, that the European pro-rule of law environment is one reason why the continent has seen far more successful international courts established in Europe than on any other continent and that this success may not be immediately replicated elsewhere.[178] In the opinion of the author there is no basis for assuming that successful international courts cannot be set up outside Europe.[179] Nevertheless, it is clear that the domestic legal culture of the countries adhering to an international court's jurisdiction creates an environment upon which the international court must rely for facilitating real life changes, as in most instances such changes can be attained only through cooperation with the relevant national authorities.

[173] *Sveinbjörnsdóttir* (n 69) para 66; *Karlsson* (n 160) paras 32, 47.
[174] Case C-321/97 *Ulla-Brith Andersson and Susanne Wåkerås-Andersson v Svenska Staten* (*Swedish State*) [1999] ECR I-3551, Opinion of A-G Cosmas.
[175] Joined Cases C-6/90 and C-9/90 *Andrea Francovich v Italy* [1991] ECR I-5357.
[176] *Íslenska ríkið gegn Erlu Maríu Sveinbjörnsdóttir*, Hrd 1999 (Icelandic Supreme Court, *The Icelandic State v Erla María Sveinbjörnsdóttir*, Supreme Court Reports 1999) 4916. Note that the Icelandic Supreme Court based its finding on the domestic principle of tort liability of the state, not EEA law.
[177] Høyesterett, 28 October 2005, *Veronika Finanger mot Staten v/Justisdepartementet,* Retstidende 2005:1365. The Norwegian Supreme Court cited the *Sveinbjörnsdóttir* judgment of the Icelandic Supreme Court.
[178] 'Most notably the liberal democratic regime types of European governments and the strong tradition of domestic courts committed to the rule of law were the product of larger historical, political, and cultural forces that could not be immediately replicated (if at all) in other state or regions': Helfer and Slaughter (n 63) 907.
[179] Indeed, Helfer's later work indicates that other continents are capable of putting up effective international courts: see Helfer, Alter and Guerzovich (n 137).

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Indeed, a pro-rule of law environment would be, in this respect, a key factor favouring cooperation.

The EFTA states have been considered among those nations that carry the highest standard of the rule of law,[180] an attribute representing considerable strength for the EFTA Court. Still, other cultural factors can generate adverse effects: it has been mentioned in this context, for instance, that the mentality of Nordic judges leans towards preserving their country's sovereignty, an attitude that affects their willingness to refer cases to the EFTA Court.[181]

Cultural diversity can similarly affect the internal operation of international courts. On the one hand, cultural diversity can enrich a court and enable it to identify a larger pool of possible solutions to a particular legal problem; on the other hand, having individuals from different cultures sitting in one court may engender difficulties relating to language barriers or ideological tensions. In this respect, the EFTA states are culturally very similar. Although it may be extremely difficult to establish causation between cultural diversity and effectiveness, the President of the EFTA Court has commented in an interview that he perceived the cultural similarity of the countries represented within the Court as a factor contributing to its effectiveness.[182]

Still another factor that is crucial for understanding the political environment of the EEA Agreement is the significant difference in size between the two country blocs party to the Agreement. There are only three states on the EFTA side of the Agreement, all relatively small – with a total population of about 5.2 million people or approximately 1 per cent of the EU's population (residing in 27 states). This is far from the balance that existed between the two blocs at the beginning of the EEA negotiations. The small size of the EFTA states clearly affects the perceived importance of the relationship for the EU and often leads to frustration on the part of the EFTA states, who feel deprived of the attention to which they believe they are entitled. Nor is their voice adequately heard, in their view, when legislative proposals of significant relevance to them are considered within the EU.[183]

This survey has provided a short overview of selected non-legal factors, mainly specific to the EFTA Court. Future research within the Effectiveness Project framework might consider the development of a twofold approach to non-legal factors as structure indicators. First to be

[180] For example, in research conducted by the World Bank which focused on empirical assessment of governance indicators in the years 1996 to 2008, the EFTA countries were in the top ten of the list for the entire period for rule of law, with Iceland and Norway often sharing the top two places: Daniel Kaufmann, Aart Kraay and Massimo Mastruzzi, 'Governance Matters VIII: Aggregate and Individual Governance Indicators for 1996–2008', World Bank Policy Research Working Paper 4978, June 2009, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1424591.

[181] Baudenbacher (n 8) 90; Baudenbacher, 'The EFTA Court Ten Years On' (n 45) 15. Political scientists have put forward theories that the impact of the Nordic *majoritarian democratic* tradition is observed in judges being reluctant to refer cases to the CJEU: see Marlene Wind, 'The Nordics, the EU and the Reluctance towards Supranational Judicial Review' (2010) 48 *Journal of Common Market Studies* 1039.

[182] Baudenbacher and Magnússon (comment by Baudenbacher) (n 66).

[183] For an example of the diminished importance of the EEA Agreement, one can look to the report from the Foreign Ministry of Iceland on the EEA Agreement (n 131) 83, in which the difficulties of getting EU Foreign Ministers to attend meetings of the EEA Council are described. The report states that EU Ministers have prioritised joint meetings with other neighbourhood countries, such as the Ukraine and Russia, during summits.

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considered would be the construction of an objective scale to measure the Court's background conditions by means of indicators such as democracy, rule of law and, possibly, the level of economic development and security in member countries. This may be followed by a qualitative assessment of the factors that affect the relevant court's potential effectiveness. Understandably, such steps would be more of interest to regional courts than to global courts as regional courts generally represent more cohesive constituencies (for example, the EFTA states, members of the East African Community, and countries belonging to the Andean Community). Still, a similar assessment might account for different usage rates and impacts of global courts on their various constituents.

6. CONCLUSION

This article has discussed the *structural* factors considered to be most relevant to an understanding of the effectiveness of the EFTA Court. It has highlighted the obvious strengths of the Court as a well-funded institution which has built upon experience gained in the sphere of EU law in an effort to optimise its effectiveness. It has also revealed how the Court's small size has had obvious impacts on its function and organisational structure. It is therefore tempting to conclude that the EFTA Court somewhat reflects the strengths and weaknesses of the EFTA states.

As explained at the beginning, *structures* are all the assets available to an organisation at its outset, at some later point in time, or on a continuing basis. These assets, which determine the operative capacity of the organisation, may be enhanced by the very outputs produced by the organisation (for example, judgments create precedents and advance, *in theory*, the relevant legal system; they therefore become part of the assets of the respective court). Accordingly, the task of future research is also to examine how the EFTA Court has utilised these assets to obtain its mandated goals. Such research may lead to the conclusion that the Court has been invested with inappropriate resources, that these could possibly have been invested elsewhere, or that other institutions have been more effective in advancing the same goals.

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