

# The EFTA Court: Providing Safe Anchorage to the Single Market

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*All views expressed are personal, and do not necessarily represent those of the EFTA Court.*

# Outline

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B. The EFTA Court

A. Composition and Procedure

B. Principles of EEA Law

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# The European Economic Area

# The EEA Agreement: an overview

## Recital 4 of the Preamble to the EEA Agreement:

‘CONSIDERING the objective of establishing a **dynamic and homogeneous** European Economic Area, based on common rules and equal conditions of competition and providing for the adequate means of enforcement including at the judicial level, and achieved on the basis of equality and reciprocity and of an overall balance of benefits, rights and obligations for the Contracting Parties’

How is this goal to be achieved?

# The EEA Legal Framework

## Goal:

- The EEA single market can only function in an undistorted way if there is a regulatory level playing field for individuals and economic operators
- “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[...] 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*.”

E-9/97, Sveinbjörnsdóttir para. 59

# The EEA Legal Framework

## Scope:

- **Provides full membership of the Single Market:** free movement of goods, services, persons, capital, competition & state aid, public procurement, intellectual property
- **Flanking and horizontal policies** – ensure that the Internal Market functions well; include budgetary matters, civil protection, company law, consumer protection, cultural affairs, education, employment & social policy, Enterprise, environment, gender equality, anti-discrimination and family policy, labour law, public health, research & innovation

# The Surveillance and Court Agreement

- EEA Agreement **did not create** the EFTA Court or the EFTA Surveillance Authority
  - However, contains an obligation for the EFTA States to enter into a separate agreement to create such institutions (Articles 108 and 109 EEA)
- Agreement of the **EFTA States** on the Establishment of a Surveillance Authority and a Court of Justice
  - Signed in Porto on 2 May 1992, together with the EEA Agreement
  - Sets up the EFTA Court and how it runs
  - Sets up the EFTA Surveillance Authority
- **Modelled on the 1994 version of the CJEU and the Commission, but with some significant differences.**

# The EFTA Surveillance Authority

- **Monitoring** and **enforcement** of the EEA Agreement
  - Same role as the European Commission
- Ensure that the EEA/EFTA States:
  - Fulfil their obligations under the EEA Agreement
    - Fully, correctly and timely transposition of the common Internal Market rules (the *acquis communautaire*)
- Role in competition, State aid and procurement law
- Working language: English



# The EFTA Court



# The EFTA Court - Role

- Binding infringement judgments – can issue fines in certain cases
- The EFTA Court uses essentially the same interpretive toolkit as the ECJ
- The EFTA Court is bound to follow relevant pre-EEA Agreement ECJ case-law (i.e. pre-1992)
- Required to ‘pay due account’ to relevant post 1992 ECJ case-law where those rules in the EU pillar are ‘identical in substance’ to those in the EFTA pillar (Art. 6 EEA and Art. 3.1 SCA)
- These are behavioural duties. If the EFTA Court goes its own way, the judgment is valid.
- Not a foreign court (same situation as ECJ and European Court of Human Rights)

# The EFTA Court – Structure and Procedure



## Structure:

- 1 Judge from each country – 2 *ad hoc* judges per country
- 3 *cabinets* consisting of a judge, legal secretaries and personal assistant
- *Cabinet* system as opposed to a pool system

## Procedure:

- **Advisory Opinions** – not *strictly* binding
- **Direct Actions** – actions for annulment (EEA/EFTA State v ESA; private operator v ESA); State aid cases, competition law cases and infringement proceedings (ESA v EEA/EFTA State)

# The EFTA Court – Principles of EEA Law

## Substantive homogeneity

- Basic rule: Court follows ECJ, as far as relevant case law is available
- However, law is not an exact science
- If new circumstances or new scientific evidence, the Court may not follow old relevant ECJ case law E-3/00 *ESA v Norway (Kellogg's)*
- Case law from the European Court of Human Rights may point in another direction E-15/10 *Posten Norge*
- The Court may take its own direction E-8/13 *Abelia*; E-5/15 *Matja Kumba*

# The EFTA Court – Principles of EEA Law

## Effect-related homogeneity

- *'Obligation de résultat'*
- **State liability** is part of EEA law - E-9/97 *Sveinbjörnsdóttir*
- **No direct effect** (Commission had pleaded in favour of direct effect), but quasi-direct effect
- **No primacy, but quasi-primacy and obligation of result** (E-3/15 *Liechtensteinische Gesellschaft fuer Umweltschutz*)
- Conform interpretation

# The EFTA Court – Distinctive Character of Case Law

## The EFTA Court has been able to develop its own profile

- EFTA Court is less jurisdictionally ‘grasping’ than ECJ
- Recognised the negative freedom of association (E-14/15 *Holship* – based itself on its own previous case law (E-8/00 *LO*) and an earlier opinion of AG Francis Jacobs in *Albany* C-67/96)
- Relationship with national supreme courts ‘*is more partner like*’ than in the EU (E-18/11 *Irish Bank*)
  - Result of legal framework and ethos
  - EFTA Court assesses the economics in cases – E-15/10 *Norway Post*, E-16/11 *Icesave* – moral hazard



# The EFTA Court – Relationship with CJEU



# The EFTA Court – Relationship with CJEU

- Article 3 of the Surveillance and Court Agreement:
  - Provisions prior to EEA-Agreement – shall be applied and interpreted in conformity with the case law of CJEU.
  - Provisions post to EEA-Agreement – EFTA Court shall ‘pay due account’ to the case law of CJEU.

HOWEVER:

No written requirement on ECJ to refer to EFTA Court jurisprudence

YET....



# The EFTA Court – Relationship with CJEU

ECJ President Skouris in 2004:

*‘Case-law on a particular issue of EU or EEA law often does not derive from one judgment only, but from a series of judgments rendered over a long period of time.’*

ECJ AG Verica Trstenjak in 2010:

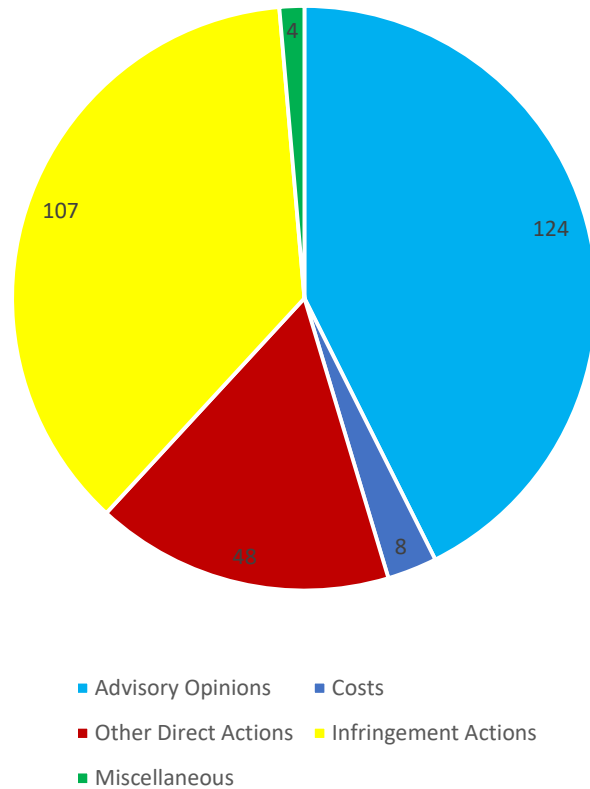
*‘**Unique judicial dialogue**’ (C-300/10 Marques Almeida)*

ECJ President Skouris in 2014:

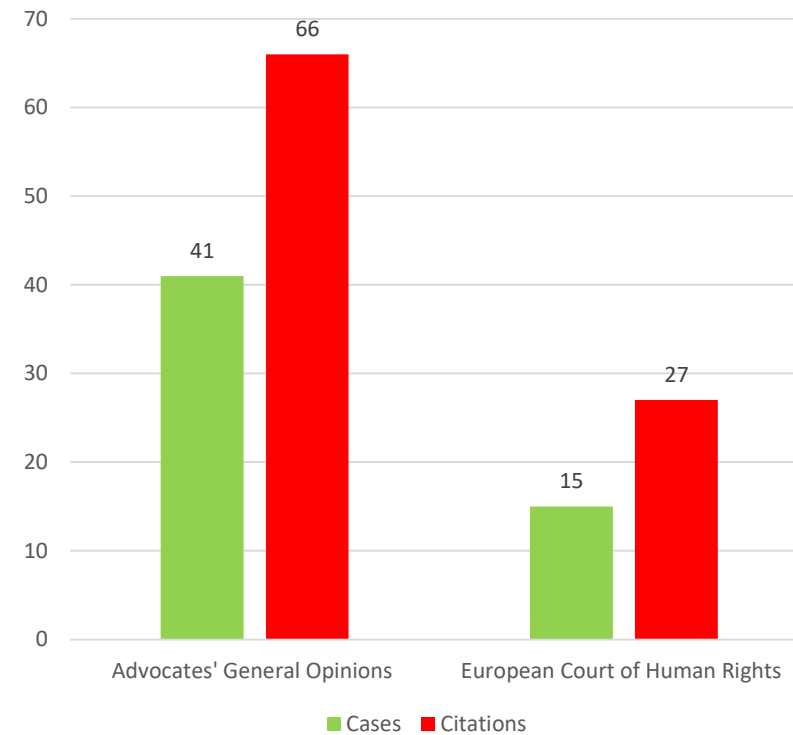
*‘The long lasting dialogue between the EFTA Court and the CJEU has allowed the **flow of information in both directions**. Ignoring EFTA Court precedents would simply be incompatible with the overriding objective of the EEA Agreement which is homogeneity.’*

# The EFTA Court – Relationship with CJEU

I. Total EFTA Court Cases: 291



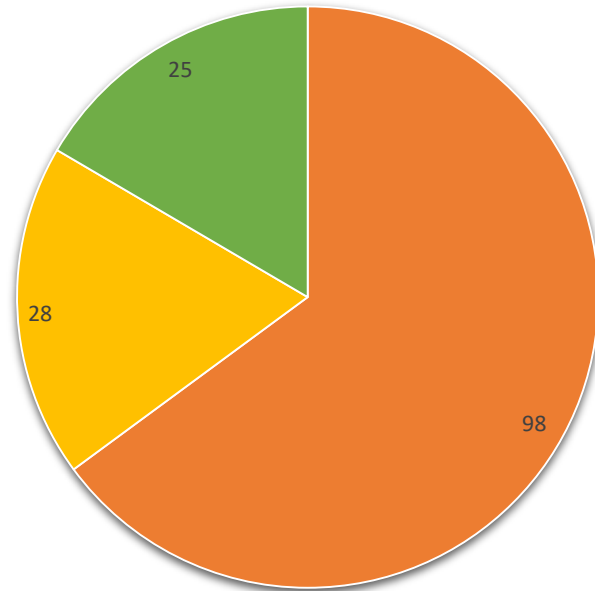
II. References by EFTA Court to AGs  
Opinions and Judgments of the European  
Court of Human Rights



Statistics (October 2017)

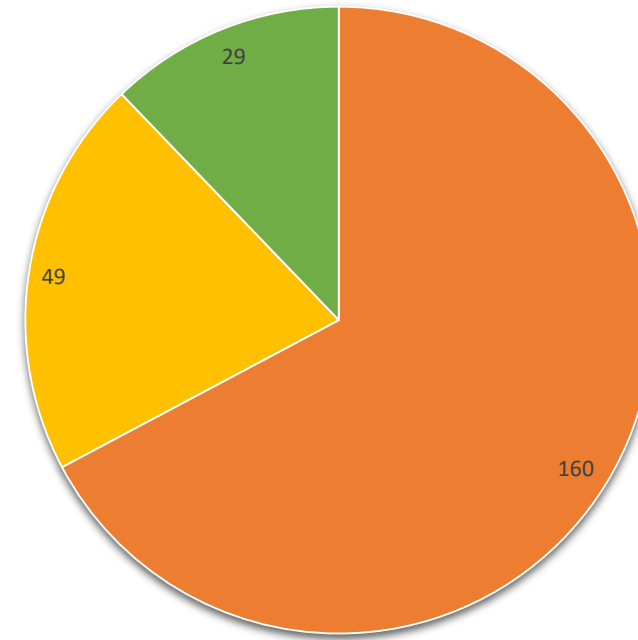
# The EFTA Court – Relationship with CJEU

III. Cases referring to EFTA Court case law: 151



Advocates General Court of Justice General Court

IV. Citations of EFTA Court case law: 238



Advocates General Court of Justice General Court

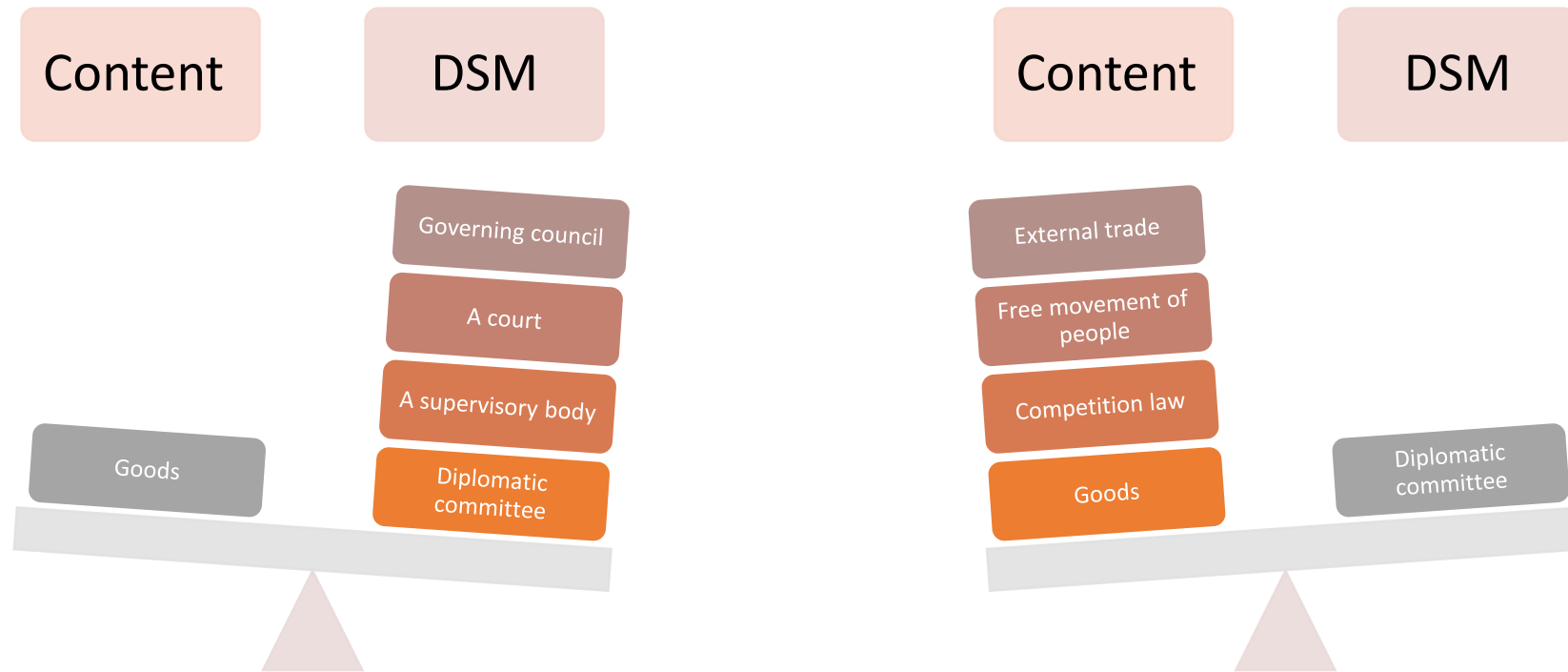
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# The EFTA Court – Relationship with CJEU

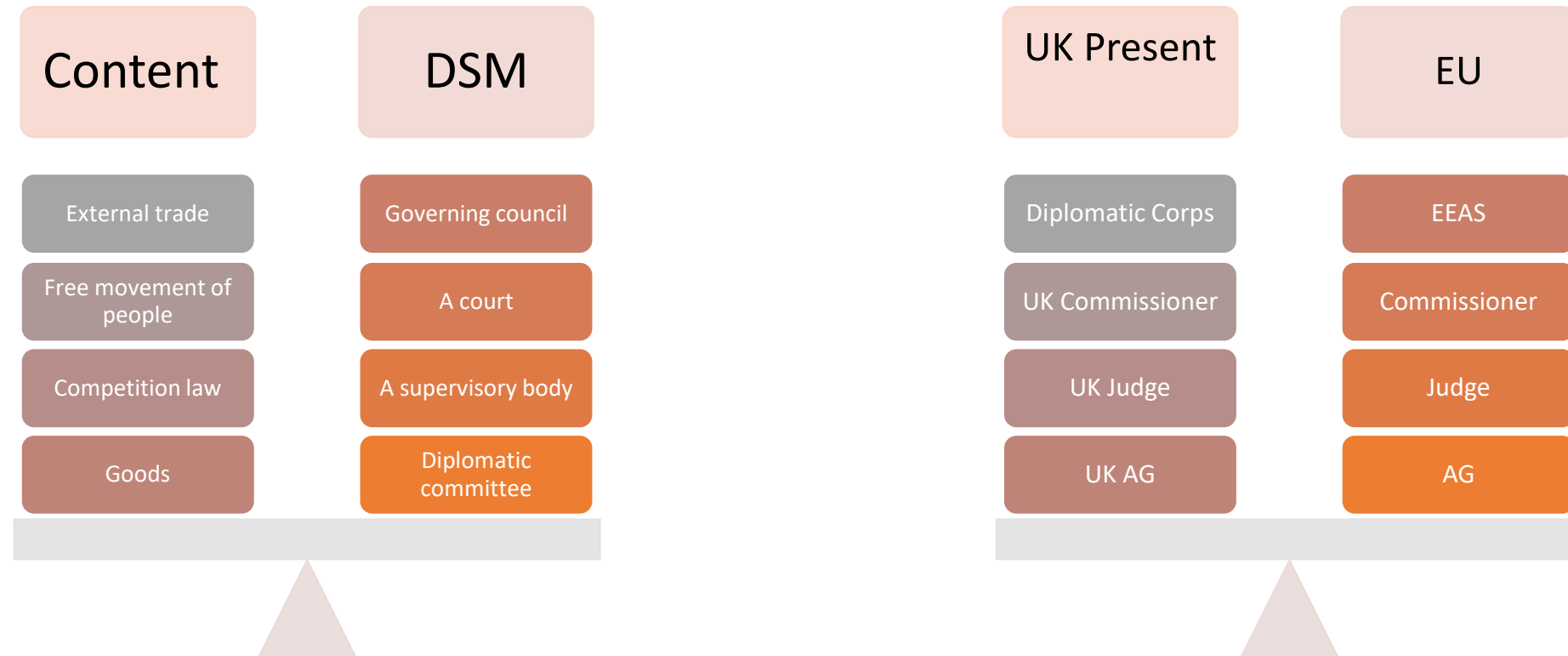
- From a common law perspective, judicial dialogue between the ECJ and EFTA Court is a 'regional' example of the dialogue between common law supreme courts (where the jurisprudence *is persuasive, but not binding*).
- Extensive reasoning facilitates the exchange of ideas

# Future Dispute Settlement for Switzerland and the UK

# Dispute Settlement: General



# Dispute Settlement: The Present (UK)



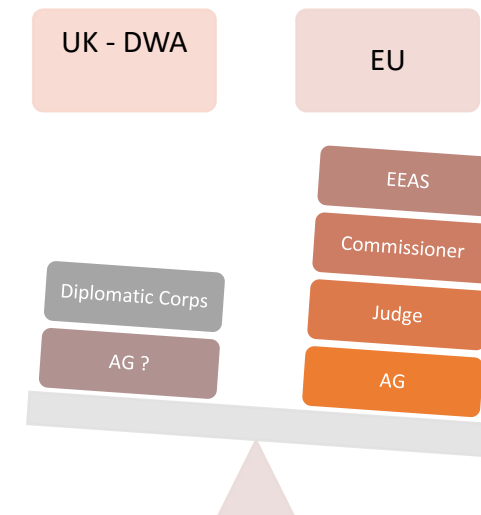
# Dispute Settlement: The Present (UK)

- Individuals and companies can **directly enforce** their rights under EU law.
- EU's **institutional architecture** to deal with infringements of EU law is robust and effective.
- *'I would like to emphasise once more that the European Union has exceeded all the international instruments in its **systematic and efficient enforcement of rights**.'* - AG Szpunar, Tygodnik Powszechni, November 2017



# Dispute Settlement: Draft Withdrawal Agreement

- Draft Withdrawal Agreement currently sets:
- CJEU will issue binding (Article 85 DWA):
  - Preliminary references - **2 years** (Article 83(2) DWA)
  - Infringement cases - **2 years** (Article 83(1) DWA)
  - Preliminary references concerning Citizens' Rights - **8 years** (Article 151 DWA)
- However, UK shall **not** '*participate in the decision-making*' or attend '*the meetings of the institutions*' (Art. 6(1) DWA):
  - No UK judge on the ECJ bench.
  - Advocate General?
  - No Commissioner
  - No member of the Court of Auditors



# Dispute Settlement: The White Paper

- UK White Paper ‘**Chequers**’ – favours **Ukraine-style** arbitration

## EU-Ukraine Association Agreement Dispute Settlement:

### Article 306 Initiation of the arbitration procedure:

1. Where the Parties have failed to resolve the dispute by recourse to consultations [...], the **complaining Party may request the establishment of an arbitration panel**.

### Article 321 Arbitration panel decisions and rulings:

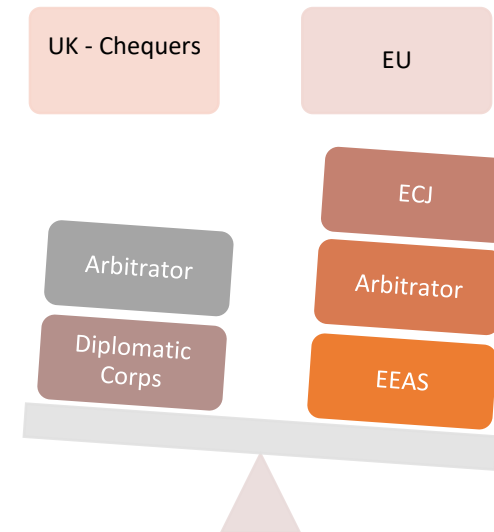
1. The arbitration panel shall make every effort to take any decision by consensus. Where, nevertheless, a decision cannot be arrived at by consensus, the matter at issue shall be decided by majority vote. However, in **no case dissenting opinions** of arbitrators **shall be published**.
2. Any **ruling of the arbitration panel shall be binding** on the Parties **and shall not create any rights or obligations for natural or legal persons**.

# Dispute Settlement: The White Paper

## EU-Ukraine Association Agreement Dispute Settlement:

Article 322(2) EU-Ukraine Association Agreement:

2. Where a dispute raises a question of **interpretation of a provision of EU law** referred to in paragraph 1, **the arbitration panel shall not decide the question**, but **request the [CJEU] to give a ruling** on the question. [...] The **ruling** of the [CJEU] **shall be binding** on the arbitration panel.



# Dispute Settlement – Alternatives to Docking

## Comprehensive Economic and Trade Agreement ('CETA'):

- EU-Canada **bilateral 'arbitral court'**
- Dispute settlement under CETA may be problematic due to the autonomy of EU legal order (Opinion 1/17, forthcoming early 2019)

# Dispute Settlement: Switzerland's Situation

## Switzerland:

- Approx. 120 existing Swiss-EU sectoral agreements. Dispute resolution currently managed by **approximately 20 diplomatic joint committees** (excluding the air transport agreement)
- EU views this as deficient since 2008
- **EU first proposed docking** to Switzerland in 2013:
  - Either join the EEA on the EFTA side or 'dock' to the EFTA pillar's institutions (ESA + EFTA Court)
  - In either situation, Switzerland would have the right to nominate an ESA College Member and an EFTA Court Judge
- Switzerland currently favours Ukraine-style arbitration

# Dispute Settlement: Docking

- Content + DSM of international trade agreements are equally important
  - DSM '*second most difficult point after Ireland*' (Michel Barnier, July 2018)
  - If Single Market, **a court of law** is needed
  - A two pillar solution – DSM analogous to EEA, but docked to EFTA institutions
  - Having one's own 'voice' represented at both ESA and EFTA Court
  - Competence to apply specific EU-UK/EU-Switzerland agreements
- 
- Existing example of docking – the **Caribbean Court of Justice**

# Docking – A Viable Mechanism

## United Kingdom:

- Michel Barnier's Internal preparatory discussions on framework for future relationship (February 2018):

### **VI. Analysis of the "EEA-docking" idea**

- Basic assumption: UK not to accede to the EEA
- The "EEA-docking" idea: description
- "EEA-docking" idea for future relations: legal, institutional, political issues

# Docking – A Viable Mechanism

- Former President Carl Baudenbacher's evidence to House of Lords and House of Commons - possibility of two UK judges on the EFTA bench
- 'Docking' debated by the House of Lords – 17<sup>th</sup> October 2018
- UK White Paper 'Chequers' – favours Ukraine-style arbitration

How would 'docking' work?

1) **The UK transitions to become an EFTA/EEA State** – EFTA Court given jurisdiction to hear cases both under the EEA Agreement and the EU-UK Treaty covering requisite additional law

2) **UK seeks a bilateral relationship with the EU** – would also be a two-pillar agreement with supervision and enforcement of the agreement within the UK being 'docked' to ESA and EFTA Court (+ UK members)

Were questions to arise in EU Member States, they would be supervised by the European Commission and heard by the CJEU



# Dispute Settlement: A Comparison

	Can individuals + companies access an European Court?	European Supervisory Body	UK Judge	UK Advocate General	CJEU Jurisdiction
Present	✓ (CJEU)	✓ (Commission)	✓ (CJEU + GC)	✓	✓
Withdrawal Agreement	✓ (CJEU)	✓ (Commission)	✗	??	✓  2 years (full jurisdiction) / 8 years (Citizens' Rights)
White Paper	✗ (state-to-state arbitration)	✗	✗	✗	✓ (via arbitration panel)
<i>Docking to EFTA Court</i>	✓	✓ (ESA + UK member)	✓ (possibly 2)	✗ (n/a)	✗

# Docking – Potential Benefits

## As an EFTA-EEA State:

- EEA is the Single Market without the federalist ambition
- **Revisions to the EEA** may be achievable

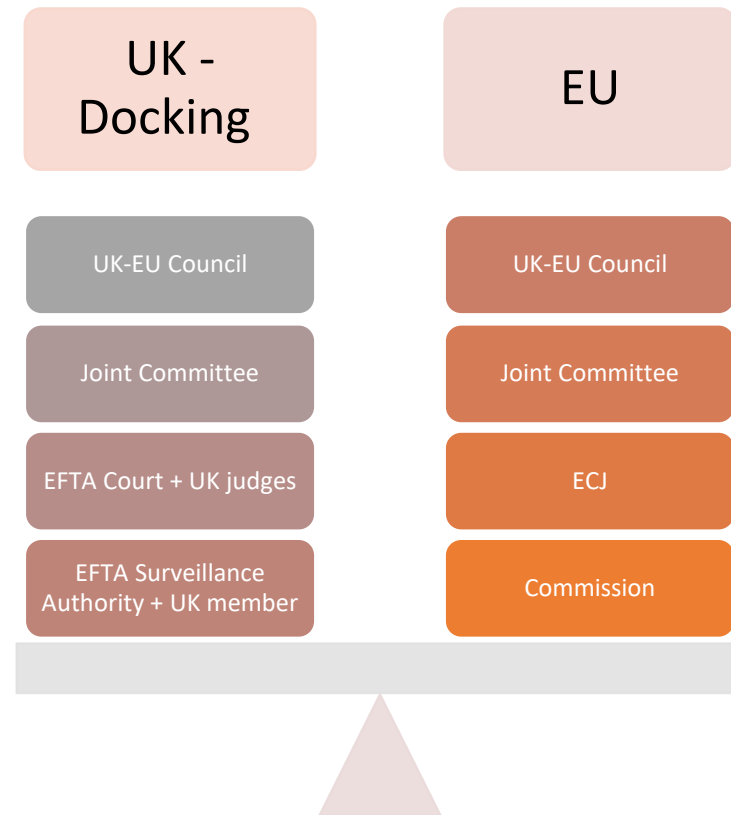
## Docking is a feasible framework to resolve disputes beyond the EEA:

- The EFTA Court is a **mature judicial institution**
- The two pillar structure works well in Europe

## Avoids Ukraine-style arbitration problems:

- Avoids private parties from needing government patronage
- Arbitral panel is **tightly bound** to the CJEU – **more so** than **EU MS supreme courts**  
( – also more so than Turkey-EU DSM)

# Docking – Potential Benefits



# Concluding Remarks

*Thank you for your attention.*

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