The Alternative Report

Alternatives

To The Current EEA Agreement

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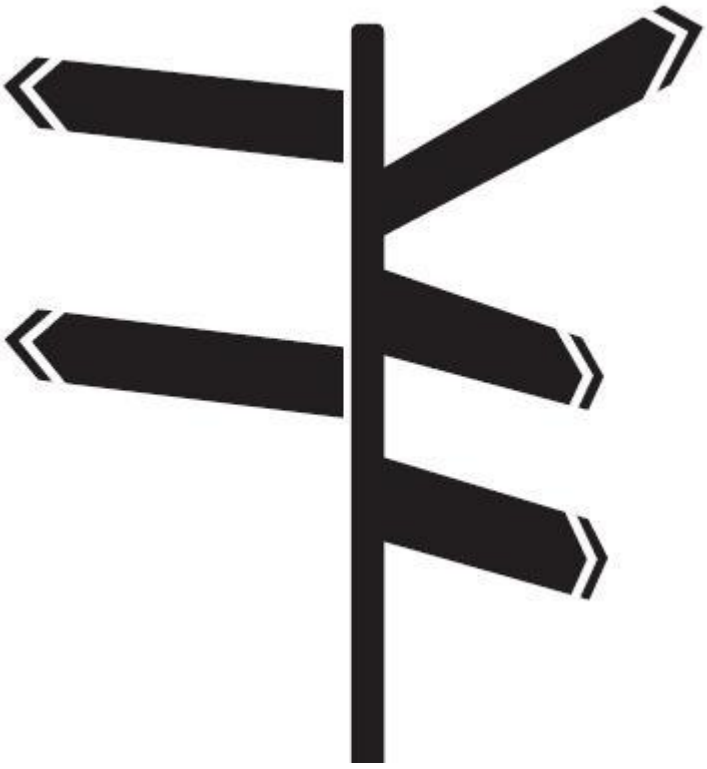

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Steering committee for the Project - Alternatives to the Current EEA Agreement, in front from left: Dag Odnes, The Norwegian United Federation of Trade Unions; Kathrine Kleveland, The Norwegian Country Women;;s Association; Tale Marte Dæhlen, project assistant; Heidi Larsen, The Norwegian Labour Union – Fredrikstad; Jonas E. Wenberg, Youth Against the EU; Harald Velsand, The Farmers' Union. Back row from left: Arne Hansen, Norwegian Labour Union in Fredrikstad, Helene Bank, For the Welfare State; Heming Olaussen, No to the EU, Jan Tore Strandås, The Norwegian Union of Municipal and General Employees; Stein Gulbrandsen, Norwegian Union of Municipal and General Employees; Sigbjørn Gjelsvik, project manager, Roy Pedersen, The Norwegian Labour Union - Oslo, Inge Staldvik, Small Holders;; Union. The picture was taken on the occasion of a meeting of the steering committee, December 12, 2011. Jan Olav Andersen, project chairman, was not present when the picture was taken.

Foreword

Based on an initiative of The Norwegian Union of Municipal and General Employees, Electricians and IT Workers Union and No to the EU, the project Alternatives to the Current EEA Agreement was established in February 2011, after a preliminary project in Autumn 2010, with a number of organizations and associations as participants. The project has also been open to new entrants along the way. In addition to the initiators, the following are affiliated with the project: The Norwegian United Federation of Trade Unions, The Norwegian Union of Social Educators and Social Workers, For the Welfare State, The Norwegian Labour Union – Fredrikstad, Kristiansand region, Oslo, and Trondheim,, Nature and Youth, The Norwegian Farmers' Union, The Norwegian Country Women;;s Association, The Norwegian Farmers' and Smallholders' Unions and Youth Against the EU. The project;;s steering committee is comprised of representatives of the affiliated organizations but participants in the project have joined at different times and therefore have had a part in varying degrees in laying the framework for the preparation of the report.

Among the organizations, associations and Labour Union branches affiliated with the project, there are different assessments of the EEA Agreement;;s importance and consequences for Norway. Across the different attitudes towards the EEA, we have joined forces in a joint project recognizing that the study of alternatives to the current EEA agreement is an important part of the EEA debate in Norway, and whose main purpose such alternatives to the public debate.

This report from the project *Alternatives to the current EEA Agreement* is a contribution to a debate about the choices Norway can take in the future in our relations with the EU. It seeks to shed light on what problems there are with the current EEA Agreement; and possible alternative approaches.

Although the Foreign minister gave Europe study instructions not to consider alternatives, we took his words in context with the presentation of the Europe study;;s report at the Literature House on January 17th 2012: "*As Foreign Minister, I welcome a a debate about alternatives. It is part of the right and responsibility of the democratic exchange of ideas to hold debates [...] so that the Democratic Norway should have the debate, it's a very good thing and I believe it is a prerequisite for democracy.* "

We are taking up the debate and therefore submit this Alternative Report. The preparation of the report was led by the project committee consisting of Jan Olav Andersen (Electricians and IT Workers Union), Stein Gulbrandsen / Jan Tore Strandås (The Norwegian United Federation of Trade Unions) and Heming Olaussen (No to the EU), in collaboration with the project. The project's affiliated organizations, associations and labour union branches did not have a hand in the report;s preparation.

As part of the report;s preparation the project commissioned an external study from the researcher Peter Ørebech University of Tromsø on "Community, fish, customs and alternatives to the EEA." In addition, the project commissioned an external memo from Stein Stugu of the De Facto Knowledge Centre for unions "The Labour Unions;; 15 requirements for the EEA – how did that work out? ". Both of these documents follow as a unprinted appendix to this report and key elements are summarized and presented in the report. The project management would also like to acknowledge the useful contribution to the report of the project researcher Tale Dæhlen M., as well as Lave K. Broch, Hildegunn Gjengedal, Morten Harper, Dag Seierstad and all others who have contributed their input during the process. We hope this will contribute to increased knowledge-based debate on alternatives to the current EEA agreement, both within our own organizations, associations and branches, as well as in the public debate in general.

Oslo, March 9th, 2012

Jan Olav Andersen /s/
Steering Committee Chairman

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Part I:

Right to the point

What are the alternatives to the current EEA agreement and why is it of interest to discuss them further? In this section of the report we present a summary of eight different main alternatives that the project has identified.

Furthermore, a review was made of the background of the project -Alternatives to the Current EEA Agreement, who we are and our goals, and why it is more relevant than ever to explore and discuss alternatives to the EEA.

The debate on alternatives to the EEA is more relevant than ever. Eight main alternatives - both inside and outside the current EEA agreement - will be discussed in the report.

Chapter 1
Which Alternatives – and why?

1.1. Purpose, content and depiction

There are many alternatives to the current EEA agreement. Throughout this report the main alternatives that we have identified in our work on the project have been highlighted. These are alternatives ranging from not having a separate trade agreement with the EU, through variations of bilateral and regional trade agreements to compensate for the EEA, then variations of the EEA by which the agreement plays a lesser role than it does today through renegotiation or through the flexibility in the agreement being far better utilised, to alternatives that involve deeper cooperation with the EU than in the current EEA agreement.

It is not the project's goal to assess which alternative(s) would be the most appropriate for Norway or what, if any, should be selected. The order of the alternatives in the report is not related to any existing preference but is an attempt to set up a logical sequence, in which the alternatives involving the deepest cooperation are presented first.

The EEA Review Committee has for example quite extensively highlighted all of Norway's affiliations to the EU which currently comprise over 70 different agreements. It is outside the project's mandate to conduct an assessment of all these agreements, whether they are appropriate, and whether they should be changed or in some areas done away with. The project's objective was to investigate and discuss alternatives to the current EEA agreement. The discussions in this report are therefore limited to the areas of cooperation with the EU which include or are closely related to the scope of the current EEA agreement. Other aspects of Norway's relations with the EU is only briefly mentioned and discussed to the extent that it is relevant in a discussion of the current EEA agreement.

1.2. EU membership

The alternative that has given rise to the most debate is the membership in the EU, and this has been thoroughly discussed and explored by many different players. Partly for these reasons, the project has chosen not to undertake a wide-ranging presentation, analysis or evaluation of this alternative. The most unanimous and comprehensive criticism of the EEA stems from the profound consequences for democracy in Norway. These problems can be remedied with representation and the right to vote in the bodies where decisions are made for the EU and EEA. EU membership will lead to less independence in a number of areas where Norway is not currently subject to EU policies. The alternative is discussed in Chapter 8 of this report.

1.3. The EU alternative

EEA cooperation consists of two parties. When the one party, the EU, signals that it envisages a new and more comprehensive agreement in the future, there is reason to take this seriously. When the European study specifies and discusses this alternative, the authors have entered a debate about alternatives they have been instructed to keep away from. Secondly, they have placed on the table a specific alternative that the government, parliament and other actors in the public debate in Norway must deal with.

When the European study first went beyond its instructions and discussed alternative ways to organise cooperation, it proved to be quite inadequate as it did not lay out any of various solutions as the basis for real discussion. Indeed, the EEA agreement is assessed against the EU-Norway bilateral trade agreement from 1973, or "*another looser form of bilateral agreement structure with the EU"* [1] in a number of places in the European study, but it lacks a complete review of what is in the alternatives. Their assessment of the EEA as the best option appears as a predetermined policy that was not done with research-based materials or methodology.

The EEA Review Committee discusses a comprehensive framework for all of Norway's agreements with the EU and considers it to mean that:

"*The simplest thing would probably be a form of an extended EEA agreement which also covers the other areas where Norway has agreements, and strengthens the political level at the top. However, other models are also possible [...] one*

1 See NOU 2012:2, page 358 (majority of the Committee): "... and thus Norwegian economic actors are given a far more secure and predictable environment than the oldThe EU-Norway bilateral trade agreement from 1973 the EU-Norway bilateral trade agreement from 1973 or another looser, bilateral form of agreement framework with the EU would have given. "

could consider additional areas where EU cooperation should be included "[2]

An alternative that involves a comprehensive framework around Norway's agreements with the EU, where the EFTA Surveillance Authority (ESA) and the EFTA Court and the agreement's other dynamics are maintained and made to apply in new areas, would involve a dramatic change in Norway's contractual relationship with the EU. In practice this would call for a completely new agreement with the EU, by which democratic issues with the EEA would be amplified and would affect more areas of Norwegian policy, which would be difficult to argue in favour of - unless you intend to use it as a springboard for EU membership. This option is discussed in more detail in Chapter 9 of this report.

1.4. Starting point: More national freedom in trade and less control from the EU

Over time, the EEA has been increasingly extended, and now is involved in areas that the parliamentary majority implied that it would not touch.[3] Key elements in Norwegian regional policy, petroleum policy, management of natural resources, alcohol policy, and in recent years, rights and measures to prevent social dumping, have in turn been challenged by the EFTA Surveillance Authority (ESA) and the EFTA Court.

Quite a lot believe that the EU have too much much power in Norway.[4] At the same time, other polls show great support for a trade agreement as an alternative to the current EEA agreement. However, very few people want EU membership as an alternative to the current EEA agreement. What specific content those who support the trade agreement envisage will certainly vary, but it is fairly obvious that the common denominator for those who would like to replace the EEA with a trade agreement is the perception that the EEA has become too extensive and that an alternative is desired that will provide to a greater extent the ability to carry out an independent national policy. We want this report to help to illuminate, clarify and discuss these alternatives, and the main focus of this report will be on alternatives that point in this direction. These are summarised below. A comprehensive description, analysis and assessment are in Chapters 10 and 11 of the report.

1.5. Inside or outside the EEA – an important difference

The report discusses both alternatives which would further build on the EEA in one or another form and alternatives that involve replacing the EEA with another affiliation to the EU. The most important difference between these two groups of alternatives is that the alternatives based on the EEA will involve building on the institutions and frameworks of the EEA, including the agreement's dynamics with new directives and negotiations aimed at further liberalization and interpretation of the agreement. Within this framework it will be possible to either renegotiate the EEA agreement, for example by removing subjects from the agreement, or by taking advantage of the flexibility that the agreement would provide to a much greater extent than is currently the case.

The other main group of options involves replacing the EEA with a bilateral or regional trade (and cooperation) agreement with the EU – based possibly exclusively on multilateral trade regulations that would set comprehensive common rules internationally. It is common in international trade to supplement multilateral rules with bilateral or regional trade agreements, with clearly define content and where changes in agreements are resolved politically through negotiations between the parties. The report specifies three different alternatives based on such trade cooperation with the EU.

1.6. Alternatives within the EEA

1.6.1. Exploiting the flexibility

When evaluating the effects of an agreement, it is important to assess the agreement's terms, the cooperation framework determined and how this directly and indirectly contributes to changing Norwegian policy. Secondly, it is important to examine the extent to which the flexibility that agreement provides is used and whether Norwegian interests will be sufficiently maintained. How much better could the current agreement have been if the flexibility had been fully utilised?

The project has identified a number of areas where Norway could have done more to exploit – and It is partly an active national strategy, both in and against the EEA institutions - but also in other international forums in which Norway has full initiative and voting rights. It will be important to set clear limits for the EEA - in line with the provisions of 1992, to reject EEA changes which involve increased jurisdiction for the courts of the ESA and the EFTA, and assess changes in cooperation pursuant to Article 118 which makes the agreement less unilaterally market oriented.

Both in terms of new legislation and in the interpretation of the regulations, it will be important to be active in the early phases - political and strategically, and to implement active and targeted national policies to increase the flexibility, to bring about increased transparency in the management and to enable Parliament's control function in European policy. In terms of the new regulations all lawsuits that are not relevant to the EEA should be rejected, while working

2 NOU 2:2012, page 870

3 See more about this in Chapter 3
4 Nationen, 06.02.2012.

actively for special national arrangements and exceptions by utilizing the flexibility in the implementation and using the right of reservation actively. This option is further specified and discussed in Chapter 10.2. [5] Individual proposals are not considered an alternative to the current EEA agreement, but taken as a whole the proposals provide for a completely new way to organise and carry out our relationship with the EU. The alternative also requires that the government and the parliamentary majority take the initiative to study alternatives to the current EEA agreement, as part of political readiness and to demonstrate that there are alternatives that Norway can activate if future developments in the EEA require it.

1.6.2. A leaner EEA

In the same way as the EU seeks to safeguard their best interests within the framework of the agreement; Norway should systematically and strategically do the same. When the EU proposes considering new and far more extensive cooperation, which in practice would mean an entirely new agreement, it would most definitely require new initiatives on the part of Norway. A proposal for "A leaner EEA" whereby the agreement is changed, for instance, by removing areas of cooperation to which the agreement was not to apply and areas that have caused significant problems for Norway, could be such an initiative. An element of this would be to provide the EEA agreement with a cooling-off period, which would make it possible to opt out of a directive when we see how it actually works.

An important goal of a slimmer EEA would be to regain national control in key policy areas. Regional policy should be formulated regardless of EU legislation, so that Norway is be able to make its own decisions regarding district policy measures like differentiated employer contributions. Norway also needs to be able to restrict free capital flow in crisis situations like Iceland did on its own initiative, to be able to protect individual service sectors from the EU's liberalization policies - such as removing collective regulations and the rules for transport of goods from the EEA, and having full sovereignty over the licensing regulations as long they do not discriminate against foreigners.

The EEA rules should be further amended so that, for example the EEA cannot set aside Norwegian collective agreements through its own binding protocols and declarations that ensure the anti-contracting clause, so that the ESA and the EFTA Court cannot intervene in decisions concerning general application, so that the Norway's directives for the posting of workers can be carried out independently of EU court's interpretation, and so that Norway can sustain the demand for wages in accordance with the collective agreements for construction projects for public agencies. The EU/EEA should not be able to determine which projects municipalities can make tender offers for and what the municipality can carry out with their own employees. It will also be essential to have the right to impose stricter environmental, health and safety requirements for chemicals and stricter requirements for food products than the EU does, as well as to add a new framework for trade in agricultural products, based on real reciprocity.

The right venue to draw attention to these discussion points as outlined above in the EEA, is the EEA Council, which among other things "*is to consider how the agreement works as a whole and is developed. It is to make the political decisions leading to changes in the agreement ... [The Agreement Parties may] bring up any issue at the EEA council which are giving rise to difficulties.*"[6] The Council's decisions are to be in agreement with the EU on the one hand and the EFTA countries on the other.[7] If there is a question of removing a subject from the cooperation, or of changing main parts of the EEA agreement,

5 You will find many of the discussion points in Chapter 4

6 EEA, Article 89

7 EEA, Article 90, paragraph 2

the natural procedure would likely be based on the procedures provided for in Article 118. Specifically, is it provides for the initiation of a political process that becomes a part of new agreements to be ratified or approved by the agreement parties in accordance with the regulations of that individual country.[8]

A renegotiation of the EEA agreement would also affect our EFTA partners in the EEA. Firstly, a "slimming" of cooperation would also involve the EFTA countries in the EEA, unless otherwise agreed upon bilaterally or within the EFTA. It would also be natural that Iceland and Liechtenstein would be given the same opportunity to remove from the cooperation, rules that had been approved earlier in areas that turned out to be particularly problematic. In this way, the EEA cooperation would develop in a more differentiated manner, with a greater degree of different commitments for different countries.

The fact that Norway is negotiating new exceptions should not be problematic. Iceland and Liechtenstein have exemptions from the EEA-cooperation in many areas - and in many more areas than Norway. [9] Some exceptions that Norway may desire may involve areas where the other EFTA countries already have exceptions or operate on their own with different rules than what the EEA permit. The restrictions on the free flow of capital which Iceland introduced after the financial crisis is an example of the latter.

Norway has exercised flexibility towards our EFTA partners, including the question of membership dues, and it is not unreasonable that Iceland and Liechtenstein would contribute in a positive and supportive way in a process of changing the EEA. If the changes occur in the form of binding protocols and statements relating only to Norway, the other EFTA countries would not necessarily be closely involved in the process. If however, it is a question of significant changes to the main part of the EEA agreement, or of removing significant aspects of cooperation from the agreement, and the other EFTA countries do not want such changes in the EEA, it would probably be more appropriate for Norway to replace the EEA with another form of bilateral cooperation with the EU on its own. In sections 11.2. and 11.3. two different variants of such agreements are discussed.

8 EEA agreement, Article 118

9 See section 4.3.3.

The EU will likely react negatively at first to Norwegian attempts to negotiate a reduction of the EEA agreement, or to not envisage any further deepening of cooperation.[10]

As long as we maintain that there is no alternative for Norway if it terminates the EEA agreement, we will have no bargaining position vis-à-vis the EU. In order to negotiate with the EU for adding limits to the EEA agreement, we first need to make it credible that the withdrawing from EEA could be a real alternative for Norway.

The alternative “A slimmer EEA” is specified and discussed in Section 10.3.

1.7. Options outside the EEA

1.7.1. Multilateral trade regulations

In the same way as the EEA, the EU-Norway bilateral trade agreement of 1973 may also be terminated by either party. In that case, at least for a period of time, there could exist the situation where Norway has no bilateral or regional trade agreement with the EU, and would have to rely on general trade rules that exist internationally. The rules of the World Trade Organization (WTO) are the most fundamental.

This discussion is also important because the EFTA countries could find themselves in a situation where the EEA regulations are suspended in individual areas, for example, as a result of the use of the reservation clause. Unless these conditions are governed by previous regulations between the parties that one can fall back on, for example, the provisions from the EU-Norway bilateral Trade Agreement of 1973, it will be important to have an overview of the international rules applicable to the area in question. The WTO rules would also set up a framework for the design of a trade agreement with the EU and for changes of the EEA.

The WTO provide comprehensive regulations in many of the areas with which the EEA deals, and that the EU-Norway bilateral 1973 trade agreement does not cover. In certain areas Norway has agreements through the WHO that are nearly identical to the EEA, such as the recently revised Agreement on Government Procurements.[11] In other areas of WTO cooperation, such as trade in services, the difference with the EEA is considerably larger, and allows for Norway to regain national control in areas such as the import of alcohol, -

10 See further discussion in Chapter 9
11 See further discussion of this Agreement in Section 11.1.6.6.

ownership limitations in the financial industry, labour hiring and license conditions - for example, to reintroduce the Petroleum Act's previous requirements on management and field development bases in Norway.

Regarding industrial goods, international cuts in customs fees have come a long way. The average tariffs are currently approx. 3.5 percent - which is 40 percent lower than when the EEA agreement was entered into. Should the EU in the unlikely case terminate the EU-Norway bilateral trade agreement from 1973 (which ensures full duty-free access to the EU market for all industrial products), such duties would still be limited. The specific duties that Norway could face from the EU have been established by the EU binding commitments in the WTO, but Norway, according to the WTO most favoured nation (MFN) principle would not be faced with higher tariffs than those the EU uses against other countries that are not in the union, or countries with which the EU have extensive trade agreements (such as the EEA). According to the WTO principle of national treatment (NT), neither can the EU, in the areas they have binding commitments, favour its own businesses at the expense of businesses from Norway and other WTO countries.

In the fishing sector the difference between Norway's real tariff burden to the EU market and customs is based on the best country principle of the WTO (MFN duty) calculated to be about 6-7 percent. Custom tariffs to the EU market of this size will not have an effect on export volume and value. This is because there are other factors affecting which markets are selected and the market share we manage to achieve in these markets.[12]

The WTO has brought about significant weakening in Norwegian tariff protection on agricultural products, and any new agreement in this field can further accelerate this trend. The commitments under the EEA agreement's Article 19 and Protocol 3, however, take precedence over this, and have contributed to imports from the EU growing considerably over the last decade. For agricultural goods and trade of processed agricultural products it would have turned out positive if Norway had replaced the EEA and only relied on WTO trade commitments with the EU.

A fundamental difference between the EEA and the WTO is that the WTO essentially deals with disputes between countries, while the EEA includes an investor-state dispute settlement that is actively used by Norwegian actors as a lever for changing Norwegian policies. The WTO solution is therefore more manageable - because states often have a certain diplomatic respect for legitimate policy instruments. Norway has also used the WTO dispute settlement mechanism with the EU - and won, as we did in the Salmon case. This option is specified and discussed in Section 11.1.

12 See the elaboration of this in the discussion about The EU-Norway bilateral trade agreement from 1973 , in ____ and in Section 7.4.

1.7.2. Out of the EEA with a future-oriented trade agreement

Norway signed a bilateral trade agreement with the then EC in 1973 that ensured full duty-free access to the EU market for all industrial goods. This is still a current agreement, which today includes regulating the conditions of the fish trade, which may again be used in its totality if the EEA agreement is terminated. The EEA agreement may be terminated with one year's notice if a majority in Parliament votes for it. If the EEA agreement is terminated, it states in Article 120 that trade between the EU and Norway will be regulated by former agreements.

The framework for the discussion of such an agreement would be totally different in 2012 than when Norway discussed the then trade agreement with the EU measured against the EEA in the early 1990's. As shown above the WTO are comprised of comprehensive regulations in many of the areas that the EEA deals with, and which the EU-Norway bilateral trade agreement of 1973 did not cover. In some areas Norway has through the WTO entered into agreements which are nearly identical to those of the EEA, such as the recently revised Agreement on Government Purchasing.[13] In addition, Norway in the period after 1992 negotiated a number of bilateral agreements with the EU in various sectors, and Norway has today (besides the EEA) a total of 73 agreements with the EU.[14] All those agreements would still be valid and could be further developed regardless of what happens to the EEA. To state that Norway's situation, by replacing the EEA with a trade agreement would mean a return to the situation in the 1980s, is pure fantasy.

In two areas the trade agreement had disadvantages in relation to the EEA agreement.

13 See further discussion of this Agreement in Section 11.1.6.6.
14 Retrieved from the Foreign Ministry's treaty database and reproduced in NOU 2012:2, Appendix 1, page 878.

Firstly our exports of processed fish products throughout the EEA faced lower tariffs than under the trade agreement. Secondly, the EU cannot use the anti-dumping weapon against Norwegian industry under the EEA. This was possible under the trade agreement. These advantages of the EEA agreement are relatively modest. In a report of the Alternative project from the autumn of 2011 the manager of research at the Norwegian College of Fishery Science, Peter Ørebech, calculated that the difference between the current tariff burden, and what we would be at risk of in the outside chance of having to go back to Trade Agreement, would constitute just 1.8 percentage points of the export value.[15] Ørebech has further documented that such a level at EU customs would not have an impact on how many fish would be sold to the EU market. On the contrary, it is shown in the market report that if Norway were faced with a substantially higher tariff burden than this it would still have stable export growth. The anti-dumping weapon has also become less relevant over time. The Norwegian business support has been changed,
Norwegian companies must increasingly pay the market price for electricity, and the WTO has far more stringent anti-dumping measures than the EU imposed in the 1980's.[16]

The EEA agreement in principle gave the food industry certain benefits in trade agreement. On the one hand the agreement would protect the Norwegian companies that process agricultural products from being out-competed by imports from the EU, while in relation to the trade agreement it provided lower toll rates for processing companies which export fish to the EU. This picture has changed. Through several rounds of negotiations between Norway and the EU, agricultural trade has been further liberalised. In practice, there has been an extensive increase in imports from the EU to Norway, while exports have remained steady.[17] For most service industries it is difficult to prove that they have gained more than they have lost at home as a result of the EEA, and the EU has in recent years had a net export of services to Norway. This option is specified and discussed
in Section 11.2.

1.7.3. Out of the EEA with a bilateral trade and cooperation agreement

It is possible to achieve a comprehensive framework around Norway's agreements with the EU - without the need of closer integration to the EU, which both the EU and The EEA Review Committee seem to assume. One must then remove the peculiarities that characterise the EEA agreement, e.g., the ESA and the EFTA Court and the provisions which mean that all relevant regulations the EU adopt come to Norway on a conveyor belt. In this case, one could establish a bilateral trade and cooperation agreement with the EU, which include the agreements with the EU that one would like to continue, with a scope and content that may be acceptable to both parties and where changes in cooperation are done through negotiations between the parties. The EU has signed over 200 trade agreements internationally, [18] that are almost all bilateral, and which are not normally framework agreements for the introduction of new regulations like the EEA agreement is. The EU has also signed bilateral agreements concerning other types of cooperation, such as participating in research programs. The country with the most comprehensive bilateral agreement cooperation with the EU is Switzerland. The EU's initiative that one wants to change Switzerland's agreements into a more automated EEA arrangement does not mean that the EU has ruled out new bilateral agreements. The initiative is first and primarily intended to open negotiations with Switzerland, and the EU also intends to push for increased transparency in Swiss banking. The EU has ongoing negotiations on bilateral trade agreements with, among others India, Canada and Egypt, all of which are less important trading partners for the Union than Norway is.

A natural starting point for a new bilateral trade and cooperation agreement with the EU is that the other existing agreements will continue when the EEA agreement is terminated. The bilateral agreement must apply to clearly defined areas and be of a purely public law character. Cooperation areas it may be appropriate to negotiate for would be, for example, research, education and culture, by participating in the EU framework programmes - either in whole or in part, as well as environmental protection by participating in the European Environment Agency. The agreement should not contain mechanisms that pressure Norway to accept new regulations from the EU. The agreement must be renegotiated or possibly supplemented by one's own supplementary agreements if new rules are incorporated. Such an agreement model would mean that Norway may demand something in exchange from the EU when the new EU regulations have

15 See also the discussion in Section 7.4.
16 See further discussion in Section 7.5.
17 See more on this in Section 7.9.2.

18 European Commission: "Free Trade Agreements," http://ec.europa.eu/trade/creatingopportunities/bilateral-relations/free-trade-agreements /. Original quote: "There is no one-size-fits-all model of a trade agreement ..."

have been accepted and thus lead to a genuine dialogue between the parties. Authority should not be transferred to a monitoring body (similar to EFTA Surveillance Authority (ESA)) or the court. Disputes shall be resolved at political level. That the enforcement mechanisms and the dynamics of increasing liberalization and the introduction of new EU regulations would be removed is fundamental difference between a bilateral agreement and the EEA agreement, and also the variant of "a leaner EEA".[19]

In relation to the EU-Norway bilateral trade agreement from 1973 with adjustments for changes in the WTO[20] there are two significant differences. First, a larger part of the contents of the EEA would continue in a trade and cooperation agreement. The new agreement can be designed so that it regulates services, capital and labour. The agreement can also go further in terms of trade in agricultural products and easing the tariffs on fish than the commercial agreement did. There will be many different possible variations to be weighed between the current EEA agreement and the trade agreement from 1973.

Second, more than 70 agreements Norway and the EU in various fields (including a new bilateral agreement) can be connected to a common "package", with the joint bodies to discuss further development of cooperation and issues causing problems. On thepositive side, this could lead to better coordination and clearer political control in the development of cooperation. The problem is that Norway with such a "package solution" can be faced with an "all or nothing" attitude by the EU in discussions about changes in agreements. If one seems to be better served by a comprehensive framework for the agreements, but which requires that each agreement be negotiated and changed individually, it is possible to choose such a solution. Some of the EU agreements with Switzerland, for example, are connected together in packets (Bilateral I and II), while other agreements are negotiated and developed as individual appointments. Both Norway and the EU have good experience practicing bilateral agreements and expertise in negotiating such agreements. Even if it is unlikely that the EU will want to enter into such proceedings without the EEA agreement being terminated, it appears unlikely that EU would reject free trade with Norway, which provides the EU countries with such large amounts of oil, petrol and other intermediate goods for their own businesses. Similarly, Norway is currently a significant contributor to the EU's cooperation programme. Therefore the EU will probably also want to discuss continued cooperation in research and education.

A bilateral agreement is a flexible alternative that can be filled with specific content to be negotiated. It provides room so that the many different actors who are dissatisfied with the EEA agreement can enter into elements that safeguard their most important interests. For example, a person who is concerned with the new EU rules' assault on union rights can get rid of the EEA agreement's steady stream of EU rules, while the agreement establishes an updated framework for trade both in goods and services between Norway and the EU. The agreement can also accommodate those who are critical of the environmental impact of the EU's internal market but are in favour of regional environmental cooperation. In this manner you will get wide approval for the alternative. This alternative is specified and discussed in Section 11.3.

1.7.4. Out of the EEA with a regional EFTA / EU agreement

Globally, there are a large number (bilateral and regional) trade agreements, and it is common that the member countries of WTO complement the multilateral system by entering into trade agreements. This is also something that Norway has been doing to an increasing degree. The main strategy here is the negotiation of trade agreements with EFTA as a platform. At the beginning of 2012 EFTA had 23 free trade agreements covering a total of 32 countries[21], and EFTA aims to enter into new agreements with a growing number of countries around the world.[22] Similarly the EU is always negotating new trade agreements with many of the same countries that have are enter into agreements with EFTA. It is thus a known and proven strategy for Norway and the EU to negotiate regional trade agreements in the international arena. Seen in this light it would seem very strange if Norway and the EU failed to negotiate a trade agreement in 2012, either bilaterally or within the framework of EFTA. A regional trade agreement between a united EFTA and the EU should be a very relevant alternative. The question one be asked is whether after 20 years of the EEA should we continue with a

19 Read more about "A leaner EEA" in section 10.1.
20 Read more about the trade agreement as an alternative to the EEA in Section 11.2.
21 NOU 2012:2 outside and inside - The agreements with the EU side 750.
22 See more on this in section 11.4.3.

with two part EFTA in our relations with the EU for 20 more years. Isn't EFTA small enough as it is, without us being split in two when we are negotiating with the EU? Even if the current EFTA consists of some few and lowly populated countries, the EFTA is the EU's third most important trading partner for the trade of goods and second largest for finance.[23] And even though Norway and Switzerland may have different interests in some contexts, Norway would have much to gain by negotiating with Switzerland on the team. The Swiss are known as tough negotiators, who have in no small part clear limits as to how far they are willing to go in ceding their sovereignty. In addition to being partners in EFTA, Norway and Switzerland also consider it as being in their own best interest to cooperate based on common interests in other arenas internationally – such as in the group of countries in the WTO which are net importers of food products (G10).

The EU has initiated an evaluation of the EEA and Switzerland agreements, and has indicated that they are considering making changes in both the Switzerland and EEA agreements. The pressure has so far been greatest on the Swiss to make changes to their agreements, but also in regards to Norway, there has been talk of extensive changes in the cooperation.[24] Together with Iceland, which is also feeling pressure from the EU, and there could be benefits from Liechtenstein acting together and in a coordinated manner. An agreement between EFTA and the EU can also be extended to more countries, either as a result of more countries joining EFTA which would emerge as more relevant if EFTA negotiates with the EU as a block, or through individual countries entering into the negotiations or the pre-negotiated agreement.

A new regional trade agreement between the EFTA countries and the EU must be based on the lowest common denominator. This means that such an agreement in principle would not regulate matters not provided for in both
in the EEA and Switzerland Agreements. More specifically, this would large-scale institutional changes in relation to the EEA. That is to say that the EFTA Surveillance Authority (ESA) and the EFTA Court should be dismantled, there should no longer be a steady stream of directives, on the contrary, any expansion of cooperation would be achieved through negotiations. If the limitations imposed by Switzerland's agreements with the EU are followed, services would not be part of the agreements, at least not from the start. Similarly, there are good reasons for being reluctant towards investment activities.

Provisions for trade in agricultural goods and processed agricultural products would involve less pressure for further
liberalization, if one assumes that the EEA would be replaced by the EFTA Convention regulations, which state: "*With regard to the goods listed in Annex D part III the Member States are willing to promote a harmonious development of trade as far as their agricultural policies allow,* "[25] and where there are
not any built-in explicit commitments to constant new negotiations with the aim of the further liberalization of trade in this area - as is the case in the EEA. The tariff concessions arising from this agreement are currently less problematic than similar ones
in the EEA.

It is also the main template for dispute resolution in EFTA and for EFTA agreements with third countries which should form the basis of the EFTA/EU agreement which provides state-state disputes settlements but not investor-state dispute settlements that is in the EEA. A factor that also gives cause for reflection is of course whether the Vaduz Convention, which in many ways was negotiated to reflect that the EFTA countries had entered into the EEA (and the Switzerland agreements), so that in a future without the EEA, it will continue to be the basis for cooperation. A possible alternative would be a cooperation agreement more in line with the original intentions for the EFTA.

Since an EFTA/EU agreement in principle will be a new regional agreement with other parties than the current EOS, the initiative can be taken to negotiate an agreement without first terminating the EEA agreement. If the goals reached as a result of such negotiations are not acceptable to all parties, the EEA will either be able to live on in one or another form (cf. The alternative "A leaner EEA" and "Exploiting the Flexibility ") or any of the other alternatives for cooperation to replace the EEA ("Multilateral trading rules "," A forward-looking trade agreement "or" Bilateral Trade and agreement ") can be considered.

If the EU does not show a willingness to enter into a process as outlined above, an alternative approach would be for Norway, alone or together with the other EFTA countries, to report that they intend to terminate the EEA agreement and negotiate a new regional trade agreement

23 Broch, Low. No to the EU Yearbook 2011, page 81-82.
24 See further discussion of this in Chapter 9 and 12

25 Agreement amending the Convention establishing the European Free Trade Association (EFTA) of 21.06.2001, Article 11A.

with the EU, based on the principles in the Vaduz Convention. In such a situation, the EU would likely see benefits from a possible interim period during which the provisions of the EU-Norway bilateral trade agreement from 1973 with adjustments for changes in WTO rules would be applied to the cooperation agreement, for the shortest time possible – while the EFTA Convention comes up with a much broader cooperation agreement.

This option is specified and discussed in Section 11.4.

1.8. How to go from the EEA to an alternative outside the EEA?

The EEA is a regional agreement which may be terminated with one year's notice. The agreement's rules for what would happen if one of the parties wishes to withdraw from the cooperation agreement are clear and specific. This is stated in Article 127, which holds that "*each Contracting Party may withdraw from this Agreement by giving at least twelve months written notice to the other contracting parties.* "[26] This right is so absolute, that it applies without any conditions and you do not need to present any justification for why you would like to withdraw from the agreement. Nor does the agreement legitimise any countermeasures or sanctions against a country that invokes this right. What happens in a situation where Norway has announced that we would withdraw from the EU cooperation agreement has partly to do with legal regulations and partly with political realities. When the EU itself says that they are very satisfied with the EEA, and in addition, have a material self-interest in access to important resources and intermediate goods from Norway and in maintaining liberalised trade with Norway, the logical consequence is that they are trying to minimise the consequences of a Norwegian "withdrawal" and trying to maintain the largest possible part of the cooperation agreement.

The withdrawal itself from the EEA would take place according to clear rules set forth in the agreement. Termination of the EFTA Surveillance Authority (ESA) and the EFTA Court, which can only happen in the case where all the EFTA countries opt for a trade agreement without such institutions, should not be difficult to manage. The way the EEA is implemented in Norway, also provides the national process easier legal recourse than it could have been. There is no need to change the Constitution, as the EEA is not discussed there.

The main part of the EEA agreement was incorporated into Norwegian legislation through a special law' the EEA Act. This can be easily removed, as can the primacy provisions that apply to other legislation.

Of course trying to eliminate all traces of legislation from the EU which have resulted in changes in Norwegian legislation would be a very comprehensive task. Neither is it the point. Even without the EEA many of the same changes would probably have been made - either because Norway considered it beneficial to harmonise national rules with EU regulations on a voluntary basis in the appropriate area, or because it was part of Norway's commitments pursuant to international agreements to adopt similar rules.[27] Regardless of the type of affiliation, there is still be a need for harmonization, coordination and cooperation. We also have this with other markets, although we don't allow China, India, Russia or the United States to override Norwegian policy according to "the EEA model." The point is thus to reclaim national control to a larger degree in order to pursue an independent national policy. This flexibility depends on the type of affiliation to the EU that is relevant in the future.[28]

In all the alternatives that we are considering, we assume that the rules of the World Trade Organization will be at the base and supplemented with the varying degrees of commitments of the various alternatives. In the alternative which involves basing trade with the EU on the principles and rules that are in the revised EFTA Convention (the Vaduz Convention), for example, from the start, discrimination on the basis of nationality was not allowed. It is followed by several provisions of the convention.[29] An equivalent principle also applies to those areas to which Norway is bound by the WTO Agreement and would thus be to a greater or lesser extent the basis for all options discussed in the report.

However, it would be possible to set clearer licensing requirements among other things to meet national objectives. A key description of national control in this respect is that such new requirements would apply to new allocations of licenses, or license renewal. Existing, perpetual rights acquired by private individuals and companies in Norway have a constitutional

26 The EEA agreement, Article 127.

27 See further on this in Chapter 6

28 Cf. discussion in Section 10.1, 10.2. and 10.3.

29 Cf. EFTA Convention, art. 14.1., Art. 15A.2., Art. 16.1., Art. 16.5, among others

protection against retroactive power.[30] These kinds of situations could be handled in a very ordinary way, for example when changes in the political majority or external circumstances demand it. This has also been done in Norway's relation to the EU, such as in the reversion case. Here
"the watershed" was established when the new law took effect. From that point on, private parties could not get a concession.[31] Similarly, one can envisage a connection with AS in agriculture, or a connection with conditions which are imposed on various concessions.

30 Cf GRL. § 97: no law may be applied retroactively.
31 See further discussion about this the issue in chapter 3.2.2.

CHAPTER 2
BACKGROUND AND CURRENTLY

2.1. Why this project?

This year marks the 20th anniversary of the parliamentary majority after long debate, adopting the EEA agreement, and as of New Year's Day, it has been 18 years since the agreement came into effect. During this period, the agreement has become steadily more comprehensive, and today it affects areas that the parliamentary majority assumed would never be touched. Key elements within Norwegian regional policy, petroleum policy, management of natural resources, alcohol policy, and in recent years, trade union rights and measures to prevent social dumping, have in turn been challenged by the surveillance bodies in the EEA, ESA, and the EFTA court. Through new judges at the EU Court the grip on EU member states has been further tightened, and not in the least in the areas trade unions are seeking to protect. Similarly, the grip is being tightened on Norway through reinterpretation of the EEA agreement by the ESA's surveillance body and EFTA's court. There are constantly new EU directives which are hardly discussed here at home, and which the parliamentary majority too seldom dares to stand up against.

In its policy platform, Soria Moria II, the government's parties stated that there should be set up "*a research-based, broad-based committee to conduct a thorough and wide-ranging review of the EEA agreement and the consequences of the agreement in all areas of society.*"[32] They deserve credit for this. Not everyone has wanted such a review - much less that it should come in the form of a public committee.

However, something significant was lacking in the committee's mandate. They were not tasked with examining alternatives to the current EEA agreement. On the occasion of committee's presentation in January 2010, Foreign Minister Jonas Gahr Støre was very clear on the committee not investigating alternatives: "*It is important that the government not send signals that Norway is studying other forms of affiliation to the EU other than the EEA, such as a membership or a trade agreement.*"[33] Without a review of alternatives, the EEA debate will be inadequate. This is a viewpoint that has attracted participants to the project – from across the spectrum of attitudes towards the EEA agreement. The project has not asked either the EEA Review Committee or the government to take a position on the various alternatives to the EEA agreement, however we do believe that it is important that the committee illuminate what alternatives currently exist or that can be imagined. This would also help to strengthen the committee's analysis. It is difficult to evaluate an agreement's specific criteria without having one or more alternatives to measure against. The idea that there is no alternative is detrimental to the political debate and political engagement. And it is a not an accurate description of reality. In most cases there are alternatives - whether you are talking about motorway corridors, power lines, location of institutions - or about Norway's relation to the EU. Of course there are alternatives. Something else is quite apparent, which is whether the alternatives being considered as politically are desirable or appropriate in relation to achieving our goals.

Despite its lack of mandate, the EEA Review Committee had the opportunity to include an analysis of the EEA in view of the alternatives, at least in certain areas. The Foreign Minister Jonas Gahr Støre said to ABC News, March 23rd, 2011 that "*the mandate is to focus on the EEA agreement. If they want to analyse EU membership or a free trade agreement, it is up to the committee chairman Sejersted to come up with a way to carry it out.*"[34] There are numerous examples of analyses of EU membership in their report. The committee did not take much advantage of the opportunity to analyse other alternatives, however, in its main report.[35] To be sure, the EEA was compared with the EU-Norway bilateral trade agreement from 1973, or "*another looser bilateral form of agreement construction with the EU*"[36] in several places in the report, but the report lacks a complete a review of what the alternatives are comprised of. It appears then that their evaluation of the EEA as the best option,

32 Political platform for the majority government representing the Labour Party, Socialist Left Party and Centre Party, 2009-2013, page 6

33 NTB, 07.01.2010.

34 ABC News 3/23/2011.

35 NOU 2012:2 outside and within Norway's agreements with the EU.

36 See e.g. NOU 2012:2, page 358 (majority of the Committee): "... and thus grants Norwegian economic actors far more secure and predictable environment than the old EU-Norway bilateral trade agreement from 1973 or another looser, bilateral form of agreement structure with the EU would have granted.

as a pre-determined alternative that was carried out without any research-based materials or methodology.

The EEA Review Committee has to some extent considered possible changes to the framework of current EEA agreement, among other things it has assessed the possibility for Norway to have a more active policy and to make use of the agreement's flexibility. There are considerably more possibilities and the flexibility is greater than what the EEA Review Committee describes. We will examine this in more detail later in the report, including in the discussion of alternatives within the framework of the EEA agreement.

2.2. The establishment of the Alternative Project

The EEA Review Committee which for the last two years has reviewed what we have experienced with Norway's agreements with the EU, was instructed to not investigate alternatives to current EEA agreement. Therefore the project Alternatives to the Current EEA agreement was launched.

In autumn 2010, The Norwegian Union of Municipal and General Employees, the Electricians and IT Workers Union and No to the EU initiated a pilot project, and in February 2011 a main project was established with a number of organisations and associations. The project has also been open to new entrants along the way. Behind the project stand major players in Norwegian society. Besides the initiators, the following are affiliated with the project: The Norwegian United Federation of Trade Unions, The Norwegian Union of Social Educators and Social Workers, For the Welfare State, The Norwegian Labour Union – Fredrikstad, Kristiansand region, Oslo, and Trondheim,, Nature and Youth, The Norwegian Farmers' Union, The Norwegian Country Women's Association, The Norwegian Farmers' and Smallholders' Unions and Youth Against the EU.

Our mission has been to investigate alternative ways to cooperate with the EU. In addition, it is our desire to contribute to the public debate on the EEA becoming a fact-based debate, and to it also being about alternatives to the current agreement. As part of the research for the project, we also examined the effects of the EEA agreement on various areas of society and within different sectors.

The project does not have as its goal to have a shared vision of the EEA or to present an alternative to the current EEA agreement, but rather those behind the project believe that the debate on the EEA is inadequate unless alternatives are included. A key goal of the project is to create debate on alternatives to the EU and EEA in other countries, such as by inviting international experts to seminars and debates in Norway. In addition, we have attempted to shed light on current issues related to the EEA agreement in order to illustrate the agreement's function and operation.

In 2011, the project organised seminars on ILO 94 and pay and working conditions in public contracts, the EU's third postal directive and the right of reservation, the EEA and the environment, the EU's strategic interests in Norway and the EU's initiative for the evaluation of the EEA and alternatives to the EU and the EEA. The seminars have helped to focus attention on important issues in the media, the NGOs and associations, as well as in political circles. The project aims to organise more professional seminars and debates in the coming months. Through lectures and the like, we would like to contribute to increasing information and knowledge-building, both in the affiliated organizations and other organizations that desire it.

Sigbjørn Gjelsvik was hired as full time project manager for throughout the entire project period (08.01.2010 - 07.01.2012) for the implementation of the project's measures, and Tale M. Dæhlen as a management consultant and planner (part-time position from May 2011, and extended to a full time position from 01.01.2012 for the rest of the project period). It is also assumed that there will be considerable effort on the part of the affiliated organizations. In addition, the project has commissioned external evaluation expertise. In some cases these have been published as separate reports.

The project has been led by a steering committee with representatives from the affiliated organizations, associations and labour union branches. The ongoing operation of the project has been attended to by the project committee along with the project employees.

For the project's part, we have been concerned with shedding light on the effects of the EEA agreement, including through the practical challenges that elected representatives, government agencies, businesses and others daily encounter in relation to the EEA, while we illuminate the political choices Norway has. Unlike the EEA Review Committee, the project group is not composed of researchers. We still think there is good reason to argue that our key considerations and conclusions are to the same degree based on research-based material and methodology as those of the EEA Review Committee.

We hope that our initiative will contribute to a more open minded and active debate on Norway's association with the EU through the EEA agreement.

2.3. The Alternative debate more relevant than ever

It is frankly dishonest to present things such as Norway has only one alternative to the EEA - full membership in the EU. It is historically incorrect, and it is wrong in today's Europe. A number of countries have chosen to organise its relations with the EU in a different way than through the EEA. For although the EU has been extended several times in recent years, the EU population is still only a little over 7 percent of world population. The remaining 93 percent is outside. We are thus in good company, and there are numerous examples of agreement with neighbouring countries, trade agreements between the EU and various countries around the globe. That does not mean that it is necessary for Norway to create a blueprint from some of these agreements, but it illustrates that there are different ways to organise its relationship with the EU. The EEA is just one example. It's a question of thinking anew and taking inspiration from other countries. The EU has in turn proved to be flexible and pragmatic in its relations with the world.

2.3.1. EU internal development - what happens and how it affects the EEA?

The EU has undergone major changes over the past 20 years, which also affects Norway through the EEA agreement. With the expansion of the Lisbon Treaty and a further deepening of EU cooperation, the pillar structure has been removed and the EC court has been made into a EU court with jurisdiction throughout the entire EU cooperation. This could have significant implications for the EEA agreement, but also provide opportunities to think anew about Norway's relationship with the EU. [37]

Today's EU is not the end of history; the internal market may change over the next few years. If we wind up with a core EU, will the euro survive? The debate about national freedom also exists in the EU, although the movement is strongest towards supra-nationality. Taking back regional policy has been a topic for 10 years already. The renationalization of agricultural policy is also an issue. There are alliance partners in the EU who also want to "relieve" Brussels of its duties. Developments within the EU will also provide a basis for discussing how Norway will deal with the union. When a member state discusses whether to participate in the ongoing integration process in certain areas, Norway as a country outside the EU must definitely be able to discuss whether it is to our benefit by being so closely linked to the EU integration in so many areas, or whether instead we should look at the possibilities of a looser form of association with the EU that would provide greater national control in key policy areas.

2.3.2. EU review of the EEA and Switzerland agreements

The EU is generally positive to the EEA agreement and Norway's adhering to it, which was brought out in the EU Council's evaluations of December 2010.[38] Naturally though, Norway pays well for it (about 3 billion NOK annually net) and adapts itself effectively and loyally to ever new EU rules and interpretations of the EEA agreement. The Council "*emphasises that Iceland, Norway and Liechtenstein so far have made an outstanding effort to incorporate and implement the rules.*" [39]

At the same time, the conclusions of the Council tell us that the EU is envisaging the possibility of major changes to the EEA in the future: "*35. Furthermore, it should be reviewed whether the EU's interests are maintained well enough through the existing framework or alternatively through a more comprehensive approach, encompassing all areas of cooperation and which would ensure a horizontal coherence. This review of the EU would also take into account possible developments in the membership of the EEA.* "[40]

The Council is launching here the idea of a far more comprehensive agreement, where new areas would be included in the EEA, where the ESA and EFTA's Court's grip on Norwegian democracy may be further tightened. So far this has not resulted in any new initiatives or more specifics on the part of the EU, at least not yet known to the public. The EU's initiative demonstrates why it is also important due to external circumstances to examine and discuss alternatives to the current EEA agreement in Norway. If this is not done, Norway may be faced with a forced situation where the EU puts forth specific proposals for changes to the EEA, which would be both politically and constitutionally unacceptable for Norway, but as a political majority in Norway you feel

37 See further discussion of this in Chapter 12

38 Rådet (2010): Council conclusions on EU relations with EFTA countries. 14.12.2010.

39 NOU 2012:2, side 302.

40 Council (2010): Council conclusions on EU relations with EFTA countries. 14.12.2010, pkt. 35.

that you cannot say no because you do not see any alternative.

2.3.3. An even more comprehensive agreement in the future?

The European study had clear instructions not to explore alternatives to current EEA agreement. And they have largely remained loyal to. At the same time, the study has picked up the thread from the European Council's conclusions, and has taken up in the final chapter the way forward for discussing proposed comprehensive amendments to the EEA agreement, which in practice would involve a completely new and much more far-reaching agreement than today. The committee writes that: "*If the current affiliation with the EU is to be continued indefinitely, it is natural to ask whether one should try to make it more unified and coherent, and negotiate a common framework for the current agreements.*

Such a framework may be formed in various ways, but the key point is an agreement framework that encompasses it all - including the EEA, Schengen, the other legal agreements, agreements on security and defence policy, Interreg and other programmes etc. Furthermore, it must be surrounded by a common institutional framework, with procedures for the overall and general political dialogue and governance, which is lacking today. The detailed procedures could conceivably be harmonised, but could also continue to vary from subject area to subject area, as in the EU. The easiest would probably be a form of an extended EEA agreement which also covers the other areas where Norway has agreements, and strengthen the political level at the top. But other models can also be envisaged. Reform could be purely Institutional and only be implemented in a common framework around existing agreements, or one could imagine at the same time, assessing whether additional areas of EU cooperation should be included. "[41]

The review committee clearly exceeded the instructions they received from the Foreign Minister. As outlined here, it is in practice an entirely new agreement, whereby the ESA and the EFTA court is likely to gain additional powers. When the EEA Review Committee first went beyond its mandate and discuss alternative ways of organizing cooperation, it missed out on the chance to outline various solutions as a basis for real debate.

41 NOU 2:2012, page 870.

2.3.4. The White Paper on European policy

in the European policy report to Parliament on November 17, 2011, the Foreign Minister signalled that the heralded White Paper on Norwegian European policy would *"outline the way forward for Norwegian European policy, focusing on how the EEA agreement can meet our needs, and address issues such as: How should we best safeguard Norwegian interests in light of the major changes the EU has undergone in recent years? Could there be a need for new, longer-term measures to ensure these interests in cooperation with the EU?"*

This shows that not even the foreign minister sees the EEA agreement, in combination with the current sector agreements in other areas, as a final blueprint for Norway's association with EU. This legitimises and reinforces the work of the project - Alternatives to the Current EEA agreement. The project does not take a position on the EEA agreement or any particular alternative, but will highlight the various alternatives that exist, both within and beyond the scope of the current EEA agreement. This report is a contribution to this debate.

2.3.5. Strong support for alternatives

In a poll by Sentio that was presented in February 2012, 41 percent of respondents said that the EU has too much power in Norway - just 17 percent disagreed with the statement. The same poll two years ago showed the same results.[42] There has also in recent years been a persistent and growing majority against Norwegian membership in the EU in all polls. A widespread belief in some political circles has been that support for EU membership would increase if the EEA no longer existed. Whether this would be correct historically speaking, is very hard to say. What is more interesting is what the current situation is. A series of polls from the market research and opinion poll institute Sentio in the winter 2011/2012 all showed a clear majority in Norway being in favour of a trade agreement instead of the EEA. While about half of those surveyed said they preferred a trade agreement, only about 20 percent of respondents said the EEA.[43] However, very few people want

42 The Nation's district barometer, 06.02.2012.

43 Three polls from Sentio A/S for the period November 2011 - January 2012 showed, respectively. 52%, 46% and 46% who prefer a trade agreement over the EEA. Those who prefer the EEA vary between 19 and 24%.

EU membership as an alternative to the current EEA agreement.

What specific content those who answered in favour of a trade agreement envision will certainly vary, but it is reasonably clear that the common denominator for those who would like to replace the EEA with a trade agreement is the notion that the EEA has become too extensive and that they want an alternative to the current EEA agreement which would give greater opportunity to pursue an independent national policy. We would like this report to help illuminate, clarify and discuss these alternatives.

Part II

EEA – 20 years later

With the EEA, Norway has been tied to the EU's economic liberalization through an increasingly more comprehensive internal market. The aim is for all laws and regulations that the EU adopts concerning the internal market to be implemented in Norway. The main difference with the former trade agreement with the EU, which was to ensure the free flow of goods, is that the EEA is also to ensure the free flow of services, capital and labour. In order to ensure this , things such as common competition rules, and a surveillance body and courts to enforce them were established.

In this section of the report the EEA agreement dynamics are highlighted as well as how they are contributing to changing Norwegian society. In addition, conditions that the parliamentary majority and the Labour Union had to agree to in order to enter into the EEA are spotlighted - and what their status is 20 years later. Finally, it is illustrated how Norway's position of power vis-a-vis the EU is affected by the political majority in Norway signalling that no appropriate alternatives to the current EEA agreement are being considered.

A number of the assumptions that the Parliament had made at the time the EEA agreement was approved in 1992 have been broken. The EEA agreement has been both more extensive and intrusive than expected. (Photo: No to the EU.)

Chapter 3:
Broken Assumptions

3.1. Intro

In a review of the EEA agreement, it is natural to consider whether the assumptions that were the basis for concluding the contract were actually met. This chapter focuses on the framework that the Parliamentary majority originally set for the EEA agreement. Furthermore, the requirements of the Labour Union at the time set forth in order to enter the EEA agreement will be reviewed and evaluated as to whether these requirements were actually satisfied.

3.2. The Parliamentary majority's assumptions in 1992

3.2.1. Intro: Out of balance?

In the introduction to the EEA agreement (preamble), it states that the EEA shall be created "*[...] on the basis of equality and reciprocity, and an overall balance of benefits, rights and obligations of the parties*." [1] According to the EEA Review Committee this is "*a fundamental principle of the agreement. It is meant to balance the rights and obligations between the parties, and when it was negotiated all parties gave up something and took away something.* "[2] This is probably a description that the majority that backed the EEA agreement at the time could sign on to. The interesting thing will be to judge whether this balance is actually being maintained, or whether developments have been contrary to the intentions of Parliament. For the parliamentary majority had clear conditions for entering into the agreement, not the least of which was to ensure adequate support for the agreement by the parties and their respective circles.

According to the EEA Review Committee, the EEA "*eventually proved to be a much more comprehensive and binding agreement than originally anticipated, and it is debatable how much longer the Parliament's approval in 1992 can provide political legitimacy.*" [3] Following the presentation, there was a debate about whether the assumptions on the part of the Parliament of 1992 have been broken. It would therefore be useful to review what the assumptions of the Parliament actually were at the signing of the EEA agreement. This applies in particular to the external framework of the cooperation - what would be included in the agreement and what should still be up to the national authorities to decide?

The project has undertaken a review of some of the issues that attracted the most attention in the public debate leading up to the decision in Parliament 16 October 1992 and afterwards. With regard to Parliament's assumption, this will be in practice the majority's view, as was expressed by the Labour Government in proposition no. 100 (1991-92), and the majority of the comments from the Labour, Conservative and Christian Democratic Party members of the Foreign Committee of Parliament's debate on the EEA[4]. To some extent the minutes of the debate in Parliament of October 15th and 16th, 1992 further clarify what was the majority's intent and meaning when the EEA agreement was concluded.

The review shows that both the government and the parliamentary majority were very clear in several areas that the Norwegian regulations could be maintained, and it was considered to be a very important condition. However, Norway allowed itself to be pressured to change Norwegian law in several areas under by the EEA agreement's overseers. A more detailed description of each of the cases appears below.

3.2.2. Reversion

When the EEA agreement was concluded, Norway changed the industrial licensing and watercourse regulatory act so that the Norwegian rules should not discriminate on the basis of nationality. Norwegian authorities were very clear at the conclusion of the EEA agreement that you could maintain regulations that differentiated between public and private stakeholders. In the EEA proposition, the government stated that "*the part of the licensing laws for waterfalls that apply to resource management are not affected by the EEA [...] The strong public ownership in the hydropower sector is consistent with the principles of the EEA. The same applies to the State's pre-emption in acquiring ownership of waterfalls, reversion to the State at expiration of the license and*

1 EEA agreement, Preamble.
2 NOU 2012:2, page 133
3 NOU 2012:2, page 828

4 As we will show in Section 4.7.1 the FRP, who also voted in favour of the EEA agreement, had a completely different approach to the obligations resulting from agreement than the majority consisting of Labour, Conservative and Christian Dem. Parties had.

the provisions of state pre-emption and reversion of a share transfer ".[5]

Further on it was maintained that*"the prohibition of discrimination on grounds of nationality means that stakeholders in other EEA countries will be on par with Norwegian private interests when acquiring rights to exploit the hydroelectric potential, use rights and developed waterfalls in Norway . Access to such acquisitions will still be strongly limited by the State's pre-emptive and reversion rights, and the general requirements for the management of hydro resources."*[6] On the basis of this, among other things, it was decided that *"the State's right to reversion was not affected by the EEA agreement ".*[7]

When Norwegian authorities so clearly established that one could differentiate between public and private actors, they were supported by article 125, which clearly states that the agreement does not affect the parties' rules on ownership. According to the EEA proposition, the agreement shall hereby *"not affect the relationship between private and public ownership in the individual country ".*[8]

The Norwegian interpretation of the EEA agreement was communicated through Norway's notification of changes in the industrial licensing and watercourse regulatory acts. No comments on these were received - either from the EU, ESA or any EEA country. The ESA expressed in the first seven years of the EEA's existence no objections to the proposed changes.

How it turned out:

After a six-year long process initiated by ESA, the case ended with a ruling by the EFTA Court in June 2007. The EFTA Court declared that Norway had violated articles 31 and 40 of the EEA agreement by maintaining rules which granted private undertakings and undertakings from other EEA countries, a time-limited license for the acquisition of hydroelectric plants, through an obligation to return all installations to the Norwegian State without recompense at the expiration of the license, while Norwegian public enterprises enjoy the benefit of a license for an unlimited period. The Court rejected the argument that Norway's agreement that the EEA's article 1259 meant that the reversion is beyond the scope of the agreement.[10]

In August 2007 the government approved a provision arrangement to bring the reversion plan into accordance with the judgement of the Court and the EEA agreement, until Parliament could make the necessary legislative changes. In the arrangement, the basic principle of public ownership of the country's hydropower resources at the state, county and municipal levels is continued. Licenses will no longer be granted to the private sector for the acquisition of waterfalls and power plants, but private concerns can still own up to one third of the publicly owned hydro electric plants.[11]

The example of reversion thus entailed a loss and a victory at the same time. It involved a loss because the Norwegian Reversion Institute was considered to be in violation of several provisions of the EEA agreement. The victory was that they found a national solution that could be defended by EEA law, which ensured a strengthened public ownership of hydroelectric resources. The Norwegian authorities have, however, accepted that with the current EEA agreement we are not even free to decide the balance point between public and private ownership of hydropower resources. If too high a degree of private ownership is allowed, the entire reversion institute could fail. This despite the government's promise in the EEA proposition that the agreement "*may not affect, for example, the relationship between private and public ownership in the individual country* ".[12] The assumption that "*the State's right of reversion will not be affected by either the EEA agreement*"[13] has obviously been broken.

3.2.3. Vinmonopolet

Vinmonopolet's future was one of the issues that aroused much debate in 1992. Despite clear warnings from several quarters, the clear statements from the government: "*Vinmonopolet's exclusive rights to the import and wholesale of wines and spirits will also be maintained. This monopoly is justified by the considerations that Norwegian alcohol policy is based upon.* "[14] The Government discussed the problems of having to maintain the import monopoly in the framework of the EEA agreement, but concluded nonetheless clearly: "*State-owned import, wholesale and export monopoly arrangements are considered to be in violation of the Rome Treaty's article 37 and thus of the EEA agreement article 16. However, at this point, the contents of article 16 are understood in the light*

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5 Proposition No. 100 (1991-1992), pp. 200-201.
6 Proposition 6. No. 100 (1991-1992), pp. 201
7 Proposition 7. No. 100 (1991-1992), pp. 167
8 Proposition 8. No. 100 (1991-1992), pp. 103
9 Member AVT. nature. 125: *"This Agreement shall not in any way affect the agreement parties'ownership rules."*
10 Judgment in Case E-2/06 EFTA's Surveillance Authority (ESA) against the Kingdom of Norway, Section 63
11 Oil and Energy Ministry: the Government ensures public ownership of hydropower. Press release. 10.08.2007.
12 Proposition No. 100 (1991-92).
13 Proposition No. 100 (1991-1992), pp. 167
14 Proposition No. 100 (1991-92), p 13

of the EC Court's practice when applies to Rome Treaty article 37, cf. the agreement's article 6. For this reason, the current exclusive rights to the import and wholesale of wines and spirits will be maintained. "[15]

The Committee majority (Labour, Conservative and Christ.Dem) in its recommendation during the Parliament's debate stated that the EEA agreement did not impair the ability to have an independent alcohol policy. Vinmonopolet's monopoly would be retained. "*These members [members of the Labour Party and Christian Democratic Party] agreed it was of vital importance for the Government to state in the proposition that Vinmonopolet can and will be maintained within the EEA. This is true for both the import and sale of wines and spirits.*"[16]

Representatives from both the Conservative and Christian Democratic Party in the parliamentary debate were clear that the measures in the Norwegian plan should be continued. The Conservative Thorhild Widvey said that "*on the part of Conservatives, we note that the EEA agreement does not impair the ability to exert an independent alcohol policy*"[17] Christian Democratic Svein Alsaker was no less clear: "*Politicians do not give objective information. But it is objective information in any case that the government and the committee's majority, including the Christian Democratic Party, are making it a condition that Vinmonopolet can and will be maintained within the EEA from a health policy consideration and based on non-discriminatory procurement practices. We believe in this*".18

How it turned out:
The promises in the alcohol policy were shown to have a short shelf life. The year after the agreement came into effect the import monopoly for wines and spirits fell. Later, Norway lost a case at the EFTA Court about the so-called alcopops. Starting July 1, 2009, the ban on private imports of alcohol was abolished, and it was legal to order alcohol from abroad for personal use – all due to pressure from the ESA. The assumption that was most clearly broken is that the import monopoly could and would be maintained.

3.2.4. Alcohol advertising on television
The government stressed that the ban on alcohol advertising, which had been a difficult issue during the negotiations on the agreement, would continue. It was announced that the ban could be taken up for renewed consideration in 1995, but the government reassured: "*The result of the issue of alcohol advertising is that the EFTA countries can refuse broadcasting alcohol advertisements on cable networks [...] In 1995, this exception will be taken up for renewed consideration. If an agreement is not reached at this point, the current provisions will continue.*"[19]

In its recommendation the Christian Democratic Party emphasised the importance of the ban on alcohol advertising: "*For the Christian Democrats, the fight against drugs is a key political objective, and this member wants to emphasise the importance of reducing alcohol consumption through information and a ban on alcohol advertising.*"[20]

How it turned out:
The Christian Democratic Party has maintained its strong commitment to a restrictive alcohol policy in general and advertising in particular. Former party leader Dagfinn Høybråten also stressed in the autumn of 2001 that "*if a change in the Norwegian alcohol policy were to be forced by the EU, that would break the conditions for our support of the EEA agreement.*"[21] Høybråten has also on several occasions challenged the government on whether to continue to stand up for the ban on alcohol advertising on television, including during an interpellation debate in Parliament in February 2012. In his response to Høybråten the Foreign Minister announced that the Government is committed to extending the directive to audiovisual media services in the EEA agreement, while "assuming that Norway can continue the ban on alcohol advertising in broadcasting, even if the written exemption lapses".[22] The government is basing this on the directive allowing for stricter national rules to be made applicable to broadcasts from other countries if the broadcasts are essentially directed at Norway.

The problem with this strategy is that there is no cooling-off period in the EEA agreement for directives that have already been accepted, if the government's assumptions prove not to be absolutely true.[23] There are plenty of players in the market that will benefit from a different interpretation of the directive over time, and that would challenge the ban and cause the case to land at the EFTA Court's board.

15 Proposition No. 100 (1991-92), p 118
16 Recommendation. S. No. 248 (1991-92), p 28
17 Thorhild Widvey, Parliament EEA debate, October 16th, 1992, page 305.
18 Svein Alsaker (Chr.Dem), EEA Parliamentary debate October 15, 1992, page 195.
19 Proposition No. 100 (1991-1992), pp. 242
20 Recommendation S. No. 248 (1991-92), p 40
21 Nationen, 22.11.2011.
22 Minutes of parliamentary meetings 14/2/2012, Case # 2: interpellation from Dagfinn Høybråten to the foreign minister.
23 One must then possibly take the matter up at the EEA Council in accordance with the procedures applicable to it, see EEA, art. 92.

Alcohol advertising is already being broadcast from the UK to Sweden. And before Norway banned such advertising, many foreign channels featured alcohol from their broadcasts to Norway.

TV2 has previously indicated that they would consider moving parts of their business abroad if the advertising ban is repealed for companies that broadcast to Norway from abroad. Other players, such as TV Norway have been cautious in their statements and have said that they do not have concrete plans for alcohol advertising. At the same time the companies refer to the fact that they must consider things from a commercial standpoint. In practice this will probably mean that alcohol advertising will push ahead, unless the Norwegian authorities maintain a set of rules that forbid it.

The Foreign Minister's statement to Parliament is in contrast to what his then-Secretary of Foreign Affairs, Erik Lahnstein (Soc.Party), announced after Norway had investigated the possibility of entering an agreement with Great Britain in which broadcasts from there to Norway would not contain alcohol advertising, "*I have taken this up with the UK European Minister David Lidington. He says the only thing they can do is to encourage TV stations to not broadcast alcohol advertising. They have no way to prevent it.* "[24] The message is not surprising. If Norway, without an opt-out, accepts an EU directive that allows alcohol advertising on TV, based on the EU's four freedoms, it wants other measures with the aim of getting people to avoid this life's danger.

One cannot be sure that industry players will challenge the Norwegian ban, and one cannot be sure that Norway would eventually lose the case before the EFTA Court. But if the most important thing in this case is to make sure to maintain the ban on alcohol advertising in Norway, the safest and most durable solution over time would be that this issue remain up to the national authorities to decide, which probably in practice would lead to using the right to reservation in the EEA agreement.

3.2.5. Regional policy, including the differentiated employer tax

The rural policy measures was something that was heavily debated in connection at the signing the EEA agreement, and opponents of the agreement warned against the consequences of the agreement including the differentiated employer fee. Still the government and the parliamentary majority maintained that we could control our own local policy and that the differentiated employer fee would continue to exist: "*The members of the Labour Party and Christian Democratic Party have shown that the differentiated employer's contribution should still be able to continue as an important regional policy measure [...] emphasises that the payroll fee for each region is neutral with respect to industry, company size, occupation, public or private sector, etc. It is also consistent with the rules governing non-discrimination, since it does not discriminate between Norwegian and foreign employers or employees*."[25]

The spokesman for EEA matters in Parliament, Labour Party's Gunnar Skaug, clearly expressed in connection with the Parliament's consideration that the objections from the EU opponents were both unfair and untimely, "*Time after time, clarification and answers have been required for issues the two parties [Socialist Left and Centre.] have constructed. Time after time they have been given answers, crystal-clear answers. And so I ask: How many times do we have to explain these to two parties that the EEA does not threaten the Norwegian regions? How many times do we have to explain that the EEA is not an obstacle to setting strict requirements regarding health, safety and the environment? How many times do we have to explain that the EEA is not a threat to Norwegian sovereignty over natural resources, or that democracy and representative government is simply not threatened?*[26]

***How it turned out**:*

In retrospect, we can see what happened. Through the EFTA Court's decision in 1999, several industry sectors removed from the arrangement. Norway was to have the arrangement grandfathered in, but in 2004 it was judged illegal by the EFTA Court. After the EU adopted new guidelines for regional aid in December 2005, the ESA allowed for a certain differentiation of the payroll fee in parts of the country. The decision was an important victory, and the diligent efforts of particularly the Muncipalities and Regions Ministry and the Finance Ministry contributed to the fact that most municipalities were able to maintain differentiated employer fees and other compensatory measures. Nevertheless, there were several municipalities that received a higher rate than before and the EFTA Court's decisions from 1999 on

24 NTB, 20.09.2011.

25 Recommendation S. No. 248 (1991-92), p 57

26 The EEA Parliamentary debates, 16 October 1992, page 335 in the minutes.

what industries it will apply to, still stand. In addition, the approval of the Norwegian arrangement is only valid until 2013. What happens after that depends on the developments in the EU in this matter.

The case is an important illustration of it being possible to achieve significant improvements through active political engagement. At the same time, we live at the EU and ESA's grace and we are no longer masters of our house.

The EEA also affects the ability to have an active rural and regional policy in many areas - far beyond "small" regional policies (which is often used as a term for the public support system that has explicitly regional policy purposes). The EEA has had a deep effect in sector policies and is limiting our control on adopting policies that would benefit employment, housing and geographical and social distribution.

One of the areas where rural and regional policy objectives have been emphasised is in regards to oil and gas extraction, as the coalition government enshrined in its new policy platform (Soria Moria II) declaration: "*It is a goal that the new [oil and gas] project will provide local spill over effects in that they contribute to economic development and job creation locally and regionally, through the localisation of the operational organizations. It is particularly important to focus on skilled job creation locally.*"[27]

To ensure this, the Petroleum Act § 10-2 set forth a requirement that licensees on the Norwegian shelf must have a separate organization that is able to conduct business from Norway, and that the petroleum industry will be operated from bases in Norway. This provision has now changed - after pressure from ESA.[28]

3.2.6. The petroleum policy

Resource management on the Norwegian shelf in recent decades laid the foundation for substantial revenues to the community and for many jobs along the coast. Government stated in the EEA proposition that "resource management includes opening new search areas based on an assessment of the desired pace of development, the interests of fisheries, environmental and regional issues and the social economic profitability. Further included is the selection of solutions for field development and transport systems. Resource management is a national responsibility that is not covered by the EEA agreement."[29]

The government was aware that they did not have full national control in granting licenses. In the proposition in 1992, the Norwegian system was described along with the need for changes as follows: "*The Norwegian licensing system is based on the oil companies' applications. Allocation is based on a complete administrative assessment in accordance with the announced criteria. Business must be conducted per the conditions stipulated in the permit, and must otherwise take place in accordance with the petroleum act and other Norwegian legislation. The system - mainly based on current professional criteria - will be continued. The relevant considerations in relation to the EEA agreement will be maintained in such a system.*

Some criteria that are associated with the applicant's contribution to the strengthening of the Norwegian economy, the use of competitive Norwegian goods and services, etc. would imply the possibility of discrimination between Norwegian and foreign companies. Such criteria would have to expire or be given a form that complies with the regulations in the EEA agreement. The above criteria must be considered in the context of the petroleum act § § 8, 23 and 54 and associated regulations."[30]

Leadership and base requirements in § 10-2 were not mentioned among the regulations that had to be changed. The proposition further discussed the proposal for the licensing directive, "*The EC Commission presented on March 25 of this year a proposal for a directive on licenses in the oil and gas sector [...] It is uncertain when such a directive will be processed and it is also uncertain what the final content will be if it is adopted [...] The proposal must be adopted by a unanimous vote of the EEA Committee to become a EU regulation.* "[31] This was a formulation that was used several times in the proposition, in connection with cases where one considered that the use of the right of reservation may be appropriate.

Christian Democrat Svein Alsaker underlined in the parliamentary debate that the use of the right of reservation in this case could be relevant: "*For the Christian Democratic Party, it is essential that Norway have full sovereignty over our national wealth on the continental shelf. If necessary, Norway in the future will veto the EEA in order to secure this right of disposal. And this may be appropriate because the EC Commission has proposed a oil directive which among other things will be able have an influence on the government's licensing practices*."[32]

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27 Soria Moria Declaration II, page 60

28 See further discussion of the matter under section 3.2.6 below.

29 Proposition . No. 100 (1991-92), p 165

30 Proposition No. 100 (1991-92), p 166

31 Proposition. No. 100 (1991-92), p 166

32 The EEA Parliamentary debate, October 16, 1992, page 195 in the minutes.

How it turned out:
The petroleum act § 10-2 instituted in the changes in 2011 a requirement that licensees on the Norwegian shelf must have a separate organization that is able to conduct business from Norway, and the petroleum business will be operated from bases in Norway. The - petroleum act § 10-2 did not contain any discrimination as to nationality, either in its original form or after the changes in 2003, where it was allowed for the Ministry to waive the management requirement after specific evaluation in individual cases. It was quite possible for foreign companies to comply with the requirements provided for in this section. The "problem" for the ESA was that in practice the companies were faced with other limitations on the free flow of capital.

The legality of placing such limitations was discussed during the conclusion of the EEA agreement, and the government was clear at that time that the restrictions which are not discriminatory on the basis of nationality, such as the licensing arrangements, should be continued. More on that to follow. They relied on correspondence with the European Commission, "*where the Commission stated that non-discriminatory arrangements in their view could not be considered to be contrary to the rules on the free movement of capital."* [33] Norway and the EU had in other words a common understanding that, for instance, licensing arrangements that do not differentiate between Norwegians and foreigners, were allowed.

A number of laws had to be changed, when Norway entered the EEA, including the old industrial licensing act as a result of the EEA. The relevant provision in the act, however, was one of the provisions that Norway had always assumed could be continued, but that Norway now has allowed itself to be pressured to change. The assumption that "*resources are a national responsibility that is not covered by the EEA agreement"* [34] is broken.

3.2.7. Property policy in agriculture
The government clearly stated in 1992 that "agricultural policy is not included as part of the EFTA cooperation, and will not be part of the EEA agreement".[35] This view has been maintained right up to today. On the European Portal's focus page on agriculture it clearly states that "*agriculture is not part of the EEA agreement, with the exception of veterinary matters and plant health [as well as trade in agricultural products and products]"*.[36]

For property policies the EEA agreement article 125 also applies, which states that "*this Agreement shall in no way affect the parties' rules on property ownership.*" The Brundtland Government specified concerning agriculture that "*furthermore, the prohibition against preferential treatment will not preclude maintaining the following provisions and principles: the residence and operation obligation is required for any acquisition of agricultural properties, including forests properties*".[37]

How it turned out:
Important elements in the property policy for agriculture have come under pressure from the ESA and the Norwegian authorities have accepted the EEA placing limits on the design of key measures such as the residence and operation obligation, loosening the period in the inheritance law, and the possibility of creating a differentiated policy between different forms in agricultural ownership.

The rules for the sale of agricultural properties, including who can buy and on what terms, effects the core of the Norwegian agricultural policy. The detailed rules governing this, we find, for example, in the licensing Act, the land act and the inheritance act. In connection with changes being proposed to these laws, the coalition (red green) government discussed in Proposition. No. 44 (2008-2009) the following about the relationship to our EEA obligations: "*[When the EEA was signed, one found] that the rules did not hinder the free flow of capital because neither provisions nor practices result in discrimination between Norwegian citizens and citizens from other countries [...] In retrospect, Norway in regards to subsequent litigation by the EC Court has come to realise that decisions in this matter could have an impact on Norwegian conditions.*"[38]

The EU Court has also stated that licensing rules may not be discriminatory, or designed so that the license can be denied if the owner is not going to be operating [the concern] himself. (See the Ospelt case from Austria in 2003). Following this ruling, the Agriculture Minster discussed the effects on the Norwegian residence requirements as follows: "A consequence of the ruling

33 Report. No. 27 (2001-2002) About the EEA agreement 1994-2001, pg.46.
34 Proposition No. 100 (1991-92), pg 165
35 Proposition No. 100 (1991-92), pg 119

36 European Portal theme pages on Agriculture, http://www.regjeringen.com / en / sub / European portal / European themes / European-agriculture. html? id = 444305.
37 Proposition No. 100 (1991-92), p 197
38 Proposition No. 44 (2008-2009), p 42

is that the practice must be changed so that an individual assessment will taken into consideration for deciding whether it is necessary to maintain the law's basic premise which is the personal residence requirement, or whether the residence requirement may be fulfilled by someone other than the new owner."[39]

In a case against Denmark in 2007 (The Festersen case) the EC Court established that the Danish requirement of eight years of personal residence on agricultural properties of under 30 acres was in conflict with the requirement of the free movement of capital. The government summarises the consequences of these cases for the EEA as follows: "*The contents of the EEA agreement's article 40 and the court practice that explains it, does not provide a clear picture of the requirements the legislation must meet to be acceptable in light of EEA law. This creates a disadvantage when national legislation is designed.*"[40]

The Government further concludes that *"the rationale for the rules will thus be decisive for the legality of the residence requirement.*"[41] One refers to the inheritance Law Commission, which believes that a one-year redemption period in inheritance law may imply an unconstitutional restriction under the EEA on the free flow of capital, but that the changes in the inheritance law that were proposed would mean that one was within the EEA rules.

In Norwegian agricultural policy the significance of personal ownership has been emphasised over time that the agricultural property should be owned by natural persons. In connection with Proposition. No. 79 (2002-2003) the Bondevik II government showed that there was broad consensus among respondents to the consultation for this principle, and stated further that: "*this is a Norwegian tradition, and it has proven to be a stable and rational form of ownership. Such ownership prevents the property from being merely a place of investment where the owners are not resident and the user has no ownership ties. [...] In the Ministry's view, this should basically be clearly reflected in the current legislation, not only indirectly, such as the relationship is today.*"[42]

But even here we are not masters of our own house - if we are to use ESA's reinterpretation of the EEA as a basis. In their understanding of the agreement, a rule that corporations cannot get a license, involves the discrimination of different forms of ownership which are framed by the EEA agreement. After the change of the licensing act in 2003, the ESA has had a particular focus on companies' opportunities to acquire agricultural land in Norway. In order for there not to be discrimination, in the eyes of the ESA, there must be in practice a real opportunity for companies to purchase agricultural land. Norwegian authorities have tacitly accepted ESA's understanding and adapted Norwegian practice to this.

There are different ways to assess how much an impact there has been so far by the Norwegian authorities' acceptance of this reinterpretation of the EEA. What is nonetheless certain is that it has placed key measures of Norwegian agricultural policy in the hands of the EU - contrary to the impression given to the outside world. There is a detailed discussion of the effects on Norwegian agriculture due to the increased trade in agricultural products in section 3.2.13, 4.4.2 and 7.9.2.

3.2.8. Fishing policy

In the same manner as agricultural policy, fishing policy is also said to fall outside the framework of the EEA agreement. In two of the additions to the EEA agreement, exceptions to the area of fishing are specified: "*Norway can continue with the restrictions that exist at the signature date when it comes to ownership by non-Norwegian interests in respect of fishing vessels [...] National authorities have the right to oblige companies that have been completely or partially acquired by non-Norwegian interests to deprive them of any investment in fishing vessels*", [43], and that "*Norway can continue with restrictions on non-national ventures in fishing or companies that own or operate fishing vessels.*"[44]

How it turned out:

The Norwegian government has agreed to remove the requirement that at least half of the crew or fishermen or leader or captain of Norwegian fishing vessels should either be Norwegian nationals or reside in Norway. The citizenship requirement has been completely abolished, while the residence requirement has been changed to a requirement of residence in the coastal municipality or municipalities which neighbour coastal municipalities for at least half of the crew, see the fishing ban act § 3, second paragraph.

In the autumn of 2010 the fish farming company Marine Harvest brought a suit against the Norwegian ban on owning more than 25 percent of Norwegian salmon licenses at the ESA. This outcome of the case at the time of writing (January 2012) is still unclear.

39 Circular M-2/2004: "Residence and operation obligation -the legal framework and proceedings ", p 8
40 Proposition . No. 44 (2008-2009), p 43
41 Ibid.
42 Proposition No. 79 (2002-2003), p 66
43 The EEA agreement, annex XII, letter h
44 The EEA agreement, annex VIII, section 10

Although the Norwegian government has until now maintained that it is up to national governments to decide, Marine Harvest has probably become hopeful since Norwegian authorities have given into the pressure for making changes in ownership rules for fishing vessels and after the ESA strongly restricted the scope of the EEA agreement's article 125 , i.e. legal property conditions which under Norwegian's opinion would be completely outside the EEA agreemen.[45] They have probably also noticed that the previous prohibition against a single party owning more than 10 percent of the Norwegian financial institutions was removed after pressure from ESA.[46]

3.2.9. Ownership restrictions in the financial industry
The government highlighted legislation in the EEA proposition which meant that it was "bound by law that no single owner or group can own more than 10 per cent of the shares in a Norwegian financial institution, unless permission is given to a subsidiary. This ownership rule may be maintained within the EU [...] The government places great emphasis on the importance of the rule of 10 per cent ownership ".47

How it turned out:
The former prohibition against a single party owning more than 10 percent of the Norwegian financial institutions has been removed after pressure from the ESA and has been replaced with a notification requirement.[48]

The Bondevik II government gave the following description of the change in the understanding of the Norwegian EEA commitments in the EEA notification in 2002: "A recurrent feature of the discussion in proposition no. 100 (1991-92) is that one assumes that the EEA rules were not an obstacle to maintaining non-discriminatory restrictions on capital movements, such as licensing arrangements that do not differentiate between Norwegians and foreigners. The reason for this view was included in the correspondence between the EFTA countries and the Commission, where the Commission stated that non-discriminatory arrangements in their view could not be considered to be contrary to the rules on the free flow of capital.

This can be illustrated by a discussion of the rules on ownership of financial institutions. Previously the financial activities act stated that total foreign ownership in Norwegian financial institutions could not exceed 33 1/3 percent. In prop. No. 100 (1991-92) it was assumed *that this provision had to be repealed because it was discriminatory. On the other hand, it was assumed that the rules on ownership of financial institutions that did not discriminate between Norwegians and foreigners could continue. This applied to the rule that no one could own more than 10 percent of the shares of a financial institution, cf. Prop. No. 100 (1991-92) pp. 202-203.*

There have been no formal amendments to the EEA rules on the free flow of capital since the EEA agreement came into effect. Developments in EU/EEA are also characterised by the specific decisions that the EC Court and the EFTA Court have made in individual cases, see further discussion under 4.3"[49] The condition that the ownership rule would be enforced, has obviously been broken.

3.2.10. Property ownership policy
When Norwegian authorities argued that property ownership policies would not affected by the EEA agreement, they referred to article 125, which clearly states that the agreement would not affect the parties to the agreement's rules on ownership. According to the EEA proposition this would mean that "*the agreement would not effect for example, the relationship between private and public ownership in the individual country.* "[50]

How it turned out:
Time has shown that with the current EEA agreement this does not hold true. In order to maintain the rules for reversion of power plants (a regulation that the government at that time explicitly said we could maintain), for example, there had to be clear limitations on the private sector's ownership of hydro power plants. In most other contexts, the pressure is in the opposite direction, to cancel or alter arrangements that private actors perceive as unfair treatment in relation to public ones.

3.2.11. Public services
In the EEA proposition from 1992 it was stated that "*[...] most public services fall outside the agreement*".[51]

How it turned out:
A large part of public services has been shown to be affected by the EEA agreement's

45 See also paragraph 3.2.7. and 3.2.10.
46 See also Chapter 3.3.5.Proposition
47 No. 100 (1991-92), p 202
48 The Financial Institutions Act, § 2-2.
49 Report. No. 27 (2001-2002) About the EEA Agreement 1994-2001, pp.46-47.
50 Proposition No. 100 (1991-1992), p. 103
51 Proposition No. 100 (1991-1992), p 25

competition rules. This occurs partly through EU regulations on public procurement, partly through new, broad directives (such as the services directive), partly through sector directives (such as the health care directive), and partly by the ESA and the EFTA Court's interpretation of the basic principles of the agreement. For further details, see section 3.3. and 4

3.2.12. Free flow of labour

The government stated in the EEA proposition that "*In the EEA, a company that performs services in another country will be allowed to bring their own employees with them. The significance of this is limited, however, by the fact that all EEA countries can pass legislation on working conditions and agreements on pay and working conditions that are applicable to all forms of paid employment in their country, regardless of the worker's nationality. The application of this principle for work assignments shorter than 3 months has not yet been fully resolved*."[52]

"*The proposed directive excludes work assignments of shorter than 3 months from the residence country's rules on salary and holidays. In the government's view, 3 months is too long in this context [...] The proposal has not yet been adopted by the EC, and the final result is therefore uncertain [...] Any new EC rules in this area will have to be the subject of discussions within the EEA committee. For new EC rules to become EEA rules, they must be unanimously adopted in the EEA bodies.*"[53] The then Local Government Minister Gunnar Berge was one of those who calmed the parliamentary debate on the EEA:" *I see that the committee does not believe that the EEA agreement will lead to large movements in the labour market. The majority believes that such free movement of persons is unlikely to create major problems. This is because it is assumed that people taking permanent residence in Norway comply with the Norwegian wage and working terms.* "[54]

How it turned out: Several of the judgments of the EF Court (Vaxholm /Laval, Viking Line, Ruffert and Luxembourg), and the ESA's pressure to change Norwegian laws and regulations as a result, are contributing to a new situation when it comes to ensuring Norwegian wage and working conditions when working in Norway, both in private and public sectors. The general application of collective agreements has been considered an important strategy to counteract this trend. But in a statement to the Court of Appeals in January 2012, the EFTA Court concluded that the posting of workers directive does not allow making general provisions for payment of travel, food and lodging. They believe further that the directive "in principle" is an obstacle to the general application of a 20 percent mark-up on the hourly rate for travel assignments, unless it is justified by overriding public interest.[55]

For further discussion of this topic see section 3.3.2., 3.3.10., 6.4.2. and 10.3.4.8.

3.2.13. Trade in agricultural products

The results of the negotiations on trade in processed agricultural products can be found in protocol 3 to the EEA agreement.[56] According to the EEA proposition the main elements of the new system were that the variable import duty would be calculated according to actual raw material content, and that it should even out the difference between the domestic price in Norway and the lowest price within the EU, rather than world market prices for agricultural raw materials. In this way, the new system would "*largely eliminate the biases that current calculation of the variable import duty has led to for a number of items. This would mean that the EFTA countries can improve their market access to the EC.*"[57] Although the negotiations on Protocol 3 had not been completed, this was played down in the EEA proposition in that it remained focused on the details of the listing of prices for agricultural raw materials," *and some other technical issues*"[58] that would be finally clarified sometime in 1992. It was recognised that parts of the Norwegian food industry could face increased competition as a result of increased trade in processed agricultural products, but it was also emphasised that there was the potential for increased exports, such as for Norwegian aquavit.[59]

The result of the bilateral negotiations on the expansion of trade in agricultural products between Norway and the EC is found in a separate correspondence about the EEA agreement.[60] The EEA proposition referred also to the provisions of the EEA agreement, article 19 that the goal was "*to develop trade in agricultural products within the framework of each country's agricultural policy*

52 Proposition No. 100 (1991-1992), pp. 253-254.
53 Proposition No. 100 (1991-1992), pp. 255
54 Minister Gunnar Berge, the Parliament's EEA debate, October 16, 1992.
55 Case E-2/11 STX Norway Offshore AS, et al v. The State Tariff Board.
56 Special Annex I of prop. No. 100 (1991-1992), page 34
57 Proposition No. 100 (1991-1992), page 120
58 Proposition No. 100 (1991-1992), page 120
59 Proposition No. 100 (1991-1992), page 121
60 Special Annex I to prop. No. 100 (1991-1992), page 445

in a way that will be of mutual benefit for both parties. "[61]

How it worked out:
Through several rounds of negotiations between Norway and the EU, trade in agricultural products has been further liberalised. It has moved away from the principle that formed the basis of the original draft of the protocol on trade on processed agricultural products which existed when the EEA agreement was approved.[62] In the agreement on protocol 3, which was adopted in 2004 the requirement that compensation should reflect the actual raw material costs was considerably toned down in the agreement text. This was not accidental. As Torbjørn Tufte describes in the report, "*Customs Protection Crumbles - Norwegian Agricultural Trade in Light of the EEA and Third Countries*" from 2011, after negotiations over many years a "mutual reduction of 3 percent in the agricultural components-tariffs was agreed to. This, despite the fact that the EU had falling raw material prices, while Norway had stable and in some cases rising raw material prices."[63]

If one had relied on the principles of the original draft of protocol 3, Norwegian customs on imports from the EU should have been revised upwards, while the EU customs on imports from Norway should be adjusted downwards. Instead, custom tariffs have been uniformly reduced for both parties. This has provided a basis for a continuing and growing imbalance in trade in processed agricultural products. Similarly, we have seen in agricultural trade, despite the assumption in the EEA agreement, article 19 that developments in the trade are to take place on a "mutually beneficial basis." In practice, there has been an extensive increase in imports from the EU to Norway, which in 2011 was nine times greater than exports to EU.[64]

The assumptions underlying the original protocol 3 when the EEA was adopted, that the customs tariffs would ensure equalization between the lowest level in the EEA and the Norwegian level has clearly been broken. The same is the assumption in the EEA agreement, article 19, that trade would develop on a mutually beneficial basis.

61 Proposition No. 100 (1991-1992), page 121
62 The EEA was not negotiated in this area in 1994, and i an agreement wasn't until 2002. See more about the processes associated with this and what the changes consisted of in the report mentioned below, page 42-44.
63 Agricultural Investigation Office: *Customs protection crumbles - Norwegian agricultural trade In light of the EEA and third countries* . Report 7/2011, page 43
64 Source SSB / SLF. See also more on this in Section 7.9.2.

3.2.14. Summary
The current EEA agreement violates a number of areas of important political intentions and promises made by the government and parliamentary majority when the EEA agreement was adopted in autumn 1992. Whether a political majority, in retrospect, believed that it was a good thing is in this context less interesting. What matters is what the EEA was explicitly said to apply to and not apply to - and what has actually happened.

Secondly, it is obviously relevant to look at how and why this development has occurred. In some cases this has occurred because a political majority wanted a new policy. In other cases, it is less clear whether the policy change was desired or not. But in a lot of cases it is obvious that the EEA has led to approval for changes in Norwegian policy that are in conflict with the majority's view. Neither reversion, differentiated payroll fees or the Vinmonopolet arrangement would had been so amended without the EEA. This is how the EEA has been a lever for change in national policy. This is also supported by the EEA Review Committee when they summarise that "*the majority of lawsuits on the EEA agreement brought before Norwegian courts by Norwegian companies and individuals are against the Norwegian authorities.*"[65]

How far is the EEA likely to go? Even opponents of the agreement did not have at the time enough imagination to envision the full scope of the agreement. Few people imagined that EU/EEA would be able to deny us earmarking professorship positions at Norwegian universities for women. And who could have imagined that the surveillance of telecommunications and data traffic would be defined as an issue relevant to the EEA, as it has been through the parliamentary majority's acceptance of the data retention directive?

The debate on the data retention directive shows how wrong things can turn out when letting bureaucrats and lawyers define the EEA agreement framework, based on the four freedoms. It is time that Norwegian politicians make a fundamental review of issues and discuss the content and framework of the agreement. This is not primarily about the policies we should be for or against. No one would prevent Norway from imposing the same rules for the retention of telecommunications and data traffic that are in the data retention directive - if the political majority in Norway wanted it. But the question Norwegian politicians should ask themselves is how far the EEA

65 NOU 2012:2, side 134.

should go, what the agreement should include and what we should accept to be part of the agreement without getting something back through negotiations.

For, as Professor of Political Science at the University of Oslo, Dag Harald Claes put it: "*there is almost no limit to Norwegian policies that cannot be considered to have an anti-competitive effect. Seen in this way, it is dramatic how far the EU can possibly go.*"[66]

3.3. The Labour Union's 15 demands for the EEA

So far in this chapter we have examined how the assumptions that the political majority in Parliament made in advance of the EEA being adopted are in the current situation. It is also interesting to see whether the assumptions/conditions/requirements that other key players had in order to enter the EEA agreement at that time, are said to be met. We will address in this chapter the requirements that the Trade Unions (LO) had concerning the EEA, measured against what has happened subsequently.

The trade union movement realised that full integration into the internal market would present major challenges. The concern was reflected, for example in the Labour Union's 15 demands for the EEA agreement, which were adopted at a meeting of representatives August 28, 1990, before the negotiations started. Stein Stugu at the De Facto Knowledge Centre for Unions was commissioned by the Alternative project to look at how the development has gone, has made an assessment based on the Labour Union demands for an EEA agreement. The main points of Stugus' review are summarised in this chapter. The paper in its entirety is a non-printed appendix to the report. Stugu stresses that the review does not intend to provide a comprehensive response that addresses all elements that may be considered an expansion of Labour Union's demands, but to provide important elements of how trends have gone after Norway signed the EEA agreement on the basis of the objectives in the requirements.

3.3.1. Employment

The Labour Union's demand: Cooperation on economic policies for full employment must be part of EEA cooperation.

If cooperation on economic policies that ensure full employment is part of EEA cooperation, it must be evaluated on the basis of the results that the internal market led to. It is not enough to look at the wording of the agreement, one must look at the results of the policy that is completed.

The EU's designed its employment strategy on the basis of the Amsterdam Treaty, which went into effect in 1999. In principle, member states should have a goal of full employment when they implement the EU policies and activities. At the Lisbon treaty of 2000 the European Union was to develop the world's most competitive economy, including by increasing mobility and strengthening the internal market as a real, common labour market. This strategy for growth continues with the vision of Europe 2020.

The crisis in the euro illustrates how successful the strategy has been. Instead of reducing unemployment, unemployment has skyrocketed. Youth unemployment is increasing even more dramatically. Unemployment among young people under 25 was in December of 2011 at 22.1 percent. To the extent that the EU has a common policy to increase employment, the results are the opposite. The austerity measures now being implemented in large parts of the EU will probably increase this tendency considerably. In addition, the regional imbalance will increase. Although the EU has formally stated objectives of increased employment, it has a policy which in practice is producing no results. The policy is far from the Labour Union's aim for a policy of full employment.

3.3.2. Social dimension and fundamental rights

The Labour Union demand: the EEA cooperation must include the social dimension with a binding action plan to ensure the community members' basic rights.

The community members' basic rights are the basis for the EU's social charter and the charter of fundamental rights adopted in 1999. The problem is that the social rights are subordinate to the internal market's four freedoms. ETUC (Euro-Labour Union) is concerned because they believe that the European Court's rulings in the so called Laval Quartet (Viking Line, Laval, Ruffert and the commission against Luxembourg) has changed the relationship between the market's four freedoms (free flow of capital, goods, labour and services) and fundamental social rights. With the four judgments the right to free negotiations has been subordinated to the market's four freedoms. When the ETUC analyzes the four rulings, the consequences there are on the

66 Nationen, 08.05.2002.

the posting of workers directive is key. The ETUC evaluated the posting of workers directive when it came out so that it wouldn't hinder the individual country from having stronger legislation against social dumping, while it established a minimum standard. After the four rulings the assessment is that the directive has become a maximum directive that cannot be open to stronger domestic requirements than that defined by article 3, points a - g. The points define specifically which areas requirements may be added. This assessment from the ETUC fully shows that the EU/EEA in practice has not incorporated a binding action plan to ensure the community members' fundamental rights.[67]

3.3.3. Professional cooperation and participation

The Labour Union's demand: The right to professional cooperation and participation must be ensured in the EEA agreement.

The Labour Union's basis when the demand was crafted, was that the Norwegian decision-making traditions should be maintained. Not only in the form of a consultation and discussion arrangement, which is the result of the directive on professional work (European Works Council EWC), but also representation in the groups' governing bodies. In addition, work continued in the early 90s in several trade associations to establish a Nordic professional partnership arrangement with the goal of a more committed relationship than what is in the European cooperation councils.

Much of this work was halted and replaced by the directive on European Works Councils. A positive consequence of the EEA agreement is that Norway's place in European Works Councils is maintained. Without the EEA agreement, it could be a problem to get Norwegian employees into the cooperation councils that have been established. It should be added that Swiss employees who are not in the EEA have largely been placed in cooperation councils.

Concerning the objectives that the Norwegian trade unions movement had for how the professional cooperation should be designed, and especially the goal of representation in governing bodies, it must nevertheless be said that what has been established is inadequate in relation to the objectives that are in the Labour Union's demand. [67] See also Chapter 3.3.10, 6.4.2. and 10.3.4.8.

67 See also Chapter 3.3.10, 6.4.2. and 10.3.4.8.

3.3.4. Participation in the EEA process

The Labour Union's demands: Employees must be ensured participation in the EEA process.

The demand was a desire for real influence on the agreement process itself. In a report from Torstein Eckhoff and Tor Brostigen[68] in 1992 this was deemed as not having been honoured. One can also see the demand as a desire for real influence on the content of the EEA agreement. In the agreement itself some formulations are included that specifically protect the interests of employees, for example in article 66 it states that "*The parties to the agreement agree that it is necessary to work for an improvement in workers' living and working conditions.*" Furthermore, provisions on equal pay, working conditions, equal treatment and dialogue between employers and employees are on par with the European level. Viewed in this way, the agreement has features to ensure workers' jobs.

The real problem is that these good intentions alone have little content because the agreements are subject to the four freedoms. We see now how the court interprets the relationship between the four freedoms and the regulations that are established to ensure workers in the judgements in "Laval Quartet". Although the agreement had considerations that were based on workers' rights, the practical monitoring and implementation show that the Norwegian rules for employment are being undermined.

3.3.5. Market access

The Labour Union's demands: Norwegian businesses must have access to the unit market.

This is also true for processed fish products. Access to the internal market is the main reason for the Norwegian membership in the EEA. It is claimed that without the EEA agreement, Norwegian businesses would not have access to the internal market. Customs tariffs and other restrictions would hinder exports. And Norway is, due to the EEA agreement, essentially a part of the internal market (the food industry is exempt). There is a tariff on agricultural products coming into Norway, while the EU has secured tariffs for processed fish products going to EU. In one area the EEA agreement is better than what Norway had before it was entered into, in that it prevents dumping accusations. When the EEA agreement's consequences for market access are to be evaluated, there are two factors that are important to include:

67 68 Eckhoff, Torstein and Tor Brostigen (1992): Labour Union demands for the EEA – an assessment.

Most of the access to the internal market was already in place in the form of free trade agreements, which one will fall back on if the EEA is dissolved. The free trade agreement with the EU was established by referendum on EU membership in 1972 and took effect in 1973.[69]

Since the EEA has existed there has been a general liberalisation of world trade through the WTO and a general reduction of trade barriers.[70]

The most important elements for ensuring Norwegian market access would therefore still be in place. For processed fish products, there has been a reduction of customs duties, but customs duties have not been completely done away with. As such, the Labour Union's demand has not been successful. The total customs duties on fish products is not very large and is between 2 and 3 percent of total Norwegian fish export.[71]

When it comes to fish, the EEA has also had an impact on the Norwegian government's ability to give preference to local owners when allocating new licenses. The ESA claimed in 2000 that this was contrary to the rules on the right of free establishment. Initially the government (Jagland) had believed that this was an area that lay outside the EEA, but in 2006, the Norwegian authorities went along with the demands of the ESA whereby the interests of local ownership were not included in the aquaculture act, which replaced the licensing act.[72]

3.3. 6. Working conditions, health and the environment

The Labour Union's demand: Work rules must be prioritised, they must be high on the list, and the possibility of sanctions must be attached to the treaty. Norwegian rules for hazardous substances and the asbestos ban should apply until the corresponding regulations are introduced throughout the EEA. Norway should continue to implement more stringent environmental regulations than non-EEA countries.

It must be distinguished between how to adapt the work environment rules as opposed to general environmental rules. When it comes to work environment rules, the EEA agreement has an explicit formulation that allows for stricter national rules in article 67: "*The minimum requirements shall not preclude any party to the agreement from maintaining or introducing more stringent protective measures that are compatible with this agreement*." More stringent regulations in Norway are therefore possible, but in practice the internal market has also put pressure on this area.

When it comes to environmental regulations relating to hazardous substances, the EU's goal is total harmonisation, no member state can impose stricter standards than what is in the REACH (the EU regulatory framework for chemicals). This means that Norway cannot implement more stringent rules than the EU. The thinking is that the legislation will promote the internal market, having more stringent rules in one country than another would create a barrier to trade. It is thus difficult to pursue a proactive environmental policy based on the "pre-emptive" principle. In practice, environmental cooperation has established a plan that reduces Norway's ability to be a pioneer.[73]

3.3.7. Participation in environmental cooperation

The Labour Union's demands: the member states must ensure full participation in the EC's environmental cooperation. The cooperation must be opened to Eastern European countries. Norway is participating in the environmental cooperation, and with the expansion of the EU, this cooperation has also been opened to many Eastern European countries.

3.3.8. Management of natural resources and the licensing laws

The Labour Union's demand: the management of natural resources remain national, with social control in order to realise important goals. Licensing laws should, in light of the EEA negotiations, be developed to safeguard the social control of economic policy, promotion of community interests and ensure state influence and control of the ownership structure in business. The legislation needs to be made into an appropriate tool and be improved to ensure against business acquisitions from abroad with the goal of acquiring technology without continuing production. The laws must be opened to professional activities. Reversion of hydropower is an area in which the EEA agreement has had direct consequences for Norwegian legislation.[74] With regard to the licensing laws, things have been developing in the opposite direction relative to the Labour Union's demand. The licensing laws regulating foreign ownership are being phased out rather than reinforced. At the conclusion of the EEA agreement, there was no doubt that the old industrial licensing act had to be discontinued. This law required licensing of foreign acquisitions in Norway and was

69 See detailed review in Chapter 10.3.
70 See detailed review of Chapter 11.1.
71 See detailed review in section 7.4.
72 See also Chapter 3.2.8.
73 See more on this in chapter 6.3.
74 See further discussion of the case in section 3.2.2.

therefore discriminatory. Acquisitions could be examined, and requirements made on the purchase of more than 20 percent of companies in the stock exchange. The limit was raised just before the law was dissolved to 33 percent. As a replacement, we got the acquisition act, [75] which replaced licensing with a notification requirement.

Notification requirements applied to all acquisitions, but seldom led to injunctions or conditions being imposed by Norwegian authorities. Yet the law started in many companies a process which in practice gave important impetus to their representatives both in terms of assessing the impact of the acquisition, designing strategies in relation to the buyer's plans and establishing professional cooperation arrangements. The new acquisition act also came into conflict with the EEA agreement, in any case with the ESA's interpretation of it. In 2003, the ESA stated that the law was contrary to the EEA agreement. The law was then dissolved by the Norwegian authorities without it being further examined against the EEA agreement. The rationale was that it is used only to a small degree when special conditions or injunctions are imposed. With that the government closed down in two steps, legislation that was important in terms of social control and the employee's position within many companies/corporations.

Norway has had a law that limited ownership by one individual owner to 10 percent of financial institutions (banking and insurance). This legislation has also been changed because the ESA said it was in violation of the rules on the free flow of capital and the right of free establishment.[76]

3.3.9. Managing the activities on the continental shelf

The Labour Union's requirements: The Norwegian government should have control over the activities on the Norwegian continental shelf. The Community interests must continue to be based on the distribution of rights. The oil and gas sector's crucial significance for Norway's economy puts Norway in a special position with respect to the natural resources' importance to the nation. The offshore sector must not be subject to adjustments, but rather to negotiations that result in arrangements that ensure the Norwegian government's control of the sector. The negotiations should not lead to the liberalisation of Norwegian offshore policies to the detriment of Norwegian industry and jobs. Transparency in tenders for the Norwegian continental shelf requires Norwegian terms for wages, contracts and professional organisational rights and that the Norwegian continental shelf be opened accordingly.

As of this writing (February 2012) a political battle is going on for whether Norway will be subject to proposals for new safety rules for oil and gas operations. The EU has prepared a proposal for a common security policy, which as a unified industry both employees and employers say will weaken the level of security level on the Norwegian shelf. The proposal would, if implemented, reduce the efforts that are currently based on the strong involvement of both parties. Responsibility would be removed from the two parties to be based to a greater extent on public inspections. Norwegian experience is that it would undermine the detailed control one has today, although the current system does not cover everything either. This is a point of view the government fully shares.[77]

The EEA agreement has had the consequence that all building projects on the continental shelf should be opened to tender in all EEA countries. The consequence of this is pressure on prices, which also means pressure on working conditions and safety. It also complicates the work that unions in the North Sea do to oversee the efforts for a proper working environment and a satisfactory level of safety.

As a consequence of the EEA agreement, requirements are no longer imposed on bases in Northern Norway during the extraction in the north, which probably would have been a fully natural requirement by the Norwegian authorities if it were possible.[78] The gas market directive of 1998 also sets down important guidelines for the gas sector. An important feature of the directive is that gas buyers will be free to choose from whom to buy gas, and that the pipelines will be available to both seller and buyer in the gas market. This provides guidelines for handling gas exports, which has likely caused Norway great losses.[79]

3.3.10. Norwegian wage and working conditions

The Labour Union's demand: Norwegian contract and salary conditions must apply to working in Norway. The host country's rules must apply as a minimum for work in other EEA countries.

The claim must be evaluated in relation to the legal situation which was established in and with the four aforementioned rulings in the EU (Laval, Viking Line, Ruffert, Luxembourg). That Norwegian wage and working conditions would apply, was also something

75 relating to the acquisition of businesses.
76 See the discussion in Section 3.2.9.
77 See further discussion of this in Section 4.3.2.
78 See further discussion of this issue in section 3.2.6.
79 See further discussion of this in Section 7.9.4.

that the trade union movement assessed was in place with the introduction of the posting of workers directive. The ETUC said the directive was a minimum directive. With the state of law that the four rulings established, this was changed.[80] In practice Norwegian rules were challenged to prevent social dumping in several areas: The ESA concluded in June 2011 that requirements on tariff wages in public contracts could only be imposed if they were based on a generally applied tariff agreement. There is a conflict between the government and the ESA over the implementation of the ILO Convention 94 in Norwegian tendering rules. The ILO Convention allows for a requirement that the contractor must pay wages in accordance with the applicable tariff agreement or what is otherwise normal for the appropriate place and occupation. The convention allows it so that such requirements are included in the specification of requirements from many public providers. If this is changed, an important tool in the fight against social dumping will be removed.[81]

The NHO has examined the Norwegian general application laws since they, together with Norwegian industry and several shipyards, raised an issue about the general application of the engineering convention. The EFTA Court concluded that the general application of the 37.5 work week was acceptable, however there was no general application of the provision for travel, board and lodging as well as an out of town surplus. When it comes to the out of town surplus, the ball has been pushed back to the Court of Appeals.[82] Important elements in the Norwegian general application law has been in reality undermined.

3.3.11. Precautions to ensure the Norwegian agreement, wages and environmental conditions

The Labour Union's demand: With the free movement of persons, national authorities must have access to measures against large disturbances to the labour market. The authorities must ensure that the unrestrained introduction of a tender principle and privatization do not jeopardise permanent jobs. The labour movement must have the right to enter into control agreements to secure Norwegian contract, wage and environment conditions.

The EEA agreement in principle allows for the introduction of safeguards against large disturbances in the labour market. In practice, such protective measures were allowed for in connection with the EU expansion in 2004 and 2007, whereby in a transition period one could have different policies relating to labour immigration from the new member states. An important element in these transitional measures was that one would be paid a salary in line with what was common for workers in the same industry in Norway. It gave the Labour authority the ability to control wages in industries where the tariff agreement was not made public. The transitional period for the Czech Republic, Estonia, Latvia, Lithuania, Poland, Slovakia, Slovenia and Hungary ended in May 2009. For Romania and Bulgaria, which joined the EU in 2007, the transitional rules continued.

When it comes to control measures, there is an ongoing discussion about what kind of measures it is possible to reconcile with the contents in the EEA agreement. The employer asserts that the sum of the elements proposed by the government to control wages and working conditions in the temporary employment industry are measures that are so extensive that they are in violation of the rules of free competition.[83] In particular, employers are concerned that the representative might not have access rights in wage and working conditions at temporary employment agencies, and that the principle cannot be applied to joint liability, ie, a liability for wages if the employment agency does not pay what was agreed/imposed. This illustrates how the EEA agreement limits effective measures against social dumping. It is particularly problematic for employers trying to prevent their representatives from having the right of access. It's hard to imagine an effective fight against social dumping, without trade unions and employee representatives as strong players.

The demand from the Labour Union is a requirement that in reality is directed against the whole notion of a common internal market with free movement of labour. The idea of the internal market is that the ability to compete will be strengthened by moving resources to where they can be used in the most efficient manner.

3.3.12. Better access to prevent tax evasion

The Labour Union's demand: The free flow of capital must be the basis for improved transparency and measures taken to prevent tax evasion.

The free flow of both capital and labour increases the problem of effective tax control. The main problem is related to control of the Norwegian-registered foreign enterprises (NUF). In practice, this new corporate structure has proved very difficult to control. The company form was not allowed

80 See further discussion in section 3.3.2, 6.4.2 and 10.3.4.8.
81 See further discussion of the case in section 6.4.1.
82 See also paragraph 3.2.12.
83 cf. chapter 4.7.1.

in Norway, but we were obliged to approve the NUF after a decision by the EC in 1999.

When someone wants to hold NUF accountable, it is often difficult to get a hold of those responsible. The company can be registered with a PO Box address, it is often also removed before those responsible can be found. It is so difficult that the Tax Evasion Committee has proposed to ban the NUFs that are established outside the EEA. But a ban on NUFs established in another EEA country is not possible, because it would violate the provisions of the internal market.

3.3.13. Participation in EU programmes for research, technology and education

The Labour Union's demand: Maximum participation in EC programmes for research, technology and education must be ensured.

When negotiations on the EEA agreement were concluded in 1992, law professor Torstein Eckhoff rated this as being the only demand that was met. He posed the question at the same time whether this was such a good idea. The reason that this demand was met is that fact there had never been a problem. Participation in these programmes is primarily a question of whether one is willing to cover the expenses.

3.3.14. Security of consumer interests

The Labour Union's demand: Consumer interests must be safeguarded through cooperation within the EEA.

In important areas, consumer interests are threatened by the EEA. One of the most recent is the issue of the level of bank guarantees, the guarantee for deposits. Norway has a deposit guarantee of 2 million NOK per deposit. The EU is in favour of full harmonisation with a common guaranteed level of 100,000 Euros, which at the current exchange rate is less than 800,000 NOK. The EU has since 1994 had a requirement of a minimum guarantee of 20,000 Euros, but this was a minimum, not a requirement for harmonisation. With an increase of the guarantee, there is a desire for a standard, which would have consequences for Norway. If Norway is allowed to have a stronger guarantee than what is allowed by the EU's common rules, this would been seen as undesired competition by the EU.

The disputed services directive was the subject of criticism from the Norwegian consumer interests. Lars Waterhouse of the Consumer Council wrote in 2006 that "*In the Consumer Council's view, the interests of consumers were not sufficiently considered when the services directive was designed. That the directive was influenced by other interests than consumer interests is reflected in the legislative process.*"[84] The Consumer Council is therefore concerned that the interests of the free flow of services take precedence over consumer interests.

Another example of consumer interests being subordinate to market demands is the controversy over the so-called food make-up directive. In January 2001, Parliament majority accepted EU's legislation on food additives. All relevant Norwegian authorities, such as the Norwegian Food Control Authority and the Norwegian Nutritional Council, agreed that from a consumer safety standpoint it would be advantageous to maintain the Norwegian regulations instead of accepting the three food make-up directives. In the proposition from the Stoltenberg government, the issues were specified in the following areas: "*The conservatives nitrite and nitrate that can be converted to carcinogenic nitrosamines in meat products, the so-called azo dyes that can cause hypersensitivity reactions in susceptible persons; the sweetener cyclamate that in large amounts may cause testicular damage and impaired sperm quality.*"85 This is yet another example of the internal market's need for common rules taking precedence over consumer interests.

3.3.15. To not impair public solutions and safeguard the welfare

The Labour Union's demand: the EEA cooperation must not impair public solutions for common issues in society, but must continue to safeguard the welfare through a strengthened public sector.

There is an ongoing struggle over the interface between the public and private sectors in the EU/EEA. The logic behind the EU's economic policy, with the four freedoms at the base, is that most of society needs can be solved through their being opened to competition. This is in conflict with the fundamental view that is reflected in the Labour Union's demand, that a secure welfare system and good solutions to important common issues require a strong public sector and that important welfare issues are still the responsibility of the public sectors. When it comes to what should be solved by government,

84 Http://forbrukerportalen.no/Artikler/2006/tjenestedirktivet 84, 30/5 - 2006.

85 Quoted from Dag Seierstad, "the EEA - a critical review," De Facto report 2:2012, page 55

it is in principle still each country's decision, but if the area is opened up to competition, it is subject to the requirement for being opened to tender throughout the internal market.

In practice, the fight on how much should be opened to competition is about specific measures to liberalise area after area. Important areas are being opened to competition, and public management is subordinate to market demands. Examples include:

the postal directive, which Norway has now decided to opt out of, but has not yet come up with an alternative solution with the EU.

The transport sector, with the liberalisation of road transport, the EU allows for cabotage (the opportunity to transport goods on the way home), which is good for the environment, but allows for social dumping in the sector.

The collective regulation, which forces bidding if bus transport receives public support without being operated by the government itself. In some of these areas, Norway has adopted liberalisation ahead of the EU's decisions. But decisions are often impossible to reverse as long as we are subject to EEA regulations.

3.3.16. Summary

Looking at the totality of the Labour Union demands of the EEA, they would - if they had been fully met - have meant completely different EEA policies than the current EU/EEA ones. These requirements imply a completely different possible type of social management in the form of a stronger public sector and public regulation. Control of wages and working conditions of migration would have been better, as would have capital controls. The demands break so fundamentally with the ideology underpinning the internal market, that is not surprising that at best only 2 or 3 requirements can be said to be met. Had all the LO's demands on the EEA agreement been met, we would certainly have had a different debate on the EEA agreement in Norway.

Chapter 4: Law and politics – the EEA dynamics

4.1. Intro

In the previous section we showed examples of how fundamental the assumptions at the conclusion of the EEA have been subsequently broken. In this chapter we will illustrate in more detail the obligations and mechanisms in the EEA and how they over time have contributed to changes in Norwegian society.

4.2. Existing regulations and their interpretation

4.2.1. Commitments and understanding

Which obligations Norway has committed itself to through the EEA and which rights the agreement grants, exist at different levels. It is partly about the obligations/rights explicitly set forth in the agreement, partly about a mutual understanding between the parties at the conclusion of the contract, and partly about a unilateral Norwegian understanding that was assumed by the government and parliamentary majority at the conclusion of the contract.

4.2.1.1. The literal agreement

An example of this could be the wording in the agreement text itself about what the agreement covers - and what it does not. Although the text appears to be clear, we often find that there are differing opinions among the parties to the agreement concerning the interpretation of the wording in the agreement. There may often be contradictory wording in various articles.

Examples of wording that set limits to the what the EEA agreement applies to, can have a very general design and principally have an effect in many sectors ("*This Agreement shall in no way affect the parties' rules on ownership*)" [86], or they may be specific to a particular policy area ("[...] *Norway can continue to apply restrictions which apply on the day the agreement was signed, on the establishment of foreign nationals in fishing or in companies that own or operate fishing vessels* ").87

4.2.1.2. Mutual understanding between the parties at the signing of the agreement

In order to seek to clarify some issues that could give rise to differing opinions between the parties, there was an exchange of letters between Norway and the EU in advance of entering into the agreement. The aim of this was that there should be a mutual understanding of how the agreement should be understood. This can often be policy clarifications which can't be read directly from the text.

An example of this is discussed in the Bondevik II government's EEA message from 2002: "A recurrent feature of the discussion in ref. No. 100 (1991-92) is that one assumes that EEA rules were not an obstacle to maintaining non-discriminatory restrictions on capital movements, such as licensing arrangements that do not discriminate between Norwegians and foreigners. The reason for this view included the correspondence between the EFTA states and the Commission, in which the Commission stated that non-discriminatory arrangements in their view could not be considered to be contrary to the rules on free movement of capital. "[88]

4.2.1.3. The understanding that assured the majority for the EEA

A third level of understanding of the agreement's obligations and rights is the unilateral understanding that the political majority in Norway assumed, both by the government through EEA proposition No. 100 (1991-1992), and by the parliamentary majority through the committee for the parliamentary process.[89]

At the signing of the EEA agreement, a number of Norwegian laws changed. The changes were not only done as a national process. There was extensive dialogue with the EU and ESA in the meantime, and all amendments were justified and reported to the ESA. The amendments

86 The EEA agreement, article 125

87 The EEA agreement, Annex XIII, section 10

88 Report. No. 27 (2001-2002) About the EEA Agreement 1994-2001, pp. 46

89 For a review of examples of this, see chapter 3.2.

that the government thought were needed were discussed in the EEA proposition and were presented to Parliament as separate pieces of law. The EU thus had ample opportunity to have an overview of Norway's compliance of our EEA obligations. In many cases the changes occurred just after an indication by the EU.

The government also discussed in the EEA proposition a number of laws/rules that were not intended to be changed.[90] When the other party - in this case the EU does not oppose this understanding of the agreement, it is reasonable to assume this understanding. The EU has - if only tacitly - accepted Norway's understanding of what changes needed to be done in Norwegian law as a result of entering into the agreement.[91]

4.2.1.4. Loyal compliance on the part of Norway

The EEA Review Committee describes the extensive effort that was carried out by the Norwegian administration for several years in the early 1990's to identify areas where Norwegian laws and regulations were considered to be contrary to the EEA agreement provisions, and later how the adopted amendments would implemented. Over 10,000 pages of EU rules were to be incorporated into Norwegian law and about 100 Norwegian laws and several hundred regulations were created or amended as a result of the EEA in the period 1992-1993. The report states that "*It is agreed that the Norwegian legislature and administration performed this task efficiently and in a way that was loyal to the EEA agreement's intentions.*" [92]

When the general perception is that both the Norwegian legislature and administration have been loyal and efficient in complying with the implementation of Norway's obligations, one could ask why Norway should be subjected to a public trustee with meticulous surveillance on the part of the ESA. This suggests that things should be able to work well with a bilateral cooperation based on equality between the parties, and mutual trust that the agreed commitments will be complied with by each side.

There was a general perception that Norway had changed what needed to be changed as a result of entering into the EEA agreement. People were aware that the EEA agreement was a dynamic agreement, which included the requirement that all new legislation from the EU that exists within the area of the agreement should be implemented by Norway, unless right of reservation is used. But the growing pressure on Norwegian policy is not only due to new regulations from the EU, but through the ESA and the EFTA Court's interpretation of existing regulations. Quite suddenly Norway's efficient and loyal compliance with the EEA intentions from 1992 is no longer sufficient.

4.2.2. The law's legislative history as a premise?

In Norwegian case law, it is common to rely on legislative history of the law when the law is to be interpreted. This is intended to ensure that laws are applied and interpreted in accordance with the legislator's intention.

In the EU, there exists in practice a ban on the use of legislative history in EU law, even if this prohibition is not codified anywhere. This is because there are a number of member countries that may have very different motives for agreeing to a treaty, regulation or directive. And more importantly, in most cases no such legislative history actually exists. They are simply working documents of the Commission and not available to either the judges or the public. This means that they are kept secret, even for those who wish to access them.

Claus Gulmann and Karsten Hagel-Sørensen write in their book, EC-law that "*The Court emphasises the need to take into account the dynamic nature of community law, and it usually rejects that the Treaty provisions can be interpreted from the legislative history (which, incidentally, at least for the main part is still unknown)* ".[93]

This is mainly how a court law is created. This means that EU member states in practice have no idea what they are committing themselves to by voting for the new treaty texts, regulations, directives etc. Robin Churchill, a professor of international law at the University of Dundee, said indirectly the same thing: "*the Court's decisions illustrate, when interpreting community law, how little importance it gives to the intentions of the legislators and to what extent it assumes a dynamic, policy-oriented approach to promote the interests of the Union and the further integration of the member states.* "[94]

This point was not emphasised by the government in the EEA proposition in 1992, nor by the majority parties Labour

90 For a review of examples of this, see chapter 3.2.
91 See more about this in chapter 6.7.
92 NOU 2012:2, page 119

93 Gulmann, Claus and Hagel-Sørensen, Karsten: EF law. Law and Economy League Publishing, Copenhagen, p.128
94 Churchill, Robin: EEC fishery law. Martinus Nijhoff, p 89t

Party, the Conservatives and the Christian Democratic Party. However, there was a representative who argued this point in the Parliamentary debate on the EEA, lawyer and professor of EU law, Fridtjof Frank Gundersen of the Progress Party, "Another general remark concerns the interpretation of EEA treaty. It is clear that EEA law just as EC law, will be interpreted in a completely different way than the law provided in a typical national parliament. National laws are interpreted on the basis of what lawmaker's opinion was, and lawmaker's opinion is often expressed in the legislative history, i.e. including the law's proposition, the committee recommendation and also sometimes by the statements made in Parliament. EEA law, however, will primarily be interpreted by the wording of the text, the EEA treaty's objective and consideration for the coherence of the whole treaty system. Legislative history will however not be given much importance for the good reason that it does not exist. The negotiations are not public. This means that statements that are made during the negotiations cannot be given much emphasis. Anyone who is not aware of this, can, on the basis of statements that are made during the negotiations, easily get an unrealistic picture of the legal situation. This also means that those who led the negotiations are no more qualified to interpret the EEA law than those who only have the treaty texts to abide by. "[95]

Gundersen was not against the EEA for that reason, on the contrary, he saw the EEA as an opportunity to gain support for important aspects of the Progress Party's policies – for which there was no majority in Norway. But he was also concerned that the consequences of the EEA should be looked at in an open and honest way.

The development of the EU meant that the problem of court made law would escalate. This happens partly as a result of EU regulations becoming more extensive, with increased potential for different rules pulling in different directions - and thus giving more room for court interpretation. This problem is amplified by the fact that the union has grown to 27 member countries, with sometimes very different history, cultural and political traditions and preferences. The ability to make new decisions, especially decisions that change the treaties, is reduced. At the same time the Union's area of jurisdiction is steadily increasing, and with the Lisbon Treaty the pillar structure has been removed and the EU Court is granted in principle the authority for the entire EU region.[96]

95 The EEA Parliamentary debate, 16 October 1992.
96 See further on the Lisbon Treaty and its implications in section 13.5.

The EU Court's responsibilities have increased so dramatically, while the ability to make policy decisions that corrects the direction of Court's have decreased.

4.2.3. International agreements

It is not only the EEA and bilateral sector agreements that regulate trade and political cooperation between Norway and the EU. Both Norway and the EU/EU member states participate in a number of international organizations, conventions and forums - and assume obligations under international law as a result.[97]

Norway can as a member of the EEA still speak with an independent voice in international forums, where the EU increasingly speaks with one voice. It also means that Norway has the ability to present its views and specific proposals that either the EU does not want to promote because of internal disagreements on the matter, or because they simply disagree with them. There are a number of examples where Norway has used its control outside the EU to present views on behalf of the interests of a minority within the EU who have been prevented from promoting the proposals themselves, as well as proposals that have been in support of less developed countries of the world.[98] There are also examples of Norway making use of international regulations that exist within the framework of the World Trade Organization (WTO) in cases of conflict with the EU, where Norway has been successful, for example, in salmon case.[99]

There is significant flexibility for Norwegian negotiators in international forums to promote their views to a greater extent that can help to strengthen Norway's interests in cases in which Norway is under pressure from the EU and the EEA's Surveillance Authority. This is the case both within the framework of various UN organisations and conventions, such as the UN Convention on labour rights (ILO). Other relevant forums are the World Trade Organization (WTO), the European Court of Human Rights (ECHR) and the Council of Europe. Although these international organisations and institutions do not have the same intrusive enforcement mechanisms, they will be politically important in the tug of war battles with the EU and the EEA's Surveillance Authority.[100]

97 See the detailed review of Chapter 6 and 11.1.
98 See more about this 6.3.4, 6.5.3 and 63.5.
99 See further discussion of this in chapter 7.5, 11.1.2.12. and 12.2.4.
100 See section 10.2.2.2. and 10.2.2.3. for specifics.

This will in turn be a question of how these new commitments to international forums shall be implemented in Norwegian law, and how this can contribute to "trumping" EEA commitments (implementation in the Constitution, the Human Rights Act, or other ways for them to become rules which take precedence) .

4.3. New regulations

The EEA agreement is amended, among other ways, through the adoption of new regulations in the EU, which will in turn reach the EFTA countries through the EEA. This was a familiar and accepted part of the EEA agreement. At the same time the provisions of the agreement also allows for other options.

4.3.1. The right of reservation

The right of reservation is a legitimate right for the EFTA countries in the EEA to oppose new legislation that the EU adopts being made applicable to the EEA. Each EFTA country has in this context veto power. Such as if Norway says no to the implementation of a new directive, then these regulations will not become part of the agreement. Some say it is wrong to talk about a veto as long as we cannot prevent the EU from implementing the regulations. This has however never been the purpose of veto power in the EEA. Of course, the EFTA countries could not veto the EU adopting new rules and developing cooperation among itself. The key to this is, of course, that the EFTA countries, individually, through an independent national decision, may prevent the new directives from applying throughout the EEA agreement.

In the areas the EEA agreement covers, the right of veto does not exist within the EU and is replaced with majority decisions. The EFTA countries in the EEA thus have the right to opt out of new EU legislation that EU countries do not have. Several sources have stated that the right of reservation goes against the spirit of the treaty of a unified development of regulations, [101] and that there is an internal contradiction in this. There is nothing exceptional about agreements having built-in contradictions. The EU treaties and directives have a long series of such. The right of reservation was a political and constitutional necessity.

On April 10, 2011 the convention of the Labour Party agreed that Norway should use the right of reservation on the EU's third postal directive. This was a historic decision. For the first time a majority in Parliament was to use the right of reservation in a specific case, and for the first time the Norwegian government reported to the EU that they had no intention of implementing a directive that had previously been decided as relevant to the EEA. This view was communicated to the EU at the EU Council meeting in May 2011. It was the government's view that the EU should formally start the procedure in the EEA agreement, article 102 for using the right of reservation. This still hadn't happened in January 2012.

Although the natural steps in a 102-procedure are that the EU will start the formal process in the committee, after Norway has signalled the EEA Council that we do not intend to implement a set of rules, Norway is free to take up the matter in EEA Committee on its own initiative. This is also emphasised by Trond A. Eriksen, from the Centre for European Law in his book on the right of reservation: "*The time period in paragraph 4 commences when the case is submitted to the EEA Committee. Both parties have under art. 92, No. 2 the right to take matters up in the EEA Committee.* "[102] If the case drags on too long, in the interest of predictability for market participants, among other things, it has been argued that the EFTA side take the matter up in the EEA Committee and thus begin the 102-process. This can also be done on the part of the Norwegians to make it clear that the government's view remains unchanged and that the case is not "[...]" *is maturing* "*while clarifying the matter politically or awaiting that resistance decreases or pushing it back to a more convenient time (such as after the next election)* ".[103]

Along with the debate on the data retention directive, the treatment of the EU's third postal directive marked a crossroads in the debate on the implementation of EU directives in Norway. For a few weeks in spring 2011, there was genuine debate in all parties in Parliament on the use of the right of reservation for a specific EU Directive. The Progress Party's parliamentary group went along with Socialist Left Party, Centre Party, Christian Democratic Party and the groups on the left for use of the right of reservation on the data retention directive. Also among the Conservative Party, there was significant opposition to the directive and there was real debate about whether the Conservative Party's parliamentary group would recommend the use

101 see the Preamble to the EEA: "The Parties [...] Considering that the purpose
is to create a dynamic and a uniformed European Economic Area. "

102 Trond A. Eriksen: Norway's opportunity to opt-out of new EEA regulations - Directives on additives in food. IUSEF No. 41. Centre for European Law, University of Oslo. University Press 2003, page 52

103 NOU 2012:2, pages 95-96.

of the right of reservation. Several Members of Parliament from the Conservatives voted against the vote in Parliament, including the Oslo representatives Michael Tetschner and Nikolai Astrup. Several sources held that the outcome within the Conservative Party would have been different if they had waited for the party's national congress in April 2011.

As well, on previous occasions, there has been considerable debate related to the implementation of certain EU directives, and when the Bondevik II Government took up the EU patent directive even then Prime Minister Kjell Magne Bondevik was among those who dissented. But every time the right of reservation has been brought up before, a clear parliamentary majority consisting of the Labour, Conservative and Progress Party has argued against the right of reservation being used.

When Parliament debated the EEA agreement in October 1992, the then Prime Minister Gro Harlem Brundtland stated that "*we will be ready to use the right the agreement gives us, to oppose the proposal from becoming a common EEA rule, if we find it necessary*" [104] Neither Gro Harlem Brundtland, nor any of the other key players on the yes side considered that Norway in 2010 would still remain outside the EU - and that the that EEA agreement would still be Norway's association with the EU. When Brundtland held that the right of reservation was negotiated to be used, was it the intention that this should only happen for the first time after nearly 20 years of the agreement?

So why has the right of reservation never been used before? Over the years, lack of use of the right of reservation has been justified in many different ways. The warnings against the use of this right as the agreement provides have been strong, even somewhat hysterical. Although the EU's former ambassador to Norway, Percy Westerlund, threw himself into the debate in 2006 with what could be perceived as threats from the EU related to the EEA agreement's continued existence: "*If Norway against all imagination chooses not to implement the services directive, the question of EEA's future will be held at stake.*"[105] The current EU Ambassador Janos Herman followed the same track, when he announced that one could not exclude the broader counter-reactions from the EU if Norway turned down the data retention directive.[106] These are to be perceived as untimely threats from the EU representatives in Norway, which cannot be mandated by the provisions of the EEA agreement.

The possible effect of the use of the right of reservation is often exaggerated in political debate. It is a legitimate right enshrined in the agreement. It does not allow for counter-reactions on the part of the EU. The agreement's provisions on protection measures may only be used when "*serious economic, societal or environmental difficulties are about to occur*"[107], it is only the directly affected part of an annex to the agreement which *may* be suspended,[108] and it is incumbent upon the parties to find solutions that do not create unnecessary problems for the cooperation. If larger parts of the annexes are removed, this could be a measure that could put the agreement's purpose of uniformity in greater danger than the temporary suspension [of] an individual directive.

This is also underlined by Trond A. Eriksen's book on the right of reservation: "*There is no doubt that the right of reservation is a legal reality. It is clear from the agreement, and a use of the right does not constitute an infringement. The legal consequences of your reservation appears to be relatively limited [...] It has been claimed that art.102 gives the EU the opportunity to "respond firmly" if the EFTA/EEA countries oppose the new legislation (cf. Sejersted, Arnesen, Rognstad, Foyn and Stemshaug: EEA law (Oslo 1995). s.129). As the discussion above in this chapter shows, this is not pertinent. The opportunity of suspension under art.102 is not a criminal sanction against the reservation, but a result of the harmonised rules being forfeited (see also Arnesen, Graver, Sverdrup, JV s.125-126, note 11). The suspension must be limited to those directly affected directives, and the effect is reduced in many cases as a result of provisions in the main agreement.* "[109]

The market participants will be assured of good protection in the event of suspension of the rules, through the "*rights and obligations which individuals and market participants have already*

104 Parliament's minutes of debate EEA 15 - 10/16/92, page 216
105 Aftenposten 22.11.2006.
106 Aftenposten 25.11.2010.

107 EEA agreement, article 112
108 A problem here, which among other the professor at the Centre for European Law, Finn Arnesen, emphasised at the Alternative Project seminar on the postal directive and the right of reservation in June 2011, is that whatever annex to the agreement directives shall be included which generally will not resolved before the political treatment of directives starts - even though this is assumed in the EEA agreement, art. 102. Therefore it will often not be known exactly what the directly affected parts of the agreement are when one discusses whether the right of reservation shall be used. Possible effects can therefore soon be exaggerated in a heated political debate, with conflicting interests both between Norway and the EU and internally in Norway.
109 Trond A. Eriksen: The opportunity to opt-out of new EEA regulations - Directives on additives in food. IUSEF No.41. Centre for European Law, University of Oslo. University Press 2003, page 72

acquired pursuant to this Agreement continuing to exist."[110] In addition, you will not be in a gap in the suspended area. This is described by Trond A. Eriksen's book on the right of reservation as follows: *"A special feature of the EEA agreement, as opposed to traditional treaty law, is that prior agreements between the parties do not stop (Nordberg et al pp. 298-301). It follows from art.120 that the EEA agreement will only 'go ahead', and to the extent there are previous free trade agreements in the suspended area, these can conceivably again be applicable. This was partly justified by the possibility of a suspension of part of the agreement (Proposition. No. 100 (1991-1992) s. 102 and 324). If the suspension of the rules is referred to in art.8, the previous agreements are of minor importance, since the EEA main agreement in the great majority of cases regulates trade more exhaustively than the previous free trade agreements."*[111]

It has been argued that the right of reservation cannot be constantly used. There are no other people who have been calling for it. Norway has, since the existence of the EEA agreement, accepted thousands of directives, and only in the debate of a few of these has the question of a possible reservation on the part of Norway been brought to a head. [112] There is no reason for the EU to be dissatisfied with the political majority in Norway's ability and willingness to accept and implement new EU legislation. For long periods we have been most talented of all EU and EEA countries when it comes to this.

Another reason for not using the right of reservation could of course be that the problems in the agreement were less than expected. It is quite obvious that this is not the case. The EEA has become more extensive and affects areas today far beyond what was foreseen when the agreement was signed. In areas such as the management of natural resources, alcohol policy, equality policy, rural and regional policies and the protection of labour rights, the consequences of the agreement have been far greater than anticipated. Even opponents of the agreement could not have had not been able to imagine how far-reaching the subordination to the free flow would be. The need for use of the right of reservation clause has thus been greater than anticipated when the agreement was signed.

It has been argued that the reservation clause cannot be used because a Norwegian reservation would not only have consequences for Norway, but for all the EFTA countries in the EEA (i.e. also for Iceland and Liechtenstein). Now, however Iceland and Liechtenstein can on their own initiative adopt the EU legislation that Norway has refused to implement in the EEA agreement. If Norway for example, had said no to the data retention directive, Iceland and Liechtenstein would have remained free to implement comprehensive monitoring of their own citizens.

Formally, the argument can still be said to be valid. A Norwegian reservation would have the result that the current directive would not be incorporated into the EEA agreement - and Norway could thus block the part of the EFTA in the EEA. But if such an argument to be meaningful to the EU, it would be simpler for Norway to use the right of reservation today - than when the agreement was signed.

When the EEA agreement was negotiated, there were seven countries that negotiated on the part of the EFTA against 12 countries on the part of the EU. In addition to Iceland, Liechtenstein and Norway also Switzerland participated (who later said no to the EEA in a referendum), as well as Sweden, Finland and Austria (which all joined the EU after the referenda in 1994). The right of reservation was thus negotiated in a situation where a Norwegian reservation would have blocked the introduction of new EU legislation in seven countries with a total of more than 25 million inhabitants. In the current situation, by comparison, a Norwegian reservation is able to block the introduction of EU legislation in three countries with a total of just over 5 million inhabitants. In a EU which will soon have half a billion, one would think that such a situation would be manageable.

Of course, a Norwegian reservation would be noted in the EU and the political consequences of a Norwegian reservation against an EU directive can of course be much larger than a mathematical calculation of our share of the population in the EU. We wanted to use a right that EU countries do not have. In the areas that the EEA agreement covers, no right of reservation in the EU applies. In matters related to the internal market, it is the majority who decides - and the minority must acquiesce.

All this was known however when the EEA agreement was negotiated. Then the

110 EEA agreement, article 102, section 6
111 Trond A. Eriksen: The opportunity to opt-out of new EEA regulations - Directives on additives in food. IUSEF No.41. Centre for European Law, University of Oslo. University Press 2003, page 65
112 Cf. NOU 2012:2, page 246

question – does one not trust that the EU stands by an international agreement that it has signed? Would the EU lose interest in Norway if we used the right of reservation? The answer to this question is obviously no. This is the same frightening image that the yes side has tried to conjure up in two referendum campaigns for membership in the EU. A frightening image that was totally unfounded. The EU has an interest in maintaining good trade relations with Norway. The EU even has a surplus trade balance with Norway for traditional products and is completely dependent on imports of Norwegian gas, for example, to ensure its security of supply.

It is not only Norway that has said no to the EU. The Swiss voted no to the EEA in a referendum, but still have subsequently negotiated a series of agreements with the EU. Understandably enough - the EU is interested in maintaining good relations with its neighbours and major trading partners. Similarly, of course, the EU is interested in maintaining good relations with the energy nation of Norway. [113]

Did Gro Harlem Brundtland mislead the Norwegian Parliament in 1992? One may question whether the right of reservation was really meant to be used when necessary. If so, then Prime Minister Brundtland led the Parliament to conclude an agreement on false premises. This is probably an argument for the agreement to be reviewed and that one should look at alternatives to the current EEA agreement.

4.3.2. The EEA's relevance

The right of reservation both should be and should have been used several times. However, the use of the right of reservation is not the first choice. Defining a question as not being relevant to the EEA is a track that should have been pursued with much more force in many contexts, and that is becoming ever more relevant.

The assessment of relevance depends partly on the basis that was used in the EU treaties for enacting legislation and on which pieces of legislation in the relevant area that were previously included in the EEA.[114] With the Lisbon Treaty the pillar structure of the EU has been removed and at the same time the EU is enacting more and more wide framework directives. This makes it less obvious than before which directives are relevant to the EEA and it also raises questions about which parts of directives should be implemented.

The EEA Review Committee states that "*it may seem to be a tendency that in cases of doubt, one has chosen to adopt legislation*" [115] One of the most glaring examples of the deterioration of the agreement through the assessment of relevance is the data retention directive. Who would have imagined that the surveillance of telecommunications and data traffic would be defined as a question relevant to the EEA, as it has been through the parliamentary majority's acceptance of the data retention directive? The EEA Review Committee evaluates it to the point where "*if Norway at an early stage rather than [believing that it was relevant to the EEA] had quietly argued that the directive was not relevant to the EEA, there might have been support for this, and the great battle over the reservation would have never occurred* "[116]

It will be a clear benefit that directives which one thinks should not to be incorporated into the EEA agreement because they by their nature extend beyond the scope of the agreement, are rejected as not relevant to the EEA - instead of activating the procedures for using the right of reservation in the agreement. With a reservation the affected parts of the annex to the agreement could be removed and additionally one would have the responsibility to try to find a solution to the issue. If a new directive however is deemed not relevant to the EEA, the case is in principle settled. The directive is not in the EEA agreement because it is not relevant to the contract. Thus, there is no legal basis for the EU to consider further action on this matter.

This is not primarily about the policies we should be for or against. No one would prevent Norway from imposing the same rules for storage of telecommunications and data traffic as in the data retention directive - if the political majority in Norway wanted it. But the question Norwegian politicians should ask themselves is how far should the EEA go, what agreement should include and what we should accept for being part of the agreement without getting something back through negotiations. A wise rule in the EEA should be at least that directives that violate the clear assumptions that existed at the signing of the EEA agreement should not considered relevant to the EEA agreement.

For example, by accepting that the data retention directive is EEA-relevant, it would

113 See more on this in Chapter 12
114 Cf. NOU 2012:2, page 94

115 Ibid, side 95.
116 Ibid, side 94.

be difficult for Norway at the next opportunity to claim that a similar directive - with perhaps even more politically sensitive content - was not relevant to the EEA. Over the years, Norway has accepted directives concerning sovereignty over natural resources (such as the licensing directive and gas market directive). Experience shows that being compliant in a case - does not contribute to the general goodwill - but rather that the screw gets tightened further at the next opportunity.

In some situations, the EEA's relevance has been considered politically in individual cases, and it has come to open conflict between Norway and the EU. Such was the EU's emissions trading directive, in which Norway, unlike the EU, initially conceived of a system that covered most sectors and emissions. Neither the EU's comprehensive system of free allowances was in line with the vision that was originally prevalent in Norway, while in view of the measures in developing countries (which were not committed to emission reductions via the Kyoto Protocol) it was the EU that was the most restrictive. Based on this different policy, the Norwegian authorities wanted to be associated with the EU's emissions trading plan without implementing the directive. The Norwegian authorities argued that the directive was not relevant to the EEA, but the Commission disagreed and after several years of negotiations, Norway relented. The result was a narrow quota system, where most of the permits were given out for free and the use of measures in developing countries was limited.[117]

Another issue being discussed these days is the EU's proposed safety rules for the offshore oil and gas industry. A united Norwegian oil industry has come out against the proposal. On the part of the government, the oil and energy Minister Ola Borten Moe clearly indicated that they do not consider it appropriate to incorporate these EU rules in the EEA agreement. State Secretary Per Rune Henriksen explained the Norwegian position at a meeting at the Stavanger Chamber of Commerce in February 2012: "*We are using all the means we have to stop this. [...] We have given the EU a clear message that the regulation of safety is a national responsibility and that we are the ones who are best qualified to do this. [...] But the EU has just rolled on and now has a proposal on the table, a proposal for a regulation [...] A regulation is simply 'copy and paste', it just goes straight into the legislation as it is. It doesn't seem to us to be a good idea, and we are working unperturbed toward the reasoning that this should never be introduced on the Norwegian shelf. [...] If the EU continues its course, we must decide whether this is relevant to the EEA or not. "*[118]

At the time of writing (February 2012) it is still not clear whether the case has been defined as EEA relevant or whether Norway may initiate the use of the right of reservation.

There is considerable room for an increased awareness of how relevant new directives are to the EEA, and the importance of this will increase in the coming years. The system for assessing the relevance, which the EFTA countries themselves have influence over, appears to be generally closed and without sufficient political leadership and control. An example which the EEA Review Committee refers to, are the standard forms that the EFTA secretariat sends out to EFTA/EEA countries with questions about whether a new act is deemed relevant and the need for (political) adaptation texts or exceptions, technical adjustments and the need for parliamentary consent. The EFTA Secretariat gives no insight into the standard forms that are sent out and which ones are returned. [119]

4.3.3. Special national arrangements and exemptions

Although the new regulations are defined as relevant to EEA, there are other options besides the right of reservation. The EEA Review Committee divides the exceptions into three groups: the exception that was achieved by the signing of the agreement, exceptions (permanent or temporary) for new regulations and exceptions due to special circumstances. Of Norway's total of 55 exceptions, the EEA Review Committee estimates that the majority are from the original negotiations on the EEA or from the first few years thereafter. A full list of recent exceptions does not exist.[120] At the request of Aftenposten [Norway's paper of note] in spring 2011,[121] the government indicated that in the period starting in 2005 it had been given exemptions from four directives (the revised gas market directive, the tunnel directive, the hygiene package and the equality directive), after which the EEA Review Committee estimated that only the tunnel directive represented a new, substantial exception. Besides the tunnel directive, Norway has in two other cases received special provisions in EU legislation, one of which concerns a directive on the health of fish and the other

117 For further discussion of this matter, see Elin Lerum Boasson: Norwegian environmental policy and the EU and EEA as a source of inspiration and power assets. External report to the EEA Review Committee. 08/07/2011, page 19-20.

118 E24, 03.02.2012.
119 NOU 2012:2, page 94
120 NOU 2012:2, page 98
121 Aftenposten 01.03.2011.

concerns railway wagons.[122] Of the ongoing cases in which Norway is trying to get an exception, the bank deposit guarantee is perhaps the most crucial.

There is a general pressure on the part of the EU to lift such exceptions. Among the exceptions that are still causing contention is the prohibition of alcohol advertising on television and genetically modified organisms (GMO). However, there is no reason why Norway should allow itself to be pressured into unilaterally revoking such bans - without the possibly of getting something in return. The exceptions are part of the overall balance of the agreement.

There are good reasons why Norway should strive for national exceptions and special arrangements in several cases - in addition to our rejecting the revoking of existing exemptions. The number of exceptions for Norway (55) is significantly lower than those of our EFTA partners, Iceland (349) and Liechtenstein (1056). The EEA Review Committee says the difference is almost entirely attributable to Iceland and Liechtenstein being so small that many laws do not make any sense for them, in addition to a number of the exceptions for Liechtenstein having been provided to safeguard their special relationship with Switzerland.[123] On the EU's scale, however, Norway cannot be regarded as a big country and there are more than enough examples of legislation from the EU that are not specifically adapted to a sparsely populated, elongated country with special challenges related to the topography and climatic conditions.

4.3.4. National adjustments

The EFTA countries have the right to negotiate adjustments to the incorporation of new EU regulations in the EEA agreement. This is done through negotiating the joint declaration with the EU, or through Norway promoting a unilateral declaration concerning the incorporation of the regulations in the EEA in order to clarify how the regulations should be interpreted and applied.

While the flexibility in the implementation of the regulations is relatively small (one is obliged to implement these literally), there is considerably greater latitude in the implementation of the increasingly large number of wide framework directives. It is up to national authorities to adapt the text and formulate national measures to meet the directive's intention.

In the Boasson report, the EEA Review Committee described how the interpretations of the EU rules can contribute to curtail Norway's flexibility, in this case the state aid rules and Norwegian policy for renewable energy and energy efficiency: "It is important to note that there are no EU regulations as such that play directly into the Norwegian policy development processes, but rather the Norwegian interpretation of the policy. The Oil and Energy Ministry decided to promote a strict cost-effective interpretation, which is not based on the guidelines for environmental aid as such. This led to very specific and stringent ESA decisions which again resulted in Norway having to change its practices. The outcome was quite different for carbon capture and storage where it was primarily politicians and civil servants who had dialogue with the ESA."[124]

Boasson argues that the civil service through its role as interpreter has an increased influence over environmental policy, and that the interpretation may be that a stricter policy winds up being implemented than the EU requires, there are loopholes to be exploited in the EU legislation to get the weakest policy possible or the EU's rules can be simply be reinterpreted because they want to introduce plans other than the idea behind the EU's policy. She also notes that all these forms of interpretation have been carried in the areas she has studied in the report, before she states that: "*Because of the freedom of interpretation, it becomes important for environmental management or sector ministries to take the lead in the EU adaptation processes. The conflicts in the ministry over who would control implementation of the EU's water framework directive show that the administration is aware that the power lies in controlling the implementation of EU environmental policy. The adaptation of Norwegian renewable energy policy for EU state aid rules shows that the way the administration chooses to interpret the EU rules is not necessarily in line with political needs and the administration's key role as interpreter of regulations usually limits the political flexibility. It can also be argued that the politicians, through their low involvement in the implementation of EU environmental policies, give the civil service increased importance.*"[125]

4.3.4.1. Changes in national laws

Another factor when it comes to adaptations to the EEA legislative demands is the Surveillance Authority, which is the ESA's role when national laws and regulations are to be

122 Answer from the Ministry of Foreign Affairs, dated 03.01.2012, e-mail correspondence with the project leader Sigbjørn Gjelsvik.

123 NOU 2012:2, page 98

124 Elin Lerum Boasson: Norwegian environmental policy and the EU EEA agreement source of inspiration and of power. External report to the European Report. 08/07/2011, page 23

125 Ibid, page 28

modified to accommodate the EEA obligations. Sometimes you can get the impression that the ESA has the authority to determine what specific amendments to be made. This is not the case. The ESA does not have the expertise to say which legislative amendments Norway must make, but only to consider what they believe cannot be accepted within the EEA legislation. This was highlighted by the EEA lawyer Jon Øyvind Eide Midthjell at the Energy and Environment Committee hearing in June 2011, relating to the amendment of the petroleum act provisions related to management and bases in Norway by granting of licenses to oil and gas exploration. Midthjell emphasised that the ESA does not have the authority to limit the Parliament's control within the EEA agreement. The ESA can only ascertain whether there is a breach of contract and then bring the matter before the Court if not corrected. The government must decide how the breach can best be corrected.[126]

This implies that even if ESA has given its acceptance to a particular amendment, it is not a given that this would have been the only way for Norway to fulfil its obligations under the EEA agreement. In particular, there is reason to question whether every possibility has been looked at if the case has not been subjected to previous public consultation, and the case hasn't been legally tested in court. The experience of the reversion case shows that just taking the case to court was the key to finding solutions other than what originally had been imagined possible.

4.3.4.2. Loss and win in the same step

The example of reversion thus entailed loss and win at once. It involved a loss because the Norwegian reversion institute was considered to be in violation of several provisions of the EEA agreement. The victory was that a national solution was found that could defend EEA law and that secured an increased public ownership of hydroelectric resources. Norwegian authorities have, however, accepted that we, with the current EEA agreement, are not even free to decide what the balance should be between public and private ownership of hydropower resources. If it had allowed for too high a degree of private ownership, the entire reversion Institute would have failed. This despite the government's promise in the EEA's proposition that the agreement "*would not affect, for instance, the relationship between private and public ownership in the country ".*[127]

The same applies within the organisation of public services. One is on reasonably safe ground carrying out tasks on one's own account, both in terms of the EEA and WTO rules. Once one chooses other options, be it in the form of corporate organisation or of obtaining tenders from external providers, both the procurement rules and the basic principles of the main EEA agreement come into play. Thus it is possible through active political elections in municipalities and counties to utilise the flexibility of the EEA agreement to avoid bureaucratisation and expensive tendering processes. At the same time the ability to find the right mix between public and private solutions has been severely limited, for example, in an effort to facilitate increased local wealth creation.

The EEA Review Committee points to public ownership as a possible strategy to exploit the flexibility in the EEA agreement, and points out that Labour already stated in its party platform for 1970-73 that Norwegian EC membership with adaptation to the Treaty of Rome must be met with the strengthening of the state interests to ensure the "*right of use and control of our country's resources and production*."[128] The discussion with the ESA on ownership restrictions in the financial industry (which ended with Norway removing the 10 percent limit[129]), according to the report, was important for the decision that the state should not sell down to below 34 percent of DnB Nor.

The study further considers that "*state ownership is itself a form of industrial policy, which among other things, serves to ensure the longevity and predictability, or to keep the core business and headquarters in Norway.*"[130] Although the EEA agreement, according to the report, sets up a certain framework for state ownership policy, it is also "*clear that the state has much more possibilities of control both in practise and formally of companies that it owns in whole or in part, compared to the purely private sector - if it wishes to use it. The State may, in principle, exercise control in the same way a private investor would - including to a significant degree pursuing political goals* "[131] It would of course have been interesting to get the government's assessment

126 Midthjells views are, among others, cited in Christian Democratic minority in the notice 417 L (2010-2011).

127 Proposition No. 100 (1991-92).
128 Reproduced in NOU 2012:2, page 371
129 See further discussion in Section 3.2.9.
130 NOU 2012:2, page 371
131 Ibid, page 371-372

of this statement. But the study has revealed a point. When the toolbox is emptied of other policy measures, policy ownership is one of the opportunities we are left with in order to legislate active and targeted policy. But if industrial policy is primarily about "how the government can facilitate private business" [132], the opportunities for management, given the current EEA agreement, is more limited.

In principle it is possible in many ways to formulate national policies to avoid the effects of the EEA agreement. At the same time these will create new problems. The discussion about the national minimum wage as a strategy to meet the challenges in the labour market is a good illustration of this.

4.4. Negotiations for an expansion of the agreement

4.4.1. The lump sum that became permanent membership dues

Originally, it was agreed that Norway would pay an annual 200 million NOK a year over five years. During negotiations on the expansion of the agreement, Norway accepted that the annual cost to the EEA would increase in stages to its current level of nearly 3 billion NOK annually. We still paid, in other words, in 2011, 12 years after the payment was to cease, an annual amount of EEA dues. The amount of which is currently approx. 15 times greater than in the agreement's first year.

It is right that Norway is contributing to a social, economic and environmentally sound development in the countries of Eastern and Central Europe who have become members of the EU. It appears, however, as completely unreasonable that Norway should pay an annual 3 billion NOK for an agreement that the EU and Norway will mutually benefit from. Norway's contribution to these countries should be included as a regular part of the priorities in the budget discussion held concerning other regions in the world. It appears in many cases also hardly appropriate to channel funds through the EU and its budget, instead of establishing direct country-to-country and people-to-people cooperation. It is difficult to imagine that there won't be any significant change (at least not a decrease) in "membership dues" as long as Norway is in the EEA.

4.4.2. "Mutual beneficial basis"

The agreement is subject to periodic negotiations on trade in agricultural goods and processed agricultural products with the aim of progressive liberalization. As we will return to later in the report, the trade in this area is in no way said to have evolved on a mutually beneficial basis. On the contrary, the EU has increased its exports to Norway relatively unilaterally; in the other direction exports have remained steady.[133] It's hard to imagine that new rounds of negotiations based on the grounds set out in protocol 3 and article 19, should result in any significant change in a positive direction for Norway.

4.4.3. From free trade with fish to the EU arrangement

When the EU gets new members the EEA is also changed. With all the recent expansion of the EU compensation, legal proceedings have been brought because the countries Norway has bilateral trade agreements with have been subject to the EU's tariff arrangements.[134] Thus, these countries no longer have any guarantee that they can still take advantage of the fish that Norway can still sell duty free to the EU market. For Norway's part, it cannot be documented that increased tariffs to these countries has led to lower exports - either in volume or value.[135]

4.4.4. Rather the legal system than negotiation?

Some people use these examples as an argument that Norway to an even greater extent should be concerned with a legal, rule-based system - where everyone, in principle, is treated equally. As the discussions in other sections of this chapter show, the legal, rule-based system through which we are connected to the EEA is by no means any guarantee that Norwegian interests are safeguarded. Norway's position of power to the EU in negotiations could have been significantly changed - had there been the political will in Norway.[136]

4.5. The surveillance system

4.5.1. Dynamic interpretation "out of area"?

Are we assuming that the EU Court's every single decision should be adopted by the ESA and the EFTA Court in regards to their surveillance and control of Norway's compliance with the EEA

132 NOU 2012:2, page 370

133 See more about this in chapter 7.8.
134 See also paragraph 11.1.5.2.
135 See more about this in chapter 7.5.
136 See more about this in Chapter 5 and 12

obligations, the development within the EEA in the future could go very far. For, as Professor of Political Science at the University of Oslo, Dag Harald Claes, has put it: "*There is almost no limit to the Norwegian policies that cannot be thought as having an anti-competitive effect. Seen in this way, it is dramatic how far the EU can possibly go.*"[137] The EEA, however, sets both limits for participation in the existing EC cooperation at the time of signing and the acceptance of future legislative development.

The ESA and the EFTA Court have been given the authority to interpret, but this right is not absolute. It is within specified limits. Admittedly, these limits are open to interpretation. It then becomes a political issue to make sure to monitor the monitors. In many ways, this is a "chicken and egg" situation. The ESA and the EFTA Court shall monitor the Norwegian authorities. But Norwegian authorities shall also monitor the ESA/EFTA Court, and ensure legal enforcement of the provisions of the agreement. If one disagrees, one can for example take up the matter at the EEA Council for principle clarification between the parties.

The purpose of the EEA is to create a dynamic and uniform European Economic Cooperation area.[138] Some seem to think that once you have accepted the EEA as a dynamic agreement, then you have to accept everything the EU defines into this dynamic. There is no reason to. The agreement contains provisions that set clear limits on the ESA and the EFTA Court's ability of dynamic interpretation. A major role here is Article 6, which states that "*the implementation and application of the provisions of this agreement, and subject to the future development of case law, the provisions [...] shall be interpreted in accordance with the relevant rulings that the EC Court made prior to the signing of this agreement.*"[139]

While the ESA in cases where the legal situation in the EU has changed, relatively consistently relate to legal development after the agreement was signed, the agreement holds that we should interpret in accordance with the relevant rulings from *before* the agreement was signed. In the EEA proposition it was made clear why such a solution was chosen: "*The fact that we have come to a cross-roads once having signed the agreement, was because for fundamental reasons; one cannot agree to be bound by legislative activities that may take place in the future through the decisions of a body belonging to one of the parties to the agreement.*"[140] This is a logical consequence of the Constitution's § 93, which allows for ceding sovereignty in only a limited area to an organization Norway has joined.

It was stated further in the EEA proposition that "*interpretations made by the Ec court after this date will therefore not be legally binding on member states. The objective of uniformity nevertheless implies, among other things that the Court and the EC court as mutually as possible comply with other's decisions even after the time of signature*".[141] Here it is assumed, in other words that the two courts as mutually as possible apply the other's decisions - not that decisions from one court shall be unilaterally assumed by the other.

The Bondevik II government interpreted the wording of Article 6 to mean that the ESA and the EFTA Court is obliged to take "into due consideration" the decisions of the EC Court after the signing of the EEA agreement.[142] This is in line with the ODA Article 3: *" The EFTA's Surveillance Authority and the EFTA Court shall, through the interpretation and application of the EEA agreement and this agreement take under due consideration, the principles laid down by the relevant rulings that the EC Court has made after the signing of the EEA agreement, which are relevant to the interpretation of the EEA agreement or the rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community to the extent the material contents is identical to the provisions of the EEA agreement or the provisions of Protocol 1-4 and the provisions of the pieces of legislation corresponding to those listed in Annexes I and II to this Agreement."*[143]

It is clear that article 6 emphasises case law *before* the agreement was signed ("*interpreted in accordance with*") more than the case law developed afterwards ("*subject to*"). Had the parties to the agreement intent been that the prevailing case law in the EU should always be applied, it would be

137 Nations, 8 May 2002.
138 see Preamble to the EEA: "The Parties [...] considering that the purpose is to create a dynamic and uniformed European Economic Cooperation Area ".
139 EEA agreement, article 6
140 Proposition No. 100 (1991-1992), pp. 319
141 Ibid.
142 Report no. No. 27 (2001-2002) on the EEA agreement 1994-2001, page 85.
143 ODA agreement, article 3, point 2.

both unnecessary and misleading to adopt an article stating that the agreement shall be construed in accordance with case law before signing the agreement.

Further Article 7 establishes that it is current legislation ("referred to or contained in an appendix to this Agreement or in the EEA Committee decision") which is binding on Norway. For future regulation development a right of reservation applies, a right that the EU member states do have not.

This marks a clear political understanding of the obligations in the EEA agreement. However, it is also a viewpoint that is supported by lawyers, among them Prof. Dr. Erik Boe Law of the University of Oslo. Boe was one of five members of the legal team appointed to evaluate and provide advice on the constitutional issues in the Schengen negotiations.

In his written contributions which were passed onto the Norwegian authorities at the conclusion of the negotiations, Boe commented on (as the other members of the legal team did) certain constitutional questions concerning the EEA agreement. Here Boe states that "*[...] what Norway legally committed itself to in the EEA agreement was essentially to implement the EC rules and EC decisions that existed when the EEA agreement was signed. It was assumed that Norway would largely comply with new decisions from the European Union and not oppose at the wrong time making these applicable to Norwegian law. But the commitments applied essentially to law that already existed when Norway entered the EEA agreement, see EEA agreement, article 7 - 'referred to or contained in an appendix to this agreement or in the EEA Committee decision.' "* [144]

The same view is presented by Professor of Law at the University of Tromsø, Department of the Norwegian College of Fishery Science, Peter Ørebech: "According to EEA, article 6, we are bound by EC Court's case law '*before signing this agreement*', but no later case law. "[145]

Boe writes that: "*It is inaccurate when certain lawyers and others give the impression that the EEA agreement, like the Schengen Agreement, commits Norway to saying "yes" to every future EU decision; Norway has the right to refuse future EU decisions without putting the EEA agreement on the line. Only the part of EF law which the case is about, is to be temporarily suspended. See EEA agreement Article 7 and Article 97, 99 and 102 No. 6 cf 102 No. 5 "*[146]

The EEA Review Committee discusses to a small extent the importance of the EEA agreement's articles 6 and 7, but in a brief statement described article 6 as follows:*" In the EEA agreement, article 6 states that the EU Court's decisions prior to signing the EEA agreement (May 1992) shall be the basis for the interpretation of the agreement. For formal reasons, one does not desire to commit to complying with later judgments. In practice, it has been long established (including by the Norwegian Supreme Court) that the later judgments of course carry great weight. The reality is that current case law EU Court's ongoing case law is of great importance for the interpretation of the EEA agreement, and thus the extent of Norway's obligations. "*[147]

It is unclear what the committee adds by saying that the later judgements should also carry " great weight ". In particular, this becomes unclear when the committee on several occasions gives the impression that Norway is obliged to comply with EU case law. In the discussion of ESA's function and role, the committee writes that *"one of the reasons that many in Norway still experience the ESA as very" strict "is perhaps that there is a somewhat wrong perception of the extent of the EEA agreement. But the agreement is clear - the rules are not just copied from EU law, but also interpreted, practiced and controlled in the same way. "148*

This gives a false picture of Norway's obligations. The whole point of articles 6 and 7 is that the EEA agreement's rules are not necessarily to be interpreted, practiced and controlled the same way.

The same false impression is made when the committee emphasises that the ESA has *"continuous control of how the implemented EEA legislation is actually managed and complied with by national authorities [...]. Most of these cases involve suspected violations of the general provisions of the EEA agreement main body, which must be interpreted in light of the EU Court's practice, and that evolves dynamically. "*[149]

The committee writes that it is *"unacceptable if the ESA is stricter with national authorities of the EFTA/EEA states than the Commission is with the EU states. On the other hand, it is unacceptable if the ESA is less strict than the Commission. "*[150] This is correct if one is clear that the basis of the ESA's control is the case law that applied before the signature of the EEA in May 1992, subject to

144 Proposition No. 50 (1998-99), Annex 7.3, paragraph 3
145 Www.kraftnytt.no, 01.02.2005.
146 Proposition No. 50 (1998-99), Annex 7.3, section 9.1.
147 NOU 2:2012, page 235
148 Ibid, page 219
149 Ibid, page 215
150 Ibid, page 213

later development. Internally, there is no such difference in the EU, and the basis for the Commission's control is current EU case law. Thus, there may be situations in which Norway has greater national flexibility than the EU countries.

4.5.2. From the EF Court to the EU Court

The development of EU cooperation after 1992 strengthens the rationale for the provisions of articles 6 and 7 of the agreement.

When the Lisbon Treaty came into effect on December 1st, 2009 the EC Court's name changed to the EU Court. The reason for this was that the court had extended its area of jurisdiction to be able to make judgements regarding EU law and not only EC law.

Although the EC had already changed its name to the EU with the Maastricht Treaty in 1994, the EC Court's name at the time remained unchanged. The reason for this was that EU cooperation was based on several treaties - the two most important were the EC Treaty on the European Community and the European Treaty on the European Union. The Court was therefore called the EC Court, because it initially only had general access to judge in matters relating to the EC Treaty. With cases which had to do with the European Union Treaty, it had only limited court authority.

With the Lisbon Treaty this system was changed. It removed the division between the European Community and the European Union and placed everything under the designation of the European Union. The Court has also received general jurisdiction for all EU law, unless the treaty provides otherwise.

4.5.3. ESA - more Catholic than the Pope?

From time to time there has been the debate in Norway about whether the ESA is more Catholic than the Pope, in other words, the ESA is rigorous in its monitoring of Norway through the EEA than the Commission is with EU member states.

The EEA Review Committee discusses the key issues on the basis of a quantitative analysis of the number of ESA cases against Norway to the number of Commission cases against Sweden. It is however not a very precise analysis. As the EEA Review Committee itself points out, Norway is very conscientious in its compliance with its EEA obligations. Thus, the Norwegian authorities might fit the label of "more Catholic than the Pope". Thus, there is basically less need for the ESA to take up cases against Norway.

When the ESA periodically has been labelled "more Catholic than the Pope" it has a lot to do with how they have acted in specific cases. One must therefore look to the content of the issues that the ESA has taken up on its own initiative. To what extent is it about, for example, Norway's compliance with obligations under the agreement, or whether it has to do with the development of regulations based on court created case law in the EU. Moreover, one must look at whether the content in the cases that ESA takes up, mean that Norway will be denied the ability to maintain rules that have an equivalent in (individual) EU member states.

The assessment of the ESA and ESA's role is also about how they proceed in specific cases. It has sometimes been criticised that the ESA in some cases actually negotiates with Norwegian authorities about which solutions should be selected. This is outside their mandate. The ESA's mission is to identify the Norwegian legislation that is contrary to its EEA obligations. It is not up to the ESA to have any opinion about which laws and regulations Norway should implement in order to meet these obligations.[151]

4.5.4. The "Ask permission" society

After debate in Norway over several years, the majority in Parliament approved in the spring of 2009 the implementation of the EU services directive in Norway. In connection with the implementation of the services directive, the Norwegian authorities were obliged to report to the ESA all national authorization systems and requirements for service providers. If Norway is to introduce new national requirements for the provision of services, as of December 2009, it must be reported to the ESA, with an explanation of why it is considered necessary for the public interest. This is considered by the EEA Review Committee as imposing "requirements for increased awareness and rationale for the new requirements on service industries, and establishes a system for ongoing inspections that are intended to make the EU/EEA regulations more effective" .[152]

Although the obligation to "ask permission" as a EEA member is less extensive than that of the countries in the euro zone, which must submit its state budget proposals to Brussels for review before it is presented in the home country, it is

151 See discussion in Section 4.3.4.1.
152 NOU 2012:2, page 379

however, a clear example of how the grip on the national sovereignty has been tightened in the EEA.

4.5.5. Norwegian courts "out of bounds"

In Halvard Haukeland Fredriksen external report for the EEA Review Committee[153] he documented that Norwegian courts largely refer to EU law and use it as a source of law in case areas in which Norway is not bound to do so. As the EEA Review Committee summarises it, this is "*an example of voluntary (unilateral) Norwegian acceptance of EU law. [...] In some cases this is because it is the Norwegian legislature (parliament or government) which indicated in the legislative history of the Norwegian laws that they should be construed in accordance with EU law. [...] But there are also examples in which Norwegian courts have on their own initiative taken EU's legal solutions into consideration, including on tax matters* ".[154]
This is reason to take a critical look at this practice, especially if it is spreading.

One such example is the Supreme Court upholding in February 2012, 10 helicopter pilots' claim that the employer cannot demand that they resign at the age of 60. The Supreme Court deferred the issue in 2010 pending the decision in the so-called "Prigge Ruling" of the EU Court. In that case, the Lufthansa's pilots' claim that they could continue to fly until age 65 was upheld. The Court found that Lufthansa's particular age limit was in conflict with EU provisions on age discrimination and that the age limit could not be justified by safety or health concerns as long as the certification rules allowed flying until the pilot turns 65 years old. The judgment may provide a basis for a review of a number of age limits in Norway.

When the Supreme Court used the Court's decision as a basis for its own decision, and set aside a collective agreement in aviation, this was not based on a commitment by Norway under the EEA agreement. EU age discrimination rules are basically beyond the scope of the EEA, and Norway has not been obliged to implement these. This is good reason for Norwegian politicians to take a serious look at this issue.

153 Fuller, Halvard Haukeland (2010) EU/EEA law in Norwegian courts. EEA Review Committee, Report No. 3
154 NOU 2012:2, page 209

4.5.6. When Norway is denied the ability to promote its views of at the EU Court

Such a development as described above becomes further problematic when Norway has even less of an opportunity than before to help set standards for matters of relevance to Norway in the dealings of the European Court. Such influence of Norway has been considered very important given that the ESA and the Court are to take the new judgements of the EU Court into due consideration.

In October 2010, Norway was denied the ability to promote its views (intervene) in a case at the European Court that had to do with the Netherlands' requirements for length of residency in order to receive educational support in other countries - an issue that is highly relevant in the EEA context. While the Netherlands require that you have lived in the country three of the last six years to receive student loans, the requirement in Norway is two of the last five years. In February 2012, the EU Court's Advocate General came out with a statement in the case, in which he says that the rules are inconsistent with the principle of the free movement of persons, and therefore required that the rules be changed. A final judgment is expected later this year.[155]

The reason that Norway was not allowed to intervene is a reinterpretation of article 40 of the EU Court's statutes, which assumes that Norway will only be able to provide written submissions in cases where a national court asks the EU Court for an opinion (preliminary matters). However, the EEA countries no longer have the opportunity to promote their views to the Court in matters between the EU and member countries, between EU countries or between EU institutions (direct actions). According to attorney Jon Midthjell Norway is thereby "*cut out of the most important issues*"[156], when the EU Court, above all, is creating legislation. Norway, together with the other EFTA countries expressed concern about the new practice in the EEA Comittee.[157]

The presentation above demonstrates the lack of equivalence in the EEA cooperation, and how the basic assumptions for Norway's participation in the EEA agreement have been changed to our disadvantage

155 European Court of Justice: Attorney General Sharpston deems the Dutch rule restricting student loans to foreign students who have lived in Netherlands three of the last six years to be in conflict with EU rules on free movement of labor, press release 16.02.2012.
156 Aftenposten 26.01.2011.
157 Member: Summary of the EEA Committee meeting, 09-12.10.2010.

4.5.7. Is Norway at the mercy of the ESA and the Court's interpretation?

What happens if Norway refuses to comply with ESA's orders? ESA may institute proceedings at the EFTA Court against Norway if it is considered that there is a violation of the EEA agreement obligations.[158] If the EFTA Court agrees with the ESA and makes a decision in line with this, the Court's decision of the Court shall be binding on Norway. Norway will be obliged to implement the necessary measures to comply with the judgment.[159] So what if Norway fails to follow a judgment of the EFTA Court? In the proposition to Parliament on the ODA agreement, this issue was referred as follows: "*There are no further sanctions if a country fails to comply with that obligation.*"[160]

A situation where a EU country is not fulfilling its obligations as per EU regulations is not uncommon, and in some cases, this has also affected Norway. In 2005, Greece for example, topped the EC statistics of offenders in the EU - with 20 cases with a lack or missing or incomplete implementation of compliance with EU directives, followed by Luxembourg (16), France (13), Germany (12) and Italy (11) .[161]

However, Norway has historically chosen a line where it has remained loyal to the EFTA Court's decisions. But it need not be the only way to go, even if one should be loyal to the agreement. The EEA agreement states that "the EEA Council shall for this purpose, consider how the agreement as a whole works and develops. It will make the political decisions leading to changes in the agreement. [...] [The parties to the agreement] can, after having discussed the case in the EEA Committee or directly in exceptionally urgent cases, take up at the EEA Council any issue giving rise to difficulties".[162]

While the ESA shall "ensure that member states fulfil their obligations under EEA agreement",[163] the EEA Council is therefore the appropriate body for "*political decisions leading to changes of the agreement*"[164] Nevertheless, the EFTA countries have the right to raise the issue at the EEA Council and EEA Committee. "[The EEA Committee] shall ensure *an effective implementation of this agreement and ensure that the agreement works. It shall for this purpose, exchange views and information and make decisions on cases relating to the agreement. [...] [The parties to the agreement] shall hold hearings in the EEA Committee on all matters of importance to the agreement that cause trouble, and are brought up by one of them."*[165]*" The EEA Committee shall make decisions on agreements between the Community on the one hand and the EFTA countries speaking as one, on the other. "*[166] Norway has accepted that the EEA agreement can be developed in areas where the agreement already applies, either through accepting new directives adopted by the EU, through negotiations based on the provisions of the agreement (such as article 19 and protocol 3) or through the ESA and the EFTA Court's interpretation of the agreement. When it comes to further development of the agreement extending into areas which the agreement initially did not cover, this, according to the EEA agreement article 118, shall be done through a political process that culminates in new agreements which must be ratified or approved by the parties to the agreement in accordance with the rules for this in each country.[167]

EEA agreement, article 118: *1 When a party to the agreement considers that it would be of mutual benefit and interest to the parties to the agreement to develop the associations established by this agreement, to include areas not covered by it, it shall submit a reasoned request to the other parties of the agreement through the EEA Council.The EEA Council may request the EEA Committee to examine all aspects of the request and issue a report.*

The EEA Council may, where appropriate, make the political decision to open negotiations between the parties.

2. The agreements resulting from the negotiations referred to in paragraph 1 shall be ratified or approved by the parties to the agreement in accordance with their procedures.

Which areas are included in the agreement and which are outside of it will naturally be a subject of dispute between the parties. But on the part of Norway, it should at least be based on the understanding of the agreement's contents and the restrictions that were added because of

158 Agreement on the establishment of a Surveillance Authority and a Court (ODA agreement) article 31
159 ODA Agreement, article 33
160 Proposition No. 101 (1991-92) On consent to ratification of the EFTA agreement on the Surveillance Authority and the Court, and the EFTA agreement on the Standing Committee, Section 5.3.1.
161 EUObserver.com, 02/13/06
162 EEA, article 89
163 ODA agreement, article 5
164 Cf, article 89.
165 EEA, article 92
166 EEA, article 93
167 EEA agreement, article 118

the parliamentary majority when the agreement was signed. For even then, people were well aware that the EEA was a dynamic arrangement. Nevertheless, it provided clear promises about what the EEA should or should not contain and what we still be able to control ourselves.

4.6. Unconstitutional interpretation of the EEA?

How far can the current interpretation of the EEA go before it becomes unconstitutional, in that a de facto surrender of sovereignty beyond a reasonable restricted area has occurred? As previously discussed the EEA agreement's article 6 was not designed for fun. It was designed to meet the constitution's requirements and to contain a political reality. If it is considered to mean that other articles of the EEA override article 6, a "legality check" of the EEA agreement should be done against the Constitution § § 1, 26 and 93.

It does not hold that the provisions of the EEA agreement give the impression of a national sovereignty, unless this is a reality. As Doctor of Law, Erik Boe put it in his constitutional review to the government of the Schengen case: "*A freedom without reality is a fiction. And the constitution's limits do not stand or fall by fiction. If the limits on the Parliament, Government and courts become so tight that the decision-making and sovereignty is an empty shell, we will have to cut through and say that such extensive restrictions on self-determination must be equal to the direct effect.* "[168]

Another element that is key to consider is whether the overall de facto overriding by the EU through the EEA agreement of the Schengen agreement and Norway's other agreements with the EU has gone so far that these agreements collectively cannot be justified in light of the Constitution and the people's rejection of the EU in 1994. Boe asked this in its constitutional review in February 1999. In addition to the discussion of the four main dimensions (whether the EU or the EU's Schengen forums could make decisions with a direct impact on Norway, whether the Norwegian authorities' sovereignty was so badly cut that the EU decisions in practice have had a direct impact, the degree of Norwegian participation and influence on regulation development, and how far the EC Court with binding effect could determine whether Norway has complied with the Schengen obligations), he added the following:

"During the overall assessment it is not only the four main dimensions that count. [...] Among other things, the emphasis must be on whether to establish an active EU monitoring of Norway's enforcement of regulations, such as by the Commission or a body like the ESA (for the areas of the EEA). Uncertainty about how the Schengen agreement may be interpreted and enforced, can also come up, and in principle also the viewpoint: Does the Schengen Agreement stand when it is added on top of the EEA? Are we getting close to the limit that the Norwegian people say no in the referendum, or is the Schengen snippet so small that nobody can properly talk about EU membership via the back door? Furthermore, the emphasis must be on how one-sided or mutual the surrender of sovereignty is, the need to reconcile Norwegian sovereignty with the need for international cooperation, and more."[169]

After Boe wrote this more than 13 years ago, developments in the EEA have accelerated , it is debatable whether the conditions for participation in Schengen have been adequately met and whether Norway joined a number of new agreements with the EU that individually and collectively involves the surrender of real sovereignty on a large scale.

In the EEA Review Committee's summary, Norway's actual sovereignty in key areas is assessed as follows: *"The special Norwegian form of association with the EU means that there are a number of points where Norway's real commitments go beyond the formal. Among the most important are:*

- *Every time a new law is to be included in the EEA agreement, Norway [...] must formally accept this. In real terms, the obligations are so strong that this "right of reservation" has so far not been used.*

- *Each time a new act is to be included in the Schengen agreement, Norway must formally accept this [...] In reality the commitments are so strong that there has never been a question of denying any of the 158 new acts that have been included in Schengen after it went into effect in 2000.*

- *The EEA agreement article 6 states that the EU Court's decisions prior to signing the EEA agreement (May 1992) shall be the basis for the interpretation of the agreement [...] In practice, it has long been established (also by the Norwegian Supreme Court) that later judgement of course carry great weight.*

- *When a national court in the EU obtains an interpretation ruling from the EU*

168 Proposition No. 50 (1998-99), Annex 7.3, section 9.0.

169 Proposition No. 50 (1998-99), Annex 7.3, section 5.1.

Court, this is binding. When a Norwegian court obtains a similar interpretation ruling by the Court, it is formally only "advisory." The difference means little or nothing in practice. The EFTA Court's interpretations are applied by national courts and if they should not do it, it means that Norway is violating the agreement.

- *In the EU, the common EU law has precedence over national law, in the event of any conflict. For formal reasons the EFTA states did not wish to introduce a similar principle in the EEA agreement. But we agreed on a formally somewhat more cautious form of primacy, which was embodied in a protocol to the agreement, and then implemented in the EEA act § 2. The difference means little or nothing in practice. In the event of conflict between implemented EEA and "normal" Norwegian law, Norwegian courts as a clear rule are obliged to let the EEA law prevail, and let Norwegian law yield.*
- *In the EU, common laws have a direct effect on national law, even if they are not implemented by the national legislature. Under the EEA agreement, all laws must formally implemented by Norwegian legislation before being considered as applicable law. There is no so-called "direct effect". But through case law, principles have developed that largely fill the same function. First, Norwegian law as far as possible is to be interpreted in accordance with non-implemented legislation. Second, the state can be financially liable if someone suffers losses due to lack of implementation.*
- *The cases involving competition the EU Commission may adopt damning decisions against Norwegian companies, and impose large fines on them. Formally, the decision will not be enforced in Norway. The obligation to pay applies nonetheless and will also be enforced against properties companies have in EU countries.*
- *According to the agreement on Norwegian participation in EU response forces (the Nordic Battle Group), the Norwegian authorities must formally give consent on the day the marching orders come. In real terms the Norwegian forces represent (about 150 men) an integral part of a larger brigade, with specific tasks - such that in practice it would be very difficult to refuse to send them. "*[170]

If one uses the committee's description as a basis, this implies a very extensive real surrender of sovereignty through Norway's agreements with the EU. It should, among other things, on this basis, make a detailed assessment of whether the overall de facto override by the EU through the EEA agreement of the Schengen Agreement and Norway's other agreements with the EU, have gone so far as a whole cannot be defended in accordance with the constitution and the people's rejection of the EU in 1994. Whether the individual decision of the Parliament has had a clear majority behind it in this context is not crucial. Both the interests of minority rights and people's ability to influence key policy issues through elections speak for a more detailed assessment of these issues.

In this context, two issues, which the EEA Review Committee points out, should be further evaluated. One is how far and how long the Parliament's consent pursuant to § 93 in October 1992 stretches. *"Should the original consent at some point be reconfirmed?"*[171] The second is whether a constitutional amendment should be promoted to adapt the rules of Parliament's consent to enter into international obligations to Norway's current affiliation with the EU. [172] The project does not take a position on whether this should be done, but it is obvious that in order for any new provision not to blunt other key provisions in the Constitution, clear limits must be set to the actual surrender of sovereignty through Norway's agreements with the EU.

4.7. Why do the Norwegian authorities allow the EU to set the agenda?

The EU chooses "the easy way" for extensive changes in the basic conditions of the agreement. It is not surprising. The integration train in the EU rolls on, including through the extensive legislation creating decisions from the EU Court. That the EU bases these new decisions on how the EEA shall be interpreted, probably has a lot to do with that they live in a "EU world", where details of the EEA agreement's provisions are not always the most prominent. As the EEA Review Committee highlights, it is mostly handled by the EFTA Secretariat, the EFTA countries and the ESA and the EFTA Court,

170 NOU 2012:2, pages 235-236.
171 Ibid, page 238
172 Ibid, page 874

and only a few people in the EU's Foreign Service (EEAS) handles the daily EEA and the EU's relationship with EFTA countries.[173] It is therefore the responsibility of the Norwegian authorities to ensure that the agreement is managed in line with the assumptions, and in line with the Norwegian constitution .

That there is unused flexibility in the EEA is without a doubt. Then the question becomes: why not utilise this flexibility to a greater extent? Is it the result of a deliberate policy, or could there (also) be other explanations? It probably has to do with several factors. First there is the 50-year-long EU battle in Norway as a backdrop. The forces that are most committed to get Norway into the union, perceive differences between Norwegian practices and EU practices to be a problem because that in turn could be used as an argument against membership. Secondly, it is part of the Foreign Ministry culture to too often quietly give in when the EEA management leads - at the expense of sectoral interests and Norway's main political interests.

Even if one believes this to be right, it will be difficult to challenge the perception of reality that exist in the ESA, the EFTA Court and the EU in terms of what Norway's obligations are under the EEA. Being right does not mean that you get the right. Lack of resources, both politically, economically and legally, to take up the fight and if necessary take the case to the top of the EFTA Court and to be prepared to pay the costs of a loss can lead to "good causes" being shelved.

There are (without an equivalent, by the way) countless examples of complaints that have been dismissed by the police, even if the perpetrator was known and in some cases, caught in the act. A lack of resource leads to the need to prioritise. The same is true in politics. There is limited capacity to take up political battles. It can then happen that cases that in the short term provide greater domestic political gains can be prioritised ahead of cases that set or maintain clear fundamental limits to the EEA which politically will be important in the long term.

Another factor that comes into play is those in the political arena who see an advantage from the developments that occur when a reinterpretation of the EEA is pushed forward. They see that this can win support for political solutions that they could otherwise hardly dream of – and furthermore the decisions are made irreversible as long as Norway is in the EEA.

This was a key motivational factor for the Progress party for entering the EEA agreement in that time. In the report from the Foreign Affairs Committee Carl I. Hagen and Fridtjof Frank Gundersen stated, among other things, that they were "*happy that the EEA-agreement forces greater competition, less state aid, elimination of discrimination against EEA nationals when it comes to Norwegian public tenders and the repeal of discriminatory provisions in licensing. [...]*

If [these] reforms are not implemented, it is because the political pressure groups have contributed to the Norwegian authorities not having the courage to implement a rational policy. This will be much easier after Norway has joined the EEA, since the government can then refer to the fact that we are legally obliged to implement liberalization and non-discrimination. According to these members' opinion, this would be a very positive effect of the EEA.[174]

Development within the EU has also created problems in the perspective of the Progress Party- in particular opposition has been expressed about the export of welfare benefits. Employees from other EEA countries are entitled to welfare benefits in line with Norwegian workers from day one, as long as they have the accumulated rights when coming to Norway. In a speech to his National Board, 26 February 2012 the Party leader Siv Jensen stressed that the export of Norwegian social security benefits from 1998 to 2008 had increased from 2.3 billion to 4.2 billion and stated that "*therefore we have to set limits. If we encounter obstacles in the EEA system, we'll challenge them*".[175] As chairman of the committee that evaluated the Norwegian welfare system, Grete Brochman, points out, the reach of the transition rules that impose restrictions on workers from new EU and EEA countries applies for a maximum of seven years. Unless in the future restrictions can be justified based on "*considerations of public order, security and public health*" [176] or it can be demonstrated that "*serious economic, societal or environmental difficulties which could persist are about to occur in a sector or within a district*", [177] special measures will not be implemented within the scope of the current EEA agreement. With

173 NOU 2012:2, page 300.

174 Recommendation No. 248 - 1991-92, page 31
175 NTB, 26.02.2012.
176 EEA agreement, article 28, item 3.
177 EEA agreement, article 112, paragraph 1

the level of the export of social security benefits which Jensen refers to, such an argument in the EEA system on the part of Norway Norwegian will hardly succeed. Recognizing this is probably one reason why more and more Progress Party politicians are advocating considering alternatives to the current EEA agreement.

Prior to the annual county meeting of the Progress Party in Nord-Trøndelag in February 2012, the Member of Parliament Robert Eriksson called for a study of alternatives to the current EEA agreement. He was thus following his party colleague Karin Seth Wold, who in the Nationen [the Nation publication] of January 18th, 2012 called for the same. Eriksson presents both real political and principled reasoning when he argues that "we had free trade with the EU before the EEA as well. The Norwegian export industry can be secured in a proper way through a trade agreement with the EU, where market access is assured, without us having to be linked so closely to the EU that we aren't able to decide our own welfare, immigration and regional policies. "[178] So one can disagree about how national control should be used - it is part of a vibrant democracy.

The main line of the Progress Party's policies is still clear support for the EEA and using Norway's association with the EU's four freedoms to push through liberalisation of Norwegian politics. There are several Norwegian players who are attempting to use the EEA as a lever for "the Progress Party-recipe", most recently exemplified by the employer organization Virke's response to the government's stimulus package for the labour market in connection with the temporary employment agency directive. Virke concludes that "the package as a whole is so extensive that it must be regarded as an unlawful restriction under the EEA agreement, article 36. Secondly, Virke believes that the individual elements of the package would be contrary to the EEA agreement/ECHR, this applies particularly to joint and several liability and the right of access. "[179] Previously, the organisation has threatened the state with lots of lawsuits to kill the regulations on foreign tour busses in Norway. The man behind the report, which forms the basis for Virke's view is Morten Sandberg, who has five years of service as an employee of the ESA.[180]

4.7.1. Our sharpest officials sent to Brussels

It is a paradox of the EEA structure that we in Norway send some of our sharpest officials and lawyers to the EEA system (the ESA and the EFTA Court), for meticulous monitoring of elements in Norwegian legislation "with EU glasses on" which can be thought of as having an anti-competitive effect. We send some of the sharpest bureaucrats with many years experience in the Norwegian government, so that the ESA and the EFTA are able to shine a spot light on the details of Norwegian law which neither citizens, businesses nor policymakers in the EU have ever had any interest in.

This is also underscored in the EEA Review Committee which states that "*the EEA agreement in many important areas [has] a greater impact on domestic relations than on cross-border ones*" [181], and further that "*the vast majority of complaints to the Norwegian administration and legal proceedings before Norwegian courts about EU/EEA legal relations is between private Norwegian companies and Norwegian authorities. Most complaints to the ESA against Norway also come from Norwegian citizens and businesse*s ".[182] This leads in many cases, to a pure Norwegian tug of war with the Norwegians on all sides of the table - where players from the EU, in the best case, are represented on the tribunal. In cases where there is a question of whether Norway will comply with the commitments agreed upon in the EEA agreement, this is not necessarily problematic. But the involvement of private Norwegian players and agencies also tends towards changing Norwegian laws and regulations - in areas where a broad political majority in Norway wishes to maintain Norwegian legislation. Thus, the EEA is also a lever for change in national policy, for what there otherwise would not have been political support (at least not in the foreseeable future).

The NHO has long committed itself to get the regulations on wages and working conditions in public contracts repealed, and has expressed willingness to take it up in the EEA system if the government does not give into the ESA. Similarly, we have seen that players within the NHO system (as Private Child Care Association) has gone to the EFTA Court to argue its case, [183] when they haven't got political support in Norway for their demands. The general application of collective agreements is an example of the same, where the NHO instead

178 The Trønderavis [newpaper] 04.02.2012.
179 Virke's Association, response - proposed measures to ensure that rules concerning entry and provisions hiring in and out of personnel are complied with, page 1 27.01.12.
180 Today's Business, 1/13/2012.
181 NOU 2:2012, page 134
182 Ibid, page 202
183 Lawsuits filed 4 April 2007 by Private Child Care Association with the EFTA's Surveillance Authority (Case E-5/07).

of showing loyalty to the three party cooperation in employment, is trying to use the EEA as a lever for political changes for which there otherwise would not be majority support in Norway. Such a development is not just a problem for the labour movement, but for the entire Norwegian democracy.

The Norwegian state therefore needs not only the legal jurisdiction to create laws, but also the legal jurisdiction to defend Norwegian laws and regulations against pressure from private Norwegian stakeholders, organizations, Norwegian courts, as well as Norwegian officials and lawyers in the ESA and the EFTA Court.

4.7.2. Advisory opinions from the EFTA Court

In accordance with the ODA article 34, it is up to the EFTA Court to give advisory opinions on the interpretation of the EEA agreement. The statement is to be provided at the request of a court of a member state. The initiative lies, in other words, with the national courts, and the statements are merely advisory - unlike the EU where the EC Court's opinions are binding. Nevertheless, it is up to the national court to pass judgment. The Court will furthermore only be able to comment on how the EEA agreement is to be understood. This was also clearly established in the EEA proposition in 1992: "*The Court will, similar to what applies in the EC, only comment on the interpretation of treaty provisions, never directly on the interpretation of national law. It will therefore never in a statement of interpretation express whether a national law is in conformity with the EEA agreement. It is still the national court which makes the ruling in the cases, both based on their interpretation of national law which the case shall be determined by, according to their understanding of the specific result this would lead to in relation to the facts of the case which it has found to be well grounded*. "[184]

It further states that *"should the national court make a ruling based on a different interpretation of the relevant EEA rules in the case than that stated in the EFTA Court's opinion, the ruling will still be valid. The judgment cannot be appealed at the EFTA Court, only at a national body of appeal.* "[185]

In practice, of course, there will be considerable pressure to comply with the assessments of the EFTA Court once you have chosen to obtain advice from the court. This has been seen in cases in which courts in Norway have obtained an advisory opinion of the Court, most recently with the Court of Appeal taking up a case where the employers believed that the general application of the Engineering Industry Agreement of 2008 was contrary to EU law.[186] The EFTA Court found in this case that the posting of workers directive does not permit the general application of provisions relating to payment for travel, room and board. They believed further that the directive "in principle" is an obstacle to the general application of a 20 percent mark up on the hourly rate for travel assignments, unless it is justified by overriding public interest. This is up to the Court of Appeal court to decide. [187]

There is a significant democratic problem if the changes in the Norwegian legislation are driven by the Norwegian courts and not through the democratic processes in the political system. There is therefore a point to limiting the ability of the national courts to obtain the opinion of the EFTA Court. The EEA agreement allows for this. Norway can through "*its own legislation limit the right to request an advisory opinion to courts which according to national legislation will make the ultimate ruling*".[188]

4.7.3. Why the KOFA?

According to the EEA Review Committee the administrative body that gets the most EU/EEA legal cases is the Complaints Board for Public Procurement (KOFA) .[189] The reason for the establishment of the Complaints Board was "a desire of the Parliament and government to streamline the public procurement regulations and facilitate the contractor's right to appeal". [190] According to KOFAs own oversight they, since its establishment in 2003, have handled more than 2,000 complaints concerning the processes of public procurement. Just under 800 of these were confirmed rules violations, the remaining cases were either withdrawn by the complainant, rejected or confirmed as a non rule violation.[191]

The EU's legislation on public procurement is extensive and is becoming even more so, including the directive on the enforcement of competition in public procurement.[192] This directive requires a waiting period,

184 Proposition No.100 (1991-1992), page 338
185 Ibid.

186 Case E-2/11 STX Norway Offshore AS, etc. against the State v / Tariff Board.
187 Electricians and IT Workers Union: Court's statement of general application. 23.01.2012.
188 ODA agreement, article 34
189 NOU 2:2012, page 204
190 Retrieved from KOFAs Annual Report, 2009.
191 KOFA statistics per. January 2012, http://www.kofa.no/no/Statistikk/?month=0&year=0
192 Directive 2007/66/EF, see NOU 2:2010.

so that there is a time between the decision and contract signing, and that further proceedings are stopped until the appeal has been dealt with in the KOFA. If the rules are accepted by Norway, it will undoubtedly cause further fear (among public companies that advertise tenders) that it will be a mistake due to the delays and additional costs it may incur.

There remains significant national flexibility. One factor is that the Norwegian authorities can increase the limits for when the tender is required at the minimum level specified in the EU regulations, something about which municipal Minister Liv Signe has already signalled there are processes underway to accomplish.[193] Another factor is that municipalities and counties are still free to carry out work on their own. In *For the welfare state's* booklet "Take services back" the fact is referred to that, despite the increasing free market orientation of the EU/EEA and WTO regulations, it is not necessary to submit to public service and business procurement laws.[194] Similarly, it appears in the booklet that it is quite possible for the government to take services back in-house, after they have outsourced. Services performed by enterprises that are one hundred percent publicly owned, and which are not operated in a market, do not need to be put out to tender. At the same time it is a requirement under EU law that certain conditions be met. The fact that there is no fixed definition gives the EU Court the right to overrule national practice. Sometimes it turns out positive for the government, like when Germany and Hamburg won over the EU Commission in a case concerning the organisation of renovation.

Despite this, a number of public services have been outsourced. A contributing factor may be the expectations that exist for many that there will be cost savings to the public. Parts of the business community and the political right argue that the liberalisation of the EU/EEA will pave the way for positive results, and will contribute to cost-effective solutions. In the EEA proposition of 1992 it was also emphasised that an average price reduction to the government of 7-10 percent was expected due to increased competition among suppliers (specified at 3.5 to 5,500,000,000 billion in 1991-prices) .[195] Estimates from the EU itself 20 years later show rather substantial costs for Norway due to outsourcing, estimated at 16 billion NOK.[196]

For the Welfare State's pamphlet mentioned a number of factors that are contributing to the pressure towards outsourcing and privatisation. In addition to the above (EU legislation, Norwegian over-compliance and facilitating the providers' right of appeal through the establishment of the KOFA), among other things, officials providing guidance about tenders from several ministries, comprehensive information pages and courses at the Directorate for Renewal and IKT (Difi), as well as training and guidance in use of profit accounting and control mechanisms from the private sector involved in the public sector under the auspices of the Finance Ministry Government's Agency for Financial Management (SSE).

At the same time, there exists little or no action in the opposite direction." *Contrary to all measures to ensure the commercial companies' interests, there is no similar public inspection, any guidance or training courses to provide advice and to maintain public services on its own account - with the emphasis on democratic rights and the right of access, participation and information . There is no legal aid for municipalities that have been lawfully or unlawfully sued at the KOFA or the ESA. There are no bodies which are entitle us to participate in decisions that affect us as citizens. There is no fast-working system of appeal or oversight agency for employees or residents who believe that the private sector has wrongly been allowed to provide public services with lower quality, poorer working conditions and wages, or that estimates of the alleged savings by outsourcing or public-private partnership (PPP) are not documented."*[197]

All of this could have been acted upon. It's about political will and the ability to prioritise resources for such purposes. Some measures may require an amendment, others may require budget decisions. But it is also about a political consciousness.

4.7.4. Who is getting the best counsel?

The example of public procurement demonstrates how EU legislation, and the Norwegian practice of it, the need for municipalities, counties and other agencies to acquire legal assistance to deal with the challenges that we face.

193 VG, 9 September 2011.

194 Cf. Prof. Dr. Juris Finn Arnesen in the lecture "citizens: welfare services and the legal action", 05/23/2011:" To turn to the market because you are afraid of EEA violations, is not very rational. There is no obligation to turn to the market. Once you do It comes the EEA rights come into play, and the risk of violations increases. "

195 St.pr. No. 100 (1991-1992), page 383

196 See further discussion of this in chapter 7.2.

197 For the Welfare State "Take services back", report May 2011.

Meanwhile, these same agencies have limited resources to purchase external services and legal counsel does not come cheaply. The measures that *For the Welfare State* is missing could have been implemented, and helped to improve the situation for providers in municipalities and counties. Meanwhile, legal counsel is a limited resource and there is no guarantee that the public agencies would be in the front of the queue to get the best counsel.

There are also other factors that may explain why Norway does not stand up more against the adverse political effects of the EEA agreement. Among other things, this stems from a desire to not highlight the (expected) political loss, or from the fear of being confronted with other issues one failed to do earlier. Some people just close their eyes and hope that the case will have minimal public attention. Others see attacking as the best defence and can go a long way to defend the things people are really opposed to.

Other times it may be convenient to blame the EU/EEA ("*we have to do such and such*"), when the issue has not been prioritised. Some are also probably of the mindset that there are a certain quota of cases for which one has the capacity to challenge the EU and the forces in Norway for whom it is "business as usual".

4.7.5. Why no greater involvement by critics of the system?

Why isn't there greater involvement among critics of the system in Norway against an agreement based on the free flow of goods, services, capital and labour? Why do these communities take such little initiative to lead fundamental discussions on the impact of the EEA, much less to present proposals for changes in the EEA or to replace the EEA with a trade and cooperation agreement?

It's probably part of a mindset that it's important to change attitudes before we can change systems. Others may argue that it is not the systems, but the attitudes that are the problem. However, different systems may yield different results. Which framework the international negotiations occur in can often be decisive for the results. For example, environmental issues in general would be handled better in international negotiations under the auspices of the UN - than for example in the EU or the WTO.

4.8. Stepping outside the EU reality can be quite different.

Article 6 could be interpreted strictly/to the letter. Then neither reversion nor the residence and operational requirements would be threatened by the EEA. In these cases there are no new directives, but rulings, and thus a new interpretation of the EEA, which tend to dominate. Then the provisions in the agreement for negotiations on the expansion of the agreement would be used instead, if the EU wanted the agreement changed. Had this been the case, Norway's negotiating position in these matters immediately been greatly changed. The practical differences between the EEA and Switzerland's agreements with the EU could thus have been less than what it is today with the EEA agreement.

To cling to the perception that the parliamentary majority assumed in 1992, is not primarily about securing the legacy of the politicians who brought Norway into the EEA. Strategically it is about getting Norway into negotiations with the EU concerning areas that the Norwegian government believes the agreement was not intended to cover. Thus, Norway would be able to make their claims in such proceedings, either about areas that we want in the agreement, changes in the agreement, or removing other areas from the agreement.

Article 118 makes no commitment about reaching that implies the EEA expanding into new areas and Norway can thus prevent such from happening.
But the Norwegian authorities don't use such a strategy very often with the EU. Admittedly, the Norwegian authorities have on several occasions pointed out that areas are not to be defined in the EEA, but yet changes in Norwegian policies have often been agreed to as a result of pressure from the EU.

An alternative to the EEA agreement would thus be to take advantage of the flexibility that the agreement actually provides - both through more active use of the right of reservation, through standing up to the ESA and the EFTA Court's interpretation of the agreement and by not accepting the agreement being extended to new areas pursuant to the provisions of Article 118. This alternative is discussed further in Section 10.2. Another alternative could be to remove the most problematic aspects of the agreement, but otherwise retaining the framework of which one is a part. Getting equal status or alcohol policies out of the EEA agreement are examples of specific action

to make the EEA more acceptable. This option is discussed in more detail in section 10.3.

Basically it's about a change in culture, mentality and use of resources. Challenging the EU and the ESA/EFTA Court can be demanding. Stepping outside of the EU is also about freeing oneself from the compulsive idea that we have to have the EEA and that the EEA is essential for Norwegian industry and Norwegian jobs. As a supporter of the EEA Hallvard Bakke put it in the No to EU Annual Report 2012: "*But Norway needs to be less servile and use its veto power when it comes to things of important interest. If the European Union gives up the agreement, we can live well with that too.*"[198]

The question is not just about the EU's reaction, it is also about whether the political majority in Norway is actually willing to take significant advantage of the flexibility in the agreement. If this does not happen, the arguments for replacing the EEA agreement with a trade and cooperation agreement with the EU will gain more strength.

198 Hallvard Bakke, No to the EU Annual Report 2012, page 77

Chapter 5: With our backs to the wall

The EEA agreement is presented as a partnership between two equal parties, the EU and the EFTA countries, but the dynamics of the EEA agreement are such that the EEA is based on EU rules in all areas that are covered by the agreement. The legal provisions that have been introduced to meet the EEA obligations take precedence over other Norwegian rules in case of conflict. The Surveillance Authority (the ESA) monitors how the legislation is implemented and practiced in the EFTA countries and may require the countries to change their legislation or their practices. If a country fails to comply with ESA requirements, the matter may be brought before the Court for binding determination. The EFTA Court shall again, according to the agreement, make a ruling in line with EU Court.[199] The perspective of power is clear. This is no mutual agreement, but an agreement whereby one party provides the framework for all interactions. The question is whether this can be changed within the framework of the EEA agreement, or whether Norway must agree to be bound so close to the EU regulations as long as we are in the EEA.

The agreement text shows that the regulations that existed when Norway joined the EEA are the regulations that should also apply for the future. In addition, Norway (and the EU) obtained exceptions when the EEA agreement was negotiated. However, this has gradually changed, and to a larger extent in favour of the EU over Norway.[200] It is reasonable to look at the perspective of power to determine the cause of this.

5.1. The right of reservation and exceptions

The EEA Review Committee concluding remarks on the EEA agreement's consequences on democracy include the claim that "*political Norway was aware of the price when the EEA agreement was signed in 1992, but chose to do it anyway. Firstly, this was the compromise we could agree on. Secondly, a broad majority said that the material benefits of the agreement more than offset the fundamental weaknesses* ".[201] This statement is debatable in many ways. There is reason to question whether one was actually clear about the democratic price of the agreement, in that the right of reservation was expressly described as a right that was to used.[202] In 2011 - after more than 17 years with the EEA agreement, a Norwegian government for the first time notified the EU that it did not intend to implement an EU relevant directive and thus make use of the right of reservation in the agreement. Furthermore, the EEA agreement on the date it was adopted was a much more limited agreement than it is today. The agreement has gone far beyond the limits Parliament assumed when they adopted the agreement, partly because of changes within the EU and the new interpretations of existing regulations in the EU (EC) - and the EFTA courts.[203]

It is also reasonable to question what was known about the substantive benefits of joining the EEA. Market access to the EU has been presented as something that stands or falls on EEA or EU membership, and that this market access has also been made out as having a tremendous significance for the Norwegian economy and jobs which has not been documented.[204] The fact that we need the EEA agreement to sell our products is a myth that is still being repeated, even though we have had duty free access to the EU market for all industrial products since 1977.[205] In spite of this, half of the respondents in a poll by MMI in September 1994 answered that there would be a toll on the export of manufactured goods if Norway turned down the EU.[206]

5.2. The Gas Market Directive and the Gas Negotiating Committee

Both as an example of the unforeseen consequences of the EEA agreement, the enormous pressure from the EU and the myth of only getting financial gain through the EEA agreement , one can bring up the Gas Market Directive and the abolition of the Gas Negotiating Committee. As far back as 1988 the Commission believed that a number of conditions in the West European gas market were contrary to the principles of the internal

199 See more about this in chapter 4.5.
200 See more about this in Chapter 3 and 4.2.
201 NOU 2012:2, page 836

202 See the section 4.3.1.
203 See more about this in Chapter 3 and 4.2.
204 NOU 2012:2, page 356
205 See further elaboration in Section 11.2.
206 Seierstad, Day: EEA - A critical assessment. De Facto 2012:2, page 9

marked.[207] This was followed by the development of three directives with the goal of liberalising the gas trade. The goal was to get rid of the monopolies in the gas trade, in order to increase competition and lower prices. The consequence of this is that it has become less attractive to invest in large, long-term, but costly projects, which in the long run will threaten a secure supply.[208] Furthermore liberalisation and thus partitioning of the market to a less than optimal utilisation of infrastructure and resources.

The Gas Negotiating Committee was to contribute to gas fields being utilised more efficiently and to keeping prices stable. Under pressure from the EU, this committee had to be shut down, because it was a barrier to free competition in the gas market. The Gas Market Directive and the closure of the Gas Negotiating Committee has led to estimated losses of up to 9 billion NOK a year.[209]

This example shows a scenario where the EU and Norway have conflicting interests. The EU is the buyer, and wants lower gas prices, while Norway is the seller and wants higher gas prices. In addition, Norway has focused on a more long-term use of resources, in which all the fields, in principle, are be used to the fullest, while the EU has shorter-term goals of cheaper gas, and therefore has not taken into account the efficient use of infrastructure and gas deposits.

In such a case where there are such obvious conflicts of interest between the seller and buyer, it is thought provoking that the buyer alone can determine the rules of trade between the two parties. This is also discussed in the EEA Review Committee's external evaluation of the EEA agreement's consequences for Norwegian energy policy: "*The cases around the Gas Negotiating Committee and the gas market directive have been one of the most conflict filled processes between Norway and the EU. The buyer countries in the EU through legal means got Norwegian companies to commit to selling more gas than planned, and the Norwegian authorities to discontinue the Gas Negotiating Committee and the Negotiating Committee's arrangements, which only a few years earlier were seen as an integral part of the Norwegian resource management system and a necessary instrument for the development and export of Norwegian gas fields.* "[210]

207 Austvik, Ole Gunnar and Dag Harald Claes: EEA and Norwegian energy policy. External report to the European study. 2011, page 23
208 Austvik, Ole Gunnar and Dag Harald Claes: EEA and Norwegian energy policy. External report to the European study. 2011, page 27
209 Today's Business 01/31/01.
210 Austvik, Ole Gunnar and Dag Harald Claes: EEA and Norwegian energy policy. External report to the European study. 2011, page 30

Austvik and Claes points to solutions that have been done to remedy the damage the EU's demands have had on the Norwegian energy policy (such as in regards to the reversion and gas market directive). However, this cannot be seen as an argument of the EEA agreement's dynamics not being problematic, but must be seen as a unilateral influence from the EU that Norway has tried to stop. Ultimately this has resulted in the Norwegian regulations having to be changed. Particularly serious is the fact that not even in the energy sector, the largest industrial concern, has it been possible to stop unwanted liberalisation under pressure from the EU. [211]

In many cases, Norway has been forced to accept the originally unwanted directives, in some cases we have managed to circumvent the consequences of changing the rules so that the consequences for Norway would be less . This applies to reversion among other things. [212] Many have referred to this and similar cases to show what possibilities Norway has for maintaining desirable regulations in spite of the provisions in the EU and the EEA. Even more clearly, these examples show how in many cases we have to fight to maintain our own rules and regulations.

5.3. Unilateral dependence and unilateral effects

> *"We are paying now three billion a year in dues to belong to the EEA. Actually, Norway should not pay a penny for the EEA agreement. When it was signed, both parties stated that the agreement would ensure "the greatest possible mutual benefit" and that cooperation was of a "balanced character". An agreement that is balanced and mutually advantageous should not be paid for by the one party. "*
>
> (Hallvard Bakke in the article Let the EEA in Peace! in the No to EU Annual Report 2012)

The EEA funds, [213] which initially were to be a sum of 200 million NOK a year over five years, because of demands from some EU member states have been continued and increased steadily up to now. The EEA funds are now considered to be a lasting arrangement. This is example enough of how the EU has come to dominate the negotiations on the EEA agreement. It also shows a unilateral impact of the EU in the EEA. There is nothing to do about this one-sidedness

211 See more about this in Chapter 7.9.5.
212 See further discussion in Section 3.2.2.
213 See further discussion in Section 4.4.1.

as long as there is a perception that Norway is dependent on the EEA agreement, but that the same does not apply to the EU.

To remedy this myth, real alternatives to the EEA are needed, so we have something to bargain with in negotiations with the EU. For agriculture, Norway originally obtained exceptions from the EEA. Through other cooperative agreements such as food safety and the veterinary agreement, however, Norwegian agriculture has become more and more influenced by EU policy, although not on the agricultural regulations directly. The Norwegian Farmers' Union said in a response to the EEA Review Committee's external study on agriculture and food safety that as the EU reforms its regulations it becomes increasingly difficult to maintain the additional guarantees Norway achieved in previous negotiations with the EU. Areas such as agriculture and energy policy, where Norway retained its own rules after the signing of the EEA agreement, however, have been challenged as the EEA agreement has grown to cover more and more. In these cases, the liberalisation has so far gone in one direction – in the EU's favour. The Norwegian Farmers' Union believes this is because "*the fear of political and economic consequences appear to lead Norway to easily give in to EU demands and desires and to not take advantage of the flexibility the EEA agreement provides*".[214]

5.4. Alternatives are necessary

Alternatives to the current EEA agreement are desired by many who believe the EEA agreement has gone too far. Equally important, however, is the basis for Norway's bargaining relationship with the EU. In the time we have had the EEA agreement, we have experienced many losses, both economic, democratic, in the environment, in food safety and other fields. The victories, however, have been far fewer, which are due to several factors. Firstly, there exists today a perception in Norway that we are dependent on the EEA agreement, but that the same does not apply to the EU. On the basis of this perception people claim that the EEA should be treated with caution so that it does not disintegrate. Secondly, this perception on several occasions has also been presented on the part of the EU. That there is a mutual understanding that Norway is at the mercy of the EU in negotiations on the EEA agreement leads to negotiations to be on the EU's terms.

Thirdly, the EEA discussion in Norway has been taboo because the agreement serves as a compromise between both the yes side and no side and between the various wings of no-side. Discussing the EEA and the advantages, disadvantages and opportunities we have in the agreement has become a discussion where all parties are evasive on the question of what the real consequences of the agreement are.

The reasons mentioned have contributed to Norway being in the bargaining position we are in, and it is important to debunk the myths about the EEA and to outline constructive and real alternatives, including in these three different scenarios:

5.4.1. In a scenario where we want to take better advantage of the flexibility

For Norway, negotiations on exceptions, reservations and the impact of the new regulations have been difficult primarily because there is disagreement about which opportunities and initiatives are real, and what kind of consequences these would entail. To a large extent, the EU's demands have gone through without much discussion; in certain cases through the use of pressure such as the threat of exclusion from all or part of the EEA agreement or other sanctions.[215]

In entering into negotiations with the EU, it is important to be aware of what rights we have according to the EEA agreement. This applies not only to the negotiators sent by the government, but also to the elected representatives who are to decide whether negotiations are to be carried out, and to all those who are to exercise pressure on elected officials. In almost 20 years in the EEA cooperation, we have seen that it is too easy to let the directives and other pieces of legislation become a part of Norwegian legislation without an adequate review of the consequences and a thorough discussion in the current political environment and other forums.

Sometimes information has been intentionally withheld to avoid generating discussion about policies the government wants to pass, other times the discussion has been denied by saying that a reservation would be impossible because of the serious consequences it would have for Norway's access to the affected part of the internal market. This is probably due partly to a real fear among politicians, bureaucrats and others, either of sanctions from the EU or the economic impact it may have to remove

214 Norwegian Farmers' Union: Comment to the EEA Review Committee No. 9: "Norway's relations with the EU in the food and agricultural field."

215 See more about this in Chapter 4.3.1.

parts of the EEA agreement annex, but the desire for EU adaptation could also be a motive on the part of Norway.[216]

5.4.2. The scenario in which the EU wants a more comprehensive agreement

The EU has also decided that they want to study the EEA agreement and look at further cooperation and development in the agreement. In a situation where the EU wants to renegotiate the EEA agreement, it is very important that the political environment in Norway draw an independent line based on its own national interests, as a basis for discussions and possible negotiations with the EU. As this chapter has outlined, the negotiations between Norway and the EU are characterised by Norway's negotiating basis often being ignored or underestimated. With how the mood in Norway is today, there is no basis for, or willingness to, entering into a more comprehensive EEA agreement. On the contrary, more and more want to have a looser association with the EU. The EU, however, has stated its goal of a more comprehensive agreement, and in this case, the Norwegian negotiators should come equipped with good alternative solutions and strategies.

In any new negotiations with the EU, it will be important to show that Norway is not dependent on the EEA agreement, and that we are willing to demand other solutions if the EU's alternatives are not good enough.

So far it has been a one way street in the negotiations between Norway and the EU, partly due to a lack of confidence in Norway's negotiating ability, but especially because of threats of sanctions or exclusion from parts of the inner market.[217] In such negotiations, a push can be made for a less comprehensive EEA agreement, but that assumes you know that you have something to fall back on if these negotiations were to fall through.

5.4.3. In a scenario where we want to terminate the EEA

Eventually as a number of EU directives with sometimes serious consequences for Norwegian conditions has been adopted in Norway, resistance against the EEA and the way the agreement works has grown. There is still limited knowledge of the EEA, and many are afraid of the consequences of terminating the agreement. However, recent opinion polls indicate that almost half of those surveyed would like to replace the EEA agreement with a pure trade agreement.[218] The debate about Norway's future relations with the EU has been halted however by solutions other than a continuation of the EEA agreement or a full EU membership being dismissed as impossible.[219]

In order to create an open and constructive debate about what we want from a cooperation with the EU, we need to have some clear alternatives and a political climate where all possibilities can be considered. Today the debate has been halted by alternatives other than the EU membership not being taken seriously and avoided in the discussion. Greater knowledge about what kind of rules connects Norway and the EU regardless of the EEA, and what possibilities are available is essential for a full debate.

5.5. The EU uses all means possible - why don't we do the same?

The above-mentioned cases in this chapter show how the EU uses all means possible to negotiate results that are most favourable for them. Norway does not do the same. Instead of the EEA agreement serving as an agreement between equal parties, we have an agreement where one party sets all the premises and may even go so far as to prohibit the other party's negotiating basis, as the EU did in gas negotiations.

No matter what kind of association Norway chooses to have with the EU, it is important to be aware of real alternatives to the current agreement. The undesired adaptations Norway has made on the request of the EU has not led to milder negotiations by the EU, on the contrary, we have ended up in a relationship of unbalanced power in which the EU requires Norway to make even more extensive adaptations, including in areas that do not really fall under the purview of the EEA. A study of alternative forms of cooperation can contribute to an equalization of power between Norway and the EU, by our showing both ourselves and the EU that Norway is not dependent on the current agreement, and that we may be willing to enter into negotiations on new ways of cooperation if the current arrangement is not conducive to mutual profit.

216 See more about this in Chapter 4.7.1.
217 See more about this in Chapter 4.3.1.
218 See further discussion of the measurement in section 1.3.6.
219 Dagens Næringsliv [Today's Business] 17.01.12 http://www.dn.no/forsiden/politikkSamfunn/article2311174.ece
Dagsavisen [The Daily Newspaper] 01.02.12 http://www.dagsavisen.no/nyemeninger/alle_meninger/cat1003/subcat1010/thread240191/

Part III

Do we need the EEA?

Is the agreement so important for Norway that we ultimately have no alternative but to accept what the EU decides? In this section of the report we discuss some of the myths that exist concerning the EEA agreement's importance for the Norwegian economy and Norwegian jobs, as an important contribution to a more fact-based debate on the EEA and alternatives.

We also raise the question about whether through the EEA, we have actually linked ourselves to an important arena for adopting policies in areas such as the environment, labour rights, women's rights and trade between countries - that we would otherwise miss out on. What would happen if we were not in the EEA - what rules would apply and how would that affect Norway, both in regards to the ability to pursue an active national policy and the ability to exert influence internationally?

EU tariffs are not essential for fish exports. The danger of anti-dumping measures is not imminent without the EEA. (Photo: Per Eide Studio / Norwegian Sea Food Council.)

Chapter 6: International agreements

6.1. Intro

Norway's agreements with the EU imply very extensive and detailed commitments. However, it is far from the only internationally binding cooperation Norway is participating in. This chapter seeks to provide an overview of some of the cooperation that exists internationally and regionally, which both the EU as an institution, the EU countries and Norway are part of, with a primary focus on the environment and climate. In addition, there is a brief overview of the international cooperation to strengthen labour rights, women's rights and gender issues, international contract law and international trade rules. The discussion is limited to the international agreements which are most relevant to the EEA discussion, that is, agreements that regulate the same matters as the EEA or adjacent areas.

This is important to examine more closely for several reasons. Firstly, it is be important to give a realistic picture of the real impact the EEA agreement has on Norwegian policy in areas such as the environment and climate. Do the EEA obligations have any real significance or are they affected similarly by other international and regional cooperative agreements that we participate in?

If there is a difference, do the EU/EEA strengthen or weaken our international obligations in other international arenas? And where would we be if Norway had not been in the EEA - would it in some areas have created a "gap" in regards to international rules? Would it have weakened Norway's national and international environmental and climate efforts, or strengthened them? Secondly, it is important to consider whether international agreements of which both Norway and the EU are members can be used to Norway's advantage in disagreements. Can the existing regulatory framework be utilised to a greater extent in this respect, and to what extent it will be necessary for Norway to take new international initiatives that will strengthen us in discussions and controversies with the EU and the EEA's bodies, the ESA and the EFTA Court? Similar assessments can be made in relation to international regulations to strengthen labour rights, where the UN labour organization (ILO) is the most important international framework.

In regards to women, women's health and gender issues, the UN organization, UN Women, is the most important.

International agreements may establish rules for conditions that other agreement may contain. The most important is the UN Convention on Treaty Law (the Vienna Convention) in 1969, which will be discussed further in Section 7.6. After that it is important to shed light on the international rules that exist for trade, for example in relation to customs and dealing with disagreements. This will be important both in terms of the current situation in the EEA and in evaluating any alternative forms of association. The principal framework under consideration concerns the rules of the World Trade Organization (WTO).

6.2. International agreements

Norway is involved in many international forums, organizations and agreements.[1] In many cases, the purpose of the cooperation is to establish binding obligations under international law between the participating states.

According to the United Nations Association "*International agreements can [...] be very different but have two common features. They imply a degree of commitment from those who sign, and it is international law that determines the obligations the agreements can contain [...] In contrast to the state legal systems international law does not have a unified, coherent system that monitors and enforces these regulations. This is mainly due to the states' autonomy - their ability to rule over their own circumstances* "[2] International agreements can be divided into charters/pacts (such as the UN Charter), declarations (the UN Human Rights Declaration, the EU's declaration on the basic fundamental rights) treaties and conventions (the United Nations Convention on the Rights of the Child, the Treaty on the Non-proliferation of Nuclear Weapons), agreements (the WTO Agreement, the EEA agreement) and the protocols and annexes thereto.

In many contexts, both the EU/EU countries and Norway are part of the same international agreements. The difference is that

1 For a complete list of treaties signed by Norway, see the Foreign Ministry's treaty registry.
2 United Nations Association's Focus on conventions and declarations, http:// www.fn.no / UN information / Conventions and Declarations.

while Norway speaks with an independent voice, the EU countries speak increasingly with a common voice. This is one of the obvious differences in being a member of the European Union. Whether Norway is a member of the EEA or has a trade agreement does not in principle matter.

It may indeed be questioned whether the EU will argue that initiatives in the international arena which in their view are in direct conflict with the regulations that Norway has implemented through the EEA, violate the general obligation of loyalty in article 3 of the EEA agreement, which states that the parties to the agreement "*shall abstain from any measure which could jeopardise the realization of the objectives of this agreement.*" [3] In the preamble to the EEA, it states that the agreement "does not limit the parties' decision-making autonomy or their ability to make treaties, subject to the provisions of this agreement and the limitations imposed by international law. "[4] However, it would be an unreasonable interpretation of the EEA agreement that Norway is not free to take initiatives found to be necessary in various international forums - regardless of what the EU might think. The EEA is not a customs union, Norway is not part of the EU's common trade policy and is not covered by the EU's joint actions in various international forums.

In addition, the EU countries can participate in processes within the EU for changes in EU regulations. Although only the Commission has a formal right to make proposals and although the road to changing the EU rules is a long one for a member country - especially when it comes to treaty changes that require unanimity - the EU member states do have a legitimate right to try to change EU policies. Therefore Norway, which does not participate in the political decision process in the EU, must be able to use the other opportunities that we have to contribute to changing EU policy.

6.3. Environment and Climate

6.3.1. The EU is no environmental organisation, the EEA is no environmental agreement

In the public debate on the EEA and the environment, several have stuck by what appears to be the main conclusion of the external report to the EEA Review Committee from Hans Christian. Bugge j.d., namely that the EEA has had a positive effect on Norwegian environmental policy. At the Alternative Project's environmental seminar on November 22, 2011 Bugge made it clear that he had limited himself to looking at the effects of the EEA in specific policy areas, primarily related to the area of responsibility of the Environment Ministry and the scope of the pollution control act.

As Bugge himself stressed, he would have challenged the situation of the Norwegian environment a lot more. There are completely different areas of society that have real influence, such as forestry, agriculture, transportation and especially energy (including oil and gas). And as he also made clear in the external report to the EEA Review Committee: "*I will not elaborate on the difficult question of how the EU cooperation and the goals of the four freedoms in general affect and have affected the environmental conditions in Europe and in Norway.*" 5 Thereby the focus is reduced to be primarily a matter of how well the EU is in developing new environmental regulations, instead of the one that is ultimately the most important: what impact does the EU and the EU's internal market have on the environment and climate, and on our ability to solve the major global environmental problems.

The main reason for environmental and climate problems are economic growth in general and increased international trade and transportation specifically. The EU is based on unlimited growth, greater growth than individual countries could manage alone. The reason for the establishment of the internal market was simply a desire to further accelerate economic growth in EU countries through the establishment of a genuine internal market with greater competition and increased cross-border trade. This growth gets worse when it comes to trade in goods based on transport, and it gets worse when the country is not allowed to have stricter rules. The EU's own Environment Agency has offered strong criticism on the EU transport policy. They emphasise that the effect of the measures the EU has carried out "is more than offset by increased transport volumes. In order to achieve emission reductions, measures and instruments should be directed at transport in a radical way. "[6] If this isn't done, the union will not be able to achieve its climate goals for 2020.

3 The EEA agreement, article 3

4 EEA, preamble's last paragraph. See also the preamble's fourth paragraph, and chapter 6.7.

5 Bugge, Hans Christian: The EEA's role and importance in environmental protection. External report to the EEA Review Committee, page 8

6 The European Environment Agency (EEA): Climate for a transport change, March 2008, page 4

The EU is not and has never been an environmental organisation and the EEA is no environmental agreement. As the researcher at the Fridtjof Nansen Institute, Elin Lerum Boasson, points out in her external report to the EEA Review Committee "*While national environmental policy has historically had custodianship of nature as part of the national character as basis, the EU's environmental policy is largely motivated by a desire to remedy the negative effects of economic liberalisation, or a desire to avoid environmental regulations that have negative market impact. Since 1990 we have seen an extensive growth in the scope of EU environmental policy, while the content of the environmental policy to some extent has changed in character, although it is still characterised by the EU having started out as an economic cooperation (Hey 2005).*"[7]

6.3. 2. The EU reflects international trends, but is rarely in the driver's seat

In his external report to the EEA Review Committee Bugge shows that Norway starting in the early 70s was cooperating on environmental issues with the EFTA countries (especially the Nordic countries) and the EU member states in several important forums. He calls particular attention to cooperation with the OECD and the UN Economic Commission for Europe (ECE). In addition, he emphasises as important "*two regional environmental treaties and their cooperation bodies: UN/ECE Convention on Long Range Transboundary Air Pollution (LRTAP or the "acid rain" Convention) and the Oslo Convention and the Paris Convention which in 1992 were merged into OSPAR Convention for the Protection of the Marine Environment of the Northeast Atlantic. Eventually, several regional and global conventions were made that added a common framework for environmental policy in the EU and Norway, which is both a forum and framework for cooperation.*"[8]

As Boasson points out in his report to the EEA Review Committee there is" *a close link between the EU's environmental policies and general international environmental policy development in most environmental areas. The EU is far from the only international cooperation arrangement that has produced an increased amount of environmental regulations in the last twenty years. "*[9] Boasson's report discusses how and to what extent EU environmental policy has influenced the development of Norwegian environmental policy, mainly through an assessment of the four policy areas: local and regional pollution, waste, climate and nature conservation and natural resource management. The review of climate policy is based mainly on the author's own research in these areas, while the other three areas are based mainly on primary sources and interviews.[10]

Boasson concludes that "*in all four areas, the scope of the international regulation development has increased, be it through UN-related agreements (including the way we look at climate change) or through more regional cooperation arrangements (which are part of both the areas of pollution and waste). [...] In some areas, it is evident that Norway is influenced by international cooperation, regardless of EU policy, such as the formation of a quota system for greenhouse gases, implementation of the NOX policy to meet the Gothenburg Protocol and the changes in the biodiversity policy . At the same time one can argue that adapting to EU regulations have affected the way Norway has implemented these international agreements, for example, Norway has developed a rather different quota system for greenhouse gases because of the EU rules than we would have done, without the EU having created its own system.* "[11] Whether this can be said to be a positive effect of EEA cooperation is highly disputable.[12]

6.3.3. Cooperation with the EU on the environment we would have had without the EEA

Although the EU-Norway bilateral trade agreement from 1973 did not have the environment as a prominent theme, this is no so important in assessing how such a cooperation between Norway and the EU would be set up today without the EEA. As Bugge points out in his report, recognition was growing of the need for international cooperation to address transboundary environmental problems starting in the 1970's. This resulted in the establishment of environmental cooperation between the EFTA countries and the EC. Bugge speaks about it this way: *"Between the Community and the EFTA, especially since the early 1970s there was some environmental cooperation, mainly in the form of an information exchange. Through two joint ministerial meetings between the Community and*

7 Boasson, Elin Lerum: Norwegian environmental policy and the EU EEA agreement source of inspiration and of power. External report to the EEA Review Committee. 07.08.2011, page 9

8 Bugge, Hans Christian: EEA's role and importance of environmental protection. External report to the European report, page 9

9 Boasson, Elin Lerum: Norwegian environmental policy and the EU EEA agreement source of inspiration and of power. External report to the EEA Review Committee. 08/07/2011, page 28

10 Boasson, Elin Lerum: Norwegian environmental policy and the EU EEA agreement source of inspiration and of power. External report to the EEA Review Committee. 08/07/2011, page 8

11 Ibid, page 28-29.

12 See further discussion of the disagreement between Norway and the EU on Emissions Trading Directive in section 4.3.2.

the EFTA respectively in Luxembourg in 1984 and Noordwijk in the Netherlands in 1987, the basis was set for a more committed relationship."[13]

6.3.4. Norway as a pioneer

"Even without being a EU member state, Norway has influenced the EU's environmental policy, and in some areas, has introduced measures that are stricter than the EU has set." [14] It is so stated in the OECD report, *Environmental Performance Reviews*: *Norway 2011 from May 2011.* This states that Norway has played a pioneering role in the development of environmental policy and has been an international "*spearhead*" .[15]

The impact has occurred on several levels, writes the OECD: Norway participates in the Commission's expert groups and in informal dialogues with the EU Parliament and member countries. The report describes Norway as a "*leader*" in the development of EU environmental policy in several areas, including chemicals and maritime policy. Norway also affects the EU through the Nordic cooperation, especially in areas such as pollution and climate challenges in the northern areas.

The OECD has found a number of areas where Norway has stricter environmental standards than the EU and is a model for both for the EU and internationally.[16] Norway, for example, has set stricter standards for air quality and pesticides. The Norwegian arrangement for the collection and recycling of electrical waste and electronic products is unique. It declares that the biodiversity act goes well beyond EU legislation in that area, including the pro-active principle in natural resource management.

Norway has made a significant contribution in international forums, including a globally binding mercury agreement, protection of national rights by the exploitation and patenting of genetic resources and in international climate negotiations.

Norway's role as an international force has been highlighted by several key international players, such as Nobel laureate and former U.S. Vice President Al Gore, who in the publication Verdens Gang in September 2007 emphasised that "*Other countries look at Norway as a moral leader in climate policy*".[17] A year before Greenpeace chief negotiator, Steve Soyer said that "it is better *having a clear voice from the north, than being drowned in the EU's internal disputes.* "[18]

6.3.5. What was Johannesburg about?

Norway played a crucial role during the UN Summit in Johannesburg in 2002 in preventing international trade rules from having precedence over agreements on the environment and development. It would be a significant setback for the idea of sustainable development if we had accepted international trade agreements being more important than and superior to environmental agreements.

One of the leading figures in the anti-globalisation movement, the head of the Third World Network Martin Kohr, stated that the EU countries could not object to the environment being subordinate to trade because they were bound by a commitment not to change anything in the text. Norway, however, was one of very few countries that clearly went against a formulation of subordination.[19] And simply because Norway was able to speak with an independent voice and promote independent proposals, we managed to prevent a decision that could have had major consequences for efforts on the environment and development internationally.

After the summit the Development Minister, Hilde F. Johnson explained that *"We had the feeling that this was David versus Goliath. But we had enough closet supporters in the EU ".*
Goliath in this context was not in the least the EU, who spoke with one voice in Johannesburg. The EU's common voice in this context lead to that although some of the EU country disagreed, they had no opportunity to oppose the proposal.

This example shows one of the major differences of being members of the EU and members of the EEA (or any other form of cooperation with the EU). At the same time, the EU's position was not purely by chance. In the Lisbon Treaty it is stated that the intent of the common trade policy is to contribute to the *"gradual abolition of restrictions on international trade and direct foreign investment and lowering tariff barriers and other obstacles."* [20] Aslaug Haga rated the consequences of this provision as such in his EU-book from 2005: "Changes to this paragraph require agreement among all EU countries' governments. Because, after all, it is easier to change trade policies that have been determined by the majority in

13 Bugge, Hans Christian: EEA's role and importance of environmental protection. External report to the EEA Review Committee, page 9
14 OECD: Environmental Performance Reviews: Norway 2011.
15 Ibid, page 13
16 Ibid, page 21
17 Verdens Gang, 09/04/2007.
18 Aftenposten 14.11. Of 2006.
19 E-mail messages distributed worldwide through the anti-globalization-network in the wake of the Johannesburg Summit.
20 Lisbon Treaty, Article 206 (formerly Article 131 TEF) . Foreign Ministry official Norwegian translation.

Parliament. Non-governmental organizations, political parties and others can put pressure on our elected representatives and have a greater chance to get their views across. The conditions are more conducive to an active Norwegian environmental policy - both nationally and internationally - as long as we remain outside the EU. "[21] She pointed out that Norway is hardly less concerned with safeguarding its own interests than the EU countries. But Norway has fewer of its own interests to consider and can thus act as a supporter of the poorest countries in the world when the EU has put on the brakes on.

6.3.6. Are we losing an important arena for influencing the EU without the EEA?

Expert groups and preparatory committees are important arenas to provide input at an early stage in connection with the preparation of new regulations in the EU, and this is a channel of influence that should be used more actively and strategically by Norway.[22] It would also be possible to achieve such a channel of influence even if Norway chooses to have a different relationship with the EU than the EEA. Switzerland has a similar model for participation in the preparatory phase through its agreements with the EU.[23]

The most effective influence occurs outside the formal channels of cooperation between Norway/EFTA and the EU. This happens in part through being a role model for the EU's regulatory development, through Nordic cooperation and through being able to speak with a clear and independent voice and make proposals on one's own behalf and on behalf of countries that have been voted down in the EU.

6.3.7. What would Norwegian environmental policy have been like without the EEA?

How would the Norwegian environmental policy be like today if Norway had not been in the EEA? Such an assessment would of course be based on more or less certain speculations. Even before the EEA, the Norwegian bureaucracy had been instructed that the with preparation of all new regulations one was to refer to the EU, and that they should not be contrary to similar rules that the EU had adopted or were being prepared. Exceptions were to be justified separately. With the EEA, this has had stronger effect. Legislating is not just a problem for politicians, but also for the administration.

Norwegian administration and technical experts are overrun and overwhelmed by the regulations, and do not have the capacity or willingness to take independent positions.

There is a steady stream of new regulations from the EU and the EEA has quickly become an excuse for the development of national legislation. In a review of 1999, it was pointed out by the Environmental Ministry's Agnethe Dahl that Norwegian environmental management was reluctant to develop environmental policies that could be contrary to the EU, and that it had introduced "*self-censorship in relation to the development of new national legislation on the environment*" [24]

According to Boasson it is however a change in a positive direction. *"We see that Norway in many areas has developed environmental policy completely or almost completely independent of what is occurring in the EU; this is very clear in the area of climate change (and perhaps especially regarding carbon capture and storage), the administration's work plan for the petroleum industry, the cleanup of hazardous substances, the new biodiversity act and in a number of measures in our policy. A primary reason for this is that in most politically sensitive environmental policy issues, Norway has evolved independently of the EU, such as the gas and petroleum operations in the North and the protection of wolves and forests. A large part of the expansion of Norwegian environmental policy that has occurred over the last twenty years is due to such national debates."*[25]

This can be interpreted as a sign of increased self-awareness in Norwegian environmental management, and as a sign that increased national control in the design of environmental regulations could lead to further creativity and innovation on the part of Norway. This view is strengthened further by the examples we have seen where the Environment Ministry and the negotiators in civil service (throughout the period that Norway has been associated with the EEA) have indicated clear opposition to the EU's positions in international forums and have promoted proposals that the EU has not wanted to bring to the table.

6.3.8. More binding rules in the EU?

Both in the EU and in the EEA there are far more powerful means for implementing the objectives of the cooperation than in most other international agreements. To assess whether the EU/EEA is a useful means to solve global

21 Haga, Aslaug (2005): Norway and the new EU. N.W . Damm & Son AS, page 137-138.
22 See more on this in Chapter 4 and 9.2.
23 See more on this in chapter 9.3.
24 Dahl, A. (1999) 'Full Fit political debate', pp. 127-149 in Claes, D.H. and Tranøy, B.T. (eds). Outside, different and outstanding: Norway under the EEA Agreement. Fagbokforlaget.
25 Boasson, Elin Lerum: Norwegian environmental policy and the EU EEA agreement source of inspiration and of power. External report to the EEA Review Committee. 08/07/2011, page 29

environmental and climate problems, however, one must consider the purpose for the cooperation. As previously mentioned, the EU is no environmental organization and the EEA is no environmental agreement. The purpose of the EEA is "*to ensure the fullest possible realization of free movement and free movement of persons, services and capital*" in the EEA area.[26] The objectives are not limited to the internal cooperation between member states, the parties to the agreement have "*decided to contribute to global trade liberalisation and cooperation, on the basis of the market economy, particularly in accordance with the provisions of the General Agreement on Tariffs and Trade and the Convention on the Organisation for Economic Cooperation and Development,* "[27]

Another issue is what legitimacy and acceptance there is for the system, and thus the willingness to comply with the rules, when you feel you have little influence over the development of the rules. This question becomes particularly relevant in the EEA, where Norway does not participate in the political decision process, but only has the opportunity to opt out of rules it is against.

6.4. Employee Rights

The issue of employee rights is regulated internationally through the UN's special organisation on employment (ILO). The ILO was established to "*better living conditions, working conditions and opportunities for workers worldwide.*" [28] The ILO's three party structure, where governments, workers and employers participate on an equal footing, is unique in the UN context and distinguishes the organisation from all other intergovernmental organisations. The ILO's mandate is to improve working and living conditions, through, among other things, the adoption of international conventions such as salary, working hours, conditions of employment and social security. The United Nations Association emphasises that *"the ILO's special strength lies in the permanent monitoring of the implementation of conventions and recommendations for 183 countries."* [29]

6.4.1. Wages and working conditions in public contracts

The coalition government has been keen on supporting the ILO. Among the conventions the government has been clear that the ILO 94 is to be complied with, which is to ensure that public contracts do not contribute to pressure on employees' wages and working conditions and that the wages paid in public sector contracts shall be in accordance with the tariff wage for similar work in the places where the contract is executed.

The monitoring of this is governed by a regulation that the government adopted in 2008 and which the Surveillance Authority in the EEA, the ESA, shortly thereafter committed itself to changing. The ESA and the EFTA Court is responsible for enforcing the EEA regulations. The legislation says nothing about the relationship with the ILO conventions. The ESA wants to prevent Norway from requiring Norwegian tariffs from companies supplying the public sector. Only a few industries in their opinion can have a pass on this.

The ESA's involvement is a direct consequence of the so-called Ruffert case where the EU Court concluded that the requirement of following the local collective agreements is contrary to the EU's posting of workers directive, because the agreement was not applied generally. The German state of Lower Saxony had agreed that public construction contracts could only be awarded to companies that paid wages in accordance with local collective agreements. Together with three other rulings by the EU Court in recent years (Vaxholm /Laval, Viking Line and Luxembourg), this represents a completely new experience for the labour movement.[30]

Key players in the labour movement have been very clear that court decisions in the EU and EEA will not override the UN conventions. Among them, the first secretary of the labour union and member of the ILO, Trine Lise Sundnes, who has stated that "*we are not going to put up with regional organisations leaving it to the courts to pursue policy.*"[31] She has also emphasised the international perspective on the matter: " In the ILO, we are constantly being told by our African trade union comrades that we must be careful that we do not weaken ILO 94. This is a global standard with which it is important that everyone comply. "[32]

There is no reason to accept that the ESA and the EFTA Court have the authority to determine what status the ILO conventions shall have in Norway. As Dag Seierstad, among others, has pointed out, it is a sign that the battle over ILO Convention 94 is by no means settled, that the EU's most important bodies, the Commission, the Council of Ministers and the European Parliament have repeatedly decided that all updated ILO

26 The EEA agreement, the preamble's sixth paragraphs.
27 The EEA agreement, the preamble's fourth paragraph.
28 United Nations Association's ILO website. http://www.fn.no/FN-informasjon/FN-systemet/FN-organisasjoner/Den-internasjonale-arbeidslivsorganisasjonen.
29 United Nations Association's ILO website. http://www.fn.no/FN-informasjon/FN-systemet/FN-organisasjoner/Den-internasjonale-arbeidslivsorganisasjonen.
30 See more about these rulings in section 3.3.2, 3.3.10, 6.4.2 and 10.3.4.8.
31 ABC News 17 January 2011.
32 Union website, www.fagforbundet.no, 17 January 2011.

conventions must be ratified by all EU countries. ILO Convention No. 94 is one of 76 updated ILO conventions.[33]

6.4.2. Right to strike is restricted by the EU

The EU Court has handed down several judgments in recent years relating to the free flow of services and the posting of employees (the so-called Laval quartet). Trade unions in a series of European countries have come out against these judgements based on their putting free flow in front of fundamental rights, the right to collective actions, including strikes.[34] For this reason, the European trade unions called for a "Monti II" regulation, for at least to make these concerns equal.

The Monti I regulation from 1998, which was named after the then EU Commissioner for the Internal Market Mario Monti, was to help balance the ratio between the free flow of goods and the right to collective action (the right to strike). This was a response to a development promoted by Monti himself, including the proposal to remove all obstacles to the free flow of goods within the internal market. In addition, the Commission sued France at the EU Court for not having taken steps to ensure the free flow of goods in a situation of striking French farmers - a case the Commission won in December 1997.[35]

The Monti I regulation clearly states that "*under no circumstances should it be interpreted such that it interferes with the exercise of the fundamental rights recognised by member countries, including the right or freedom to strike. These rights may also include the right or freedom to take other measures that fall under labour arrangements in member countries.* "[36] This formulation has been regarded by some as the first EU act that would ensure the right to strike.[37]

While the Monti I regulation exclusively dealt with the relationship between free flow of goods and collective action, the Laval-quartet case indicated that there was a clear need to also regulate the relationship between the free flow of services and the right to strike, a claim that, among others, unified European trade unions have demanded.[38] As the Labour Unions's Brussels office has put it: "*In short, the European Court shifted the position of strength to the market's four freedoms at the expense of fundamental rights (including the right to strike).* "[39] In the Viking Line case, the EU Court recognised the right to strike in principle, but laid down narrow definitions of when this right was present. In the Laval case, the European Court stated that collective action to force an employer to agree to wages and working conditions that are better than what the posting of workers directive assumes is illegal.

The rulings of the EU Court involve a reinterpretation of the posting of workers directive. When the directive was adopted in 1996, it was assumed that there was a minimum directive that should not prevent member states from going beyond the provisions of the directive. With the EU Court's reinterpretation, the Directive has become a maximum directive, in which demands for wages and working conditions that go beyond the directive are to be judged as illegal, the right to strike is limited and the efforts to ensure the wages and working conditions for posted workers have been significantly weakened.[40]

In April 2011, the European Commission adopted an action plan for the internal market, [41] as a follow-up to the 50-point plan for the relaunching of the internal market of October 2010.[42] Based on the debate in the EU member states and EU institutions, the Commission announced twelve measures to increase growth, jobs and an improved confidence in the internal market. The Commission agreed to propose new legislation in these twelve areas by the end of 2012. In February 2012, however, no proposed improvement of the regulations relating to posting of workers had yet been laid on the table - the time line that is now outlined is the first half of 2012.[43] The Commission also announced that it intended to present two proposals

33 Dag Seierstad. Report 2:2012 EEA - a critical assessment. De Facto, page 41-42

34 See the discussion of the so-called Laval Quartet, among other things, in Chapter 3.3.2, 3.3.10 and 10.3.4.8.

35 Case C-265/95. Judgment 09/12/1997

36 Council Regulation (EC) Nr. 2679/98: On the internal market function with respect to the free movement of goods between Member States. 07.12.1998, Article 2

37 The Labour Union's Brussels office: the Monti-regulation and the right to strike in the EU. Theme Report, 06.09.2011, page 1

38 Euro-LO (ETUC) has also proposed that the following be included in a protocol to Lisbon Treaty: "Nothing in the Treaties, neither economic freedoms nor competition rules should have priority over fundamental social rights and social progress. In case of conflict the basic social rights have priority. "

39 The Labour Union's Brussels office: Monti-regulation and the right to strike in the EU. Theme Report, 09/06/2011, page 2

40 Ibid.

41 Opinion of the European Commission, European Parliament, European Council et al: Action plan for the internal market ". Twelve measures to increase growth and strengthened confidence. "Working together for new growth" 04/13/2011

42 EU Commission's 50-point plan for the relaunching of the internal market, 27/10/2010

43 European Commission: Status of implementation of the Action Plan for the internal market. Working Document, 15.2.2012, page 1

for new legislation for "*better social cohesion in the internal market*" [44] One is an enforcement directive to improve the implementation of the posting of workers directive. The second is to be a proposal for regulations on exercising the right to take collective action in the context of the right of free establishment and the right to provide services (the so-called Monti II regulation) .[45] At the meeting of the Council of Labour, Social , Health and Consumer Policy in February 2012 the EU countries' ministers in these fields had an initial exchange of views in regards to the announced regulations. [46]

The specific design of new regulations in the EU has at the time of writing (March 2012) not yet been presented. The signals that the European Commission has so far made, are not sufficient to safeguard the views that both the Norwegian trade unions and the Norwegian government brought up during the process.

The Labour Union has ruled that a new law regarding the implementation and enforcement of the directive is not sufficient, and has advocated a "*revision of the posting of workers directive to the extent necessary to ensure the posted workers equal pay and working conditions as the workers in the host country. A legal measure can prevent additional rulings like in the Viking, Laval, Ruffert and Luxembourg cases, and put the member countries in the position to be able to maintain their labour standards, including ensuring the collective autonomy of the labour market. It has also been established through the rulings that legal measures for labour issues are secondary to community law, which is particularly problematic for the international legal protections enshrined in the European Social Charter article 6, paragraph 5, the ILO conventions No. 87 and 98 and also the European Human Rights Convention article 11. The rulings referred to would undermine what is at the core of all trade unions: the right to fight social dumping through organisation and professional actions. "*[47] The Labour Union further demanded that the government follow up on these views with the EU.

In its response to the EU government stated that "*We are of the opinion that it should be made clear that the right to fight for and defend the collective rights must not be influenced by economic freedom, and should not be regarded as a restriction for EU legislation."*[48] The case illustrates how the EU is on a strong collision course with Norwegian practices and views on the right to strike, as well as with internationally applicable law to which both Norway and the EU countries are legally obligated.

One of the biggest concerns with the established legal situation in the EU is the fundamental shift of power to the employers and partly to the EU Court. The democratic problems are thus further reinforced. [49] EU law in this area is attacking not only the right to strike, but also the right to organise and the right to collective bargaining. Professor of labour law, Stein Evju, put it this way*: "But with the approach that the EU Court has created and the state of the law the state court has thus established, the foundation of the collective labour law arrangements and collective agreement system is in reality under threat."* [50] Evju is particularly clear in his assessment of its significance: *"and the consequences can be more far reaching than tariff law and that which relates to "social dumping". If the foundation of the collective labour law arrangement and the collective agreement system are shaken, it will also entail shifts in societal power relations, and it will thus have implications for society's basic structures. "*[51] The case law provided by the EU Court's interpretation of the EU constitution in recent years whereby it followed the intention of the treaty, is the most serious threat to the Norwegian social model. In labour law, this legal development violates the labour rights and the institutions that the labour rights have built and developed during almost a century.[52]

44 European Commission: Status of implementation of the Action Plan for the internal market. Working Document, 15.2.2012, page 7

45 Ibid.

46 European Council on employment, social, health and consumer policy: Agenda Meeting 17.02.2012. Retrieved from the Council's website.

47 LO's response to the Trade and Industry regarding the EU Commission's proposal for a relaunching of the internal market (A new strategy for the Internal Market, 09.05.2010), quoted by the Labour Union's Brussels Office: the Monti-regulation and the right to strike in the EU. Theme Report, 09/06/2011, page 2

48 Trade and Industry Ministry's submission to the EU Commissioner for the internal market, Michel Barnier on the occasion of the EU's strategy for the relaunch of the Internal Market, 09.03.2011, page 1-2

49 See more on this in chapter 4.7. and 4.7.1.

50 Evju, Stein: Collective autonomy, "the Nordic model" and its future. Labour Rights vol 7 no 1-2 2010, page 27

51 Ibid, page 29

52 See also chapter 10.3.4.8. for an assessment of possible changes to the EEA in this area

6.5. Women, women's health and gender equality issues

6.5.1. The UN's organization for gender equality and the empowerment of women

The issues relating to women, women's health and gender equality issues are important topics in international forums. The UN Charter is based on the principle that men and women shall have equal rights,[53] and among the most important arenas internationally is the new UN organization for gender equality and empowerment of women (UN Entity for Gender Equality and the Empowerment of Women - UN Women). The organization is to be "*a dynamic and strong advocate for women and girls and to give them a strong voice at global, regional and local levels.*", [54] and to work for the elimination of discrimination against women and girls, empower women and to create equality between women and men as partners and beneficiaries of development, human rights, humanitarian efforts, and peace and security.[55]

The organization was created in 2011 as a direct consequence of the UN's 63rd General Assembly in 2010 to strengthen the UN's efforts for women and gender equality. It was to be designed on the basis of the action plan of the UN women's conference in Beijing[56] and the UNS's Women's' Convention.[57]

UN Women's role is to support intergovernmental agencies, such as the UN Women's Commission in the formulation of policies, global standards and norms. Furthermore, the organization is to assist member states in implementing these standards, the making available of appropriate technical and financial assistance to countries that request it, and creating effective partnerships with civil society. Furthermore, the organisation is to hold the UN system responsible for its own commitments on gender equality, including regular monitoring of progress throughout the system. National committees have been set up in the UN's member states. In Norway, it is the Forum for Women and Development Issues (FOKUS), which is the national committee.

53 UN Charter, preamble's 3rd paragraph.
54 United Nations Association's theme pages on UN Women.
55 Ibid.
56 Beijing Declaration and Platform for Action, The Fourth World Conference on Women, September 1995.
57 United Nations Convention

6.5.2. EU policy on gender equality

Equal treatment is a key principle in EU law, and member countries are not to be able to discriminate on the basis of gender, unless there are special reasons for doing so. It was established in the equal treatment directive of 1976.[58] which was later incorporated into the gender equality directive. [59] The EU has also emphasised that "*the prohibition of discrimination should not preclude the maintenance or adoption of measures that aim to prevent or compensate for disadvantages to an individual group of one sex.*" [60] The same principle is enshrined in the EU charter of fundamental rights, which states that equality between men and women will be ensured "*in all areas, including those relating to employment, labour and wages. The principle of gender equality shall not prevent the creation or adoption of measures providing for specific benefits to underrepresented gender*"[61]

The EU has adopted a series of directives relating to gender equality. Most of these are integrated into the gender equality directive, including the equal wage directive[62] and the directive on occupational safety arrangements.[63] The EU has a directive on parental leave, which states that both male and female workers shall be entitled to leave for at least three months until the child turns eight. Any salary in such situations is however up to the nation states to decide.[64]
The directive on extended parental leave gives the employees the right to parental leave for 16 weeks, compared to 12 previously. The directive also stipulates that at least one of these months cannot be transferred from one parent to the other. The pregnancy directive of 1992,[65] deals with safety and health at work for pregnant workers, those who have recently given birth or who are breastfeeding. In Norway, the arrangements and protection are significantly better than the minimum level of EU regulations stipulate.

The focus on gender equality and women's rights in the EU's rules has been used as an argument for Norwegian membership in the EU, among others, by former Secretary General of the European Movement, Grete Berget:

58 Among other things, the equal treatment directive, Article 1, 3 and 4
59 Directive 2006/54/EC.
60 Equality directive, article 21, cf. also article 2 of the directive which states that measures to correct "factual inequalities" between women and men are allowed.
61 The European Union Charter of Fundamental Rights, Article 23. The Charter was adopted in 2000 and made enforceable through the Lisbon Treaty in 2009.
62 Directive 75/117/EEC.
63 Directive 86/378/EEC.
64 No to the EU's series of papers 4/2011: Women in Crisis, page 10
65 Directive 92/85/EF.

"The Nordic equality model grew slowly but steadily forward, and the Nordic countries have been a beacon of gender equality. Norway joined the women's government in 1986 which is seen as a women's Mecca. The Nordic equality model is now being further developed in the EU, and it can become even better in its European costume."[66] The critics of the EU gender equality policy emphasise on the other hand that it is of no use to refer to the fine formulations of the political decisions within the EU, if EU policy in practice is pushing the development in another direction. The former leader of the women's committee in the European Parliament, Eva-Britt Svensson, put it this way: "Gender equality and the importance of equal treatment is often spoken of in glowing terms, but then a policy on the economy or another area comes along, which goes in the exact opposite direction. All attempts to improve things such as the situation of undocumented women, investment in child care and so on, become undermined. "[67]

6.5.3. A big difference between life and learning

Although the European Commission's own strategy for gender equality states that "*the EU is committed to promoting gender equality measures in international contexts. The union will be an advocate for women's rights and will seek the cooperation of both governments and civil society in the process* "[68], the political reality shows a different picture.

The fact that the EU is to increasingly act with one voice in foreign policy is creating a new situation in international negotiations. As Aftenposten documents in a case in February 2012, more progressive EU countries in the UN are kept from voicing their opinion when for example conservative Malta blocks it within the EU. The backdrop for Aftenposten's case was the UN's gender equality conference in New York in February/March 2012, where the question of a resolution concerning abortion and contraception (referred to as reproductive health in "UN speak") was the subject of negotiations. Progressive countries like Norway argued for the interests of the mother's life or health and that it is life threatening for woman if the abortion is carried out with the knitting needles of the so-called "wise" women and not by medical personnel. On the opposite side were the conservative forces including the Vatican, Iran, Egypt and Syria. At some negotiation meetings, Norway, according to Aftenposten stood virtually alone against this alliance. The text of the resolution which is subject to the tug of war is not binding on any country, but held up as important and as a directive for the UN's work in the field.

Aftenposten's colleague, Alf Ove Ash, describes the situation like this: "The startling thing, according to diplomats familiar with the negotiations, is that the EU or EU countries do not make their vote prevail. The requirement to speak with one voice - and it does not exist in the EU on these issues - leads to more progressive EU countries like the Nordic ones being rather silent during this important phase of the negotiations. They negotiate within the EU and are therefore not present in the tug of war that takes place in the UN."[69]

The case illustrates how Norway's being outside the control of the EU is becoming more important as more countries join the EU and in many cases both the EU as such - and the EU member states – have become paralyzed in major international negotiations.

6.5.4. Increased pressure on Norway

EU policies will not only have an impact on the women of the EU and on the EU's performance in the international arena. Norwegian women are also affected by the EEA agreement. Among other things, the EEA halted measures to facilitate more women entrepreneurs, through a proposed support arrangement for small businesses in rural areas where women should have preference.[70]

Another case in which Norway has been forced to change Norwegian policy was in the Postdoc case of earmarking positions for women at the University of Oslo. The Norwegian Universities and Colleges Act earlier allowed for the earmarking of academic positions for women, but this was rejected by the EFTA Court in 2003. The Court held that the basis for "*discriminating against*" men was not good enough, partly because it "*in principle might be a possibility that the best qualified candidate might not be appointed*" .[71] In No to the EU's series of papers, Vett 4/2011 it was made clear that the need for such regulations that the Court ruled illegal is still very present: "*Despite the fact that figures from 2010 show that 61 percent of the students at Norwegian colleges and universities were women,*

66 European Movement and the European Youth (2004): The women of Europe. A report on the EU and gender equality.

67 No to the EU Common sense Papers 4/2011: Women in crisis, interview with Eva-Britt Svensson, page 19

68 EU Commission with a new strategy for Gender Equality (COM (2010) 491), 2010-2015, area of work No. 5

69 Aftenposten article: The EU is silent on important women's issues in the UN, 27.02.2012.

70 No to the EU's series of papers 4/2011: Women in Crisis, page 12

71 Case E-1/02, ESA against Norway - positions at the University of Oslo earmarked for women. http://www.eftacourt.int/index.php/cases/case_e_1_02 /.

still only 22 percent of the professors were women. "[72]

The cases discussed above show how the current EEA agreement affects Norwegian gender equality policies. This highlights the need to make changes to the agreement or replace the EEA with a different type of association with the EU which would give Norway the control to pursue a more active and ambitious gender equality policy, without being restricted by the conservative forces in the EU and the economic liberalism in the EEA.

6.6. Trade

6.6.1. From the GATT to the WTO

The World Trade Organization (WTO) was established in 1995 as a result of the eight-year Uruguay Round, and is to "*serve as the common institutional framework for the management of trade relations between its members*".[73] This was the eighth international round of negotiations on reduced tariffs on industrial goods, where the General Agreement on Tariffs and Trade (GATT) had served as a negotiating secretariat since 1947.
From being a negotiating secretariat it became a permanent organization with several negotiating areas. The WTO includes the revised GATT ("GATT 1994"), and a number of other agreements. GATT 1994 includes the provisions of GATT 1947 and a number of previous agreements relating to these, but is formally legally separate from the old GATT.[74] Among the agreements included in GATT 1994 is an agreement on the interpretation of article XXIV of GATT 1994.[75] Today's WTO consists of total of 16 different multilateral agreements that all member countries are covered by, and two agreements that only some WTO member countries participate in.[76] One of the agreements in the latter category is the agreement on public procurement.[77]

The WTO's main function is to make sure the flow of trade is as undisturbed and free as possible, to provide more predictable trade and protect member states against arbitrary and unfair treatment from other member countries. For this purpose, the WTO develops and monitors global trading rules, the WTO is also an appeals body for member organizations.

The original GATT was negotiated and signed by 23 countries, including Norway.[78] Today, there are 153 WTO member countries, which collectively account for more than 97 percent of world trade. The WTO is the only global organisation that works on rules of trade between nations. It manages rules for trade in industrial goods, agriculture, services and intellectual property rights (TRIPS). In addition, the WTO has dispute settlement mechanisms for trade disputes. The WTO serves as a consensus organization, where all member countries must agree on a deal. When agreements are negotiated, they must be approved by the national parliaments. The highest body is the Ministerial Conference, which meets approx. every other year. Between the ministerial conferences is the General Council, where ambassadors from member countries meet, which governs the organization. The WTO's Secretariat in Geneva has approx. 700 employees and is headed by Director-General Pascal Lamy.

The member states have committed themselves to following the agreement, and Norway can be sued through the WTO dispute settlement court by other member states if we violate it. Conversely, Norway can sue the other member countries of the WTO if we believe they have violated the agreement. Norway has also made binding commitments for how high tariffs can be on agricultural and industrial products, and how much and what type of support can be given to agriculture. Changes in national policies that affect these rules are to be reported to the WTO. Various committees controlled by the member states monitor the observance of the agreement. The WTO periodically reviews the member states trade policies.

6.6.2. Extended mandate, scope and continuous new member states

Since the first GATT round, 65 years ago, the global regulations have expanded into new areas and with more and more member states. Tariffs on industrial goods have been reduced from 40 to 3.5 percent on average. With the Uruguay round came rules for trade in agricultural products for the first time, regulation of services (GATS) and intellectual property rights (TRIPS). The current round of negotiations included agriculture, services, industrial goods,

72 No to the EU series of papers Vett 4/2011: Women in Crisis, page 13
73 Agreement Establishing the World Trade Organization, Article II, Section 1
74 Agreement Establishing the World Trade Organization, Article II, Section 4
75 General Agreement on Tariffs and Trade 1994, Article 1c, section IV
76 WTO: About the WTO - a statement by the Director-General. Retrieved from the WTO's official website.
77 See the discussion in Section 11.1.6.6.
78 Proposition No. 70 (1948), Appendix 2, page 45

Non-Agricultural Culture Market Access - NAMA), trade and environment, rules for areas such as anti-dumping and subsidies, investment, competition policy, facilitating trade, government procurement, intellectual property, as well as problems that developing countries encounter in the implementation of existing WTO rules. Along with previous rounds of negotiations, this represents the sum of comprehensive rules for international trade.

With the expansion of the scope, the WTO has got more power in new areas, which has also resulted in considerable debate both in Norway and in other Western countries, but perhaps not least in a number of developing countries. The international adviser to the Norwegian Farmers' Union, Hildegunn Gjengedal, summed up the negotiation situation in 2011 this way: "After some years of enthusiastic negotiation attempts, the current bargaining climate is characterised by pessimism and the lack of political will for reaching the goal of a new agreement. Even the always optimistic Director-General of the WTO, Pascal Lamy, has, in the last few months, said that negotiations were deadlocked."[79]

The ongoing round of negotiations (the Doha Development Round), began in 2001, and it is very uncertain when and if it will be concluded. The agreements are being negotiated separately, but must be adopted together (single undertaking). In other words, nothing is done until everything is finished.

The most difficult area of negotiations is now manufactured goods including fish (NAMA), in which above all the United States is opposing countries like China, India and Brazil. The agriculture negotiations are more or less quiet after comprehensive proposals for cuts in support and tolls were brought up along the way.[80] In the service area, the negotiations largely deal with supply and demand among member countries and liberalization in different parts of the service sector. Originally, Norway had presented demands to liberalise the service sector in more developing countries. These demands were pushed by the coalition government in 2005 after strong pressure from NGOs, among others.

The WTO and the WTO's development have occasionally encountered considerable resistance from globalization critics, both in Norway and in a number of other countries. The WTO is being criticised for being a framework that helps to reinforce the unequal power structures in the world, and to limit the ability of developing countries to adopt measures countries like Norway used in the construction phase of the economy. Among the most obvious critics in Norway is the Trade Campaign, which has pointed out that "*the framework includes an international patent agreement (TRIPS), which de facto monopolised technology, and a service agreement (GATS), which did not fulfil the conditions of the theory of free trade on the free flow of labour. Many of the measures that industrialised countries have used in their development have been illegal for developing countries, but the measures that industrialised countries still need are defined as exceptions.*"[81]

The conditions which are imposed as a result of negotiations, are binding and can only be changed in a negative direction to other parties through negotiations in the WTO, with, however, the exceptions as required by the agreement (relating to regional trade agreements and customs unions) .[82] In addition, the National treatment NT) and the Most-Favoured-Nation Clause (MFN) are key principles of international law which are of importance to many agreement plans, including the WTO. The MFN implies that no economic player from one country is to be given less favourable terms than a player from another country, while the NT implies that no national player is to get better terms than foreign players. See also the detailed discussion of the WTO in Section 11.1.

6.7.International contract law

Through international agreements, rules are established for which factors other agreements may contain. The most important in this case is the UN Convention on the Treaties Law(Vienna Convention) of 1969. Norway is one of the countries that have not bound themselves to the Vienna Convention (only 108 states have done so), but the Convention's key provisions are used as a basis by both Norway and most countries internationally for the notion of what the law is to contain and common ways to interpret international agreements.[83] It is generally assumed that the Vienna Convention largely reflects customary international law, and that the

79 Gjengedal, Hildegunn: WTO - global framework. No to the EU Annual Report 2012, page 33
80 Ibid, page 34
81 Bank, Dæhlen and Lundberg, Behind closed doors. A report on Norway's bilateral and regional free trade agreements. Handelskampenjen, 2001, page 7.
82 Foreign Ministry's theme pages on trade policy – WTO basic principles and functions.
83 United Nations Association's Focus on Conventions and Declarations, http:// www.fn.no / UN information / Conventions and Declarations

therefore (to the extent it is common law) is binding on those states which have not ratified it.[84]

The EEA is an international agreement between equal states which is interpreted in light of the 1969 Vienna Convention on the interpretation of treaties. Of importance in the EEA context are the convention's provisions that the legislative history also be part of the legal authority for the interpretation of treaties. Ørebech Peter has put it this way: "According to the 1969 Vienna Convention, article 31 is to be based on the interpretation of the text as read in its context and in light of the regulations' objectives and purpose. The interpretation of words is crucial, but where the interpretation according to article 31 is ambiguous or obscure or leads to obviously absurd or incomprehensible results, one has the right to emphasise the treaty's legislative history, see article 32."[85] In the EU, however, there is in principle a prohibition against the use of legislative history.[86]

Ørebech also highlights another aspect of the Vienna Convention's article 31, relating to implied acceptance.[87] When Norway has notified the ESA about changes in Norwegian law, and there has been no reaction from the ESA or other member countries within a reasonable amount of time, the interpretation of the EEA agreement is to be considered tacitly accepted. Ørebech brought up this issue in regards to the so-called reversion case, where Norway at the signing of the EEA had already made notification of changes in industrial licensing and watercourse regulatory laws and assumed that the reversion institute could continue unchanged in the framework of the EEA. Only seven years after the EEA came into force did the ESA respond to Norway.[88]

6.8. Summary

Norway participates in extensive international cooperation and is active in many arenas internationally. In this chapter, a number of examples of cooperation relevant to the areas that the EEA agreement covers have been reviewed. Norway is in many respects just as ambitious when it comes to international rule development in key policy areas as the EU, which among other things, is evidenced through the OECD in their status report on Norway from 2011.

International agreements establish common international rules, which both Norway and the EU/EU member states have implemented in many contexts. As Boasson highlights, many of the EU initiatives do not stem from the EU itself, but are the result of international and/or regional commitments that countries have undertaken. This also implies that if the international rules are changed, there will be pressure on the EU/EU countries to change their internal rules.

The impression that everything comes from the EU is misleading, but might be due to the fact that a lot of attention is paid to cases in which Norway is forced by the EEA to accept regulations that weaken Norwegian rules and standards and make it difficult to fulfill Norway's obligations under international law. Examples include the ESA's pressure to weaken Norwegian regulations on wages and working conditions in public contracts - in violation of the obligations that apply to Norway through ILO 94.
As well, important measures to help achieve the UN goal of equal rights for men and women have come under attack from the EEA agreement's agencies, and in the case of professorship positions at the University of Oslo, Norway was ordered by EFTA Court to remove a regulation which gave women a priority.

If we had not linked ourselves to EU rules, this would not have been an issue. In most other contexts, we would relate to other rules, which would not necessarily be any worse, and at the same time we would have greater freedom to adopt our own stricter rules. In some contexts, it would still be appropriate and reasonable to associate ourselves with EU initiatives and processes, such as the EU's work on chemicals through REACH.

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84 NOU 2003:18 National security, section 3.2.1.
85 Ørebech, Peter: What does the EEA really have to say about reversion? - About the EEA agreement article 125 Kraftnytt.no, 01.02.2005.
86 See more on this in section 4.2.2.
87 1969 Vienna Convention, article 31 (3) (b).
88 See further discussion of this issue in section 3.2 and section 4.2.

Chapter 7: Do we need the EEA for economic reasons?

7.1. Intro

In Part II, we showed that the EEA is a very comprehensive agreement, and that the current EEA agreement has become far more extensive and intrusive than expected. Polls suggest that there are quite many who believe that the EU has too much power in Norway, and when the EEA is compared against a trade agreement the majority says that they prefer a trade agreement.[89] Nevertheless, several polls indicate a majority for the agreement, when the question was "*yes or no to the EEA*". Is this a sign that people really do not want the EEA, but still feel we have no alternative in the current situation?

Do we have to hold our nose and accept an agreement we do not like? An important element of a fact-based debate on the EEA is to "*check around the seams*" of the arguments used for why we must have the agreement. Do they hold water? Can it be documented that the EEA is so critical for the Norwegian economy as portrayed in some contexts? In this chapter we will take a closer look at some of the myths that exist about the agreement, measured against the alternatives.

7.2. The researchers' assumptions

One of the EEA Review Committee's tasks was to shed light on the EEA agreement's consequences for the Norwegian economy. According to their mandate the committee was to "[...] make a broad and thorough assessment of the political, legal, administrative, economic and social consequences (including welfare and regional policies) of the EEA agreement." [90] In accordance with the mandate, the committee's work was to be research-based, to be led by researchers and to allow for broad and critical professional evaluations.[91]

The government made no attempt to establish a representative committee for this, composed of representatives from various organizations, associations, movements or for that matter, political parties . Neither social background, political preference or attitudes to the EU/EEA were to be used as an evaluation criterion for the composition of the committee.

Given the facility the committee got, one would have had to expect that the committee would have supported its central analysis, assessments and conclusions with research-based material, and at the same time refrained from having certain perceptions on issues where there was significant scientific doubt or where clear technical material was not presented. At key points in the report, this was unfortunately not the case.

In the absence of research-based documentation, the majority of the committee chose to present the assumptions about the EEA agreement's effects on the Norwegian economy. The majority of the committee was of the opinion that "*isolating and measuring the economic impact of the EEA agreement was not possible, but for the majority it appeared clear that the gains for Norway had been considerable.*" [92] Further, they wrote that "A total sum of the effects of all this is not possible to determine, but the majority of the committee believes there is good scientific basis for assuming that the economic benefits far outweigh the disadvantages, and that the EEA agreement has contributed in a significant manner to the positive development the Norwegian economy. "[93]
They are therefore saying that it is not only very difficult to isolate and measure the economic impact of the EEA. They are saying simply that it is not possible. Nevertheless, it was decided that the benefits to Norway have been significant and that the agreement has contributed significantly to positive developments in the Norwegian economy.

Had this been the assessment and conclusion of a representative committee, such undocumented claims would have been less problematic. There are many players in the public debate in Norway that have clear perceptions of the effects that the EEA has had on the Norwegian economy. So have many of those in our project. There is a quite a range of those who also maintain that the EEA has contributed significantly to positive developments in the Norwegian economy.

In principle, players in civil society or politicians don't have to support their political assessments and points of view with scientific evidence (although in many cases that would be preferable).

89 See more on this in Chapter 12
90 NOU 2012:2, page 26
91 Ibid.

92 NOU 2012:2, page 358
93 Ibid.

That's why one would expect that when a broad research-based committee is appointed, it should help to provide a knowledge-based foundation for the debate - not a handful of researchers using this as a venue to present personal views and preferences for Norway's relationship to the EU.

In this case a minority in the committee appeared significantly more precise when it wrote that "*the Norwegian economy as a whole has developed well during the EEA, but there is no definitive research-based foundation to differentiate the impact of the EEA agreement from other economic factors and trends.*" [94] They point out further an important point when they refer to the fact that "*If the connection to the internal market had been decisive, one would expect that this trend in many other countries in the EEA would have been similarly as strong.*" [95] Looking at the trends within the EU in the current situation, it is not difficult to see that this is not the case.

The minority justifies why it is so in part by pointing out that "*The Norwegian economy has several positive features which are of great significance beyond our participation in the internal market: Large natural resources (energy and fish), competitive advantages based on some high-tech, global industries (e.g. the supply industry and shipping) and the advantages associated with how employment in Norwegian is organised.*"96

7.3. A small country in a big world

Norway has extensive trade with other countries, and a large part of our exports go to EU markets. While imports from the EU in 2010 accounted for 64.6 percent of GDP, total exports to the EU were 80.7 percent. If one limits this to goods excluding oil/gas (mainland exports), the exports to the EU accounted for 64 percent. It is not the EU as such, but rather a few EU countries that are important for Norwegian exports. Denmark, France, Netherlands, the UK, Sweden and Germany account for 66.8 per cent of our raw material exports. This illustrates that it is not the EU as an entity that imports Norwegian goods. There are consumers who from tradition and due to Norwegian brand marketing buy Norwegian salmon or Norwegian cod, there are car manufacturers who use aluminium wheels manufactured in Norway, there are private consumers, industry and government agencies who need Norwegian energy.

Dagsrevyen [the Daily Review, publication] reported on February 10th, 2012 that since the financial crisis in 2008, 20,000 industrial jobs in Norway had been lost. When production is moved out of the country, this has nothing to do with a lack of access to EU market. Ever since 1977, long before the EEA was conceived of, we had the trade agreement with the EU with duty-free access to the EU market for all industrial goods. Outsourcing, however, can be caused by other factors, such as the high and increasing costs in Norway. Norway is a high-cost country, but traditionally we have had an important competitive advantage through a plentiful supply of cheap, clean energy. With more expensive power for energy-intensive industries as a result of adaptation to EU legislation, this competitive advantage has been largely disappearing and is thus one of the reasons for maintaining and developing industrial production in Norway.

7.3.1. Increased emphasis on new markets

International trade is based on mutual dependency. Just as we depend on selling our products, others are dependent on buying them. The relation between supply and demand has a greater say on how much you can sell and at what price than an assessment of the relative size of the country of origin and receiving countries. That's why Norwegian exporters look increasingly to other areas in the world where the economy and markets are growing.

Trade with the EU grew strongly in absolute terms, both before the EEA agreement came into force in 1994 and after 1994. Yet growth in trade with countries outside the EEA has been even stronger. This trend was documented in the Bondevik II government's EEA notice in 2002: "*As shown in Figure 2.1, trade with the EEA countries has increased significantly since 1994. Trade with other countries has increased somewhat stronger, so that the share of Norwegian exports going to the EEA countries has slowed. In 1994 the export of traditional goods to the EEA countries made up about 75 percent of total exports of traditional goods. In 2001 the proportion had fallen to about 70 percent. The strong growth in exports to countries outside the EEA must be primarily seen in the context of economic growth in North America, Eastern Europe and Southeast Asia having been significantly stronger than in Western Europe since 1994. Also regarding the import of traditional goods*

94 NOU 2012:2, minority note from Hansen Bundt, Seierstad and Stubholt, page 359
95 Ibid.
96 Ibid.

the proportion that comes from the EU has declined from 1994 to the present day."[97]

The EU continues to be the dominant trading partner for Norwegian industry. As shown above, approximately 64 percent of exports of traditional goods (excluding oil and gas) went to the EU in 2010. The decline in the EU market share of Norwegian exports has thus continued in the years after 2002 as well and is far below the level of 1994 when 75 percent of Norwegian merchandise exports (excluding oil and gas) went to the EU.

7.3.2. Norwegian exports today and in the future

As an exporter, you have a particularly favourable situation when you can offer a product for which there is high demand, which is perceived as necessary by the purchaser and where the alternatives are not currently able to meet market demand. For Norway, this applies above all to oil and gas, which in 2010 accounted for 46 percent of our total exports. The EU is a large net importer of energy, and this will increase in coming years - partly because of increasing consumption and phasing out of nuclear power. Since we also know that the EU mainly imports gas from Russia and Algeria as well as Norway, we know that strategically speaking, Norway in the years ahead will be regarded as a more important player in central European countries such as Germany.

The challenge for the future is thus to a large extent about how we can manage to create new growth opportunities in new industries as the production and revenues from exports of oil and gas gradually decrease. The minority in the Sejersted Committee, consisting of Dag Seierstad and Liv Monica Stubholt illustrates an important point when they point out that "*with the EEA agreement, Norway joined a liberal economic plan with free flow of goods, services, capital and labour. This is a plan that removes key fiscal and monetary policies for the Euro countries, and that removes important industrial policy measures for all member countries, including the EEA country Norway. The foundation of our employment and competitiveness was set long before we joined the EEA.*

These members believe that Norway under the EEA has also benefited from the national economic control we had before, and we still reap the results and social conditions that were achieved then. It is control that the EEA agreement has narrowed considerably. In the short term, the Norwegian economy is strong enough to compete in today's trade regime. But the Norwegian business sector is now so dependent on petroleum that many alternative business environments are deteriorating. We have therefore a strong need for long-term restructuring and the development of new production environments, and therefore Norway will need to have control over industrial policy beyond what the EEA agreement allows. "[98]

7.4. EU tariffs are not essential for export of fish

For the export of fish the EEA entails changes in tariffs for some products, but as the researcher at the Norwegian Fisheries College Peter Ørebech has documented in the report "*The EEA, fish, customs and alternatives to the EEA*" [99], which was commissioned for Alternative Project, EU customs are not essential for Norwegian fisheries exports. There are other factors that are crucial for which markets are chosen and which market share you manage to achieve. Ørebech points out the factors such as purchasing power, consumer preferences, pricing policies at the wholesale and retail, market power, ad campaigns, sales knowledge and interest in taking advantage of tariff niches, the informal codes in the importing country and insights into the people's culture, language, etc., and refers to international studies which support this. [100] [101]

How wrong it can be, if one only makes a theoretical calculation, without investigating the actual trade data, is presented in a NUPI Report from 2007, by Arne Melchior. Here it was calculated that if tariffs on the export of fish to the EU (which amounts to about 400 million NOK) was removed, it would mean that "*the demand for Norwegian fish in the EU could [...] increase by around 1.5 billion NOK*".[102] As Peter Ørebech points out in his report, however, "*only by adding comparative analysis to reason - i.e., how the revenue in practice has changed with the amended tariffs - that one with any certainty is able find answers on the relative importance of the tariffs.*"[103]

97 Report No. 27 (2001-2002): On the EEA Agreement 1994-2001.

98 NOU 2012:2, page 425

99 Ørebech, Peter, University of Tromsø: *The EEA, fish, tariffs and alternatives to the EEA. External report for the Alternative Project, September 2011*.

100 White Lock, Jeryl & Jobs, David (2004): *An evaluation of external factors in the decision of United Kingdom industrial firms two enter a new non-domestic market: an explanatory study . European Journal of Marketing, Vol 38 (2004), pages 1437-1455.*

101 Katsikeas, Piercy & Ioannidis (1996): *Determinants of export performance in the European context, European Journal of Marketing. Vol 30 (1996), pages 6-35.*

102 Melchior, Arne (2007): *WTO or EU membership? Norwegian fisheries and the EU's trade regime. NUPI, May 2007, page 1*

103 Ørebech, Peter, University of Tromsø: *The EEA, fish, customs and alternatives to the EEA. External report for Alternative Project. September 2011, page 25*

Research on trade strategies, undertaken for the report for Alternative Project, show that you do not find that exporters choose other markets for their sales on the basis of there being no tariffs on fish. While exports to countries like Russia, India and China have increased sharply over the past decade despite the relatively high tariffs (in the order of 15-30 per cent), for instance, exports to Switzerland have declined over the past decade in spite of zero tariffs for exports. Exports to this market is, was and has remained relatively modest despite the low tariff rates with the establishment of the EFTA Convention in 1960 and up to July 1990, and zero tariffs after that. In Poland, export from Norway has been increasing after it joined the EU, despite the increasing tariffs.[104]

There is thus no correlation between high import tariffs and low export of fish, nor between low customs and high exports of fish. This may be because it is normally the importer and ultimately the consumers in the EU who pay the duties, not the Norwegian exporter. The EU's main mission in their import duties is, by the way, to contribute revenue to the EU's common budget, not to protect the EU's fishing industry. All other revenue going to the EU budget can either be attributed to agreements with third countries, including Norway via the EEA funds or transfers from their own member states. Customs are also maintained as a medium of exchange for access to resources in the fish-rich underdeveloped and industrial countries, including for example Norway.[105]

Although customs are prohibited within the EU, that is, charges that are incurred because a product crosses a threshold, there is still no ban national excise tax, provided these are not used in a discriminatory manner. An exporter can thus find that even if customs are removed, the taxes one is obliged to pay for that product is not lower. For example, there can be a manufacturer's fee or a fee for commercial development, which is also imposed on foreign players to pay. In such cases, there is little potential for exporters even if import tariffs are lowered.

An assessment of the price elasticity will also often be essential. If fish costs for example 40 or 45 NOK per kilo it is not essential for demand. More important than tariff protection is exporters' notion of the importance of tariff protection and lack of knowledge about a complex tariff system. It is also important that Norwegian fish range from cured fish to herring. If consumers can not afford raw fish, they can probably afford herring. The choice is not between having fish or not, but between the many different species of Norwegian fish in different price ranges.

It is the relative differences in the level of protection that provide competitive advantage, not primarily the level of tariffs. Practice has shown that tariffs must be at a high level above the normal MFN rates (MFN rates under the WTO) to have an absolute preventative effect on exports.

The research on real trade data shows that the absolute and relative importance of tariffs is greatly exaggerated. This relationship will only be strengthened as fish prices increases as a result of further shortages in the world market. You will find that the meaning of tariffs will be marginalised. The general rule is not there is a high tariff to pay, but the opposite: that there are usually no tariffs or that they are insignificant.[106] Bondevik Government's EEA message of 2002[107] indicated that the overall tariff burden on exports of fish to the EU at that time was 2-3 percent of the total value of Norway's fish exports to the EU. This tariff burden is even less today, and amounts in total to approx. 400 million NOK. This is because the EU part of the year has problems meeting the demand for fish products, and that tariffs be either placed on a permanent basis or that quotas be granted for zero tariffs at certain periods.

As the coverage increases, tariffs are reduced so that consumers and producers are ensured a sufficient supply of fish at not too high a price, and so that the fishing industry in the EU escapes the added financial burden resulting from import duties, when they compete with foreign industry. Precisely because it is the importers who pay the duties in practice, this is "*apt to damage the EU's own fishing industry's competitiveness in export markets.*" [108] Today approx. 55% of all fish consumed in the EU is imported.[109] The EU's net import of seafood has increased by approx. 60% (1995-2010) .[110]

104 See further details on the changes in the conditions for export to countries in Eastern and central Europe in chapter 11.1.5.2.

105 Ørebech, Peter, University of Tromsø: EEA, fish, tariffs and options to the EEA. External report for Alternative Project. September 2011, page 15

106 How R.R. Churchill, EEC Fisheries Law (Nijhoff 1987) pp. 262

107 Report no. No. 27 (2001-2002).

108 Ørebech, Peter, University of Tromsø: EEA, fish, tariffs and options to the EEA. External report for the Alternative Project. September 2011, page 14

109 Ørebech, Peter, University of Tromsø: EEA, fish, tariffs and alternatives to the EEA. External report for the Alternative Project. September 2011, page 14, cf. Green Paper: Reform of the Common Fisheries Policy, Brussels 04.22.2009 COM (2009) 5;

110 Ibid, page 14

7.5. The danger of anti-dumping less imminent

A key argument of the EEA agreement was that with the EEA, the EU could not use (or threaten to use) anti-dumping against Norway. The anti dumping weapon is, however, less relevant today. Between 1970 and 1992 the EU brought up cases of antidumping on six occasions: on fishing nets (1979), fibreboard (1982), ferrosilicon (1983 og1990), aluminium (1984) and silicon carbide (1986). The case about aluminium was dropped. In the other cases, the Norwegian companies were made to sell over a certain minimum price. In no cases were Norwegian companies fined, a measure which the EU, however, had used against countries in Eastern Europe and the third world.[111]

The danger of dumping accusations has decreased since the 1980s, when the idea of an EEA agreement was launched. Norwegian business support changed, Norwegian companies must increasingly pay market prices for electricity, and the WTO has set far stricter anti-dumping measures than the EU did in the 1980s. Norway have also used WTO regulations to get rid of unwarranted dumping accusation on the part of the EU and won.

The so called salmon case is an example of just that. As then-Secretary of State in the Foreign Ministry, Erik Lahnstein put it in the autumn of 2011: "The case gave a clear and significant victory for Norway, and led to the EU halting measures against Norwegian salmon in July 2008." [112]

7.6. Technical trade barriers removed regardless of the EEA

Another argument sometimes used in favour of the EEA agreement is that technical barriers to trade are removed with the agreement. This might have been an argument for establishing an EEA agreement in the 1980s, when a large number of different technical standards hindered trade in Europe significantly. It is not so anymore. Efforts to reach common technical standards occur in European standardization bodies such as the European Committee for Standardization (CEN) [113], the European Committee for Electro-technical Standardization (CENELEC) [114] and The European Telecommunications Standards Institute (ETSI) [115] These bodies exist independently of the EU, and Norway is in line with all EU countries. Whether we have the EEA, the EU-Norway bilateral trade agreement from 1973 or some other form of association with the EU, in other words, has nothing to say in this respect.

7.7. Increased trade in services with substantial consequences

Another of the key arguments that was used in favour of the EEA agreement was that growth in the future would not be in retail trade, but in the service industries. There has undoubtedly been significant growth in the service industry, and services make up a growing share of the economy. This applies particularly to public services, where there is growing pressure for market orientation, competition and privatization. To the extent that such services have been subject to competition, it has been rarely documented that this has resulted in cost savings, rather it has led to increased costs to the public. [116]

The EEA agreement entails the free flow of services, including in sectors such as banking, insurance, mail and telecommunications. This should provide opportunities for Norwegian player in the EU market. The market share of this that Norwegian companies have achieved, can hardly be compared with the lost market share at home as a result of the Norwegian market in a similar way being opened to competition from players in the EU.[117] At the core of this it is like the retail trade. Today's trade in services with the EU is not due to the EEA agreement, but because Norwegian services meet a need in the EU countries - and vice versa. The EEA entails, however, a significant impetus to open up the national service markets to competition, which means that trade in services between Norway and the EU is likely to be considerably larger than what it had been without the EEA. The question is whether Norway as a whole has gained or lost by this and what the consequences of the free flow of services, capital and labour have been for Norwegian society.

Norway has in recent years imported more services from the EU than we export. Both in 2009 and 2010, Norway ran a deficit on the trade in services with the EU.[118] In order to ensure the free flow in the EEA, common rules of competition have been established, as well as a surveillance

111 Seierstad, Dag. Report 2:2012 EEA - a critical assessment. De Facto, page 8

112 Lahnstein, Erik (2011): Salmon conflict with the EU - how a small country used the WTO to assert its rights. No to the EU Annual Report 2012, page 41 See, for other more detailed discussion of this issue in Section 11.1.7.3.

113 http://www.cen.eu/cen/pages/default.aspx.

114 www.cenelec.eu/.

115 http://www.etsi.org.

116 See more about this in section 7.9.1.

117 View more about this in Chapter 11.2.9.Statistics 118: Balance of Payments for 2009 and 2010 respectively.

authority and a court to enforce them. Key elements of Norwegian regional policy, petroleum policy, management of natural resources, alcohol policy, and in recent years, labour rights and measures to prevent social dumping, have in turn been challenged by the Surveillance Authority in the EEA, the ESA. The consequences of this have been very extensive and difficult to quantify.

The head of the European Movement, Paal Frisvold, claimed in an article in the VG in December 2011 that "*A trade agreement would be built on WTO regulations with a clear weakness because there would be no provisions for trade in services - the fastest growing part of the Norwegian economy.*" [119] This is not correct. The General Agreement on Trade in Services (GATS), of which all WTO members are members, regulates trade in services, and has done so since the WTO was created in 1995 after the conclusion of the Uruguay Round. The GATS includes general provisions that apply to all service sectors and to more specific obligations on individual sectors (provided for in binding national commitments). The principle of MFN treatment requires equal treatment of service providers from all WTO countries, unless other agreements on trade obligations have been entered into (for example, the EEA) or agreements on a common labour market (such as the common Nordic labour market) .[120]

The WTO Agreement on Services (GATS), however, allows national authorities greater latitude in designing a national policy governing the service industries than the EEA does. Perhaps this seems to Paal Frisvold to be negative, but for many others in Norway society, the ability to regulate the service industries effectively, for example, through licensing arrangements, will likely be perceived as very important and as an important part of national control. Many will probably argue that through GATS, Norway has already gone far enough facilitating international trade in services - at the expense of its ability to control social development in Norway.

Frisvold seems to assume that a trade agreement with the EU would not include its own rules for trade in services. Both the EU and Norway/EFTA, however, include services as a theme in many of their trade agreements with countries around the world, and there is an increasing tendency for that to be done.[121] Whether it would be politically desirable is an entirely different matter. Many of the controversial issues related to the EEA in recent years have been precisely in the service area, partly through new legislation from the EU and partly by the ESA and the EFTA Court's interpretation of the EEA agreement due to regulations.

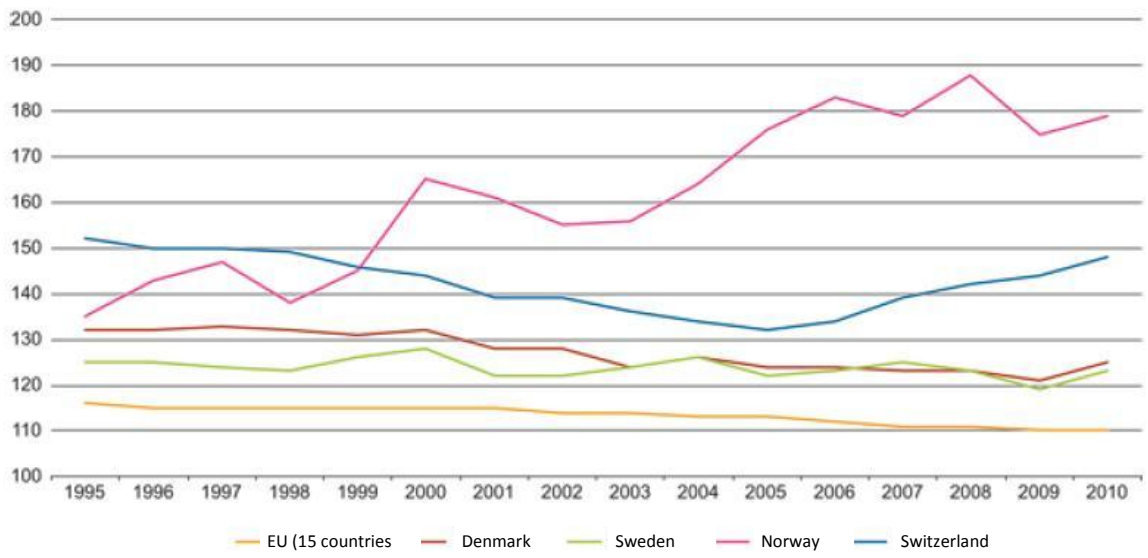
Switzerland's agreements with the EU through several rounds of negotiations have become very extensive, but they have not led to an agreement for trade in services. The agreements do not cover the EU rules on bank deposit guarantees, the EU's third postal directive or the service directive either. If Norway had been a model a la Switzerland, where the scope of the obligations in the service area had been negotiated as a package - and did not come as individual directives and interpretations of the agreement along the way - it is far from certain that one would have come to an agreement that the majority in Norway had considered the politically acceptable.[122]

7.8. Do we have the EEA to thank for everything that has gone well?

The background material that the EEA Review Committee presents, shows that the Norwegian economy has been significantly better than for most countries it can be compared with. Measured against the EU-15 (the old Western European EU countries), the GDP in Norway has increased from being around 10 percent higher in 1995 to about. 60 percent higher in 2010.[123] Unemployment in Norway during the period was significantly lower than in the EU and in 2010 was about 1/3 of the EU average. [124] The same charts also show that development in Switzerland during the period has been very good, especially if you measure it against the situation in many EU countries. Both Norway and Switzerland have had much lower unemployment than the EU average in the periods mentioned. Growth in GDP for Switzerland against the EU average has varied over the period, but in recent years (since 2005), growth in Switzerland was clearly higher than in the EU. Although it doesn't compare with Norway, Switzerland had a GDP in 2010 that was clearly higher than those of the EU-27, EU-15, Sweden and Denmark.

119 VG, 22.12.2011.
120 Foreign Ministry Focus: General information on the GATS agreement.
121 See further elaboration in section 11.3.3. and 11.4.3.
122 For a more detailed review and assessment of Switzerland agreements, see chapter 11.3.4.
123 See Figure 1
124 See Figure 2

Figure 1. *GDP per inhabitant (1995-2010)*



Source: Eurostat and SSB (reproduced in NOU 2012: 2, page 326)

The GDP for Sweden and Denmark (which have not adopted the euro) is also higher than the average for the EU 27 and EU-15.

This clearly shows that the hypothesis that economic growth increase depending with how they are integrated in the EU internal market, cannot be supported by the statistical data for the period 1995-2010. It cannot be documented that participation in the EEA is essential for favourable economic development. The example of Switzerland highlights this. Switzerland has fared very well economically compared to EU countries, despite the fact that their agreements with the EU is not "dynamic" and that the EU and Switzerland have not succeeded in coming to an agreement on free flow of services.

7.8.1. Development of trade between Norway, EU and Switzerland

A comparison between different countries will always be based on different assumptions. Nevertheless, there will be similarities, and the EEA Review Committee has found it relevant in many contexts to include a comparison with Switzerland, partly because Switzerland has a close relationship with the EU through bilateral agreements, geographical location and that they, like Norway, is very dependent on trade with the outside world. The trend in exports from Norway to the EU in the period 1980-2009 follows a similar curve as the trend in exports, from, respectively, Switzerland, Germany (internal trade in the EU) and Sweden (internal trade from 1995) .[125]

125 See figure 3.

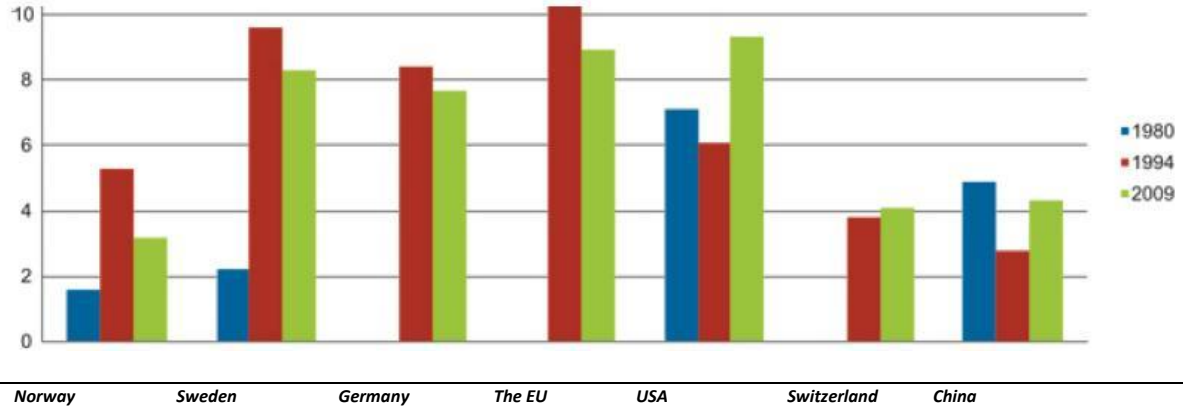
The same goes for exports.[126] The trend during the first years after Norway joined the EEA and Sweden joined the EU showed a slightly higher growth in exports to the EU for these two than for the other two countries, that was followed by a period around 2000, where exports from Norway to the EU developed the slowest out of the four mentioned, but over time there aren't any significant differences. This illustrates that a different connection to the EU and the EEA has not resulted in different developmental pathways in total trade between the EU and these different countries.

7.8.2. The economic effects for Norway

The basis of the mandate of the EEA Review Committee were the economic effects for Norway. Although one can find interesting trends when measuring Norway in comparison to other countries that have chosen a different relation to the EU, it will be very difficult to say something that is based on research about the economic effects for Norway in the EEA if the EEA is not measured against a specific (or planned) alternative for Norway in the analysis. The political science professor Øyvind Østerud has illustrated this point as such in his comment to the EEA Review Committee: "*At the same time many believe that the EEA agreement has been the key to prosperity and wealth for twenty years. That is what the polls show. The agreement opens up the European market and explains much of the growth in the Norwegian economy. The majority of the committee also believes this. Here they are hitting the boundaries set by the mandate. They*

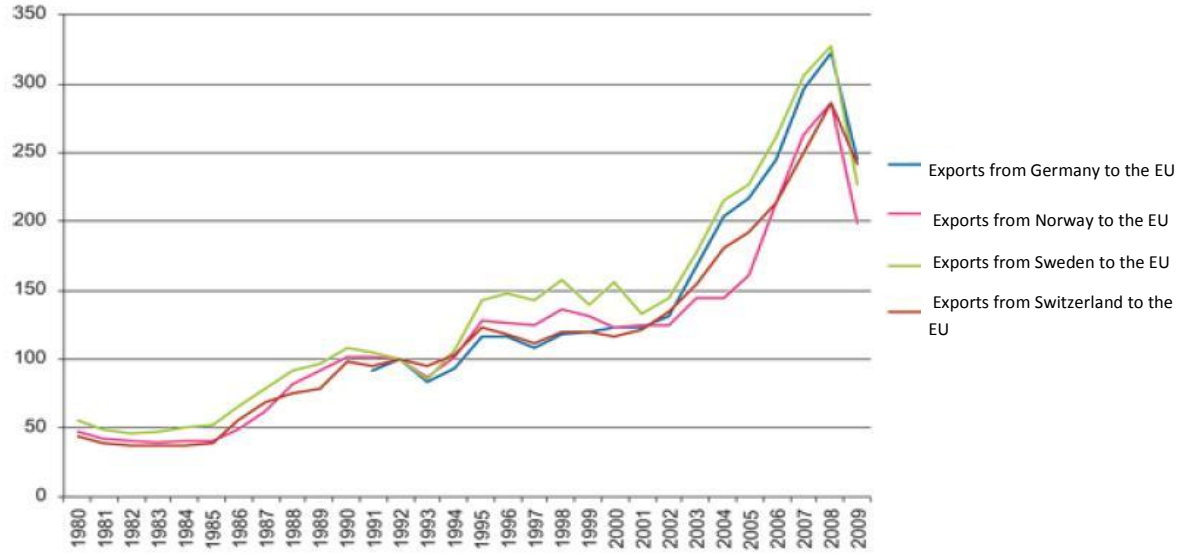
126 See figure 4.

Figure 2. *Unemployment in Norway and selected countries*



Source: World Bank Indicators (reproduced in NOU 2012: 2, page 325)

Figure 3. *Selected countries' exports to the EU (1980-2009)*



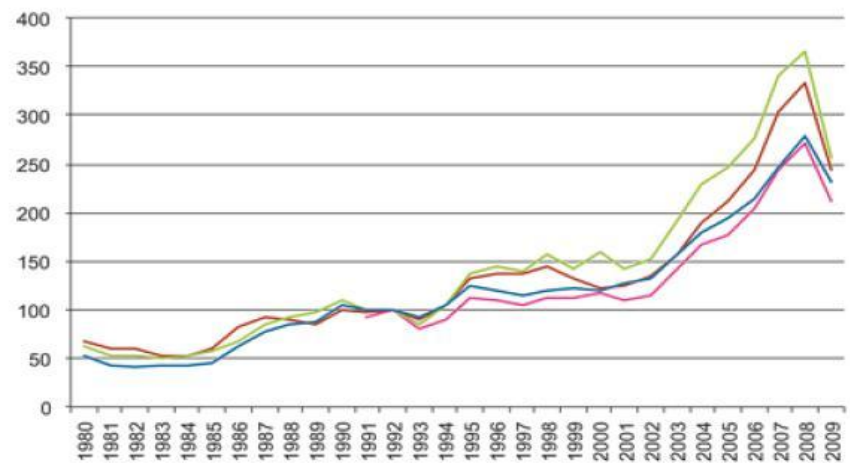
should not branch out to an alternative to the EEA. They cannot know how important a trade agreement could have been for the Norwegian economy and the trade turnover. In resource policy, Norway is somewhat of a super power, a major player in negotiations. Here's what they say about the Swiss solution, it is interesting. For Switzerland they can set up more than 120 sectoral agreements in an overall agreement, but it is unlikely that Switzerland would agree to something that resembles the EEA agreement. "[127]

The majority in the EEA Review Committee seems primarily to justify the alleged positive economic effects of the EEA with a notion that market integration is good and provides an economic value that cannot have otherwise been achieved. Statistics that calculate the direct effects of participation in the EU internal market through the EEA were not presented by the committee. The Alternative project has also found figures of recent data that isolates the effects of the EEA presented in other contexts. If you go back to the 90s, however, you will find calculations that give a picture of the magnitude that can be expected by a theoretical calculation of such effects.

The SSB presented a metric in 1999 which analyzed the welfare effects of four trade agreements that Norway signed in the 90s: the EEA agreement, the WTO Agreement, as well as two agreements that limit subsidies to fisheries, respectively, and shipbuilding. The findings were presented in a 30-page article in the *Economic Survey 6/99*, where the two researchers in macroeconomics at the SSB, Taran Fæhn and Erling Holmøy, summed up: "We find that the implementation of the four contracts provide for a total welfare gain of 0.77 per cent. Converted to an equal annual dollar amount, the welfare increase makes up 0.65 percent of the GDP. We are talking about

127 Dag og Tid, 27.01.2012.

Figure 4. *Exports from the EU to selected countries (1980-2009)*



Source: United Nations Comtrade (reproduced in NOU 2012: 2, page 341)

a modest gain. The result does not stand out much when compared to similar studies of other developed market economies."[128] How much of this can be attributed to respectively the EEA and the WTO is not quantified by the authors. The total gain is, however, as the authors themselves write, modest, and the isolated effect of the EEA must be expected to be even significantly less than this.

The authors of the article justify their conclusion as follows: "*The modest gains must be viewed in the light of the fact that Norway and comparable economies are already very open, even without the implementation of the four agreements we are studying. That the discussions on trade liberalization are so heated and difficult is probably due to the impact on individual industries and on distribution.*"[129]

7.8.3. Bilateral and regional trade agreements

This point is also illustrated on the Foreign Ministry's website: "Free trade agreements are nevertheless increasingly less important as an instrument of pure tariff reductions. The reason is primarily that we have come a long way with tariff reductions in the multilateral context, especially when it comes to industrial goods. Today 51% of global duty-free trade is on the MFN basis and the average MFN tariff is only 4%. Despite the increase in the number of free trade agreements, we see that only 16% of global trade takes place at discounted (preferential) tariff rates. "[130] Internationally there is a total of approx. 300 free trade agreements.

Norway is, through the EFTA, part of 23 free trade agreements covering 32 countries, and by the end of 2011 negotiations were going on for nine further countries.[131]

One of the most persistent myths about the EEA is that the agreement is critical to market access for Norwegian industry. Norway has had duty-free access to the EU market for all industrial goods since 1977. This was also confirmed by the Brundtland Government in the EEA proposition, where it stated that before the EEA, Norway had "*participated in a free trade area for industrial goods that included 19 countries in Western Europe.*" [132]

This meant in other words that there would be no change. Even if someone is in favour of the EEA agreement, they should be honest enough to recognise this. The former Labour Minister Hallvard Bakke is a perfect example of this. In the No to the EU's Annual Report for 2012, he writes: "*The truth is that we would have sold our products just as well even without the EEA agreement. With the loss of the EEA, the former trade agreement with the EU would automatically take effect in accordance with § 120 in the agreement. Norway would be able to sell their goods without tariffs and other barriers to trade just as before.* "[133]

Regardless of whether Norway returns to the above-mentioned trade agreement or chooses a different relationship with the EU, the freedom from can be maintained. The WTO does not authorise the EU to introduce higher tariffs against Norway than other countries outside the Union, apart from countries with which the EU has extensive trade agreements.[134] Increased tariffs on trade between the EU and Norway would also

128 Fæhn, Taran and Holmøy, Erling (1999): Welfare Effects of multinational trade agreements. Economic Survey 6/99, Statistics Norway.
129 Ibid.
130 Foreign Ministry's website, Focus on bilateral and multilateral free trade agreements.
131 For an overview of these, see NOU 2012:2, Appendix 8, page 910
132 Proposition No. 100 (1991-92), page 10
133 Bakke, Halvard: Let the Community in peace! No to the EU Annual Report 2012, page 74
134 For further elaboration of this, see Section 11.2.1.4.

be a clear violation of the treaty objective of the EU's common trade policy, which is to contribute to the "*gradual abolition of restrictions on international trade and direct foreign investment and lowering tariff barriers and other obstacles.*"[135] Moreover, the EU and Norway have a mutual interest in maintaining good trade relations. The EU has a surplus in trade in traditional goods to Norway, it needs Norwegian raw material for its industry and access to energy from Norway for private consumers and industry in the EU.[136]

7.9. Costs of the EEA agreement

The economic impact of the EEA agreement involves both positive and negative effects due to Norway's participation in the agreement. The costs include Norway's net contributions to the funding, which over time have increased to approx. 3 billion NOK annually, as well as the cost of implementation, enforcement and compliance with a large number of pieces of legislation from the EU. Negative economic effects also arise from reduced income opportunities as a result of various aspects of the EEA regulations.

7.9.1. Price competition

An assessment of the economic effects of the EEA should also imply that the expectations you have in certain areas were reviewed and evaluated against what has actually happened. The EEA proposition from the government in 1992 contributed for example to creating the expectation that the public would gain from the competition that the EU would set the stage for. "*It is estimated that Norwegian participation in an internal market in public procurement could result in average price reductions for the public of 7 to 10 per cent as a result of increased competition among suppliers. Overall, this could provide a savings equalled to 0.5 to 0.8 per cent, of the gross domestic product, or approx. 3.5 to 5,500,000,000 Euros expressed in 1991 prices, cf. Kjær (1989).* "[137]

The EEA Review Committee's majority concluded 20 years later that they "*are generally positive about the rules that public procurements of a certain size must be put out to open competition and awarded according to clear criteria*", [138] although they must admit that "*there is little economic research and study of the effects of procurement rules have had. "*[139] However, there are analyses of the economic impacts of the procurement regulations which point in the opposite direction of what was envisioned 20 years ago. A survey of how much the competition bureaucracy costs the member states of the EU and the EEA shows that Norway is on top with costs of 16 billion NOK a year. [140] The European Commission has conducted the survey of what it costs to put public sector contracts out to tender. The cost is mainly due to EU regulations that require public sector contracts over a certain size to be put out to tender across the EU/EEA region. But according to the Commission's review 1.4 billion arise from the cost from the rules particular to Norway where the value thresholds for when the requirement of a tender applies are set much lower than what the EU requires, which has contributed to county and regional Minister Liv Signe Navarsete's initiative for changing the Norwegian rules. [141]

7.9.2. Bi- or unilaterally beneficial?

According to the EEA agreement, article 19, Norway and the EU are committed to gradually liberalising trade among themselves on a "mutually beneficial basis." The trend has in no way proven to be mutually beneficial, and actually liberalisation can be said to have been unilaterally beneficial for the EU. The Norwegian Farmers' Union described the development as follows in its input to the EEA Review Committee in July 2011: *"Increased imports as a result of article 19 and protocol 3 is very serious for Norwegian agriculture. As Veggeland points out, the import of agricultural products from the EU has increased fivefold since 1990 (measured in volume). In only the last ten years, imports of agricultural goods from the EU has doubled in terms of value. Almost 70% of our imports of agricultural products now come from the EU. At the same time, Norway's exports to the EU are instead holding steady. Norway has also been given preference for goods that we do not produce. Imports of agricultural products from the EU are now 7 times greater than exports to the EU from Norway. The new article 19 agreement which was approved by Parliament in the spring will reinforce this trend. This presents major challenges for Norwegian agriculture. These last concessions alone are equivalent to milk from 250*

135 Lisbon Treaty, Article 206 (formerly Article 131 Official Journal). Foreign Ministry official Norwegian translation.
136 See more about the EU's interests in trade with Norway in Chapter 12.3.
137 Proposition No. 100 (1991-92), page 383
138 NOU 2012:2, page 425
139 NOU 2012:2, page 425
140 PwC, London Economics and ECORYS: Government Procurement Europe - cost and efficiency. A study commissioned by EU Commission. March 2011.
141 *Verdens Gang*, 09/09/2011.

dairies. "[142] As of this writing, the trend has further accelerated, and in 2011, EU exports were in total nine times greater than imports from Norway.[143]

These negative economic effects on Norway are referred to in the EEA Review Committee only in a minority note from Dag Seierstad and Liv Monica Stubholt. The majority did not comment on these negative effects, but chose instead to focus on the "*exception in the EEA agreement for the agricultural sector has been advantageous to Norwegian manufacturer interests rather than to those of consumers. The shield against competition and structural changes are also expensive from an economic perspective.*"[144]

7.9.3. Reduced prices for fish producers and exporters as a result of abolished monopoly

The monopoly of manufacturers in the fisheries sector was abolished in Norway in 1991 and exports to all EEA countries became free. Peter Ørebech has summarised its effects this way: "prices for consumers, for example, in Italy remained at the same level as before. Prices for Norwegian manufacturers and exporters were greatly reduced. This means that the market power that Norway had, moved to importers abroad. "[145] At the same time Ørebech's research shows that EU tariffs are not essential for the export of Norwegian fish. The tariff reductions that came as a result of the EEA have probably not had any impact on export volumes to the EU market.[146]

7.9.4. Costly directives

In some cases, the cost of individual directives from the EU can be very huge. According to *Dagens Næringsliv* (Today's Business) the Oil and Energy Ministry originally prepared for an annual loss of as much as 9 billion NOK as a result of the EU gas directive.[147] In the more than 900-page report from the EEA Review Committee, this is only discussed in a minority note from Dag Seierstad, which declared that *"There may be a distinct disadvantage for Norway that competing suppliers of oil and gas to the EU such as Russia, Algeria and Libya to the EU are not subject to the same constraints as Norway. Due to the EEA regulations, only Norway is unable to take advantage of possible large-scale benefits and coordination between production, transportation and the sale of oil and gas. In the tug and war with the EU, the Norwegian position was that the pipelines from the Norwegian gas fields were part of the production system. The EU was not willing to accept that despite the fact that no country has invested more in both money and trust than Norway for a long-lasting gas supply to the EU."*

Seierstad shows that the EEA has *"made it difficult to maintain an industrial power regime that could ensure Norwegian industry favourable energy prices. This has led to outsourcing and closure of business. The Oil Directive (the license directive) in 1995 took away the essence of what had been Norwegian oil policy: that it should be managed for the benefit of the Norwegian society, as it was called for in the Petroleum Act. The most effective means of control was lost when the entire oil and gas industry along the Norwegian coast became subject to EU free competition. In June 2011, the Parliament – at the request of the ESA – agreed to weaken the so-called base requirement in the petroleum act (§ 10-2) so that there is now considerable uncertainty about the ability of requiring oil companies to manage operations from a base in Norway."*[148] These views have not been commented on by the majority on the committee. There have been less attempts to estimate the economic impacts of this.

With the EEA agreement the oil industry on the Norwegian continental shelf is subject to the EU rules on public procurement and construction. Norway can no longer give priority to other Norwegian companies in the bidding competition on the shelf. Dag Seierstad documents that at the first major tender after the EEA came into effect (Ekofisk II) *", the Norwegian share fell from the normal 60-65 percent to 40-45 percent. Later, the Norwegian share never reached the level prior to when the EEA agreement came into effect. "*[149] An unfair distribution of Norwegian companies will probably not be in line with the WTO Agreement. However, without the EEA, Norway would in all probability have had the opportunity once again to impose requirements relating to management and the bases for new allocations of licenses (and thus reverse the changes made to the Petroleum Act of 2011).[150] The economic effects of changes in the petroleum act

142 Norwegian Farmers' Union:. 15.07.2011. For further elaboration of developments in this area, see also the Agricultural Assessment Office: Customs protection crumbles - Norwegian agricultural trade in light of the EEA and third countries. Report 7/2011.
143 Source: SSB / SLF.
144 NOU 2012:2, page 666 Ørebech 145, page 29
146 See also paragraph 7.4.
147 Dagens Næringsliv, 1/31/2001.
148 NOU 2012:2, page 564
149 Dag Seierstad. Report 2:2012 EEA - a critical assessment. De Facto, page 11
150 See further elaboration of this in Section 11.1.6.4., and chapter 3.2.6

which were made in 2011, neither the possible local spill over effects nor the national impact were assessed on the part of the EEA Review Committee.

7.9.5. New costs on the way?

Through the Eldirective II, the EU wants to prevent the utility companies from providing their own energy production company benefits at the expense of competitors. Therefore, power generation and grid operations are to be kept separate. A distribution network with fewer than 100 000 customers, however, shall be exempt for this requirement. It has therefore been assumed on the part of Norway that the regional grid to a considerable extent can be exempt from this requirement. The regional grid in Norway is owned largely by the owners of the local grids and is closely connected to the local grids. According to the Oil and Energy Ministry "*the function of the installations which are characterised by regional networks must also be understood in light of the important characteristics of the Norwegian power grid system, such as the need for supply over long distances in a country that in many areas are sparsely populated.* "[151]

In a letter from the ESA, which *Teknisk Ukeblad* (Technical Weekly) republished in February 2012, the ESA argued that the Norwegian regional grid must be considered a transmission network, and not as a distribution network. As a result, the ESA demanded that companies that own regional networks be required to separate their power production to meet EU regulations, even though they have fewer than 100 000 customers. The Oil and Energy Ministry disagrees with the ESA, and in a response letter the ministry defended its position by stating that the Norwegian model of regional network is not defined in the EU directive and that the "*regional network is significantly more closely related to the directive's definition of " distribution "than to" transmission "." 152 The trade organisation Energy Norway is in line with the Ministry and CEO Oluf Ulseth argues that "If ESA decides that the regional grid is considered a transmission, this could have serious consequences for the future organization of the ownership of the regional grid in Norway."* [153]

What would the costs be for such an extensive reorganization of the ownership of the regional grid in Norway for the owners, and in turn for the consumers, has been not quantified. In the EEA Review Committee, the issue is not discussed.

151 Teknisk Ukeblad, 02.02.2012.
152 Ibid.
153 Ibid.

7.9.6. Data storage without cost estimates

According to a report which was submitted to Transport Minister Magnhild Meltveit, February 1st, 2012, no one knows how much it will cost to implement mandatory storing of information from the phone, e-mail and Internet use, despite the fact that it has been almost a year that a narrow majority in Parliament decided that Norway should implement the data retention directive. The committee summarised among other things, that "*A major challenge for the committee's work has been the very uncertain cost situation. Cost estimates for implementation of the directive have been previously carried out, but these are very uncertain. However, it is clear that it will be expensive for the providers. In addition, the parliamentary decision guidelines mention very costly measures to ensure privacy and the individual's legal protection. The storage operator shall not take advantage of the stored data in its own operations. The cost of these measures has not been calculated."*[154]

Despite the fact that no one knows how much it will cost to implement the Data Retention Directive in Norway, it does not seem at the time of writing (February 2012) that the majority in Parliament intends to change their attitude towards the directive. Instead, opponents of the directive have to bet on Iceland, which has not yet completed the directive and that has on two occasions already received a deferral of dealing with the case in the EEA committee (where the EFTA countries and the EU meet to discuss the implementation of new legislation). The Icelandic parliament representative Arni Thor Sigurdsson of the ruling party The Green Left justifies this by saying that "*the Foreign Affairs Committee has reservations about the data retention directive DRD being relevant to the EEA. And our government agency for privacy has asked for a postponement in order to assess the effects [...] the EU is reviewing the DRD now. The obvious thing would be to wait for EU review before considering accepting the DRD into the EEA agreement.*"[155]

If Iceland rejects implementing the directive through the use of the right of reservation, the directive will not be made applicable through the EEA agreement. A final victory is not necessary for the opponents of the directive. Norway can obviously implement the exact same provisions in Norwegian legislation in the directive on its own. But Norway would then be free at a later time to change the regulation, for

154 Report by the committee appointed by the Justice and Emergency Ministry and Communications Ministry: Proposed cost allocation model in conjunction with the introduction of data retention directive in Norwegian law. 02/01/2012
155 ABC News, 02/06/2012.

example, if we find that the costs are too great.

7.9.7. Answers without calculations

The examples above reveal that there are substantial costs associated with the implementation, enforcement and compliance with the EEA rules. The EEA Review Committee says little about this. They do not provide any calculation of the pluses and minuses. It then becomes even more evident that the majority nevertheless concludes that there is "*[...] a good scientific basis for assuming that the economic benefits far outweigh the disadvantages.*" [156]

Of course, one can be in favour of the EEA agreement without being able to provide any calculations of the financial implications for Norway. One can of course also believe that the EEA agreement provides Norway with economic benefits that outweigh the disadvantages, but then one must also be honest about the fact that there is no documentation to back this up.

7.10. The EEA is more than the economy - the world is more than EEA

Although the economic effects of the agreement are dominant in the argument for the EEA in the public debate, there are other factors that are highlighted. Below we will review some of the arguments that are used to see whether these hold water.

7.10.1. Research, education and culture

It is emphasised as an argument for the EEA that the agreement, among other things, will ensure Norway access to collaboration in research, education and culture. The programs regarding research, education and culture are indeed related to the EEA agreement and the EEA gives us the right and duty to participate. However: we participated in the collaboration on research and education before the EEA agreement. And countries like Switzerland and Israel participate currently on equal footing in EU programmes. There is no reason to believe that Norway cannot participate without the EEA agreement, if we want to. The 7th Framework includes by the way "*most R & D sites, and provides access to collaboration with virtually all non-European countries*".[157]

Notwithstanding the EEA agreement, Norway has a number of international and bilateral agreements on culture, education and research. The collaboration takes place among others under the auspices of UNESCO (United Nations organ-Educational, Scientific and Cultural Organization), OECD (Organisation for Economic Cooperation and Development), Council of Europe, the Nordic Council and the Nordic Council of Ministers. Norway also has bilateral agreements on education, with Denmark, Germany and France, and on research with the United States, India, Japan and Russia. Norway is affiliated with major international research programmes such as EUREKA (European network for market oriented industrial research and development), ESA (European Space Agency) and IARC (International Agency for Research on Cancer).

Norway is a significant net contributor to EU research programme. In the current 7 Framework Programme, which runs over seven years from 2007 to 2013, Norway will pay 8.9 billion NOK. Figures from the Research Council show that so far only 53 percent of this amount comes back to Norwegian research. Whether Norway will continue to be a net contributor to the EU's research programme will likely be an important evaluation criterion by the EU over whether this cooperation will be linked to the EEA or a trade and cooperation agreement.

7.10.2. Practically everyday

According to Paal Frisvold's article in VG, December 2011, the EEA ensures continuous updating of legislation in line with our neighbouring countries, it provides legal rights that make the Norwegians equal in areas such as health care, pensions and the right to live, study and work in Europe. However, he believes a trade agreement would mean that we will gradually lose our rights.

Look, for example, at Switzerland; they have agreements on the free movement of persons (residence and work), mutual recognition of technical standards, trade and participation in educational programmes. The agreements provide rights in line with the EEA.

When it comes to health care and pensions, the Norwegian welfare system is of a much higher standard than most, if not all, the EU countries, so there is little to be gained for Norwegians on being "equal" with the EU.

Regardless of the EEA, Norway participates in the EU Public Health Programme with annual dues. It consists of workshops and projects in health, health hazards and prevention of risk factors.

On education, Norway participated even before the EEA in the two main programmes:

156 NOU 2012:2, page 358

157 International Director of the Research Council, Simen Ensby, No to the EU Annual Report 2012, page 95

COMETT (since 1990) and ERASMUS (1992).

7.10.3. Discrimination

Frisvold also claims that since the EEA gives us the same duties with regard to airports, port fees, road tolls for heavy transport, school fees, patent applications and roaming for mobile phones, we risk being discriminated against without the EEA.

Patent applications are, however, regulated in the European Patent Convention, which is an independent agreement which Norway joined in 2008. When it comes to tuition fees, an agreement on participation in education programmes, like Switzerland has regardless of the EEA, could safeguard tuition fees.

The directive on airport duties (2009) provides for a general equal treatment at airports. Tax differences should be based on actual costs. At an airport there may be differences between the terminals. These principles suggest that the distinction has nothing to do with the EEA, but rather if your flight is coming from inside or from outside Schengen.

7.10.4. Bureaucracy

Frisvold expresses in his aforementioned VG article concern that we will have a far more extensive and unwieldy bureaucracy outside the EEA. However, vast resources of the Norwegian administration is currently being used on the EEA work and cooperation or else with the EU. The EEA Review Committee shows that the Food Authority alone has 32 full-time employees related only to the implementation of the EU/EEA rules.[158] To the extent that we would like to assess the new EEA regulations carefully on our own, the difference between the EEA and bilateral agreements would not be very large.

A trade and cooperation agreement with the EU may require a larger bureaucracy in Norwegian ministries, but we can get rid of a significant amount Norwegian-funded bureaucracy in the EEA bodies. In sum, this calculation should be on the plus side.

Switzerland has lower direct costs associated with their bilateral agreements than Norway has with the EEA. The EEA costs Norway about 4.5 billion per year. Switzerland, is both in population and GDP a bigger country, and pays approximately 3.6 billion NOK a year. In addition to the costs of participating in EU programmes for research, education and culture, Switzerland has also committed itself to supporting measures for cohesion in the Eastern European EU countries.

7.11. The EEA provides access to important cooperation

In some contexts, it would be appropriate and reasonable to associate ourselves with the EU initiatives and processes, such as the EU's work on chemicals through REACH which Norway participates in. Although it is problematic that we cannot have more stringent rules in important areas, it would be important for Norway to continue being part of this control plan. The same would apply to food control and food additives. These are examples of cooperation within the EEA framework that should be continued, considering the fact that there is extensive trade between Norway and the EU.

If Norway chooses a different connection than the EEA, it would be a negotiation question whether Norway should continue to be part of the EU's efforts in these fields - and if so, on what terms. A natural approach on the part of the EU would be for Norway to have to follow the common rules for being a part of the cooperation and that it would have to co-fund the costs of the system. This does not appear to be unreasonable if Norway is still connected to the EU processes and is granted influence on the further development in the field.

7.12. Summary

The review in this chapter demonstrates that perceptions of the EEA agreement, crucial for the Norwegian economy and Norwegian jobs, are in many cases based on more or less unproven assumptions about the internal market's excellence.

Market access also without EEA

One of the most persistent myths about the EEA is that the agreement is critical to market access for Norwegian industry. However, Norway has since 1977 through the trade agreement with the EU had duty-free access to the EU market for all industrial goods. Regardless of whether Norway will return to this agreement or choose a different relationship with the EU, the freedom from tariffs will be able to be maintained. The WTO does not authorise the EU to impose higher tariffs against Norway than on other countries outside the Union, except countries the EU has extensive trade agreements with.[159]

158 NOU 2012:2, page 646.

159 For further elaboration of this, see Section 11.2.1.4.

Increased tariffs on trade between the EU and Norway would also be a clear violation of the treaty objective of the EU's common trade policy, which is to contribute to the "*gradual abolition of restrictions on international trade and direct foreign investment and lowering tariff barriers and other obstacles.* "[160] The EU and Norway have a mutual interest in maintaining good trade relations. The EU has a surplus in trade in traditional goods to Norway, needs Norwegian raw materials for their industry and access to energy from Norway for private consumers and industry in the EU.

The EU's relative importance for Norwegian exports is declining

Trade with the EU grew strongly in absolute terms, both before the EEA agreement came into effect in 1994 and after 1994. Yet growth in trade with countries outside the EEA has been even stronger. While 75 percent of Norwegian merchandise exports (excluding oil and gas) in 1994 went to the EU, the percentage in 2010 decreased to 64 percent. This is not about a lack of market access to the EU, but that there are other areas in the world economy and the markets that are growing more.

Outsourcing is not due to lack of market access to EU

When production is moved out of the country, this is not about lack of access to the EU market. On other hand, more expensive power for energy-intensive industries as a result of adapting to EU legislation can contribute to an important competitive advantage for Norwegian energy-intensive industries disappearing, and thus one of the reasons for maintaining and developing industrial production in Norway.

Transition to new industries is made difficult by the EEA

Oil and gas in 2010 amounted to 46 percent of our total exports. The EU is a large net importer of energy, which will increase in coming years - partly because of increasing consumption and phasing out of nuclear power. The challenge for the future is largely about how we can manage to create new growth opportunities in new industries when the production and revenues from exports of oil and gas gradually decrease. "*Then Norway may need more industrial policy control than what the EEA agreement allows,* "[161] as the minority in the Sejersted Committee, Liv Monica Stubholt and Dag Seierstad put it.

EU customs not essential for Norwegian fish exports

For fish exports EEA meant changes in tariffs for some products, but as the leader of research at the Norwegian College of Fishery Science (University of Tromso), Peter Ørebech has documented, the EU tariffs are not essential for Norwegian fishery exports. There are other factors that are decisive for which markets are chosen and what market share you manage to achieve.

Research by trade strategists shows that you do not find that exporters choose markets for their sales based on tariffs. While exports to countries like Russia, India and China have increased sharply over the past decade despite the relatively high tariffs (in the order of 15-30 per cent), exports to Switzerland, for instance, have declined over the past decade in spite of there being zero tariffs for exports. In Poland, exports from Norway have been increasing since they joined the EU in spite of increased tariffs.

The danger of anti-dumping less imminent

A key argument for the EEA agreement was that the EEA could not longer use the EU's (threat of) anti-dumping against Norway. The anti-dumping weapon is less relevant today. The Norwegian business support changed, Norwegian companies must increasingly pay market price for electricity, and the WTO sets far stricter anti-dumping measures than the EU did in the 1980s. Norway has also used the WTO rules to get rid of unwarranted dumping accusations on the part of EU on Norwegian salmon exports - and won.

Technical barriers to trade removed regardless of the EEA

Another argument sometimes used for the EEA agreement is that the agreement means the removal of technical trade barriers. Efforts to reach common technical standards, however, are occurring in the European standardization bodies, which exist independently of the EU, and with which Norway are in line with all EU countries.

160 Lisbon Treaty, Article 206 (formerly Article 131 Official Journal). Foreign Ministry official Norwegian translation.

161 NOU 2012:2, page 425.

Increased trade in services with substantial consequences
One of the central arguments that were used for the EEA agreement was that the growth in the future would not be in retail, but in the service industries. There has undoubtedly been significant growth in the service industry, and services make up a growing share of the economy. The EEA has meant a significant impetus to opening up the domestic service markets to competition. The result is that Norway imports more services from the EU than we export. In the first half of 2011 we imported 24 billion NOK and exports of 17 billion.

Both the EU and Norway/EFTA have services as a proponent in many of their trade agreements with countries around the world. Internationally the GATS agreement regulates the WTO trade in services. Without the EEA, there would therefore still be international rules for trade in services that both the EU and Norway would have to comply with. Whether it would be politically desirable to include services in any new trade agreement with the EU is a political question. Many of the most controversial issues between Norway and the EU have come from this area. Switzerland has not reached an agreement with the EU for an agreement covering services. Nor do the agreements cover the EU rules on bank deposit guarantees, the EU's third postal directive or the services directive.

The degree of European integration cannot explain the degree of economic growth
In the period during which Norway has been part of the EEA agreement, trends in the Norwegian economy have been significantly better than for most countries to which it can be compared. The Norwegian GDP has skyrocketed, while the unemployment rate in Norway in the period was significantly lower than in the EU and in 2010 was about 1/3 of the EU average. Trends in Switzerland in this period have been very good, especially if you measure it against the situation in many EU countries. This has occurred even if the agreements between Switzerland and the EU are not "dynamic" and even though the EU and Switzerland have not succeeded in coming to an agreement on the free flow of services. Both Norway and Switzerland also have a level of exports and imports to the EU which is in line with the member states Germany and Sweden (internal trade in the EU).

This clearly shows that the hypothesis that economic growth is increasing in line with how they are integrated in the EU's internal market cannot be supported in the statistical data for the period 1995-2010. It cannot be documented that participation in the EEA is essential for favourable economic development. The example of Switzerland highlights this.

The economic effects on Norway
In 1999 the SSB presented calculations which analyzed the welfare effects of four trade agreements, in which the EEA and the WTO were the two most important. Based on their theoretical calculations, they came up with a total welfare gain of 0.77 percent of GNP, and justified the very modest effect with the fact that both Norway and comparable economies are already very open. The isolated effect of the EEA must then be expected to be significantly less than this again.

Bilateral and regional trade agreements' significance are decreasing internationally
As the Foreign Affairs Ministry highlights on its website, the bilateral and regional trade agreements are becoming increasingly less important as an instrument of pure tariff reductions: "*The reason is primarily that we have come a long way with tariff reductions in the multilateral context, especially when it comes to industrial goods. Today 51% of global duty-free trade is on the MFN basis and the average MFN tariff is only 4%. Despite the increase in the number of free trade agreements, we see that only 16% of global trade takes place at discounted (preferential) tariffs.* "[162]

The EEA agreement's price
The review in this chapter shows that there are significant costs associated with the implementation, enforcement and compliance with the EEA rules. Among the examples mentioned are the gas market directive, the data retention directive, the ESA requirement of the reorganization of the ownership of the regional grid for power supply, the cost to the public with competitive bidding, as well as the imbalance in the outcome of the protocol 3 and article 19 - negotiations. In addition, the cost of Norway's net contribution to funding, which over time, has increased to approx. 3 billion NOK annually. Negative economic effects would also arise from reduced income opportunities as a result of various aspects of the EEA regulations. The EEA Review Committee says little about this. They do not present any calculation of the pluses and minuses.

162 Foreign Ministry's theme pages on bilateral and regional trade agreements.

It then becomes even more evident that the majority nevertheless concludes there is "*a good scientific basis for assuming that the economic benefits far outweigh the disadvantages.*" [163]

If these had been the assessments and conclusions from a representative sample, such undocumented claims would be less problematic. There are many players in the public debate in Norway that have a clear perception of the effects that the EEA has had on the Norwegian economy. So have many in our project. There is a large range of perceptions, with some maintaining that the EEA has contributed significantly to the positive trends in the Norwegian economy.

The EEA Review Committee, however, should have been research-based, led by researchers and allowed for broad and critical scientific judgments, and they should have undertaken a broad and thorough evaluation of the EEA agreement's impact on the Norwegian economy. In the absence of research-based documentation, the majority of the committee chose to present assumptions of the EEA agreement's effects on the Norwegian economy. The majority of the committee are of the belief that "*To isolate and measure the economic impact of the EEA agreement is not possible, but to the majority it appears clear that the gains for Norway have been considerable.*"[164]

Here, the minority of the committee was significantly more precise when they wrote that "*the Norwegian economy as a whole has developed well during the period, but there is no definitive research-based foundation to distinguish the consequences of the EEA agreement from other economic factors and trends.*" [165]

Of course, one can be in favour of the EEA agreement without being able to present a calculation of the financial implications for Norway. One can of course also believe that the EEA agreement provides Norway with economic benefits that outweigh the disadvantages, but then one must also be honest about there not being any documentation that support this.

EEA is more than the economy - the world more than the EEA

Finally, we have touched on areas of cooperation that don't primarily have to do with economics and trade. Norway cooperated on research and education before the EEA agreement. And countries like Switzerland and Israel participate currently on equal footing in EU programmes. There is no reason to believe that Norway cannot participate without the EEA agreement, if we so desire. Norway is also a substantial net contributor to the EU research programme.

Regardless of the EEA agreement, Norway has a number of international and bilateral agreements on culture, education and research. Switzerland, for its part, has an agreement with the EU on the free movement of persons (residence and work), mutual recognition of technical product standards and the participation in educational programmes. The agreements provide rights which are in line with the EEA.

In some contexts, it would be appropriate and reasonable to associate ourselves with EU initiatives and processes, such as the EU's work on chemicals through REACH which Norway participates in. If Norway chooses a different connection than the EEA, it would be a negotiation question whether Norway should continue to be part of the EU's efforts in these fields - and if so, on what terms. A natural approach on the part of the EU would be that Norway would have to follow the common rules in order to be a part of the cooperation and would need to co-fund the costs of the system. This does not appear to be unreasonable if Norway is still affiliated with the EU process and is given influence on the further developments in this field.

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163 NOU 2012:2, page 358
164 Ibid
165 NOU 2012:2, minority note from Hansen Bundt, Seierstad and Stubholt, page 359

Part IV

The Alternatives

In this section of the report we will specify and discuss eight alternatives to current EEA agreement. For several of these it is conceivable to come up with different variants. The alternatives can be placed into one of three groups:

- One the one hand, there are the alternatives that involve an even closer and more extensive cooperation with the EU than under the current EEA agreement, either by including new areas in the agreement and extending the ESA and the EFTA Court's responsibility, or by taking the final step through membership in the EU.

- On the other hand, there are the alternatives that involve replacing the EEA with another form of trade cooperation with the EU, either through a bilateral or regional trade (and cooperation) agreement with the EU, or even basing trade exclusively on multilateral trade regulations.

- In between these two groups are the alternatives that involve retaining the EEA, but taking advantage of the leeway that the agreement provides to a much larger extent than we have been doing, or removing those parts of the agreement that have had the most impact on Norwegian interests.

A fundamentally important distinction between the different alternatives is whether they continue or discontinue the EEA agreement's enforcement mechanisms such as the Surveillance Authority, the ESA in Brussels and – as shown in the above picture – the EFTA Court in Luxembourg. (Photo: Court.)

Chapter 8: Alternative I: EU membership as an alternative to the current EEA agreement

8.1. Why consider this alternative?

The EEA agreement creates democratic problems for Norway. Although we did not transfer formal authority to the EU through the agreement,[1] many would argue that the real transfer of power is of such a degree that we are in a situation where in principle we have become a EU member without voting rights. Although this is not correct, it is still a problem that there has been a unilateral transfer of laws and rules from the EU to Norway that we have a limited ability to reject.

As described in chapters 6 and 7 the opportunities for cooperation on the environment, trade and economy are today open to both the EU and the rest of the world. EU membership is not necessary to ensure better access to the EU's internal market. The reservations in the cooperation that exist today are largely those that Norway wanted and negotiated. The main reason to consider EU membership must therefore be to try to find a more democratic solution for cooperation with the EU.

Norway has recently introduced several pieces of legislation that have been processed and approved in the EU without our influence. Through the EEA agreement, we have a contractual right of reservation however for reasons that are described in detail in Chapter 4, it has not been used as was intended when the agreement was signed. That it has become such that Norway in practice has only a limited opportunity to opt-out of unfinished legislation from the EU is a democratic and constitutional problem. EU membership would give Norway the opportunity to participate in the processing and adoption of new legislation, and would thus be able to bring an important democratic element into the relationship between Norway and the EU.

8.2. Participation in EU institutions and processes

The Commission has the exclusive right to propose laws in the EU. It is not opened for the EFTA countries' regulations to be introduced in the EU as EU regulations are introduced in the EFTA countries' regulations. With EU membership, we would have a representative on the commission as all EU member states have today. It has, however, been suggested that the number of representatives on the Commission shall be limited so that the major EU countries have permanent representatives and the rest of the seats should be passed around among the other member states. This proposal was stopped by Ireland when they voted no to the Lisbon Treaty, but it is expected to come up again after 2014.[2] The Commission is also to carry out its work fully independently and individual members of the Commission are therefore not able to submit proposals on behalf of the countries they come from.

During the preparation of the propositions, expert committees are set up comprised of experts from government, industry and NGOs. Norway has already been allowed to participate in the expert committees which consider EEA-relevant propositions. However, this is a field to which we have been reluctant to contribute, despite the opportunity we have through the EEA agreement.

During the consideration of new legislation, with EU membership, we would be represented in the Council and European Parliament. These institutions are equal in the decision making process, and both institutions can block a proposal. In the Council, Norway would have a vote share of about 1 percent, and in the European Parliament a share of about 1.5 procent.[3] The benefits of this representation must be compared against the limitations of self-determination that membership in the EU would imply.

8.3. Supranationality

The EEA is not a supranational agreement; Norway has not formally transferred power to the EU bodies, beyond the authority granted to the EU Commission on competition policy. When there are changes or an expansion in the agreement or EU legislation, Norway may choose whether to accept or reject them. This can be done through opting-out of new legislation

1 Except as provided by ODA agreement, relating to competition policy.

2 Harper, Morten (ed.): Increasingly more Union, Lisbon Treaty and EU developments. VETT No. 1 2010, page 20

3 Ibid, page 47

or by rejecting the legislation's EEA relevance.[4] EU member countries do not have the opportunity to opt-out of new legislation.

Previously, a number of policy areas were subject to the rules of unanimous decision, which in principle gave each member country the opportunity to block any decision. After the Lisbon Treaty a majority vote was adopted for the majority of these areas. This means that member states have lost the "veto" that they previously had. Similarly, the EU has extended its area of authority to the foreign policy field, which means that in negotiations with third countries or international institutions, the EU speaks increasingly with one voice.

Through the Lisbon treaty the political direction of the EU has been linked to the treaty. The four freedoms and its political goals have placed a strong limit on the types of policy that can be created in the EU and the treaty can only be changed by unanimity. Compared with other constitutions the Lisbon treaty is a very comprehensive and complex treaty that imposes very detailed regulations on member countries. Even if Norway had the right to vote in the European Parliament and the Council, we would have to gain the support of all EU member states to change the EU's treaty basis. Legislation contrary to the Lisbon treaty can be rejected by EU Court despite the decision of the legislative assemblies.

8.4. Power of the Court

In order for Norway and EFTA countries that have become part of the EEA not to give up sovereignty to the European Union by being subject to the EU Court (formerly the EC Court), a separate EFTA Court and a Surveillance Authority were created whose mission it is to ensure that EEA regulations are followed and which can bring matters before the EFTA Court. The EFTA Court rules in accordance with EEA regulations and takes into due consideration the rulings of the EU Court. In this way the ESA and the EFTA Court binds Norway to EU policy in the areas covered by EEA.[5] As a member of the EU, the EFTA Court would be replaced by the EU Court. The EU Court rules in individual cases and interprets EU legislation, and after the implementation of the Lisbon Treaty has jurisdiction in all policy areas except over the common foreign and security policy.[6] The EU Court's jurisdiction is therefore quite excessive in relation to the EFTA Court.

8.5. The scope of the EEA - the scope of the EU

Although the EEA agreement binds us to the EU policy in many areas, we are still much freer than the EU countries. The EEA agreement did not initially cover areas such as trade policy with third countries, agricultural policy, fisheries policy, regional cooperation, the monetary union, coordination of taxes and fees, as well as foreign and security policy. Much of the criticism of the EEA is that the agreement is too extensive. With the current situation, there is no willingness to surrender a number of policy areas to the EU.

8.6. The Economic and Monetary Union and the EU's crisis management

By being a member of the EU, according to EU rules, Norway would have to become part of the Economic and Monetary Union (EMU). The EMU means having a common currency, a common monetary policy and common framework for economic policies across very different countries with different economic conditions, which from the beginning have made cooperation a risky experiment. Low inflation is prioritised over employment, and we have demonstrated increasingly clearly during the ongoing economic crisis in the EU, the advantage of Norway being outside the EMU.

The government has adopted measures in both fiscal and interest rate policy to counteract the consequences of the financial crisis. Where the government has used aggressive economic policy, the EMU has imposed requirements for low budget deficits, strict inflation objectives, and a ban on political control of the central bank.[7] This policy is now being expanded to the rest of the EU. Herman Van Rompuy admits that the new emergency measures put social conditions in the EU in danger, but they will still be put into effect.[8] Member states are prevented from promoting measures that can contribute to more jobs that would cause a deficit to the state budget. This coincides with unemployment reaching a new peak of 10.7 percent.[9]

4 For more on the right of reservation and EEA relevance, see Section 4.3.1. and 4.3.2.
5 See chapter 4.5.1. for further discussion.
6 Harper, Morten (ed.): Increasingly Union, Lisbon Treaty and EU developments. VETT No. 1 2010, page 8
7 Harper, Morten: Intimidation that disappeared for 15 years with the EEA No to EU Annual Report 2009, page 41
8 ABC News.no 01.03.12.
9 Ibid.

The EMU has been shown to increase the economic tensions between the member countries. Not all countries are served by the same monetary politics at any given time. Whether a country has a high or low rate of recession, there can only be one rate within EMU, and it is determined by the whole region's average. This means that for the Norwegian economy, which in important areas is different than most of the economies of EU countries, it will often be necessary to have a different monetary policy than in the EU. The EMU's regulations to not allow this.

8.7. Summary

The most unanimous and comprehensive EEA criticism stems from the profound consequences for democracy in Norway. These problems can be remedied with representation and voting in the bodies where decisions are made for the EU and EEA. EU membership would lead to less autonomy in several areas in which Norway is not currently subject to EU policy.

Chapter 9: Alternative II: The EU's alternative

9.1. Why discuss this alternative?

The EEA cooperation consists of two parties. When one party, the EU, signals that it is envisioning a new and more comprehensive EEA agreement for the future, there is reason to take it seriously. When the EEA Review Committee specifies and discusses this alternative, they have entered into a debate about the alternatives that they were instructed to stay away from. Secondly, they have placed on the table a specific alternative which the government, Parliament and other players in the public debate in Norway must contend with.

9.2. EU initiatives for review by the EEA and the Switzerland agreements

The EU is generally positive to the EEA agreement and Norway's compliance with it, which appears in the European Council's (the EU Council's) assessments of December 2010.[10] Naturally though, Norway pays well for them (about 3 billion NOK annual net), and adapts efficiently and loyally to ever new EU rules and interpretations of the EEA agreement. The Council "*emphasises that Iceland, Norway and Liechtenstein so far have made an outstanding effort to incorporate and implement the rules.*" [11]

At the same time the conclusions of the Council tells us that the EU envisages the possibility of major changes to the EEA in the future:"*35. Furthermore, it should be examined whether the EU's interests are safeguarded well enough through the existing framework or alternatively through a more comprehensive approach, encompassing all areas of cooperation and ensuring a coherence across the board. The EU's review should also take into account possible trends in EEA membership.* "[12]

The Council is launching this idea of a far more comprehensive EEA, where new areas are included in the EEA, where ESA and the EFTA Court's grip Norwegian democracy can increase and be further tightened. Seen from Brussels, the EEA agreement itself is apparently too much trouble, and they would like an agreement that is even more flexible, comprehensive and extensive, with less comprehensive case management, and faster and more efficient execution of EU legislation.

So far this has not resulted in new initiatives, or more specifics on the part of the EU - at least not known to the public. The EU initiative demonstrates why based on external circumstances it would be important to examine and discuss alternatives to the current EEA agreement in Norway. Norway could soon find itself in a forced situation where the EU puts forward specific proposals for changes in the EEA which are both politically and constitutionally unacceptable to Norway, but to which a political majority in Norway feel they cannot say no, because they do not see any alternative .

9.3. The EEA Review Committee's specifications

The EEA Review Committee had been given clear instructions not to explore alternatives to current EEA agreement. And they have largely remained loyal to that. At the same time the EEA Review Committee has picked up the thread from the European Council's conclusions, and has brought up in the final chapter how to proceed with a discussion on proposed comprehensive amendments to the EEA agreement. In practice this means a completely new and much more far-reaching agreement than today. The committee writes that: "*If current affiliation with the EU is to be continued indefinitely, it is natural to ask whether one should try to make it more unified and coherent, and to negotiate a common framework for the current agreements.*

Such a framework may be formed in various ways, but the essential thing is an agreement that covers everything - including the EEA, Schengen, the other legal agreements, security and defence policy agreements, Interreg and other programmes. Furthermore, there must be a common institutional framework around it, with procedures for overall and general political dialogue and governance, which is lacking today. The detailed procedures could be conceivably harmonised, but could also continue to vary from subject area to subject area, as in the EU. The easiest would probably be a form of an extended EEA agreement which also covers the other areas where Norway has agreements, and strengthens the political level at the top. But other models can also be envisaged. Reform could be purely institutional and only extend to a common framework around existing

10 The Council (2010): Council Conclusions on EU relations with EFTA countries. 14.12.2010.
11 NOU 2012:2, page 302
12 The Council (2010): Council Conclusions on EU relations with EFTA countries. 14.12.2010, section 35

agreements, or one could imagine at the same time evaluating whether additional areas of the EU cooperation should be included."[13]

The EEA Review Committee clearly goes outside the instructions they received from the Foreign Minister with this. It is, in practice, as outlined here, an entirely new agreement in which the ESA and the EFTA Court is likely to gain additional authority. When the EEA Review Committee first went beyond its mandate and discussed alternative ways of organizing cooperation, it is quite lacking that no various solutions were outlined as a basis for real discussion.

9.4. Støre's statements

In the European political report to Parliament on November 17th, 2011, the foreign minister signalled that the upcoming White Paper on Norwegian - European policy was to "*outline the way forward for Norwegian European policy, focusing on how the EEA agreement could meet our needs, and address issues such as: How should we best safeguard Norwegian interests in light of the major changes the EU has undergone in recent years? Could there be a need for new, longer-term measures to ensure these interests in the cooperation with the EU?* "[14]

Jonas Gahr Støre has characterised an alternative that involves replacing the EEA with a trade agreement with the EU as a "*phantom*".[15] One must therefore assume that Støre with his statements in the Parliament did not have a trade agreement in mind when he asked whether there is a need for "*new, longer-term initiatives*" in the cooperation with the EU. Støre's statements must not be interpreted as new initiatives based on the current EEA agreement. Chapter 10 discusses the two alternatives ("A leaner EEA" and "Taking advantage of flexibility") that will involve new initiatives to the EU based on the current EEA agreement.

Støre's statement has been interpreted from several sides as new initiatives beyond those in the current EEA agreement. Whether it is a more comprehensive EEA agreement along the lines of what the EU has advocated and the EEA Review Committee has specified, or if there are proposals for new agreements on the part of the EEA is not known. It would be enlightening for the political debate if the Foreign Minister were to specify what he means by the "new, longer-term initiatives" in the cooperation with the EU.

9.5. Comprehensive Framework?

It may initially sound intriguing to have a comprehensive framework for Norway's agreements with the EU. It is also possible to achieve it. It must involve the removal of the peculiarities that characterise the EEA agreement, such as the ESA, the EFTA Court and the provisions which mean that all relevant legislation that the EU adopts in the field coming to Norway on a conveyor belt. In this case, one could establish a bilateral trade and cooperation agreement with the EU, including the agreements with the EU that we want continued, with a scope and content that would be acceptable to both parties and where changes to the cooperation are done through negotiations between the parties. A detailed description of such an alternative is provided in Section 11.3. However, this is not the model that either the EU or the Sejersted Committee have outlined.

The problems of a solution as the EU advocates and Sejersted Committee specifies, are reasonably obvious when one looks at the arguments used for such a comprehensive framework. The reason for the initiative is not least due to the institutional changes made in the EU through the Lisbon Treaty, including removing the former pillar structure within the EU, as well as the EC Court having become the EU Court which will to be able to rule in all areas of EU policy, except foreign and security policy.

It has been argued that it is increasingly difficult to distinguish which of the new EU legislation is relevant to the EEA and that in many cases only parts of it will be relevant to the EEA. The solution then becomes a new comprehensive framework, where there is no need to make this evaluation, in that all new regulations that the EU adopts in all the areas in which Norway has agreements with the EU will be defined as relevant. Similarly, with the expanded authority of the EU Court is becomes more difficult to define which rulings/parts of ruling are relevant to the EEA and thereby be used by the ESA and the EFTA Court as a basis in the interpretation of the EEA. The solution is then a comprehensive framework in which the ESA and the EFTA Court should have a similarly expanded jurisdiction as the EU Court has within the EU.

An alternative that involves a comprehensive framework for Norway's agreements with the EU, where the ESA and the EFTA Court and the agreement's

13 NOU 2:2012, page 870
14 Retrieved from foreign policy statement, the Parliament 17.11.2011.
15 Dagens Næringsliv, 17.01.2012, page 8

other dynamics are maintained and applied in new areas, will mean a dramatic change in Norway's contractual relationship with the EU. In practice this will mean a new agreement with the EU, where the democratic problems of the EEA are amplified and spread to more areas of Norwegian policy. It is difficult to find a good argument for this - unless you are intending to use it as a springboard into the EU.

9.6. Summary

When the EEA Review Committee first went beyond its mandate and discussed alternative ways of organizing cooperation, it was quite lacking that various solutions were not outlined as a basis for real discussion.

It is also fully possible to have a comprehensive framework for Norway's agreements with the EU. It must then involve the removal of the peculiarities that characterise the EEA agreement, such as the ESA, the EFTA Court and the provisions that mean that all relevant legislation that the EU adopts in the field comes to Norway on a conveyor belt. In this case, one can establish a bilateral trade and cooperation agreement with the EU, including the agreements with the EU that we want continued, with a scope and content that would be acceptable to both parties and where changes in the cooperation are done through negotiations between the parties. However, this is not the model that either the EU or the Sejersted Committee has outlined.

An alternative that involves a comprehensive framework for Norway's agreements with the EU, where the ESA and the EFTA Court agreement and other dynamics are maintained and applied in new areas, will mean a dramatic change in Norway's contractual relationship with the EU. In practice this will mean a new agreement with the EU, where the democratic problems of the EEA are amplified and spread to more areas of Norwegian policy, which it is difficult to find a reasonable argument for - unless you have the intention of using it as a springboard to the EU.

Chapter 10
Can the EEA be improved?

10.1. Why discuss alternatives based on the EEA?

The EEA is not any given size. The EEA is an agreement that is constantly changing. As we have shown earlier in the report, the agreement has become increasingly extensive and clearly in breach of conditions that were added on the part of the majority at the time when the agreement was entered into. [16] The question then becomes - could the EEA be improved? How much better could the agreement have been, for example, if we had taken the most advantage of the flexibility in the agreement? This is discussed in Section 10.2.

In the same way as the EU seeks to safeguard their best interests within the framework of the agreement, Norway should systematically and strategically do the same. When the EU puts forward ideas about a new and far more extensive cooperation (which in practice will involve a completely new agreement, see Chapter 9), then there could definitely be some new initiatives on the part of Norway. A proposal for a "leaner EEA" where the agreement is changed, for instance, by removing areas of cooperation for which the agreement was not meant to apply and areas that have caused significant problems for Norway, could be such an initiative. These are specified and discussed in Section 10.3.

Both of these alternatives are based on the structure, the institutions and the dynamics that are in the current EEA agreement. There are also limitations in terms of how extensive the changes could conceivably be, and could create, like today, ongoing challenges when it comes to delineating the ESA and the EFTA Court's authority and to determining which parts of the EU regulations and the interpretation of them should be relevant to Norway. Despite this, it will still be possible to imagine significant changes in the agreement and how it is carried out.

16 For more information, see e.g. Chapter 3

10.2. Alternative III: Taking advantage of the flexibility

10.2.1. Can the flexibility be better taken advantage of?

The EEA is a very comprehensive agreement, which over time has become increasingly intrusive and which overrides Norwegian policy in a growing number of areas. But to what extent was this a development that was bound to happen - as an inevitable consequence of the obligations in the agreement? And to what extent do the Norwegian authorities have the ability through an active and targeted policy - within the framework of the EEA - to make other choices than those that have been made?

In some contexts, the flexibility available in the agreement is quite obvious. In other contexts, it is less clear what the range of flexibility is, and there will be different legal and political opinions of how great the range of flexibility is. That in itself is a good reason to be more aggressive in the management of the EEA, to take better advantage of the flexibility available. Across the different attitudes to the EEA agreement and EU membership, one should be able to agree to do more to clarify and take advantage of the flexibility in the agreement.

The EEA Review Committee brings up a key point when they point out that "*For the Parliament as legislator, it is a principled and practical important challenge to understand the flexibility that exists in implementing EU law, and to use this in a way that ensures that the national elected majority's political objectives to can be realised to the greatest extent possible.*"[17] To some extent, the report from the committee gives guidance to what the flexibility is and presents some specific suggestions for how that flexibility can be better utilised. Most of these suggestions will be general accepted.

In some areas, however, their proposals involve challenging the EU and the EEA institutions in a way that cannot be expected to be free of conflict. This is also supported by the fact that Norway has tried in some of these areas over the years to

17 NOU 2:2012, page 256.

pursue an active policy within the Community - with varying results.[18]

The flexibility in the EEA is significantly larger than what one might have the impression of when reading Sejersted committee's report, and there are considerably more measures that may be used. A number of such measures are discussed in Chapter 4 and are summarised and evaluated in more detail below. As far as the Sejersted Committee is concerned, some of these measures will be generally accepted as reasonable (several of the suggestions are relatively identical). Overall though, we are presenting many more proposals that will involve challenging the EU and the EEA institutions in a way that cannot be expected to be free of conflict.

The suggestions below are not to be considered individually as an alternative to the EEA agreement, but as a whole the proposals would create a whole new way of organizing and carrying out our relationship with the EU. It is therefore the total package of strategies and measures below that represents "*taking advantage of the flexibility*". Support for such a strategy will also significantly be affected by whether there are specific, realistic alternatives to the EEA that the political majority in Norway would be likely to activate in a given situation. At the core of this is about whether the EU can assume that the political majority in Norway, no matter what happens, and no matter how unreasonable the EU is being vis-a-vis the cooperation, will cling to the EEA agreement - or if there is a limit to what Norway is willing to accept. [19]
As far as the project is concerned, we have been absolutely clear from the start that various alternatives to the current EEA agreement should be studied and discussed, including as part of the political response in Norway. "*Taking advantage of the flexibility*" presupposes therefore that the government and parliamentary majority initiate a study of alternatives to the current EEA agreement, which include alternatives beyond the scope of the EEA.

10.2.2. How to take advantage of the flexibility?

10.2.2.1. Active in the early stages - politically and strategically

In order to have the greatest possible flexibility in the EEA agreement and to utilise it in the best possible way, it will be important for Norway to clarify Norwegian positions and viewpoints in relation to new EU legislation that is under construction at the earliest possible stage. Firstly, in that way, the Norwegian representatives in various forums will be perceived as an appropriate, knowledgeable and predictable player. Secondly, it could form the basis for building alliances with the forces within the EU that have similar views on the matters in question, or who for other reasons can see it in their interest to build strategic alliances with Norway. Thirdly, the political parties in Norway will be able to identify potential problem issues at an earlier stage and be better able to outline solutions that will serve the interests of Norway. Fourthly, it will provide a better basis for the involvement of Parliament in the early stages when the political level of government has a clear awareness of what issues they believe should be prioritised and what the Norwegian positions and viewpoints of individual cases should be.

Although the White Paper on European policy from the Stoltenberg government in 2006 outlined this as one of the strategies on the part of Norway, the EEA Review Committee makes it apparent that at this is a significant improvement at this point. [20]

10.2.2.2. Using other international forums to get the EU on the right course

Some flexibility that Norway has as a member of the EEA is that we can still speak with an independent voice in international forums, where the EU increasingly speaks with a common voice. This flexibility has also been used in a variety of contexts in international negotiations.[21]
Norway should increasingly promote national interests in these forums and not be reluctant to promote views and specific proposals that either the EU does not want to promote because of internal disagreement on the matter, or because they simply disagree.

Norway should actively use international rules that exist within the framework of the World Trade Organization (WTO) in cases of conflict with the EU, as we did in the salmon case, which we won.

Norwegian negotiators in international forums should promote viewpoints to a larger extent that can help to strengthen Norway's interests in cases in which Norway is under pressure from the EU and

18 See further discussion and examples of this in chapter 3-4.
19 See further discussion and examples of this in chapter 5
20 NOU 2:2012, page 141 et al
21 See more on this in section 6.3.4.

the EEA's Surveillance Authority. This can apply both within the framework of various UN organisations and conventions, such as the UN Convention on labour rights (ILO). Other relevant forums are the World Trade Organization (WTO), the European Court of Human Rights (ECHR) and the Council of Europe. Although these international organizations and institutions do not have enforcement mechanisms that are as intrusive, it will be politically important in the tug of war battles with the EU and the Surveillance Authority in the EEA.

Furthermore, it must be discussed in more detail how these new commitments in international forums are to be implemented in Norwegian law to be able to help to "trump" the EEA obligations through their implementation in the Constitution, in the Human Rights Act, or in other ways as precedence rules.

10.2.2.3. Develop arenas outside the EU/EEA framework to address key issues of common interest

The EEA agreement contains no reciprocity in terms of submitting initiatives and proposals for both parties in the cooperation. This suggests that Norway in matters of special importance for our national interests should develop arenas outside the EU/EEA framework to address issues of common interest to Norway and the EU/EU member states. This can be done partly in terms of prioritising the existing arenas where both Norway and the EU/EU member states are represented, and partly by establishing new arenas for policy development and strategic alliances.

Examples of areas of particular importance to Norway would be the northern regions and the different strategic matters related to them, fisheries management and energy. In these forums, Norway will be able to submit initiatives and proposals, including taking the initiative to participate with other countries not included in the EU.

Norway is already an active and key player in the Arctic Council. It is a wise approach to emphasise that the EU as an institution has no role in this cooperation. However, three of the EU member states (Denmark/Faroe Islands/Greenland, Sweden and Finland) are members of the Council. It is important that Norway continue to develop and strengthen cooperation with the Arctic states, so that these countries will be the ones that provide the framework for development in the Arctic and not other EU countries who see strategic interests and opportunities in the area.

10.2.2.4. Set clear limits for EEA - in line with assumptions from 1992

Through the years there has been a gradual expansion of the EEA agreement, contrary to the assumptions that were used as a basis by the parliamentary majority. Although the main agreement is unchanged, the acceptance of the new directives of questionable relevance to the EEA and ESA's reinterpretation of the agreement have contributed to a new legal situation. This expansion of the EEA must cease.

Norway must insist that the EEA Council is the appropriate body for "*political decisions that lead to modification of the agreement,*" while the ESA is to limit their activities to "*ensuring that member states fulfil their obligations according to the EEA agreement* ."[22] The further development of cooperation to areas not covered by the agreement shall be dealt with in accordance with the procedures in article 118. Article 118 does not allow for any obligation to result in the EEA expanding into new areas and Norway can thus prevent such from happening.

Norway should increase its use of the EEA Council as a forum to address issues that are causing difficulties with the goal of clarifying policy among the parties. Norway should be involved early in relation to new cases that are potentially problematic, both in terms of new directives that are being developed in the EU and when it comes to new interpretations of the agreement from ESA and the EFTA Court. Norway should increasingly bring cases before the EFTA Court, instead of accepting the ESA's interpretation of the agreement.

10.2.2.5. Rejecting non EEA relevant legislation

Given that Norway has accepted the development of the legal situation in the EEA which has occurred to date, it is important that the expansion does not continue. Norway needs to be more consistent in its rejection of new EU legislation that is not relevant to the EEA when it deals with issues that the agreement, as it currently stands, is not intended to cover. If such legislation contains elements of legislation that we want to introduce nationally, this should be done through independent national decision making outside the scope of the EEA agreement.

10.2.2.6. Working actively for special national arrangements and exceptions

In the case that a new piece of EU legislation is considered relevant to the EEA, Norway should actively seek special national

22 ODA-agreement, article 5.

arrangements and exceptions that take into account our special situation as a sparsely populated, elongated country with special challenges related to the topography and climatic conditions.

Norway has to retain the exceptions that we negotiated at the conclusion of the EEA agreement. Any removal or modification of existing exemptions should only be done through negotiations, in which Norway in return must secure other political concessions from the EU.

10.2.2.7. Actively use of the available flexibility during implementation

With the incorporation of new legislation into the EEA agreement, solutions should always be chosen that ensure the greatest possible degree of national control unless special circumstance warrant otherwise. Such special circumstances should be justified in each case and politically grounded. Interpretations of new EU legislation are to be politically grounded. The administration is not to be allowed to restrict Norway's political control through their interpretation of legislation from the EU.

10.2.2.8. Active use of the right of reservation

The right of reservation is to be used when necessary to protect national interests. A reservation on the part of the EFTA will in most cases have very little impact on citizens and businesses in the EU and Norway should work to create public acceptance and understanding of the EU that this is a legitimate instrument of the agreement.

10.2.2.9. Active national policies to increase flexibility

Norwegian authorities should seek to find solutions through national decisions that help increase national flexibility within the scope of its EEA obligations. Increased public ownership may therefore be an appropriate tool. The changes in the reversion institute is an example of how, through increased public ownership control has been ensured over natural resources. More acting on one's own account in municipalities and counties may be an important strategy to avoid bureaucratically unwieldy and expensive tendering for EU procurement regulations, and increased active state ownership may be an important instrument of industrial policy.

It should be ensured that public agencies, organisations, individuals and businesses can make informed choices, when the alternatives to adaptation to EU rules are evident. Acting on one's own account as an alternative to adapting to the EU procurement regulations is an example of this. It should also be considered in more detail how the state can provide legal expertise to ensure real freedom of choice.

10.2.2.10. Enable Parliamentary control function in the Parliament's European policy

The Parliament's control function should be enabled to ensure that the EU/EEA issues are handled on equal footing with other key elements of Norwegian domestic politics. This is a particular responsibility for the control committee and open hearings should be held among other things to ensure transparency and information to the public.

The Auditor General's control of the EFTA bodies and EEA regulations should be more closely followed by Parliament.

The independent assessment capacity of the parliament should be further strengthened, in order to become less dependent on information from the government.

10.2.2.11. Increased transparency in the management of the EEA

All standard forms from the EFTA Secretariat received by the Norwegian authorities, and the answers to these, must be made available to the general public. In this way, it will be increasingly possible to have an open and informed debate about the new EU legislative acts that are considered relevant to the EEA, which political and technical adjustments should be considered, and whether it is considered necessary to obtain the consent of Parliament when taking up the issue.

10.2.2.12. All new EU law shall be considered politically

Norwegian courts shall not be able to apply the new EU law beyond the scope of Norway's obligations under international law unless it is explicitly stated to Norwegian legislators that a law shall be construed in accordance with EU law.

Interpretations of new EU legislation are be politically grounded. The administration shall not be allowed to restrict Norway's political control through their interpretation of legislation from the EU.

The right to obtain advisory opinions from the EFTA Court for Norwegian courts should be limited to the courts that are making the ultimate ruling, thereby utilizing the flexibility of ODA Article 34.

10.2.2.13. Reject the changes of the EEA which involve increased jurisdiction of the ESA and the EFTA Court
It must be inappropriate for Norway to accept that changes in the EU's internal organization entail real increased jurisdiction of ESA and the EFTA Court. Norway must also reject all other changes in the EEA cooperation involving increased jurisdiction of ESA and the EFTA Court.

10.2.2.14. Assess changes in the cooperation under article 118 which makes the agreement less unilaterally market-oriented.
Any expansion of the cooperation to new areas in accordance with article 118 should only occur to the extent there is a willingness to change and/or remove items from the main EEA agreement, which shows signs of being "from the eighties" and "unilaterally market-oriented" .[23] For a more detailed assessment of the issue of renegotiation of the EEA, see chapter 9.1.

10.2.2.15. The Government and the parliamentary majority must take the initiative to investigate alternatives to the current EEA agreement
Whether the strategies and measures outlined above will result in greater support to the EU and EEA institutions will be significantly affected by whether there are specific, realistic alternatives to the EEA, which the political majority in Norway is likely to activate in a given situation. At its core, this is about whether the EU can assume that the political majority in Norway, no matter what happens, and no matter how unreasonable the EU is acting in relation to the agreement, clings to the EEA agreement - or if there is a limit to what Norway is willing to accept.[24] As far as the project is concerned, we have been very clear from the start that various alternatives to the current EEA agreement must be studied and discussed, including as part of the political response in Norway. "**Taking advantage of the flexibility**" presupposes therefore that the government and parliamentary majority initiate a study of alternatives to the current EEA agreement, which includes alternatives beyond the scope of the EEA.

23 Cf. NOU 2012:2, page 86
24 See further discussion and examples of this in chapter 5

10.3. Alternative IV: "A leaner EEA"

10.3.1. Can the scope of the EEA reduced?
The majority against EU membership in the polls is now so large, and has lasted so long, that enrolment in the EU seems very distant to most people. An important reason of why this is so, is the economic and political chaos that the EU is failing to end. Not even the EU's initiative for a more comprehensive EEA agreement is winning much popular support. Rather, the polls show that the majority believes that the EU's power in Norway is already too large.[25] More polls from winter 2011/2012 have also shown a clear majority in favour of a trade agreement instead of the EEA.[26]

So far, the alternatives that involve replacing the EEA with a trade agreement, have won little support in the main political environment. The parties that once provided a majority for the EEA agreement, however, have the attitude that the important assumptions that we had for participating in the cooperation have been broken.[27] The EEA has become a very comprehensive agreement, which intervenes in areas that originally the agreement was not to regulate. The question then becomes how to do something about this situation. Within the framework of the EEA there would be two alternatives to the current EEA agreement, to take better advantage of the flexibility within the EEA, or to negotiate with the EU to remove the parts of the agreement that are most problematic. How to use the flexibility within the EEA better is discussed in more detail in section 10.2. Here we will look at the possibilities of reducing the scope of the EEA agreement.

10.3.2. When market forces run wild
The whole world is working to gain control of the market forces that have been running wild due to the financial crisis that struck in 2008. When market forces are running wild, it's usually because someone has set them free. More than anything else that has set market forces loose in Norway is the EEA agreement we have with the EU. We could agree that when there are new directives and regulations from Brussels, we should ask: Do they set market forces loose - or do they give us better political control

25 Nationen's district standings 02/05/12: Over 40% believe that clear that the EU has too much power in Norway. Only 17% disagree with the statement.
26 Three polls from Sentio A / S for the period November 2011
- January 2012 show respectively. 52%, 46% and 46% who prefer trade agreement over the EEA. Those who prefer the EEA vary between 19 and 24%.
27 See more on this in chapter 3.2.

than we had before? If we could agree that we should reject directives and regulations that set loose market forces, then we should start acting locally against the global crisis and the release of market forces on the EU's internal market. As a result, we must start to ask ourselves: What is most problematic about the EEA agreement? Should we try to negotiate with the EU to remove it from the EEA?

10.3.3. Will the EU negotiate?

Is it possible or realistic for the EU to want to be involved in negotiations to reduce the scope of the EEA at all? We can safely assume that the EU has basically very little interest in negotiating a reduction of the EEA agreement. The EU has from the beginning, in 1958, been very adamant about rejecting what has been called "membership á la carte": No one will be offered a membership in which a country selects the policy areas that it wants to be part of the EU.

Nevertheless, the EU has in practice accepted that some member states are not participating in everything that the EU is doing. For various reasons, the EU has accepted that neither Sweden, Denmark, Great Britain or Ireland fully participate in the EU cooperation.[28] Through the Lisbon Treaty, groups of member countries are allowed to cooperate more closely, or more than is required by the treaty, and they can make use of EU institutions in this cooperation.

The EU has been forced to accept that not all member countries are involved in everything. The EEA agreement, which was specially made for Norway and Iceland in 1992, is not essentially different from the partial solutions that EU countries offer each other from time to time. The EU has also attached to the treaty a so-called "*subsidiary principle*" which says that decisions should be made at the lowest level possible, but that the EU can make decisions that cannot be made at national or local levels. Within the EU, this principle is more for decoration than something that is actually practiced. There is no doubt that the EEA agreement in area after area violates the EU's own subsidiary principle. EU legislation has set aside many political decisions that only affect us here in Norway, and which certainly cannot be construed as trade barriers that discriminate against foreigners. Such decisions are set aside at both the national level and local level.

28 See further elaboration of this in Chapter 12.1.2.

The right of reservation

When the EEA negotiations began in 1991, the EU assumed that the EEA agreement would include rules for the internal market, i.e. the rules of the free flow of goods, services, capital and labour, as well as competition policy and rules for the right of free establishment. Agriculture and fisheries were excluded, however, as well as some specific exceptions (including veterinary and regulations for GMO products). In addition, we have the right to reserve ourselves against new directives and regulations. The right is a necessary part of the EEA agreement. Without it, the EEA would have been contrary to the Constitution. The right of reservation gives Norway the right to "*go a little outside the EEA.*" The parliamentary majority, for example, decided that the right of reservation was to be used against the postal directive. This means that the EU must accept that in this area, EEA law deviates from EU law.

10.3.4. What should be changed in the EEA?

10.3.4.1. Cooling off period when the right of reservation is not used

In debates about whether the right of reservation is to be used, it is often word against word concerning the hypothetical basis on what the effects of a directive will be. The EEA agreement should therefore have a cooling-off period: It should be possible to opt out of a directive when we see how it actually works.

10.3.4.2. Designing regional policy regardless of EU legislation

Regional policy should be designed independently of EU regulations, so that Norway, for example should be able to decide on regional policy instruments such as differentiated employer contributions.

10.3.4.3. The tender requirement for public tender: more freedom in procuring

Municipalities across Europe are reacting against the bid requirements of the EU. They are as annoying in the EU countries as in the EEA country of Norway. The Council of Europe forum for municipalities and regions, CEMR (Council of European Municipalities and Regions) adopted a charter on local and regional services in 2009 involving severe limitations on which contracts should trigger a tender at the EU level. Local authorities must have a basic right to decide when to put a contract up for open tender

and when they should not be. It must be up to the municipality what is to be tendered, and what the municipality can perform with its own employees regardless of legal organisational form.

It is at the local level that expertise of the matter is greatest when deciding what benefits there are in an open tender in 30 countries compared to a more limited competitive bidding - or to a contract made directly with a local firm. Therefore, there are good reasons for the requirement of the CEMR for greater "*freedom in procuring*". The EEA agreement should be amended in accordance with the charter which the CEMR adopted in 2009. In the short term, the special Norwegian threshold that triggers a tender should be increased to the thresholds that the EU has adopted.

10.3.4.4. Shield the individual service sectors from the EU's liberalization policies

Concerning domestic bus service, it is largely local Norwegian interests that are affected. Therefore, decisions about the use of tenders should be made locally. Therefore there are good reasons for the collective regulation which requires that all bus routes should be tendered to be removed from the EEA agreement.

Freight transport by road is now out of control when it comes to wages and working conditions for foreign drivers. There is an urgent need to intervene against the kind of liberalisation that the EEA is imposing on us in this area. The government is trying to introduce the new cabotage rules in the gentlest of ways. There should be a minimum requirement to remove these rules from the EEA agreement if there is no point to them in the first place.

10.3.4.5. Full sovereignty over the licensing rules as long as they do not discriminate against foreigners

Full sovereignty over the licensing rules that do not discriminate against foreigners will include the opportunity to reintroduce requirements for the management and the bases when allocating licenses for oil and gas exploration. The same may apply to the real estate policy in agriculture, rules of ownership restrictions in the financial industry and more.

10.3.4.6. Right to stricter requirements for foods

Norway should have the right to impose stricter requirements for food if the expert authorities recommend it. The EU has introduced a series of requirements for food quality which are defined as total harmonisation. This means that Norway as an EEA country cannot impose more stringent requirements, even though our expert authorities would recommend it.

EU's rationale for total harmonisation of such requirements on goods is that if a country could impose stricter requirements than the common regulations allow, some items that the EU approves would not be able to flow freely into that country. However, it is precisely to prevent the sale of goods that are hazardous to the health or the environment that we would want to impose stricter requirements.

Norway should generally follow EU legislation on additives in foods, and we should never set lower quality standards than the EU. But if there are strong health or environmental reasons for it, Norway should have the right to impose stricter requirements on the amount of additives that can be added and what foods they can be added to. Norway should have stricter rules for the addition of vitamins and minerals in baby food and addition of vitamins, minerals and medicines in food products in general.

10.3.4.7. The right to stringent environmental, health and safety requirements for chemicals

Trade in industrial goods between the countries on the same level of development generally benefits all countries and regions participating in the trade. So it is with the free trade of goods that are part of the EEA agreement. The problem is when the flow of goods in the EEA takes precedence over environmental, health and safety concerns.

Norway should have the right to impose stricter environmental, health and safety requirements for chemicals. It is important for Norway to be associated with the EU's system for registering and testing chemicals (REACH) which is used in production or in some other way is spread in nature. It is then natural for Norway to adhere to EU regulations on which chemicals may be used in which contexts, and in which doses.

Norway, however, should have the right to impose stricter requirements if our expert authorities have good reasons for it - either because the Norwegian landscape is particularly vulnerable to certain chemicals, because some chemicals pose greater health risks because of the distinctive Norwegian conditions, or because our expert authorities have discovered health or environmental hazards The EU system is not as concerned.

10.3.4.8. The EEA rules should not be able to set aside Norwegian collective agreements

Four rulings by the EU Court have since 2008 turned large parts of European

labour rights upside down.[29] Basic labour rights shall hereafter be subordinate to the EU market freedoms. It will eventually affect the EEA country of Norway as well. Many countries are discussing how to get around such judgments. The Euro-Labour Union (ETUC) has suggested that a protocol of four short points be included in the Lisbon Treaty. The essence of the proposal is that "*neither economic freedoms nor competition rules should have priority over fundamental social rights and social progress, and in case of conflict the fundamental social rights shall have priority.*" [30]

If this is adopted, it will also mean that in Norway labour rights are to be determined by the Parliament and through collective agreements between employment partners - and that ESA and the Court will not have anything to do with such. In the EU, the problem is that such a protocol can only be adopted if all EU governments agree on it. But if we raise this as a negotiation requirement within the EEA, we would be actively associating ourselves to the political struggle is dominating employment in Europe at the moment.

The four rulings of EU Court and the stream of directives affecting basic labour rights make the following demands desirable: the EEA agreement should be amended so that it cannot intervene in the Norwegian collective agreements or in Norwegian legislation that is of importance to workers' rights in employment. In connection with the current conflict, this means:

- That the *employment agency directive* must be rejected.
- That ILO 94 must apply in Norway, so that we can maintain the salary requirements in accordance with collective agreements in connection with *building contracts for public agencies.*
- That *the anti-contractor clause* must be secured - for example, through a separate protocol to the EEA agreement.
- That the way *the posting of workers directive* is construed in Norwegian law must be changed so that the formulations cannot provide a basis for rulings by the EFTA Court of the same kind as the rulings of the EU Court. Next, the changed wording must be included in the binding protocols to the EEA agreement.
- The *General Application Act* must be secured against the ESA or the Court having the power to intervene against decisions of general application.

29 See further discussion of these rulings in section 3.3.2, 3.3.10 and 6.4.2.

30 Euro-LO (ETUO): Declaration of achieving social progress in the internal market: Suggestions for the protection of fundamental social rights and posted workers. Brussels, 12/08/2012.

10.3.4.9. The free flow of capital must be limited in emergencies

The financial crisis has shown how vulnerable society has become as a result of the relaxation of the rules in the financial world that has dominated trends for a decade. It is necessary to take into careful consideration what must be done to bring the world of finance under democratic political control. Can modern society live with the free flow of capital as Europe and most of the world have had to? What does the right of free establishment for banks and insurance companies mean for financial and economic stability?

Iceland imposed strict controls on capital flow in and out of its borders in order to take control of the acute crisis problems. It was in clear violation of the EEA obligations on the free movement of capital, but was probably accepted by the EU because there was no way around it. Norway should demand the same right to impose capital controls in crisis situations.

10.3.4.10. New frameworks for trade in agricultural products, based on true reciprocity

Through several rounds of negotiations between Norway and the EU trade in agricultural products has been further liberalised. It has moved away from the principle that formed the basis of the original draft of the protocol on trade in processed agricultural products that prevailed when the EEA agreement was adopted.[31] In the agreement for protocol 3, which was adopted in 2004, the requirement that compensation should reflect the actual raw material costs was toned down considerably in the text. Despite falling raw material prices in the EU and rising raw material prices in Norway, the agreement has led to a mutual three percent reduction of tariffs.[32] This has provided a basis for a continuing and growing imbalance in trade in processed agricultural products.

This speaks for Norway to initiate an amendment to protocol 3, in which the original principle that tariffs should ensure that full compensation for the various raw market costs is respected, and that adjustments are made so that tariffs reflect the actual difference in raw material prices. Based on the current situation, this would suggest for some items that tariffs on imported goods from the EU were

31 The EEA was not negotiated in this area in 1994, and it was first agreed to in an agreement in 2002. See more about the processes associated with this and what changes consisted of in report mentioned below, page 42-44.

32 Agricultural Research Office: Customs protection crumbles – Norwegian agricultural trade in light of the EEA and third countries. Report 7/2011, page 43.

revised upwards, while the EU's tariffs on imports from Norway were adjusted down.

The same requirements apply to trade in agricultural products, which despite the assumption of the EEA agreement, article 19 that the development of their trade would take place on a "mutually beneficial basis," in practice there has been an extensive increase in imports from the EU to Norway; while exports have remained at the same level.[33] There is therefore a need for clarification and operationalisation of what the term mutually beneficial basis actually means. Furthermore, it shows a need of the provision of article 19 for trade being reviewed every two years with a view to removing further liberalisation.

10.3.5. How to proceed with the EU?

The right venue to draw attention to these discussions about the EEA as outlined above is the EEA Council. The agreement states that "*the EEA Council shall for this purpose, consider how the agreement as a whole is working and developing. It will make the policy decisions leading to changes in the agreement [...] [The parties to the agreement] can, after discussing the issue in the EEA Committee or in exceptionally urgent cases directly, raise any issue that is causing difficulties at the EEA Committee.* "[34] The council's decisions will be made by consensus between the EU on the one hand and the EFTA countries on the other.[35] Although the Council in principle meets twice a year, it may meet more often "*when circumstances require it*" .[36] It will be quite possible for the Council to decide on protocols and declarations of the type outlined in the paragraphs above.

If we are talking about removing the subject from the cooperation, or changing the main EEA agreement, the natural procedure is likely to start with the procedures set forth in article 118. This section deals with the development of cooperation into new areas, but the same procedure should be used if the cooperation is to become more restricted. Specifically it has to do with initiating a political process that culminates in new agreements to be ratified or approved by the parties to the agreement in accordance with the rules that exist in the individual country.[37]

10.3.6. Relations with our EFTA partners

A renegotiation of the EEA will also affect our EFTA partners in the EEA, Iceland and Liechtenstein. First, a "slimming down" of the cooperation with the EU through the EEA would involve a similar restriction in the partnership and our commitment to the EFTA countries in the EEA, unless Norway bilaterally or through the EFTA adopts rules to ensure that cooperation is maintained at current levels. Secondly, a renegotiation of the EEA for Norway would involve a completely new principle in the EEA, namely that one can remove from the cooperation, rules that are not appropriate or that have had unintended effects, or simply as a result of changed national political preferences. In this case, it is natural that the same opportunity be given to Iceland and Liechtenstein, for the removal/modification of obligations in the areas they find particularly problematic.

This way the EEA cooperation can develop more differentiated, with a greater degree of different obligations for different countries. Different obligations for different countries is not new - within the EU [38] or the EEA. As the EEA Review Committee documents in its report, Iceland and Liechtenstein have exceptions to EEA regulations in many areas - and in many more areas than Norway has.[39] If Norway therefore negotiated a new exception it should not be problematic. Some exceptions which Norway may desire can also involve areas where the other EFTA countries already have an exception or operate under different rules. In this respect it is interesting to see the restrictions on the free flow of capital that Iceland introduced after the financial crisis in conflict with the EEA agreement.

Norway has also on previous occasions demonstrated flexibility with our EFTA partners. This happened in connection with the expansion of EEA member dues, in which Norway agreed to give a bilateral contribution to the EU, as a supplement to the fee imposed by the distribution formula between the EFTA countries.

If changes in Norway's obligations under the EEA are presented in the form of a protocol or declaration, it should in principle not be necessary to involve the other EFTA countries for much of the process.

33 See more on this in section 7.9.2.
34 The EEA, article 89
35 The EEA, article 90, section 2
36 The EEA, article 91, section 2
37 The EEA agreement, article 118

38 Cf. chapter 12.1.2.
39 See section 4.3.3.

If, however, there is talk of significant changes to the main EEA agreement, or to remove a substantial part of the cooperation from the agreement, and the other EFTA countries do not want to make such changes in the EEA, it will probably be more appropriate for Norway on its own to replace the EEA with another form of bilateral cooperation with the EU. In section 11.2. and 11.3. two different variants of such agreements are discussed.

10.3.7. How to get into a bargaining position with the EU on the agreement?

The EU will probably initially flatly reject the Norwegian attempt to agree on a reduction of the EEA agreement. The EU Council adopted a decision, for example, in December 2010 which may indicate rather that the EU wants to expand the scope of the EEA agreement to new areas.[40]

This attitude towards negotiations is natural enough. Why should the EU negotiate any reduction of the EEA agreement as long as official Norway insists that there is no alternative to the EEA agreement other than membership?

As long as we maintain that there is no alternative for Norway to terminate the EEA agreement, we have no bargaining position towards the EU. If we are to achieve negotiations with the EU to limit the EEA agreement, we must first make it credible that the withdrawal of the EEA could be a real alternative for Norway.

40 See further discussion in Chapter 9

Chapter 11: Out of the EEA – which alternatives do we have?

11.1. Alternative V: Multilateral trading regulations

11.1.1. Why elucidate multilateral trading regulations as an alternative?

In this chapter we will discuss further which situation Norway would be in if we did not have an agreement with the EU, either bilaterally or through the EFTA, which regulates the conditions currently, covered by the EEA agreement...

Why is it so important to discuss this issue further? Among the EEA opponents in Norway, the EU-Norway bilateral trade agreement from 1973 or a trade and collaboration agreement with the EU are presented as alternatives.41 Operators in both Norway and in the EU questions have from time to time raised the question whether the EEA construction is viable in the future, for example if Iceland should choose to join the EU. However, it is not in the EU's interest that the trade between Norway and the Union is adversely affected. As then head of the department of the European Commission handling the EEA, Lars-Olof Hollner, stated in February 2010:"I do not believe the EU would wish to lose any part of the trade with Norway without the EEA." 42

It will be important to have an idea of where we would be if we did not have a separate agreement with the EU. Just as with the EEA, the EU-Norway bilateral trade agreement from 1973 can also be terminated by one of the parties. Then one will, at least for a while, be in a situation where Norway has no bilateral or regional trade agreement with the EU, but must rely on general rules for trade existing internationally. The regulations of the World Trade Organisation (WTO) are the most important here, and this chapter's discussion will focus on these.

This discussion is also important because the EFTA countries may get in a situation where the EEA regulations are suspended in individual areas, for example if the right to reserve is used. Unless these c43 Agreement on the establishment of the World Trade Organisation, article II, item 1.

41 More on this in chapters 11.2 and 11.3.
42 ABC News, 11/02/2010.

fall back on, for example provisions from the EU-Norway bilateral trade agreement from 1973, it will be important to have an overview of the international regulations covering the area in question. The discussion in this chapter focuses on the WTO agreement. Other international agreements with which Norway is affiliated and which will be significant in such a context, are among other things discussed in chapter 6.

11.1.2. From the GATT the World Trade Organisation (WTO)

The World Trade Organisation (WTO) was established in 1995 as a result of the eight year-long Uruguay Round, and is to "serve as the common institutional framework for the management of trade relations between members".43 From being a negotiation secretariat in the GATT it became a permanent organisation with several areas of negotiation. WTO consists of a total of 16 different multilateral agreements which include all member countries, as well as two agreements in which only some of the WTO member countries participate.44 One of the agreements in the latter category is the agreement on government procurements...45 Today the WTO has 153 member countries, which together account for more than 97 per cent of world trade. WTO is the only global organisation working with trade regulations between nations. WTO functions as a consensus organisation, where all member countries must agree on an agreement.46

It is outside the scope of this project to consider WTO as such or various elements of the WTO collaboration. It is within our mandate to discuss any changes in multilateral trade regulations, based on other principles than the current ones. This is a debate in which participating organisations, federations and departments can participate in other contexts, together with other NGOs, federations, political parties, etc. Such an arena is, for example, the Trade Campaign which wants to "oppose the prevailing, neo-

44 WTO: About the WTO - a statement by the Director-General. Taken from WTO's official website.
45 See detailed discussion in chapter 11.1.6.6
46 See detailed discussion on what WTO is and its history in chapter 6.6. onditions are regulated by previous regulations between parties which one can

liberal trade policy and thoroughly reform the trade policy system." 47 Whether one should democratise or replace the IMF, the World Bank, WTO and G20 with a stronger UN and more democratic institutions, as the Socialist Left Party has adopted in its programme of principles,48 or work to submit regulations for trade in the WTO environmental agreements and the goals to the UN, as the Centre Party has advocated in its election programme for the current period,49 is a debate for other arenas than this project's report. Changes in multilateral trade regulations which may occur, will, however, add other terms for the debate on alternatives to the current EEA agreement and open up possibilities for other alternatives than the ones we have discussed here.

Our mission is to describe central aspects of the existing multilateral trade regulations, as long as WTO establishes global rules for trade covering 97 per cent of world economy, regulations which both Norway and all EU countries have pledged to follow. We will try to clarify to what extent WTO constitutes a global "safety net" for Norway, downplaying the consequences of being without a bilateral/regional trade agreement with the EU. At the same time we will try to clarify to what extent WTO constitutes a global "spider web", limiting the possibility of making independent national choices in situation without the EEA, including reversing changes to Norwegian laws and regulations imposed through the EEA. These issues are, of course, closely connected. When WTO can appear as such a "safety net" for Norway, it is, of course, because regulations contribute to binding the freedom of action which other countries have to implement certain measures.

11.1.3. Binding commitments

A central principle in WTO is the principle of binding commitments. The conditions given as a result of negotiations, are binding and can only be changed in an adverse direction for other parties through new negotiations in WTO, although with the exceptions following the agreement (tied to regional trade agreements and customs unions).50

47 Take from the Trade Campaign's website About Us.

48 Programme of principles for the Socialist Party. Adopted by the SVs annual convention on 27 March 2011, page 16.

49 The Centre Party's programme of principles and action for the parliamentary term2009-2013, page 112.

50 The Ministry of Foreign Affairs' theme pages on trade policy: WTO - basic principles and functions.

11.1.4. National treatment and the Most Favoured Nation clause

National treatment, NT) and the Most Favoured Nation Clause, MFN, are central principles of international law, which are important to many contract regimens. The Ministry of Foreign Affairs sums up the principles like this: "The MFN principle means that one treats all countries equally. The principle of national treatment means that one makes the same requirements to foreign products as to domestic products."51 The implication of MFN is that no economic agent from a country shall be given worse conditions than an agent from another country, while the implication of NT is that no national agent shall have better conditions than foreign agents.

National treatment and the Most Favoured Nation principle are basic elements of the WTO collaboration to which all members are committed The Most Favoured Nation clause has been a fundamental principle in GATT since the beginning,52 and was also introduced as a central element in the General agreement on trade in services53, the agreement on trade related aspects of intellectual property rights54 and the agreement on government procurements.55 Correspondingly the principle on national treatment embodied in article 3 of GATT 1947 (and incorporated with reference in GATT 1994), article 17 of GATS and article 3 of TRIPS.

These principles do not entail a general prohibition against protecting national production. However, according to GATT 1947, article XI requires that when such protection is given, it must be done in the form of import duty, while a general prohibition is made against quantity limitations (quantitative quotas).56 The purpose of national treatment is to prevent that national taxes or other regulations are used as an alternative to tariff protection. One will thus force members to make the extent of the protection they give their own manufacturers visible in a comparable way.

It is important to emphasise that the prohibition is only valid within the scope of the agreement and the

51 The Ministry of Foreign Affairs' theme pages on trade policy: WTO's agreement on technical barriers to trade.

52 Embodied in the General Agreement on Tariffs and Trade 1947, article 1

53 The General Agreement on Services (GATS), article II.

54 The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), article 4.

55 WTO Agreement, appendix 4: Agreement on government procurements, article III.

56 See a.o The Ministry of Finance, consultation paper - draft act on customs and movement of goods, 17/01/2006 page 97

through the national binding commitments. Several exceptions from the prohibition have also been made. Developing countries can be favoured unilaterally through the GSP scheme which was established in 1971. Article XXIV of GATT also opens up for countries establishing customs unions and free trade zones under specified conditions to discriminate against countries not participating in this collaboration. In specific situation it is also possible to deviate from the most favoured nation tariffs by using customs-related trade measures, as well as making exemptions from the general prohibition against quantity limitations.

11.1.5. The relationship with customs unions, as well as bilateral and regional trade agreements

11.1.5.1 The purpose shall be further liberalisation

WTO recognises customs unions and bilateral and regional trade agreements as a supplement to the multilateral trade system. However, clear guidelines are set forth for such agreements. GATT 1994 article XXIV (5)(a) states that"when it comes to a customs union [...] the tariffs and other regulations of the trade imposed on establishing such a trade union [...] in the whole not be higher or more burdensome for trade with a contracting party who is not partner in such a union [...] than they were on average

in the participating territories before [...] the customs union was established"57. In the agreement on the interpretation of article XXIV of GATT 1994 it is stated that" the purpose of such agreements should be to facilitate trade between the individual participating areas

in the customs union of free trade area, and not to put obstacles in the way of other member's trade with these areas; and that the parties entering into such agreements or expand the scope of the agreements, should, to the extent possible, avoid letting this have adverse consequences for other members."58 No establishment of neither customs unions nor free trade associations which include new member countries shall in other words be able to reverse already granted lower duties.

11.1.5.2 Compensation negotiations

Article XXIV also gives clear rules for compensation negotiations (no. 6), dispute resolution (no. 11) and compliance (no. 12). In extreme cases this may mean that tariff concessions are changed unilaterally or abolished from the customs union's side. However, the affected members will then be free to abolish substantially equivalent concessions

in accordance with article XXVIII.59 In practice it has turned out that EU at any extension of the union has related to the fact that Norway is legitimately entitled to compensation, and one has been able to reach a result through negotiations.

Sweden's, Finland's Austria's, Spain's and Portugal's EU memberships have given Norway the right to duty free quotas and special tariff preferences. Only new or increased export is affected by customs, if any.60 Neither did the Eastern and Central European countries disappear as markets for Norway when these joined the EU, since the GATT agreement prevents EU memberships from barring the current tariff exemption.

When the EU expanded in 2007 (Bulgaria and Romania), Norway won support for the claim for compensation for lost market access which was made as a consequence of the duty free regimen of the EFTA agreements with Bulgaria and Romania. Through negotiations Norway obtained new annual duty-free quotas to the EU of a total of 15,900 tons of frozen mackerel, frozen herring, frozen herring fillets and herring flaps, frozen capelin and other frozen fish. Norway also got an additional annual duty-free quota for 2,000 tons of frozen peeled shrimp.61

11.1.5.3 What if one leaves a bilateral/ regional trade agreement?

A question which is relevant to discuss further in this report is the scope of the WTO obligations in a situation where one withdraws from a bilateral/regional trade agreement. With the proviso that this has not been legally tested in WTO and that it can be argued that WTO's basic-

57 Proposition to the Parliament. no.. 65 (1993-94): On the result of the Uruguay Round (1986- 1993) and consent to the ratification of the Agreement on the establishment of the World Trade Organisation (WTO) etc., page 561.

58 Agreement on the interpretation of article XXIV in GATT 1994, fifth paragraph of the preamble.

59 Agreement on the interpretation of article XXIV in GATT 1994, no. 6, item 2.

60 See a.o Proposition to the Parliament no.. 15 (1986-87) Norway's agreements with the European Union in connection with Portuguese and Spanish EU membership. The preferential agreement with Spain and Portugal upon exit from EFTA and entry into the EU, new customs tariff agreements were necessary.

61 Proposition to the Parliament. no.. 72 (2006-2007): On consent to the ratification of the agreement on the participation of the Bulgarian and Romanian republics' participation in the European Economic Area (EEA) with adjacent agreements, as well as conclusion of contracts regarding provisional application, page 17.

principles speak against being able to "reverse" liberalisation processes, one would be able to assume that WTO regulations only regulate the obligations entered into in WTO (binding commitments and horizontal/general obligations) – and not obligations going further in bilateral/regional trade agreements. If, for example, Switzerland were to withdraw from the EFTA cooperation, further progress is regulated by the EFTA convention – not by the WTO regulations. Of course, Switzerland cannot according to the Most Favoured Nation clause, not give Norway poorer conditions than other third countries with which they have no trade agreement, and the limitations to national treatment follow their WTO obligations. The same goes if Norway withdraws from the EEA. What happens then is regulated initially by the EEA agreement and not by the WTO regulations Norway and the EU will be able to return to the provisions of the EU-Norway bilateral trade agreement from 1973, nut Norway cannot be faced with higher tariffs than other countries outside the EU with which the EU does not have a trade agreement, in accordance with the Most Favoured Nation clause. Also, the EU countries cannot favour their own companies at the expense of Norwegian companies in areas where they have committed themselves to national treatment through WTO binding commitments. In the areas not covered by the EU-Norway bilateral trade agreement from 1973, the WTO regulations and other international agreements will, of course, regulate the conditions previously regulated by the EEA. Also, leaving the EEA will not initially affect Norway's 73 other agreements with the EU, however, it may be relevant to change or remove some of the agreements.62

Further we shall look more closely at possible consequences for various sectors to stand without a trade agreement with the EU and rely on multilateral trade regulations. Will this be a problem for Norway, or will we rather have more to gain from regaining more freedom of action?

11.1.5.4 The reduced significance of customs unions and trade agreements

Globally there are about 300 bilateral and regional trade agreements currently in force, and each WTO member is part of 13 such agreements on average. Two thirds of the agreements are made between developing countries, one fourth between developing countries and industrial countries (many of the EFTA trade agreements are in this category), while the final approximately 10 per cent are between industrial countries, of which the EEA agreement, the EU-Norway bilateral trade agreement from 1973 and Norway's trade agreement with the Faeroes, are examples. It is worth noting that the trade agreements according to the Ministry of Foreign Affairs" become less and less significant as instruments for pure tariff reductions. The reason is primarily that one has come far with tariff reductions in multilateral contexts, especially when it comes to industrial goods. Today 51 % of global trade is duty free on MFN basis (editor's note: duty free trade from which all countries benefit on the basis of MFN) and average MFN tariff is only 4 %. In spite of the increase in number of free trade agreements, we see that only 16 % of global trade takes place at reduced (preferential) tariffs."63 The last round so far of industrial tariff reductions in WTO was the Uruguay Round, when tariffs were reduced by 40 per cent.

11.1.6. Consequences in various sectors

11.1.6.1 Negligible tariffs on industrial goods

Each WTO country has binding commitments with tariffs for each product. This means that one has to enter each tariff line in order to find the specific tariff from Norway to the EU on a specific item. 31 per cent of item lines to the EU for industrial goods are according to their WTO obligations completely duty free.64 For these industrial goods the EU cannot introduce one cent of duty towards Norway - even if Norway and the EU neither had a bilateral nor a regional trade agreement regulating trade with industrial goods. Binding commitments change on new negotiations and adjustments, and tariffs are gradually reduced. Making a complete comparison between WTO and the EEA is extensive The Alternative Project has not made such an analysis for industrial goods.

As the overview in the previous subchapter shows, the reduction in tariffs through WTO is particularly advanced when it comes to industrial goods, the average tariff for all goods is 4 per cent, and in spite of an extensive network of trade agreements worldwide, only a small portion of international trade is based on tariffs lower than the tariffs from which all countries benefit through WTO's Most Favoured Nation princliple.65 Even without the EEA

62 For an overview of Norway's agreements with the EU, see the Official Norwegian Report 2012:2, appendix 1

63 The Ministry of Foreign Affairs' theme pages on bilateral and regional trade agreements.

64 Tufte, Torbjørn: Customs protection is crumbling - Imported goods take market growth. Taken from a presentation held on 17/02/2012, slide no. 3.

65 Chapter 11.1.5.4.

Figure 5. Trade with fish. Basis for agreement and tariff reduction

Agreement	**Product**
The Fish Letter (1973 trade agreement)	Tariff reduction: Frozen fillets of saltwater fish Canned sardines Canned crabs Peeled frozen shrimp
Compensation agreement (when the EU expands)	44 bilateral duty-free import quotas for about 130 different products (item lines)
The EEA agreement	Zero tariff: Round, fresh/ frozen, as well as fresh fillet, of cod, pollock, haddock and Greenland halibut Salted or dried cod Salted or dried fillet of salt water fish (including herring and mackerel) Breaded fillets Caviar substitutions 70 % tariff reduction: All other products except salmon, mackerel, herring, shrimp, scallops and crayfish
Unilateral Preferential Rates	• WTO bound rates (MFN) • WTO bound import quotas • WTO bound duty free periods • Autonomous tariff reductions and tariff suspensions • Autonomous import quotas

Source: Ørebech, Peter, University of Tromsø: The EEA, the fish, the tariff and the alternatives to the EEA. External report for the Alternative Project, page 27. A more detailed review of individual rates and quotas facing Norway in the EU market are in this report, cf.

and the EU-Norway bilateral trade agreement from 1973 (which both ensure duty free access to the EU market for all industrial goods) the tariff load for Norwegian industrial goods to the EU market would be negligible. This point is often under communicated when speaking of the significance of bilateral og regional trade agreements.

11.1.6.2 WTO or EEA tariffs are not crucial to the fish export

With the EEA Norway became part of EU's inner market, but with a few central exceptions. Trade with agricultural products and fish products was regulated through separate protocols and articles in the EEA agreement. For these goods the EEA means a different regimen, although with considerable duty free quotas.

Although Norway has committed itself not to charge tax on import of fish to Norway, this example has not been followed by the EU, which charges tax on most fish species in the range of 9 % to 25 %. This is referred to as the EU's bound rates in WTO. According to the Most Favoured Nation principle (MFN) no country will have a higher tariff than this. Partly as a result of the lack of fish in the EU, the tariff is suspended in several periods of the year. Then no duty is paid even though it should have been done according to the EEA agreement, the EU-Norway bilateral trade agreement from 1973 and the EU's WTO binding commitments (autonomous reductions). Otherwise, figure 5. above gives us a picture of the customs regimen to which Norway relates when trading with the EU in the fish sector.

For the fishing sector, Peter Ørebech has summed up the effects for the various alternatives as follows: *"The trade weighted tariff reduction – i.e. in relation to the actual trade figures – represent 6.7 % of total sales figures at MFN-tariff (editor's note: maximum rate a country can face as a result of the Most Favoured Nation-*

principle). The corresponding figure under the EEA regimen is 3.2 %, but only 1.8 % if the customs load is calculated based on the rates following from the trade agreement of 14 May 1973 (the Fisheries letter) and other bilateral preferences as a result of WTO."66 Arne Melchior of NUPI has found more or less similar figures, 27 % (EEA), 1.84 % (the Fish letter) and 6 % respectively (according to the Most Favoured Nation principle - MFN).[67] According to Peter Ørebech rates in this order to the EU market will not be significant to export volume and value. This is due to the fact that completely different factors influence which markets are chosen and which market share one is able to obtain in these markets.[68]

11.1.6.3 Agriculture loses on the EEA - will lose less on WTO only

Agricultural goods are regulated through article 19 (agricultural goods) and protocol 3 (processed agricultural products of the EEA agreement. Article 19 determines that the EU and Norway shall aim at liberating the trade with agricultural goods gradually within the respective countries' agricultural policies and on a mutual favourable basis. This condition has in no way been fulfilled.69 While the EU exported four times as much to Norway in 1995, this had increased to nine times as much in 2011.[70] During the last negotiation round on article 19, which the Parliament adopted in the spring of 2011, the import quota on cheese was expanded to 7200 tons. An agreement was also reached through negotiations on import quotas of 900 tons of beef, 800 tons of chicken and 600 tons of pork, which will be part of a possible new WTO agreement, but which in other words is not part of the current WTO agreement. Norway also has quotas to the EU, but these quotas have not led to much export from Norway to the EU.[71]

The result of the Uruguay Round in WTO was that member countries were obligated to reduce tariffs on agricultural goods by an average of 36 per cent from a reference period (1986-1988), and the reduction should not be less than 15 per cent for any products or customs lines.[72] The practical follow-up is again up to each member country through their national binding commitments. Norway has bound 29 per cent of item lines of agricultural goods as duty free, with free import. Norway can thus charge import tax on 71 per cent of the remaining item lines, which must then be at least 15 per cent lower than it was during the reference period. As the Agricultural Evaluation Office has referred to in the report Tariff protection is crumbling from 2011, Norway maintains tariff on a lot fewer item lines. Thus on tries to prioritise strong protection of the most sensitive items, i.e. the items which are most important in the national agricultural production in Norway. WTO's tariff profile for Norway shows that we use rates of 54 per cent of item lines on agricultural goods, zero tariff on the other 46 per cent.[73] EU on the other hand practices zero tariff on 30 per cent of item lines and tariff on the remaining 70 per cent.[74] This is the tariff regimen which would be used in relations between Norway and the EU, if we did not have a separate bilateral or regional trade agreement with the EU regulating trade in this field. In that case the EU would be placed in the same category as the US, Japan, Russia, New Zealand and Australia when trading with agricultural products, these countries do not profit from special customs preferences from Norway in this field.[75] At the same time the value of other countries' customs preferences to Norway increase, such as the zero tariff which Norway has for import from the 48 least developed countries in the world (the LDC countries) and 14 other low-income countries.[76]

WTO has led to a considerable weakening of the Norwegian tariff protection on agricultural products, and there is a danger that any new agreement in this field will accelerate this development further. However, the obligations according to article 19 and protocol 3 get on top of this, and have contributed to increasing import from the EU considerably in the last decade. For agricultural goods and trade with processed agricultural products it would have had a positive impact if Norway had replaced the EEA with

66 Ørebech, Peter, University of Tromsø: The EEA, the fish, the tariff and the alternatives to the EEA. External report for the Alternative Project, September 2011, page 15.
67 Arne Melchior (2007): WTO or EU membership? The Norwegian fishing industry and the EU's trade regimen. NUPI, May 2007. page 2
68 See detailed elaboration in chapter 7.4.
69 See detailed elaboration in chapter 7.9.2.
70 Source SSB/SCF.
71 Gjengedal, Hildegunn: WTO - global framework. No to the EUs yearbook 2012.
72 The Agricultural Evaluation Office: Customs protection is crumbling - Norwegian agricultural merchandising in light of the EEA and third countries. Report 7/2011, page 5.
73 World Trade Organization and International Trade Centre UNCTAD/WTO 2008:"The World Tariff Profiles
2008, pages 78 and 133
74 The Agricultural Evaluation Office: Customs protection is crumbling - Norwegian agricultural merchandising in light of the EEA and third countries. Report 7/2011, page 6.
75 Ibid, page 9.
76 For a more detailed overview of the tariff preferences which Norway has given to various countries and groups of countries see The Agricultural Evaluation Office: Customs protection is crumbling - Norwegian agricultural merchandising in light of the EEA and third countries. Report 7/2011, pages 8-10.

Article XVI Market Access 1. With regard to market access through the modes of supply stated in article 1, each member shall give any other member's services and service providers a treatment which is not less favourable than what is determined in accordance with the conditions and limitations decided and specified in its schedule. 2. In sectors where a member has assumed obligations with regard to market access, the measures it shall maintain or implement neither on a regional level nor in all its territory, unless otherwise stated in the member's schedule, defined as: a) limitation of the number of service providers, either in the form of numerical quotas, monopolies, service providers with exclusive rights or requirements for financial needs tests, b) limitation of the total value of service transactions or assets, in the form of numerical quotas or requirements for financial needs tests, c) limitation of the total number	service businesses or of the total number of services rendered, expressed by stated numerical units, in the form of quotas or requirements for financial needs tests, d) limitation of the total number of physical persons who can be employed in a specific service sector, or whom a service provider may employ, and who are necessary for and directly related to providing a specific service, in the form of quotas or requirements for financial needs tests, e) measures limiting or requiring the use of specific corporate structures or joint ventures through which a service provider can provide a service, and f) limitation of participation of foreign capital expressed by a maximum percentage for foreign shareholdings or by the total value of individual or total foreign investments."[1] _____ 1 GATS, article XVI

only relying on WTO commitments in trading with the EU.

11.1.6.4 Services - less bound in WTO

The WTO regulates trade of services through GATS, aiming for "a speedy implementation of gradually higher levels of liberalisation"[77], while having due respect for national political goals.[78] To fulfil the objective of liberalisation regular negotiations rounds shall be conducted. Each member country reports sectors for liberalisation through their respective binding commitments. These binding commitments shall clarify a.o limitations of and conditions for market access, as well as conditions for and limitations to national treatment.[79] When a sector has been liberalised through the binding commitments , very extensive and detailed requirements are made to national authorities, cf. a.o article XVI (see box xx). Former Director General of the WTO, Renato Ruggiero, has described the scope of GATS as follows: "GATS interferes in areas which

have never before been considered trade policy. I would believe that neither governments nor the business community understand the full scope of this agreement yet."[80]

Services rendered during the exercise of government authority are exempt from GATS. This is defined as"any service which is neither rendered on commercial basis nor in competition with one or more service providers." [81] Beyond this, any service in any sector is covered by the agreement. Among other things, the agreement sets requirements to and procedures in connection with qualifications, technical standards and requirements for licenses shall not constitute unnecessary barriers.[82]

According to article XXI, any member can withdraw any obligation in its schedule after three years have elapsed from the date the obligation became effective. A member whose advantages have been affected by such a withdrawal can require compensation negotiations.

Norway's current obligations in the service sector of WTO

Current binding commitments in WTO (for goods and services) were negotiated with the WTO agreement, and Norway's binding commitments were incorporated as a 319-page special attachment to

77 The General Agreement on Trade in Services (GATS), third paragraph of the preamble.
78 GATS, article XIX.2.
79 GATS, article XX.
80 Said in speech, 02/07/1998.
81 GATS, article I.3c.
82 GATS, article VI.4.

the 1994 WTO proposition.[83] Although Norway

in several rounds later has made new offers of liberalisation through proposals to extend the binding commitments, these are all negotiation offers which may be withdrawn. Norway's obligations under international law are still only tied to the binding commitments from 1994.

Of the more than 300 pages of binding commitments, the service sectors represent just over 20 pages. The binding commitments are organised with different conditions for the four modes of service provision the GATS agreement defines.[84] This classification is associated both with specific conditions for each service sector, and the general/horizontal obligations applicable to all sectors.

For example, Norway has made a general exception from the MFN principle for all sectors in order to maintain and promote Nordic cooperation, for measures such as guarantees and loans for investment projects and export (Nordic Investment Bank), financial support for R&D projects (Nordic Industrial Fund), support for market research on international projects (Nordic Project Export Fund), as well as financial support to companies (where cooperation with Eastern European companies may be included) using environmental technology (Nordic Environment Finance Corporation).[85] Norway can thus give the other Nordic countries more favourable conditions than other countries in these areas, even if this is not the result of a separate regional trade agreement or customs union. Since the EEA prohibits discrimination between countries and therefore puts limitations on such a Nordic positive discrimination, one will be able to regain the freedom to prioritise Nordic cooperation by only relying on WTO regulations in the services sector.

In the horizontal/general obligations for all sectors, Norway has a.o incorporated a requirement for a license when purchasing real estate, applicable to all companies where more than 1/3 of the votes are controlled by citizens of other countries. Norway has also emphasized that *"an acquisition will normally be considered based on the impact it will have for future activities and – employment in the company and society as a whole."* [86] It is further emphasized that *"two conditions are considered important and are made in most cases; the condition that a majority of the Board members, including the Chairman, shall be Norwegian nationals, and the conditions that business relations between the Norwegian company and the foreign owner shall be based on the OECD principle of "arm length prices".*

For employment services Norway has made a restriction on market access as a consequence of a government monopoly scheme, while labour hire is prohibited according to the schedule.[87] This illustrated on the one hand that the binding commitments are from the mid 1990's and do not reflect current Norwegian legislation. This is not necessary as long as the schedule sets a minimum level. Norway can at any time take the liberalisation beyond their obligation. On the other hand the binding commitments demonstrate the flexibility existing for reintroducing restrictions,

in a situation where Norway is no longer part of the EEA or the EEA is no longer applicable to the area in question.

Similarly, "the 10 per cent rule" for limitation of ownership in the finance sector is reported to the WTO and will be applicable again if Norway leaves the EEA.[88] For most services in construction and other related engineering services, Norway has reported that the contractor and the technical manager of the business must have been resident in Norway for at least 1 year and must still live there.[89]

When it comes to energy, this is not defined as a separate sector in the binding commitments, but it is found in various areas (oil extraction goes under mineral extraction, providing services in connection with the extraction process goes underproviding similar services ashore, etc.), in addition, the horizontal/ general obligations also apply here. Specifically, Norway's obligations in relation to oil can be defined thus: Where to search, where it shall be allocated and the extraction rate are things we decide ourselves.[90] One cannot discriminate based on nationality when granting licenses, but remains free when it comes to which criteria

83 Special appendix to Proposition to the Parliament no.. 65 (1993-1994) Norway's binding commitments- goods - services

84 The four ways of delivering services are cross-border services, consumption abroad, commercial presence and the presence of physical persons, cf. GATS, and article I.2.

85 Special appendix to Proposition to the Parliament no.. 65 (1993-1994) Norway's binding commitments- goods - services, page 292.

86 Ibid, page 294-295.

87 Special appendix to Proposition to the Parliament no.. 65 (1993-1994) Norway's binding commitments- goods - services, pages 294-295.

88 Ibid, page 312-315.

89 Ibid, page 308-309.

90 cf. The Ministry of Foreign Affairs' theme pages on GATS. Norwegian interests and priorities. Bilateral requirements, energy services.

are to be set in the licenses. For example, criteria for management and bases (reintroduction of the previous criteria in §10-2 of the Petroleum Act) would be entirely possible according to the WTO obligations

Like Norway, the EU countries have also reported their binding commitments in the WTO. In order to find out which restrictions on market access and national treatment which may face Norwegian operators if Norway leaves the EEA or if the EEA is no longer in force in (parts of) the service area, one must thus go through each country's schedule from 1994. This is an extensive task which the Alternative Project has not performed; however, it could be an interesting topic for further analyses. This will still kun only be a description of a theoretical situation. The EU will be interested in maintaining the largest share possible of the service trade with Norway; the EU is, among other things, a net exporter of services to Norway.[91]

Pressure for further liberalisation

Norway submitted an opening offer in the WTO service negotiations in the spring of 2003 and a revised offer in the summer of 2005. These offers go further in committing Norway to liberalising services in many different sectors If we go into the details of Norway's offer, we will see that it intends to commit Norway to liberalising the service trade in many of the areas where Norway has let itself be pressured into changing Norwegian legislation in the EEA.[92] This includes:

A larger extent of foreign company formations in Norway, for example by offering to remove several licensing provisions in the schedule, in accordance with the changes made in the Industrial Licensing Act for purchase and rental of real estate. Further, it is offered to remove the requirement that half of the founders and members of the Board of Representatives in a company shall be Norwegian residents, in accordance with the changes made to the corporation legislation.

Construction services, by removing the requirement in the schedule that the contractor and the technical manager must be Norwegian residents.

It is opened for financial institutions to get permission to won 25 per cent of share capital in a financial company, as long as this is part of a strategic cooperation.

Offer access for foreign service providers to engage in import and wholesale trade of alcoholic beverages, as a consequence of AS Vinmonopolet's exclusive right to import and wholesale trade is abolished. Foreign service providers are also offered access to engage in import and wholesale trade of fish and grain.

If one assumes that Norway's obligations in the service sector in WTO are to be extended, it can be understandable that one chooses areas for liberalisation where Norwegian legislation is already changed for the EEA area, which constitutes the largest part of the trade. At the same time this entails that, if the WTO negotiations are successful and Norway commits itself in accordance with the offer, that the freedom to reintroduce policies in Norway which are limited by the current EEA agreement, is considerably limited.[93] While there has been considerable debate and resistance in Norway in connection to ESA and the EFTA court's pressure to change Norwegian policy, there has been very little focus on the fact that Norway in a WTO context offers to make this policy part of Norway's commitments towards all countries in the multilateral trade network.

At the same time, the fact that Norway has opened up our own service market through the EEA to a large extent is used as an argument in favour of that Norway increasingly pursuing offensive interests which Norway has in opening service markets for Norwegian operators around the world. The EEA is thus a mere blind for promoting extensive liberalisation on the global arena. Still, the Norwegian coalition government made important adjustments here when it took over in 2005, for example through withdrawing the requirements for liberalisation of educational services and water supply in developing countries.[94]

In addition to national offers, Norway has also participated in collective requirements in the service negotiations, for example from the spring of 2006,[95] as well as in the common input to the negotiations, like they did together with a group of countries in

91 See a more detailed discussion of this in chapter 7.7.

92 Examples are taken from The Ministry of Foreign Affairs' theme pages on GATS: Norway's opening offer (2003) and revised offers (2005). Bilateral requirements, energy services.

93 As previously mentioned, WTO member countries have, after three years with new binding commitments, the opportunity to change these binding commitments again, however, one may then face requirements for compensation from the country/countries which believe themselves to be harmed by this.

94 cf. The Ministry of Foreign Affairs' theme pages on GATS. Norwegian interests and priorities. Bilateral requirements, educational services and environmental services.

95 cf. The Ministry of Foreign Affairs' website: WTO. Norway participates in collective requirements in the service negotiations. Press release, 02/03/2006

negotiations in the spring of 2008.[96] The goal has been to get closer to finishing negotiations in the service sector, which so far has been unsuccessful. It is thus still the 1994 binding commitments which are Norway's current obligations under international law. All later offers from Norway are submitted with the reservation that they can be withdrawn or changed at a later time. If the EEA is re-negotiated or replaced by another tie to the EU, it will be natural to make a thorough review of the requirements and obligations which Norway has submitted to the WTO. For the time being it will be a wise strategy to "put on ice" the requirements relating directly to elements in Norwegian legislation which Norway has let itself be pressured into changing through the current EEA agreement.

11.1.6.5 Technical barriers to trade independent of the EEA

An important purpose of the WTO agreement on technical trade barriers (the TBT agreement) is to balance two different considerations. On the one hand one wishes to secure the authorities' legitimate need to regulate, and on the other hand the need for the regulations not to be barring trade unnecessarily. The TBT agreement encourages members to base their regulations on international standards. The TBT agreement also includes an additional text (Code of Good Practice) with recommendations for how to develop and use standards. More than 200 harmonisation organisations have endorsed this text, and all these organisations follow in this respect a set of common guidelines. The agreement also includes the procedures used to ensure that regulations and standards are followed, so-called conformity assessment procedures.

Together with the European harmonisation organisations this forms an international framework for the removal of technical trade barriers, completely independent of the EEA and the EU.

11.1.6.6 Government procurements - EEA enters the back door in WTO

Government procurements constitute a large and growing international market. The Norwegian public sector trades for about NOK 250 billion each year, the equivalent of 15 per cent of the GNP. Norway an open regimen for government procurements, which besides the EEA are based on the WTO agreement on government procurements (Government Procurement Agreement - GPA), where Norway participates together with 40 other countries.[97] In December 2011 a revision of this agreement was adopted after years of negotiations.[98] With this the 41 countries have agreed to open public tenders worth 100 billion dollars to foreign competition, which means that the parties give each other the opportunity to submit tenders in connection with government procurements. The agreement is optional for WTO's members.[99] All EU countries and Norway are included.

According to Dagfinn Sørli of the Ministry of Foreign affairs, "*the markets for government procurements which Norway opens will be subject to the same rules as towards the EU countries in the EEA agreement*." [100] Foreign companies from for example the US, Japan and Australia can thus compete on equal terms with Norway and EU countries in selling goods and services to the government, counties, municipalities and other public enterprises.

According to the EU Commissioner for the inner market, Michel Barnier, who is also responsible for government procurements, this is "*a very positive signal for the European business community. We have achieved an open, mutual access to each other's markets without discrimination*."[101] To the question of whether the agreement can lead to European companies being ousted in their home markets, Barnier replies that "*It is the law of how international competition works. The point is to create justice, mutuality and openness*"[102]. Director General of WTO, Pascal Lamy, argues in turn that is "*Very welcome under the current circumstances. The conclusion will not only open new market opportunities among current members, but also facilitate entry for new members".*[103] In a few years, China, which is currently negotiating for membership

in the WTO agreement on government procurements and Russia with its enormous markets for government procurements be on their way into the agreement.

96 DDA SERVICES NEGOTIATIONS Contribution from Australia, Canada, EC, Japan, Korea, New Zealand, Norway, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, Switzerland, USA to the Chairman's Consultations.

97 The Ministry of Foreign Affairs' theme pages on trade policy: WTO's agreement on government procurements.

98 The Ministry of Foreign Affairs: Consensus on the WTO agreement on government procurements. Press release 15/12/2011, and WTO: Historical deal reached on government procurement. Press release, 15.12.2011.

99 cf. GATS, article XIII.

100 ABC News, 15/12/2011.

101 Ibid.

102 Ibid.

103 Ibid.

In the Ministry of Foreign Affairs' press release on the case it is emphasised that ”the agreement does not set guidelines to the question of how the public sector shall be organised. It will still be a matter og national concern to decide whether, and

to what extent, the public sector shall produce goods and services on its own or whether they shall be bought from public suppliers.”[104] This also applies in principle for the EU's procurement regulations. At the same time, other sides of Norway's EEA commitments involve considerable pressure to make public services subject to competition to a larger extent than the WTO, although it is moving in the same direction.

With the new agreement in hand one will in practice be subject to the same rules within the WTO agreement on government procurements as in the EEA, enforcement of the rules mainly happens on a national basis

in Norway through the Norwegian Complaints Board for government procurements (KOFA).[105] Also, there is nothing indicating that the follow-up of EU regulations in this area is inadequate from Norway's side, and that there is reason for ESA or the EFTA Court to significantly involve themselves The Norwegian regulations have rather been criticized for ”over-fulfilling” the EEA obligations. If one instead of the EEA were to only rely on the new WTO regulations, it would not involve a significant difference in practice. WTO regulations give suppliers the right to appeal in the member countries included in the agreement, and ensure the parties' right to bring possible cases to the WTO dispute resolution mechanism. Still, the principal difference of regulating this through the EEA will, of course, be that here are powerful enforcement mechanisms.

The case also illustrates another perspective of the EEA agreement. Without the EEA agreement’s provisions on government procurement, it would probably not be possible for the Norwegian Minister of Foreign Affairs to accept such an extensive international obligation without prior consent from the Parliament. With his acceptance of the agreement the Minister of Foreign Affairs binds Norway to this agreement, even though it has not been treated in the Parliament, which has been strongly criticized from several sides.[106] Thus, the EEA agreement becomes a camouflage for broad international liberalization of a very sensitive policy area, without it having been submitted to thorough democratic processes involving the legislative assembly in Norway.

11.1.7. Trade measures and dispute resolution

11.1.7.1 Anti-dumping - improvement in the WTO

Regulations on trade measures are an important and extensive part of international legislation on customs and the movement of goods. According to the Ministry of Finance, this jurisdiction gets greater significance, among other things due to an increasing number of trade measures and several bilateral and multinational agreements. Besides, the international laws on trade measures become significant not only between countries, but also between public authorities and civil parties, among other things because the latter are given certain rights in agreement texts. A considerable international jurisprudence has also emerged, which is given precedence effect and which is significant when interpreting and applying the agreement texts.[107]

The EU uses several types of trade measures towards other countries. Anti-dumping measures are the EU's most frequently used trade measures, while anti-subsidy duties have been used to a lesser extent. Both of these are price-regulating measures. The EU also has common rules for applying protective measures against import from third countries in the form of quotas,[108] as well as an authority to take action against illegal trade practices from third countries.[109]

The EEA agreement's provisions on protective measures are stricter than the corresponding provisions in GATT, which are limited to item specific protective measures. Article 112 of the EEA agreement also requires that the damage ”is about to occur”, for measures to be implemented. Consequently, a potential damage will hardly be sufficient in itself. The provision is a safety valve for extraordinary situations, and must be interpreted in the light of the purpose of the EEA agreement of a free inner market. The revised EFTA Convention contains provisions on customs-related trade measures and protective –

104 The Ministry of Foreign Affairs: Consensus on the WTO agreement on government procurements. Press release 15/12/2011, and WTO: Historical deal reached on government procurement. Press release, 15.12.2011.

105 See detailed discussion in chapter 4.7.3.

106 See Nygaard, Johan a.o: Støre in WTO. Klassekampen, 11/01/2012.

107 The Ministry of Finance, consultation paper - draft act on customs and movement of goods, 17/01/2006, page 112.

108 Council regulations 3285/94 and 519/94.

109 Regulations on implementing the common trade policy– Council regulation 2641/84. The legislative act has later been replaced by council regulation 3286/94 determining procedures for the common trade policy and provides for the rights under the international trade legislation, including the WTO regulations. See further elaboration, the Ministry of Finance, consultation paper - draft law on Customs and Movement of Goods, 17/01/2006, pages 109-111.

measures. These are approximately equal to the corresponding provisions in the EEA agreement.110

EFTA's third country agreements also contain certain customs related trade measures and protection mechanisms. In content these are close to the corresponding WTO regulations in the area. The specific regulation in each agreement varies somewhat. Norway's two bilateral trade agreements (EC 1973 and the agreement with the Faeroes of 1992) both contain provisions for protective measures.[111]

The Uruguay Round involved stricter anti-dumping regulations in the form of more precise rules and definitions.[112] The changes involved among other things that it was referred explicitly to the WTO regulations. In the period 1957 and up to the last anti-dumping case in1984 a total of 62 complaints were filed, and half of these were followed up by formal investigations. In four of the cases anti-dumping duty was implemented, while

in a number of other cases negotiations were initiated with the respective manufacturers and thus voluntary minimum price agreements were achieved. The last anti-dumping duty was discontinued in 1985. Complaints after this time have not been taken into account.[113] The WTO makes much stricter requirements for anti-dumping measures than what the EU applied during the1980's. Norway has also used WTO regulations to remove unwarranted dumping allegations on the EU's part against Norwegian salmon export, and won.

11.1.7.2 Dispute settlement between countries in WTO

One of the WTO's most important tasks besides negotiation rounds is dispute resolution in conflicts between member countries over the lack of follow-up and wrongful application of the existing WTO regulations. The system is based on clearly defined rules and deadlines for all stages in the dispute resolution process. A panel is established for the case in question, which is responsible for ruling. A decision in the panel can be appealed to a superior agency which makes the final decision that all involved parties are obligated to follow up. The panel's recommendations or the appeal board's

110 The Ministry of Finance, consultation paper - draft act on customs and movement of goods, 17/01/2006, pages 104.-105

111 The Ministry of Finance, consultation paper - draft act on customs and movement of goods, 17/01/2006, pages 105.-106

112 Proposition to the Parliament. no.. 3 (1994–95) On changes in the tariff as a result of

113 The Ministry of Finance, consultation paper - draft act on customs and movement of goods, 17/01/2006, page 106.

trade negotiations in the Uruguay Round under the General Agreement on Tariffs and Trade (GATT) and the ratification of the Agreement on the establishment of World Trade Organisation (WTO), etc., pages 12-14. An extensive discussion of regulatory changes effective from 1 January 1996 is found in Proposition. 1 (1995–96) On tariffs, page 21.final decision, can only be rejected if all members of the dispute resolution council, consisting of WTO members, agree.114 WTO also has consultations with member countries involved in a conflict before it becomes a case for the panel. Until January 2008, 136 of close to 369 cases had reached the panel stage.[115]

The Ministry of Foreign Affairs emphasises on its website that the clear rules which exist for conflict resolution, in addition to the obligation each member country has to use the conflict resolution system in trade conflicts rather than resorting to unilateral trade measures, ensure the members' opportunity to try their case before an international trade court with a view to a decision within reasonable time. Therefore the dispute resolution system is frequently used by the members. If a member does not abide by decisions made by WTO's dispute resolution body, other member countries may implement trade measures against it.[116]

WTO's dispute resolution system contributes to more predictable framework conditions for international trade. On Norway's part, which has extensive trade with a number of countries in the world, it is vital to build up around global mechanisms to handle disputes. Norway has also used the WTO court for complaints on the EU's anti-dumping measures and the import ban on seal skins.

11.1.7.3 Could the salmon case occur again?

In the so-called salmon case Norway challenged the EU in WTO and succeeded. As former Undersecretary of the Ministry of Foreign Affairs, Erik Lahnstein has phrased it: ”The case gave a clear and considerable victory for Norway, and led to the EU dismantling the measures against Norwegian salmon in July 2008.”117 Violations were noted of both substantive and procedural rules regarding the import of Norwegian salmon. Although the same case cannot be reopened in the WTO, new sales may create new situations, and the EU and any member country are welcome to try if new salmon sales are in violation of the anti-dumping regulations.

114 The Ministry of Foreign Affairs' theme pages on trade policy: WTO - basic principles and functions.

115 Gjengedal, Hildegunn: WTO - global framework. No to the EUs yearbook 2012.

116 The Ministry of Foreign Affairs' theme pages on trade policy: WTO - basic principles and functions.

117 Lahnstein, Erik: The salmon war with the EU - a small country says «enough is enough». No to the EU's yearbook 2012 41.

118 However, The condition is that other, either private or public measures can be proven. According to Ørebech, the probability for this is small when it comes to state subsidies. Norway has roomed it for good, and it will probably not be reintroduced. He also believes that the Norwegian salmon manufacturers have learned and that they do not make the mistake of taking out of the home market "what the market can pay" and then sell "the surplus salmon" abroad at a lower price.[119]

11.1.7.4 EU court vs. dispute resolution in WTO

While the EU court has a considerable law-creating function through new interpretation of the basis for the treaty, which in turn turns into the EEA, the dispute resolution scheme in WTO shall serve to "maintain the members' rights and obligations according to the agreements covered, and to clarify current provisions in these agreements in accordance with customary rules of interpretation in international law. The DSB cannot extend or restrict rights and obligations provided for in the covered agreements through their recommendations and rulings."[120] The same applies to the panels and the Appellate Body's assessments and recommendations.[121]

A fundamental difference is that in WTO there are country-country disputes, while in the EEA there is investor-country dispute resolution. The WTO solution therefore becomes more manageable – because countries usually have a certain diplomatic respect for political measures– and seeking dispute resolution for intergovernmental relationships can cost more than when a business party decides to challenge a country's democratically adopted schemes.

An additional factor is that is Norway had been an EU member; Norway would no longer be able to challenge the EU through WTO's dispute resolution procedure. If there is dispute on an internal EU regulation which has consequences for Norwegian fish export, this is a case which belongs under the EU court.

11.1.8. Norway's strategy in the WTO – different tracks – different alliances

The above discussion shows that Norway has chosen different tracks and different alliances – in different page 468. contexts in WTO. We have partly worked for multilateral obligations including all member countries. We have partly participated in the development of (plurilateral) agreements which only include some of the WTOs member countries, and which have given results in a time when multilateral negotiations are at a standstill. Whether the revised WTO agreement on government procurements is desirable and has been created through a proper democratic process is, however, a relevant question.

In the multilateral negotiations in single areas we have chosen to ally ourselves with a fixed group of countries, such as in the agricultural negotiations. In other contexts we build other alliances. This shows that the WTO track gives room for different strategies.

11.1.9. Freedom of trade with the WTO - without the EEA?

The policy which the EEA has demanded implementedin Norway, and which is less extensiveunder WTO, is the flexibility we havein Norway. As the review in this chapter shows, we have through WTO on single areas committed ourselves to a policy which is largely identical to the EEA, such as when it comes to government procurements.[122] In other areas, such as the service area, the differences are larger, and Norway would be able to regain considerable national freedom of action by leaving the EEA.[123]

A complicating factor is the political declaration which indicates a "stand still" in the WTO. Here there are two declarations. One is from 1998 on E-commerce and is confirmed at repeated ministerial conferences in the WTO. Minister of Foreign Affairs, Jonas Gahr Støre, took the initiative to the other together with Australia in 2011, and it involves a "stand still" with regard to removing all protectionist measures - in order to save the world economy in crisis. [124] In connection with the Ministerial meeting in December 2011, Støre emphasised that "It is pleasing that the member countries support WTO's role as a bulwark against increased protectionism, while we emphasise the obligations and rights the regulations give today"[125]

It is difficult to give an accurate assessment of the meaning of such declarations. It is only about 1/3 of the member countries in WTO who have signed. On the government's part it is

118 Ørebech, Peter, University of Tromsø: The EEA, the fish, the tariff and the alternatives to the EEA. External report for the Alternative Project. September 2011, page 36.
119 Ørebech, Peter, University of Tromsø: The EEA, the fish, the tariff and the alternatives to the EEA. External report for the Alternative Project. September 2011, page 37.
120 Proposition to the Parliament. no.. 65 (1993-94), appendix 2: Agreement on rules and procedures for dispute settlement, article3, item 2, page 453.
121 Ibid,
122 Cf. chapter 11.1.6.6.
123 Cf. chapter 11.1.6.4.
124 WTO: Joint Ministerial Press Statement. Ministerial statement signed by 23 countries, including Norway, as well as the EU. 15/12/2011.
125 Støre, Jonas Gahr: Norway's main contribution at WTO's 8. ministerial conference, Geneva, 15/12/2011.

stated that this is only a political declaration which means nothing for our agricultural policy. The question is then whether it means anything for other Norwegian policies. Is it just a declaration of intent without the power of international law, but with policy guidelines for what a government dares do? Or can such declarations also be used in a dispute resolution. Only time will tell. The fact that the E-commerce declaration is confirmed at every Ministerial meeting, may indicate that such a declaration is only considered valid until the next crossroads, and that the countries then shall either continue the declaration or start negotiations for an agreement which can make it binding.

When it comes to the rights of EEA citizens in Norway, this category is not covered by the WTO –at least not liberalised. It depends a bit on how one interprets GATS' delivery method four of services (physical persons). Among Western WTO members it will probably be interpreted as workers who have a contract - and that it is not necessary to give other rights than a work permit, and not family, school, etc. However, this sector is not liberalised at all in the WTO.

When it comes to the question of active trade policy, the requirements for equal treatment are quite extensive. The US is constantly trying all measures which can be argued to resemble subsidies in China, for dispute resolution in WTO. Thus an extensive development of precedent which most likely is not very different from the EU is developing. The fundamental difference is that in WTO there are country-country disputes, while in the EEA there is investor-country dispute resolution. In relation to the licensing laws, the system of agreements is less detailed in the WTO (the TRIMS agreement) than in the EU – thus they can give flexibility. A requirement for placement of facilities for the landing of oil in Finnmark will most likely not be in conflict with the WTO.

When it comes to public services and a country's own account, WTO regulations are at least as demanding to relate to as the EU regulations. In the EU/EEA, public services of non-financial character do not yet have a fixed definition; in addition there is legislation on various sectors. GATS article I.3.c defines public services as services not rendered on a commercial basis or where there are not one or more private operators in the market. Such services exist to a very small extent, in this area the legal development/conflict resolution show us over time how the rules are interpreted (which will probably happen due to pressure from private operators to liberalise these services).

In the field of patents Norway has gone further than the EEA and requires membership in the European patent organisation (EPO), which the EU also has acknowledged. WTO's patent agreement (TRIPS) gives more flexibilitys than both the EEA and the EPO. The challenge to freedom of action here is that Norway is on its way into free trade agreements at full speed, which require more than WTO's TRIPS.[126]

11.1.10. How to transit from the EEA to the multilateral trade regulations only?

A situation where Norway only relies on multilateral trade regulations in trading with the EU will, should it occur, probably be a situation we "get in", rather than a situation to which we actively take the initiative. As mentioned initially, there are no central operators in the Norwegian political debate who have called for Norway not having any form of bilateral/regional trade agreement with the EU as a supplement to the multilateral regulations. But in principle it is fully possible for Norway to cancel both the EEA agreement and the EU-Norway bilateral trade agreement from 1973. The practical consequences for Norway of cancelling the EEA agreement and which national processes this must give rise to, are discussed in chapter 11.5.

11.1.11. Summary

One main principle in the WTO is that a country/ region is bound when one has first opened the market for foreign trade. When expanding the union, the EU cannot introduce regulations which give Norwegian businesses a less favourable market access than ”the current situation”, unless a compensation is given. If this does not happen, Norway has the opportunity to implement countermeasures. Negotiations in connection with extending the Union show a little of how the EU has handled this in practice towards Norway. Norway had free trade agreements with countries in Eastern and Central Europe, and there were negotiations for compensatory schemes for Norway when these countries joined the EU customs union.

WTO also ensures that Norwegian companies cannot have worse conditions than countries outside the EU (the Most Favoured Nation principle – MFN). However, countries with which the EU has entered into a free trade agreement are an important exception. However, international trade

126 Cf. chapter 11.4.1. and 11.4.3.

is so liberalised that the margins here are limited, and it is difficult to see which sectors would have problems with this. Today only 51% of global trade is duty free on MFN basis, and the average MFN tariff is only 4%. Despite the increase in the number of free trade agreements, we see that only 16% of global trade takes place at reduced (preferential) tariffs (according to the Ministry of Foreign Affairs' website). Customs cuts have come particularly far on industrial goods.

With the proviso that this has not been legally tested in the WTO, and that it can be argued that the WTO's primary principles speak against being able to reverse liberalisation processes, one could assume that the WTO regulations only regulate the obligations one has assumed in the WTO (binding commitments and horizontal/general obligations) – and not obligations going further in bilateral/ regional trade agreements. If Norway cancels the EEA, it will basically be the provisions of the EEA that will determine what happens in the case, but both Norway and the EU must still relate to the obligations they have assumed in the WTO. Norway and the EU will be able to return to the provisions of the EU-Norway bilateral trade agreement from 1973, but Norway cannot be faced with higher tariffs than other countries outside the EU with which the EU does not have a trade agreement, in accordance with the Most Favoured Nation clause. Also, the EU countries cannot favour their own companies at the expense of Norwegian companies in areas where they have committed themselves to national treatment through WTO binding commitments. In the areas not covered by the EU-Norway bilateral trade agreement from 1973, the WTO regulations and other international agreements will, of course, regulate the conditions previously regulated by the EEA. Also, cancelling the EEA will not initially affect Norway's 73 other agreements with the EU.[127]

In the fishing sector the difference between the EU's actual tariff burden to the EU market and the tariff based on the Most Favoured Nations principle in the WTO (the MFN tariff) estimated to be approximately 6-7 percentage points. Tariffs of this size to the EU market will not have any impact on export volume and value. This is due to the fact that completely different factors influence which markets are chosen and which market share one is able to obtain in these markets.

WTO has resulted in significant impairment of the Norwegian tariff protection on agricultural products, and there is a risk that a possible new agreement in this field will accelerate this development further. However, the obligations according to article 19 and protocol 3 get on top of this, and have contributed to increasing import from the EU considerably in the last decade. For agricultural goods and trade with processed agricultural products, it would have had a positive impact if Norway had replaces the EEA by only relying on the WTO obligations in trading with the EU.

Trading with services in the WTO is aimed at liberalising the trade with services, while having due respect for national political goals. Each member country reports sectors for liberalisation through their respective binding commitments. When a sector has been liberalised through the binding commitments, very extensive and detailed requirements apply to national authorities. binding commitments can be changed, but affected member countries then have a right to compensation. Even though the WTO obligations are extensive, they still give more national flexibility than the EEA.

Norway has taken out a general exception from the MFN principle in order to maintain and promote Nordic cooperation,[128] and one will be able to regain the freedom to prioritise the Nordic cooperation by only relying on the WTO regulations in the services sector. One has also adopted a general requirement for license when buying real estate, applying to all companies where more than 1/3 of the vote are controlled by citizens from other countries, and has also specified that ”an acquisition will normally be evaluated based on which effect it will have on future activity in the company and in society in general.”[129] For employment services, Norway has set forth a restriction on market access due to a government monopoly scheme, while labour hire according to the schedule is prohibited.[130] This illustrates on the one hand that the binding commitments are from the mid-1990's and do not reflect current legislation

in Norway. This is not necessary as long as the schedule sets a minimum level. Norway can at any time take the liberalisation beyond their obligation. On the other hand, the binding commitments demonstrate

127 For an overview of Norway's agreements with the EU, see the Official Norwegian Report 2012:2, appendix 1

128 Special appendix to Proposition to the Parliament no.. 65 (1993-1994) Norway's binding commitments - goods - services, page 292.

129 Ibid, page 294-295.

130 Ibid, page 294-295.

the freedom of action that exists for re-introducing restrictions, in a situation where Norway is no longer part of the EEA, or the EEA is no longer applicable to the area in question.

Similarly, "the 10 per cent rule" for limitation of ownership in the finance sector is reported to the WTO and will be applicable again if Norway leaves the EEA.131 For most services in construction and other related engineering services, Norway has reported that the contractor and the technical manager of the business must have been resident in Norway for at least one year and must still live there. [132] Where there is to be searched for oil and gas, where licenses are to be allocated and the extraction rate are things we decide ourselves.[133] One cannot discriminate on the basis of nationality when granting licenses, but one is free in terms of which criteria shall be furnished in the licenses. For example, criteria on management and foremen (re-introduction of the previous criteria in §10-2 of the Petroleum Act) will be fully possible according to the WTO obligations.

Which restrictions on market access and national treatment which Norwegian operators can meet in the worst case if Norway leaves the EEA or if the EEA is no longer in force in (parts of) the services sector, are evident from the EU's WTO binding commitments. However, this is only a theory. The EU will be interested in maintaining the largest share possible of the service trade with Norway; the EU is, among other things, a net exporter of services to Norway.[134]

If one goes into the details of the offers Norway has given for further liberalisation of the services trade in WTO, this applies to many of the areas where Norway has allowed itself to be pressured into changing Norwegian legislation in the EEA.135 Several licensing provisions are offered removed in the binding commitments, as well as the requirement that half the founders and the members of the board of representatives of a company shall be Norwegian residents. The requirement that the contractor and the technical manager must be Norwegian residents is proposed removed, foreign service providers from all WTO member countries shall be able to do import and wholesale of alcohol, fish and grain and it is opened for financial institutions to own up to 25 per cent of a financial company.

If the WTO negotiations are successful and Norway commits itself in accordance with the offer, the freedom to reintroduce policies in Norway which are limited by the current EEA agreement, will be considerably limited.[136] While there has sometimes been considerable debate and resistance in Norway in connection with the EU and the pressure of the EEA agreement's guardians to change Norwegian policy, there has been very little focus on the fact that Norway in a WTO context offers to make this policy part of Norway's commitments towards all countries in the multilateral trade network. All later offers from Norway are submitted with the reservation that they can be withdrawn or changed at a later time. If the EEA is re-negotiated or replaced by another tie to the EU, it will be natural to make a thorough review of the requirements and obligations which Norway has submitted to the WTO. For the time being it will be a wise strategy to "put on ice" the requirements relating directly to elements in Norwegian legislation which Norway has let itself be pressured into changing through the current EEA agreement.

In one important area the WTO negotiations have led to new obligations for Norway. With the new WTO agreement on government procurements, the difference from the EEA becomes marginal. Thus the practical difference between choosing the EEA or the WTO as an alternative for this area does not become very large.

While the EU court has a considerable law-creating function through new interpretation of the basis for the treaty, which in turn produces the EEA, the dispute resolution scheme of the WTO shall serve to maintain the members' rights and obligations according to the agreements covered. A fundamental difference is that in WTO there are country-country disputes, while in the EEA there is investor-country dispute resolution. The WTO solution thus becomes more manageable - because countries often have a certain diplomatic respect for legitimate political instruments. Otherwise, Norway has used the WTO dispute resolution mechanism against the EU - and succeeded, like we did in the salmon case.

The discussion in this chapter shows that it would mainly be unproblematic for Norway if we - for a shorter or longer

131 Special appendix to Proposition to the Parliament no.. 65 (1993-1994) Norway's binding commitments - goods - services, pages 312-315.
132 Ibid, page 308-309.
133 cf. The Ministry of Foreign Affairs' theme pages on GATS. Norwegian interests and priorities. Bilateral requirements, energy services.
134 See a more detailed discussion of this in chapter 7.7.
135 Examples are taken from The Ministry of Foreign Affairs' theme pages on GATS: Norway's opening offer (2003) and revised offers (2005). Bilateral requirements, energy services.

136 As previously mentioned, the WTO member countries have, after three years with new binding commitments, the opportunity to change the binding commitments again, but may then face requirements for compensation from the country/countries which believe they are adversely affected by the change(s).

period – were without a (bilateral or regional) trade agreement with the EU - and thus only relied on the multilateral trade system. In several areas this would also mean that we regained considerable freedom to conduct a national policy. At the same time, this freedom should rather be overestimated. As the discussion shows, Norway has, through both WTO and regional trade agreements, assumed extensive obligations which will not disappear with the EEA.

This chapter also shows that Norway has chosen different tracks and different alliances – in different contexts in the WTO. We have partly worked for multilateral obligations including all member countries. We have partly participated in the development of (plurilateral) agreements which only include some of the WTOs member countries, and which have given results in a time when multilateral negotiations are at a standstill.

Globally there are a large number of (bilateral and regional) trade agreements, and it is common that WTO member countries supplement the multilateral system by signing trade agreements. This is also something that Norway does increasingly. The main strategy here is negotiating trade agreements with EFTA as a platform. Correspondingly, the EU constantly negotiates new trade agreements with many of the same countries which enter into agreements with EFTA. It is thus known and proven strategy from both Norway and the EU to negotiate regional trade agreements on the international arena. Seen in this light it would appear very strange if Norway and the EU were not able to negotiate a trade agreement anno 2012, either bilaterally or within the EFTA framework.

11.2. Alternative VI: A progressive trade agreement

11.2. 1 Why illuminate this alternative?

In the previous subchapter we have shown that the multilateral trade regulations are very extensive and form the basis for international trade where tariffs and other trade obstacles have been strongly reduced with time. Still it is common to supplement these regulations with bilateral or regional trade agreements which go beyond what one needs to do according to obligations under international law.[137] Norway and the EU have a long tradition for just this – both in establishing trade agreements with third countries separately and in trading with each other.

It would therefore be very likely that both Norway's and the EU's basis would be a desire to have their balance regulated by a trade agreement, if either party cancels the EEA or if it ceases for other reasons. In which setting should such an agreement be negotiated (bilaterally or for example regionally through a joint EFTA138), which areas shall be included and whether it shall be institutionally linked with agreements which Norway has with the EU in other areas (in the form of a trade and cooperation agreement[139]), is something further progress will clarify.

In this subchapter we will discuss in more detail the simplest alternative for such an agreement, which is to start with the trade agreement which Norway signed with the then EC in 1973, and which is still a valid agreement. The framework for the discussion of such an agreement will be completely different in 2012 than when Norway discussed the then trade agreement with the EU measured against the EEA in the early 1990's. WTO gives extensive regulations in many of the areas which the EEA deals with, and which the EU-Norway bilateral trade agreement from 1973 did not cover. In single areas Norway has through WTO even signed agreements which are nearly identical to the EEA, such as the recently revised agreement on government procurements.[140] Norway has also in the period after 1992 negotiated a number of bilateral agreements with the EU within various sectors, and today Norway has (besides the EEA)

137 See more details on such an alternative in chapter 11.1.5.4.
138 See more details on such an alternative in chapter 11.4.
139 See more details on such an alternative in chapter 11.3.
140 See more details on this agreement in chapter 11.1.6.6.

a total of 73 agreements with the EU.[141] All of these other agreements will still be valid and possibly be developed further, regardless of what happens with the EEA. Portraying that Norway's situation at a trade agreement replacing the EEA would mean going back to the situation in the 1980's, is an idea taken from the imagination.

11.2.2. The EEA agreement can be cancelled with one year's notice

The EEA agreement can be cancelled with one year's notice if a majority in the Parliament so decides. If the EEA agreement is cancelled, it is stated in article 120 of the agreement that the trade between the EU and Norway are regulated by previous agreements.

From 1973 Norway had a trade agreement with the then EC.[142] Similar agreements were signed between three then EFTA countries Sweden, Finland and Austria, and the EU in 1972. The trade agreement was signed after the EC vote in 1972 and entered into force in July 1973. It introduced tariff exemption on trade with industrial goods between Norway and the EU. On some sensitive export products like aluminium and paper tariffs were scaled down to zero during a transitional period. There was a corresponding zero tariff on the import of industrial goods from the EU. All quota schemes and other quantity limitations were also removed both ways.

The food industry was the only exception from the tariff exemption. There has been duty on most processed agricultural products (by Norway's request) and on some fish products (by the EU's request). However, all other industrial products and all raw materials have been completely duty free for 35 years, and there were no quota limitations on trade between Norway and the EU until 1994by virtue of the trade agreement, after 1994 in accordance with the EEA agreement.

11.2.3. The EU-Norway bilateral trade agreement from 1973 has not been cancelled

The 1973 trade agreement has not been cancelled. This means that if we leave the EEA, the trade agreement applies – modified with the changes produced through WTO regulations after 1995. These regulations ensure that important parts of the EU-Norway bilateral trade agreement from 1973 will remain even if the EU should decide to terminate it. However, this would involve a clear breach of the EU's treaty objective for the trade policy with third countries, which is to contribute to ”gradually abolish restrictions in international trade and on direct foreign investments and to lower customs barriers and other obstacles.” [143] It is also in the EU's own interest to maintain good trade relations with Norway.[144]

Some seem to believe that to the extent that the trade agreement still exists, it has been a sleeping agreement since 1992. In some areas this is right. However, for trade with processed agricultural products, one relied on protocol 2 of the EU-Norway bilateral trade agreement from 1973 up until 2002. The background for this was that negotiations for a protocol 3 in the EEA through years of negotiations did not find its solution earlier.[145] Even today, the trade agreement regulates the part of the trade between Norway and the EU which is not regulated by the EEA agreement, for example in trading with fish. Here the trade agreement is updated continuously when needed, anything from linguistic and technical updates to practical political changes. The last update so far of the trade agreement took place in the summer of 2010.[146]

11.2.4. But don't we need the EEA to sell our goods to the EU?

EEA supporter Hallvard Bakke, leader of Social Democrats against the EU (SME) in 1994, put it this way in an article in Dagsavisen in 2003: «The significance of the EEA agreement is very strongly overrated. That we without this agreement would «gamble with Norwegian jobs», as some have claimed, has no basis in the real world. Many believe that the EEA is vital to market access to the EU. This is not correct. Upon termination of the EEA, the previous trade agreement with the EU would enter into force in accordance with the provisions in § 120 of the agreement. Norway would be able to sell its goods without duty and other trade obstacles, just as before.»[147] For a more thorough discussion of whether we need the EEA to sell our goods, see chapter 7.

11.2.5. It is easy to withdraw from the EEA

Formally it is a simple matter to withdraw from the EEA. Article 127 of the EEA agreement says: "Each party can withdraw from this agreement

141 Taken from the Ministry of Foreign Affairs' treaty database and reproduced in NOU 2012:2, appendix 1, pages 878 ff.

142 Adapted by the Parliament on 24 May 1973 based on Proposition to the Parliament no.. 126 (1972–1973) and Recommendation to the Parliament no. 296 (1972-1973).

143 The Lisbon treaty, article 206 (previously article 131 TEF). The Ministry of Foreign Affair's official Norwegian translation.

144 For more on this, see a.o chapter 12.3.

145 See more on this in chapter 11.2.9.

146 Agreement between Norway and the European Economic Community (EEC), additional protocol 28-07-2010 no. 42

147 Contribution in Dagsavisen 20/01/2003.

by giving at least twelve months written notice to the other parties." It also says: "Immediately after notification that a party wishes to withdraw from the agreement, the other parties shall summon a diplomatic conference in order to evaluate the changes that will be necessary to make in the agreement." This means that withdrawal is possible, that the EEA agreement mentions a possible withdrawal undramatically and that a withdrawal is followed by negotiations on finding practical solutions which benefit both parties.

Article 120 of the EEA agreement states that the EEA provisions shall "*prevail over provisions in existing bilateral or multilateral agreements*". In the EEA proposition of 1992, the government was completely clear that this meant that existing agreements, such as the EU-Norway bilateral trade agreement from 1973, were not abolished – only that the provisions regulating the same conditions as the EEA were set aside: "This does not mean that existing agreements are abolished, but in accordance with the article, they cannot be applied."[148] The government was also very clear as to why such a solution was chosen in the negotiations: "The reason why one has not decided to abolish the existing agreement at the signing of the EEA agreement, is that one wishes that they will again be applicable if a party cancels the EEA agreement, or in case of partial termination of the provisions of the EEA agreement in accordance with article 102, no. 5."[149]

11.2.6. The WTO regulations as a safety net

The simplest alternative to the EEA is therefore something as simple as cancelling the EEA agreement. Then the WTO provisions will function as a safety net which in all essentials will provide Norway with the same market access to the EU market as today. The international trade with industrial goods has been strongly liberalised after 1995 within the WTO framework. In 2010, 51 per cent of all international trade was duty free and the average tariff was only 4 per cent.150 A withdrawal from the EEA is therefore not a step outinto the unknown. Both Norway and the EU are members of WTO. It means that the WTO regulations will regulate trade between Norway and the EU from the first moment after a withdrawal.

There may also be a desire on both sides to enter into an agreement which goes beyond what is stated in the WTO regulations. The EU signs trade – agreements with more and more countries, not just in Europe, but also countries around the Mediterranean and with countries further away (Mexico, South-Africa). [151] The same applies to Norway. If a separate trade agreement is not signed between the EU and Norway, the EU tariffs towards other countries, with which the EU does not have extensive trade agreements, also apply to Norway. The same will be the case the other way around. When exporting to Norway, the EU will meet the same tariffs as other countries meet.

11.2.7. Will the EU wage a trade war against Norway if Norway leaves the EEA?

The danger of the EU waging a trade war against Norway is small. Most of the export to the EU consists of raw materials and semi-finished products which are intermediate products in the EU's production. To the EU it is neither a point to shut out Norwegian oil and gas – nor to make it more expensive than necessary by adding duty. What we buy from the EU, however, is mainly finished products, anything from screws to vehicles and machines. It is in this area that the EU has won market shares in Norway, while Norway has lost market shares in the EU market after the mutual tariff exemption was established in the 1970's. The EU has nothing to gain from building up mutual tariffs on such goods.

Norwegian export goods like metals, paper and fish are needed as intermediate products in car factories, printing houses and the processing industry, which want the Norwegian goods as cheap as possible. Here the tariff is lowered or removed completely. It is therefore highly unlikely that the EU has any motivation for shutting out Norwegian goods if Norway leaves the EEA. The worst that can happen, is that the EU uses the same tariffs as against other WTO countries with whom they do not have extensive trade agreements.[152] In that case they can be balance with corresponding tariffs from Norway's side. The most likely thing to happen is that a trade agreement is signed which furthers the situation which was established in the 1970's; tariff exemption for trade with raw materials and industrial goods between the EU and Norway.

11.2.8. Market access both ways

The 1973 trade agreement ensured market access both ways: Norwegian market access to the EU market and similar access for all EU countries to the Norwegian market. In absolute figures, the trade with the EU grew strongly both

148 Proposition to the Parliament. no.. 100 (1991–1992), page 102.
149 Ibid.
150 The Ministry of Foreign Affairs' website 20/01/2012 on "Free trade agreements – supplement or competitor". See also detailed discussion in chapter 11.1.6.

151 See more on this in chapter 11.1.3.
152 See more on this in chapter 11.1.4.

before the EEA agreement entered into force in 1994 and after1994. However, after 1994 trade with countries outside the EEA area has grown even more strongly. The EU is still the dominant trading partner for the Norwegian business community.

For the time being, slightly more than 60 per cent of the export of traditional goods (besides oil and gas) goes to the EU. That is a considerable decrease in export share after the EEA agreement entered into force in 1994. Then 75 per cent of the Norwegian goods export (besides oil and gas) went to the EU. This shift in export away from the EU shows that Norway is in a robust trade policy situation. The EU-Norway bilateral trade agreement from 1973 gave our export industry mainly the same market access to the EU market as the EEA agreement gave later. There was therefore no reason for the EEA agreement to shift our export further in the direction of the EU. Import from the EU has also increased strongly both under the trade agreement and under the EEA. However, the EU's share of Norwegian import has been stable. Approximately 68 per cent of the import comes from the EU. In 1994 the share was 70 per cent.

However, during the trade agreement (1973–1994), the Norwegian business community lost market shares to the EU in the Norwegian market while few Norwegian industries other than the oil and gas industry managed to win market shares in the EU's inner market. The same thing has happened after the EEA agreement entered into force in 1994, although to a smaller extent. Norwegian industry has not won back lost market shares at home, while it is mostly just oil, gas and farmed fish that can demonstrate increased market shares in the EU.
The trade agreement ensured the EU's industry the same market access to the Norwegian market as what the Norwegian industry got to the EU market. The result was that Norwegian industry had to suffer great losses in market shares and employment in our own home market. Karl Glad (CEO of NHO from 1991 to 1998) made a big deal out of this in March 1991: "If Norwegian labour had maintained its market shares in the Norwegian market during the 1980's, Norwegian value creation would have been 30 billion NOK higher than it is today, and import would have been correspondingly lower. Without losing market shares at home, the GNP of the Norwegian mainland would have been five per cent higher. Translated into jobs, this would be equivalent to more than 100,000 jobs." 153

This was before the EU debate started in earnest – and thus before Karl Glad started to argue the opposite; because even with the EEA agreement we did not have adequate "market access" to the EU market, and that we therefore had to vote yes to EU membership. But in 1991 it was not, according to CEO of NHO Karl Glad, the "lack of market access" to the EU which was the reason for the problems in Norwegian industry. The problem was that Norwegian companies were outcompeted in the home market, among other things thanks to the market access which EU companies had to the Norwegian market.

11.2.9. Comparison between the trade agreement and the EEA when it comes to trading with the EU

In two areas the trade agreement had some disadvantages compared to the EEA agreement. First of all, our export of processed fish products faced lower tariffs through the EEA than under the trade agreement. Then the EU may use the anti-dumping weapon against Norwegian industry in the EEA. It was possible under the trade agreement. These advantages of the EEA agreement are relatively modest.

According to Report to the Parliament. no. 27 (2001–2002), the total tariff burden on export of fish to the EU then 2–3 per cent of the total value of our export of fish to the EU. The tariff burden is even smaller today. This is due to the fact that the EU during parts of the year has difficulties in meeting the need for fish products, and that tariffs are thus lowered either permanently, or that zero tariff quotas are given in some periods. In a report for the Alternative project from the autumn of 2011, the research manager at the Norwegian College of Fishery Science, Peter Ørebech, calculated that the difference between the current tariff burden and the one we in the worst case could risk by going back to the trade agreement, constitutes only 1.8 per cent of the export value.[154]
Ørebech has also documented that such a level of EU tariff would not be decisive for how much fish we would sell to the EU market. On the contrary, the report points to markets where Norway faces a considerably higher tariff burden than this, and still has a stable export growth.
The anti-dumping weapon has also become less applicable after a while. The Norwegian business support has been changed, Norwegian companies must to an increasing extent pay market price for electricity, and the WTO makes much stricter requirements for anti-dumping measures than what the EU assumed in the 1980's.[155]

153 Arbeiderbladet 02.03.1991.

154 See also the detailed discussion in chapter 7.4.
155 See detailed discussion in chapter 7.5.

The mantra that we need the EEA to ”sell our goods to the EU” is a form of manipulation to draw attention away from the fact that nearly all our goods export to the EU had the same zero tariff under the trade agreement before 1994 as in the EEA. Goods export to the EU would not have been lower had we continued with the trade agreement instead of the EEA agreement. From 1974 we had, like all EFTA countries, a trade agreement with the EU which after a transitional period gave us full zero tariff and free access to the EU market for all Norwegian industry except for the food industry.

For the food industry the EEA agreement gave some advantages initially over the trade agreement. On the one hand the agreement was to protect Norwegian processing companies for agricultural products against being outcompeted by import from the EU, while compared to the trade agreement it gave lower duties for processing companies exporting fish to the EU. This picture has changed. Through several rounds of negotiations between Norway and the EU the trade with agricultural products has been further liberalised. The assumptions underlying the original protocol 3 when the EEA was adopted that tariffs were to ensure equalisation between the lowest level of the EEA and the Norwegian level, are clearly broken.156 This has formed the basis for a continuing and increasing imbalance in the trade with processed agricultural products. The same has been seen in the trade with agricultural goods, despite the assumption in article 19 of the EEA agreement that the development in trade shall take place on a ”mutually beneficial basis”. In practice there has been a very extensive increase in import from the EU to Norway, while the export has remained at a standstill.[157]

During the debate on the EEA agreement in 1992 the most common argument in favour of the EEA agreement was the growth industries were in services, and that all these industries were outside the scope of the trade agreement. It weakened the argument that the growth was the largest within the forms of services which – at least then – were sheltered from foreign competition. This was true for both public services in schools, and administration, and large parts of private services (within trade and other close services).

156 See more on this in chapter 3.2.13.
157 See more on this in chapter 7.9.2.

The new market access – and thus competition – would occur in industries such as banking, insurance, transport, postal services and telecommunications. In most of these areas it is difficult to prove that Norwegian businesses have won more abroad than they lost at home. Also, the increased competition has sometimes had dramatic effects on employees. The workload has increased and jobs are more insecure in both banking, insurance, postal services and telecommunications. The point of departure was particularly bad in banking and insurance. Norwegian banks and insurance companies had just started getting back on their feet after a long crisis when the EEA agreement came into effect. The Norwegian market is not big enough for foreign banks and insurance companies to go massively in to secure market shares. Their strategy is to capture profitable individual contracts with large Norwegian customers.

In the EEA Norway has a lower tariff on some of the fish export to the EU. If we leave the EEA, we must expect to, in principle, accept the customs situation we had with the trade agreement. But since 1995 the WTO has set a limit to how high tariffs can be on various fish species and fish products. Compared to the tariffs set by the WTO, the tariff burden in 2000 with the then export amounts could increase by no more than 940 million NOK, according to calculations made by economics professors Carl Erik Schultz and Fritz Holte. This would mean a doubling of the EEA tariff burden, but it would still not exceed five per cent of the export value of the fish. The EU has too little fish and has therefore reduced its tariffs on fish import several times in the last decade, and cannot require higher tariffs on Norwegian fish than on fish imported from other countries.[158]

11.2.10. Intimidations that did not strike – neither in 1972 nor in 1992 – and which there is no reason to trust in 2012

The "no" majority at the referendum in 1972 was a no to membership in the EC. The trade agreement with the EC signed in 1973 formalised the voters' "no". At the same time it demonstrated that it was possible to negotiate a trade agreement with the EU, despite the fact that Norway previously had said no to the negotiated membership agreement. It was not true that Norway could not have the same type of trade agreement with the EU <which Sweden, Finland

158 See detailed discussion in chapters 7.4. and 11.1.6.2.

and Austria had signed in the spring on 1972. It was therefore not true that a “no” would sentence Norwegian export industry to a meagre future outside the EU customs walls. The export industry would after a few years get the same market access to the EU market as with a membership.

The customs argument was the most important single argument in the EU debate a late as the summer of 1972. The personal letters which managers in many key companies sent their employees in the months before the referendum, have no place of honour in company archives. The managers let themselves be tempted to argue against better knowledge about the consequences for their own business. The message was simple: “Your job is in danger if you vote no.”

But it was in the EU that jobs were endangered. In England, in Belgium, in Holland, in France, in West-Germany, in Italy, in Ireland and in Denmark. The EU was supposed to be the salvation of Norwegian industry everywhere. After 1974, Western Europe became a sea of mass unemployment – a sea with six little “islands” with virtually full employment. For almost fifteen years, up until 1988, Western Europe was sharply divided: in an EU with mass unemployment and an EFTA with near full employment.

From the yes-side the EEA debate was still made a question of market access to the EU market. The EU developed an “inner market” which we must not end up on the outside of at any cost. The language used was likely to create fear: We could choose between ”outside” or”inside”, between ”isolation” or ”cooperation”. Dare we choose the solitude outside the inner market?
This message was just as wrong then as it is today. It was barely possible to find one area of society where Norway developed towards isolation from the rest of the world. It was just as true in 1992 as in 2012 that what each of us eats, consumes, experiences, thinks and expresses is part of an increasingly close relationship with people and societies far beyond Norway's borders. Still, the development of the EU's “inner market” was portrayed as something that could isolate us.

11.2.10.1 Isolated from the inner market?
In 1992 the trade agreement with the EU had lasted 19 years. That agreement would not become less valuable if the EU developed an ”inner market”. On the contrary: The inner market meant that the EU simplified all goods flow inside the EU – also for Norwegian businesses wanting to sell to the EU. The EU removed all border control in the EU and radically simplified the red tape following any shipment which was to cross borders inside the EU. All of this opened the markets in the then nine EU countries to Norwegian exporters, it did not isolate us. Portraying the inner market as something which could threaten us, was playing on people's ignorance. It was the opposite of public enlightenment when large parts of Norwegian media systematically failed to tell the simplest truths about what the inner market meant to Norwegian export industry.

11.2.10.2 "We cannot remain outside..."
“We cannot remain outside the EU's inner market” – that was the rationale that above all was used for the EEA. The most incredible thing about this rationale was that the export industry one was so worried about was the only industry which, by virtue of the trade agreement, was inside the EU's inner market. The export industry was part of the inner market whether we wanted it to or not – because of the trade agreement.

Three fourths of our export at the time went to the EU. Did this indicate that we were about to be isolated from the EU market? The nine EU countries buy a larger part of our export goods today than they did 10 years ago or 20 years ago. Does this indicate that we are being isolated? A significant part of our export to the EU is raw materials and semi-finished products which the EU needs for its own industry. Why should the EU from now on shut out this export?

What Norway buys from the EU, however, is mainly finished products. The EU's industry has won market shares in Norway for nearly all its export products since 1972 – at the expense of our own home industry. The EU has therefore has no reason to regret the zero tariff between Norway and the EU. It is a greater advantage for the EU than it is for Norway. The inner market will sharpen competition strongly for all businesses wanting to sell in this market. We cannot do anything about that – whether we are part of the EU or not. We cannot protect ourselves against this competition by joining the EU. Because that is where the competition is so strong. The strong competition on the inner market does not force us into the EU, either. The trade agreement causes our industry to be exposed to this competition anyway. The only way to protect ourselves against the competition, would be to cancel the trade agreement, build tariff walls against the EU, protect our industry against the EU's industry,

isolate ourselves. But nobody wanted that.

11.2.11. Freedom of trade with a trade agreement - without the EEA?

As described in this subchapter, the EU-Norway bilateral trade agreement from 1973 is an agreement which primarily regulates trade between Norway and the EU. This means that within the EU's three other freedoms the regulations are embodied in the WTO and other international agreements, as well as other agreements between the EU and Norway, which will regulate. In these areas Norway will have the opportunity to regain national freedom of action similar to what is described in the WTO alternative in chapter 11.1, be it anything from ownership restrictions in the financial industry, import monopoly on wine and spirits, the opportunity to make requirements to management, to bases when allocating petroleum licenses, etc.

11.2.12. Summary

The multilateral trade regulations are very extensive and form the basis for international trade where tariffs and other trade obstacles have been strongly reduced with time. It is still customary to supplement these regulations with bilateral or regional trade agreements.[159] Norway and the EU have a long tradition of this – both in establishing trade agreements with third countries on each side and in trading with each other.

This will probably also be the situation in the future if the EEA is cancelled by either party or is terminated for other reasons. In which setting should such an agreement be negotiated (bilaterally or for example regionally through a joint EFTA[160]), which areas shall be included and whether it shall be institutionally linked with agreements which Norway has with the EU in other areas (in the form of a trade and cooperation agreement[161]), is something further progress will clarify.

The EEA agreement can be cancelled with one year's notice if a majority in the Parliament so decides. If the EEA agreement is cancelled, it is stated in article 120 of the agreement that the trade between the EU and Norway are regulated by previous agreements. The trade agreement which Norway signed with the EC in 1973 is still valid. The framework for discussing such an agreement will be completely different in 2012 than when Norway discussed the then trade agreement with the EU measured against the EEA in the early 1990's. Today WTO gives extensive regulations in many of the areas which the EEA deals with, and which the EU-Norway bilateral trade agreement from 1973 did not cover. Norway has in individual areas even signed agreements through the WTO which are near identical to the EEA, such as the revised agreement on government procurements.[162] Norway has also in the period after 1992 negotiated a number of bilateral agreements with the EU in various sectors, and today Norway has (besides the EEA) a total of 73 agreements with the EU.[163] All of these other agreements will still be valid and be developed further, regardless of what happens with the EEA. Portraying that Norway's situation at a trade agreement replacing the EEA would mean going back to the situation in the 1980's is an idea taken from the imagination.

Through the EU-Norway bilateral trade agreement from 1973 there has been duty on most processed agricultural products (by Norwegian desire) and on some fish products (by the EU's desire). On all other industrial products and on all raw materials there has been zero tariff for 35 years and no quota limitations on trade between Norway and the EU, until 1994 by virtue of the trade agreement, after 1994 in accordance with the EEA agreement.

The danger of the EU waging a trade war against Norway is small. Most of the export to the EU consists of raw materials and semi-finished products which are intermediate products in the EU's production. To the EU it is neither a point to shut out Norwegian oil and gas – nor to make it more expensive than necessary by adding duty. What we buy from the EU, however, is mainly finished products, anything from screws to vehicles and machines. It is in this area that the EU has won market shares in Norway, while Norway has lost market shares in the EU market after the mutual tariff exemption was established in the 1970's. The EU has nothing to gain from building up mutual tariffs on such goods.

In two areas the trade agreement had some disadvantages compared to the EEA agreement. First of all, our export of processed fish products faced lower tariffs through the EEA than under the trade agreement. Then the EU may use the anti-dumping weapon against Norwegian industry in the EEA. It was possible under

159 See more details on such an alternative in chapter 11.1.5.4.
160 See more details on such an alternative in chapter 11.4.
161 See more details on such an alternative in chapter 11.3.

162 See more details on this agreement in chapter 11.1.6.6.
163 Taken from the Ministry of Foreign Affairs' treaty database and reproduced in NOU 2012:2, appendix 1, pages 878 ff.

the trade agreement. These advantages of the EEA agreement are relatively modest. In a report for the Alternative project from the autumn of 2011, the research manager at the Norwegian College of Fishery Science, Peter Ørebech, calculated that the difference between the current tariff burden and the one we in the worst case could risk by going back to the trade agreement, constitutes only 1.8 per cent of the export value.[164] Ørebech has also documented that such a level of EU tariff would not be decisive for how much fish we would sell to the EU market. On the contrary, the report points to markets where Norway faces a considerably higher tariff burden than this, and still has a stable export growth. The anti-dumping weapon has also become less applicable after a while. The Norwegian business support has been changed, Norwegian companies must to an increasing extent pay market price for electricity, and the WTO makes much stricter requirements for anti-dumping measures than what the EU assumed in the 1980's.[165]

For the food industry the EEA agreement gave some advantages initially over the trade agreement. On the one hand the agreement was to protect Norwegian processing companies for agricultural products against being outcompeted by import from the EU, while compared to the trade agreement it gave lower duties for processing companies exporting fish to the EU. This picture has changed. Through several rounds of negotiations between Norway and the EU the trade with agricultural products has been further liberalised. In practice a very extensive increase in the import from the EU to Norway has taken place, while export has been at a standstill.[166] For most service industries it is difficult to prove that they have gained more abroad than they have lost at home because of the EEA, and the EU has in later years had a net export of services to Norway.

The EU-Norway bilateral trade agreement from 1973 is an agreement which primarily regulates goods trade between Norway and the EU. This means that within the EU's three other freedoms the regulations are embodied in the WTO and other international agreements, as well as other agreements between the EU and Norway, which will regulate. In these areas Norway will have the opportunity to regain national freedom of action similar to what is described in the WTO alternative in chapter 11.1, be it anything from ownership restrictions in the financial industry, import monopoly on wine and spirits, the opportunity to make requirements to management, to bases when allocating petroleum licenses, etc.

164 See also detailed discussion in chapter 7.4.
165 See detailed discussion in chapter 7.5.
166 See more on this in chapter 7.9.2.

11.3. Alternative VII: Bilateral trade and cooperation agreement

11.3.1. Intro: Why consider this alternative?

A central feature of the EEA agreement is the dynamic aspect, both through the continuous incorporation of new regulations in the agreement's appendices and its enforcement through enforcement bodies' interpretation of the existing regulations. In a number of areas the agreement has gotten a different scope and other effects than what was assumed on Norway's part when the agreement was signed. [167] The dynamics are particularly problematic because the agreement thus challenges the Norwegian national freedom of action and sovereignty to a larger and larger extent and in more and more areas.

Bilateral agreements are agreements signed exclusively between two parties, for example between two countries or between a country and a regional union such as the EU. Bilateral trade and cooperation agreements do not normally have framework agreement with a dynamics such as the EEA and thus have a larger degree of predictability. The typical bilateral agreement applies to a limited areas of cooperation. If there is a need for development or revision of an agreement, it normally happens through negotiations between the parties. Usually no independent enforcement mechanism is established for the agreement. Disagreements and ambiguities are clarified in dialogue or negotiations between the parties.

Since a bilateral agreement is signed directly and exclusively between only two parties, the agreement can be adapted specifically to the parties' interests and needs. In addition to this tailoring, stability is another strength of bilateral agreements, since they are based on a direct community of interest between the parties. Bilateral agreements are a very common form of agreement to regulate both trade and other forms of cooperation.

The EEA agreement is one of very few multilateral framework agreements which the EU has signed. Most of the EU's trade agreements are bilateral. The EU has also signed bilateral agreements on other types of cooperation, for example on participation in research programmes. The country with the most comprehensive bilateral contract cooperation agreement with the EU is Switzerland. Since Switzerland rejected participation in the EEA through a referendum in 1992, the country has signed agreements on e.g. technical product standards, free movement of people, research and education. With its bilateral agreements Switzerland is a concrete example of a country which has, in its own eyes, a well-functioning relationship with the EU, looking after both the consideration of economic relations and national sovereignty.

167 Read more on this in chapter 3.

11.3.2. Norway's agreements with the EU besides the EEA

Both before and after the EEA agreement, Norway has signed a number of agreements with the EU. The EEA Review Committee has after going through the register of the Ministry of Foreign Affairs found 74 agreements which are valid as at November 20111[68]. Most of the agreements are bilateral. The agreements are independent and irrespective of the EEA Agreement. Some of the agreements, especially the ones concerning EEA funds, will be natural to discontinue or change if the EEA agreement is cancelled.

Norway participates in the EU's public health programme, against an annual fee. It consists of work groups and projects in the fields of health information, health threats and prevention of risk factors. Norwegian authorities are also represented in the newly established forum for alcohol and health. Norway also participates in the EU centre for prevention and control of infectious diseases, which is situated in Stockholm. Through the Schengen agreement, Norway is linked to parts of the EU's justice and police cooperation. Agreements have also been signed regarding participation in the police cooperation Europol and the EU's asylum cooperation. Norway is not part of the EU's security and defence policy (ESDP), but has committed itself to contribute to the EU's crisis management with personnel and other resources. In so-called crisis management operations, Norway has the same influence as the EU countries in running the operations. Norwegian military forces also participate in a Nordic battle group.

The management of fish resources is not part of the EEA Agreement, although during the EEA negotiations a connection was made between market access and fish quotas. The fisheries cooperation between the EU and Norway is based on a framework agreement from 1980, and on that basis annual quota agreements on fishing of joint stocks in the North Sea are made. Norway and the EU also exchange quotas on stocks outside the North Sea. Besides, a control cooperation has been established in order to fight illegal fishing. Other agreements are mentioned in a separate overview.

168 Official Norwegian Report 2012:2, appendix 1, pages 878-881.

11.3.3. EU's bilateral agreements

The EU has exclusive competence in trade policy. This means that only the EU, and not the individual member countries, can sign international trade agreements or legislate on trade issues. The EU is thus a customs union, where the same trade agreements and tariffs apply to the entire EU area. The EU's exclusive competence does not only apply to goods trade, but also - services, commercialisation of copyright and direct foreign investments.

The trade policy follows the ordinary decision process in the EU. The framework for the policy is adopted jointly by the Council -of Ministers and the European Parliament, on proposal from the European Commission. The European Commission negotiates on behalf of the EU. New trade agreements are approved by the Council of Ministers with the consent of the European Parliament. The European Commission emphasises that «there is no one-size-fits-all model for trade agreements»169, but in most casesthe EU negotiates extensive free trade agreements, so-called FTAs. The EU has signed more than 200 free trade agreements. They are constructed around the guidelines for such agreements in the WTO regulations, and are to liberalise trade more than what has been possible to achieve within the WTO.

Nearly all the agreements are bilateral, which means that they have been signed between the EU and a country outside the union. The agreements are normally not framework agreements for introducing new regulations, like the EEA agreement.

The EU has several kinds of motives for entering into free trade agreements, as the EU Commission itself describes it.170 The agreements shall:

Open new markets for goods and services.

- Increase investment opportunities.
- Make trade cheaper by removing all substantial customs barriers.
- Make trade faster by facilitating rapid customs clearance and set common technical standards.
- Make the framework for trade policy more predictable by establishing common -obligations in areas affecting the trade, such as copyrights, competition rules and government procurements.

169 The EU Commission: «Free Trade Agreements», http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/free-trade-agreements/. Original quote: «There is no one-size-fits-all model ja trade agreement...

170 The EU Commission: «Free Trade Agreements», http://ec.europa.eu/trade/creatingopportunities/bilateral-relations/free-trade-agreements/. And: «The European Union Trade Policy 2011», http://trade.ec.europa.eu/doclib/docs/2011/august/tradoc_148181. pdf.

A natural extension of the maxim of a free market in the union's treaties is that the EU also wishes to liberalise trade with other countries and regions. The EU thus has an ideological motivation for the free trade agreements. Free trade agreements are also driven by the EU's financial needs and interests. Partly by the wish to open new markets for their own businesses, and partly by the need for access to resources, both intermediate goods to businesses and products to consumers.

Besides the free trade agreements, the EU also signs cooperation agreements in various sectors. For example, the EU has signed over twenty bilateral agreements on research cooperation, both inside and outside the framework programme for research.[171] The EU also has a formalised bilateral cooperation on the environment with several countries.[172]

11.3.4. Switzerland's trade and cooperation agreements with the EU

On 06 December 1992, Switzerland voted no to the EEA agreement. The "no" majority was narrow – 50.3 per cent versus 49.7 – but there was a majority against the agreement in 18 of the 26 cantons. The population's "no" to the EEA was, if not surprising, then at least contrary to government recommendations. A couple of months earlier botch chambers in the national assembly approved the agreement with a clear majority. This decision was now set aside.

Five months earlier the Swiss government had also applied for an EU membership. The referendum led to a halt in the membership negotiations, although the application was not formally withdrawn. An initiative to resume membership negotiations was rejected by referendum in 2001, where 76.8 per cent voted no.

Instead of the EEA, Switzerland has signed a number of agreements directly with the EU in limited areas, collected in two contract packages: Bilateral I signed in 1999 and Bilateral II from 2004. Besides the two contract packages, agreements have also been made for trade, research and transport. Everything in the relationship between Switzerland and the EU are regulated by about twenty main agreements and about a hundred additional agreements.[173] These are

171 The EU Commission: Research – International cooperation, http://ec.europa.eu/research/iscp/index.cfm?pg=countries.

172 The EU Commission: Environment – Bilateral and regional cooperation, http://ec.europa.eu/environment/international_issues/bilateral_en.htm

173 Arabella Thorp: «Switzerland's relationship with the EU», memo, House of Commons Library, October 2011.

Norway's agreements with the EU

The EEA agreement is only one of 74 current, independent agreements between Norway and the EU (as at November 2011). Some of the most central bilateral agreements are:

- Agreement between Norway and the European Economic Community (the free trade agreement of 1973).
- Agreement between Norway and the European Economic Community on fisheries (1980).
- Cooperation agreement between Norway and the European Economic Community on research and development in area of environmental protection(1989).
- Cooperation agreement between Norway and the European Economic Community on research and development in the field of medicine and health research (1989).
- Cooperation agreement between Norway and the European Economic Community on a plan to stimulate international cooperation and the international exchange necessary for European scientific researchers (SCIENCE, 1990).
- Agreement between Norway and the European Economic Community regarding the establishment of cooperation on education and training within the framework of the ERASMUS programme (1991).
- Cooperation agreement between Norway and the European Economic Community on research and development in the environmental sector: Science and technology for environmental protection (STEP, 1992).
- Agreement between Norway and the European Economic Community on customs cooperation (1997).
- Agreement between Norway and the European Community on Norway's participation in the work at The European Monitoring Centre for Drugs and Drug Addiction (2000).
- Agreement between Norway and the European police unit (Europol, 2001).

Agreement between Norway and the European Union on safety procedures in connection with exchanging classified information (2004)

- Agreement between Norway and the European Union on the establishment of a framework for Norway's participation in the European Union's crisis management operations (2004).
- Agreement between Norway and Eurojust (2005). In the field of justice, a number of multilateral agreements have been signed together with Iceland and in some cases Switzerland and Liechtenstein:
- Agreement between the Council of the European Union and Iceland and Norway regarding the latter countries' association with the implementation, application and further development of the Schengen regulations (1999).
- Agreement between Norway and Iceland and the European Community on criteria and mechanisms for determining which country is responsible for processing an asylum application submitted in Norway, Iceland or a member country (the Dublin agreement., 2001).
- Agreement between Norway, Switzerland and Iceland on the implementation, application and further development of the Schengen regulations, and on criteria and mechanisms for determining which country is responsible for processing an asylum application submitted in Norway, Switzerland or Iceland (2004).
- Agreement between the European Union and Iceland and Norway on extradition procedures between the EU member countries and Iceland and Norway (The European arrest warrant, 2006).
- Agreement between Norway and Iceland and the European Union on Norway's and Iceland's participation in the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex, 2007).
- Agreement between the European Union and Iceland, Liechtenstein, Norway and Switzerland on these countries' participation in the work of the committees aiding the European Commission in exercising its powers in the implementation, application and further development of the Schengen regulations (2011).

ordinary agreements under international law in limited areas, with the 1972 free trade agreement as the most extensive.

Like Norway, Switzerland is one of the EU's largest trade partners. The alpine country is the EU's fourth most important trade partner, after the US, China and Russia. Norway is in fifth place. 7.8 per cent of the EU's export goes to Switzerland, and 5.6 per cent of the import comes from Switzerland.[174] 63 per cent of the export from Switzerland goes to the EU, and 81 per cent of the import comes from there.[175]

174 The EU Commission: Leading Client and Supplier Countries of the EU27 in Merchandise Trade (2010), http://trade.ec.europa.eu/doclib/html/122530.htm.

175 Paul Ruppen: «Switzerland's association with the EU», presentation Oslo 04/04/2011, http://www.alternativprosjektet.no/wp-content/uploads/2011/08/Switzerland%27s-association-with-the-EU.pptx.

11.3.4.1. Swiss agreements under pressure?

The relationship between Switzerland and the EU is considered stable and good by both parties, but the EU has from its top level several times expressed a desire for an EEA-like arrangement for Switzerland with more automated implementation of EU legislation.

In July 2010, Council President Herman van Rompuy emphasised that Switzerland must accept EU regulations continuously if they want access to the inner market. Commission President José Manuel Barroso declared his dissatisfaction with what he described as difficult administration of the bilateral agreements.[176] The EU's Council of Ministers repeated the criticism on 14 December 2010 in a report on the relationship with the EFTA countries, and called for procedures for enforcement and conflict resolution.[177]

The answer from Switzerland was that the bilateral agreements work perfectly. "*The government has discussed EU and EEA membership, and neither are relevant because we do not want Switzerland to automatically implement new EU legislation*," the then president Doris Leuthard explained.[178] This is also the attitude of both business organisations and trade unions. The government believes that conflicts can be resolved by the EU and Switzerland in the existing joint committees. Doris Leuthard concluded as follows: "*Our bilateral agreements with the EU give us enough freedom of action and are the best instruments for anchoring our place in Europe.*"[179]

As at February 2012, no institutional changes have been made to the Swiss model. Neither has the EU presented any more specific proposals, at least not through public channels. The Swiss election

in October 2011 led to a setback for the large, EU critical, conservative party Swiss People Party (SPP) and progress for the centre/leftist parties. However, SPP is still the largest party, and the government constellation is the same. There have been no signals indicating that Switzerland is now more open for an EEA-like solution. Most people consider an EU membership as out of the question.

Most factors therefore indicate that there will not be great changes to the Swiss model. Switzerland's initiative from 2005 on consolidating the agreements in a framework agreement probably gives an indication of what kind of changes Switzerland would be likely to accept. The proposals primarily concerned a more efficient administrative coordination.180 The EU will be able to reject the discussion of new sector agreements – for example, Switzerland wishes to negotiate an energy agreement – in order to push for clarification regarding the institutional, but it seems unlikely that Switzerland will accept substantial changes.

11.3.4.2 The contents of the Bilateral I package

Let us take a closer look of what Switzerland's agreements contain: The seven agreements within the Bilateral I package mainly concern liberalisation and mutual opening of the markets. The package contains a so-called guillotine clause, saying that if one of the agreements is breached, all seven are terminated.

1. Free movement of people

The agreement requires equal treatment of citizens of Switzerland and of the EU with regard to residence and work. National Insurance systems shall be coordinated. Compensating measures were implemented to secure employees, with requirements to working conditions and wages.

2. Mutual recognition of technical product standards

The agreement applies to most industrial products. Gives equal status to requirements and control for example with regard to environmental standards.

3. Government procurements

Expands WTO's procurements to apply to government procurements. Requirements for tenders for major purchases. For construction contracts the limit is approximately 60 million NOK. For government purchases of goods and services 1.5 million, and for local authorities 2.3 million.

4. Trade with certain agricultural products

Reduces tariffs and removes other obstacles for trade between Switzzerland and the EU. Applies to certain products, for example free trade with cheese.

5. Air traffic

The agreement regulates the airlines' access to the civil air traffic market.

176 Referred a.o in Aftenposten 23/07/2010, http://www.aftenposten.no/nyheter/uriks/article3742663.ece.

177 «Council conclusions on EU relations with EFTA countries», 14.12.2010, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/118458.pdf.

178 Switzerland rejects both the EU and the EEA, Aftenposten 24/09/2010. See also: «Bundesrat setzt im Verhältnis zur EU auf Kontinuität und führt den bilateralen Weg fort», 19.08.2010, http://www.admin.ch/aktuell/00089/index.html?lang=de&msg-id=34656

179 «Switzerland does not want the EEA», ABC News 19/08/2010, http://www. abcnyheter.no/nyheter/politikk/100819/sveits-vil-ikke-ha-eos.

180 René Schwok: Switzerland – European Union. An Impossible Membership?, P.I.E. Peter Lang (2009), page 71-76.

6. Land transport

Applies to both car and train. Regulates vehicle fee and weight limit for trucks. Shall contribute to transferring more goods from car to train.

7. Research cooperation

Makes Switzerland an associated member of the EU's research programmes. Participation and costs are renegotiated for each programme period. Switzerland pays approximately 14 billion for participation in the seventh framework programme.

11.3.4.3 The contents of the Bilateral II package

The nine agreements in the Bilateral II package develop further cooperation in economy and trade, and expand to new areas such as justice, asylum, environment and culture. The agreements can be cancelled separately.

1. Justice and asylum cooperation (Schengen/ Dublin)

Switzerland joins the Schengen agreement which abolishes border control for persons inside the EU. Increased control at the outer borders. The Dublin Regulation coordinates asylum management. Asylum applicants shall be evaluated in the first EU country they arrive in. The agreement gives access to the EU's person registers.

2. Trade with processed agricultural products

The agreement liberalises trade with a.o coffee, lam, mineral water, beer, biscuits, bread and pasta.

3. Participation in the film programmes (MEDIA)

Gives Swiss filmmakers access to the EU's film programmes. The current programme, MEDIA 2007, mainly gives funding for distribution and marketing. Switzerland pays approximately 360 million NOK during the programme period until 2013. The EU wanted to implement regulations for TV commercials as part of the agreement. However, in the negotiations Switzerland gained acceptance for maintaining the prohibition against religious and political advertising as well as advertising for strong alcoholic beverages and alcopops. Advertising for wine and beer is permitted.

4. Participation in the educational programmes

Switzerland participates in some of the EU's educational programmes, such as the exchange programme ERASMUS. The parties are to meet annually to develop the cooperation. Switzerland pays approximately 85 million NOK annually.

5. Participation in the European Environmental Agency (EEA)

The European Environmental Agency, located in Copenhagen, collects and analyses data on

Agreements between Switzerland and the EU

Bilateral package I, 1999

1. Free movement of people
2. Mutual recognition of technical product standards
3. Government procurements
4. Trade with certain agricultural products
5. Air traffic
6. Land transport
7. Research cooperation

Bilateral package II, 2004

1. Justice and asylum cooperation (Schengen/ Dublin)
2. Trade with processed agricultural products
3. Participation in the film programmes (MEDIA)
4. Participation in the educational programmes
5. Participation in the European Environmental Agency (EEA)
6. Statistics
7. Taxation of property
8. Pension taxation
9. Fighting financial fraud

Some other agreements

1972 The free trade agreement
1974: Agreement regarding the watch-making industry
1985: Scientific and technological cooperation
1986: Trade with processed agricultural products
1989: Trade with electronic computer systems 1989: Insurance
1990: Simplified customs inspection of goods
1995: Trade with certain agricultural products and fish products
2004: Europol
2008: Eurojust
2009: Simplified customs inspection of goods

the environmental situation. The agency is an advisor to the EU Commission.

6. Statistics
Switzerland adapts data collection to the guidelines from Eurostat, which is the EU Commission's office of statistics.

7. Taxation of property
The agreement obligates Switzerland to tax property owned by persons residing in an EU country. Most of the tax is to be transferred to the person's country of residence. The agreement does not apply to companies.

8. Pension taxation
The agreement removes double taxation of pension for former EU employees living in Switzerland; this means that they are exempt from tax in Switzerland when their income is taxed in the EU.

9. Fighting financial fraud
Escalation of the cooperation against smuggling and other evasions of customs duties and VAT.

11.3.4.4 Implementation of the agreements
In most cases a so-called joint committee is established with representatives from Switzerland and the EU for each agreement. This applies to both older agreements such as the free trade agreement from 1972 and the agreements in Bilateral I and II. The committees shall ensure implementation of the agreements. They shall clear u misunderstandings and correct any errors in interpretation and practice. The committees can make minor adjustments and updates to the regulations or in new agreements which should be negotiated. The committees shall also clarify disputes between the EU and Switzerland. Decisions require consensus.

The committees meet at least once a year. The EU and Switzerland take turns leading the committees. From Switzerland the members come mainly from the central administration, but the cantons are represented in the committees which affect regional authorities especially, for example the agreements on government procurements and free movement of persons.

On the EU's side there are representatives of the relevant department in the Commission, such as the department of transport and energy when it comes to the transport agreements. This differs from most of the EU's third country agreements, where the foreign service usually represents the EU.
Switzerland has had a certain influence on the development of new EU regulations, by having national experts participating in committees preparing relevant legislation for the EU Commission. The influence and access are formalised only in Switzerland's agreements on air transport, Schengen and the Dublin system, but experience shows that Switzerland in practice participate nearly to the same extent as the other EFTA countries.[181]

11.3.4.5 Static or dynamic solution?

The extent to which Switzerland must adapt to EU regulations was a contentious issue in the negotiations of both Bilateral I and II. Disagreements regarding this was the main reason why the plans for an agreement regarding services was put off.[182] The agreements are basically ordinary agreements under international law. Any change is subject to agreement between the EU and Switzerland. And all disputes, with the exception of competition

in air traffic, are settled bilaterally in the joint committees. A separate enforcement authority has not been established, and disagreements cannot be referred to the EU Court or the Swiss judiciary

system. Each party is responsible for implementation in their area. As a general rule the agreements are valid for a specified period, but they are automatically renewed until one of the parties cancels.

The agreements are essentially static. There is no obligation to change them and neither are there any independent bodies which are supreme interpreters of their content. At the same time both Bilateral I and II are based on legal equality between the parties and uniform practice of the regulations. Switzerland is not bound by the EU court's jurisprudence after an agreement has entered into force. New relevant practice is discussed in the joint committee which evaluates consequences and decides whether it is to be applied.

If the EU changes its regulations in one of the areas of the bilateral agreements, the Switzerland must not automatically make similar adjustments. If the changes are small, Switzerland will usually make similar adjustments independently. If the changes are large, it is assumed that the parties take the initiative to negotiating a new agreement. However, there is no

181 Marius Vahl and Nina Grolimund: Integration Without Membership . Switzerland's Bilateral Agreements with the European Union, Centre for European Policy Studies 2006, page 85.
182 Vahl and Grolimund 2006, page 37.

obligation for this or recipe for a solution in the agreement model.[183]

Since no enforcement institutions have been established, conflicts are resolved through negotiations between parties. This model favours the status quo, because changes are subject to agreement. Perhaps the main conflict between the EU and Switzerland has been regarding the cantons' mild taxation of foreign companies. The EU believes that the tax advantage is in violation of the 1972 free trade agreement, while both Swiss authorities and legal experts believe the schemes do not constitute a breach of agreement. The case has been going on for nearly five years without the cantons changing their tax policy. Some commentator believe that Switzerland will end the case by suggesting increased taxes for foreign companies, while reducing taxes for domestic companies.[184]

The air traffic agreement (Bilateral I) stands out when it comes to conflict resolution. Here the EU Commission and the EU Court shall enforce the competition regulations through supervision and dispute resolution. Otherwise the agreement is handled by a joint committee. The agreement in the justice area (Bilateral II) is also different, and has the same system as the Norwegian Schengen agreement. Formally there is one committee with the EU and Switzerland and another with Iceland and Norway, but they have joint meetings and function thus multilaterally. From the EU's side all member countries participate in the committee. This means in reality that Switzerland, Norway and Iceland participate in the Council of Ministers' meetings in the Schengen field, including preparatory meetings and work groups. The countries participate on an equal basis in discussions, but have no vote. They must implement new regulations at the same time as the EU countries, unless they have been granted an exception.

11.3.4.6 Evaluations of the Swiss model

The bilateral agreements have simplified trade between Switzerland and the EU in a number of ways. Neither in the population, nor among politicians, nor in the business community has there been expressed desire to substitute the agreements with an EEA scheme. On the contrary, as pointed out above, one wishes to maintain the bilateral agreements. After pressure from the EU, the commission and the Swiss government still have establishes a work group to consider simplifications to the agreements, including schemes for faster adaptation. Switzerland has made it clear that automatic implementation of new EU regulations is out of the question.

At some points the agreements are less equal than what Swiss authorities like to give the impression of. New regulations always come from the EU, and in practice the initiative to changes in the agreements come from the EU's side.[185] There is little transparency in the joint committees' work, and there is no debate on the extent to which the EU regulations in practice affect Switzerland.[186]

The clause in Bilateral I that all seven agreements are terminated if one of the agreements is not implemented as intended weakens the flexibility of the agreements. It is not possible to reverse only one of the areas if Switzerland wishes to do so. The clause is also a means of enforcement which makes it less relevant for Switzerland to practice regulations differently from the EU.

The so-called Eurolex Act from 1992, which requires that all new Swiss legislation is in line with EU legislation, was not changed even though the EEA agreement was rejected. The act involves national adaptation to EU regulation and harmonisation beyond the scope of the bilateral agreements.

On the other hand the agreements have proven to be a viable model to ensure economic association and political sovereignty. Swiss authorities themselves sum up some of the advantages in the information booklet Bilateral agreements Switzerland-EU: "*One advantage is that the bilateral approach enables a tailored cooperation in the areas where Switzerland and the EU have common interests. At the same time Switzerland can develop and maintain its own rules in areas deviating from the EU's practice, if this is in the country's interest. This applies to for example trade and monetary policy or in the financial and labour markets*."[187]

The agreement model gives Switzerland as much influence as the EU to pint out cooperation areas and define topics for negotiations. Switzerland is free to introduce new regulations within existing agreements or enter into an agreement on a new area. The same information booklet states: "*Switzerland is not obligated to implement EU laws. The country*

183 Schwok 2009, page 128.

184 New American: EU Threatens Tiny Switzerland Over Low Taxes, 28/11/2011.

185 Vahl and Grolimund 2006, page 49.

186 Ibid page 61.

187 *Bilateral agreements Switzerland-EU, booklet, Integration Office FDFA/ FDEA, August 2009, page 42. Original quote: «One advantage is that the bilateral approach enables tailor-made cooperation in those areas in which Switzerland and the EU have mutual interests. At the same time, Switzerland can develop and retain its own regulations in other areas which deviate from the EU rulings if this is in its interests, for example in trade and monetary policy or in the financial and labour markets.»*

adapts regulation to EU legislation where it is in its interest."[188]

As examples of areas where it is important to Switzerland to keep its own regulations, the authorities mention animal transportation, genetically modified foods, patents and taxation. The EU requirement of more automated adaptation is in many ways an indication that Switzerland generally reviews new EU regulations thoroughly and evaluates both relevance and consequences. It often takes six months from the EU presenting a regulation in one of the joint committees to its implementation in Switzerland.[189]

The agreement model gives great national freedom of action in implementing regulations. There is no dedicated surveillance agency or independent court following up and enforcing the agreements. On the other hand, the EU can threaten with the so-called guillotine clause in Bilateral I, and terminate the entire agreement package. Conflicts are to be resolved in the joint committees. The lack of formal procedures can make it easier for the EU as the largest party to trump its views through, but it can also mean that difficult cases remain unresolved.

The bilateral agreements have lower direct costs than the EEA agreement has for Norway. The EEA costs Norway about 4.5 billion NOK per year. Switzerland, which is a larger country in both population and GNP, pays about 3.6 billion NOK per year. In addition to the costs of participating in EU programmes for research, education and culture, Switzerland has also committed itself to support efforts for equalization in the Eastern European EU countries. For both Norway and Switzerland, some of the money comes back as project funding in the programme cooperations.

11.3.5. Possible elements in a new Norwegian agreement

As mentioned in item 1.3.2., Norway has more than 70 agreements with the EU besides the EEA. The agreements apply independently of the EEA agreement. A natural point of departure for a new bilateral trade and cooperation agreement with the EU is that the other, existing agreements are furthered when the EEA agreement is cancelled.

The bilateral agreement must apply to clearly defined areas, and its nature be that of purely international law. The agreement should not contain mechanisms putting pressure on Norway to accept new regulations from the EU. The agreement must be renegotiated or possible supplemented by separate supplementary agreements if new regulations are to be incorporated. Such an agreement model means that Norway can require favours from the EU when accepting new EU regulations, and thus invite to a real dialogue between the parties. Authority should also not be transferred to a surveillance agency (similar to the ESA) or court. Disputes are to be resolved on a political level. The removal of enforcement mechanisms and the dynamics for continuous liberalisation and the implementation of new EU regulations, is a fundamentally important difference between a bilateral agreement and the EEA agreement, including the "a slimmer EEA" variety.[190]

Although the EU-Norway bilateral trade agreement from 1973, which will again enter into force upon cancellation of the EEA, and the WTO agreement ensure an extensive duty free market access to the EU, it may be desirable to have a new agreement which also regulates parts of the non-liberalised trade, primarily trade with fish. Here the new agreement can in principle give even more liberalised trade than the EEA agreement. Cooperation areas relevant for negotiation are for example research, education and culture, with participation in EU framework programmes - either wholly or partly, as well as environmental protection with participation in the European Environmental Agency.

In relation to the EU-Norway bilateral trade agreement from 1973 with adjustments for changes in the WTO191 there are especially two significant differences: Firstly, a large portion of the content of the EEA can be continued in a trade and cooperation agreement. The new agreement can be formulated so that it regulates services, capital and labour. The agreement can also go further when it comes to trade with agricultural products and tariff reductions for fish than what the trade agreement did. Here one can imagine many different variations on the scale between today's EEA agreement and the EU-Norway bilateral trade agreement from 1973.

Secondly, the more than 70 agreements which Norway and the EU have in various fields (including a new bilateral agreement) can be combined into a joint «package», with joint bodies to discuss the further development of cooperation and to address issues causing problems. On the positive side this may lead to better coordination and clearer political management in developing the cooperation. The problem is that with such a «package deal», Norway can be facing an «all or nothing» attitude from the EU's side in discussions on changes in the agreements.

188 Ibid. Original quote: «Switzerland is not obliged to implement EU law. It adapts its regulations to EU law where this is in its interests.»

189 Vahl and Grolimund 2006, page 49.

190 Read more on «a slimmer EEA» in chapter 10.1.

191 Read more on the trade agreement as an alternative to the EEA in chapter 11.2.

As mentioned, Switzerland's first agreements after the rejection of the EEA are linked together by a guillotine clause (Bilateral I), while no such link has been made in the later agreements. Besides, experiences from the WTO's multilateral negotiations show how such an approach («single undertaking») creates pressure, while at the same time works as a plug in negotiations.[192]

11.3.6. How to go from the EEA to a bilateral agreement?

Both Norway and the EU have good experiences with practicing bilateral agreements and competence in negotiating such agreements. In several evaluation rounds, the EU has expressed its satisfaction with the EEA agreement, so the initiative to negotiations for a bilateral agreement will certainly have to come from Norway. It is not very likely that the EU will wish to enter into such negotiations without the EEA agreement being cancelled. After cancelling the EEA agreement, Norway can invite to negotiations with the desire to enter into a trade and cooperation agreement as a defined goal.

In such a situation it appears unlikely that the EU would reject free trade with Norway, which supplies EU countries with large quantities of oil, gas and other intermediate goods for its own businesses. Today Norway is also a significant contributor to the EU's programme cooperation. Therefore the EU will probably also wish to discuss further cooperation on for example research and education.

The experiences from Switzerland, which has the most developed bilateral agreements with the EU, indicate that the EU will want the negotiations focused in one joint agreement, possible arranged as an agreement package. In this way the EU can set its interests against Norwegian desires in other areas. This, of course, is a negotiation tactics that Norway can also use.

11.3.7. Is it realistic to imagine such an option in the long run?

From the EU's point of view, a bilateral agreement will probably be the most interesting alternative if the EEA agreement is cancelled. It is in the nature of the alternative that the agreement will be a closer connection than the EU-Norway bilateral trade agreement from 1973 and the WTO regulations, and thus – still from the EU's point of view – the second best if the EEA agreement is cancelled.

The EU's initiative on wanting to change Switzerland's agreements towards a more automated EEA scheme does not mean that the EU has excluded new bilateral agreements. The initiative is first and foremost meant for starting negotiations with Switzerland, and also has a backdrop where the EU wishes to push for increased transparency in the Swiss banking system. The EU has on-going negotiations on bilateral trade agreements with a.o India, Canada and Egypt, which are all less important trade partners for the EU than Norway.

Switzerland's bilateral model is described by several experts as a possible model for the EU in future negotiations, for example by Swiss political scientist René Schwok, professor at the University of Geneva and author of the standard work Switzerland – European Union. An Impossible Membership?[193]

The process around the Swiss agreements shows that the EU is flexible and can extend far in order to protect its interests. After Switzerland rejected the EEA agreement, the EU had to ask: Could there really be a financial or political advantage in finding tailored bilateral solutions for a country which had rejected the inner market? And: Would letting Switzerland decide its own menu a la carte still make it possible for the EU to achieve results in the union's interest? Besides: Should the EU again take the chance of negotiating with a country where direct democracy and referendums are political uncertainties and had already given a negative outcome against the EEA? Despite these significant concerns the EU chose to enter into negotiations with Switzerland. Compared to this, going into negotiations with Norway appears as more politically predictable. High purchasing power and essential natural resources give Norway just as good a starting point financially as what Switzerland had for bilateral negotiations with the EU.

Upon a termination of the EEA agreement, a bilateral trade and cooperation agreement will be the alternative which involves the least radical changes in the cooperation, also for Norway, in the sense that the difference from the EEA will be less than for other alternative solutions.

A strength of this alternative is that one is not limited to the existing agreement forms, and can therefore better base it on current Norwegian interests and needs – seen

192 Read more on this in chapter 11.1.

193 Schwok 2009, page 67.

in relation to what is suitable and realistic towards the EU and possibly within the international agreements.

A bilateral agreement is a flexible alternative that can be filled with concretised content towards a negotiating position. It gives room for many of the participants who are dissatisfied with the EEA agreement to insert elements that safeguard their most important considerations. For example, those concerned about new EU regulations attacking labour rights can have the EEA agreement's continuous flow of EU regulations removed, while the agreement establishes an updated framework for trade with both goods and services between Norway and the EU. The agreement can also meet the requirements of those who are critical of the environmental consequences of the EU's inner market, but are positive towards regional environmental cooperation. This way the alternative can have broad support.

11.3.8. Summary

Bilateral agreements are agreements signed exclusively between two parties, for example between two countries or between a country and a regional union such as the EU. Bilateral trade and cooperation agreements do not normally have framework agreement with a dynamics such as the EEA and thus have a larger degree of predictability. The typical bilateral agreement applies to a limited area of cooperation. If there is a need for development or revision of an agreement, it normally happens through negotiations between the parties. Usually no independent enforcement mechanism is established for the agreement. Disagreements and ambiguities are clarified in dialogue or negotiations between the parties.

Since a bilateral agreement is signed directly and exclusively between only two parties, the agreement can be adapted specifically to the parties' interests and needs. In addition to this tailoring, stability is another strength of bilateral agreements, since they are based on a direct community of interest between the parties. Bilateral agreements are a very common form of agreement to regulate both trade and other forms of cooperation.

The EEA agreement is one of very few multilateral framework agreements which the EU has signed. Most of the EU's trade agreements are bilateral. The EU has also signed bilateral agreements on other types of cooperation, for example participation in research programmes. The country with the most comprehensive bilateral contract cooperation agreement with the EU is Switzerland.

Both before and after the EEA agreement, Norway has signed a number of agreements with the EU. The EEA Review Committee has after going through the register of the Ministry of Foreign Affairs found 74 agreements which are valid as at November 2011[194]. Norway participates among other things in the EU's public health programme, the EU's justice and police cooperation through Schengen, Europol and the EU's asylum cooperation, contributes to the EU's crisis management and participates in the Nordic combat group. The fishery cooperation between the EU and Norway is based on a framework agreement. Norway also participates in the EU's cooperation in the research and education fields. Most of the agreements are bilateral. The agreements are independent and irrespective of the EEA Agreement.

The EU has signed more than 200 trade agreements internationally, in different varieties, [195] but mostly extensive agreements. Nearly all the agreements are bilateral, and the agreements are normally not framework agreements for the implementation of new regulations, like the EEA agreement.

A natural point of departure for a new bilateral trade and cooperation agreement with the EU is that the other, existing agreements are furthered when the EEA agreement is cancelled. The bilateral agreement must apply to clearly defined areas, and its nature be that of purely international law. The agreement should not contain mechanisms putting pressure on Norway to accept new regulations from the EU. The agreement must be renegotiated or possibly supplemented by additional agreements if new regulations are to be implemented. Such an agreement model means that Norway can require favours from the EU when accepting new EU regulations, and thus invite to a real dialogue between the parties. Authority should also not be transferred to a surveillance agency (similar to the ESA) or court. Disputes are to be resolved on a political level. The removal of enforcement mechanisms and the dynamics for continuous liberalisation and the implementation of new EU regulations, is a fundamentally important difference between a bilateral agreement and the EEA agreement, including the «a slimmer EEA» variety.[196]

Areas of cooperation which can be relevant for negotiation are for example research, education and culture, with participation in the EU's

194 Official Norwegian Report 2012:2, appendix 1, pages 878-881.

195 The EU Commission: «Free Trade Agreements», http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/free-trade-agreements/. Original quote: «There is no one-size-fits-all model trade agreement...»

196 Read more on «a slimmer EEA» in chapter 10.1.

framework programmes – either wholly or partly, as well as environmental protection with participation in the European Environmental Agency.

In relation to the EU-Norway bilateral trade agreement from 1973 with adjustments for changes in the WTO[197] there are especially two significant differences: Firstly, a large portion of the content of the EEA can be continued in a trade and cooperation agreement. The new agreement can be formulated so that it regulates services, capital and labour. The agreement can also go further when it comes to trade with agricultural products and tariff reductions for fish than what the trade agreement did. Here one can imagine many different variations on the scale between today's EEA agreement and the EU-Norway bilateral trade agreement from 1973.

Secondly, the more than 70 agreements which Norway and the EU have in various fields (including a new bilateral agreement) can be combined into a joint «package», with joint bodies to discuss the further development of cooperation and to address issues causing problems. On the positive side this may lead to better coordination and clearer political management in developing the cooperation. The problem is that with such a «package deal», Norway can be facing an «all or nothing» attitude from the EU's side in discussions on changes in the agreements.

Both Norway and the EU have good experiences with practicing bilateral agreements and competence in negotiating such agreements. It is not very likely that the EU will wish to enter into such negotiations without the EEA agreement being cancelled. In such a situation it appears unlikely that the EU would reject free trade with Norway, which supplies EU countries with large quantities of oil, gas and other intermediate goods for its own businesses. Today Norway is also a significant contributor to the EU's programme cooperation. Therefore the EU will probably also wish to discuss further cooperation on for example research and education.

The EU's initiative on wanting to change Switzerland's agreements towards a more automated EEA scheme does not mean that the EU has excluded new bilateral agreements. The initiative is first and foremost meant for starting negotiations with Switzerland, and also has a backdrop where the EU wishes to push for increased transparency in the Swiss banking system. The EU has on-going negotiations on bilateral trade agreements with a.o India, Canada and Egypt, which are all less important trade partners for the union than Norway. The process around the Swiss agreements shows that the EU is flexible and can extend far in order to protect its interests.

A strength of this alternative is that one is not limited to existing agreement forms, and can therefore better base it on the current Norwegians interests and needs – seen in relation to what is appropriate and realistic towards the EU and possibly within the international agreements.

A bilateral agreement is a flexible alternative that can be filled with concretised content towards a negotiating position. It gives room for many of the participants who are dissatisfied with the EEA agreement to insert elements that safeguard their most important considerations. For example, those concerned about new EU regulations attacking labour rights can have the EEA agreement's continuous flow of EU regulations removed, while the agreement establishes an updated framework for trade with both goods and services between Norway and the EU. The agreement can also meet the requirements of those who are critical of the environmental consequences of the EU's inner market, but are positive towards regional environmental cooperation. This way the alternative can have broad support.

197 Read more on the trade agreement as an alternative to the EEA in chapter 11.2.

11.4. Alternative VIII: Regional trade agreement EFTA/EU

11.1.4. Why consider this alternative?

A regional trade agreement between the EFTA countries on the one hand and the EU on the other, can have several advantages. Firstly, a collective EFTA will be negotiating with the EU is a block. Even though EFTA is a much smaller player than the EU, a joint EFTA with Switzerland on the team will mean a considerable expansion of the total market on the EFTA side covered by the agreement (measured against the EEA). Correspondingly, for Switzerland it will mean a considerable expansion of the total EFTA market covered by their agreements with the EU, if Norway, Iceland and Liechtenstein join.

A joint EFTA is a considerable financial player also in EU standards. 70.2 per cent of the EFTA countries' total trade was with EU countries in 2010.[198] Conversely the EFTA countries are the EU's third most important trade partner in goods. 11.8 per cent of the EU countries' goods trade went to EFTA countries in 2009. Only the EU's goods trade with the US (15.9 per cent) and China (12.9 per cent) are bigger. In the financial area the EFTA countries are the EU's second largest trade partner, only surpassed by the US, and thus larger than China.[199]

The significance for Norway to have Switzerland in negotiations with the EU is not just about their size in population or their trade with the EU. The Swiss are known as tough negotiators, not at least have clear limits to how far they are willing to go in surrendering sovereignty. In addition there are the Swiss systems for using referendums in important cases. The Swiss elected still remember

the EEA negotiations, which ended with the people saying no in a referendum in 1992. It has also been stressed on several occasions from Switzerland's side that it is out of the question for the country to consider the EU or the EEA as alternatives to their current agreements with the EU.

At the same time the Swizz have indicated that they may consider changes in the agreements they have with the EU. This has come up after considerable pressure for changes to the agreements from the EU's side. It is in the EU's own

interest to maintain a good working - relationship, both when it comes to trade and other political issues. On the other hand, the EU is not happy with the institutional framework surrounding the agreements, and EU representatives cited by the EEA Review Committee are very clear that the Swiss solution *"is not a model, but a disaster!"* [200]

The disadvantage could be that Norway and Switzerland may have conflicting interests, both with regard to which areas to negotiate, that is what should be included in the agreement, and the political content in the various areas of issue. For example, Switzerland has some other offensive interests (among other things related to the patent rights and chemical areas) than what Norway has. This has been seen as a challenge in the negotiations which EFTA has conducted with third countries.

This implies, however, that Norway and Switzerland, together with Iceland and Liechtenstein, have considerable experience in negotiating relatively extensive trade agreements with other countries. If the EFTA is used as a platform for negotiations with the EU, one would be able to build on experience with trade agreements with third countries. It would also be possible to use provisions similar to those used in relations with other countries and international areas with which one wished to interact.

Negotiations with the EU will present particular challenges as a result of the nature and content of the EU cooperation, but from EFTA's side one should be able to assume that there should not be fundamental differences in how one interacts with the EU countries and other important trade partners for EFTA.

It is also worth noting that Switzerland is not only a collaborator for Norway in EFTA and in EFTA's trade agreements with third countries. Switzerland has also been, and is, an important ally for Norway in the WTO context through the so-called G10 group, which among other things is mentioned in the White Paper on agriculture and food policy which was presented in December 2011: *"In the Doha round, as with previous rounds of negotiations, Norway has played an offensive and constructive role in order to find good solutions for the joint Norwegian interests. It has been necessary to seek special solutions for agriculture which provide opportunities to reach national goals. In order to achieve this, Norway has played a leading part in the group of countries which are net importers of agricultural food products,*

198 EFTA trade statistics: EFTA countries' trade with the EU-27, 2000-2010 . Taken from the EFTA website.

199 Broch, Lave. No to the EU's yearbook 2011 pages 81-82.

200 Official Norwegian Report 2012-2 page 310.

the-so-called G10 group. The group consists of nine countries, among them Japan, South Korea and Switzerland."[201]

Norway and Iceland have many common interests to protect, and in an evaluation of alternatives to today's EEA agreement, it will form this perspective be a point to negotiate a regional trade agreement with the EU through EFTA instead of choosing a bilateral solution, which is often presented as an alternative.202

An agreement between EFTA and the EU can also be expanded to more countries if desired, either as a consequence of more countries joining EFTA (which would seem more relevant if EFTA as a block negotiates with the EU), or by individual countries joining the negotiations or the pre-negotiated agreement in addition to EFTA and the EU. Both EFTA and the EU negotiate trade agreements with other countries separately, both in their neighbouring areas and in other
parts of the world. One option within an EFTA/ EU framework would be to include some of these countries in an EFTA/EU agreement.

11.2.4. The EFTA convention as a platform

The European Free Trade Association (EFTA) was established in 1960 through the Stockholm convention as an alternative to the European Economic Community, predecessor of EU. In addition to Norway, the initial participants were the UK, Sweden, Denmark, Portugal, Switzerland and Austria. Later Iceland (1970), Finland (1986) and Liechtenstein (1991) joined. The main goal of the EFTA cooperation was free gods trade between member countries, but without common tariffs or external trade policy. Free trade with industrial goods was achieved in 1966 and free trade with fish in 1986.

11.4.2.1 From Stockholm to Vaduz

The Stockholm convention was replaced by a revised convention in 2001 (the Vaduz convention).[203] From being primarily a convention with the goal of ensuring free goods trade, it was clearly stated in the Vaduz convention that one was to *"facilitate free exchange of goods further, aiming at a gradual achievement of free movement for people and a gradual liberalisation of trade in services and investments, opening the EFTA countries' markets for government procurements and further ensure the necessary protection of intellectual property rights, under fair conditions of competition [...]"*[204] This is further followed up in the Mission Statement and specified in the following provisions of the convention.

Many of the provisions are characterised by mirroring similar provisions in the main part of the EEA agreement (and similar for the Swiss agreements); cf. for example the following in a consultation paper from the Ministry of Finance in 2006: *"The Vaduz convention also contains provisions on customs-related trade measures and safeguards. These are almost similar to the corresponding provisions in the EEA agreement."*[205] The Alternative Project has not undertaken any further analysis of what the differences consist of, but assumes the Ministry of Finance's understanding of the provisions on customs-related trade measures and safeguards are almost similar in the EEA, the Swiss agreements and the EFTA convention.

It follows that one must be able to assume that a possible new regional trade agreement between EFTA and the EU will have almost identical provisions on customs-related trade measures and safeguards as the EEA. The same would be the case if Norway negotiates a trade and cooperation agreement after the Swiss model.
At the same time it appears that the EEA goes further than the EFTA convention in several areas, for example important areas like services and investments. When it comes to services *"each member country can regulate services in their territory, provided that the regulations do not discriminate against individuals or companies from the other member countries in favour of their own individuals or companies"* [206] This is largely the same understanding that one originally had in the EEA, but which has gradually been replaced by an attitude, fuelled by the EC court, that restrictions of the free flow of services in itself is to be attacked. There are similar differences in connection with the provisions on investments.

11.4.2.2 Consultation and conflict resolution in EFTA

The names the EFTA Court and the EFTA Surveillance Agency (ESA) can easily leave a false impression that these institutions apply to the entire EFTA cooperation. This is not

201 White Paper 9 (2011-2012): Agricultural and food policy. Welcome to the table, page 79.
202 Read more on such alternatives in chapters 11.2 and 11.3.
203 Agreement on changing the Convention on the establishment of the European Free Trade Association (EFTA) of 21/06/2001.
204 The revised EFTA convention, sixth paragraph of the preamble.
205 The Ministry of Finance, consultation paper - draft act on customs and movement of goods, 17/01/2006, page 105.
206 The revised EFTA convention, art. 16A1b.

the case, these are establish and only have a function in accordance with the EEA agreement.[207]

The EFTA convention has a chapter dedicated to consultation and conflict resolution. Here clear procedures are established: *"(1). Member countries shall at all times strive to reach agreement on the interpretation and application of this convention, and shall in all manners though cooperation and consultations try to reach a mutually satisfactory solution in all cases that might affect the function of the convention. (2). Any member country can submit any case pertaining to the interpretation or application of this convention, to the Council. The Council is to provide all information which can contribute to enable a thorough examination of the situation, aiming at find a good solution that can be accepted. For this purpose the Council is to examine all possibilities for the convention to still function in a satisfactory manner. (3). The Council shall hold a meeting within 30 days after request for consultations is received."*[208]

In a case where a member country believes that a measure used by another member country is in violation of the convention, and the case has not been resolved within 45 days after the consultation took place in accordance with article 36 B, it shall be referred to arbitration.[209] The arbitration court's decision shall be final and binding for the member countries which are parts in the conflict, and shall be complied with immediately.[210]

In other words, one strives at finding mutually acceptable solutions. If this fails, the case is settled by arbitration. The conflict resolution mechanisms are between countries, and not also between investors and countries, like we find in the EEA. The EFTA convention does not have any surveillance agency or court which reinterprets the content of the provisions of the agreement/convention, like in the EEA. However, the interpretation of the provisions for e.g. services and investments in the EEA could affect the EFTA convention, as long as we are associated with the EEA. This follows among other things from article 16.5 of the Convention's chapter on investments: "*Regarding new agreements being signed between a member country and the European Community, the member countries are further obligated to give each other, on a mutual basis,* the advantages of such agreements, by resolution of the *Council.*" If one leaves the EEA, one will no longer have this effect.

11.3.4. EFTA's trade agreements with third countries

The EFTA has signed trade agreement with a number of countries worldwide. Norwegian authorities use the terminology first and second generation agreements, where the former agreements mainly apply to goods trade while the newer agreements also include services, investments, immaterial rights, government procurements, competition policy, etc. The Trade Campaign is among those who have criticized this broad negotiating mandate, since these areas *"are very controversial in the WTO where the industrial countries have not gained support for multilateral negotiations because of opposition from the large majority of developing countries."*[211] EFTA's third country agreements contain certain customs related trade measures and safeguards, which in content are very close to the corresponding WTO provisions in the area.[212] The same also goes for the bilateral trade agreement Norway had with the EU before the EEA.

The EFTA agreements are basically regional, i.e. the EFTA countries sign joint agreements with the countries with which one negotiates. When it comes to trading with agricultural products, the customs preferences are given through bilateral binding commitments between each EFTA country and the contracting party. In this area Norway negotiates bilaterally the concessions to be given in connection with trade with agricultural products.[213]

The criticism against the contents of the trade agreements signed by the EFTA countries and the EFTA processes should be taken seriously. However, it is possible to do something about this. Contents and strategy for negotiations on EFTA's part are completely governed by the four EFTA countries with a total of about 13 million inhabitants, and it should thus be much easier to ensure democratic control and influence on the development of these agreement than what is the case in for example the EU with 27 member countries and approximately half a billion inhabitants.

207 Another thing is that it has been discussed whether these also in some areas would be given powers towards Switzerland, cf. Official Norwegian Report 2012/2, page 312. However, this does not seem like the most likely development scenario for Switzerland's agreements with the EU.

208 The revised EFTA convention, art. 36B

209 The revised EFTA convention, art. 36C, pt. 1.

210 The revised EFTA convention, art. 36C, pt. 3.

211 Bank, Dæhlen and Lundeberg: Behind closed doors. A report on Norway's bilateral and regional free trade agreements. The Trade Campaign, 2001, pages 19-20.

212 The Ministry of Finance, consultation paper - draft act on customs and movement of goods, 17/01/2006, pages 105.-106

213 The Agricultural Evaluation Office: Customs protection is crumbling - Norwegian agricultural merchandising in light of the EEA and third countries. Report 7/2011, page 8.

At the EFTA council meeting on 15 February Switzerland, which is chairing this spring, EFTA's priorities in the free trade area for the first half of 2012. EFTA's ambition is, among other things, to sign a trade agreement with Bosnia and Herzegovina, complete negotiations with China, make progress in the negotiations with Indonesia, Russia, Belarus and Kazakhstan, and start negotiations with Vietnam and several Central American countries.[214] Belarus is also among the countries for which EFTA has been criticized for negotiating with. Minister of Foreign Affairs Jonas Gahr Støre has defended this by saying that the country participates in a customs union with Russia and that omitting the country would make it difficult to continue negotiations with Russia.[215]

11.4.4. WTO's provisions for regional trade agreements

There are two concepts in the WTO in connection with regional trade agreements that recur. The agreements are to give mutual market opening, and they shall comprise basically all trade. Both these concepts are flexible.[216] As the Ministry of Foreign Affairs writes on its webpage: "*The current WTO regulations allow for the departure from the MFN principle through bilateral and regional trade agreements, but the regulations require that the contracting parties abolish tariffs and other restrictive regulations for substantially all trade*". A main issue in negotiations for strengthening the regulations has been exactly what is the specific meaning of "*substantially all trade*."[217]

Although the services sector is a strongly growing sector internationally, goods trade continues to dominate between the EFTA countries and the EU. It must thus be argued that a regional trade agreement between EFTA and the EU could be established without including the services area. It should in this context also be mentioned that Norway has a bilateral trade agreement with the EU, which is still valid and which will again enter into force if the EEA ceases, which primarily concerns goods trade. Switzerland has for its part a set of bilateral agreements with the EU covering a broad range of matters, but which does not include services. These agreements were negotiated after the WTO was established.

The second key criterion in Article XXIV of GATT is in this context that one upon establishing free trade areas cannot impede trade by introducing tariffs on existing volumes. This is an important premise which must assumed by all parties in a new agreement.

In the WTO service agreement is stated that "*If a member by signing, expanding or substantially changing an agreement in accordance with no. 1 intends to withdraw or change a specific obligation in a way that is inconsistent with the terms in its schedule, it shall inform of the change or withdrawal with at least 90 days' notice, and the procedure set out in Article XXI no. 2, 3 and 4 are to be used*"[218] According to Article XXI any member can withdraw any obligation in its schedule after three years have elapsed from the date the obligation became effective. A member whose advantages have been affected by such a withdrawal can require compensation negotiations.

11.4.5. Possible contents of a new agreement: Lowest common denominator

A new regional trade agreement between the EFTA countries and the EU must be based on a lowest common denominator. This means that such an agreement shall basically not regulate issues which are not covered in both the EEA and the Swiss agreements. Concretely, this means extensive institutional changes compared to the EEA. This means that the ESA and the EFTA Court must be dismantled, directives cannot arrive continuously, but expansion of the cooperation must be negotiated. If one follows the limitations set by Switzerland's agreements with the EU at present, services will not be part of the agreements, at least not from the beginning. Provisions for trade with agricultural goods and processed agricultural products will involve less pressure in the direction of further liberalisation, if one assumes that the provisions of the EEA Agreement is replaced by the EFTA Convention's provisions, where it is stated: "*With regard to goods listed in appendix D part III, the member countries are willing to promote a harmonious development of trade as far*

214 EFTA: Priorities in the Swiss EFTA Council Presidency, 1st half of 2012, 15/02/2012
215 Minutes of the Parliament's Europe Committee, 06/02/2012
216 Bank, Dæhlen and Lundeberg: Behind closed doors. A report on Norway's bilateral and regional free trade agreements. The Trade Campaign, 2001, page 8.
217 The Ministry of Foreign Affairs' theme pages on bilateral and regional trade agreements.
218 GATS, article V.5

as their agricultural policies allow."[219] The tariff concessions arising from this agreement today are less problematic than similar ones in the EEA.

Although EFTA's trade agreements with third countries follow a relatively fixed template, there are individual differences. Most of the agreements have a bilateral conflict resolution scheme where a country can take legal action against another country. The parties may choose to use the WTO conflict resolution mechanism, but cannot bring a case up again in one body if it was lost in the other. One of the agreements, the Singapore agreement, differs from this standard and provides for the use of the highly controversial dispute settlement mechanism of the World Bank (ICSID). (ICSID) is controversial because it provides for companies being able to take legal action against countries. This means that where the other agreements provide for legal processes between countries, the Singapore agreement provides for private companies to be able to take legal action against companies.[220] It is the main template for dispute resolution

in the EFTA agreements with third countries and not the exception that should form the basis of a possible EFTA/EU agreement.

It is also worth noting that the EFTA agreements contain different provisions in the fields of services and investments. Since services so far are not included in Switzerland's agreements with the EU, it is natural that the same applies in an EFTA/EU Agreement, at least from the beginning. Similarly, there can be good reasons to be cautious with regard to the investment area.

One aspect that also gives cause for reflection is, of course, whether the Vaduz convention, which in many ways was negotiated in order to mirror that the EFTA countries had signed the EEA (and the Swiss agreements), in a future without the EEA is still to form the basis for cooperation. A possible alternative would have been a cooperation more in line with the original intentions.

11.4.6. How to go from the EEA to an EFTA-EU agreement

Since an EFTA/EU agreement in principle will be a brand new regional agreement, with other contracting parties than today's EEA, one can initiate negotiation of such an agreement without the EEA first being cancelled. It will most likely be evident relatively quickly that the consequence of a new agreement as outlined in this chapter will be that the EEA ceases or must be changed considerably, but there should not be any practical impediments for such an agreement to be negotiated before one eventually decides what to do with the EEA. If one does not obtain a result in such negotiations which is acceptable to all parties, either the EEA will live on in some form (cf. the alternatives *"A slimmer EEA" and "Exploiting flexibility") or one may consider one of the other alternatives outlined in this sub-chapter ("Multilateral trade regulations", "The trade agreement anno 2012*" or "*Bilateral trade and cooperation agreement")*.

If the EU does not show willingness to enter into a process as outlined above, an alternative course of action can be that Norway, alone or together with the other EFTA countries, announces that one intends to cancel the EEA agreement and negotiate a new regional trade agreement with the EU, based on the principles of the Vaduz convention. In such a situation the EU will be likely to see the benefits of a possible interim period where the provisions of the EU-Norway bilateral trade agreement from 1973 with adjustments for changes in the WTO regulations forming the basis for cooperation, being as short as possible. If one ignores the fundamentally entirely different institutional solutions of the EEA and the EFTA convention, the extended EFTA convention mirrors, as previously mentioned, many of the provisions one finds in the main part of the EEA agreement, and thus goes much further than the EU-Norway bilateral trade agreement from 1973 .

The practical consequences of cancelling the EEA agreement and which national processes this must give rise to, are discussed in chapter 11.5.

11.4.7. Is it realistic to imagine such an alternative in the short or long run?

A regional trade agreement between a joint EFTA and the EU should be a very relevant option. The question one should ask after 20 years of the EEA is whether we should continue with a split EFTA in our relationship with the EU for another 20 years. Is the EFTA not small enough as it is, that we should not be split in half when we negotiate with the EU?

The EU has started an evaluation of the EEA and the Swiss agreements, and has indicated that they envisage

219 Agreement on changing the Convention on the establishment of the European Free Trade Association (EFTA) of 21/06/2001, article 11A.

220 Bank, Dæhlen and Lundeberg: Behind closed doors. A report on Norway's bilateral and regional free trade agreements. The Trade Campaign, 2001, page 21.

changes to both the Swiss agreements and the EEA. The pressure so far has been heavier on the Swiss to make changes to their agreements, but also towards Norway extensive changes to the cooperation have been signalled.[221] Norway and Switzerland could benefit from acting coordinated and together in this phase.

11.4.8. Summary

A regional trade agreement between the EFTA countries on the one hand and the EU on the other, can have several advantages. Firstly, a collective EFTA will be negotiating with the EU is a block. The EFTA countries are the EU's third most important trade partner in goods trade and the second largest in finance.[222] The Swiss are known as tough negotiators, who not the least have clear limits to how far they are willing to go in surrendering sovereignty. Both Switzerland and Norway experience pressure from the EU regarding changes to their respective agreements. Together with Iceland, which is also pressured by the EU in its areas, and Liechtenstein, one would benefit from acting together and coordinated. An agreement between EFTA and the EU can also be expanded to more countries, either as a consequence of more countries joining EFTA (which would seem more relevant if EFTA as a block negotiates with the EU), or by individual countries joining the negotiations or the pre-negotiated agreement.

The disadvantage may lie in the fact that Norway and Switzerland may have conflicting interests, both when it comes to the scope of the agreement and the political content in the various subject areas. Switzerland has some other offensive interests (for example in relation to patent rights and chemicals) than Norway, but this has not has not appeared as an insurmountable problem in the EFTA. Norway and Switzerland have, together with Iceland and Liechtenstein, considerable experience in negotiating relatively extensive trade agreements with other countries. If the EFTA is used as a platform for negotiations with the EU, one would be able to build on experience with trade agreements with third countries. It would also be possible to use provisions similar to those used in relations with other countries and international areas with which one wished to interact. On the EFTA's part on could assume that there should be no fundamental differences in how one interacts with the EU countries and other important trade partners for the EFTA.

Many of the provisions in the revised EFTA convention are characterised by the fact that they mirror similar provisions in the main part of the EEA agreement (and similarly for the Swiss agreements). At the same time it appears that the EEA goes further than the EFTA convention in several areas, for example important areas like services and investments. When it comes to services "*each member country can regulate services in their territory, provided that the regulations do not discriminate against individuals or companies from the other member countries in favour of their own individuals or companies*" [223] This is largely the same understanding that one originally had in the EEA, but which has gradually been replaced by an attitude, fuelled by the EC court, that restrictions of the free flow of services in itself is to be attacked. There are similar differences in connection with the provisions on investments.

The conflict resolution mechanisms in the EFTA are between countries, and not also between investors and countries, like we find in the EEA. The EFTA convention does not have any surveillance agency or court which reinterprets the content of the provisions of the agreement/convention, like in the EEA.

The EFTA has signed trade agreements with a number of countries worldwide. Norwegian authorities use the terminology first and second generation agreements, where the former agreements mainly cover goods trade, while the newer agreements also include services, investments, immaterial rights, government procurements, competition policy, etc. The agreements are basically regional, i.e. the EFTA countries sign joint agreements with the countries with which one negotiates. When it comes to trade with agricultural products, the negotiations are done bilaterally. The criticism against the contents of the trade agreements signed by the EFTA countries and the EFTA processes should be taken seriously. However, this is something that it is possible to do something about - far easier in the EFTA with four countries than in the EU with 27.

The EFTA starts negotiations with more and more new countries worldwide. In the first half of 2012 one has ambitions of signing a trade agreement with Bosnia and Herzegovina, complete negotiations with China, make progress in the negotiations with Indonesia, Russia, Belarus and Kazakhstan, and

221 See more on this in chapter 12.
222 Broch, Lave. No to the EU's yearbook 2011 pages 81-82.
223 The revised EFTA convention, art. 16A1b.

start negotiations with Vietnam and several Central American countries.[224] Similarly, the EU conducts negotiations in trade agreements with more and more new countries worldwide. In this perspective it appears reasonably unlikely that the EFTA countries and the EU should be unable to negotiate a regional trade agreement between them.

There are two recurring concepts in the WTO associated with regional trade agreements. The agreements are to give mutual market opening, and they shall comprise basically all trade. These are both flexible terms. Although the services sector is a strongly growing sector internationally, goods trade continues to dominate between the EFTA countries and the EU. It must thus be argued that a regional trade agreement between EFTA and the EU could be established without including the services area. Norway has a bilateral trade agreement with the EU, which is still valid and will enter into force again if the EEA ceases, which primarily deals with goods trade. Switzerland has for its part a set of bilateral agreements with the EU covering a broad range of matters, but which does not include services. These agreements were negotiated after the WTO was established. The second key criterion in Article XXIV of GATT is in this context that one upon establishing free trade areas cannot impede trade by introducing tariffs on existing volumes. This is an important premise which must assumed by all parties in a new agreement.

A new regional trade agreement between the EFTA countries and the EU must be based on a lowest common denominator. This means that such an agreement shall basically not regulate issues which are not covered in both the EEA and the Swiss agreements. Concretely, this means extensive institutional changes compared to the EEA. This means that the ESA and the EFTA Court must be dismantled, directives cannot arrive continuously, but expansion of the cooperation must be negotiated. If one follows the limitations set by Switzerland's agreements with the EU at present, services will not be part of the agreements, at least not from the beginning. Similarly, there can be good reasons to be cautious with regard to the investment area. The provisions for trade with agricultural goods and processed agricultural products will mean less pressure in the direction of further liberalisation if one assumes that the provisions of the EEA agreement are replaced by the provisions of the EFTA convention, where it says that "*With regard to the goods listed in appendix D part III the member countries declare themselves willing to promote a harmonious development of trade as far as their agricultural policies allow.*"[225] The tariff concessions arising from this agreement today are less problematic than the equivalent in the EEA.

Further it is the main template for dispute resolution in the EFTA and in the EFTA agreements with third countries which should form the basis for a possible EFTA/EU agreement, which is dispute resolution between countries, and not also between investors and countries, like in the EEA.

One aspect that also gives cause for reflection is, of course, whether the Vaduz convention, which in many ways was negotiated in order to mirror that the EFTA countries had signed the EEA (and the Swiss agreements), in a future without the EEA is still to form the basis for cooperation. A possible alternative would have been a cooperation more in line with the original intentions.

Since an EFTA/EU agreement in principle will be a brand new regional agreement, with other contracting parties than today's EEA, one can initiate negotiation of such an agreement without the EEA first being cancelled. If one does not obtain a result in such negotiations which is acceptable to all parties, either the EEA will live on in some form (cf. the alternatives "A slimmer EEA" and "Used flexibility") or one may consider one of the other alternatives outlined in this sub-chapter ("Multilateral trade regulations", "The trade agreement anno 2012" or "Bilateral trade and cooperation agreement").

If the EU does not show willingness to enter into a process as outlined above, an alternative course of action can be that Norway, alone or together with the other EFTA countries, announces that one intends to cancel the EEA agreement and negotiate a new regional trade agreement with the EU, based on the principles of the Vaduz convention. In such a situation the EU will be likely to see the benefits of a possible interim period where the provisions of the EU-Norway bilateral trade agreement from 1973 with adjustments

224 EFTA: Priorities in the Swiss EFTA Council Presidency, 1st half of 2012, 15/02/2012

225 Agreement on changing the Convention on the establishment of the European Free Trade Association (EFTA) of 21/06/2001, article 11A.

for changes in the WTO regulations forming the basis for cooperation, being as short as possible – since the EFTA convention covers a much broader cooperation.
A regional trade agreement between a joint EFTA and the EU should be a very relevant option. The question one should ask after 20 years of the EEA is whether we should continue with a split EFTA in our relationship with the EU for another 20 years. Is the EFTA not small enough as it is, that we should not be split in half when we negotiate with the EU?

11.5. How to go from the EEA to an alternative outside the EEA?

The alternatives we discuss in this chapter involve replacing the EEA with another association with the EU, where among other things the institutions and extensive enforcement mechanisms embedded in today's EEA agreement are removed. The question will then be how one can proceed in practice, both in relation to the EU and which national measures must be taken.

11.5.1. Relationship with the EU

The EEA is a regional agreement which can be cancelled with one year's notice. The agreement's rules on what is to happen if one of the parties wishes to withdraw from the partnership are clear and specific. This is regulated in article 127 of the agreement, where it says that *"each contracting party can withdraw from this agreement by giving at least twelve months' written notice to the other contracting parties."*[226] This right is thus absolute, there are no conditions and one does not need to present any justification for why one wishes to withdraw from the agreement. The agreement does not justify any countermeasures or sanctions against a country using this right.

What happens in a situation where Norway has announced that we wish to withdraw from the EEA cooperation is partly about legal regulations and partly about political realities. When the EU itself says that they are very satisfied with the EEA, the logical consequence will be that one will try to minimize the consequences of a Norwegian "withdrawal", and tries to maintain the cooperation as much as possible.

11.5.2. How to remove the EEA provisions from Norwegian legislation?

The withdrawal itself from the EEA happens according to clear rules laid down in the agreement. Termination of the ESA and the EFTA Court, which only happens if all EFTA countries go for a trade agreement without such institutions, should not be difficult to handle, either.

The way the EEA has been implemented in Norway, makes the national process simpler legally speaking than what it could have been. There is no need to change the constitution; the EEA is not mentioned there. The main part of the EEA agreement is embedded in Norwegian legislation through a separate act; the EEA Act. This can be easily removed; this also applies to the primacy provision that applies in relation to other legislation.

National laws which one has had to remove and/or change due to the EEA are also of manageable size. All such changes shall be notified to the ESA from Norway, and reporting shall have been done on a separate form. Of course, removing all traces of EU acts which have led to changes in Norwegian legislation will be a major task. That is not the point. Both the EU countries and Norway are associated with many of the same international agreements, and will because of this need to adopt fairly similar rules in order to fulfil their respective obligations under international law. In some contexts Norway can profit from operating with the same rules as the EU, for example when it comes to goods trade, as long as one is not barred from making stricter requirements in the interest of health, safety and environment.[227]

Many provisions in Norwegian legislation which can be derived from acts from the EU would endure anyway, and Norway would most likely also continue to adopt provisions with content similar to the EU's acts in many areas of Norwegian legislation. One can even envisage that a new instruction to the ministries was sent out, like Gro Harlem Brundtland did on 13 June 1988 in the letter "*Harmonisation of Norwegian laws and regulations to the EC regulations*" *where it was envisaged that Norwegian rules were to be adapted to the EC's regulations as far as possible and desirable, and that specific deviations were possible, but should be justified."* [228]

However, such an instruction must be clear that one may take inspiration from regulations

226 EEA Agreement, Article 127

227 See further on this in chapter 6 and section 10.3.4.6. and 10.3.4.7.
228 Reproduced in NOU 2012:2, page 50

made by the EU in the same way as other sensible agreements internationally, but that pressure in the direction of harmonisation in areas where Norway has better regulations is neither necessary nor practical. Depending on the form of association, there will still be a need for harmonisation, coordination and cooperation. This is what we also have towards other markets, without letting China, India, Russia or the US override the Norwegian policy according to the "EEA model". The pint is thus to regain national freedom of action in order to be able to lead an independent national policy to a greater extent in the future.

11.5.3. The legal and practical consequences in Norway

The basis for all the alternatives discussed in this chapter is that the EEA is replaced with another form of association with the EU, where among other things the institutions and extensive enforcement mechanisms embedded in today's EEA agreement are removed. With regard to the legislative effect one has seen through the ESA and the EFTA court's reinterpretation of the EEA agreement, it is a very important difference in principle of the alternatives we discuss in this chapter and the alternatives which involve building on the EEA in one form or another.

The flexibility in relation to regaining national freedom of action depends on which form of association to the EU is relevant in the future.[229] In all the alternatives we discuss we assume that the WTO regulations form the basis and are complemented with varying degrees of obligations in the various alternatives. In the alternative which involves basing trade with the EU on the principles and rules which lie in the revised EFTA convention (the Vaduz convention), it will, for example, basically not be permitted to discriminate on the basis of nationality. This follows from several provisions

in the convention.[230] A similar principle also applies to the areas where Norway is bound through the WTO agreement and will thus to a greater or lesser extent form the basis for all alternatives discussed in this chapter.

On the other hand, it will be fully possible to make clearer licensing requirements, etc., in order to meet national objectives. An important limitation of the freedom of action in this respect is that such new requirements will apply when new licenses are granted, possibly also in question of renewal. Existing, perpetual rights acquired by individuals and companies in Norway have a constitutional protection against retroactive force.[231] However, this will involve a completely ordinary way to deal with such situations, for example when changes in the political majority or external circumstances require it. This has also been done in Norway's relationship with the EU, as it was done in the reversion case. Here the "watershed" was established upon entry into force of a new law. From that time on, private companies could not obtain a license.[232] One can envisage a similar thing in connection with corporations in agriculture, or in connection with conditions stipulated in the licenses.

229Cf. discussion in chapter 10.1, 10.2. and 10.3.
230 cf. the EFTA convention, art. 14.1., art. 15A.2, art. 16.1., art. 16.5, a.o
231 cf. The Constitution §97: No law must be given retroactive force.
232 See more details on this case in chapter 3.2.2.

Part V:

The way forward

Can Norway's position of power towards the EU be changed? Will the EU be interested in signing a new trade agreement with Norway? Which are the EU's trade political interests in general – and in particular towards Norway?
In this section we also discuss which development traits we can see in the EU and how it could affect Norway. In which direction is the EU headed after the Euro crisis? Will the main tendency still be supranationality – or are there development traits pointing in a different direction?

Developments in the northern areas are one of the conditions affecting Norway's position in relation to the EU. (Photo: Mike Vecchione/NOAA National Marine Fisheries Service)

Chapter 12: Can Norway's position of power be changed?

It is often said that the EU would not be interested in another form of association between the EU and Norway than the EEA agreement or EU membership. In that case it would be an extended and coordinated EEA agreement, as the Council suggests in its report from December 2010 on the relationship between the EU and the EFTA, individual EFTA countries and the EEA.[1] According to this report, the EU wants an agreement that is even more dynamic, general and extensive, with simpler processes for case handling and a faster execution of EU regulations.

Several Norwegian politicians have also commented in the direction of envisaging such a change, for example Svein Roald Hansen, The Labour Party foreign policy spokesman in the Parliament.[2] The EEA Review Committee also points in the direction of coordination of the EEA and other agreements between the EU and Norway.[3] In such a scenario many new case areas could be subject to a supranational surveillance agency and a supranational court, it could be areas such as justice, environment, education, defence and foreign policy. Hansen and others argue that the EU's legislation has become more compound and complex after the Lisbon treaty entered into force and the old division of the EU cooperation into three columns has been removed, and there is thus a need to find new and more flexible ways to interact with the EU.

A central premise in such a way of thinking is that Norway has to adapt to the EU. When the signal from the EU is that they do not wish to renegotiate the EEA, this is communicated in Norway with the meaning that there is absolutely no way the EEA can be renegotiated until the EEA is cancelled. In this chapter we will try to show that the EU is far more pragmatic and focused on practical politics than one may perceive from the Norwegian debate. It is very important that we first focus on the national debate and ask: What serves our national interests best? as stated by the Soria Moria declaration.[4] It is not until one has reached a new, consensual national basis for negotiation with the EU that there is a point to requiring negotiations. A divided and compliant Norway will not be able to prevail in the negotiations; therefore the idea that Norway has to adapt to the EU must be opposed.

12.1. Is the EU not interested in new bilateral agreements?

12.1.1. Which agreements does the EU have with other countries?

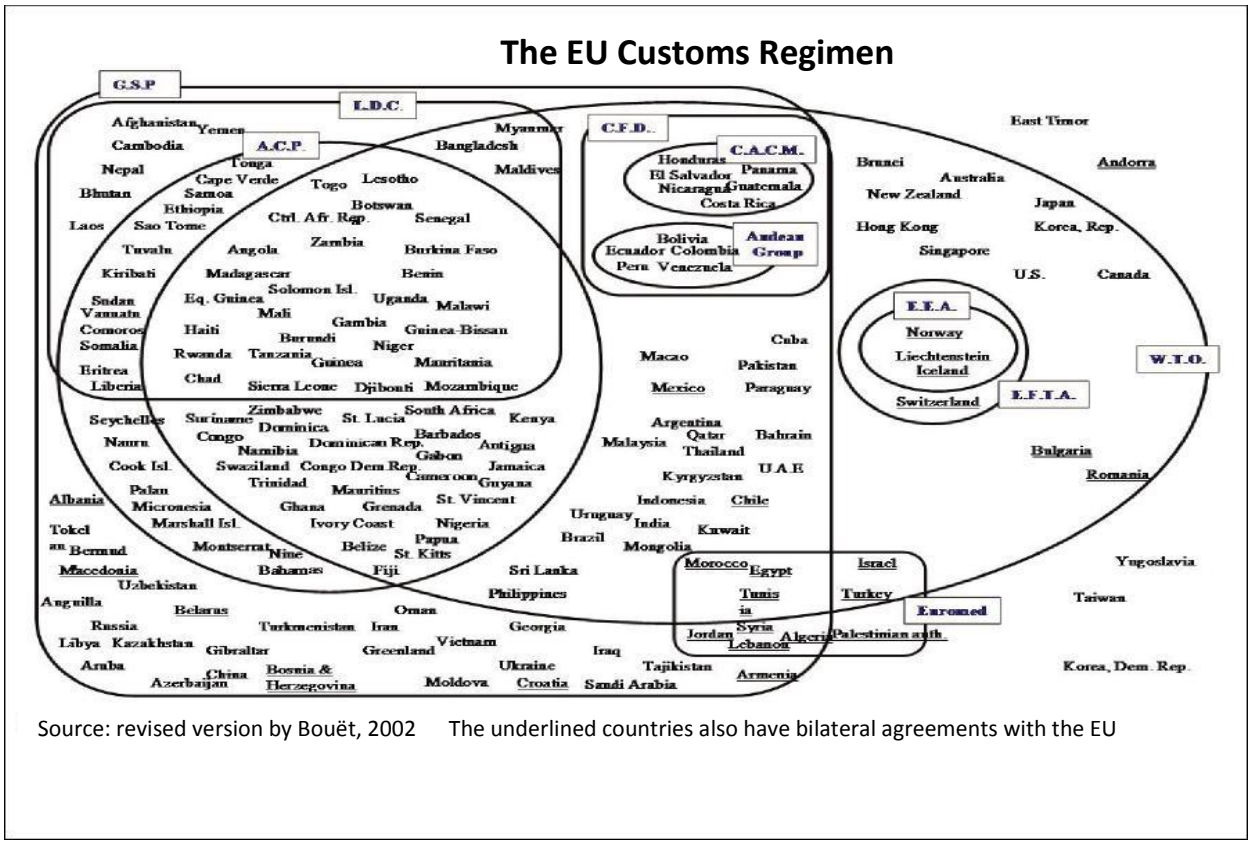
The EU has signed more than 200 trade agreements internationally which are nearly all bilateral, and which are normally not framework agreements for implementation of new regulations, like the EEA agreement.

The EU's ambition for the agreements is, as the EU Commission itself describes it, to open new markets for goods and services, increase possibilities for investments, make trade cheaper by removing all substantial tariff barriers and establish common obligations in areas affecting trade, such as copyrights, competition rules and government procurements.[5]

The EU Commission emphasises that there is no "one-size-fits-all" model for trade agreements.[6] On the contrary, the overview illustrates a complex , multi-faceted and flexible trade system ensuring the EU's access to both resources and markets. Thus the most striking image of the EU in the trade policy area is the pragmatism. The EU secures its own interests through negotiations with other countries internationally. The claim that the EEA puts Norway in a "particularly privileged position" in relation to the EU should be taken with a grain of salt. We are partly part of the EU's inner market, with the advantages and disadvantages this involves, but as the overview of the EU's agreements shows, this is far from the only way one can relate to the EU. We must believe that other countries also know how to assert their own interests, and weigh advantages against disadvantages.[7]

1 The Council (2010): The Council's conclusions on the EU's relationship with the EFTA- countries. 14/12/2010.
2 Parliamentary debate after the Foreign Minister's statement on EU/ EEA cases 22/11/2011.
3 Official Norwegian Report 2-2012 page 870.
4 Soria Moria 2-declaration, chapter 2.

5 The EU Commission: «The EU's trade policy 2011», August 2011, and The Commission's theme pages on trade agreements with third countries.
6 The EU Commission and the Directorate General for Trade: «Bilateral relations The trade agreement». Original quote: «There is no one-size-fits-all model trade agreement...» Taken from their theme pages on the EU's trade cooperation.
7 For a more detailed review of the EU's agreements with other countries, see chapter 11.3.3.



Source: revised version by Bouët, 2002 The underlined countries also have bilateral agreements with the EU

Rendered by Ørebech, Peter, University of Tromsø: The EEA, the fish, the tariff and the alternatives to the EEA. External report for the Alternative Project, page 15

12.1.2 Experiences with a real political EU

Norway has said no to EU membership twice. Both times the EU showed interest in finding arrangements to ensure trade and cooperation with Norway. The 1973 free trade agreement, the EEA agreement, as well as a number of bilateral agreements in various areas after the referendum in 1994, demonstrate this.[8]

The Swiss population said no to the EEA in a referendum in 1992. Then the EU and Switzerland sat down at the drawing board and made a different form of agreement set; 120 single agreements in the areas where both parties were interested in contracting the cooperation. The agreements could be criticized for being both bureaucratic and slow, but in this way Switzerland has avoided both the ESA and the EFTA Court. Disputes are resolved similarly to what is usually done in an international context; through negotiations. The then Swiss President Doris Leuthard summed up the Swiss attitude in the autumn of 2010;

"Our bilateral agreements with the EU give us enough flexibility and are the best suited instrument for anchoring our place in Europe."[9]

Denmark rejected membership in the Economic and Monetary Union (EMU) through a referendum after the Maastricht agreement was adopted in 1992. The EU accepted this. Denmark also got three other exceptions from the political union which was established in 1992; the area of justice, the question of a European citizenship and defence cooperation. The UK also chose to remain outside the EMU. Sweden accepted participation in the EMU in Maastricht, but 56 per cent of the people rejected it in a referendum in 2003. The EU accepted this as well.

Greenland could also be mentioned in this context. They left the EU in 1985 after receiving domestic autonomy from Denmark in 1979. The Danish government then negotiated with all the other EU countries on the conditions for leaving the EU, and it was agreed that Greenland was to be a supranational

8 For an overview of Norway's total of 74 agreements with the EU, see NOU 2012:2, Appendix 1

9 ABC News: "Switzerland does not want the EEA", 19/08/2010.

territory in accordance with the EU's treaty basis, effective from 1 February 1985. Then they got a fishing agreement with the EU. Finally, it is interesting to note that when Iceland recently fought its way up from the financial crisis, they implemented currency restrictions – which are in direct violation with one of the EU's «four freedoms» – free movement of capital. The EU accepted this as well.

12.1.3. Switzerland's current situation

The EU has required that Switzerland accepts an EEA-like agreement with a large degree of supranationality to replace the current bilateral agreement system. On the EU's part it is claimed that bilateralism is expensive and delaying, and one wishes to implement EU legislation also in Switzerland more automatically. There are on-going negotiations about this. Switzerland's position is that the current agreement system safeguards the country's interests in an excellent manner.

Switzerland is the EU's fourth largest trading partner, with a strategic location and strong national interests in among other things agriculture and banking, and with a large degree of internal autonomy in the country's 26 cantons. The country is also characterized by an extensive use of referendums on important questions. E new agreement system with the EU would be such a question which would lead to a new referendum. This gives the Swiss negotiators relatively little flexibility, as there is considerable scepticism towards the EU among the Swiss population, and a strong desire of national control of important areas of society. Not even with its majority of 500 million citizens in 27 countries is the EU able to dictate the tiny Switzerland to accept something the country does not want. It should be an eye-opener for those who argue that Norway has no other options than continued participation in the EEA. [10]

12.1.4. Further on the United Kingdom

Through the British rejection of the new financial covenant, the debate about their relationship with the EU has risen again. There are strong forces working for withdrawal from the EU, and the financial success in EFTA countries, as opposed to the EU, has been emphasized. The EU question is a growing source of pain in British politics, and the EU's development in direction of a federal state will most likely provide stronger encouragement to an anti-EU attitude in the-

10 See more on the situation in Switzerland in chapter 11.3.4. UK. Thus, the question of an alternative solution for the island kingdom may move farther forward on the political agenda – and become relevant also for Norway. In the UK, parts of the EU debate is about the EFTA and/or the EEA as an alternative to the EU membership. 11 There is also some debate on this basis in other countries, for example in Denmark.[12]

12.2. EU's trade policy interests

12.2.1. Liberalisation as a driving force

In the Lisbon treaty it is stated that the purpose of the common trade policy is to contribute to "*gradually abolishing restrictions in international trade and on direct foreign investments and lowering customs barriers and other obstacles*". 13 This liberalisation ideology laid down in the treaty is one of the main problems with the EU, and is the reason why changing governments or individuals in governing bodies cannot lead to changes in policy. Unanimity is required to change treaties, besides there is a much politicized court following up legally on the liberalization policy set out in the treaty very closely.

12.2.2. The Lisbon strategy

This strategy exists in two versions The first version covered the period 2000-2010 and had the ambition that the EU was to become the world's leading economy by 2010. This goal was not reached.

The strategy was then prolonged and revised, and now covers 2010-2020. This could be said to make 2020 the moment of truth for the EU. All environmental goals are focused on 2020, all financial goals are directed towards 2020, and the Lisbon strategy – which is based on knowledge and environment – is to end up in something big in 2020. The basis is still the same faith in the liberalisation policy. Internally in the EU there is full focus on facilitating free flow through cross-border trade with services and a large-scale flexibilisation of the labour market as key factors for success.

11 Poll conducted by YouGov 18.1.12 shows 44 % pro EFTA, while only 21 % want to continue as EU members (Folkebevægelsen mod EU, Denmark).
12 See Lave Broch from Folkebevægelsen i Danmark, article Nationen 21/11/2011.
13 The Lisbon treaty, article 206 (previously article 131 TEF). The Ministry of Foreign Affair's official Norwegian translation.

12.2.3. EU's conflicts with Norway in the WTO

The EU's policy has led to disputes with Norway especially in two cases: The salmon dispute and the sealing issue. In the former case the EU's policy was a follow-up of Scottish salmon exporters' claim that Norway dumped salmon in the EU market. The EU imposed an anti-dumping duty on Norway, but Norway took the case to the WTO and won.[14] The sealing issue is not yet settled in the WTO, where among others Canada has made common cause with Norway. The cases are in themselves examples that the EU conducts a protectionist policy when needed and a more idealistic policy when it does not cost them anything. Thus, the EU is flexible when needed.

12.2.4. EU pursues its own interests

Although there are exceptions in the direction of more opinion-driven idealism in the EU's policy, as well as elements of humanism and human rights focus, the general rule is that the EU's trade policy is interest-driven. In the light of a continually tougher competition for resources and market shares, the EU acts in approximately the same way as the Americans, Asians, Russians and the emerging economies, and seeks to safeguard its own interests. A highly educated population, a large economy and connections with former colonies has been considered a competitive advantage for the EU – an advantage which is largely erased by the initiatives and competitive force of others. China's enormous progress in Africa in an expression of this. The democratic revolutions in Northern Africa can also upset this balance of power, and Turkey has enlisted as an international player with strength.

Many believe that the EU is a "sunset realm" in the long run. In Africa a new self-awareness is emerging, and the many wars in which Europeans have participated as allies of the US, have been draining of forces and resources. However, the EU has not given up competition, but a lot of force has been bound in handling the financial crisis and its consequences.

12.2.5. EU in the Northern regions

There is a growing interest in the EU for the Northern areas and the resources existing there. The area is rich in oil, gas, minerals and fish, resources the EU will need in the future. Besides, the area is becoming more and more attractive both financially and strategically as the ice melting opens new transport corridors. [15]

The EU as an institution has currently no legitimate access to the arctic cooperation, where the three Nordic countries participate together with Norway, Iceland, Russia, Canada and the US. There are no signs that more countries

in the arctic area are to join the EU in the foreseeable future. Still, the EU has developed its own Arctic strategy and is trying to obtain a permanent observer position in the Arctic Council. [16]

In the Northern regions, the EU's and Norway's interests are not necessarily coinciding. [17] The cooperation between the arctic coastal states has resulted in a declaration on the future of the Arctic, the Ilulissat declaration, which commits the parties to ensure a responsible use of resources in the Arctic Ocean.[18] The cooperation is important to ensure sustainable development in the Northern regions, but can be weakened if Norway loses its independent role though an EU membership. Besides, forces within the European Parliament have shown that they are willing to challenge both international law and common practice to safeguard the EU's interests in the Northern regions.[19] According to Associate Professor Kristine Offerdal at the Institute of Defence Studies (IFS) it is especially Svalbard and the fisheries protection zone which stand out as the most relevant problem areas. The Svalbard treaty gives Norway sovereignty over Svalbard, but the fisheries protection zone that Norway established at the archipelago in 1977 is a contentious issue. Norwegian interests are thus under pressure from the EU in the Arctic. On the other hand, Norway's central position in the Northern region and the arctic cooperation can be used offensively in negotiations between Norway and the EU.

12.3. What are EU's interests in Norway?

12.3.1. EU's own statements

Acting member responsible for the EEA in the European Commission Lars-Erik Hollner said in February 2010 that *"I do not believe the EU wants to lose an part of the trade with Norway without the EEA*".[20] This is a very important basis, which documents-

a practical political pragmatism. It is obvious that the EU

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14 See more details on this case in 11.1.7.3.

15 NRK Troms og Finnmark: The Gold Route through the Arctic, 06/04/2008
16 ABC News 05/05/2009.
17 Ruud, Tore: The EU's interests in the Arctic, in the geopolitics of the Northern regions: Norway, the EU and the Arctic. VETT no. 1, 2011.
18 The Ilulissat declaration: Conference for the Arctic. Ilulissat, Greenland, 27-29/05/2008.
19 E24.no: Støre rejects Svlabard initiative, 25/10/2011
20 ABC News, 11/02/2010.

belies that the EEA agreement has served the EU very well, and would prefer that it is continued, or even expanded. The question is thus not what the EU primarily wants, but what Norwegian parties, governments and the Parliament desire and want.

12.3. 2.EU's alternative for changing the EEA

The Council's evaluation of among other things the EEA, the EFTA and Norway of 10/12/2010 is the latest documented expression of the EU's interests and wishes in its cooperation with Norway. There the EU expresses that they are very satisfied with the EEA, but that they would like a more comprehensive agreement, which is handled more automatically than the current agreement.

On the EU's part it is emphasised that the Official Norwegian Report on the EEA from the EEA Review Committee should lead to a government white paper, and it has been said that the EU will present its views in that context.[21] However, there is no doubt that on the EU's part they do not desire a less dynamic agreement where Norway has looser ties to the inner market and the implementation of EU legislation is less "automated". The fact that such an alternative is not desired on the EU's part does not mean that it is not attainable.

12.3.3. Oil and gas

The EU is, and will continue to be for a long time, dependent on Norwegian oil and gas. There is absolutely no doubt that the EU is, and will be even more, dependent on importing Norwegian oil and especially gas. Regardless of environmental considerations the EU's energy needs will increase, and the need to import even more. The EU considers Norway a reliable and closely allied energy supplier, as opposed to for example Russia, which is one of the EU's main suppliers of energy.

It could be argued that this is a mutual dependency which does not give Norway a particularly strong hand in a negotiation situation. Still, Norway has many future choices, for example how much energy we want to extract on the Norwegian continental shelf, where and if new pipelines are to be made and in which markets we wish to sell. The EU is in the buyer's position; this gives Norway considerable options in negotiations.

As the Minister of Foreign Affairs Jonas Gahr Støre pointed out in his exposition to the Parliament in November 2011: "*We should note that despite more energy efficiency and lower total consumption of fossil energy in the EU, the Commission assumes that the need for import will continue to increase. The Commission mentions Norway as important to the EU's energy security and as a partner with potential for a strengthened cooperation. [...] I believe that Norway as a stable and long-term supplier of gas contributes in a time of much instability in the European markets [...] It is my experience that when we have something to contribute, they will listen to us. Norway's competence is asked for in many areas – be it in energy, the maritime sector, the Nordic region, fisheries, the development in Sudan or the Middle East*."[22] Here Støre presents a practical political approach which is an important premise for the debate on alternatives to the current EEA agreement. With an agreement other than the current EEA agreement, where Norway has established a stronger national position for its trade policy and its oil and energy policy, Norway's position can be strengthened considerably.

12.3.4. Fish

The EU is a large and important market for Norwegian fish. The export of fish to the EU has increased considerably over time, but the development goes towards other markets increasing more. The EU needs fish both as raw material and as a finished product, thus it is important to both industry and consumers in the EU. [23] In the salmon dispute we saw tendencies to Norway having allies within the EU when we chose to take the case to the WTO. The fish trade will be an important bargaining chip for Norway if the EEA agreement is to be changed or re-negotiated.

12.3.5. Minerals and metals

On a global basis minerals and metals are raw materials which are about to become scarce, and are thus particularly in demand. The EU's need for minerals is illustrated by Managing Director Elisabeth Gammelsæter in the Norwegian Mining and Quarrying Industries: "*Europe uses 20 per cent of the world's minerals, but has only 3 per cent of the mineral deposits*." 24 In June 2010 the EU Commission published a report on critical raw materials for the Union - besides energy. This report shows that Norway is already an important exporter of several of the raw materials the EU needs. This applies especially to limestone, where the Union has an import need of over 50 per cent. 92 per cent of the import originated in Norway in 2006.[25] Aluminium (11 per cent market share, import need for the EU 50 per cent)[26]

21 See more on the EU's initiative in chapter 9.

22 Taken from Exposition on European policy in the Parliament, 17/11/2011

23 See chapters 7.3 and 7.4.

24 ABC News, 08/09/2010.

and titanium (26 per cent market share, import need for the EU 100 per cent)[27] are also emphasised in the report.

There are interesting deposits of minerals and metals in many places in Norway, and the prices in the world market causes many mines to be considered opened or reopened. In Northern Norway the mineral deposits are estimated to be worth about 1,500 billion NOK. Only in South-Varanger, Rana, Kvalsund and Brønnøy there are documented deposits worth 260 billion NOK. According to the British periodical Monocle, the Barents region is one of the most promising areas in the world for commercial activities.[28] Secretary General of the Confederation of Trade Unions Roar Flåthen has on this basis expressed a desire for a government mining company.[29]

With its raw material initiative from 2008 the EU put Europe's supply security clearly on the agenda. One of the main strategies is to reduce Europe's dependency on import of ores and minerals. The EU has pointed out the Barents region as one of the most interesting and prospective areas in this context.[30] In this area we see again how the EU will have a strong interest in interacting and making agreements with Norway – preferably before others do – while Norway comes into a favourable strategic situation.

12.3.6. Norwegian purchasing power and trade statistics

The EU has a trade surplus with Norway on mainland goods, i.e. besides oil and gas.[31] This is probably a contributing factor to the EU's statements that they wish to maintain trade no matter what happens to the EEA.[32] Norwegian economy is solid and there is considerable purchasing power in the Norwegian population and in Norwegian industry and business. These are factors that do not disappear even if Norway should wish to change the EEA or negotiate another agreement.

25 The EU Commission: Critical raw materials for the EU Report from the ad-hoc workgroup for the definition of critical raw materials. 30/07/2010 page 79.
26 Ibid, page 77.
27 Ibid, page 81.
28 The Northern Area Committee: The EU looks towards the North. The article is published on their website, 16/03/2011
29 ABC News, 01/11/2011.
30 GeoNor: Industrial value creation based on geological resources in the Northern Areas. Report 31/12/2010 page 5.
31 See chapter 7.8.
32 See chapter 12.3.1. 12.3.7. Mutual desire for good relations

All alternatives discussed in this report are based on Norway continuing to trade and collaborate with the EU. Some claim that the alternative to the EEA is isolation, this is directly misleading. EU countries like the UK, Sweden, Denmark and Germany are important trade partners for Norway. Also, no one has called for us not to continue to collaborate with the EU in areas such as environment, culture and education. Everything should therefore be set for continued good relations between the EU and Norway, even if Norway would want an agreement with greater national freedom of action in important areas of society.

12.3.8. The EU as a rational player

In Norwegian EU debate it is often said that the EU will sanction Norway if we go against proposals or requirements from the EU. This is also said in connection with the use of legitimate and contractual rights within the EEA agreement, such as the right to reservation. Ironically, it is the EU adherents who are most afraid of the EU's sanctions, while the EU critics reassure them pointing out that the EU must be expected to act wisely and rationally and not least know how to safeguard their own interests in relations with Norway. Then sensible talks and negotiations would be the natural agenda. This is also the overall experience in Norway's relations with the EU.[33]

12.3.9. Norway safeguarding its own vital national interests

The normal situation in all international relations is that various countries try to safeguard their own interests. However, negotiations are, of course, about giving and taking. The presentation in this report shows that Norway keeps giving more, and gets less and less in return for the EEA agreement. This is not just about economics. The most serious issue is how the EEA changes Norway in a way that is out of Norwegian political control, and challenges very important parts of Norwegian society, such as labour, regional policy and alcohol policy.

With a different agreement this imbalance could be corrected. It is in Norway's interest to trade and collaborate with the EU. It is not in Norway's interest to let the EU run Norwegian politics. Neither is it in line with the two

33 Read more in chapter 12.1.2.

referendums in 1972 and 1994, nor with current polls. There is a strong desire among the people that Norwegian politicians lead the way and assume responsibility for maintaining Norwegian interests towards the EU in a different way than what is currently being done.

12.4. Summary and conclusions

Experience shows that the EU conducts a practical interest policy with considerable pragmatism. There are many reasons why the EU would want to have an agreement with Norway, with or without the EEA. The EEA agreement is preferred, but there is no reason to believe that the EU would act unwisely and against its own interests if Norway should gather around a basis for negotiation for another agreement than today's EEA. However, negotiations must start in Norway. Politicians and population must gather around a new platform which safeguards national interests to a much larger extent. Not until then we can enter into negotiations with the EU.

Chapter 13: EU's inner development, what is happening and how does it affect the EEA?

13.1. EU's development in light of the Euro crisis

13.1.1. A rapidly changing EU

The EU is changing rapidly on several levels. All transformation processes will carry conflicts and insecurities with them. Trying to analyse the EU in March 2012 means trying to understand a profound and comprehensive transformation process. It will have some sources of error. When we still make an attempt, it is in this context because the EU's transformation process in turn could have important consequences for Norway's relation to the EU we see developing.

It is important that the entire political Norway takes an interest in and analyses this development. Describing the EU as a cooperation project between equal states or talking about the power and influence of small states in the EU, has come to appear as little realistic during the course of the financial crisis. Germany's and France's obvious grip on the wheel and Germany's superior financial position in the EU must be contributing factors to a debate on the future of the EU based on the EU's actual development in the past few years, even in Norway.

13.1.2. Main tendency: Increased supranationality

It is mainly in connection with economics that it is a broad consensus centrally in the EU on a uniform behaviour, in order to win market shares globally and to defend one's own position in Europe. With the Lisbon treaty there has also been established a common supranational Foreign Service, and there are constant advances from the EU to ensure a supranational management of the strategically important energy policy. Some advances have also been made with regard to supranationalising the foremost expression of the sovereignty of the nation, the military. There is still a long way to go in several of these areas.

The Lisbon treaty, the EU's handling of the financial crisis, the more and more intense global competition for raw materials and markets, as well as the EU's demographic development, are changing the EU. Not in principle – the EU has been a system based on market liberal principles since the Treaty of Rome. But where the Lisbon treaty of 2009 could be said to aim to create a gradual development towards supranationality, the financial crisis has challenged the EU and especially the Euro zone, in such a fundamental way that the EU now must be said to be on its way to a political union. This is discussed openly in for example Germany. In an interview which Angela Merkel gave to six European newspapers in January 2012,[34] Merkel claims that power will be transferred to an increasing extent to the EU level, and that she envisages a longer process leading to the EU Commission functioning as the EU's government, The Council of Europe is to function as a kind of second chamber, and that the EU Parliament is strengthened.

Through the handling of the financial crisis one has taken many steps in this direction. Through increased budget control with individual countries' national budgets, possibilities for the EU to sanction disobedient countries politically and financially, as well as establishing a member of new supranational mechanisms, such as "the European semester", the transfer of power from nations to the EU has taken a quantum leap. The extended growth and stability pact (Euro Plus Pact)[35] involves a supranational iron grip on wage determination, pensions, flexibilisation of the labour market and dismantling of welfare schemes. This is now being implemented in one EU country after the other, despite enormous protests from ordinary citizens. Former president of the Euro-LO, John Monks, described the pact as; "*This is not a pact for competitiveness. This is a perverse pact for lower living standards, greater differences and worse working conditions*."[36]

For social democratic EU adherents it must be a serious paradox that the extreme requirements for limited national debt and budget deficit implemented by the EU will make it very difficult, if not impossible, to conduct counter-cyclical policy. The successful Norwegian experiences from 2008-2009, when such measures came into use quickly and

34 The Europe blog, 25/01/2012.
35 The EU Commission: The EU's "Six-Pack" for financial management becomes effective. Press release, 12/12/2011
36 Quote from Asbjørn Wahl, For the welfare state, 29/04/2011.

effectively, will in practice violate the EU's adopted policy.

This does not affect Norway formally as long as we are not in the EU or the Euro zone. However, it may require a conscious political attitude in Norway if we wish to conduct a substantially different policy than the EU in the future.

13.1.3. Discord between the EU and the UK

The UK has given notice that they do not wish to join the new growth and stability pact, which is about distribution of burdens and supranational budget control and punitive mechanisms. The Czech Republic has not signed, either. Ireland is moving towards a new national referendum. The UK is not part of the Euro zone, and is thus not part of the inner circles when parts of the EU's challenges with the crises are discussed. Still, the UK is such a large country in the EU context that it attracts attention when the country chooses to remain on the outside.

The political consequences of this are unclear,[37] but there are strong tendencies in the UK to want an alternative other than the EU membership. With the EU developing towards a stronger and stronger supranational control and force, it is likely that the discord with the UK will be strengthened rather than weakened. "The British example" may also have a contagious effect on other EU countries.

13.1.4. The situation of the crisis stricken EU countries

With regard to national debt and budget deficit, Portugal, Ireland, Italy, Greece and Spain are the core countries of the European financial crisis. However, they are not the only European countries having financial problems. Also Latvia, Lithuania, Hungary and Romania struggle with debts and deficits, even France, the UK, Denmark and the Netherlands are threatened by the rating agencies' downward adjustments and/or budget deficits. At the same time unemployment, poverty and social differences in the EU increase at an alarming rate,[38] and the scepticism towards the EU increases in a number of countries.

Social rebellion is expressed in the streets of Athens, Madrid, Barcelona and a number of other large European cities. So far the popular resistance in January 2011:). 100 ABC News, 01/03/2012. against the EU is being ignored. The belief that the so-called rescue packages will benefit ordinary people, is low They are considered by more and more people as rescue packages primarily for banks and other financial institutions. At the same time the EU's, the IMF's and the European Central Bank's requirements to Greece in connection with the rescue packages caused many Greeks to feel that they have been placed under administration by the EU and Germany. Some refer to Greece as an EU colony.[39] In a number of countries we see that many young people emigrate or at least apply for work in better-off countries. This is very desirable according to the EU's economic ideas. It means that "free flow of labour" is being realised, that the work force is more flexible, and that there is a labour reserve contributing to keep wages down.

13.1.5. Internal conflicts in a number of countries

The pressure from the EU and the German-French alliance in the EU opens for political conflicts in a number of countries. Both Denmark and Swede were in strong doubt as to whether to accept the Euro pact, especially since they are not in the EMU. Consideration for domestic opinion matters, of course, in Sweden 88 per cent are now opposed to joining the Euro cooperation.

In Denmark support for the Social Democratic Party has dropped to a record low while Denmark holds the EU presidency. Conservative youth parties have turned and become EU opponents because of the overrun of national autonomy. In Netherland there is now a strong polarisation in politics; the Socialist Party has a historically high support while the government is conducting a clearly xenophobic policy under the influence of the extreme right.

The most important conflict developing is between the political elites following EU directions, and common people, who experience that their lives are becoming increasingly difficult. A not unwarranted concern for increased right-wing extremism as a result of the recession, like in the 1930's Europe, is growing. However, it is conspicuous that the opposite is happening in Greece. Nearly 50 per cent of voters have moved to the left of the Social Democrats, while the Social Democrats (PASOK) are falling towards 10 per cent in polls.[40] Rebellion in the streets of European cities is also

37 See discussion in chapter 12.

38 Unemployment reached 10.7 % for the Euro zone in January 2012 (compared to 10.0

39 Klassekampen, 21/02/2012 and 22/02/2012.

40 Klassekampen 18/02/2012.

more left-wing than right-wing, but on the other hand we see that conservative parties win the elections in a number of countries. The only exception in 2011 was Denmark.

13.1.6. Will the Euro survive?

The Euro cooperation has been criticised for being a high-risk political prestige project. At present it is difficult to tell whether the Euro will survive, but for the time being a lot is put into rescuing it and the accompanying cooperation. One of the main reasons why so much is being done to save the Greek economy is the danger of a domino effect if the Greek economy collapses. Portugal is in a particularly week position, but there is greater worry that the large economies of Italy and Spain are to collapse. The unrest in the Euro zone has decreased somewhat in the first quarter of 2012, but many economists believe that it is only a matter of time before Greece is bankrupt. The EU, and especially the Euro project, could be facing what may be its greatest challenge.

13.1.7. Which EU can we have - and what will the consequences be for Norway?

The EU has an express goal of being a collective unit both economically and politically, and has been considered a necessary instrument for Europe to be able to assert itself in the global competition. However, it has proved to be difficult to create such a unit. The EU is already divided today, in the sense that only 17 member countries are part of the Euro zone, while 10 remain outside (11 including Croatia). The Euro pact has also created a new division, and the Euro cooperation is facing considerable challenges and risks cracking if the financial problems for example in Greece get an imminent resolution.

On this basis the idea of an EU with two speeds, or a division between a core EU and an outer EU is re-launched. Such a situation, where some member countries have a more peripheral association with the EU, is hardly desirable from the EU's point of view, but it may become a necessary adaptation of the union. At the same time the EU's treaty basis opens for groups of countries to go deeper in the integration process than the joint EU. It would be against the EU's basic attitude if the integration process is reversed by individual countries regaining national freedom of action, but even here the EU has turned to practical politics when the situation has required it. [41]

From a Norwegian point of view, an EU with several speeds, or with varying degrees of supranational management, could offer more opportunities. Norway's financial relationship with the EU is mostly associated with countries like the UK, Sweden, Denmark and Germany, and partly France and Poland, but not so much the EU as a whole. A multilateral Europe could therefore be said to be as much in Norway's interest as a unified EU, especially considering the increasing significance of the Northern region both strategically and with regard to energy supplies and other central raw materials.[42] Such a perspective will also be able to give renewed interest and relevance to increased Nordic cooperation.

13.2. A contradictory trend: The desire for national freedom of action

While the absolute main trend in the EU is increased supranationality in one area after the other, there are certain tendencies towards the opposite, or at least an expressed opposition to EU government in certain fields of interest.

13.1.2. Greater freedom of action with government procurements?

An area which has been subject to some debate internally in the EU is the regulation requiring all government tenders over a certain size are to be announced throughout the EU/EEA area. The Council of European Municipalities and Regions (CEMR) adopted in 2009 a charter on local and regional services promoting a powerful limitation as to which assignments should call for tenders at EU level.[43] So far the EU has not been very willing to surrender authority over this area, and a recently submitted proposal for revision of the tendering principles for the public sector was met with disappointment. However, it is interesting that one here sees a transnational mobilisation in the municipal sector, wanting decentralisation rather than centralisation of power in the EU and the EEA.

13.2.2. Renationalisation of agricultural policy?

The common agricultural policy (CAP) has always been central in EU community policy. It has also been controversial, especially with regard to with the

41 See more on this in chapters 12.1. as well as below in chapter 13.2.
42 Read more on this in chapter 13.2.
43 See detailed elaboration in chapter 10.3.4.3.

vast monetary transfers within the EU funding the CAP. Now it is under revision, and in this respect voices have been raised for a certain renationalisation of the CAP. Among others, Germany and France have in a joint proposal in the autumn of 2010 called for a "*Reformed CAP allowing member countries more flexibility in designing national support schemes as long as it does not affect the inner market of the EU and the WTO obligations are respected*." [44] Extensive changes to the CAP seem unlikely, but one could imagine a less extensive and expensive CAP, especially in light of the financial crisis and the strained national budgets in many countries. The UK has been one of the strongest proponents for this within the EU.[45]

13.2.3. Conflicts of interest in foreign policy

Besides the financial, defence and energy policies, it is in the foreign policy that a country's interests are really addressed to the outside world. For a long time the EU has had a foreign policy spokesman associated with the EU Commission, with strongly limited powers. On the implementation of the Lisbon treaty, however, a joint Foreign Service was established, led by British Baroness Catherine Ashton. The establishment has been marked by power struggles and conflicts of interest. Asthon has been continuously criticized for representing the EU too weakly internationally, while the election of this relatively unknown British politician was perceived as a sign that France, the UK and Germany wanted to maintain their positions on foreign policy issues.

The EU now has an observer status with speaking rights in the UN, and to some extent one may say that the EU co-ordinates itself in the world organisation, but this is not unambiguous. A latent inner conflict in the EU would be the relationship with the US, where especially the UK and some Eastern European EU countries want the closest possible relationship to the superpower in the West, while others want a more independent EU policy. We see that the EU countries act partly independently from each other and of the EU when it comes to difficult issues like war and international conflicts. The relationship with Russia is also an issue which makes joint EU behaviour more challenging, not least in relation to the dependency on Russian energy supplies.

13.2.4. Energy policy

The access to oil and gas is considered a very important strategic interest. This is demonstrated at all times in international politics, and is the source of conflicts and war, as well as alliances based on a varying degree of mutuality. The EU will have a strong need to secure import of both gas and oil for decades ahead, even though there has been focus on transitioning to alternative and renewable energy sources. The relationship between the EU and Norway is of great significance to both parties in this respect. Norway is an important supplier of gas to the EU, and also partly of oil, not least with regard to security of supply. The EU considers Norway a loyal trade and cooperation partner, and strategically Norway balances the EU's energy import in relation to the union's dependency on Russia. New findings on the Norwegian continental shelf as well as the development in the Northern region makes Norway interesting to the EU for a much longer time than previously estimated. To Norway this relationship represents a strength. As supplier of a coveted commodity, Norway will have a strong position in the market.

13.2.5. Options for Norwegian alliances?

As a small country with major powers related to energy, location and resources, it should be in Norway's interest to balance the relationship with the superpowers, including the EU. The fact that we are geographically located in Europe should in this context be of minor importance. With an ice free North West passage in parts of the year, Russia, the US, China and Japan would be just as natural trade and cooperation partners as the EU.

Norway is connected to the US through NATO, an alliance which has lost some of its significance as a defence alliance in the traditional sense. NATO has in turn established a real "out of area" strategy with warfare in many countries outside the US and Europe, in an offensive approach in order to defend their own interests, not the least when it comes to energy supplies. Norway, with its close ties to the US and need to follow up on UN decisions, followed up with military efforts in both Afghanistan and in Libya, while we distanced ourselves from the invasion in Iraq. The relationship with the US must still be characterised as good. Norway has also been focusing on cooperation with Russia,

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44 The Agricultural Evaluation Office: CAP post 2013. Reform of the Common Agricultural Policy in the EU. Memo 3-2010, page 6.

45 The Agricultural Evaluation Office: CAP post 2013. Reform of the Common Agricultural Policy in the EU. Memo 3-2010, page 13.

with the delimitation agreement as the preliminary pinnacle of the cooperation.
Norway can and should pursue a multi-faceted strategy in order to safeguard its own interests in foreign, defence and energy policy. The main approach should be to safeguard one's own interests in a cooperation which involves weakening of national sovereignty as little as possible.

13.3. Conflict issues lining up

Is the relationship between the EU and Norway characterised by cooperation or conflict? It is easy to do as the EEA Review Committee, counting the number of implemented acts, counting the number of cooperation agreements and establish that the power of veto in the EEA has not yet been used. The conclusion will be that the cooperation is excellent, and that conflict is absent. This is a desired situation from the EU's point of view, and also from large parts of the Norwegian political environment.

Seeing the case from a slightly different angle, one gets a somewhat different picture. Firstly, the opposition to EU membership is greater than ever. between 75 and 80 per cent say no to EU membership today, while those in favour have about 15 per cent support. Other polls show that a clear majority believe that the EU has too much influence in Norway.[46] This is supported by polls showing at an even clearer majority prefer a trade agreement over the EEA agreement.[47]

Thus it could seem as if there is a clear gap between how the official Norway views the relationship with the EU, and how most people consider it. The scepticism towards the EU and the EEA is considerably greater among the inhabitants than among the political and financial elite.

A statement which could be covering for this relationship is the question of why the EU should decide so much in Norway when we have rejected the membership itself twice in referendums and the people are even more against a EU membership than before? One thing is the opposition against membership. The basis for the EEA scepticism can also be based in people's experiences with specific effects of this most extensive and intrusive agreement Norway has ever signed with another party.

During the past few years we have been through the dispute on the Services Directive, which mobilised large parts of the trade union movement to strong resistance. The resistance culminated with a resolution from the 2009 Trade Unions Congress to the majority of the Parliament, which right before adopted the directive against the votes of Socialist Left Partyand the Centre Party. Then there was the dispute over the Data Retention Directive, which among other things made the Progress Party also decided to advocate the use of the power of veto in the EEA, and directly afterwards the dispute over the EU's third Postal Directive, leading to a veto decision at the Labour Party's national congress in the spring of 2011. We are currently in the middle of a dispute over the Temporary Employment Directive, where there is division between the trade union movement, SV, the Centre Party, AUF as well as parts of the Labour Party on the one hand, and the Labour Party leaders on the other. The EU directives are thus leading to strong differences in Norwegian politics, even within the government and between the conservative parties.

13.3.1 Current disputes

Additional pieces of legislation or legal conflicts creating a basis for conflict between the EU and Norway, and within Norway, are on the way:

- *The Tendering Regulation* for the public sector, appealed by the ESA for violation of EU competition legislation. The government uses ILO 94 as basis, and wishes to make requirements to those who submit tenders to the public sector, which the ESA believes must change.[48] This could be a case where the government must decide if it wants to oppose the ESA, and thus end up in the EFTA Court. Much is at stake here, especially for the trade union movement and in relation to the fundamental question of whether EU legislation is above the ILO.
- *The Bank Deposit Guarantee Directive.* This is an unresolved dispute, where Norwegian ministers of finance over the years have worked to influence the EU into accepting that Norway keeps the guaranteed limit of 2 million NOK, against the EU's proposed limit of 800,000 NOK. Sigbjørn Johnsen has made it clear that this is an extremely important case for Norway and has suggested that Norway will reserve itself if it is not resolved.[49]
- *The AMT Directive* opens for advertising alcohol in directed transmissions from abroad. This violates a part of Norwegian politics which has broad support. The Labour Party wants to implement the directive, and

46 Nationen's district survey 05/02/2012: More than 40 % believe the EU has clearly too much power in Norway. Only 17 % disagree with the statement.
47 Two polls from Sentio A/S November 2011 and January 2012. show that 52 % and 46 % respectively prefer a trade agreement over the EEA. Those who prefer the EEA vary between 19 and 24 %.

48 See more on this case in chapter 6.4.1.
49 Nationen 03/03/2011. See also chapter 3.3.14.the Minister of Foreign Affairs claims that the Norwegian alcohol

prohibition will remain. This is not necessarily true. The Christian Democratic Party has talked about reservation, and pointed out that for them the national restrictive alcohol policy has been a condition for their support to the EEA.50

- The General Application Institute, which is to ensure Norwegian wages for foreign workers, has come under pressure after a statement from the EFTA Court undermining the institute in major respects, such as compensation for travel, room and board, and perhaps the 20% external allowance as well. The case is to be settled in a Norwegian court, but experience has shown that Norwegian courts relate to statements and rulings from EU legislators and courts.51
- Attacks on Norwegian collective agreements. A recently pronounced judgment in the Supreme Court overrules the tariff determined age limits of Norwegian pilots, based on EU provisions on the same. This has provoked strong reactions.52
- Hurtigruta goes to the EFTA Court on the basis of claims from the ESA of competition distorting government subsidies. If the ESA prevails, Hurtigruta A/S must pay approximately 180 million NOK back to the government. Many consider this meaningless doctrinarism.
- The Consumer Directive may threaten the rights of Norwegian consumers, as the EU regulations are far less extensive for example on the right to complain and warranty period than the Norwegian regulations.
- Differentiated payroll tax is to be re-negotiated by 2012, after Norway received partial approval when the government led by then Minister of Finance Kristin Halvorsen and Minister of Local Government and Regional Development Åslaug Haga implemented the scheme during the Stoltenberg I period (2005-09).53
- Directive on cross-border patient services is to be implemented by 2013. The government is currently working on the directive, and it is going out for consultation. A number of critical voices have been raised against such a far-reaching intervention in Norwegian health policy, economy and priorities, and in fear of further commercialisation and privatisation of health services. Many other objections have also been raised, for example by patient organisations and interest groups.[54]
- EU security regulations in connection with oil and gas at sea. Here a joint Norwegian environment, including industry, the trade union movement and the Ministry of Petroleum and Energy gone against the EU regulations, arguing that the regulations do not suit Norwegian reality and risk setting the HSE work on the Norwegian continental shelf far back.[55]
- The Postal Directive is still unresolved in relation to the government's reservation resolution. There are on-going discussions between the EU and Norway, with uncertain outcome.
- There is new uncertainty with regard to the Data Retention Directive. Partly because Iceland wants more time to evaluate it, partly because one has not yet managed to calculate the costs of retaining such enormous amounts of data. The EU is also working on a revision of the directive – a revision which may challenge especially the Conservatives' decision on minimum solutions for reasons of privacy. The Labour Party is depending on the Conservatives in order to have EU legislation implemented in this area.[56]

As we can see, the potential for conflict related to EU legislation and ESA/EFTA treatment of EU legislation is considerable. There are also sources of conflict in even more cases than those mentioned here. It underlines the need to see if there are alternatives which can reduce the potential for conflict and create a better and tidier situation which safeguards Norwegian interests in the relations between the EU and Norway in a better way.

13.4. Summary and conclusions

The EU's development towards stronger supranational management and reduced national sovereignty challenges Norway, where the population rejects the idea of Norwegian membership in the EU more strongly than ever. Scepticism towards the EEA has also been more clearly expressed than ever, and the disputes between the EU and Norway are now many. In this situation, where the EU requires un-Norwegian adaptation in more and more areas, it seems wise of Norway to consider interaction and cooperation primarily in the light of vital national interests. In that respect there is a need to discuss alternatives to the EEA agreement.

50 Dagfinn Høybråten in 22/11/2011. See also chapter 3.2.4.
51 See also chapters 3.3.10 and 3.2.12.
52 See also chapter 4.5.5.
53 See also chapter 3.2.5.
54 See No to the EU's fact sheet no. 3-2011
55 See also chapter 4.3.2.
56 See also chapter 7.9.6.

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