

The EFTA Court and the Principle of State Liability: Protecting the Jewel in the Crown

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I. INTRODUCTION—THE JEWEL IN THE EFTA COURT’S CROWN

IN THE NOW 20-year-long history of the EFTA Court, 10 December 1998 stands out as a defining moment. On this day, the Court decided one of the most controversial questions of EEA law with the following conclusion in Case E-9/97 *Erla María Sveinbjörnsdóttir v Iceland*:

It is a principle of the EEA Agreement that the Contracting Parties are obliged to provide for compensation for loss and damage caused to individuals by breaches of the obligations under the EEA Agreement for which the EFTA States can be held responsible.¹

Given the lack of any express provision establishing a basis for State liability in the Agreement, and the highly sensitive character of the question to the dualist EFTA States, the decision was at the time rightly characterised as ‘fairly daring’.² This was particularly so because the finding was opposed not only by the governments of Iceland and Norway, but also by the Swedish government and—perhaps somewhat unexpectedly—by the European Commission. Apart from Ms Sveinbjörnsdóttir herself, actually the only participant to the proceedings which argued in favour of an unwritten principle of State liability was the EFTA Surveillance Authority.

For the dualist EFTA States, State liability for loss and damage caused by incorrect implementation of EEA law obligations was a bitter pill. At the 35th Nordic Law Conference in Oslo the following year, several commentators criticised *Sveinbjörnsdóttir*.³ The Norwegian judge who was the President of the EFTA Court at the time came very close to an extrajudicial dissent by stating that he

¹ Case E-9/97 *Erla María Sveinbjörnsdóttir v Iceland* [1998] EFTA Ct Rep 95 (para 62).

² See the editorial ‘European Economic Area and European Community: Homogeneity of legal orders?’ (1999) 36 *Common Market Law Review* 697–702.

³ See several of the contributions referred to in *Forhandlingene ved Det 35 nordiske juristmøtet* [Proceedings of the 35th Nordic Law Conference], Oslo 1999, pp 977–1011.

found it difficult to function as a judge in a court where no dissenting opinions are allowed and by declaring parts of the Court's reasoning in *Sveinbjörnsdóttir* an act *ultra vires*.⁴ Only about a month after the EFTA Court had held State liability to be a principle of EEA law, Advocate General Cosmas concluded to the contrary in his Opinion in *Andersson*.⁵ At least in Norway, the academic literature was split—whereas some welcomed or at least accepted the decision,⁶ others criticised it to the extent that they questioned whether the stand of the EFTA Court could be acknowledged as an authoritative interpretation of EEA law.⁷

When the question of EEA State liability arose anew before the EFTA Court in *Karlsson* in 2002, the Norwegian government seized the opportunity and sought a rematch of *Sveinbjörnsdóttir*.⁸ By then, however, the principle of State liability for breach of EEA law had not only been *de facto* accepted by the Icelandic Supreme Court in its final judgment in the case brought by Ms Sveinbjörnsdóttir;⁹ it had also been endorsed by the ECJ in an obiter dictum in *Rechberger*.¹⁰ Not only did the ECJ make the referring Austrian court aware of *Sveinbjörnsdóttir*; it did so with an introductory reference to 'the objective of uniform interpretation and application which informs the EEA Agreement' and stated that the EFTA Court had expressed itself upon 'the principles governing the liability of an EFTA State for infringement of a directive referred to in the EEA Agreement'.¹¹ The ECJ's endorsement of *Sveinbjörnsdóttir* did not go unnoticed by the EFTA Court: When

⁴ See the intervention of Bjørn Haug, *ibid*, pp 1005–1006.

⁵ Opinion of 19 January 1999 in Case C-321/97 *Ulla-Birth Andersson and Susanne Wåkerås-Andersson v Sweden* [1999] ECR I-3551. There is no reference to *Sveinbjörnsdóttir* in the Opinion and it remains uncertain whether AG Cosmas was aware of it. The ECJ did not go into the matter in its judgment of 15 June 1999 as it held that it lacked competence to rule on the consequences of the EEA Agreement in Sweden during the period preceding Swedish accession to the EU.

⁶ See, eg, F Arnesen, 'EFTA-domstolen statuerer erstatningsansvar' (1999) *Europarättslig Tidsskrift* 357–362; HP Graver, 'Mission Impossible: Supranationality and National Legal Autonomy in the EEA Agreement' (2002) 7 *European Foreign Affairs Review* 73–90 and F Sejersted et al, *EØS-rett*, 2nd edn (Oslo, Universitetsforlaget, 2004), pp 108–109.

⁷ Among the more outspoken critics were Ingvald Falch, in *Forhandlingene ved Det 35 nordiske juristmøtet*, above n 3, pp 1009–1010 and SL Jervell, *Lovgivningen i EØS* (Oslo, Cappelen, 2002), pp 130–142. See also the criticism from the (then) Director General of the Legislation Department of the Ministry of Justice, Inge Lorange Backer, in his article 'Lovgivere og domstoler ved begynnelsen av det 21 århundre' (2006) 41 *Jussens Venner* 248–266 (at 257 and 261). Note, however, that the reception in academic literature outside Norway was generally of a more friendly nature; see, eg, the overview provided for by Carl Baudenbacher in his article, 'If Not EEA State Liability, Then What? Reflections Ten Years after the EFTA Court's *Sveinbjörnsdóttir* Ruling' (2009) 10 *Chicago Journal of International Law* 333–358, at 344–345.

⁸ See the arguments of the Norwegian Government in Case E-4/01 *Karl K Karlsson hf v Iceland* [2002] EFTA Ct Rep 240 (summarised at length in the Report for the Hearing).

⁹ Judgment of 16 December 1999 in Case 236/1999 *Iceland v Erla María Sveinbjörnsdóttir*. As to the only *de facto* character of the acceptance of the EFTA Court's stand, see V below.

¹⁰ Case C-140/97 *Walter Rechberger and Others v Austria* [1999] ECR I-3499, para 39.

¹¹ The latter formulation presupposes that the EEA Agreement indeed does entail principles on State liability, something which was the very core of the discussion before the EFTA Court in *Sveinbjörnsdóttir*. (This is even clearer in the authentic German version of the judgment, where the reference is to the 'geltende Grundsätze' of State liability.)

the Court stood its ground and confirmed the existence of the principle of State liability in *Karlsson*, it included a reference to *Rechberger* in the reasoning.¹²

After the defeat in *Karlsson*, the Norwegian government gave up its resistance against *Sveinbjörnsdóttir* when the question of State liability for defective implementation of a directive was raised before Norwegian courts in the *Finanger II* case. In its final judgment in the case in 2005, the Norwegian Supreme Court cited extensively from the reasoning of the EFTA Court in *Sveinbjörnsdóttir* and noted the subsequent confirmation in *Karlsson* as well as the acceptance of the principle by both the government and the Icelandic Supreme Court. Writing on behalf of the full court, Justice Gussgaard added that she found ‘the EFTA Court’s reasons for State liability to be convincing, with its emphasis on the fundamental considerations of homogeneity, equal treatment of individual persons/legal entities and protection of their activities’.¹³

After *Finanger II*, the only remaining EEA EFTA State whose courts had not acknowledged the principle of State liability was Liechtenstein. When the question of State liability for breach of EEA obligations came before the Supreme Court of Liechtenstein in 2006 in the *Dr Tschannet II* case, the court decided the matter purely on the basis of national tort law and acquitted the government without any reference to *Sveinbjörnsdóttir*.¹⁴ The judgment was quashed by the Constitutional Court of Liechtenstein due to inadequate statement of reasons,¹⁵ but this only led to a new judgment in 2008 in which the Supreme Court explained in greater detail why the government had not committed a fault within the meaning of the Liechtenstein Public Liability Act.¹⁶ However, after this second judgment was also quashed by the Constitutional Court,¹⁷ the Supreme Court finally gave in in 2010 and ruled in favour of the plaintiff in a judgment which at least by implication accepts *Sveinbjörnsdóttir* and *Karlsson*.¹⁸

If one adds that the Supreme Court of Sweden also acknowledged the principle of State liability for breach of obligations under the EEA Agreement in its final judgment in the *Andersson* case from 2004,¹⁹ and that not only the EEA EFTA States but also the European Commission have accepted the principle in their pleadings in subsequent State liability cases before the EFTA Court,²⁰ it is clear that one may now speak of a well-established principle of EEA law.²¹

¹² *Karlsson*, above n 8, para 25.

¹³ Judgment of 28 October 2005 in Case 2005/412 (Rt 2005 p 1365), para 52.

¹⁴ Judgment of 7 December 2006 in Case CO.2004.2-25.

¹⁵ Judgment of 3 July 2007 in Case StGH 2007/15.

¹⁶ Judgment of 5 June 2008 in Case CO.2004.2-38.

¹⁷ Judgment of 24 June 2009 in Case StGH 2008/87.

¹⁸ Judgment of 7 May 2010 in Case CO.2004.2 (final). As to the only de facto character of the acceptance of the case law of the EFTA Court, see V below.

¹⁹ Judgment of 26 November 2004 in Case T-2593-01 (NJA 2004, p 662).

²⁰ See, eg, the submissions of the Commission in Case E-2/10 *Pór Kolbeinsson v Iceland* [2009–2010] EFTA Ct Rep 234 (as they are summarised in the Report for the Hearing, paras 136ff).

²¹ Even though it is true that the ECJ still has not been confronted with a case where it has had to take a definite stand on the matter, the general ‘EEA-friendly’ approach of the ECJ, the de facto

Looking back at the rather heated discussion in the wake of *Sveinbjörnsdóttir*, it is possible to argue that the opposition in the end proved to be beneficial to the EFTA Court as it only accentuated the court's achievement. There are certainly striking parallels between the criticism of *Sveinbjörnsdóttir* and the criticism which was directed at the ECJ in the wake of *Francovich*.²² In a sense, the opposition to *Sveinbjörnsdóttir* allowed the EFTA Court to demonstrate its independence of the EFTA States and its commitment to secure judicial protection of EEA-based rights which equals the protection offered in EU law, if need be through a rather dynamic interpretation of the Agreement. Notwithstanding the fact that the EFTA Court has rendered a significant number of other important decisions over the last 20 years, it thus appears justified to describe *Sveinbjörnsdóttir* as the jewel in the Court's crown.

In an attempt to contribute to the EFTA Court's 20th anniversary with something more than just a historical overview of the genesis of the principle of State liability, the attention in the following is directed towards some questions concerning the legal basis of the principle which still may be of practical interest (II); the reach of the principle (III); the conditions for the liability of the States (IV); and the role of the principle in the complex relationship between the EFTA Court, the ECJ and the highest courts of the EEA EFTA States (V and VI).

II. THE LEGAL BASIS FOR THE PRINCIPLE OF STATE LIABILITY— APPRAISAL AND CRITIQUE OF *SVEINBJÖRNSDÓTTIR*

This chapter is not the proper place for an in-depth analysis of the reasons offered by the EFTA Court in *Sveinbjörnsdóttir*.²³ Still, parts of the reasoning are of interest to current discussions concerning the reach of the principle of State liability (as well as other questions of EEA law). Thus, some remarks appear appropriate.

In short, the EFTA Court deduced the principle of State liability from the purposes and legal structure of the Agreement, in particular the Agreement's overarching objective of a homogeneous European Economic Area with 'equal conditions of competition, and the respect of the same rules' (Article 1 EEA).²⁴

True enough, the EFTA Court also referred to the need for effective judicial protection of individual rights as well as to the principle of loyalty enshrined in

acceptance of the principle of EEA State liability by the Contracting Parties and the pragmatic argument that it is simply not in the EU's best interest to 'liberate' the EFTA States from a principle which is of far greater concern to them than to the EU and the EU Member States, all suggest that the ECJ will not overrule *Sveinbjörnsdóttir* if the occasion should occur.

²² Cf, eg, the submissions from the German government in Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur v Germany and Factortame and Others v United Kingdom* [1996] ECR I-1029 at paras 24ff to the arguments of the Norwegian government in *Karlsson*.

²³ For an extensive analysis in the Norwegian language, see HH Fredriksen, *Offentligrettslig erstatningsansvar ved brudd på EØS-avtalen* (Bergen, Fagbokforlaget, 2013), pp 49–79.

²⁴ *Sveinbjörnsdóttir*, above n 3, paras 47–56.

Article 3 EEA.²⁵ Still, it is common ground that without the existence of the EU law principle of State liability, there would be no basis for an EEA law principle of State liability either.²⁶ Thus, the essence of *Sveinbjörnsdóttir* is that the EFTA Court applied the fact that the EEA Agreement as such confers rights on individuals²⁷ and the fact that Article 3 EEA reproduces textually the loyalty clause of the EU Treaties (now found in Article 4(3) TEU) to support a *functional* (or *effect-related*) conception of the homogeneity objective: the objective of homogeneity does, *as a matter of a legal principle* (not only as a political goal), embrace the question of the *effect of EEA law in the legal orders of the Contracting Parties*. In doing so, the EFTA Court dismissed the understanding of the dualist EFTA States that the reach of the homogeneity principle was limited to the interpretation of the substantive content of the internal market *acquis*, leaving it to the Contracting Parties to secure the effect of the rules through national procedures. Of course, this functional conception of homogeneity has consequences beyond the question of State liability as it establishes a *general presumption for judicial protection of EEA-based rights which, in effect, equals the protection offered in EU law*.²⁸ One consequence is the EEA-based duty of national courts to do whatever lies within their competence to interpret and apply national law in conformity to obligations under the EEA Agreement;²⁹ another is the EEA-based duty of administrative authorities to do likewise;³⁰ a third is the EEA-based obligation to repay charges levied in breach of EEA law³¹ and a fourth is what the EFTA Court more recently has described as the procedural branch of homogeneity.³² Thus, the conception of homogeneity established in *Sveinbjörnsdóttir* continues to influence the judicial development of EEA law.

Less fortunate, at least in this author's view, was the characterisation in *Sveinbjörnsdóttir* of the EEA Agreement as an international treaty *sui generis* which contains a 'distinct legal order of its own'. The striking parallel to the ECJ's

²⁵ *Sveinbjörnsdóttir*, above n 3, paras 57–58 and 61.

²⁶ See, eg, S Magnússon and Ó Hannesson, 'State Liability in EEA Law: Towards Parallelism or Homogeneity?' (2013) 38 *European Law Review* 167–186, at p 171: 'Without the principle of State liability in EU law, EEA law would not have required this level of protection'. The same view is held by the President of the EFTA Court, Carl Baudenbacher, above n 7 at 356: 'It is clear ... that the recognition of this principle [of EEA State liability] has its basis in the jurisprudence of the ECJ.'

²⁷ See the fourth and eighth recitals of the Preamble.

²⁸ For a more comprehensive argument for this conception of the homogeneity objective, see HH Fredriksen, 'State Liability in EU and EEA Law: The Same or Different?' (2013) 38 *European Law Review* 884–895, at 885–888.

²⁹ See *Karlsson*, above n 8, para 28; Case E-1/07 *Criminal proceedings against A* [2007] EFTA Ct Rep 246, para 39; Case E-15/12 *Jan Anfinn Wahl v Iceland* ('Hells Angels') [2013] EFTA Ct Rep 534, para 54; Case E-6/13 *Metacom AG v Rechtsanwältin Zipper & Collegen* [2013] EFTA Ct Rep 856, para 69 and Case E-7/13 *Creditinfo Lánstraust hf v Þjóðskrá Íslands and Iceland* [2013] EFTA Ct Rep 970, para 47.

³⁰ See Case E-1/04 *Fokus Bank ASA v Norway* [2004] EFTA Ct Rep 11, para 41.

³¹ See Case E-7/13 *Creditinfo Lánstraust hf v Þjóðskrá Íslands and Iceland* [2013] EFTA Ct Rep 970, para 43.

³² See, eg, Case E-14/11, *DB Schenker v EFTA Surveillance Authority* ('Schenker I') [2012] EFTA Ct Rep 1178, para 77.

characterisation of the EEC Treaty in its seminal judgment in *Van Gend en Loos* met little understanding in Norwegian literature. Critics pointed out that it was evident that the Contracting Parties to the EEA Agreement did not intend to establish a supranational legal order—arguably, this is the very reason for the Agreement’s existence.³³ Further, it was objected that the mere characterisation of the EEA as a distinct legal order could not in itself contribute anything to the legal basis for the principle of State liability—the basis had to be found in the purposes and legal structure of the Agreement, not in a philosophical meta-discussion about the legal ‘nature’ of EEA law.³⁴

It is not clear from *Sveinbjörnsdóttir* why the EFTA Court felt it necessary to postulate the *sui generis* character of the EEA Agreement. However, a possible explanation lies in the fact that Iceland, Norway and the European Commission all referred to the alleged common understanding of the Contracting Parties in their arguments against the principle of State liability.³⁵ Arguably, the notion of a distinct EU legal order has played an important role in the ECJ’s ‘emancipation’ of the interpretation of the treaties from whatever common intentions the original Member States might have had. Still, for the EFTA Court it would have sufficed to note that pleadings from three governments and the Commission hardly proved a common understanding of the 20 parties which signed the Agreement more than six years earlier.³⁶ It is common ground that the question of the effect of EEA law in the legal orders of the Contracting Parties was a very difficult element of the negotiations and that this is why the Agreement contains no provision which unequivocally settles the matter.³⁷ Further, a possible common understanding against the existence of an EEA law principle of direct effect is hardly in itself a compelling argument against the principle of State liability.³⁸ The Icelandic government’s view, that the absence of a provision in the EEA Agreement on State liability indicated that the Contracting Parties made a deliberate decision against *Francovich*, could easily have been turned on its head: if there really was such a common understanding, should it not—given the attention which *Francovich* attracted within the EC before the closing of the EEA negotiations—be expected to be put on paper, for example in the preamble or in a joint declaration?

³³ See, eg, T Bekkedal, *Frihet, likhet og fellesskap* (Oslo, Fagbokforlaget, 2008), p 137; HH Fredriksen, ‘Bridging the widening gap between the EU treaties and the agreement on the European Economic Area’ (2012) 18 *European Law Journal* 868–886, at p 881.

³⁴ *ibid.*

³⁵ See the Report for the Hearing in *Sveinbjörnsdóttir*, paras 60 (Iceland); 71 (Norway) and 96 (European Commission).

³⁶ See the apt remark by AG Lagrange in his Opinion in Case 8/55 *Fédération Charbonnière de Belgique v The High Authority* [1954–56] ECR (English special edition) 245, at 277: ‘the common will ... is in most cases difficult to establish with certainty in the case of documents such as international agreements, which are generally the result of compromises reached with more or less difficulty and in which the obscure or imprecise wording often only conceals fundamental disagreements’.

³⁷ See, eg, H Bull, *Det indre marked for tjenester og kapital* (Oslo, Universitetsforlaget, 2002), p 78 (Bull participated in the negotiations on the Norwegian side).

³⁸ As the EFTA Court later demonstrated in *Karlsson*, above n 8, para 29.

Interestingly, at the time *Sveinbjörnsdóttir* was pending before the EFTA Court, the French government actually argued *in favour* of EEA State liability before the ECJ in *Andersson*.³⁹

Better still, the EFTA Court could have pointed out that as a matter of principle, the interpretation of an Agreement which explicitly confers rights on individuals cannot be guided by an understanding among the Contracting Parties which is not put on paper in a manner which is accessible to the public. However, even though this methodological point was not explicitly made in *Sveinbjörnsdóttir*, it may be inferred from the outcome of the case (as well as subsequent case law).⁴⁰ Thus, this too may be seen as a part of the legacy of *Sveinbjörnsdóttir* which continues to inform the interpretation of EEA law.

A final point of interest is the fact that *Sveinbjörnsdóttir* contains no reference to what the EFTA Court more recently has characterised as the fundamental EEA law principle of reciprocity.⁴¹ Arguably, the EFTA Court ought to have pointed out that there already existed a principle of State liability in EU law *which includes breaches of EEA obligations for which the EU Member States can be held responsible* (as the EEA Agreement is recognised as an integral part of EU law) and that reasons of reciprocity thus supported the deduction of a similar principle of EEA law. However, the strength of this argument should not be overestimated. The origins of the reference to reciprocity in the preamble may be traced to Article 310 of the EC Treaty (now Article 217 TFEU) and here the ECJ has clearly stated that it is not to be understood in a strict sense.⁴² Thus, at least in the view of this author, a reference to reciprocity is hardly more than an argument in support of the by now already well-established effect-related understanding of the principle of homogeneity.

III. THE REACH OF THE PRINCIPLE

As to the reach of the principle of State liability, the operative part and most of the reasoning in *Sveinbjörnsdóttir* was limited to incorrect implementation of directives.⁴³ Thus, in *Karlsson*, the Icelandic and the Norwegian government tried to limit the reach of the principle to cases of incorrect implementation of EEA obligations, arguing that in all other cases the effectiveness of EEA law was well taken care of by national law.⁴⁴ This reasoning essentially equals the argument by the

³⁹ See the submissions of the French government as they are referred to in the Opinion of AG Cosmas, para 46.

⁴⁰ See especially Case E-5/06 *EFTA Surveillance Authority v Liechtenstein* [2007] EFTA Ct Rep 296, para 63.

⁴¹ Case E-12/13 *EFTA Surveillance Authority v Iceland*, judgment of 11 February 2014, para 68.

⁴² See, eg, Case 104/81 *Hauptzollamt Mainz v CA Kupferberg & Cie KG a.A.* [1982] ECR 3641, para 18.

⁴³ With the exception of para 62, where the EFTA Court referred to breaches of EEA obligations in general.

⁴⁴ See *Karlsson*, above n 8, para 31, read in conjunction with para 69 of the Report for the Hearing.

German, the Irish and the Netherlands governments which failed to convince the ECJ in *Brasserie du Pêcheur/Factortame*.⁴⁵ Thus, it was hardly surprising that the EFTA Court followed the ECJ's lead and stated in general that an EEA State may be held responsible for breaches of its obligations under EEA law.⁴⁶

More recently, in *HOB-vín*, the EFTA Court stressed that is irrelevant whether a directive is being made or has been made part of the national legal order: with regard to secondary EEA law, individuals must be able to invoke the principle of State liability from the time when a decision by the EEA Joint Committee to incorporate a legal act in the EEA Agreement becomes applicable.⁴⁷ Thus, it is no prerequisite that the competent legislative authorities have actually tried to make the legal act in question part of national law (as in *Sveinbjörnsdóttir*).⁴⁸ And further, in cases of provisional applicability of a decision by the EEA Joint Committee, the principle of State liability will apply from the date on which the decision becomes provisionally applicable.⁴⁹

Despite the general wording in *Karlsson*, the question whether the principle of State liability also covers *judicial wrongdoing* remains to be settled by the EFTA Court. It lurked in the background in *Kolbeinsson*, but the EFTA Court limited itself to noting in an obiter dictum that *if* States are to incur liability under EEA law for incorrect application of EEA law by national courts, the infringement would in any case have to be manifest in character.⁵⁰ It may hardly be inferred from this statement that the EFTA Court has adopted the ECJ's judgment in *Köbler*.⁵¹ However, the above-mentioned effect-oriented conception of homogeneity suggests that the principle of State liability does encompass breaches of EEA law caused by national courts. Given the very limited role which the ECJ attributed to the duty of national courts of last instance to request preliminary rulings under Article 267 TFEU in its reasoning in *Köbler*,⁵² it does not seem convincing to apply the lack of such a duty under Article 34 SCA as an argument against EEA State liability for judicial wrongdoing.⁵³

⁴⁵ Cf *Brasserie du Pêcheur/Factortame*, paras 18–22.

⁴⁶ *Karlsson*, above n 8, para 32.

⁴⁷ Case E-2/12, *HOB-vín v The State Alcohol and Tobacco Company of Iceland (ÁTVR)* [2012] EFTA Ct Rep 1092, para 128.

⁴⁸ In Norwegian literature, this question was briefly discussed by Jervell, above n 7 at 141, but the general view has always been that *Sveinbjörnsdóttir* applies also to cases where the State has made no attempt at all to implement the legal act in question.

⁴⁹ In cases where one or more of the Contracting Parties has notified the need to fulfil constitutional requirements before a decision of the EEA Joint Committee can be binding, Art 103(2) EEA states that upon the expiry of a period of six months, the decision shall be applied provisionally, unless the Contracting Party in question notifies that such a provisional application cannot take place. As demonstrated by Case E-17/11 *Aresbank SA v Landsbankinn hf, Fjármálaeftirlitið and Iceland* [2012] EFTA Ct Rep 916, there have been cases where Iceland has failed to prevent such provisional applicability.

⁵⁰ *Kolbeinsson*, above n 20, para 77.

⁵¹ Case C-224/01 *Köbler v Austria* [2003] ECR I-10239.

⁵² See *Köbler*, above n 51, paras 30–50.

⁵³ As argued by the Norwegian government in *Kolbeinsson*, above n 20, para 70.

Still, at the national level, a claim for compensation for judicial wrongdoing was rejected by Icelandic courts in the case brought by Mr Kolbeinsson. According to the Supreme Court, the City Court of Reykjavik was correct when it held that Icelandic procedural law (the principle of *res judicata*) precludes the possibility to claim damages for a breach of EEA law allegedly caused by a final judgment from the Supreme Court.⁵⁴ Neither the City Court nor the Supreme Court discussed the fact that the ECJ in *Köbler* rejected similar objections from several EU Member States, stating that proceedings seeking to render the State liable do not have the same purpose and do not necessarily involve the same parties as the proceedings resulting in the decision which has acquired the status of *res judicata*: the applicant in an action to establish the liability of the State will, if successful, secure an order against it for reparation of the damage incurred but not necessarily a declaration invalidating the status of *res judicata* of the judicial decision which was responsible for the damage.⁵⁵ The reasoning of the ECJ may well be criticised on this point, but one still has to acknowledge that the ECJ has recognised that the principle of State liability also applies to decisions of a court adjudicating at last instance.⁵⁶ Still, as neither the City Court nor the Supreme Court discussed the matter from the perspective of EEA law, the latter's judgment hardly contributes anything to the discussion; it only makes clear that application of an EEA law principle of State liability for judicial wrongdoing will necessitate changes in the rules on *res judicata* in the Icelandic Code on Civil Procedure.⁵⁷

Another topical question is the reach of the EEA principle of State liability when it comes to its subjects. Throughout its decision in *HOB-vín*, the EFTA Court refers exclusively to the liability of the *EFTA States*.⁵⁸ This represents a break with earlier case law, in which the EFTA Court has been careful to refer to the liability of (all of) the Contracting Parties or at least to that of (all of) the *EEA States*.⁵⁹ The reason for this change is not clear, but it may perhaps be understood as an attempt to get out of the ECJ's shadow and warn the national courts of the EEA EFTA States that the liability of the EFTA States may not necessarily be coextensive in all respects with that of the EU Member States (see further in VI, below). Be that as it may, the EFTA Court has yet to come up with a convincing argument why the EEA State liability regime may apply to the

⁵⁴ Judgment of the Supreme Court of 21 February 2013 in Case 532/2012, upholding the City Court's judgment of 9 May 2012.

⁵⁵ See *Köbler*, above n 51, para 39.

⁵⁶ See, eg, T Tridimas, *The General Principles of EU Law*, 2nd edn (Oxford, OUP, 2006), at 525ff.

⁵⁷ It remains to be seen whether the EFTA Surveillance Authority will pursue the apparent conflict between an EEA law principle of State liability for judicial wrongdoing (which ESA argued in favour of before the EFTA Court in *Kolbeinsson*) and the Icelandic rules on *res judicata*.

⁵⁸ *HOB-vín*, above n 47, paras 119, 121 and 129–131.

⁵⁹ See *Sveinbjörnsdóttir*, above n 9, paras 61–62 and 68; *Karlsson*, above n 8, paras 32–34; Case E-8/07 *Nguyen v Norway* [2008] EFTA Ct Rep 224, paras 31–34 and *Kolbeinsson*, above n 20, paras 78–85. Note, for the sake of completeness, that the EFTA Court in para 60 of *Sveinbjörnsdóttir* referred to the liability of the EFTA States only, but in the rest of the grounds, as well as in the conclusions, the references are to the liability of (all) the Contracting Parties.

EFTA States only. The only possible explanation appears to be the assumption that the liability of the EU Member States for breaches of their EEA obligations is taken care of by the existing EU law principle of State liability and that this is to be seen as the *fulfilment of an EEA law obligation* (and not only as a generous concession on the part of the EU and its Member States for the benefit of private parties and economic operators from the EFTA States). Admittedly, Protocol 35 to the Agreement does lend some support for such a conclusion. According to this Protocol, the *EFTA States only* are obliged to introduce, if necessary, a statutory provision to the effect that EEA rules prevail in cases of possible conflict between implemented EEA rules and other statutory provisions. It may be inferred from this that the direct effect and supremacy that EU law grants to EEA rules in the EU Member States are to be seen as *part of the Agreement on the EEA*. Still, it appears questionable if this is sufficient to rebut the natural presumption that the EEA law principle of State liability, as it follows from the EEA Agreement as such, has to apply to all of the Contracting Parties—the EFTA States, the EU Member States and the European Union itself.⁶⁰ It will be interesting to see how the EFTA Court will handle this question in future State liability cases.

IV. THE CONDITIONS FOR THE LIABILITY OF THE STATES

As to the conditions for the liability of the Contracting Parties, the EFTA Court simply adopted verbatim the conditions which the ECJ set out in *Brasserie du Pêcheur/Factortame*. First, the EEA rule infringed must be intended to confer rights on individuals; second, the breach must be sufficiently serious; and third, there must be a direct causal link between the breach and the damage sustained by the injured parties.⁶¹

True enough, the only reference to ECJ case law in *Sveinbjörnsdóttir* was a reference to *Franovich* with regard to the first of the three conditions. Still, there was little doubt as to their origin.⁶² Even though the EFTA Court did not refer to the principle of homogeneity, it did not attempt to give any other explanation for the formulation of the conditions.⁶³ And subsequent cases such as *Karlsson*, *Kolbeinsson* and *HOB-vín* all include at least some references to ECJ case law in relation to the conditions for the liability.⁶⁴

⁶⁰ For a more detailed analysis, see Fredriksen, above n 28, at 888–890.

⁶¹ See *Sveinbjörnsdóttir*, above n 9, para 66; *Karlsson*, above n 8, para 32 and *Kolbeinsson*, above n 20, para 121. Note, for the sake of completeness, that the requirement of a *direct* causal link was overlooked in *Sveinbjörnsdóttir*, but that this was corrected in *Karlsson*.

⁶² See, eg, Baudenbacher, above n 7, at 344.

⁶³ Compare *Sveinbjörnsdóttir*, above n 9, para 66 to paras 39ff of *Brasserie du Pêcheur/Factortame*, where the ECJ explains why the liability of the EU Member States depends upon the existence of a sufficiently serious breach of their EU law obligations.

⁶⁴ See *Karlsson*, above n 8, paras 37, 40 and 47; *Kolbeinsson*, above n 20, para 77 and *HOB-vín*, above n 47, para 124.

Still, in *Karlsson* the EFTA Court followed up with an important reservation:

The finding that the principle of State liability is an integral part of the EEA Agreement differs, as it must, from the development in the case law of the Court of Justice of the European Communities of the principle of State liability under EC law. Therefore, the application of the principles may not necessarily be in all respects coextensive.⁶⁵

In *Karlsson*, this reservation was seen by the EFTA Court as necessary in order to repudiate the Norwegian government's assertion that the differences between EU and EEA law concerning the question of direct effect precluded the very existence of an EEA law principle of State liability.⁶⁶ As such, the statement said nothing about how the application of the principles may differ. Given the context in *Karlsson*, however, it was hardly surprising that the Norwegian government interpreted it as support for a narrower interpretation under EEA law than under EU law of the condition that there must be a sufficiently serious breach in order to establish State liability. In *Karlsson*, the Norwegian government argued for this proposition in the alternative,⁶⁷ whereas no one appearing before the EFTA Court in that case suggested that the EEA State liability regime might actually be stricter than its EU law model.

However, in the above-mentioned *Finanger II* case, the Norwegian Supreme Court forcefully rejected the government's interpretation, stating that a decisive emphasis should be placed on the principle of homogeneity and that it would not be reasonable if citizens should be in different legal positions under EU and EEA law when it comes to the protection of their EU/EEA rights.⁶⁸ Interestingly, this has not stopped the Norwegian government from reiterating before the EFTA Court that there may be situations in which EU State liability could come so close to direct effect that such a form of liability would be incompatible with the characteristics of the EEA Agreement.⁶⁹ However, in light of the above-mentioned functional conception of the homogeneity objective, and supported by the Norwegian Supreme Court's clear rejection of the case for a milder EEA State liability regime, it is very hard indeed to see the circumstances under which the EFTA Court might be persuaded by this line of argument.

Rather to the contrary, the effect-related conception of the homogeneity objective established in *Sveinbjörnsdóttir* (and endorsed by the Norwegian Supreme Court through the above-mentioned statements in *Finanger II*) suggests that the EEA State liability regime may be *stricter* than its EU model in cases where this is necessary in order to compensate for the lack of EEA law principles of direct

⁶⁵ Para 30.

⁶⁶ See *Karlsson*, above n 8, paras 26–30.

⁶⁷ See the Report for the Hearing in *Karlsson*, paras 74–76.

⁶⁸ *Finanger II*, para 58 (unofficial translation).

⁶⁹ See *Kolbeinsson*, Report for the Hearing, para 94 and Case E-19/11 *Vin Trío ehf v Iceland* [2012] EFTA Ct Rep 974, Report for the Hearing, paras 95–96.

effect and supremacy.⁷⁰ The EFTA Court has not yet had the opportunity to express itself on the matter, but the recent renaissance of the *Karlsson* reservation in *HOB-vin* and *Schenker II* may perhaps be interpreted as support for an answer in the affirmative.⁷¹

With this possible exception, the homogeneity principle strongly suggests that the application of the EU and EEA law principles of State liability indeed is coextensive. This is reflected in the case law of the EFTA Court, where the conditions for the liability of the Contracting Parties are explained and applied in accordance with ECJ case law.⁷² Even though much remains to be said about the common conditions for the liability of the States, this is not the proper occasion on which to do so. Thus, with the exception of some brief comments in the next section on the role of discretion for the assessment of the seriousness of a breach, the conditions for the obligation of the EEA Contracting Parties to provide for compensation for damage caused to individuals by breaches of EEA law will not be discussed further in this chapter.

V. THE PRACTICE OF THE HIGHEST COURTS OF THE EEA EFTA STATES: ATTEMPTING TO SIDELINE THE EFTA COURT?

Even though the Norwegian Supreme Court's above-mentioned stand in *Finanger II* is to be welcomed from the perspective of homogeneity, it does at the same time pose a potential problem to the EFTA Court. Writing on behalf of the full court, justice Gussgaard concluded as follows:

In my opinion, the considerations behind State liability within the EEA lead to the conclusion that it has the same scope and is at the same level as State liability in the EC. The ECJ's decisions on this matter thus hold significant interest.⁷³

The Supreme Court has reiterated this in subsequent State liability cases and so have other Norwegian courts.⁷⁴ As a result, the attention of Norwegian courts in State liability cases is firmly directed towards ECJ case law concerning the principle of State liability under EU law. Both in *Finanger II* and the *Edquist* case from 2010, pleas from the plaintiffs for a request to be made to the EFTA Court under Article 34 SCA were rejected by the Supreme Court. Both cases raised unresolved

⁷⁰ As suggested by Baudenbacher, above n 7, at 357–358 and later discussed by, eg, Magnússon and Hannesson, above n 26, and Fredriksen, above n 28.

⁷¹ The reference to the *Karlsson* reservation in *HOB-vin* and *Schenker II* is briefly discussed in VI below.

⁷² See *Karlsson*, above n 8, paras 36ff; *Nguyen*, above n 59, paras 32ff; *Kolbeinsson*, above n 20, paras 77ff; *HOB-vin*, above n 47, paras 121ff.

⁷³ *Finanger II*, para 58 (unofficial translation).

⁷⁴ See, in particular, the Supreme Court's judgments of 7 December 2010 in Case 2010/821 *Edquist and Others v Norway* (Rt 2010, p 1500), paras 91–92 and of 22 November 2012 in Case 2012/963 *Personskadeforbundet v Norway* (Rt 2012, p 1793), para 40. A recent example from Oslo City Court is the judgment of 8 January 2014 in Case 10-045497TVI-OTIR/06 *Norfrakalk v Norway*.

questions concerning the principle of State liability, but the Supreme Court chose to resolve them alone by relying upon existing ECJ case law.

This approach was continued in the *Personskadeforbundet* case from 2012. Here, the Supreme Court was confronted with the very same question which it refused to refer to the EFTA Court in *Finanger II*—how important is the measure of discretion which the infringed rule of EEA law leaves to the national authorities in the assessment of whether there has been a sufficiently serious breach of EEA law? In short, the majority in *Finanger II* stated that a general distinction has to be drawn between situations in which the EEA rule in question leaves the EEA States a wide discretion and situations where they have only limited or even no discretion. The minority, on the other hand, held that the breach in any case has to be manifest and grave and that the existence or non-existence of discretion is thus only a criterion in the assessment of whether this threshold is exceeded.⁷⁵ In the opinion of the government, the approach of the minority raises the threshold for liability in cases where the EEA States have only limited or even no discretion.⁷⁶ In *Personskadeforbundet*, the government argued that subsequent judgments from the ECJ had proved the minority right.⁷⁷ The Supreme Court addressed the question and hinted that the government might be correct. However, the matter was ultimately left open, as the court chose to concentrate on the degree of clarity of the directives infringed.⁷⁸ By implication, the judgment suggests that the structural disagreement in *Finanger II* need not have any practical consequences for the assessment of whether there has been a sufficiently serious breach of EEA law. This may very well be correct, but the same may not, at least in this author's view, be said about the underlying assumption that the 'manifest and grave' threshold applies also to situations where the EEA States have only limited or even no discretion.⁷⁹

In the present context, the concern of the EFTA Court lies in the fact that a preliminary reference under Article 34 SCA was not requested by either the plaintiff or by the government, and that the possibility of a referral *ex officio* appears not even to have been contemplated by the Supreme Court. As a result, the EFTA Court has been denied a say in any of the three EEA State liability cases which so far have

⁷⁵ See *Finanger II*, paras 59ff (the majority) and paras 111ff (the minority).

⁷⁶ As illustrated by the fact that the majority of nine justices in *Finanger II* upheld the judgment of the City Court awarding Ms Finanger damages, whereas the minority of four voted for the government.

⁷⁷ The government referred to Case C-446/04 *Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue* [2006] ECR I-11753; Case C-278/05 *Robins and Others v Secretary of State for Work and Pensions* [2007] ECR I-1053 and Case C-452/06 *The Queen, on the application of Synthon BV v Licensing Authority of the Department of Health* [2008] ECR I-7681.

⁷⁸ *Personskadeforbundet*, para 48.

⁷⁹ Admittedly, the ECJ's approach to the national authorities' measure of discretion in the assessment of whether there has been a sufficiently serious breach is complex and confusing. Still, as far as the application of the 'manifest and grave' threshold is concerned, cases such as C-424/97 *Haim v Kassenzahnärztliche Vereinigung Nordrhein* [2000] ECR I-5213; C-118/00 *Gervais Larys v INASTI* [2001] ECR I-5063 and, in particular, C-278/05 *Robins and others v Secretary of State for Work and Pensions* [2007] ECR I-1053 suggest that the majority in *Finanger II* was correct. Support for this view may now arguably also be found in the EFTA Court's decision in *HOB-vín*, above n 47, para 130.

been heard by the Norwegian Supreme Court. Actually, the only Norwegian case concerning EEA State liability which was referred to the EFTA Court is *Nguyen*, where the referral came from Oslo City Court. Importantly, the lack of referrals to the EFTA Court may not be interpreted as Norwegian courts protecting the government from presumed unwelcome answers from Luxembourg: out of the three State liability cases decided by the Supreme Court, the government has lost two (*Finanger II* and *Personskadeforbundet*). Evidence from State liability cases from other EEA States suggests that this is a rather good record from the perspective of judicial protection of individuals. Still, as in other parts of EEA law, the Supreme Court's 'ECJ-centred' approach to the principle of State liability poses a threat to the authority and functioning of the EFTA Court.⁸⁰

The same approach is evident in the Liechtenstein Supreme Court's decisions in the above-mentioned *Dr Tschannet II* case. Pleas for a reference to the EFTA Court under Article 34 SCA were twice rejected and even as the Supreme Court ruled in favour of Dr Tschannet in the final judgment from 2010, it did so without any references to *Sveinbjörnsdóttir*.⁸¹ Instead, the Supreme Court referred at length to *Brasserie du Pêcheur/Factortame* and construed the national rules on the tort liability of public authorities in conformity with the standards developed by the ECJ.⁸² As demonstrated by the outcome of the case, this was unproblematic from the perspective of judicial protection. To the EFTA Court, however, this *de facto* 'hand-over' of the control of the principle of State liability to the ECJ warrants some concern.

As to Icelandic courts, the picture is more nuanced. *Sveinbjörnsdóttir*, *Karlsson*, *Kolbeinsson* and *HOB-vín* are all Icelandic cases, brought before the EFTA Court by the City Court of Reykjavik. As to the Icelandic Supreme Court's final judgment in the case brought by Ms Sveinbjörnsdóttir, however, it is striking how the liability of the State is based upon interpretation of the national rules on the tort liability of public authorities and not upon open acknowledgement of the reasoning of the EFTA Court.⁸³ Still, the outcome of the case may only be characterised as very 'EEA friendly' indeed: the Supreme Court ruled in favour of Ms Sveinbjörnsdóttir even though the breach hardly could be described as

⁸⁰ For a critical analysis of the Supreme Court's attitude towards the EFTA Court, see HH Fredriksen, 'The Troubled Relationship between the Supreme Court of Norway and the EFTA Court—Recent Developments' in: P-C Müller-Graff and O Mestad (eds), *The Rising Complexity of European Law* (Berlin, Berliner Wissenschafts-Verlag, 2014), pp 11–37.

⁸¹ Judgment of 7 May 2010 in Case CO.2004.2 (final).

⁸² Cf para 29 of the judgment.

⁸³ Judgment of 16 December 1999 in Case 236/1999 *Iceland v Erla María Sveinbjörnsdóttir*. Apparently, the Supreme Court was of the opinion that the act incorporating the main part of the EEA Agreement into Icelandic law gives individuals a legally protected expectation of correct implementation of EEA obligations. To a Norwegian lawyer, this reasoning is difficult to harmonise with dualism. The same line of argument was made before the Norwegian Supreme Court in *Finanger II*, but it was unanimously rejected by the full court.

sufficiently serious from an EEA law perspective.⁸⁴ The outcome of later Icelandic State liability cases, however, has been less fortunate for the plaintiffs. In the case brought by Mr Kolbeinsson, the Supreme Court first prevented the question of State liability for judicial wrongdoing from being put to the EFTA Court and then, in its final judgment in the case in 2013, answered it in the negative it with an interpretation of the principle of *res judicata* which is in conflict the ECJ's judgment in *Köbler*.⁸⁵ However, as the judicial wrongdoing in question hardly was manifest in character, the outcome of the case still appears to be in line with the minimum requirements of EEA law. The same applies to the acquittal of the Icelandic State in the case brought by Karl K Karlsson hf and the partial acquittal in the case brought by HOB-vín ehf.⁸⁶

The cases referred are perhaps not enough to conclude that the highest national courts of the EEA EFTA States deliberately attempt to sideline the EFTA Court. Still, to the EFTA Court, there is no denial that this is the practical consequence of the approach of the national courts.

VI. THE REACTION OF THE EFTA COURT: PROTECTING THE JEWEL IN THE CROWN

Regardless of the motivation of the national courts, it is certainly tempting to read the most recent State liability decisions of the EFTA Court as an attempt to reclaim its position on the playing field.

To start with, the above-mentioned *Karlsson* reservation concerning possible differences between the EU and EEA law principles of State liability somewhat unexpectedly re-emerged in *HOB-vín*.⁸⁷ The case did not raise any EEA-specific questions concerning State liability which called for an elaboration of this reservation (nor did the EFTA Court offer any). As the reservation was not mentioned in either *Nguyen* or *Kolbeinsson*, its re-emergence in *HOB-vín* inevitably attracts attention. And shortly thereafter, the reservation was highlighted again in *Schenker II*.⁸⁸

Second, it is hard to overlook the EFTA Court's consistent references in *HOB-vín* to the liability of the *EFTA States* only. As noted above in III, this is a striking change from earlier State liability cases, where the EFTA Court has been careful

⁸⁴ Suffice to note the EFTA Court's own reference to the discrepancies between the various language versions of the provision in question in *Sveinbjörnsdóttir*, paras 25–32 and the Commission's express view of the breach as not sufficiently serious (as it is referred in the Report for the Hearing, para 99).

⁸⁵ Reference is made to the discussion in III above.

⁸⁶ The case brought by Karl K Karlsson hf failed because the company was unable to prove the alleged loss of profit, see the judgment of the Supreme Court of 15 February 2007 in Case 120/2006. The case brought by HOB-vín ehf was only partially successful before the City Court of Reykjavik, see the judgment of 21 February 2014 in case E-2381/2011 (this judgment is not final).

⁸⁷ Cf *HOB-vín*, above n 47, para 120.

⁸⁸ Case E-7/12 *DB Schenker v EFTA Surveillance Authority* ('*Schenker II*'), judgment of 9 July 2013, para 120.

to refer to the liability of (all of) the *Contracting Parties* or to that of (all of) the *EEA States*. It is carried through in such a systematic manner that it cannot be a mere coincidence and it leaves one with the impression that the EFTA Court strengthens the message to the national courts of the EFTA States that the liability of the EFTA States may not necessarily be coextensive in all respects with that of the EU Member States.

Third, *HOB-vin* is characterised by extensive paraphrasing of passages taken from the State liability jurisprudence of the ECJ, but without any references to the sources.⁸⁹ True enough, the EFTA Court has not been too eager to refer to ECJ case law concerning the principle of State liability under EU law in other cases either, but the reluctance in *HOB-vin* seems particularly apparent. If compared to the many references to relevant ECJ case law in cases dealing with other aspects of EEA law, the lack of any such references in *HOB-vin* is even more striking. Again, one is left with the impression that the EFTA Court is eager to avoid a complete ‘hand-over’ of the principle of State liability to the ECJ.

Further, a final opportunity for the EFTA Court to increase its appeal in the eyes of national judges lies in a wide interpretation of the allocation of competences between the EFTA Court and the referring national court under Article 34 SCA. Just as for the ECJ under Article 267 TFEU, the competence of the EFTA under Article 34 SCA is limited to ‘interpretation’ of the law, whereas the application of the law to the facts of the case is left to the national courts.⁹⁰ Disregarding objections from the Norwegian government in particular,⁹¹ the EFTA Court has in recent years demonstrated a firm will to assert itself as primary adjudicator of whether a breach of EEA law is sufficiently serious to entail State liability.⁹² According to the Court’s President, this may be justified by the need to ensure effective protection of individual rights.⁹³ The implicit distrust of the national courts is unlikely to improve relations to the highest courts of the EFTA States, but the EFTA Court may perhaps hope that the approach will encourage references from lower courts more interested in opportunities to ease their own caseload than in general questions concerning the allocation of competences between the EFTA Court and the national judiciary.

⁸⁹ The passage in para 125 *in fine* is clearly taken from Case C-445/06 *Danske Slagterier v Germany* [2009] ECR I-2119, para 23; para 130 is a paraphrase of Case C-5/94 *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas* [1996] ECR I-2553, para 28 (and subsequent ECJ case law) and para 131 is a paraphrase of Case C-278/05 *Robins v Secretary of State for Work and Pensions* [2007] ECR I-1053, para 73.

⁹⁰ See generally M Broberg and N Fenger, *Preliminary References to the European Court of Justice* (2nd edn, Oxford, OUP, 2014), at 154f and 428ff.

⁹¹ Cf, eg, *Kolbeinsson*, Report for the Hearing, para 75.

⁹² Cf *Karlsson*, above, n 8, paras 42–46; *Nguyen*, above n 59, paras 32–35; *Kolbeinsson*, above n 20, paras 81–84; *HOB-vin*, above n 47, paras 132–136.

⁹³ See C Baudenbacher, ‘The Implementation of Decisions of the ECJ and the EFTA Court in Member States’ Domestic Legal Orders’ (2005) 40 *Texas International Law Journal* 383–416, at 410 (concerning the similar approach of the ECJ).

VII. OUTLOOK—WILL THE PRINCIPLE OF STATE
LIABILITY ‘SQUARE THE CIRCLE’?

More than 15 years after *Sveinbjörnsdóttir*, important questions concerning the reach of the principle of State liability still remain to be settled. At the level of principle, the question of strict liability in cases where the plaintiff’s loss is caused by the lack of EEA law principles of direct effect and supremacy is of considerable interest. Strict liability for breach of EEA law in these circumstances will ‘square the circle’: the EEA Agreement does not entail transfer of legislative powers, but it nonetheless secures judicial protection of EEA-based rights, which, in effect, equals the protection offered in EU law. By accepting such an understanding of the EEA State liability regime, the EFTA States will put to rest possible allegations from the EU side of ‘cherry picking’.

However, the principle of State liability as such, and the effect-related conception of homogeneity upon which it is based, is by now well established. No one can tell for sure how the EEA Agreement would have fared if the EFTA Court had not recognised the principle of State liability. Still, it is certainly tempting to tie the ECJ’s clear change of opinion of the Agreement to the endorsement of *Sveinbjörnsdóttir* in *Rechberger*. From the deep scepticism voiced in Opinion 1/91 and, albeit to a lesser extent, in Opinion 1/92, the ECJ has come to recognise that it may indeed be possible to realise the EEA Agreement’s objective to extend the internal market to the EEA EFTA States.⁹⁴ Given the weight which the ECJ seems to put on reciprocity when interpreting international agreements, it may be assumed that the EFTA Court’s protection of EEA-based rights in the EFTA pillar has contributed to the ECJ’s willingness to offer individuals and economic operators from the EEA EFTA States the same judicial protection in the EU as enjoyed by individuals and economic operators from the EU Member States. As the fate of the EEA Agreement relies on its continued acceptance by the ECJ, this may well be the most important legacy of *Sveinbjörnsdóttir*.

⁹⁴ See HH Fredriksen, ‘The EFTA Court 15 Years On’ (2010) 59 *International and Comparative Law Quarterly* 731–760, at 750–756.

