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STATE LIABILITY FOR JUDICIAL DECISIONS IN EUROPEAN UNION AND INTERNATIONAL LAW

ARWEL DAVIES*

Abstract As a consequence of the state unity theory, the conduct of all state organs is attributed to the state in an undifferentiated manner. It follows that, in both international and European Union law, state liability can be based on the substance of judicial decisions despite the independence of the judicial branch. However, beyond the matter of attribution, there is a significant divergence between the two legal systems. In international law, the judicial origin of challenged decisions does not influence the application of liability criteria, whereas, in EU law, the liability criteria can be applied to judicial decisions in a tightened manner. This article has the twofold aim of establishing and explaining this difference.

I. INTRODUCTION

State liability for judicial decisions in European Union (EU) and international law has its origin in the perception of the state as a single entity or unity. In both legal systems, the conduct of all state branches is therefore attributed to the state in an undifferentiated manner. Despite this commonality, the two systems diverge on the application of the conditions under which state liability for mistaken judicial decisions can be incurred. In international law, the general position that state responsibility can be incurred for any breach applies in the same manner to all state branches. In contrast, the general position in EU law which requires a sufficiently serious breach can be applied in an especially strict manner to judicial decisions. Therefore, the general position applies in an undifferentiated manner to all state branches in international law, whereas, in EU law, there can permissibly be a tightening of the already strict conditions for liability in respect of judicial decisions. This article establishes this difference and evaluates possible explanations.

The specific inspiration for these enquiries is that the literature on state liability for judicial decisions is rather compartmentalized. While the EU law position has been considered from the perspective of what is recognized in

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Member States,¹ it has not been considered with reference to the international law position. From the Member State perspective, the prevailing view might well be that a rigid liability threshold for all state organs would be ‘conceptually inappropriate as well as practically inept’.² However, this position cannot be accepted as self-evidently correct when the comparison is between EU and international law. It becomes necessary to ask why the undifferentiated approach favoured in international law gives way to a differentiated approach in EU law.

The discussion is divided into three main parts. Section II considers the international law position.³ It discusses a shift in the dominant underlying theory from judicial independence to unity of the state. It follows from this shift that the conduct of state organs is attributed to the state in an undifferentiated manner. With reference to a number of case law sources, it is established that this position is embedded despite an isolated judicial pronouncement to the contrary. Also addressed is the relationship between state unity or undifferentiated attribution, and the scope for differentiating between state organs when assessing whether the conduct complained of amounts to a violation. The argument presented is that undifferentiated attribution suggests that all state organs should incur responsibility in an undifferentiated manner. Therefore, the international system can be regarded as giving effect not only to the strict requirement of the state unity theory (undifferentiated attribution), but also to a natural implication flowing from the theory (undifferentiated liability conditions in content and application).

Section III turns to state liability for judicial decisions in EU law⁴ with reference to the *Köbler*⁵ case of 2003 in which the possibility of Member State liability for decisions of final appeal courts contrary to EU law was first recognized by the European Court of Justice (ECJ). The section focuses on the ECJ’s reasons for the permission to apply the liability criteria in a tightened

¹ K Scherr, *The Principle of State Liability for Judicial Breaches: The Case of Gerhard Köbler v. Austria under European Community Law and from a Comparative National Law Perspective* (European University Institute, Florence, 1998). For a comparison between national jurisdictions, see M Cappelletti, ‘Who Watches the Watchmen? A Comparative Study on Judicial Responsibility’ (1983) 31 *AmJCompL* 1, 14.

² D Nassimpian, ‘...And we Keep on Meeting: (de)fragmenting State Liability’ (2007) 32 *EL Rev* 831.

³ On state liability for judicial decisions in international law, see AV Freeman, *The International Responsibility of States for Denial of Justice* (Longman, London/New York, 1938); J Paulsson, *Denial of Justice in International Law* (CUP, Cambridge, 2005).

⁴ On this subject area, see, among other contributions, H Toner, ‘Thinking the Unthinkable? State Liability for Judicial Acts After Factortame (III)’ (1996) 17 *YB EurL* 169; PM Rodríguez, ‘State Liability for Judicial Acts in European Community Law: The Conceptual Weaknesses of the Functional Approach’ (2004) 11 *ColumJEurL* 605; G Anagnostaras, ‘Erroneous Judgments and Prospect of Damages: the Scope of the Principle of Governmental Liability for Judicial Breaches’ (2006) 31 *EL Rev* 744–5; B Beutler, ‘State Liability for Breaches of Community Law by National Courts: Is the Requirement of a Manifest Infringement of the Applicable Law an Insurmountable Obstacle?’ (2009) 46 *CMLR* 781–2;

⁵ Case C–224/01 *Köbler v Austria* [2003] *ECR* I–10239.

manner, being ‘the specific nature of the judicial function and . . . the legitimate requirements of legal certainty’.⁶ As this permission is at odds with the international law position, the section questions whether these considerations withstand scrutiny as reasons for the exceptional nature of liability for judicial decisions. It is argued that little weight can be attributed to the nature of the judicial function in this context. On the other hand, legal-certainty based concerns provide a more compelling explanation, thereby providing normative content for a differentiated approach to liability for judicial decisions. It follows that EU law can be regarded as giving effect only to the strict requirement of the state unity theory (undifferentiated attribution), but not also to a natural implication flowing from the theory (undifferentiated liability conditions in content and application).

Section IV identifies and evaluates possible explanations for this difference. The obvious starting point here is legal certainty. As this is a valid reason for tightened liability conditions in EU law, it is questioned whether legal-certainty based concerns are less pronounced in the international law context. This is indeed found to be the general position albeit that it is necessary to draw distinctions between different international law contexts. The second and third explanations consider *Köbler* liability as an aspect of European integration, and judicial cooperation. Both these considerations provide a means of understanding not only why it was vital to recognize the possibility of state liability for judicial decisions in EU law, but also why this could be only be recognized subject to tightened liability conditions. The influences within these considerations which suggest tightened liability conditions for EU law are considerably weaker in international law. A final explanation is that tension within domestic court hierarchies caused by *Köbler* liability are absent in the international law context. The conclusion offers some observations on whether and how the international law experience might inform the development of *Köbler* liability.

II. STATE RESPONSIBILITY FOR JUDICIAL DECISIONS IN INTERNATIONAL LAW

A. From Judicial Independence to State Unity

The shift in the underlying theory from judicial independence to state unity is identified by Eduardo Jiménez de Aréchaga writing in 1978:⁷

The principles of the separation and independence of the judiciary in municipal law and of respect for the finality of judicial decisions have exerted an important

⁶ *ibid* para 53.

⁷ E Jiménez de Aréchaga, *International Law in the Past Third of a Century*, 159-1 *Recueil des Cours* (General Course in Public International Law, The Hague, 1978) 278. A similar formulation of the three categories appears in an earlier contribution: E Jiménez de Aréchaga, ‘International Responsibility of States for Acts of the Judiciary’, in W Friedmann, L Henkin and O Lissitzyn (eds) *Transnational Law in a Changing Society* (Columbia University Press, New York, 1972) 171, 176.

influence on the form in which the general principle of State responsibility has been applied to acts or omissions of judicial organs. These basic tenets of judicial organization explain the reluctance to be found in some arbitral awards of the last century to admit the extension to the judiciary of the rule that a State is responsible for the acts of all its organs. However, in the present century State responsibility for acts of judicial organs came to be recognized. Although independent of the Government, the judiciary is not independent of the State: the judgment given by a judicial authority emanates from an organ of the State in just the same way as a law promulgated by the legislature or a decision taken by the executive.

Of more recent relevance is the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts ('Articles').⁸ It is clear from Article 4 that the conduct of state organs is attributed to the state in an undifferentiated manner.⁹ The commentary to the Articles explains that, this approach reflects the treatment of the state 'as a unity, consistent with its recognition as a single legal person in international law'.¹⁰

B. A Dissenting View on Attribution of Judicial Conduct to the State

The separate opinion of Judge Tanaka in the *Barcelona Traction* case¹¹ goes very much against the tide. This may well be a large part of the explanation for why it is rarely referred to, whether with disapproval or otherwise. However, as the opinion emanates from the International Court of Justice, there is a danger that it could be approached as setting out an uncontested perspective. The following discussion therefore explains why the separate opinion is unconvincing and why the shift in the underlying theory is normatively correct.

This was the only opinion which engaged with the merits of the case which concerned the alleged responsibility of Spain toward Belgium due to various acts and omissions of Spain's judicial organs. Judge Tanaka was able to proceed to the merits as he took a different view from the majority of a preliminary objection joined to the merits.¹² When discussing the challenged

⁸ Available at <http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf>. As noted in the first paragraph of the opening *General commentary*, the Articles 'seek to formulate, by way of codification and progressive development, the basic rules of international law concerning the responsibility of States for their internationally wrongful acts'.

⁹ *Article 4. Conduct of Organs of a State*. 1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State. [paragraph 2 omitted]

¹⁰ Para 6 of commentary to Article 2. See also para 5 of commentary to Article 4.

¹¹ *Case Concerning the Barcelona Traction, Light and Power Co. Ltd. (Belgium. v. Spain)*, (Second Phase), (separate opinion of Judge Tanaka) ICJ Reports 1970, 114.

¹² Unlike the majority, Judge Tanaka considered that the third preliminary objection was not fatal to Belgium's claim. Thus he considered that Belgium did have *ius standi* to protect Belgian shareholders in the Canadian Barcelona Traction Company. Unlike the majority, Tanaka also proceeded to consider, and dismissed, the fourth preliminary objection that the Belgian application

judicial conduct, Judge Tanaka does not rely on unity of the state considerations. His focus instead on judicial independence results in statements very much at odds with the attribution rules now contained in the Articles. He notes that ‘whether a State incurs responsibility or not depends on the concrete circumstances of each case; in particular, the characteristics of the three kinds of State activities—legislative, administrative and judicial—must be taken into consideration. Mechanical, uniform treatment must be avoided.’¹³ Of course the Articles deal with attribution in exactly such a mechanical and uniform manner. Tanaka proceeds to note that:

... on the one hand, a State by reason of the independence of the judiciary, in principle, is immune from responsibility concerning the activities of judicial organs; this immunity, on the other hand, is not of an absolute nature. In certain cases the State is responsible for the acts and omissions of judicial organs, namely in cases where grave circumstances exist. That is the reason why denial of justice is discussed by writers as a matter involving a State’s responsibility.¹⁴

It is clearly difficult to reconcile Judge Tanaka’s views with the Articles and, in any event, a further passage perhaps unintentionally obliterates his views on the importance of judicial independence in the context of state responsibility, and lends weight to the position on attribution described in the Articles.

The passage comes at the end of Judge Tanaka’s treatment of the nature of judicial conduct which can, and cannot, amount to a denial of justice. His treatment of this area would be generally accepted by commentators past and present. Judge Tanaka begins by noting that the complaints raised by the Belgian government related to the interpretation of municipal law and involved matters ‘of an extremely complicated and technical nature’.¹⁵ The case is therefore disposed of on its merits on the basis that erroneous interpretations of municipal law do not, in themselves, result in a denial of justice. Such ‘issues are of a municipal law nature’¹⁶ and were an international tribunal to take up such issues it ‘would turn out to be a “*cour de cassation*”, the highest court in the municipal law system.’¹⁷

Having established that the conduct complained of could not amount to a denial of justice, Judge Tanaka proceeds, implicitly on an *obiter* basis, to identify the types of decisions which can amount to a denial of justice and, in so doing, introduces a latent contradiction.

A judgment of a municipal court which gives rise to the responsibility of a State by a denial of justice does have an international character when, for instance, a court, having occasion to apply some rule of international law, gives an incorrect interpretation of that law or applies a rule of domestic law which is itself contrary to international law. Apart from such *exceptionally serious cases*, erroneous and

was inadmissible by reason of the non-exhaustion of local remedies by the Barcelona Traction Company.

¹⁴ *ibid* 155–6.

¹⁵ *ibid* 156.

¹³ *Barcelona Traction* (n 11) 153.

¹⁶ *ibid* 157.

¹⁷ *ibid* 158.

unjust decisions of a court, in general, must be excluded from the concept of a denial of justice.¹⁸ (emphasis added)

What can be questioned here is Judge Tanaka's view of the judicial errors described as 'exceptionally serious'. On the contrary, a misinterpretation of a rule of international law by a municipal court could be an entirely excusable error when, for example, the meaning of the rule is unsettled at the time of the decision. Judge Tanaka is entirely correct to regard such a mistake as capable of incurring state responsibility. However, in doing so, he undermines his previously expressed views on the dominant role of judicial independence when deciding on state responsibility for judicial conduct. Independence based considerations cannot result in a near complete immunity against state responsibility, other than in the most serious of cases, while also having no limiting effect on state responsibility in the face of understandable and excusable mistakes by judges.

The opinion can also be challenged on somewhat more general grounds. It resonates with the objection in the *Köbler* case raised most strongly by Austria, France and the United Kingdom that recognizing a principle of state liability for judicial conduct would undermine the independence of the judiciary. The argument is that judicial independence entails that the government has no influence on reasoning and decision making in individual cases.¹⁹ At first sight, it is therefore perplexing how the government, having surrendered the decision making to a constitutionally independent institution, can be held to account for the errors of this institution. As Toner comments, the objection (which she proceeds to dismiss) is that '[s]tate liability identifies the judiciary too closely with the government and executive.'²⁰

This perspective only works as a plausible objection by incorrectly elevating judicial independence to the status of an end in itself. The sounder approach is to regard judicial independence as a means to protect freedom of judicial thought which, in turn, safeguards the sound administration of justice. When this is appreciated, it becomes possible to turn on its head the argument that state liability should be resisted by reason of judicial independence. This is because the possibility of state liability provides a deterrent against executive branch pressure to render decisions which are contrary to international law obligations. This deterrent effect can be thought of as especially important in jurisdictions which favour absolute personal judicial

¹⁸ *ibid.*

¹⁹ 'Institutional independence' has been defined as 'duties to refrain from seeking, taking or giving instructions. Judges cannot seek or take instructions from anyone, and this requires particular sensitivity in relation to the executive where this is seen to be an acute and ever-present danger'. See M Andenas and D Fairgrieve, 'Judicial Independence and Accountability: National Traditions and International Standards' in G Canivet, M Andenas and D Fairgrieve (eds) *Independence, Accountability, and the Judiciary* (BIICL, London, 2006) 23.

²⁰ Toner (n 4) 169.

immunity.²¹ Knowing that that they cannot be personally liable, judges could be more amenable to government pressure. However, a principle of state liability makes it less likely that governments will attempt to exert malign influence towards non-compliance in the first place. Objections to state liability on independence based grounds therefore lack substance. Indeed, there is a dissonance between the frequency with which independence based concerns are raised and their inability to withstand scrutiny. In contrast, it is perfectly understandable how states can be responsible for judicial mistakes which are contrary to international law if the question of attribution is considered through the lens of the state as a unity.

C. State Unity or Undifferentiated Attribution as a Codification

Despite the Separate Opinion discussed above, there is ample evidence that Article 4 of the Articles is regarded as a codification. Most of the cases involve judicial decisions which reflect and reinforce the position of other state organs. The ICJ Opinion in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*²² is illustrative here. Malaysia's failure to provide immunity from legal process granted to experts on mission arose from the executive branch failure to inform the courts of the Secretary General's finding of entitlement to immunity, and the trial court's subsequent failure to treat the matter of Mr Cumaraswamy's immunity as a preliminarily matter to be 'expeditiously decided *in limine litis*'—at the start of the procedure. Referring to what was then Article 6 of the Draft Articles on State Responsibility (now Article 4), the Court noted that 'the conduct of an organ of a State—even an organ independent of the executive power—must be regarded as an act of that State.'²³ The same pattern and outcome is evident in *Lingens v Austria*²⁴ decided by the European Court of Human Rights. The case involved Austrian court decisions imposing criminal penalties on the applicant for defamation. The decisions were in harmony with the Austrian Criminal Code and also defended by the government which referred to the need to preserve discretion for judges to prevent political debate protected by freedom of expression from degenerating into personal insult.²⁵ Ahead of finding a breach of Article 10, the Court's response was that the margin of appreciation afforded to states to interpret the Convention 'goes hand in hand with a European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court'.²⁶

²¹ In contrast to the absence of state liability for judicial decisions, some degree of personal immunity is legitimately thought of as a means to protect freedom of judicial thought and, therefore, the sound administration of justice. Olowofoyeku writes that it may undermine the administration of justice if 'instead of hearing parties abstractedly, a considerable portion of the judge's attention must be devoted to himself, i.e. the likelihood of liability if he reaches a particular decision'. AA Olowofoyeku, *Suing Judges: A Study of Judicial Immunity* (OUP, Oxford, 1993) 191.

²² ICJ Reports 1999, 62.

²³ *ibid* para 63.

²⁴ (9815/82) (1986) 8 EHRR 407.

²⁵ *ibid* para 37.

²⁶ *ibid* para 39.

In addition to these cases, Article 4 has also been applied in an unquestioning manner in a case involving disunity between different state organs; specifically, a case in which the executive branch was actively engaged in seeking the reversal of the offending court decisions. The *Brazil–Tyres*²⁷ case before a WTO panel and the Appellate Body involved an import ban on used tyres found to be a quantitative restriction contrary to GATT Article XI. Under the General Exceptions provided by Article XX, the import ban was provisionally justified as being necessary to protect human health. This left the question of whether the import ban complied with the chapeau of Article XX which prohibits the application of measures in a manner which amounts to ‘arbitrary or unjustifiable discrimination between countries where the same conditions prevail’. The application of the import ban had become incomplete by reason of injunctions granted by Brazilian courts which prevented enforcement of the ban by customs officials. These injunctions had been obtained by firms in Brazil for whom imported used tyres were a cheap source of raw material to be made into retreaded tyres. Both the panel and the Appellate Body considered that the injunctions resulted in unjustifiable discrimination in favour of Brazilian retreaders (since foreign retreaded tyres could not be imported) contrary to the chapeau.

For present purposes, the main feature of case was the effort of the executive branch to seek the removal of the injunctions. The following extract from the panel report was cited with approval by the Appellate Body:

We take note of the Brazilian government’s efforts, within the Brazilian domestic legal system, to prevent the grant, or seek reversal, of court injunctions for the importation of used tyres. We also take note of the initiative taken in the course of these proceedings to resolve the matter in a definitive manner through the initiation of proceedings at the federal level. . .

While the Panel appreciates the practical difficulties that may be associated with the prevention of such imports within Brazil’s domestic legal system, it is of the view that it remains incumbent upon Brazil to ensure that it applies its measure in a manner that is consistent with the requirements of Article XX. The fact that the imports arise from court rulings does not exonerate Brazil from its obligation to comply with the requirements of Article XX. Rather, as noted by the Appellate Body in *US–Shrimp*, a Member of the WTO ‘bears responsibility for acts of all its department of government, including its judiciary’.²⁸ (notes omitted)

The fact that attribution of the judicial decisions was not presented by Brazil, or analysed by the Appellate Body, as a contentious issue indicates that Article 4 is unequivocally accepted as a codification. This is consistent with the state unity theory which underpins the attribution principle. The theory looks at the state from the outside and asks only whether the challenged conduct is that of a

²⁷ WT/DS332 *Brazil–Measures Affecting Imports of Retreaded Tyres* adopted 17 December 2007.

²⁸ *ibid* paras 7.304–5. An omitted note at the end of para 7.305 cites Article 4 of the Articles.

state organ. It does not matter if the internal reality is that the different state organs are in a condition of disunity.

In terms of the normative content of this position, it is also worth thinking through the consequences of what would have happened had there been no chapeau violation based on the non-attribution of the judicial conduct. The executive branch would then have been less motivated to challenge the injunctions through national court proceedings in order to remove the violation. The decision therefore added urgency to the activity of the executive branch as is shown by the arbitration on the reasonable period of time for implementation which followed the Appellate Body ruling.²⁹ Attribution of the judicial conduct in this case therefore accelerated both GATT conformity and the protection of human health and the environment. It is surely possible to extrapolate that unconditional attribution enhances the observance of international law in all cases.

D. State Unity or Undifferentiated Attribution and Differentiation between State Organs When Assessing Whether There Is a Violation

As is now evident, it is uncontroversial that the state unity theory results in the attribution of the conduct of all state organs to the state without differentiation. A more difficult question is whether this non-differentiation at the attribution stage also requires or implies non-differentiation at the subsequent stage of deciding whether the conduct complained of amounts to a violation.

The ILC Articles once again provide a useful starting point here in that a clear separation of the two stages is envisaged:

As a normative operation, attribution must be clearly distinguished from the characterization of conduct as internationally wrongful. Its concern is to establish that there is an act of the State for the purposes of responsibility. To show that conduct is attributable to the State says nothing, as such, about the legality or otherwise of that conduct, and rules of attribution should not be formulated in terms which imply otherwise.³⁰

This passage explicitly provides that the matter of attribution has no bearing upon whether the conduct complained of amounts to a violation. A possible inference would be that attribution also has no bearing on the conditions under which different state organs can incur international responsibility. In other

²⁹ This report notes that 'the Government of Brazil asked the Federal Supreme Court to take note of the WTO decision and to expedite its proceedings.' WT/DS332/16 Arbitration under Article 21.3(c) of the DSU 29 August 2008 para 13.

³⁰ Paragraph 4 of the opening Commentary to Chapter II on Attribution of Conduct to a State. The importance of the distinction is indicated by the fact of its initial explanation in the very first paragraph of the opening *General commentary*.

words, it is a possible inference that an undifferentiated attribution rule and a differentiated approach to liability can comfortably co-exist.

Contrary to this inference, it is argued that an undifferentiated approach to attribution strongly implies and in practice entails an undifferentiated approach to the conditions under which different state organs incur international responsibility. The most direct evidence for this claim is provided by a feature of European Court of Human Rights (ECtHR) jurisprudence. The ECtHR has held that it need not specify which branch of the state is responsible for a Convention breach—the sole issue being the state’s international responsibility.³¹ It does not seem to be too much of a leap to suggest that this undifferentiated approach when deciding upon liability, is linked to the same approach when attribution is considered.

As the general international law position is that any breach can incur state responsibility, it can be expected that this position would apply to all state organs. This expectation is evident when international tribunals review national court decisions. The enquiry is whether a breach can be detected, and the indications are that this criterion is applied in the same manner to all state organs.³² As Paulsson notes:

A national court judgment violative of international law does not pose any conceptual difficulty. There is no need to find any exacerbated error, contaminated by bad faith or by gross incompetence. There is no presumption of compliance with international law. A simple error suffices. A simple difference of opinion on the part of the international tribunal is enough; it has plenary powers to rule on the alleged international wrong as it sees fit.³³

³¹ A statement to this effect was made in *Lingens v Austria* (n 24) which concerned national court decisions which faithfully applied the Austrian Criminal Code but which breached the Convention. (para 46).

³² For example, in *Lingens v Austria* (n 24), the ECtHR showed no deference towards the Austrian court decisions when evaluating whether they breached the applicant’s right to freedom of expression. In *Brazil–Tyres* (n 27), a violation was confirmed even though the national court injunctions were not obviously and manifestly in breach of the chapeau of GATT Article XX. The Appellate Body’s reasoning was based on an approach which it explicitly rejected in a previous case so that the evolving nature of the Article XX jurisprudence could have been presented as a consideration suggesting the excusable nature of the breach. On the development of the Appellate Body’s reasoning, see A Davies, ‘Interpreting the Chapeau of GATT Article XX in Light of the “New” Approach in *Brazil–Tyres*’ (2009) 43 *JWTL* 507.

³³ Paulsson (n 3) 72. Some commentators would take issue with the reference in this passage to the absence of a ‘presumption of compliance with international law’, operating on the international law plane. Writing in 1972 Jiménez de Aréchaga states that ‘it is unanimously agreed that in this subject there is one important presumption: that municipal judicial decisions are in conformity with both municipal and international law.’ See Jiménez de Aréchaga, ‘International Responsibility of States for Acts of the Judiciary’ (n 7) 182. A presumption in both areas would seem to be helpful in terms of fostering cooperation between national and international courts and tribunals, albeit that the presumption of compliance with municipal law is surely stronger than any presumption in relation to international law. A presumption also signals that it is for the complaining state to demonstrate violations.

E. Conclusions on the International Law Position

The starting point when considering state liability for judicial conduct in international law is now clearly the state unity theory. The theory requires that judicial conduct is unconditionally attributed to the state. It also suggests that the branch of the state from which the conduct emanates is immaterial when addressing the formally separate question of whether the conduct complained of amounts to a breach of an international law obligation. In practice therefore, the conditions under which state responsibility can be incurred are the same for all state organs, as is the application of these conditions.

On the other hand, the state unity theory is entirely neutral as to whether the general state responsibility criteria are based on any breach (international law), or only a sufficiently serious breach (EU law). As indicated, the theory only suggests that the general criteria (whatever they may be) should be applied in the same manner to the judicial branch as other state organs. Therefore, to the extent that there is a tightening of the general criteria in EU law for the judicial branch, this represents something of a suppression of a natural implication of the state unity theory.

III. STATE LIABILITY FOR JUDICIAL DECISIONS IN EU LAW

The ECJ first recognized the possibility of Member State liability for decisions of final appeal courts contrary to EU law in the *Köbler* case of 2003.³⁴ In doing so, the ECJ drew upon the state unity theory,³⁵ and went on to find that the objections raised by several Member States were not such as to outweigh the need to afford individuals the ‘possibility of rendering the State liable in order . . . to obtain legal protection of their rights’.³⁶ On the other hand, it was also recognized that some weight should be given to some of the objections. Therefore, when national courts hear state liability actions relating to judicial decisions, they are permitted to apply the liability conditions in a particularly

³⁴ The decision at issue was that of the Austrian Verwaltungsgerichtshof—the supreme administrative court. Mr Köbler had been denied a special length of service increment for university professors by the relevant Minister. While he had completed the required 15 years of service, this had been in a number of Member States rather than exclusively in Austria as required by the applicable salary law. The Minister’s decision was appealed to the Verwaltungsgerichtshof claiming indirect discrimination contrary to the free movement of workers guaranteed by Article 45 TFEU (ex 39 TEU). Mr Köbler’s complaint was eventually dismissed by the Verwaltungsgerichtshof based on its erroneous understanding of ECJ case law. There followed an action for damages against Austria before the Landesgericht für Zivilrechtssachen Wien (Regional Civil Court, Vienna) for breach of Community law by the Verwaltungsgerichtshof judgment. The Regional Civil Court referred a series of questions. Based on the ECJ’s responses, Mr Köbler’s claim was ultimately unsuccessful.

³⁵ Quoting from its earlier judgment in Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, the Court in *Köbler* noted that ‘[i]n international law a State which incurs liability for breach of an international commitment is viewed as a single entity, irrespective of whether the breach which gave rise to the damage is attributable to the legislature, the judiciary or the executive’ (para 33).

³⁶ *Köbler* (n 5) paras 33–4.

strict manner by reason of ‘the specific nature of the judicial function and . . . the legitimate requirements of legal certainty’.³⁷ To date, this has been evident in the application of the sufficiently serious breach test which was not satisfied in *Köbler* itself. It was also not satisfied in *Stephen Cooper v HM Attorney General*³⁸ heard by the Court of Appeal in May 2010 (discussed further below).

This section focuses on the extent of the permission for national courts to apply the sufficiently serious breach test in a strict manner in liability actions involving court decisions, focusing on the *Köbler* twin requirements of ‘nature of the judicial function’ and ‘legal certainty’.

A. The Nature of the Judicial Function

What did the ECJ mean when referring to ‘the specific nature of the judicial function’? Since *Köbler*, this has been elaborated upon by the ECJ in *Traghetti del Mediterraneo SpA v Italy*³⁹ and by the UK courts in *Cooper*. In *Traghetti*, the ECJ referred to the ‘very essence of judicial activity’ as being the interpretation of legal provisions in response to ‘divergent or conflicting arguments’.⁴⁰ This was echoed by Arden LJ in *Cooper*:

Interpretation of Community legislation is part of the normal judicial function and liability would no longer be exceptional if it could arise whenever the interpretation was shown to be wrong – if only because the Court of Justice often adopts an innovative interpretation or one motivated by policy insights that would not be [sic] necessarily be available to the national court. There is in our judgment no member state liability *simply* because the national court arrives at the wrong answer: this is because ‘regard is [required to be] had to the specific nature of the judicial function.’⁴¹ (emphasis added)

The emphasized term is crucial for it gives the passage its compatibility with the ECJ’s position in *Traghetti*. The ECJ considered it ‘not inconceivable that a manifest infringement of Community law might be committed precisely in the exercise of such work of interpretation if, for example, the court gives a substantive or procedural rule of Community law a manifestly incorrect meaning, particularly in the light of the relevant case-law of the Court on the subject . . .’.⁴² The sentiment that liability in these circumstances must (however rare) be a legal possibility in Member States was recently reiterated in *Commission v Italy*.⁴³

³⁷ *ibid* para 53.

³⁸ [2010] EWCA Civ 464. This appears to be the only case to date subsequent to *Köbler* in which the sufficiently serious breach test has been addressed in the context of liability for judicial decisions.

³⁹ Case C–173/03 *Traghetti del Mediterraneo SpA v Italy* [2006] ECR I–5177.

⁴⁰ *ibid* para 34.

⁴¹ *Cooper* (n 38) para 70.

⁴² *Traghetti* (n 39) para 35.

⁴³ Case C–379/10, 24 November 2011. ‘48. Par conséquent, il convient de constater que: – en excluant toute responsabilité de l’État italien pour les dommages causés à des particuliers du fait

A query here is whether the ECJ intended to suggest that liability for court decisions should be more exceptional than liability for the acts of other state organs. The passages above describe the process by which the judicial branch might reach a conclusion which is wrong as a matter of EU law. Other state branches might reach the same wrong conclusion via the same process, but a distinction can be conceded. Judges tend to reach wrong conclusions having interpreted provisions of EU law in response to ‘divergent or conflicting arguments’. In contrast, administrative officials sometimes reach wrong conclusions in complete oversight of the EU law position. However, should the process by which a wrong conclusion is reached be of relevance to the prospects for establishing state liability?

It is submitted that process considerations are not directly relevant to the question of whether decisions cross the threshold of being manifestly at odds with EU law. This is because there is a single correct answer to this question, unlike, for example, a decision made by a health board on whether to devote scarce resources to purchase one drug or another. Here, the probity of the choice which is made cannot be separated from the decision-making process and it would clearly be a problem if the interests of one set of patients had been ignored.

In contrast, when deciding whether there is a sufficiently serious breach, the decision-making process is only indirectly relevant for evidential purposes. A process which engages with the EU law position is likely to be useful when determining whether the error was excusable or inexcusable for it might well reveal where, and how, the decision maker committed the error. However, the error is neither excusable nor inexcusable directly by reason of the process. Similarly, it is not possible to conclude from a grossly deficient process whether the decision is manifestly at odds with EU law. Indeed, such a process could fortuitously result in the correct decision.

A possible response is that legal issues which are litigated tend to be more finely balanced than those which are not so that errors in the judicial process are more likely to be excusable than those in administrative decision-making. This argument is persuasive only when the origin of the *Köbler* liability action is a judicial decision. However, the *Köbler* case itself originated in the decision of a Minister while the *Cooper* case originated in a planning decision of a London council. Therefore, in both cases, the question of what was required as a matter of EU law would have been, or ought to have been, considered by an

d’une violation du droit de l’Union commise par une juridiction nationale statuant en dernier ressort, lorsque cette violation résulte d’une interprétation des règles de droit ou d’une appréciation des faits et des preuves effectuée par cette juridiction, et – en limitant cette responsabilité aux seuls cas du dol ou de la faute grave, conformément à l’article 2, paragraphes 1 et 2, de la loi n°117/88, la République italienne a manqué aux obligations qui lui incombent en vertu du principe général de responsabilité des États membres pour violation du droit de l’Union par l’une de leurs juridictions statuant en dernier ressort.’

executive/administrative official. This question did not become more difficult when it was brought before a national court of final appeal.

It follows that, for all state branches, if the reach and scope of the EU law norm is unclear at the time of the decision, state liability is unlikely to ensue. On the other hand, if the territory within which discretion or judgment can be exercised has already been constrained by clarifying decisions of the ECJ, state liability becomes more likely. Additionally, if regard to the origin of the challenged decision were to enter this exercise, this could even be depicted as disadvantageous to the judicial branch. A higher level of awareness and understanding of the ECJ's case law can arguably be expected of national courts of final appeal than any other part of the state.

Therefore, it is not clear that the nature of the judicial function provides a rationale for regarding wrong decisions of the judicial branch as a more exceptional basis for state liability than wrong decisions of other state branches. However, as the ECJ noted, regard must also be had to the 'legitimate requirements of legal certainty', which may be a stronger basis.

B. Legal Certainty

The need to protect the authority of *res judicata*⁴⁴ was foremost among the reasons presented by Member States for either not recognizing state liability at all, or only subject to restrictive conditions. Austria, for example, seemed to appeal to the public policy dimension of the *res judicata* principle which identifies the public interest in bringing an end to litigation. It considered that 'a re-examination of the legal appraisal by a court adjudicating at last instance would be incompatible with the function of such a court since the purpose of its decisions is to bring a dispute to a definitive conclusion.'⁴⁵

Both the ECJ and Advocate General Léger discarded this position as an objection to the principle of state liability. In the Advocate General's words 'the legal authority of a judicial decision—and, as a consequence, *res judicata*—is applicable only in certain circumstances, where there is a threefold identity—of subject-matter, legal basis and parties—between a dispute already resolved and a subsequent dispute'.⁴⁶ The ECJ referred more generally to the 'purpose' of the proceedings being compared and the 'parties'⁴⁷ and it can be seen how there is an appreciable difference between the initial judicial review

⁴⁴ The term *Res judicata pro veritate habetur* was defined by Advocate General Léger as 'a matter adjudicated is held to be true'. *Köbler* (n 5) point 96.

⁴⁵ *ibid* point 21.

⁴⁶ *ibid* point 101. On the 'triple-identity' criteria, a report of the International Law Association notes that 'the [*res judicata*] doctrine undoubtedly applies in all principal legal systems to prevent the same claimant bringing the same claim against the exact same respondent.' International Law Association 'Interim Report: *Res Judicata* and Arbitration' Berlin Conference 2004, 3.

⁴⁷ *ibid* para 39.

against the decision of the Minister in order to obtain the increment, and the later action for damages against the state.

In dismissing *res judicata* based concerns as a bar to the possibility of state liability, the ECJ might also have referred to the private justice rationale which accompanies the public policy dimension. This is to prevent an individual from being proceeded against twice for the same cause,⁴⁸ or, as Briza notes, the ‘main thrust’ of *res judicata* is legal certainty for private individuals.⁴⁹ The ECJ might therefore have observed that to deny the possibility of state liability would be to protect the finality of judgments for the benefit of the state, rather than individuals. However, even without this point, the ECJ noted that ‘the principle of *res judicata* does not preclude recognition of the principle of State liability for the decision of a court adjudicating at last instance.’⁵⁰

Of course, this conclusion does not mean that legal certainty based concerns are completely immaterial in *Köbler* liability actions. A judgment will only in strict terms have the force of *res judicata* in subsequent proceedings when all three of the ‘triple-identity’ criteria are satisfied. However, the related matter of whether the second proceeding compromises legal certainty is a question of degree so that certainty will tend to be significantly compromised when the *res judicata* criteria come very close to being satisfied.⁵¹ While the two national proceedings in *Köbler* were appreciably different, they were also closely related. In general terms, the question at the heart of both cases related to the EU law compatibility of the Austrian condition for the award of the increment. Like Groussot and Minssen,⁵² I would also therefore endorse the assessment of Tridimas that,

The real issue is not whether those principles [finality of judgements and *res judicata*] are undermined but whether such undermining effect is outweighed by the need to ensure respect for the rule of law and the effectiveness of EC law which liability for judicial acts is intended to serve.⁵³

In sum, legal certainty based concerns are more convincing than regard for the nature of the judicial function, as a basis for a strict approach towards liability for final appeal-court decisions. Additionally, it is perhaps not far-fetched to suppose that national courts hearing *Köbler* liability actions are likely to detect and use the permission as long as there is scope for them to do so.

⁴⁸ ILA report (n 46) 3.

⁴⁹ P Briza, ‘Lucchini SpA – is There Anything Left of Res Judicata Principle?’ (2008) 27 CJO 44.

⁵¹ This matter is discussed more fully in Section IV, A.

⁵² X Groussot and T Minssen, ‘Res Judicata in the Court of Justice Case-Law: Balancing Legal Certainty with Legality?’ (2007) 3 EurConstLRev 395.

⁵³ T Tridimas, *General Principles of EU Law* (OUP, Oxford, 2006) 528.

IV. EXPLAINING THE DIFFERENCE BETWEEN THE COMMUNITY AND INTERNATIONAL
LAW POSITIONS

In EU law, the possibility of establishing liability is constrained by the permission to apply the sufficiently serious breach test in an especially strict manner in respect of judicial decisions. In my view, this means that the conditions for *Köbler* liability permit the theory of state unity to be balanced against other considerations. This exercise does not occur in international law where the conditions for state responsibility are the same for all state organs. What are the possible explanations for the more limited conception of the state unity theory in EU law?

A. Res Judicata Concerns

As discussed in the previous section, *res judicata* concerns provide a valid reason for a differentiated approach to liability for judicial decisions in EU law. Are these concerns less pronounced in the international law context?

Advocate General Léger's statement of when the *res judicata* principle is at its strongest can be recalled. This occurs 'where there is a threefold identity—of subject-matter, legal basis and parties—between a dispute already resolved and a subsequent dispute'. Based on these criteria, it is submitted that the most sensitive point which implicates *res judicata* in the *Köbler* scenario is that the challenged final appeal court decision will have (or at least ought to have) considered whether the national measure at issue is consistent with EU law. In the event of a positive answer, the same question is considered for a second time. Significantly, the re-consideration is by a national court, albeit that it may make a reference to the ECJ. This re-consideration creates strong identity of subject matter and also somewhat blurs the division of legal basis since the remedy in both cases will depend on an EU law dimension.

This sequence only carries over to the international law context when certain conditions are present, such as that the state in question has a monist tradition and the Treaty provisions at issue are of an appropriate nature, and sufficiently precise, to be applied directly, or that the Treaty has been incorporated. Absent these conditions, the first occasion on which the consistency of the national measure with international law is considered will be before the international court or tribunal.

Looking at the criterion of 'identity of parties', there is continuity in the complainant's identity in *Köbler* actions. Classically, the state is the complainant in international law matters, as opposed to individuals who may have unsuccessfully sought redress at the national level.⁵⁴ This is not always so for there will be continuity, for example, when an investor brings a denial of justice claim before an international tribunal having been dissatisfied with the

⁵⁴ For a brief account of the gradual erosion of this view, see Paulsson (n 3) 53–6.

conduct of a hearing before a national court, and having exhausted local remedies. The process of exhausting local remedies would likely create identity of subject matter since the alleged failure in the administration of justice would be appealed within the domestic system. However, there would not be identity of legal basis since the international tribunal would be the first to hear the claim of alleged breach of the international law delict of denial of justice.

On the other hand, there are situations in which continuity in all three elements could be present in the international law context, thereby strongly implicating *res judicata* concerns. This can occur in claims relating to the European Convention on Human Rights, by reason of the combination of Article 13 which requires the availability of ‘an effective remedy before a national authority’ for those with an arguable claim that their Convention rights and freedoms have been violated, Article 34 which envisages individual applications to the ECtHR, and Article 35 which first requires the exhaustion of local remedies. Suppose that an individual wishes to challenge conduct of the executive branch which arguably violates the Convention. Using judicial review processes which satisfy Article 13, the highest national court to which the matter can be appealed decides that the executive branch has not violated the Convention. Having thus exhausted local remedies under Article 35, the applicant then relies on Article 34 in order to bring the case before the ECtHR arguing again that the executive branch conduct violates the Convention. Should the ECtHR hear the case, there could well be identity of subject matter, legal basis⁵⁵ and parties.

However, there is no evidence that *res judicata* based concerns are raised in cases which correspond with this scenario, even though they have involved the House of Lords denying alleged Convention violations which were later found to be present by the ECtHR.⁵⁶ The strongest explanation is that dispute settlement organs at the international level are considered only to be bound by decisions at the same level, and not also by decisions of national courts.⁵⁷ This explanation is generally thought to be a corollary of the triple-identity criteria.⁵⁸ The domestic decision is not binding because one or more of these

⁵⁵ Whether identity of legal basis would be present depends on whether the applicant was relying directly on the Convention at the national level. Identity of legal basis would also come close to being satisfied if the applicant was relying on a domestic instrument of incorporation. A leading work notes that ‘[a]ll states parties have incorporated the Convention in one form or another, but this has not been through any legal obligation derived from Article 13 or the Convention generally.’ The authors further note ECtHR case law to the effect that there is no requirement that the Convention be capable of being relied upon directly in domestic courts, the lesser requirement under Article 13 being ‘the possibility of canvassing the substance of the Convention argument before a national authority’. DJ Harris, M O’ Boyle and C Warbrick, *Law of the European Convention on Human Rights* (2nd edn, OUP, Oxford, 2009) 558–9 and 562.

⁵⁶ Recent cases involving the UK include, *Marper v UK* (30562/04) (2009) 48 EHRR 50; *Gillan and Quinton v UK* (4158/05) (2010) 50 EHRR 45.

⁵⁷ See ILA Report on Res Judicata and Arbitration (n 46) 18–19.

⁵⁸ Brownlie states that: ‘There is no effect of *res judicata* from the decision of a municipal court so far as an international jurisdiction is concerned, since, although the subject matter may be

criteria tend not to be fulfilled when the case transitions to the international level. However, the non-binding nature of the domestic decision before the international tribunal surely also has normative force even if the triple-identity criteria are fulfilled. *Res judicata* concerns ought not to provide a defence to a state whose courts have infringed international law obligations. They are outweighed by the power of the international tribunal to rule on the alleged wrong. The true rationale for the absence of *res judicata* concerns might therefore rest in the transition from one level of adjudication (national) to another (ECtHR) and a robust conception of state unity at the second level. Here, there is no concession to the branch of the state from which the alleged violation emanates.

The significance of this transition can be reinforced by considering the impact of a change in the noted scenario. The starting point is the same with the highest national court to which the matter can be appealed having confirmed that the executive branch has not violated the Convention. One might then question whether the applicant might once again rely on Article 13 to challenge the substance of the national court judgment as a possible Convention violation, rather than commencing proceedings before the ECtHR. There is presently no definite answer in ECtHR case law on whether Article 13 is generally applicable in this situation,⁵⁹ although it has been argued (partly by analogy with *Köbler* liability) that Article 13 ought to apply generally to acts or omissions by the judiciary which lead to violations of ECHR obligations.⁶⁰ When such questions come before the ECtHR, it is surely foreseeable that states will raise *res judicata* based objections. That these objections could be dismissed does not matter. Rather, the point is that *res judicata* will very probably be raised and discussed if Article 13 is to operate to delay, or render unnecessary, recourse to the ECtHR. This discussion will occur by reason of the retention of the dispute within the same level of adjudication.

In sum, *res judicata* based concerns are always strongly implicated in *Köbler* liability cases since they involve a re-consideration, within the same judicial order, and at the request of the same complainant, of the EU law compatibility of a national rule. In contrast, *res judicata* concerns can be depicted as applying to varying degrees in different international law contexts. The greater the extent to which the international law context in question departs

substantially the same, the parties will not be, and the issues will have a very different aspect. In the municipal court the legal person claiming is an individual or corporation: before an international tribunal the claimant will be a state exercising diplomatic protection with respect to its nationals.' I Brownlie, *Principles of Public International Law* (6th edn, OUP, Oxford, 2003) 50.

⁵⁹ To date, the ECtHR has not interpreted Article 13 as applying generally to all possible violations committed by the judicial branch. It has only so far been interpreted as applying to violations by the judiciary of the 'hearing within a reasonable time' requirement of Article 6(1). *Kudła v Poland* (30210/96) (2002) 35 EHRR 11.

⁶⁰ T Barkhuysen and ML van Emmerik, 'Accountability of the Judiciary on the National Level for Violations of the European Convention on Human Rights' in Canivet, Andenas and Fairgrieve (eds) (n 19) 419.

from the classical model of international law as being clearly separated from national law and as involving relations between states, the more pronounced *res judicata* concerns become. However, all international law contexts share the common feature of a transition between different levels of adjudication. It appears to be accepted that *res judicata* based concerns do not outweigh the power of the international tribunal to rule on the alleged wrong. The balance settles at a different point in *Köbler* liability actions. Here *res judicata* concerns have more weight because the dispute is retained within the national level of adjudication.

B. *Köbler* Liability as an Aspect of EU Integration

It is axiomatic that the EU has integration objectives which are not shared by any regime of international law. In the present context, this difference exerts two influences which pull in opposing directions. First, it would have been astonishing if *Köbler* liability had not been recognized bearing in mind that whole-state liability is an established international law feature. Secondly, however, it would also have been surprising if *Köbler* liability had been recognized without any tightening of liability conditions. This is because, in order for EU integration to be successful, it must occur with reference to the legal traditions of the Member States.⁶¹ Neither the Court nor the Advocate General pointed towards a clear example of a jurisdiction which recognizes all the elements of *Köbler* liability—state liability for mistaken judgments of national courts of final appeal.⁶² While Member States were told that all these elements have to be recognized in cases with an EU law dimension, there was a need for an accommodation. The tightened liability conditions could therefore be viewed as a concession to national legal orders, and as intended to enhance

⁶¹ Analytical tools are therefore required to mediate between national legal orders and possible EU law developments. In this regard, reference was made by the Advocate General to the established distinction between the ‘rule’ to be recognized, and the ‘scope and the conditions of application’ of the rule (point 85). The rule need not be a feature of all Member State legal systems and the fact that the scope and the conditions for applying the rule vary from one Member State to another has no influence. When applying these principles there is considerable scope for flexibility as there is only a hazy distinction between the rule, and its scope and conditions for application. However, the fact of engagement with national law traditions is arguably more significant than the extent to which the process has a true braking effect on the development of EU law. There is at least a conscious effort to relate the EU law development with something comparable which is recognized by some Member States.

⁶² The Advocate General noted that ‘Belgium is the only Member State which has acknowledged, in its case-law, the general principle of the liability of the State for the actions of its courts’ (point 83). The missing element here is that the Cour de Cassation was not discussing its own liability as a court of final appeal, but that of a court lower in the hierarchy. Other Member States are a good deal further away from recognizing all the required elements. For example, under Austrian law, state liability for the decisions of its supreme courts is excluded by statute under art 2 (3) of the Amtshaftungsgesetz – Public Tort Liability Act (Bundesgesetzblatt No 20/1949). In the UK, section 2(5) of the Crown Proceedings Act 1947 excludes proceedings against the Crown ‘in respect of anything done or omitted to be done by any person while discharging or purporting to discharge any responsibility of a judicial nature vested in him’.

the prospects for embedding *Köbler* liability as an aspect of European integration.

In contrast, when international tribunals address state liability for judicial decisions, there is less need to think about any process of integration and prevailing national law traditions. To a much greater extent than the EU legal system, international law operates above and apart from municipal legal systems. The state unity theory is therefore permitted to result in undifferentiated liability conditions.

B. Judicial Cooperation in Community Law and International Law

More than the ECJ, Advocate General Léger devoted considerable attention to establishing that national supreme courts play a vital role in the implementation, enforcement and development of EU law.⁶³ He referred to the ‘progressive development of a real Community judicial ethic’⁶⁴ and identifies ‘the leading role played by supreme courts in the application of Community law’⁶⁵ as evidenced by the obligation upon them to refer questions for preliminary rulings under Article 267.⁶⁶ These considerations led the Advocate General to conclude that ‘[i]t is impossible to see how a Member State could *prima facie* escape all liability for the acts or omissions of its supreme courts when, specifically, those courts are responsible for applying and ensuring compliance with Community law. That would amount to an insuperable paradox.’⁶⁷

There is also another paradox here. The very considerations which require the possibility of state liability for judicial conduct also suggest that the actual imposition of liability should be rare. Since, the ‘Community judicial ethic’ between the ECJ and national courts is the very foundation of the EU legal order,⁶⁸ the possibility of consequences must attach to the breakdown of this ethic in individual cases. However, this ethic depends on a spirit of collegiality between Community and national judicial organs.⁶⁹ The problem is that

⁶³ *Köbler* (n 5) points 53–76.

⁶⁴ *ibid* point 53.

⁶⁵ *ibid* point 71.

⁶⁶ *ibid* point 74.

⁶⁷ *ibid* point 70. In the same manner, the ECJ (para 34) noted that since a decision of a court adjudicating at last instance ‘cannot thereafter be corrected, individuals cannot be deprived of the possibility of rendering the State liable in order in that way to obtain legal protection of their rights’.

⁶⁸ See K Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (OUP, Oxford, 2001). Alter indicates that the ECJ has generally enjoyed a more harmonious relationship with lower national courts than supreme national courts. Lower courts have tended to view the preliminary ruling procedure as a means of expanding their authority within the national legal system while supreme courts view the same procedure as capable of undermining their authority and responsibility to maintain the coherence of the national legal system. See Alter’s discussion of a general theory of judicial interests at 45–52.

⁶⁹ This spirit of collegiality is captured in different terms by Anne-Marie Slaughter who describes a ‘community of courts’ within which each ‘is a check on the other, but not a decisive one, asserting their respective claims through dialogue of incremental decisions signalling opposition or cooperation’. A-M Slaughter, ‘Judicial Globalization’ (2000) 40 *VaJIntL* 1108.

actually imposing state liability is more akin to a hierarchical structure, something which has been strongly resisted by several national supreme courts particularly the German Federal Constitutional Court.⁷⁰ The paradox is therefore that state liability both underlines and undermines the ‘Community judicial ethic’. The riposte that the damages action is heard by a national court is not a complete answer if the lower court hearing the damages action seeks guidance from the ECJ. The way in which *Köbler* was decided may well have had more to do with this unarticulated consideration than the considerations discussed above.⁷¹ Indeed, it is even arguable that the ECJ intended to send a signal to future litigants. If it is more difficult to establish state liability for judicial conduct, litigants are more likely to frame their damages action as a challenge against legislative and administrative shortcomings.⁷² This reduces tension between the Court and national supreme courts.

Before turning to the international law context, a possible view that the tightening of the liability conditions has little to do with judicial cooperation can be addressed. This view could be based upon the ECJ’s approach in Article 258 enforcement actions relating to judicial decisions. If cooperation is among the explanations for a tightening of the conditions of liability in *Köbler* actions, a comparable tightening should be observable in this analogous context. Looking at the leading case, it is indeed difficult to identify any tightening of the liability conditions. However, it is also clear from the ECJ’s conclusion that the infringement was not ultimately based directly upon the supreme court decisions:

... it must be declared that, by failing to amend art. 29(2) of Law No. 428/1990, which is construed and applied by the administrative authorities and a substantial proportion of the courts, including the *Corte suprema di cassazione*, in such a way that the exercise of the right to repayment of charges levied in breach of Community rules is made excessively difficult for the taxpayer, Italy has failed to fulfil its obligations under the EC Treaty.⁷³

⁷⁰ Slaughter refers to this court’s ‘long history of engaging and challenging the ECJ as a co-equal rather than a superior court’ (at 1107). Alter’s chapter on German Judicial Acceptance of European Law Supremacy could be described as a full exposition of this theme. Alter (n 68) chapter 3. See also B Zwingmann, ‘The Continuing Myth of Euro-scepticism? The German Federal Constitutional Court Two Years after Lisbon’, this volume.

⁷¹ This is indicated by one of the earliest recognitions of the link between state liability for judicial conduct and undermining the cooperative relationship between national and Community courts. In a widely cited footnote, it is significant that Steiner was referring to this problem as a reason for regarding even the possibility of state liability for judicial failure as ‘unthinkable’. It is entirely possible therefore that, having recognized the unthinkable, the Court was very mindful of cooperation concerns in setting the conditions. J Steiner, ‘From Direct Effect to Francovich: Shifting Means of Enforcement of EC Law’ (1993) 18 EL Rev 11 at n 48.

⁷² Mr Köbler might himself have elected to challenge in the damages action either the national measure itself or its application by the relevant Minister.

⁷³ Case C-129/00 *Commission of the European Communities v Italy* [2003] ECR I-14637 para 41.

It is submitted that, in enforcement proceedings, it will usually be possible for the ECJ to base liability on such a failure to correct a judicial interpretation, rather than directly on the judicial decisions. This is because enforcement proceedings are only likely to be brought against established judicial interpretations rather than isolated judgments. As for why the ECJ chose to express its conclusion in this way, the need to preserve judicial cooperation is a possible explanation.

What can be said of the international context by way of comparison? Here, there is growing awareness of the benefits of various forms of interaction and cooperation among national judges and between national and international tribunals.⁷⁴ A core aspect of the debate has been the role of national courts in enhancing the salience and impact of international law.⁷⁵ Building on the work of Anne-Marie Slaughter, Benvenisti and Downs have recently posited collaboration between national and international tribunals as an essential means of enabling ‘global governance to flourish’, of ‘creating a more coherent international regulatory system’ and ‘modestly defragmenting the present system’.⁷⁶ Yet it is probably not controversial to suggest that this is an area in which normative aspirations are running ahead of what can be observed. Thus, in response to Benvenisti and Downs, Lavranos adds a note of caution by referring to ‘a sliding scale of the direct impact of judgments of different international courts on national courts, the ECJ being at the top of this scale, followed by the ECtHR, and the ICJ at the bottom’.⁷⁷ On the economic side, the decisions of WTO panels and the Appellate Body ought probably to be located closer to the bottom of this scale than the top. This is much as one would expect bearing in mind that implementing measures, at least in the US and the EU, expressly precludes private party reliance on WTO law.⁷⁸ On the other hand, US courts have expressly recognized that panel and Appellate Body pronouncements are of persuasive value in the process of seeking to interpret ambiguous domestic legislation consistently with WTO obligations.⁷⁹ In the EU context, Bronckers has referred to a number of cases in which a

⁷⁴ See Slaughter (n 68); A-M Slaughter, ‘A Global Community of Courts’ (2003) 44 *HarvIntLJ* 191 (2003); and M Amos, ‘The dialogue between United Kingdom courts and the European Court of Human Rights’, this volume.

⁷⁵ For a recent contribution to this area, see A Roberts, ‘Comparative International Law? The Role of National Courts in Creating and Enforcing International Law’ (2011) 60 *ICLQ* 57.

⁷⁶ E Benvenisti and G Downs, ‘National Courts, Domestic Democracy, and the Evolution of International Law’ (2009) 20 *EJIL* 69–70.

⁷⁷ N Lavranos, ‘National Courts, Domestic Democracy, and the Evolution of International Law: A Reply to Eyal Benvenisti and George Downs’ (2010) 21 *EJIL* 1108 (notes omitted).

⁷⁸ In the US, see the Uruguay Round Agreements Act, section 102(c)(1)(A)–(B). In the EU, see the last recital of the Preamble of the Council Decision of 22 December 1994 concerning the conclusion on behalf of the European Union, as regards matters within its competence, of the agreements reached in the Uruguay Round of multilateral negotiations (1986–1994), [1994] *OJ L* 336/1 of 23 December 1994.

⁷⁹ On the case law here, see G Gattinara, ‘The Relevance of WTO Dispute Settlement Decisions in the US Legal Order’ (2009) 36 *Legal Issues Economic Integration* 285.

reasonable assumption could be made that the ECJ was partly motivated by an inclination to avoid conflict with Appellate Body rulings.⁸⁰ He sees these cases as evidence of a ‘muted dialogue’ between the ECJ and the Appellate Body, contrasting this with a much more open dialogue between the ECJ and the ECtHR.

Judicial cooperation is clearly not something which is confined to the relationship between the ECJ and national courts. Yet, cooperation in the EU legal order is likely to retain a more developed and consistent quality than anything which can be observed in any international law setting by reason of the supremacy and direct effect of EU law coupled with the preliminary ruling procedure.⁸¹ This has a bearing upon the conditions for state liability in respect of judicial conduct. It is potentially damaging to the interaction between the ECJ and national supreme courts for the ECJ to adjudicate on the substance of national court judgments. Limiting state liability (in effect) to cases where it can be reasonably inferred that the national court has been either incompetent in failing to understand the EU law dimension of a case, or has deliberately ignored this dimension, can be seen as a means of reducing this tension. For the most part, while state liability is present in the background, it is not imposed, thereby preserving the more subtle system of signalling cooperation or opposition which one would expect within a community of courts. Hence, in EU law, the tests for state liability in respect of judicial decisions can permissibly be applied in an especially strict manner. At least in relative terms, it is a less sensitive matter for an international court to adjudicate on whether national court judgments comply with international law. There is less of a community of courts whose ethos is capable of being damaged by the imposition of state liability.

C. Internal Tensions Caused by Köbler Liability Are Absent in the International Law Context

A number of Member States in *Köbler* objected to the possibility of state liability on the basis that it would cause internal tensions which have been well described by Anagnostaras. He sees state responsibility here as ‘entrusting the determination of the breach to a body belonging to the same system as the wrongdoer’. The lower court judge may ‘hesitate to reproach’ the activity of a superior court and, if the damages action is appealed to the supreme court, he questions ‘whether there is any point at all in accepting the availability of a

⁸⁰ M Bronckers, ‘From “Direct Effect” to “Muted Dialogue” Recent Developments in the European Courts’ Case Law on the WTO and Beyond’ (2008) 11 JIEL 889–90.

⁸¹ Mancini and Keeling evoke the image of the doctrines of direct effect and supremacy as the ‘twin pillars of the EU’s legal system’ and the preliminary reference procedure as the ‘keystone in the edifice; without [which] the roof would collapse and the two pillars would be left as a desolate ruin’. GF Mancini and DT Keeling, ‘From *CILFIT* to *ERT*: The Constitutional Challenge Facing the European Court’ (1991) 11 YB EurL 2–3.

damages action under circumstances permitting the alleged wrongdoer simply to confirm the legality of its contested action and to dismiss the relevant claim'.⁸² Such concerns can be downplayed. As Advocate General Léger pointed out, the preliminary ruling makes it possible to 'dispel any reasonable doubt as to the impartiality of the national court'.⁸³ However, it may now seem as though Anagnostaras' perspective was remarkably prescient in light of the litigation in *Cooper*.⁸⁴ In this case, *Köbler* liability was considered by the High Court in respect of a Court of Appeal decision. The High Court did not make a reference and neither did the Court of Appeal before confirming the legality of its own previous judgments.⁸⁵ Concerns about internal tensions and lack of impartiality may therefore emerge to be well founded as the national reception of *Köbler* liability is tested in future cases.

In this eventuality, the burden on the applicant of satisfying stringent tests which can be strictly applied can be seen as a means of defusing this tension. Some internal tension may be caused by the national court merely hearing the action. However, the occurrence which causes the most tension—confirmation of state liability—will be highly exceptional by reason of the permission to apply the key test in a strict manner. In the international law context, the obvious difference is that state responsibility is evaluated and imposed by judicial bodies and tribunals which are external to the national court system so that the need to minimize internal tensions clearly does not apply. The externality of the international judicial body means that it can evaluate and impose state responsibility in a relatively uninhibited manner compared with a national court.

⁸² Anagnostaras (n 4) 290–1, 295–6.

⁸³ *Köbler* (n 5) point 111.

⁸⁴ The eventual state liability action originated from planning decisions of a London council in connection with the White City Development. Judicial review of these decisions was unsuccessfully sought by The Council for the Protection of Rural England (CPRE) on the basis that procedures required by the Environmental Impact Assessment Directive had not been followed. The Court of Appeal decisions which exonerated the council's actions were challenged in the liability action by Mr Cooper who was a trustee of the London branch of CPRE. Mr Cooper claimed that the decisions met all the conditions for *Köbler* liability and caused him loss in the form of adverse orders for costs.

⁸⁵ Upon closer examination, however, it is not so clear that the case is a good example of the problems described. As for why neither the High Court nor the Court of Appeal made a reference, it is suggested that, on the sufficiently serious breach requirement, the case was nowhere near as close to the threshold as *Köbler*. Pivotal in the liability action was the meaning of 'development consent' in the Environmental Impact Assessment Directive. At the time of the decisions which exonerated the council's actions, the Court of Appeal had considered the meaning of this term to be *acte clair*. Foremost among the reasons was that the Court of Appeal's understanding of the term was not at odds with the Commission's understanding (para 112). The Court of Appeal's understanding also appeared to be consistent with the text of the Directive, up to ECJ judgments which post-dated the impugned decisions. At first instance in the liability action, Plender, J warned against comparing 'the gravity of error made by one court with that of another'. ([2008] EWHC 2178 (QB) para 55) However, I would hazard that the ECJ in *Köbler* forgave far more of the Verwaltungsgerichtshof than the Court of Appeal did of itself in *Cooper*. A further point is that the Court of Appeal was only sitting as the court of last instance when it reached the decisions which were later challenged in the liability action, rather than also in the liability action itself. Therefore, the Court of Appeal did not have the last say in confirming the legality of its own contested action.

V. CONCLUSION

This article has had the twofold aim of establishing and explaining a significant difference with respect to state liability for judicial decisions in international and EU law. In international law, the judicial origin of challenged decisions does not influence the content of the liability criterion or its application, whereas, in EU law, the liability criteria can be applied to judicial decisions in a tightened manner.

Both in establishing and explaining this difference, much has depended upon an assessment of the proper meaning, strict requirements, and implications of the relevant ideas and principles. Foremost here has been the state unity theory which provides the basis for whole-state liability and which has supplanted the constitutionally independent status of the judicial branch as the dominant consideration. This is a reassuring development since freedom of judicial thought, as the value protected by the separation of the judicial branch, is better protected by the possibility of state liability for judicial decisions. More contentiously, a question has been raised about the conventional understanding of state unity that its influence begins and ends with the matter of attribution. The suggestion is that undifferentiated attribution implies undifferentiated liability conditions in content and application for all state organs, and that this would appear to be reflected in an established feature of ECtHR case law. On this basis, the article has depicted the international system as giving effect to both the strict requirement of the state unity theory, and a natural implication flowing from the theory.

In contrast, EU law gives effect only to the strict requirement, at least to the extent that Member State courts hearing *Köbler* liability actions are permitted to apply the liability criteria in a tightened manner. As to the existence and extent of this permission, it is again a matter of assessing the relevant ideas and principles. Despite some clarification of the nature of the judicial function in the post-*Köbler* case law, this consideration does not appear to withstand scrutiny as a rationale for a differentiated approach towards judicial decisions. The difficulty of deciding what is required by EU law in any particular situation does not vary as between different decision makers and decisions-making processes. On the other hand, legal certainty concerns are more convincing as a basis for the exceptional nature of *Köbler* liability because of the strong resemblance between the initial proceeding culminating in a decision of a final appeal court, and the subsequent *Köbler* liability action.

In terms of explaining the difference, the considerations which lead to differentiated application of liability criteria in EU law generally apply with less force in the international law setting. Interestingly, the further discussion of legal certainty illustrated both the need to avoid over-generalization, and the possibility of suggesting a generalization. The strength of legal certainty concerns varies between different international law settings depending on the

extent to which the context in question departs from the classical model of international law as being clearly separated from national law and as involving relations between states. On the other hand, all international contexts involve a transition between adjudication at the national and international levels. It appears to be accepted that *res judicata* concerns do not outweigh the power of the international tribunal to rule on the alleged wrong. The balance settles at a different point in *Köbler* liability actions. *Res judicata* concerns have more weight here because the dispute is retained within the national level of adjudication. The tightened application of liability criteria can be seen as a means of preserving the authority of the final appeal court decision at issue in the *Köbler* liability action.

The second explanation posited regard to the legal traditions of Member States as an aspect of European integration. State liability for final appeal court decisions is generally not recognized in domestic legal orders. The permission to apply liability criteria in a tightened manner can be seen as an accommodation to national legal traditions making it more likely that whole-state liability will become an embedded feature across Member States. In contrast, when international tribunals address state liability for judicial decisions, there is less need to think about any process of integration and prevailing national traditions so that the state unity theory can be permitted to result in undifferentiated liability conditions.

The third explanation considered the risk of *Köbler* liability actions damaging relations between the ECJ and national courts of final appeal based on the possibility of liability being imposed after a reference to the ECJ. Tightened application of liability criteria will assist in maintaining a collegiate relationship. In contrast, it is a less sensitive matter for an international court to adjudicate on whether national court judgments comply with international law. There is less of a community of courts whose ethos is capable of being damaged by the imposition of state liability. The fourth explanation shifted the focus from tensions between the ECJ and supreme courts, to tension within domestic court hierarchies based on final appeal court decisions being reviewed by lower courts. Again, tightening the application of liability criteria can defuse this tension by reducing the likelihood of the most unpalatable outcome—the confirmation of a manifest and inexcusable error. In contrast, the externality of the international judicial body means that it can evaluate and impose state responsibility in a relatively uninhibited manner.

These explanations provide a means of thinking about why state unity results in undifferentiated attribution, but not undifferentiated application of liability criteria in EU law. Their cumulative weight is probably such as to render unlikely a clarification by the ECJ in the direction of aligning the liability case law. Such a clarification is not however inconceivable, especially if national courts were to adopt an overly restrictive approach, most likely by interpreting the requirement of a manifest infringement as an ‘insurmountable

obstacle'.⁸⁶ Clarifications which soften liability criteria are not unprecedented in ECJ jurisprudence⁸⁷ and the robustness with which the limitations in Italy were rejected in *Traghetti*⁸⁸ and *Commission v Italy*⁸⁹ might be viewed as an indication in this direction. The international law position could provide a supporting rationale for such a clarification just as it did in establishing whole-state liability.

⁸⁶ This phrase is a reference to the title of Beutler's article cited at n 4.

⁸⁷ For example, the ECJ's case law from the late 1970s in the analogous context of the EU's own non-contractual liability could once be read as requiring conduct which verged on the arbitrary. In 1993, the Court clarified that, '...the concept of arbitrary conduct as mentioned only in the judgments in Joined Cases 116/77 and 124/77 *Amylum v Council and Commission* [1979] ECR 3497 and in Case 143/77 *Koninklijke Scholten-Honig v Council and Commission* [1979] ECR 3583 ... does not provide a basis for holding that a finding of conduct verging on the arbitrary represents a necessary condition or formulation for the Community to be rendered liable within the framework of the EEC Treaty...' (Case C-220/91 P) *Commission v Stahlwerke Peine-Salzgitter* ECR I-2393 para 51.

⁸⁸ The Court considered the Italian legislation which precluded state liability in relation to the judicial interpretation of provisions of law or assessment of facts and evidence to be 'tantamount to rendering meaningless the principles laid down by the Court in the *Köbler* judgment'. *Traghetti* (n 34) para 36.

⁸⁹ n 38.