

OPINION OF ADVOCATE GENERAL

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delivered on 10 July 2008¹

1. The present cases concern investment agreements entered into by either Austria or Sweden, on the one hand, and various third countries, on the other, under which investors are guaranteed the transfer of capital connected with their investments.

of capital to and from third countries too zealously. However, the main issue in these cases does not lie in that apparent paradox. Although Articles 57(2), 59, and 60(1) EC permit restrictions on the free movement of capital, the Community has yet to introduce such restrictions in respect of the third countries involved. How far can Austria and Sweden be held liable for not removing an incompatibility that, seemingly, has yet to materialise?

2. All of those bilateral investment agreements predate the accession of Austria and Sweden and are therefore governed by Article 307 EC. Under that article, Austria and Sweden are obliged to take all appropriate steps to eliminate any incompatibility with the Treaty contained in such agreements. The Commission contends that Austria and Sweden have infringed that obligation inasmuch as their agreements do not provide for the restrictions on the free movement of capital to and from third countries envisaged in Articles 57(2), 59, and 60(1) EC and they have not acted to rectify that situation.

I — Factual and legal background

3. Austria and Sweden thus 'stand accused' of having safeguarded the freedom of movement

4. Austria concluded several bilateral investment agreements with third countries before

¹ — Original language: English.

its accession to the European Union.² Those agreements contain a so-called ‘transfer clause’, which guarantees investors of either party the free transfer, without undue delay, of capital connected with their investment.

5. Before its accession, Sweden also concluded a number of bilateral investment agreements with third countries containing a transfer clause.³ In Sweden’s agreements, that clause authorises the transfer of several types of capital related to investment, namely profits, liquidation sums, the reimbursement of loans, and the payment of expenses. In certain agreements it is stated that the transfer will be made in accordance with the applicable national laws and regulations.

2 — With China (BGBl. 537/1986, entry into force on 11 October 1986), Malaysia (BGBl. 537/1986, entry into force on 1 January 1987), the Russian Federation (BGBl. 387/1991, entry into force on 1 September 1991, initially concluded with the ex-USSR and made applicable between Austria and the Russian Federation by the exchange of notes BGBl. 257/1994), Korea (BGBl. 523/1991, entry into force on 1 November 1991), Turkey (BGBl. 612/1991, entry into force on 1 January 1992) and Cape Verde (BGBl. 83/1993, entry into force on 1 April 1993).

3 — With Vietnam (SÖ 1994:69, entry into force on 2 August 1994), Argentina (SÖ 1992:91, entry into force on 28 September 1992), Bolivia (SÖ 1992:19, entry into force on 3 July 1992), the Ivory Coast (SÖ 1966:31, entry into force on 3 November 1966), Egypt (SÖ 1979:1, entry into force on 29 January 1979), Hong Kong (SÖ 1994:19, entry into force on 26 June 1994), Indonesia (SÖ 1993:68, entry into force on 18 February 1993), China (SÖ 1982:28, entry into force on 29 March 1982), Madagascar (SÖ 1967:33, entry into force on 23 June 1967), Malaysia (SÖ 1979:17, entry into force on 6 July 1979), Pakistan (SÖ 1981:8, entry into force on 14 June 1981), Peru (SÖ 1994:22, entry into force on 1 August 1994), Senegal (SÖ 1968:22, entry into force on 23 February 1968), Sri Lanka (SÖ 1982:16 entry into force on 30 April 1982), Tunisia (SÖ 1985:25, entry into force on 13 May 1985), Yemen (SÖ 1983:110, entry into force on 23 February 1984), Yugoslavia (SÖ 1979:29, entry into force on 21 November 1979, renewed with Serbia and Montenegro following an agreement concluded in Stockholm on 28 February 2002).

6. Investment agreements started to grow in importance in the 1990s, even leading to failed negotiations under the umbrella of the Organisation for Economic Cooperation and Development for a multilateral instrument. Instead, a network of bilateral agreements developed, which today number thousands. Austria and Sweden have argued, without being contradicted by the Commission, that the transfer clauses in their agreements are standard, and indeed central, to that sort of agreement.

7. The Treaty puts the free movement of capital to and from third countries on an equal footing with that between Member States. Article 56 EC prohibits any restrictions on either, as well as any restrictions on payments between Member States and to and from third countries. However, the Treaty permits certain restrictions to be imposed by Member States (notably in Article 58 EC, which sets out several justifications) and, more importantly for the present cases, by the Community itself.

8. Article 57(2) EC enables the Community to regulate the movement of capital to and from third countries, including the introduction of restrictions:

'Whilst endeavouring to achieve the objective of free movement of capital between Member States and third countries to the greatest extent possible and without prejudice to the other Chapters of this Treaty, the Council may, acting by a qualified majority on a proposal from the Commission, adopt measures on the movement of capital to or from third countries involving direct investment — including investment in real estate — establishment, the provision of financial services or the admission of securities to capital markets. Unanimity shall be required for measures under this paragraph which constitute a step back in Community law as regards the liberalisation of the movement of capital to or from third countries.'

9. The Community may also enact safeguard measures to address difficulties with economic and monetary union, as detailed in Article 59 EC:

'Where, in exceptional circumstances, movements of capital to or from third countries cause, or threaten to cause, serious difficulties for the operation of economic and monetary union, the Council, acting by a qualified majority on a proposal from the Commission and after consulting the ECB, may take safeguard measures with regard to third countries for a period not exceeding six months if such measures are strictly necessary.'

10. Finally, under Article 60(1) EC the Community may restrict economic relations with third countries, including the movement of capital, on the basis of a joint action relating to the common foreign and security policy:

'If, in the cases envisaged in Article 301, action by the Community is deemed necessary, the Council may, in accordance with the procedure provided for in Article 301, take the necessary urgent measures on the movement of capital and on payments as regards the third countries concerned.'

Article 301 EC, referred to in that provision, states:

'Where it is provided, in a common position or in a joint action adopted according to the provisions of the Treaty on European Union relating to the common foreign and security policy, for an action by the Community to interrupt or to reduce, in part or completely, economic relations with one or more third countries, the Council shall take the necessary urgent measures. The Council shall act by a qualified majority on a proposal from the Commission.'

11. Despite the above possibilities, the Community has yet to introduce any restrictions that would affect free movement of capital to and from the third countries that are party to the agreements entered into with Austria and Sweden. In particular, the Community has still not made use of Article 57(2) EC to regulate the area; there has been no need to introduce the safeguard measures provided for in Article 59 EC; and while the Council has already made use of Article 60(1) EC, it has not targeted any of those third countries in a meaningful way.⁴

12. Article 307 EC would apply if any conflict were to arise between the agreements concluded by Austria and Sweden and the Treaty. According to that article, the agreements would stay in force but Austria and Sweden would be obliged to take all appropriate steps to eliminate the incompatibility:

To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.

In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under this Treaty by each Member State form an integral part of the establishment of the Community and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States.’

II — Pre-litigation procedure

‘The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty.

13. On 12 May 2004 the Commission, in accordance with Article 226 EC, sent letters to Austria and Sweden in which it expressed the view that their bilateral agreements with third countries would conflict with the introduction by the Community of the restrictions provided for in Articles 57(2), 59, and 60(1) EC. It asked Austria and Sweden whether they had taken any measures to eliminate the incompatibility under Article 307 EC which it had identified.

⁴ — Sanctions have already been introduced under Article 60(1) EC against the Ivory Coast and Serbia and Montenegro, with which Sweden had concluded or continued agreements. However, the Commission has not alleged any conflict between those sanctions and Sweden’s agreements.

14. In their replies of 14 and 12 July 2004 respectively, Austria and Sweden denied the existence of such an incompatibility. This led the Commission to issue two reasoned opinions on 21 March 2005, with a two-month deadline for Austria and Sweden to comply with their obligation under Article 307 EC and eliminate the alleged incompatibility.

15. In response to the reasoned opinions, both Austria and Sweden continued to deny the existence of any incompatibility, with Austria adding that in the course of revising its bilateral investment agreements model an 'regional economic integration organisations' clause would be adopted which would prevent conflicts with Treaty obligations.

16. In light of those replies, the Commission brought the present actions under Article 226 EC. Finland, Germany, Hungary and Lithuania asked for leave to intervene in support of Austria and Sweden.

III — Assessment

17. The main dispute between the Commission and the Member States lies in the existence of an incompatibility under Article 307 EC. The resolution to that dispute would be greatly simplified had the Community already introduced restrictions on the movement of capital to and from the third countries party to agreements with Austria and Sweden. However, the Community has yet to do so. The issue is the extent of Austria's and Sweden's obligations in the meantime. Until the Community introduces such restrictions, say the Member States, any incompatibility would be merely 'hypothetical'. The Commission, on the other hand, contends that such incompatibility is in any event enough to trigger Article 307 EC and oblige Austria and Sweden to amend the agreements.

18. The concept of incompatibility in Article 307 EC is logically composed of two conflicting elements: a Treaty obligation and an obligation arising from an agreement with a third country.⁵

⁵ — See, to that effect, Case C-216/01 *Budvar* [2003] ECR I-13617, paragraph 146, and Joined Cases C-364/95 and C-365/95 *T. Port* [1998] ECR I-1023, paragraph 60, and the Opinion of Advocate General Lenz in Case C-324/93 *Evans* [1995] ECR I-563, point 34. In respect of the Treaty obligation, the reasoning applied for finding an incompatibility under Article 307 EC is the same as for determining an Article 226 EC infringement.

19. I will therefore first analyse whether any of the Commission's arguments are sufficient to ground a Treaty obligation (A). I will then deal with the Member States' arguments that, in any event, the investment agreements cannot give rise to a conflicting international obligation (B). Finally, if the combination of those elements results in an incompatibility, I will assess whether Austria and Sweden have adequately addressed it and the extent of their obligation to do so (C).

20. In the course of this Opinion it will become apparent that Member States' obligations in respect of potential action by the Community have a very particular character. To paraphrase Saint-Exupéry, their duty is not to foresee the future, but to allow it.⁶

A — *The Treaty obligation*

21. The Commission has suggested three sources of a Treaty obligation that would bring Article 307 EC into play: (i) the secondary legislation envisaged in Articles 57(2), 59, and 60(1) EC; (ii) Articles 57(2), 59, and 60(1) EC themselves;

and (iii) the duty of loyal cooperation.⁷ I will analyse these in turn.

22. I will also deal (iv) with the apparent paradox arising in these cases that Article 307 EC is being invoked to challenge agreements which further the existing obligation under Article 56 EC to establish free movement of capital to and from third countries.

(i) Secondary legislation envisaged in Articles 57(2), 59, and 60(1) EC

23. Both primary and secondary legislation can give rise to a Treaty obligation for the purposes of Article 307 EC. But can such an obligation derive from legislation, such as that envisaged by Articles 57(2), 59, and 60(1) EC, which has yet to come into existence?

24. The answer is patently no. The incompatibility with which Article 307 EC is concerned must be the result of two conflicting obliga-

6 — *Citadelle*, Antoine de Saint-Exupéry, éd. Gallimard, coll. NRF, 1948, p. 167.

7 — Several Member States have rightly accused the Commission of lack of clarity regarding the exact source of the Treaty obligation, since its arguments varied in the course of the procedure.

tions. In the absence of legislation — primary or secondary — there is no obligation, and hence no incompatibility.⁸

under Article 307 EC, that empowerment must imply an obligation on Member States. However, it is hard to infer such an obligation from the articles themselves.⁹

(ii) Articles 57(2), 59, and 60(1) EC

25. In contrast to the secondary legislation they authorise, Articles 57(2), 59, or 60(1) EC do not themselves require any Community action to be legally binding. They are already binding on the legislative process; the issue is whether they also impose an obligation on Member States.

27. Contrary to what was asserted by the Commission, that obligation can never be to amend agreements because they may turn out to be incompatible with the legislation that the Community is competent to enact. The obligation to amend agreements would be the effect of applying Article 307 EC. But to bring Article 307 EC into play it is still necessary to find an obligation on Member States where there is only the empowerment for the Community to act.

26. The wording of Articles 57(2), 59, or 60(1) EC does not indicate that to be so. The articles merely empower the Community to act. If they are to lead to an incompatibility

28. There is one instance where empowerment leads to an obligation: where the Community has exclusive competence. In

8 — Even the Commission reformulated its claim that the investment agreements 'infringe possible future Community measures' (Title III of its Reply to Austria's Defence) to one of incompatibility with Articles 57(2), 59, and 60(1) EC.

9 — Confronted with the same difficulty, Advocate General Tizzano considered, in his Joined Opinion in Cases C-466/98 to C-469/98, C-471/98 to C-472/98, and C-475/98 to C-476/98 '*Open Skies*' [2002] ECR I-9427, that 'external competence of the Community in matters previously regulated by agreements of the Member States does not suffice in itself to render those agreements incompatible [with the rules on competence]' (point 113). The Court did not rule on that point, since it considered that the agreements at issue had been replaced by post-accession agreements outside the scope of Article 307 EC.

that situation, Member States are obliged to refrain from legislating. However, that is not the situation here. Until the Community acts, Member States are free to regulate the movement of capital to and from third countries.¹⁰ In other words, competence is shared.

competence and preclude Member States from legislating in the absence of Community action. On the contrary, I am convinced that an answer to the question whether Member States have obligations is not dependent on the scope of the competence, but should be applicable to all areas of shared competence.

29. As some of the intervening Member States have pointed out, to impose an obligation on Member States to refrain from legislating, whether by national measures or international instruments, to prevent any potential conflict with future Community legislation would turn the free movement of capital to and from third countries into an area of exclusive competence. In fact, any area of shared competence would be liable to suffer the same fate.

31. As will become clearer in (iii) below, I do have some concerns about the effects that the exercise by Member States of their shared competence through entering into international agreements may have on the freedom and effectiveness of the Community's own competence. Nevertheless, I do not believe that the right way to address that problem lies in transforming such empowering provisions into supposedly limited exclusive competences.

30. The Commission's answer is that Articles 57(2), 59, and 60(1) EC have such a specific content that Member States' obligations would be limited, in contrast with other areas of shared competence. The Commission appears therefore to accept that competence would become exclusive, but in a limited fashion. Nonetheless, I do not see this as a reason to depart from the principles of shared

32. Accordingly, I find that Articles 57(2), 59, and 60(1) EC merely empower the Community to act and do not impose an obligation on Member States. They cannot lead, by themselves, to an incompatibility under Article 307 EC.

10 — Provided they respect Article 56 EC, which prohibits the imposition of restrictions, or provided the restrictions imposed are justified on grounds of public interest or by Article 58 EC.

(iii) The duty of loyal cooperation

obligations of Member States during the period for implementing directives.

33. The obligation under Article 307 EC is an expression of the duty of loyal cooperation formulated in Article 10 EC.¹¹ It is that duty which explains why Member States are obliged to amend agreements that are incompatible with the Treaty, even though such agreements are recognised as fully valid.

34. However, the duty of loyal cooperation also gives rise to many other obligations, which can themselves be used to trigger Article 307 EC (as any Treaty obligation can). It is in the nature of the duty of loyal cooperation that it cannot be applied on its own but requires other Community norms to come into play. In that context, Articles 57(2), 59, and 60(1) EC may again become relevant. They allow formulating the question in general terms: does the duty of loyal cooperation put Member States under any obligation in the areas in which they share competence with the Community?

35. Here I would propose drawing a parallel with another area in which the duty of loyal cooperation has been applied, namely the

36. It will be recalled that, before the deadline for the implementation of a directive expires, Member States are under no obligation to address the conformity of their national legislation with that directive.¹² However, the Court has considered that even in the absence of such an obligation Member States are not completely free. Under the duty of loyal cooperation, they are obliged to refrain from taking 'any measures liable seriously to compromise the result prescribed [by the directive]'.¹³ That does not mean that all conflicts are prohibited, but only those which could jeopardise the objective of the directive.¹⁴

37. The implementation of directives is similar to shared competences in that a conflict with national legislation can occur only after a certain point in time, respectively the end of the period for implementation and the exercise of Community competence. The difference is that the implementation period is

12 — See, to that effect, Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411, paragraph 43.

13 — *Wallonie*, cited in footnote 12, paragraph 45.

11 — See the Opinion of Advocate General Tizzano in Case C-216/01 *Budvar* [2003] ECR I-13617, point 150, and my Opinion in Case C-402/05 *Kadi*, pending, point 32.

14 — See my analysis of this obligation within the framework of an Article 226 EC action in my Opinion in Case C-422/05 *Commission v Belgium* [2007] ECR I-4749, points 27 to 51.

certain to end, while Community competence may never be exercised. Is that enough to warrant a difference of treatment under the duty of loyal cooperation?

38. I do not think so. Under the duty of loyal cooperation, it is not permissible for a Member State to frustrate any form of Community action. Article 10 EC makes no distinction. It states that Member States 'shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty'. That the Court has to date found Article 10 EC to be applicable to the period for implementing directives, but not to the exercise of Community competence granted by the Treaty, is purely a matter of chance.

39. The fact that the exercise of Community competence remains a mere possibility cannot alter that conclusion. Member States are not permitted to jeopardise a Community objective, even a potential one. It is irrelevant that the pursuit of this objective requires certain actions *in concreto* (here, the actual exercise of the competence); the obligation to respect the objective exists and is binding on Member States.¹⁵

15 — In the same way, it is settled case-law that the fact that an activity does not yet exist in a Member State cannot release that State from its obligation to implement a directive relating to that activity: see Case C-422/05 *Commission v Belgium*, paragraph 59 and the case-law cited there. See also Case C-184/96 *Commission v France* [1998] ECR I-6197; 'Foie gras', which is mentioned in some Member State observations.

40. I wish to make it clear, however, that the problem lies not in the possibility of any future conflict with the Community legislation and its objectives. If every such possibility had to be eliminated there would no longer be a shared competence, but an exclusive one. The problem only arises where the national measures or the international obligations of Member States are liable to jeopardise the effectiveness of possible future Community legislation and, in doing so, *de facto* restrict the freedom which the Treaty confers on the Community to act in those areas. That will depend on the nature of both the national measures or international obligations and the Community competences affected, for example the urgency of the measures to be adopted under such competences.

41. This is particularly important in respect of agreements safeguarded under Article 307 EC. While national legislation, by virtue of the principle of direct effect and supremacy, will automatically be set aside by future Community legislation, the same may not occur with those agreements. As a consequence, the existence of such agreements may compromise the effectiveness of the legislation which the Community has competence to adopt.¹⁶

16 — As regards Member State action during the deadline for implementing directives, I had already observed in my Opinion in *Commission v Belgium*, cited in footnote 14, that 'national provisions may create obligations, the fulfilment of which appears likely to render ineffective the harmonisation set in place at Community level or to impose options which are likely to survive well beyond the deadline for transposition and, in their turn, influence the subsequent development of decisions taken at Community level' (point 49).

42. I therefore propose that the Court should adopt the formulation already used in respect of the transposition of directives and rule that Member States are obliged to refrain from any measures liable seriously to compromise the exercise of Community competence. In particular, Member States are obliged to take all appropriate steps to prevent their pre-existing international obligations from jeopardising the exercise of Community competence.

43. That Treaty obligation can, therefore, serve as the basis for the application of Article 307 EC. Thus, for an incompatibility under that article to exist in the present cases, the exercise of the Community competence envisaged in Articles 57(2), 59, or 60(1) EC must be liable seriously to be compromised by the agreements entered into by Austria and Sweden.

(iv) Whether there is a conflict with Article 56 EC

44. I have suggested that the duty of loyal cooperation obliges Member States not to compromise the exercise of Community competence. However, does that apply when,

as in Articles 57(2), 59, and 60(1) EC, the competence is one which enables restrictions to be placed on the freedom of movement?

45. As noted by some Member States, that might seem to contradict the obligation under Article 56 EC not to introduce restrictions on the movement of capital to and from third countries. It might appear that possible future restrictions were being given priority over the present obligation to allow freedom of movement.

46. Any such concern is misguided, simply because there is no conflict. The obligation of Member States to guarantee freedom of movement applies irrespective of their duty not to compromise future Community action. If that duty involves setting aside a national rule that guarantees freedom of movement — or, as in the present cases, amending an international agreement in accordance with Article 307 EC — that is the result of the Community having been given the power, in limited circumstances, to introduce restrictions on the free movement of capital. The duty not to compromise the exercise of Community competence is not to be confused with the obligations and rights associated with Member States' actions in this area.

B — *The obligation under an agreement with a third country*

‘capable’ of being incompatible with the Treaty.

47. Once a Treaty obligation has been established, in order for an incompatibility under Article 307 EC to arise there must further be a conflicting obligation under an agreement with a third country.

48. I will therefore (i) examine the agreements concluded by Austria and Sweden for such a conflicting international obligation. I will then (ii) address Member States’ arguments that the incompatibility can be avoided without recourse to Article 307 EC.

(i) International obligations liable seriously to compromise the exercise of Community competence

49. The Court has stated that Article 307 EC applies to any international agreement ‘which is capable of affecting the application of the Treaty’.¹⁷ This establishes the level of inquiry to be made. Contrary to what Sweden has argued, it is not necessary to determine the precise meaning of an agreement based on its particular circumstances; it suffices that, based on its wording, the agreement is

50. The transfer clauses of the agreements entered into by Austria and Sweden have been described above. All parties agree as to their content: to guarantee free movement of any capital connected with investments. Were the Community to introduce restrictions on free movement under Articles 57(2), 59, and 60(1) EC, it is very likely that the agreements would be incompatible with such legislation.¹⁸ However, as has been said many times by now, that potential incompatibility does not concern the present cases. Only if the agreements are liable seriously to compromise the exercise of a Community competence will there be an incompatibility.

51. I believe there is such an incompatibility. The exercise of Community competence may serve different objectives under Articles 57(2), 59, and 60(1) EC, but common to all is the fact that they might be jeopardised by allowing Austria and Sweden to maintain international obligations which would compromise the effectiveness of the legislation which the Community can adopt under those articles.

¹⁷ — Case 812/79 *Burgoa* [1980] ECR 2787, paragraph 6.

¹⁸ — Austria has argued that certain elements in the clause in question would allow the incompatibility to be avoided, while Sweden has made the same argument in respect of other clauses in its agreements. Those arguments will be addressed in (ii) below.

52. In some situations Community action would clearly lose its effectiveness. Article 59 EC, for example, allows for the adoption of measures for a period not exceeding six months. It is difficult to envisage how could such measures be adopted and imposed in time upon the countries that are parties to the agreements entered into by Austria and Sweden. The same is true in respect of Article 60(1) EC. The urgent (and immediately enforceable) character of sanctions adopted under this article is incompatible with the maintenance of the pre-existing international obligations of Austria and Sweden. In those cases, having to wait for an actual conflict between Community legislation and the international obligations to arise before initiating all the necessary steps to eliminate such incompatibility would deprive the Community legislation of its effectiveness. It would amount to a restriction on the power that the Treaty confers on the Community.

53. In other situations the loss of effectiveness is less clear, for example with the future regulation of free movement of capital under Article 57(2) EC, or a reduction in economic relations under Article 60(1) EC for reasons other than sanctions. Nevertheless, the fact remains that the agreements concluded by Austria and Sweden may prevent the immediate application of restrictions, and such application may be essential to the objectives of Community legislation. The power granted to the Community under Articles 57(2), 59, and 60(1) EC should not be curtailed by the ability of Austria and Sweden to keep in force international obliga-

tions which may, *ex ante*, deprive Community legislation of its effectiveness.

54. I therefore conclude that there is an incompatibility under Article 307 EC between the transfer clauses in the agreements entered into by Austria and Sweden and the Treaty obligation not to compromise the exercise of the competences envisaged in Articles 57(2), 59, and 60(1) EC.

(ii) Avoiding an incompatibility under Article 307 EC

55. Austria and Sweden, supported by all the intervening Member States, have argued that there are several ways to avoid any incompatibility arising in their agreements in respect of Article 307 EC. All those ways involve preventing the agreements from being applied, either through interpretative devices, international law, or simple default.

56. As a matter of principle, I do not think those arguments should be accepted. Once an agreement is liable, because of its wording, to

impair the application of the Treaty, Article 307 EC already provides an adequate remedy: Member States must take all appropriate steps to eliminate the incompatibility, which has been interpreted by the Court as amending or, if necessary, denouncing the agreement.¹⁹

57. If Member States were correct in stating that any incompatibility could be resolved simply by interpreting the agreements in accordance with Community law, by applying certain principles of international law — notably *rebus sic stantibus* — or by default, that would always be the case and the obligation imposed by Article 307 EC on Member States to take all appropriate steps to eliminate such incompatibility would serve no purpose.

58. In any event, neither the interpretative approach proposed by Austria and Sweden nor the application of international law could cure the agreements of their incompatibility. Although in my view that point is not relevant to Austria's and Sweden's obligation under Article 307 EC, I will nevertheless briefly analyse the transfer clauses below.

59. Austria claims that the expression 'without undue delay' in the transfer clauses in its agreements would enable it to delay any transfer, thus giving effect to the temporary measures provided for in Article 59 EC. Nevertheless, that would not apply to Articles 57(2) and 60(1) EC, and even with regard to Article 59 EC it is doubtful whether the expression could be interpreted in that sense.

60. Sweden argues that, because of a clause in some of its agreements stipulating that transfers should be made in accordance with its legislation, the agreements could never be contrary to Community law. That clause is not present in all of Sweden's agreements. Moreover, whether it refers to Community law is again debatable.

61. Finally, both Austria and Sweden argue that *clausula rebus sic stantibus* would apply to their agreements. That doctrine is codified in the Vienna Convention and is generally

19 — Case C-62/98 *Commission v Portugal* [2000] ECR I-5171, paragraph 49.

considered a principle of international law.²⁰ Austria and Sweden contend that the exercise of Community competence under Articles 59 and 60(1) EC would be exceptional. Consequently, their agreements would be affected by that principle and would not be enforceable against the Community legislation. However, the principle of *rebus sic stantibus* is applied in very limited circumstances, and whether it can be applied to the present cases is a matter of controversy.

62. All these arguments should be rejected. The application of Article 307 EC cannot depend on the definitive interpretation of clauses in an agreement or the application of a controversial point of international law such as *rebus sic stantibus*. The Court has already indicated as much by stating that the mere capacity of an agreement to be incompatible suffices to bring Article 307 EC into play.²¹

20 — Vienna Convention on the Law of Treaties, 23 May 1969, Article 62 'Fundamental change of circumstances': '(1) A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless: (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty. (2) A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty: (a) if the treaty establishes a boundary; or (b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty. (3) If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.'

21 — See footnote 17 above.

C — Steps taken to eliminate the incompatibility

63. Where an incompatibility under Article 307 EC exists, Member States are under an obligation to take all appropriate steps to eliminate it.

64. Sweden believed its behaviour to be legal and therefore refused to take any action within the time-limit specified in the Commission's reasoned opinion. It has therefore infringed its obligation under Article 307 EC.

65. Austria has adopted a similar stance, but unlike Sweden has stated that it is working on an 'regional economic integration organisations' ('REIO') clause for its investment agreement model. That clause would prevent an agreement from being upheld if it is in conflict with a Community obligation. However, it would apply only to future agreements. As regards the agreements which form the subject-matter of the present case, Austria mentioned only that talks with

China were scheduled for the ‘near future’, and that the renegotiation of the agreement with Russia had begun but was suspended until work on the REIO clause was completed.

cing the agreements.²² Member States are bound by the result to be achieved, and limited only by the legality of the means.

66. The only step that Austria has effectively taken within the time-limit laid down in the Commission’s reasoned opinion is to open negotiations concerning one agreement. It bears the responsibility for having subsequently suspended those negotiations. Accordingly, I consider that Austria has also infringed its obligation under Article 307 EC.

69. In that context, they can certainly take into account the interests of their investors. However, those interests can never release Member States from their obligation to comply with Community law, unless there is a specific provision to that effect. Article 307 EC already allows for certain derogations from Community law in recognition of pre-existing international obligations entered into by Member States. Its purpose is not to authorise Member States to give precedence to such obligations over their Community obligations if that would be more favourable to the interests of their investors.²³

67. Despite not having taken any meaningful action to eliminate the incompatibility, Austria and Sweden argue that the Article 307 EC obligation would not go so far as to require them to denounce their agreements. In that respect, some Member States have argued that the interests of their investors abroad ought to be taken into account in determining the extent of the obligation to eliminate an incompatibility under Article 307 EC.

70. That being said, denunciation should in my view be considered an *ultima ratio*.²⁴ But that is because the Treaty favours avoiding, as far as possible, any interference with pre-existing international obligations of Member States.

68. Article 307 EC demands that Member States take all appropriate steps to eliminate an incompatibility. The Court has already clarified what may constitute such steps, namely amending and, if necessary, denoun-

²² — See footnote 19 above.

²³ — Similarly, as regards a Member State’s foreign policy interests, see *Commission v Portugal*, cited in footnote 18 above, paragraph 50.

²⁴ — See also the Opinion of Advocate General Mischo in Case C-62/98 *Commission v Portugal* [2000] ECR I-5171, point 69.

IV — Conclusion

71. In conclusion, I propose that the Court should declare that, by not taking all appropriate steps to eliminate the incompatibility between their pre-accession bilateral investment agreements and Article 10 EC in conjunction with Articles 57(2), 59, and 60(1) EC, Austria and Sweden have failed to fulfil their obligation under Article 307 EC.