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# KLUWER LAW INTERNATIONAL

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## **Aims**

The Common Market Law Review is designed to function as a medium for the understanding and implementation of Community Law within the Member States and elsewhere, and for the dissemination of legal thinking on Community Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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## COMMON MARKET LAW REVIEW

**Editors:** Thomas Ackermann, Michael Dougan, Jacqueline Dutheil de la Rochère, Christophe Hillion, Jean-Paul Jacqué, Pieter Jan Kuijper, Sacha Prechal, Wulf-Henning Roth, Piet Jan Slot, Ben Smulders, Jan A. Winter

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**Associate Editor:** Alison McDonnell  
*Common Market Law Review*  
Europa Instituut  
Steenshuur 25  
2311 ES Leiden  
The Netherlands  
e-mail: a.m.mcdonnell@law.leidenuniv.nl

tel. + 31 71 5277549  
fax + 31 71 5277600

### Aims

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Case C-205/06, *Commission v. Austria*, judgment of the Court (Grand Chamber) of 3 March 2009, not yet reported; Case C-249/06, *Commission v. Sweden*, judgment of the Court (Grand Chamber) of 3 March 2009, not yet reported.

## 1. Introduction

The coexistence of the Member States as fully sovereign subjects of international law with the European Community has been an area of endless fascination for international and European Union lawyers alike. This has been spurred on by a number of judgments rendered by the European Court of Justice in the last four years: these range from the constraints imposed on Member States once the Commission has been authorized to negotiate international agreements,<sup>1</sup> to the limited choice they have in the context of international conventions in which they participate along with the EC (*Mox Plant*),<sup>2</sup> to the duties imposed on them in the context of international organizations to which the EC is not a signatory even though their scope falls within its competence (*IMO*).<sup>3</sup>

Another area where serious issues have been raised concerns the international obligations assumed by Member States prior to their accession to the EU. An interesting twist is provided by two Grand Chamber judgments against Sweden and Austria. Rendered in the context of enforcement actions pursuant to Article 226 EC, these are about bilateral investment treaties (BITs) concluded by these States with a host of third countries. Similar actions were brought against Denmark and Finland: the former case was closed following the notification by Denmark of a declaration to terminate the relevant agreements, whereas, in the latter, Advocate General Sharpston rendered her Opinion on 10 September 2009.<sup>4</sup>

## 2. The legal background – Article 307 EC

The status and implications of pre-existing treaties concluded by Member States are addressed by Article 307 EC. Its first subparagraph articulates the

1. Case C-266/03, *Commission v. Luxembourg*, [2005] ECR I-4805 and Case C-433/03, *Commission v. Germany*, [2005] ECR I-6985.

2. Case C-459/03, *Commission v. Ireland*, [2006] ECR I-4635.

3. Case C-47/07, *Commission v. Greece*, judgment of 12 Feb. 2009, nyr.

4. Case C-118/07, *Commission v. Finland*, Opinion of A.G. Sharpston of 10 Sept. 2009.

principle *pacta sunt servanda* by acknowledging that Community law may not affect the international obligations assumed by Member States prior to their accession to the Union: “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.”

However, the second subparagraph adds a Community law layer:<sup>5</sup>

“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.”

This latter obligation is a clear illustration of what the duty of cooperation, laid down in Article 10 EC, entails in this area of external relations. Indeed, even if Article 307 did not exist, its *ratio* would be read into the duty of cooperation by the Community’s judges.<sup>6</sup>

The scope of Article 307 EC is unlimited: any agreement concluded by a Member State prior to its accession to the Union falls within it.<sup>7</sup> However, it applies only to the obligations assumed by Member States – it does not protect rights conferred upon them by the agreement in question.<sup>8</sup>

All in all, Article 307 EC seeks to strike a balance between respecting the rights of third countries conferred by a pre-accession agreement, and remedying the incompatibility with EC law which this agreement may raise. What is striking is that the EC Treaty is silent on quite how this is to be achieved: there is no reference to the period of time within which the incompatibilities are to be addressed; neither is there reference to the options available to Member States to do so, or their order of preference, depending on their intensity or how onerous it would be for the Member States to avail themselves of them.

5. The third subpara of this provision reads as follows: “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 advantage by all the other Member States”.

6. For an analysis of Art. 307 and its application in practice, see Klabbers, *Treaty Conflict and the European Union* (CUP, 2009), Ch. 6, and Koutrakos, *EU International Relations Law* (Hart Publishing, 2006), Ch. 8.

7. Case 812/79, *Attorney General v. Juan C Burgoa*, [1980] ECR 2787, para 6.

8. Case C-158/91, *Ministère public and Direction du travail and de l’emploi v. Levy*, [1993] ECR I-4287, at para 12.

In certain cases, specific issues are dealt with in secondary legislation.<sup>9</sup> However, it has been largely left to the Court of Justice to elaborate on the specific implications of Article 307 EC. It has done so over the years by stressing the effectiveness of both the compliance by Member States with their prior international obligations and the effort to address any ensuing incompatibilities. On the one hand, the Community institutions must not impede the Member States in the performance of their treaty obligations.<sup>10</sup> On the other hand, if a Member State, in its effort to address an incompatibility with EC law by renegotiating a prior agreement, comes across difficulties which render such renegotiation impossible, Community law imposes a specific duty: the Member State must denounce the agreement.<sup>11</sup>

This obligation has been construed consistently with the Court's approach to defences put forward in the context of enforcement proceedings: in other words, political and practical problems rendering compliance with EC law difficult are not taken into account. In this vein, war and constant tension in Angola and disintegration in former Yugoslavia may not absolve a Member State from its duty to remedy the incompatibilities between a pre-accession agreement and EC law: if renegotiation is impossible, denunciation must be considered.<sup>12</sup>

### 3. The factual and legal context of the *BITs* judgments

The EC Treaty provisions on the free movement of capital expressly cover relations with third countries. Article 56(1) EC required that all restrictions on the movement of capital between Member States and third countries be prohibited, a prohibition extended to all restrictions on payments under Article 56(2) EC.

Prior to their accession to the European Union, Austria and Sweden had concluded bilateral investment treaties (hereafter BITs) with a number of third countries.<sup>13</sup> These agreements safeguarded the principle of free movement, as

9. In the area of maritime transport, for instance, Regulation 4055/86 sets a deadline for certain agreements, O.J. 1986, L 378/1.

10. *Attorney General v. Juan C. Burgoa*, cited *supra* note 7, para 9.

11. Case C-170/98, *Commission v. Belgium (re: maritime transport agreement with Zaire)*, [1999] ECR I-5493, paras. 49 et seq., Joined Cases C-171/98, C-201/98 & C-202/98, *Commission v. Belgium and Luxembourg (re: maritime transport agreements between the Belgo-Luxembourg Economic Union with Togo, Mali, Senegal and Cote d'Ivoire)*, [1999] ECR I-5517.

12. Case C-84/98, *Commission v. Portugal*, [2000] ECR I-5215, Case C-62/98, *Commission v. Portugal*, [2000] ECR I-5171.

13. Austria had concluded with China, Malaysia, Russia (originally with the Soviet Union), Korea, Turkey, and Cape Verde. Sweden had concluded with Vietnam, Argentina, the Ivory



set out in Article 56 EC. They also contain a “transfer clause”: this guarantees to the investors of the each party the free transfer, without undue delay and in freely convertible currency, of payments connected with an investment.

The Commission took the view that, whilst facilitating the free movement of capital to and from third countries, these provisions undermined the ability of the Community to impose restrictions on such movement. Under the EC Treaty, such restrictions may be imposed in three sets of circumstances. First, in accordance with Article 57(2) EC, the Council may 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; such measures would be adopted by qualified majority on a Commission proposal, except where the relevant measures would constitute a step back in Community law as regards the liberalization of the movement of capital to or from third countries, in which case unanimity would be required.<sup>14</sup>

Second, in accordance with Article 59 EC, the Council may adopt safeguard measures with regard to third countries for a period up to six months if such measures are strictly necessary 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; such measures are adopted by qualified majority on a Commission proposal.

Third, in accordance with Article 60(1) EC, the Council may take the necessary urgent measures following a common position or a joint action adopted by the Council pursuant to Title V TEU on the Common Foreign and Security Policy which provides that the Community interrupts or reduces, in part or completely, the movement of capital and payments as regards third countries; such measures are adopted by qualified majority in accordance with Article 301 EC, to which Article 60(1) EC refers expressly.

The Commission argued that the maintenance of the relevant BITs violated secondary legislation envisaged under Articles 57(2), 59 and 60(1) EC, the above provisions themselves as well as the duty of cooperation laid down in Article 10 EC. In particular, it argued that the absence of any reference to the right of Austria and Sweden to impose restrictions adopted by the Council under the above provisions was liable to make it more difficult, or even impossible, for them to comply with their Community law duty to implement such restrictions. Whilst the renegotiation or denunciation of BITs were possible

Coast, Hong Kong, Indonesia, China, Malaysia, Madagascar, Peru, Senegal, Sri Lanka, Tunisia, Serbia and Montenegro (originally with Yugoslavia), Yemen.

14. Such measures would be adopted “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”.

and would enable the two Member States to comply with their EC law obligation, they would need to be carried out in accordance with the periods of time required under public international law. During such periods, the free movement provisions of the Agreements would be enforced and the Community rules restricting such movement would be applied in a disuniform manner within the Community.

#### 4. The Opinion by Advocate General Maduro

In his Opinion, Advocate General Maduro pointed out that no violation of EC law could be established under either secondary legislation envisaged in Articles 57(2), 59, and 60(1) EC, or these provisions themselves. In relation to the former, the absence of legislation creates no obligation on States and, therefore, entails no incompatibility under Article 307 EC; in relation to the latter, “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”.<sup>15</sup>

This emphasis on competence and its shared nature informs Advocate General Maduro’s analysis, which focuses on the duty of loyal cooperation. He argues that “Member States are not permitted to jeopardize 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”.<sup>16</sup> In doing so, he draws the parallel with directives: as the Member States are prevented from seriously compromising the result prescribed by a directive,<sup>17</sup> they should also be prevented from frustrating Community action.

However, Advocate General Maduro points out that “it is not the possibility of any future conflict with the Community legislation and its objectives”<sup>18</sup> which raises the problem; instead, “the problem only arises where the national measures or the international obligations of Member States are liable to jeopardize the effectiveness of possible future Community legislation and, in doing so, *de facto* restrict the freedom which the Treaty confers on the Community to

15. Para 28 of his Joined Opinion where he then observed that, “[i]n fact, any area of such competence would be liable to suffer the same fate”.

16. *Ibid.*, para 39.

17. Case C-129/96, *Inter-Environment Wallonie*, [1997] ECR I-7411, para 45.

18. Para 40.

act in those areas”.<sup>19</sup> It is in order to preserve the effectiveness of EC action under Articles 57(2), 59 and 60(1) EC that he suggests that the *Inter-Environment Wallonie* ruling on directives be applied in the context of Article 307 EC in order to ascertain whether agreements by Member States are liable seriously to compromise such action. Advocate General Maduro answers the question in the affirmative. Whilst the impact which compliance with their duties under BITs may have on EC action restricting free movement may vary, he argues that “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”.<sup>20</sup>

The Advocate General goes on to examine the defences on the basis of which the Austrian and Swedish Governments argued that the incompatibility with Article 307 EC would be avoided, either pursuant to an EC law-compatible interpretation of the agreements by the national authorities, or public international law principles such as *rebus sic stantibus*. All these were dismissed “as a matter of principle” because “[o]nce 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”.<sup>21</sup> Advocate General Maduro, then, concluded that the arguments of the Member States would render this proviso of Article 307 EC meaningless. These defences, along with the Austrian argument that it was working on a “regional economic integration organisation” (REIO) clause, will be examined in detail below.

## 5. The judgments

In its rulings, the Court of Justice followed a different line of reasoning than that put forward by its Advocate General. Whilst it noted that the BITs in question were consistent with the wording of Article 56(1) EC, it then focused on the restrictive measures which the Council may adopt pursuant to Articles 57(2), 59 and 60(1) EC. It pointed out that, “[i]n order to ensure the effectiveness of those provisions, measures restricting the free movement of capital must be capable ... of being applied immediately with regard to the States to which they relate, which may include some of the States which have signed one of the agreements at issue” with Austria and Sweden.<sup>22</sup> It held that the BITs

19. *Ibid.*

20. Para 53.

21. Para 56.

22. Para 37 in Case C-249/06, and para 36 in C-205/06.

in question would run counter to that objective insofar as, on the one hand, they contain no provision enabling the Member State concerned to exercise its rights and to fulfil its obligations as a member of the Community, and, on the other hand, there is no international law mechanism which makes that possible. As the former was common ground, the Court focused on the latter. It pointed out that neither a renegotiation of the agreement, nor suspension or denunciation would guarantee the effectiveness of Community's action restricting the movement of capital to or from a third country: in relation to the former, "the period of time necessarily involved in any international negotiations which would be required in order to reopen discussion of the agreements at issue is inherently incompatible with the practical effectiveness of those measures";<sup>23</sup> in relation to the latter, "the possibility of relying on other mechanisms offered by international law ... is too uncertain in its effects to guarantee that the measures adopted by the Council could be applied effectively".<sup>24</sup>

An issue which arose in the context of the action against Austria was the latter's intention to introduce a "regional economic integration organisation" (REIO) clause. Introduced in future agreements, this clause would reserve certain rights to the Community and enable Austria to apply any measures restricting movement of capital and payments which may be adopted by the Council under Articles 57(2), 59 and 60(1) EC. The Court accepted that such a clause "should, in principle, ... be considered capable of removing the established incompatibility".<sup>25</sup> However, following Advocate General Maduro's advice, it pointed out that Austria had taken no steps during the two-month period prescribed in the Commission's reasoned opinion in order to eliminate the risk of conflict with the restrictive measures which the Council may adopt under Articles 57(2) EC, 59 EC and 60(1) EC.

Finally, the Court pointed out in both judgments that the incompatibilities with EC law raised by BITs are not limited to Austria and Sweden and concluded as follows:

"in accordance with the second paragraph of Article 307 EC, where necessary, the Member States must assist each other with a view to eliminating the incompatibilities established and must adopt, where appropriate, a common attitude. In the context of its duty under Article 211 EC, to ensure that the provisions of the Treaty are applied, it is for the Commission to take any steps which may facilitate mutual assistance between the Member States concerned and their adoption of a common attitude".<sup>26</sup>

23. Para 40 in Case C-249/06 and para 39 in C-205/06.

24. Para 41 in Case C-249/06 and para 40 in C-205/06.

25. Para 42 in Case C-205/06.

26. Para 44 in Case C-205/06 and Case C-249/06.

## 6. Comment

### 6.1. *The applicability of Article 307 EC rather than Article 10 EC*

In its rulings, the Court of Justice does not follow the advice of Advocate General Maduro to rely upon the duty of loyal cooperation laid down in Article 10 EC rather than Article 307 EC. In the Opinion, the Advocate General referred to the “empowerment” of the Community to act under Articles 57(2) EC, 59 EC and 60(1) EC and argued that empowerment would only impose a Community law obligation on Member States where the Community has exclusive competence.<sup>27</sup> To the Commission’s argument about the specific content of the above EC Treaty provisions, he responded that this was not “a reason to depart from the principles of shared competence and preclude Member States from legislating in the absence of Community action” and pointed out 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”.<sup>28</sup>

There are two main problems with this line of reasoning. First, it should be recalled that the duty of loyal cooperation as laid down in Article 10 EC is not distinct from the duty imposed on Member States under Article 307 EC. In fact, the *ratio* of the second and third subparagraphs of the latter provision provides specific illustrations of the general duty laid down in Article 10 EC.<sup>29</sup> And this underlies the Court’s interpretation of Article 307 EC (a point which will be analysed below). It is not immediately apparent why the general obligation should be relied upon when a specific obligation is relevant.

Second, the above line of reasoning appears to make assumptions which are supported by neither the wording nor the context of the EC Treaty. In dismissing the relevance of Article 307 EC, Advocate General Maduro links its applicability to the nature of the Community’s competence under Articles 57(2) EC, 59 EC and 60(1) EC: he argues that “there is only one instance where empowerment leads to an obligation: where the Community has exclusive competence”.<sup>30</sup> However, this does not necessarily follow. There is nothing in the Treaty which prevents the definition of the duty of cooperation, as laid down in the second subparagraph of Article 307 EC, from taking into

27. Paras. 26 and 28 of the Opinion.

28. Para 30 of the Opinion.

29. See A.G. Tizzano in Case C-216/01, *Budejovicku Budvar v. Rudolf Ammersin GmbH*, [2003] ECR I-13617, para 150. Also, Cremona, “The Impact of Enlargement: External Policy and External Relations” in Cremona (Ed.), *The Enlargement of the European Union* (Hart Publishing, 2003), p. 161, at p. 170 and Koutrakos, *op. cit. supra* note 6, p. 304.

30. Para 28 of his Opinion.

account the specific nature and context within which an incompatibility with EC law may arise. Such an interpretation would read into Article 307 EC a condition which the latter does not set out. In any case, the focus on the nature of the competence is not helpful. The problem in the cases under review is not that the Member States had exercised a power which ought to have been reserved to the Community. What was in dispute was not whether it was the Member States or the Community which ought to exercise the power in question, but whether the former's conduct prior to their accession would undermine the effectiveness of the exceptional measures which the latter may be called upon to take. The starting point for the analysis of whether there is an incompatibility between the national conduct and Community rules is to ascertain the nature of the latter and the implications of the actions which the Community institutions may be called upon to take thereunder. In the case of Articles 59 and 60(1) EC, for instance, both the safeguard measures and the sanctions imposed following a CFSP measure are exceptional provisions which tolerate deviations from the principle of free movement in order to protect interests which are deemed to be undermined by free movement. This exceptional nature should inform the obligation which Community law imposes on Member States.

## 6.2. *The "practical effectiveness" of Community law: A strict reading*

In its rulings, the Court of Justice did not focus either on the issue of competence or the duty of cooperation. Instead, it was the effectiveness of the measures which the Council may be called upon to adopt in order to restrict the movement of capital or payments to or from third countries which sealed the fate of the BITs at issue. Exceptional measures adopted in this area have something in common: the speed with which they are to be applied determines their effectiveness. Even a minor delay would render them devoid of substantial impact and would, therefore, defeat the purpose of their adoption by the Council. This point is also made by the Advocate General, who points out the "urgent and immediately enforceable character of sanctions adopted under Article 60(1) EC" as well as the limited temporal scope of the restrictions envisaged under Article 59 EC.<sup>31</sup>

Indeed, all the possibilities available for adjusting the free movement provisions of a BIT to the new environment defined by Community law restrictions require time in order to come to fruition. For instance, the provisions of an

31. Para 52 of his Opinion. He also points out that, in the case of future regulation of free movement of capital under Art. 57(2) EC and a reduction in economic relations under Art. 60(1) EC for reasons other than sanctions, "the loss of effectiveness is less clear" (para 53).

international agreement may not be suspended or denounced instantly; instead, they may take place in accordance with the provisions of the agreement in question or the Vienna Convention on the Law of Treaties.<sup>32</sup> And yet, the time factor was only mentioned in relation to the possibility of renegotiating the BITs in question; in relation to their suspension or denunciation, the Court referred to the uncertain effects of the latter, to which it objected for their failure to guarantee that the measures adopted by the Council could be applied effectively. It is curious that the Court should have chosen the above formulation, as it is the period of time required under public international law which would undermine the effectiveness of the potential restrictive measures by the Council.

There is merit in this argument. All measures envisaged under Articles 57(2) EC, 59 EC and 60(1) EC are exceptional, insofar as they restrict the movement of capital or payments to or from a third country. Therefore, their effective application is paramount to enabling the Community to revert to a legal framework which would enhance the principle of free movement laid down in Article 56 EC. However, a qualification is also worth mentioning in relation to measures envisaged under Article 57(2) EC: the urgency of their application is less immediately apparent than that regarding measures adopted under Articles 59 EC and 60(1) EC. In this respect, Advocate General Maduro is correct in his scepticism about this particular provision in relation to which he states that “the loss of effectiveness is less clear”, although he concludes that “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”.<sup>33</sup>

The above qualification is necessary because it is tied in with the need to circumscribe the application of the effectiveness *rationale* of the judgment. To apply the logic of *effet utile* to any measure which the Community may choose to apply at any time in the future in order to impose a requirement on Member States to renegotiate or denounce their prior treaties produces effects too onerous and drastic on the basis of a criterion too uncertain and indeterminate. Such an interpretation of Article 307 EC would be difficult to sustain.

Indeed, neither the tenor nor the wording of the two *BITs* judgments appear to support such a broad reading of Article 307 EC. Not only are they confined to the exceptional measures envisaged under Articles 57(2) EC, 59 EC and 60(1) EC and the vital significance of their immediate application, but they also do not follow the parallel which Advocate General Maduro drew with directives. It is recalled that he argued that, as Member States are under a duty

32. See Art. 42 of the Vienna Convention on the Law of Treaties.

33. Para 53 of his Opinion.

to refrain from taking any measures liable seriously to compromise the result prescribed by them, so they should be “obliged to refrain from any measures liable seriously to compromise the exercise of Community competence” and, “in particular, [they should be] obliged to take all appropriate steps to prevent their pre-existing international obligations from jeopardising the exercise of Community competence”.

How helpful is this parallel? Advocate General Maduro introduces it in the context of the competence-based approach of his analysis: as Member States share competence with the Community in the area of movement of capital to and from third countries, he points out that the “implementation of directives is similar to shared competence in that a conflict with national legislation can occur only after a certain point in time, respectively the end of the period of implementation and the exercise of Community competence. The difference is that the implementation period is certain to end, while Community competence may never be exercised”.<sup>34</sup> However, viewed from this perspective of competence and the duty of cooperation, such a parallel is of questionable use. A directive imposes an obligation of result on a Member State called upon to achieve the objectives it sets out within a time limit. The very adoption of a directive initiates a process within which the Member States are endowed with a central role and are given a wide range of options, provided that they comply with their duties under Article 249 EC. The ensuing challenges for Member States are qualitatively different from those which they face in the external relations sphere where their actions have repercussions on the internal plane. By making the parallel with the directives in this context, Advocate General Maduro ends up interpreting the ensuing duty on Member States in terms which are inherently unclear and unnecessarily broad.

Instead, the approach adopted by the Court of Justice focuses on the specific nature of the measures envisaged under the EC Treaty provisions which the “transfer clause” of the BITs was alleged to have violated. The rulings under review do not suggest that the possibility of a conflict with a potential Community measure would render a treaty concluded by a Member State incompatible with EC law; neither do they suggest that the effectiveness of EC measures envisaged under the EC Treaty should be assessed *in abstracto* in order to ascertain whether such incompatibility arises. Instead, it is the specific nature of the restrictive measures which the Council may be called upon to adopt under the specific EC Treaty legal bases, namely Articles 57(2) EC, 59 EC and 60(1) EC. Therefore, a temptation to interpret the rulings in the *BITs* cases in broad terms should be resisted. It is interesting that, in her Opinion in the case of the Finish BITs, Advocate General Sharpston also relies upon the directive

34. Para 37 of his Opinion.



parallel, albeit from the effectiveness point of view, arguing that in the two judgments under review the Court “has effectively required a *guarantee* that restrictions to capital movements and to payments, as provided for in Articles 57(2), 59 and 60(1) EC, could if necessary be applied”.<sup>35</sup> Viewed from this angle, the parallel with the directives becomes more helpful.

A counterargument to the Court’s approach may draw upon the position of a Member State which, as a matter of fact, finds itself torn between its obligation to comply with EC measures adopted under 57(2) EC, 59 EC and 60(1) EC and its duty to respect the international law commitment which it has assumed pursuant to a bilateral treaty; it may choose to honour the former and violate the latter. And this choice raises no issues which the Court of Justice would have jurisdiction to review. However, this possibility, and any commitment to that effect which a Member State may make, however firm it is, would not disguise the fact that, in principle, the option of violating Community law would also be open. This state of uncertainty may not be tolerated under EC law. On the one hand, a similar argument made by the Portuguese Government in the two cases about cargo-sharing clauses in maritime agreements in the late 1990s had been ignored by the Court.<sup>36</sup> On the other hand, it has been a constant theme in the Court’s internal market case law under Article 226 EC that “an ambiguous state of affairs” and “a state of uncertainty” resulting from the maintenance, but non-application, of national law contrary to EC law can not be tolerated.<sup>37</sup> And although this line of reasoning was put forward in order to protect the individual by ensuring that there would be no doubt as to the existence of his/her Community law rights, it may also be extended to ensure the effectiveness of measures which the Community may be called upon to take in exceptional circumstances.

### 6.3. *The alternatives tolerated under Article 307 EC, but not by the Court ...*

What is rather curious is the cursory approach by the Court and Advocate General Maduro to public international law. In his Opinion, he dealt with the

35. See the Opinion in *Commission v. Finland*, cited *supra* note 4, para 32 (emphasis in the original).

36. Case C-62/98, *Commission v. Portugal*, cited *supra* note 12, at para 13 and C-84/98, *Commission v. Portugal*, cited *supra* note 12, at para 13.

37. Case 167/73, *Commission v. France*, [1974] ECR 359, Case 74/86, *Commission v. Germany*, [1988] ECR 2139, para 10, Case C-358/98, *Commission v. Italy*, [2000] ECR I-1255, paras. 16 and 17, Case C-160/99, *Commission v. France*, [2000] ECR I-6137, para 22, Case C-487/04, *Commission v. Italy*, [2006] ECR I-85\*, para 33, Case C-522/04, *Commission v. Belgium*, [2007] ECR I-5701, para 70, Case C-214/04, *Commission v. Italy*, judgment of 7 July 2005, unpublished, para 13.

argument put forward by the Swedish and Austrian Governments about the principle *clausula rebus sic stantibus*: under Article 62 of the Vienna Convention, a party to an international government may terminate or withdraw from an agreement following a fundamental change of circumstances provided that, on the one hand, the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty, and, on the other hand, the effect of the change is radically to transform the extent of obligations still to be performed under the treaty. Advocate General Maduro dismissed this argument merely by stating that the application of this principle “constitutes a controversial point of international law”.<sup>38</sup> To support his conclusion, he, as well as Advocate General Sharpston in her Opinion in the Finnish BITs case, relies upon the ruling in Case 812/79, *Burgoa* where the Court had held that “Article [307] EC is of general scope and it applies to any international agreement ... which is capable of affecting the application of a Treaty”.<sup>39</sup>

However, this statement merely suggested that the subject-matter of the pre-accession agreement need not coincide with the competence of the Community, as it is only compatibility with EC law which is of relevance;<sup>40</sup> it did not refer to the role of international law principles in rendering pre-accession agreements compatible with EC law, neither did it set any degree of certainty which such principles should be expected to meet.

In this vein, it is regrettable that the Court should choose to ignore the alternatives which its own case law had suggested. In *Budvar*, a judgment rendered in 2003, the Court of Justice had held that “the national court must ascertain whether a possible incompatibility between the Treaty and the bilateral convention can be avoided by interpreting that convention, to the extent possible and in compliance with international law, in such a way that it is consistent with Community law”.<sup>41</sup> It had, then, added that “[i]f it proves impracticable to interpret an agreement concluded prior to a Member State’s accession to the European Union in such a way that it is consistent with Community law then, within the framework of Article 307 EC, it is open to that State to take the

38. Para 62 of his Opinion. He also states that the principle “is applied in very limited circumstances, and whether it can be applied to the present cases is a matter of controversy” (para 61).

39. *Attorney General v. Burgoa*, cited *supra* note 7, para 6. See A.G. Sharpston in *supra* note 4, para 27.

40. See Cremona, “Defending the Community Interest: The Duties of Cooperation and Compliance” in Cremona and De Witte (Eds.), *EU Foreign Relations* (Hart Publishing, 2008), p. 125, at p. 132.

41. *Budvar* cited *supra* note 29, para 169. On the substantive point of law raised in this case, see Case C-478/07, *Budějovický Budvar, národní podnik v. Rudolf Ammersin GmbH*, judgment of 8 Sept. 2009, nyr.

appropriate steps, while, however, remaining obliged to eliminate any incompatibilities existing between the earlier agreement and the Treaty”.<sup>42</sup>

This duty of interpretation and the role of national courts which its application entails introduces a considerable variant in the application of Article of 307 EC: not only does it broaden the scope of possibilities open to the Member States in their effort to tackle incompatibilities between their prior agreements and EC law, but it also carves out a contribution for national courts in this process.<sup>43</sup> This parameter is completely ignored by the Court, whereas the Advocate General dismissed it by merely stating that “the obligation imposed by Article 307 EC on Member States to take all appropriate steps to eliminate [an incompatibility between a prior agreement and EC law] would serve no purpose”.<sup>44</sup>

This cursory approach is regrettable. It is true that the legal and procedural context in *Budvar* and the *BITs* rulings differ: the contribution of national courts and the possibility of consistent interpretation were introduced in the former in the context of a preliminary reference, where national courts are the Court’s interlocutors; the latter judgments were rendered in the context of direct enforcement procedures. However, this distinction does not make the possibility of consistent interpretation *de facto* irrelevant, neither does it justify the Court’s silence and the Advocate General’s cursory approach.

There is a broader issue which the above approach of the Court raises, namely the legal context required for a Member State to become aware of an incompatibility between an international agreement concluded prior to its accession to the Union and EU law. In an earlier case, Case C-203/03, *Commission v. Luxembourg*,<sup>45</sup> the Court was asked to deal with Austrian legislation on the employment of women in the underground mining industry, which, whilst consistent with Convention No. 45 of the International Labour Organization ratified by Austria in 1937, was alleged by the Commission to run counter to the principle of equal treatment for men and women as set out in Directive 76/207.<sup>46</sup> In a judgment delivered by the Grand Chamber almost four years prior to the *BITs* rulings, the Court confirmed the incompatibility pursuant to Article 307 EC. However, it held that, at the only time prior to its ruling when, according to the Convention’s rules, Austria could have denounced the Convention, “the incompatibility of the prohibition laid down by that convention

42. *Ibid.*, para 170.

43. See the analysis in Koutrakos, *op. cit. supra* note 6, at pp. 309-313.

44. Para 57 of his Opinion.

45. Case C-203/03, *Commission v. Luxembourg*, [2005] ECR I-935.

46. Arts. 2(1) and 3(1), O.J. 1976, L 39/40.

with the provisions of Directive 76/207 had not been sufficiently clearly established for that Member State to be bound to denounce the convention".<sup>47</sup>

Whilst criticized on its application to the facts of that case,<sup>48</sup> the above conclusion appears to suggest a link between the clarity of the state of Community law and the intensity of the obligation imposed on Member States to address the incompatibilities to which Article 307(2) EC. This clarity is defined to a considerable extent by the case law of the Court of Justice. Viewed from this angle, the approach adopted in the *BITs* judgments is regrettable. This is not to suggest that judgments should carry out the function of academic analyses and provide exhaustive arguments for all theoretical issues pertaining to a case brought before them; on the contrary, judgments are rendered in specific contexts within which Europe's judges are asked to adjudicate on a specific dispute. However, it is in the interest of the Community that the Member States should be aware of both the circumstances in which their pre-accession international obligations may become incompatible with EC law and the options which Article 307 EC sets out for them in order to remedy such incompatibilities.

#### 6.4. *The role of the Commission*

It is recalled that, having concluded that Austrian and Sweden had violated Article 307 EC by not having denounced their BITs, the Court referred to the Commission and its general role under Article 211 EC to facilitate mutual assistance between the Member States seeking to eliminate an incompatibility under Article 307 EC as well as the adoption of a common attitude.<sup>49</sup> This is noteworthy for a number of reasons. First, it is interesting that the Court should have chosen to construe the role of the Commission with reference to Article 211 EC, rather than Article 307 EC itself. After all, its contribution in the achievement of the objectives of the latter provision had already been seen as implied: it is recalled that in *Burgoa* the Court had pointed out that Article 307(1) EC "would not achieve its purpose if it did not imply a duty on the part of the institutions of the Community not to impede the performance of the obligations of Member States which stem from a prior agreement".<sup>50</sup>

Second, whilst the Court imposes a specific duty on the Commission in the context of Article 307 EC, it does not follow that this is linked to the fulfilment of the obligation of the Member State to eliminate an incompatibility with EC

47. *Commission v. Luxembourg*, cited *supra* note 45, para 62.

48. Koutrakos, *op. cit. supra* note 6, at pp. 315-6.

49. Para 44 of the judgments.

50. *Attorney General v. Juan C Burgoa*, cited *supra* note 7, para 9.

law. Put differently, the failure of the Commission to discharge of its role could not justify a failure by a Member State to comply with its duty as set out in Article 307(2) EC. In this vein, the Court held in *International Maritime Organization* that the failure by the Commission to comply with its Article 10 EC duty of cooperation in the context of EC external relations does not entitle a Member State to violate its own obligations as set out in the EC Treaty.<sup>51</sup>

Third, the reference in the *BITs* judgments to the role of the Commission is as general as it can be. It reminds one of the way the Court referred to the duty of loyal cooperation in the context of mixed agreements in the 1990s: seeking to rebuff the Commission's persistent claims to exclusivity by reference to practical difficulties which the participation of Member States along with the Community would raise, the Court set out this duty at the end of its rulings, and merely pointed out that it applies both to the Community institutions and the Member States in the process of the negotiation, conclusion and application of mixed agreements.<sup>52</sup> In the *BITs* judgments, the reference to the role of the Commission is made following the conclusion that the incompatibility between BITs and Articles 57(2) EC, 59 EC and 60(1) EC is an issue of concern to more than one Member State. This suggests an emphasis on a concerted approach, which is noteworthy in the light of the more recent practice, as there has been a steady effort on behalf of the EU to iron out incompatibilities between obligations assumed by Member States pursuant to bilateral agreements and EC law.

For the purposes of this analysis, suffice it to point out two strands. On the one hand, the 2004 and 2007 enlargements were preceded by a process aiming to set out the duties of the new Member States in relation to the pre-accession international obligations. This is illustrated by the Accession Treaties, the provisions of which on the accession of the new Member States to international conventions are considerably more detailed in comparison to previous Accession Treaties.<sup>53</sup> On the other hand, in relation to investment treaties in particular, the Commission had engaged in an innovative exercise of mediation between eight candidate, as they then were, countries<sup>54</sup> and the United States in order to adjust bilateral agreements concluded between them. The aim of

51. Case C-45/07, *Commission v. Greece*, judgment of 12 Feb. 2009, nyr, paras. 25-6.

52. See *Opinion 2/91*, [1993] ECR I-1061, paras. 36-8, and *Opinion 1/94*, [1994] ECR I-5267, paras. 107-109. That obligation was construed in more specific terms in judgments such as Case C-25/94, *Commission v. Council (Food and Agricultural Organisation)*, [1996] ECR I-1469, *Commission v. Luxembourg*, cited *supra* note 1; *Commission v. Ireland (re: Mox Plant)*, cited *supra* note 2.

53. See Art. 6 of the 2003 Act of Accession, O.J. 2003, L 236/33, and Art. 6 of the 2005 Protocol concerning the conditions and arrangements for admission of the Republic of Bulgaria and Romania to the European Union – O.J. 2005, L 157/29.

54. Czech Republic, Estonia, Latvia, Lithuania, Poland, Slovakia, Bulgaria and Romania.

this process was to prevent incompatibilities between these BITs and EC law prior to accession. Whilst the formal effects of this process, set out in a Memorandum of Understanding signed on 22 September 2003 in Brussels by the Commission, the eight countries, and the United States, may be debated,<sup>55</sup> the initiative itself, undertaken by the Commission, suggests an increasing intensity in the Union's effort to minimize the deleterious effects that the pre-existing international obligations of the Member States may have on the application of the *acquis communautaire*.

Viewed in the light of the above, the reference in the *BITs* judgment to the role of the Commission in a case where more than one Member States must tackle the same incompatibility appears to suggest a thread which brings together different strands of the theory and practice of Article 307 EC. By articulating a normative foundation of the Commission's involvement in the application of Article 307 (2) EC, the Court appears to open up the personal scope of that provision and focus on the management of its implications. Quite what the role of the Commission may entail in this respect remains to be seen. It is interesting, however, that in other areas of external relations it has led to the articulation of a sophisticated and pragmatic framework aiming to ensure coordination and compliance with Community law. This was the case of Regulation 847/2007/EC on the negotiation and implementation of air service agreements between Member States and third countries.<sup>56</sup> Based on Article 80(2) EC, this measure establishes a system of cooperation between the Commission and Member States aiming at the coordination of negotiations with third countries, the achievement of a harmonized approach in the implementation and application of air services agreements, and the verification of their compliance with Community law. It does so by setting out a framework of interaction between the Commission and the Member State negotiating an air services agreement and imposing substantive and procedural duties. This pragmatic approach has inspired recent proposals in other contexts of EU external relations and involving different degrees of intensity of obligations.<sup>57</sup>

55. See Burgstaller, "European Law and Investment Treaties", 26 *Journal of International Arbitration* (2009), 181, at 201-203, and Koutrakos, *op. cit. supra* note 6, at pp. 322-326.

56. O.J. 2004, L 157/7.

57. See COM(2008)893 final, Proposal for a Regulation of the European Parliament and of the Council establishing a procedure for the negotiation and conclusion of bilateral agreements between Member States and third countries concerning sectoral matters and covering applicable law in contractual and non-contractual obligations (Brussels, 23 Dec. 2008), and COM(2008)894 final, Proposal for a Council Regulation establishing a procedure for the negotiation and conclusion of bilateral agreements between Member States and third countries concerning sectoral matters and covering jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, parental responsibility and maintenance obligations, and applicable law in matters relating to maintenance obligations (Brussels, 19 Dec. 2008).

## 7. Conclusion

This analysis suggested that the *BITs* judgments should be viewed as a justified application of Article 307 EC in the light of the very specific features of the measures which the Community may be called upon to take pursuant to Articles 59 and 60(1) EC (but not necessarily Art. 57(2) EC). Confined to the context of these specific exceptional provisions, the judgments do not lend themselves to wider propositions about the duties which Article 307(2) EC imposes on Member States.

It also argued that the Court correctly viewed the issue of the incompatibility between the pre-accession *BITs* and EC law as one related to the duties imposed on Member States following their accession to the Union, rather than of competence.<sup>58</sup> However, the implications of the judgments are considerable for both the Member States and the Commission. In relation to the former, one should point out the considerable number of *BITs* which they have concluded.<sup>59</sup> As for the latter, the reference in the judgments to its role under Article 211 EC brings the Commission to the centre of the management of the application of Article 307 EC.

Viewed together, the above suggest that the Court responds to the increasing effort of the EU institutions to address problems between pre-accession international obligations and EC law, to which it adds a normative dimension in order to ensure a concerted approach. Therefore, a growing engagement of the EU with the Member States in order to enforce the *ratio* of Article 307 EC appears to emerge.

Panos Koutrakos\*

58. For the relationship between *BITs* generally and EU law, see Eilmansberger, "Bilateral Investment Treaties and EU Law", 46 CML Rev. (2009), 383.

59. According to Radu, Germany, UK, France, Italy, the Netherlands, Belgium and Luxembourg have concluded more than 500 *BITs*: Radu, "Foreign investors in the EU – Which 'Best Treatment'?: Interactions between bilateral investment treaties and EU law", 14 ELJ (2008), 237, at 238.

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