



HAL
open science

Resolving Incompatibilities of Bilateral Investment Treaties of the EU Member States with the EC Treaty: Individual and Collective Options

Ahmad Ali Ghouri

► **To cite this version:**

Ahmad Ali Ghouri. Resolving Incompatibilities of Bilateral Investment Treaties of the EU Member States with the EC Treaty: Individual and Collective Options. *European Law Journal*, 2010, 16 (6), pp.806. <10.1111/j.1468-0386.2010.00534.x>. <hal-00686081>

HAL Id: hal-00686081

<https://hal.science/hal-00686081v1>

Submitted on 7 Apr 2012

HAL is a multi-disciplinary open access archive for the deposit and dissemination of scientific research documents, whether they are published or not. The documents may come from teaching and research institutions in France or abroad, or from public or private research centers.

L'archive ouverte pluridisciplinaire **HAL**, est destinée au dépôt et à la diffusion de documents scientifiques de niveau recherche, publiés ou non, émanant des établissements d'enseignement et de recherche français ou étrangers, des laboratoires publics ou privés.



HAL Authorization



**Resolving Incompatibilities of Bilateral Investment Treaties
of the EU Member States with the EC Treaty: Individual and
Collective Options**

Journal:	<i>European Law Journal</i>
Manuscript ID:	ELJ-Jun-2009-0042.R1
Manuscript Type:	Original Manuscript
Keywords:	EU External Relations, International investment disputes, Treaty norms, Bilateral investment treaties, Conflict of laws



Resolving Incompatibilities of Bilateral Investment Treaties of the EU Member States with the EC Treaty: Individual and Collective Options

Abstract: *Bilateral Investment Treaties (BITs) concluded by the EU Member States contain substantially similar clauses including free movement of capital and investor-to-state dispute resolution. Article 307 EC Treaty provides for the primacy of pre-accession treaties over the EC Treaty and simultaneously requires the Member States to eliminate their mutual incompatibilities. The ECJ has declared that free movement of capital clauses of Austrian and Swedish pre-accession extra-EU BITs are incompatible with the EC Treaty for they will impede any restrictions on the movement of capital imposed as future Community legislation. Similar 'free movement of capital' clause is present in all extra-EU BITs of the Member States whether pre or post-accession. Article 307, however, does not apply to the post-accession treaties which are equally capable of contriving the same consequences of impeding the application of the EC Treaty. In addition, the application of intra-EU BITs provide investors from BIT Party States access to the investor-to-state dispute resolution which is not available to investors from the Member States who do not have BITs with those Member States. This is discrimination and may distort the principle of equal treatment within the EU. Furthermore the newly acceding EU states are facing extensive arbitral claims for carrying out the BIT-EU conflicting obligations within their respective territories.*

I Introduction

Bilateral Investment Treaties (BITs) are international agreements designed to protect investors from Party States in the event of expropriation and contain clauses on prohibition and compensation for expropriation, standards of treatment in the form of national treatment, most favoured nation treatment and non-discrimination by the host state and free movement of capital between Party States arising out of or relating to investments.¹ The most distinguishing feature of these BITs, however, is the dispute settlement mechanism empowering the investors of each Party State to bring disputes before a supra-national arbitral tribunal. In this respect, BITs deviate from the traditional state-to-state diplomatic protection by providing the investor-to-state arbitration commonly by the ICSID or UNCITRAL tribunals. The investors may itself bring claims against the States hosting investments, by-passing domestic remedies available within the host State and overriding traditional diplomatic settlement of disputes by the investor's home State. The significant feature of BIT arbitration is also that the primary remedy is a damages award rather than a non-monetary public law

*Doctoral Scholar, University of Turku, Finland and Lecturer in Law, University of the Punjab (Gujranwala Campus), Pakistan. Many thanks to Prof. Jukka Mähönen (University of Turku), Prof. Ole K. Fauchald (University of Oslo) and my fellow Doctoral Scholars Gurwinder Singh, Anti-Jussi Lankinen and Matti Urpilainen for their insightful reviews and valuable comments and Janne Waklin (Information Specialist) for his logistics support. I am also thankful to the Finnish Cultural Foundation for generous funding for this research.

¹ For more information about BITs, see online *UNCTAD Compendium*, 'Bilateral Investment Treaties (BITs): A Compilation', available at <http://www.unctad.org/Templates/webflyer.asp?docid=907&intItemID=3138&lang=1&mode=downloads>.

1
2
3 remedy.² The objective behind conclusion of BITs is to document the investors' rights
4 and protections as these were either not lucid or not provided at all by customary
5 international law.³
6
7

8 The number of States joining the EU has grown over a period of time and the EU legal
9 order has also evolved into a collective Community regime in almost all the areas of
10 commercial activity except foreign investment.⁴ The following analysis reveals that in
11 the absence of a Community regime, the EU foreign investments are currently governed
12 by a total 1407 Bilateral Investment Treaties (hereinafter the 'BITs') concluded by the
13 EU Member States out of which 376 are concluded by the Member States *inter-se*
14 (hereinafter the 'intra-EU BITs') and 1031 are with non-EU States (hereinafter the
15 'extra-EU BITs'). Total 569 of these BITs have been concluded by Member States prior to
16 their joining of the EU and 838 have been concluded thereafter. The account of
17 contemporary BITs of the EU Member States was first opened in 1962 by the first ever
18 Germany-Pakistan BIT. The total of BITs has constantly grown over time and many
19 States, who were not the EU Member when they signed their BITs with then Member
20 States, have later acceded to the EU themselves.
21
22
23
24

25 In this landscape, the aim of this article is to highlight and seek to resolve the current
26 issues in the foreign investment regime for the EU Member States. The study was
27 motivated by the recent European Court of Justice (hereinafter the 'ECJ') decisions
28 against Austria and Sweden,⁵ declaring the 'free transfer of capital' clause in their extra-
29 EU BITs incompatible with Treaty Establishing European Community (hereinafter the
30 'EC Treaty').⁶ The ECJ found that Austria and Sweden had violated their duty under
31 Article 307 of the EC Treaty by which they were required to take measures to remove
32 such incompatibilities of their pre-accession extra-EU treaties. These rulings have far
33 reaching ramifications on the EU's external relations in the field of foreign investment
34 since they have jeopardised the future of all pre-accession extra-EU BITs of all the EU
35 Member States containing similar provisions on transfer of capital.
36
37
38
39

40 Moreover, this finding raises important questions about the compatibility of those
41 extra-EU BITs that have been concluded by the EU Member States after they acceded to
42 the EU containing similar free transfer of capital clauses. This article asserts that the
43 objectives the EU Commission intended to achieve from cases against Austria and
44 Sweden cannot be accomplished in the presence of all existing extra-EU BITs whether
45
46

47 ² For detailed discussions on BITs and international investment law, see eg Surya P. Subedi, *International*
48 *Investment Law: Reconciling Policy and Principle* (2008); Andrew Newcombe, Lluís Paradell, *Law and*
49 *Practice of Investment Treaties. Standards of Treatment* (2009).

50 ³ Campbell McLachlan, Laurance Shore & Mathew Weiniger, *International Investment Arbitration-*
51 *Substantive Principles* (2008), p 265-266

52 ⁴ Once the Treaty of Lisbon enters into force, the foreign direct investment would come within the EU
53 competence. This would, however, not impede the application, enforcement and legal consequences of the
54 existing BITs concluded by the Member States. In this Article the expressions 'EU law', 'EC law' and
55 'Community law' have been used interchangeably referring to the EU/EC law in aggregate and without
56 distinguishing the primary or secondary rules.

57 ⁵ Case C-205/06, *Commission of the European Communities v. Republic of Austria*, Judgment 3 March 2009
58 and (hereinafter the 'Austrian BITs Case') Case C-249/06, *Commission of European Communities v.*
59 *Kingdom of Sweden*, Judgment 3 March 2009.

60 ⁶ Treaty Establishing the European Economic Community (signed on 25 March 1957 and entered into
force on 1 Jan. 1958). Now the consolidated versions of the Treaty on European Union and of the Treaty
Establishing the European Community, *Official Journal*, (2006) C 321/1.

1
2
3 pre or post-accession. Since the Article 307 obligation extends only to pre-accession
4 BITs, there is no provision in the EC Treaty maintaining the primacy of EU law over the
5 post-accession extra-EU BITs. Article 10 EC Treaty, however, requires general loyalty
6 from the EU Member States abstaining them to take any measure which could
7 jeopardise the attainment of the objectives of the EC Treaty. After the latest ECJ
8 decisions on Austrian and Swedish BITs, the Commission might take appropriate
9 measures requiring the Member States to deal with their post-accession extra-EU BITs
10 as they need to do with such pre-accession BITs and might also challenge them before
11 the ECJ. Such measures by the Commission may bring these BITs at par with the pre-
12 accession BITs as being incompatible with the EC Treaty.
13
14
15

16
17 In addition to the extra-EU BITs, the intra-EU BITs may also raise questions of
18 incompatibility with the EC Treaty. All intra-EU BITs provide for dispute resolution by a
19 supra-national arbitral tribunal and the investors from BIT Party States are empowered
20 to bring claims before the BIT designated supra-national arbitral tribunals. The
21 application of these intra-EU BITs grant investors from BIT Party States access to the
22 investor-to-state dispute resolution system which is not available to the investors from
23 the EU Member States who have not concluded BITs with those Member States. It is
24 contended that this amounts to discrimination leading to a more favourable treatment
25 of investors and investments between the parties covered by BITs and may distort the
26 principle of equal treatment within the EU Member States envisaged by Article 12 of the
27 EC Treaty.
28
29
30

31 This article further analyses the complexities emerging from the investor-to-state
32 dispute settlement system granted by the intra-EU BITs. On the basis of these BITs, the
33 acceding EU States are facing extensive BIT claims when they implement the newly
34 acquired EU obligations within their respective territories. This article argues that the
35 internal EU jurisprudence delivered by way of ECJ decisions maintaining the primacy of
36 EU law on intra-EU treaties cannot impede the BIT arbitrations. The arbitrators have
37 assumed jurisdiction on BIT claims in disregard to the EU law or the ECJ decisions on
38 the status of intra-EU BITs and this is not bound for any change even after these BITs
39 are terminated. The Treaty of Lisbon proposes to give EU an exclusive competence over
40 future investment agreements but it remains to be seen whether or not the EU
41 competence would extend to renegotiate, amend or terminate the Member States'
42 existing BITs. This article, however, argues that even if these BITs are terminated by the
43 individual Member States or in future by the EU exclusive competence, they contain self
44 styled 'freezing' provisions keeping the rights and liabilities of investors and Party
45 States alive for a considerable length of time even after their termination and it appears
46 that there is no possible way to prevent or defend these BIT arbitrations.
47
48
49
50

51
52 Founded on a comprehensive empirical evidence on the enormity of BITs concluded by
53 the EU Member States over the past fifty years, this article aims to illuminate two
54 relatively conventional theoretical issues in particular context of the EC Treaty⁷: first, do
55 conflicts of treaties actually arise; and second, how these conflicts have been or could be
56 resolved? With the help of a triangular study into the competing international treaty
57
58

59 ⁷ In this context, this article treats the EC Treaty only as a treaty as it stands in international law rather
60 than the so called 'European Constitution'. In a global perspective, the author does not share the general
European view that the EC Treaty is not just a treaty but the European Constitution which should be
treated differently than other treaties existing on international plane.

1
2
3 norms, the EU legal framework and the indigenous BIT arbitrations, this article
4 endeavours to analyse the antagonistic and conflicting international obligations
5 acquired by the EU Member States within their evolved foreign investment regime. The
6 analysis reflects on the options available in response to these issues to both the
7 individual EU Member States and the EU Commission collectively on behalf of all the
8 Member States. The starting point would be an analysis of the ECJ decision declaring
9 Austrian and Swedish pre-accession extra-EU BITs incompatible with the EC Treaty.
10
11

12 **II The ECJ Decision on Austrian and Swedish BITs**

13
14
15 In 2006, the EU Commission brought actions against Austria and Sweden under Article
16 226 EC Treaty claiming that these Member States have failed to adopt appropriate
17 measures to eliminate the incompatibilities with the EC Treaty required by Article
18 307(2) of their extra-EU BITs concluded prior to the EU accession.⁸ The ECJ on March 3,
19 2009 declared that the 'free transfer of capital' guarantees of those extra-EU BITs are
20 incompatible with the EC Treaty. The Court approved the Commission's claim that these
21 guarantees to the non-EU states would create conflicting international obligations
22 rendering the defendants incapable to abide by any future safeguard measures taken to
23 restrict the transfer of capital under Articles 57(2), 59 and 60(1) EC Treaty. The
24 defendants failed to amend these pre-accession BITs as required by Article 307(2) EC
25 Treaty when earlier notified by the Commission.
26
27
28

29
30 The ECJ also observed that such incompatibilities with the EC Treaty in extra-EU BITs
31 are not limited only to BITs concluded by the defendant states.⁹ This is a clear indication
32 regarding the future of extra-EU BITs of all the EU Member States. The decision has far
33 reaching ramifications since the EU states have signed 318 pre-accession extra-EU BITs
34 containing similar free transfer of capital clause.¹⁰ The Commission has already filed a
35 similar case against Finland.
36
37

38 **A Background**

39
40 Article 307 (2) the EC Treaty requires the Member States to take all appropriate steps to
41 eliminate any incompatibility with the EC Treaty existing in their pre-accession treaties.
42 The Commission notified Austria and Sweden that their BITs with several non-EU
43 countries containing guarantees for free movement of capital to or from these countries
44 are incompatible with the EC Treaty. The Commission is empowered in certain
45 circumstances to impose restriction as safeguard measures on the flow of capital under
46 Articles 57(2), 59 and 60(1) EC Treaty. Though the Commission has not yet resorted to
47 any such measures, any compelling economic or other reason may lead to such
48 protectionism. In case restrictions are imposed by way of safeguard measures, the EU
49 Member States having reciprocal guarantees of free transfer of capital under these
50 extra-EU BITs would either fail to abide by these measures or be compelled to infringe
51 their international BIT obligations. If the EU Member States would prefer to abide by the
52 EU safeguard measure over the infringement of their BIT obligations, they would likely
53 be compelled by the BIT arbitral tribunals to pay compensation for such infringements
54
55
56
57
58

59 ⁸ n 5 supra.

60 ⁹ Judgement of the ECJ, Case No C-249/06, *European Communities v. Kingdom of Sweden*, (hereinafter the 'Swedish BITs Case'), para 43.

¹⁰ Swedish BITs Case, *ibid.* para 22.

1
2
3 or even reconstitute the legal framework existing prior to the safeguard measures. This
4 results in an incompatibility of these BITs with the EC Treaty, which the ECJ found that
5 the defendants are obliged to remove under Article 307(2).¹¹
6
7

8 **B Legal Issues**

9

10 Austria and Sweden also joined by Finland, Lithuania, Germany and Hungary, argued
11 that the safeguard measures in question have hitherto not been applied by the
12 Commission and thus the question of their incompatibility is hypothetical. The ECJ
13 rejected this plea by providing that compatibility must be anticipated because the
14 urgent and immediately enforceable character of the safeguards is incompatible with
15 the maintenance of contrary pre-existing international obligations. The Court favoured
16 an *ex-ante* action and upheld that waiting for an actual conflict between Community
17 legislation and international obligations would deprive the Community legislation of its
18 effect.¹² The Court also rejected the defendants' arguments that they would be able to
19 prevent the application of BITs obligations at any event of the Council's safeguard
20 measures through interpretive devices, international law or simple default. The
21 defendants argued that the exceptional nature of these safeguard measure would bring
22 the application of the principle of *rebus sic stantibus* provided by the Vienna Convention
23 on the Law of Treaties,¹³ (hereinafter the 'Vienna Convention') and the BIT obligations
24 would not be enforceable against the Community legislation.
25
26
27
28
29

30 The Advocate General (hereinafter the 'AG'), however, suggested that the principle of
31 *rebus sic stantibus* is applied in very limited circumstances and its application on
32 present facts in issue is controversial.¹⁴ The Court approved the opinion of AG and
33 observed that the possibility of relying on mechanisms offered by international law,
34 such as suspension, or even denunciation of BITs provisions are too uncertain in their
35 effects to guarantee that the measures adopted by the Council could be applied
36 effectively.¹⁵ Although the AG agreed with the defendants' right and need to protect
37 their investors in foreign States but alleged that this might not be achieved by infringing
38 the obligations arising out of the Community legislation. The AG further pressed that in
39 resolution of incompatibilities, only lawful means ought to be adopted and denunciation
40 in violation of these BITs' provisions should be considered only as a last resort.¹⁶ In the
41 perspective of any measures which should be adopted by the Member States to remove
42 such incompatibilities, however, the ECJ decision is only declaratory in nature finding
43 these BITs incompatible with the EC Treaty and do not suggest any particular action to
44 be taken by the respondent States.
45
46
47
48
49
50

51 ¹¹ Swedish BITs Case, *ibid*.

52 ¹² Swedish BITs Case, *ibid.*, para 52.

53 ¹³ Article 62, Vienna Convention on the Law of Treaties (23 May 1969) (hereinafter the 'Vienna
54 Convention') illuminates the legal doctrine *rebus sic stantibus* allowing for a treaty to become inapplicable
55 because of a fundamental change in circumstances. The Vienna Convention was adopted on 23 May 1969,
56 and entered into force on 27 January 1980, 1155 UNTS 331. To date the Vienna Convention has 45
57 signatories and 108 parties. The majority of the EU Member States have ratified with the exception of
58 France, Malta, and Romania.

59 ¹⁴ Opinion of Advocate General, Case No. C-249/06, *European Communities v. Kingdom of Sweden*,
60 (hereinafter the 'AG's Opinion in the Swedish BITs Case'), para 61.

¹⁵ Swedish BITs Case, n 9 *supra*, para 41.

¹⁶ AG's Opinion in the Swedish BITs Case, n 14 *supra*, paras 68 and 70

III Application of the Vienna Convention to the EC Treaty

Obligations arising under the EU law are primarily based on the EC Treaty.¹⁷ The ECJ, while explaining the nature of EU law, has declared the EU legal framework as ‘new legal order of international law’¹⁸ distinguished from both the domestic laws of its Member States and the ‘ordinary international treaties’¹⁹ The EU Commission also has a unique capacity to bind its Member States into international agreements with third countries in the areas of its authorised competence. There are arguments suggesting the EU as a federation, the Member States as the constituent parts of the federation and the EC Treaty its constitution.²⁰ Besides all its distinctions, however, where the Member States are still able to conclude their own treaties with third countries, the status of the EU over and above an ‘International Organisation’ parallel to a federation contradicts the principles of sovereignty available to a federation as a ‘state’ under international law.²¹ Moreover, under the present state of its legal framework, where the EU can act only when authorized by the Member States and only to the authorized extent, the EU federalism appears to be a mere rumination.²² Nevertheless, the EC Treaty was concluded in the form of an international treaty, the governing law remains the law applicable to ‘ordinary’ international agreements. Accordingly, normative conflicts arising between the EC Treaty and the BITs concluded by the EU Member States are principally the subject matter of the law of treaties.²³

In this context, there is another interesting argument regarding the application of Article 27 of the Vienna Convention to the EU collectively presumed as a State. Article 27 codifies the international customary rule that prohibits states from referring to their domestic law in order to justify a violation of an international obligation. It has been suggested that Article 27 applies to the EU on the basis that the EU legal order equates to domestic law for all Member States in the light of its specific features.²⁴ The proponents of this contention base their argument upon the highly integrated nature of the EU secondary law and the special nature of the EU law declared by the ECJ.²⁵ It contemplates that duty of all the EU Member States under international law should be considered collectively as a State in light of Article 27 of the Vienna Convention. Even if this argument is conceded, for the purposes of present analysis it only leads to a

¹⁷ n 6 and 7 supra.

¹⁸ Case 26/62, *Van Gend en Loos v. Nederlandse Administratie des Belastingen* [1963] ECR 3: ‘[t]he European Economic Community constitutes a new legal order of international law for benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subject of which comprise not only the Member States but also their nationals’.

¹⁹ Case 6/64, *Costa v. ENEL* [1964] ECR1141: ‘[b]y contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, ..., became an integral part of the legal systems of the Member States and which their courts are bound to apply’.

²⁰ For detailed analysis of the application of the Vienna Convention on the EC Treaty see Kuijper, ‘The Court and the Tribunal of the EC and the Vienna Convention on the Law of Treaties’, 25 *Legal Issues of European Integration* (1998) 1. cf Magdalena Lickova, ‘European Exceptionalism in International law’, *EJIL* (2008, 19(3)), at 463-490.

²¹ Thomas O. Hueglin, ‘From Constitutional to Treaty Federalism: A Comparative Perspective’, *The Journal of Federalism* (2000) 30(4) at 137-153; Felix Knüpling, ‘Federalism and Multi-level Governance: Comparing the EU with other Federal States’, available at www.cor.europa.eu.

²² cf *ibid.*

²³ Magdalena Lickova, n 20 supra, at 467-468

²⁴ *ibid.*, at 470.

²⁵ See n 18 and 19 supra.

1
2
3 conclusion that the EU Member States cannot justify the violation of their BITs even on
4 the basis of their obligations arising from the EU law.
5
6

7 As stated earlier, it is difficult to conclude that by its legal form the EC Treaty is different
8 from any other international treaty. The equation of law made by international
9 organizations to a domestic legal order of its Member States was discussed in the 1980s
10 but it is still open today.²⁶ The argument also appears self contradictory when the EU
11 Member States have themselves entered into BITs which are incompatible with their
12 'federal constitution' i.e., the EC Treaty. Notwithstanding the validity of this argument,
13 there would be no change in the duty of the EU Member States with respect to their
14 both intra and extra EU BITs since Article 27 reiterates the same principle of *pacta sunt*
15 *servanda* (agreements must be honoured) as the other provisions of the Vienna
16 Convention read in totality.²⁷
17
18

19
20 The Vienna Convention provides for the rules of international law applicable to treaties.
21 The Convention itself clarifies that it is applicable to all treaties concluded after its entry
22 into force, whether they are the constitutional instrument of international organisations
23 or the treaties adopted within an international organisation.²⁸ Since the Vienna
24 Convention codifies the generally acceptable rules of international law applicable on
25 treaties, it would be a ready reference for the treaties concluded before its entry into
26 force as well.
27
28

29 30 **IV The Vienna Convention Norms: Termination of a Treaty by Conclusion of a** 31 **Later Treaty** 32

33 Treaties are agreements, though between States - not persons, and enjoy the same
34 principle of autonomy (self governing rules) for their construction where each treaty
35 may provide its own conflict of laws rules. These rules invariably include different types
36 of clauses which typically preserve the applicability of previous or subsequent treaties
37 of the same subject matter or which lay down the hierarchical primacy of a given
38 treaty.²⁹ Where the Vienna Convention allows the autonomy principle, it also
39 establishes the interpretive rules to determine hierarchy between two treaties in the
40 absence of specific rules in either of the two successive treaties.³⁰
41
42
43
44
45
46

47 ²⁶ cf Magdalena Lickova, n 20 supra. The rule of Article 27 'A party may not invoke provisions of its
48 internal law as justification for its failure to perform a treaty' is incorporated in the Vienna Convention on
49 the Law of Treaties between States and International Organizations or between International
50 Organizations. This Convention (adopted on 21 March 1986, doc. A/CONF.129/15) has not yet entered
51 into force. The EU has not signed it though a minority of the EU Member States have signed or ratified.

52 ²⁷ I. Sinclair, *The Vienna Convention on the Law of Treaties* (1984). cf Magdalena Lickova, n 20 supra. *Pacta*
53 *sunt servanda* is codified in Article 26 of Vienna Convention. The customary nature of the *pacta sunt*
54 *servanda* rule was affirmed by the ICJ in the *Fisheries Jurisdiction Case (UK v. Iceland)*, Jurisdiction of the
55 Court, Judgment [1973] ICJ Rep 3, at 18.

56 ²⁸ Article 5 of the Vienna Convention.

57 ²⁹ eg Article 103 of the UN Charter provides: '[i]n the event of a conflict between the obligations of the
58 Members of the United Nations under the present Charter and their obligations under any other
59 international agreement, their obligations under the present Charter shall prevail'. Similar rules have
60 been included in Article 30(1) the Vienna Convention on the Law of Treaties and Articles 103 and 104 of
the North American Free Trade Agreement.

³⁰ See n 13 supra.

1
2
3 The question of hierarchy becomes highly important when two successive treaties
4 contain incompatible obligations. Obligations in two treaties are considered
5 incompatible with each other when they cannot be simultaneously fulfilled without
6 necessarily violating one another. A conflict or incompatibility arises in a situation
7 where two obligations cannot be complied with by all addressees of the obligations, at
8 all times and in all spaces covered by the obligation, with regard to all objects of the
9 obligation and under all conditions specified by the obligation.³¹
10
11

12
13 A plain reading of the Vienna Convention reveals three interdependent interpretive
14 tests to resolve the problem of conflicting obligations in two treaties:³²
15

- 16
17 A What is the subject matter of the treaties in question? (The subject matter test)
18 B What is the chronology of their adoption or accession? (The chronology test)
19 C Who are the parties to the conflicting treaties? (The contracting parties test)
20

21 22 A The Subject Matter Test 23

24 The subject matter test is the primary test to ascertain whether two treaties are
25 mutually incompatible. If this test is not affirmative, the other two tests are no more
26 required. In other words, the questions of priority or conflict between two treaties
27 cannot arise unless they are dealing with the same subject matter irrespective of the
28 same parties or the time of their conclusion.
29
30

31 The subject matter of a treaty is the area of activity it is supposed to govern. For
32 example treaties on protection and promotion of investment, free trade agreements,
33 extradition treaties, human rights treaties, taxation treaties and treaties of friendship,
34 commerce and navigation tend to separate themselves out into special groups in respect
35 of their subject matter.³³ Title of a treaty might play a role in the ascertainment of its
36 subject matter while determining incompatibility with another treaty at the macro
37 level.³⁴ In an indiscernible situation, however, the subject matter of treaty may be
38 determined by the outcome, applicability and intended effect, the phraseology of each
39 treaty provision within its genre, the hermeneutics in its interpretation and the
40 inferences from omissions, additions and changes in terminology at the micro level.³⁵
41 Successive treaties between same States perceptibly dealing with the same subject
42 matter invariably provide their own rules of priority *inter se*. However, in a covert
43 finding of incompatibility, it is possible that a treaty do not contain any express
44 provision subjecting it to or giving it an overriding effect on another treaty dealing with
45 the same subject matter. In this unanticipated situation of conflict and incompatibility
46 between two treaties, the chronology test of the Vienna Convention becomes decisive
47 for the application of conflicting treaty provisions.
48
49
50
51
52
53

54 ³¹ Seyed Ali Sadat Akhavi, *Methods of Resolving Conflicts Between Treaties*, at 5-24

55 ³² Art. 30 of the Vienna Convention.

56 ³³ Detlev F. Vagts, 'Treaty Interpretation and the New American Ways of Law Reading', 4 *EJIL* (1993) at
57 474.

58 ³⁴ C. M. Giuliano, 'Multilateral Treaties: Accommodating Subject Matter', Paper presented at the annual
59 meeting of the ISA's 50th Annual Convention 'Exploring the Past, Anticipating the Future', New York
60 Marriott Marquis, New York City, NY, USA (2009) available at
http://www.allacademic.com/meta/p311485_index.html.

³⁵ *ibid*.

1
2
3 Article 30(2) deals with the situation where one of the two successive treaties expressly
4 provides that both of them deal with the same subject matter. In accordance with the
5 principle of autonomy, Article 30(2) provides that the rights and liabilities of States
6 parties to successive treaties relating to the same subject matter are governed first by
7 the treaties in question themselves.³⁶ Article 30(2) reads:

10
11 ‘When a treaty specifies that it is subject to, or that it is not to be considered as
12 incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.’

14 The terms of Article 30(2) suggest two possible wordings in a treaty which determine
15 the question of its priority to another treaty irrespective of chronological order of the
16 treaties in question. Firstly, when it states that it is ‘subject to’ another treaty (whether
17 earlier or later in time) then that other treaty shall have priority. Secondly, when a
18 treaty states that it is ‘not incompatible with’ another treaty (whether earlier or later in
19 time), again that other treaty shall have priority. If, however, no such provision is
20 provided in either of the treaties dealing with the same subject matter, then the
21 question of compatibility *inter se* becomes the decisive mean to determine their fate. If
22 they are incompatible with each other, one of them shall have priority in accordance
23 with the rules of chronology discussed bellow.

27 If, however, they are not incompatible i.e., if both treaties with same parties dealing
28 with the same subject matter impose identical obligations having the same effect then
29 the doctrine of parallelism of treaties would come into play as contemplated in the
30 *Southern Bluefin Tuna Case*.³⁷ The Tribunal has observed:

33 [‘I]t is a commonplace of international law and State practice for more than
34 one treaty to bear upon a particular dispute. There is no reason why a given
35 act of a State may not violate its obligations under more than one treaty.
36 There is frequently a parallelism of treaties, both in their substantive content
37 and in their provisions for settlement of disputes arising thereunder’.³⁸

40 On the combined application and effect of treaties dealing with same subject matter and
41 providing identical obligations for party states, the Tribunal observed that the current
42 range of international legal obligations benefits from a ‘process of accretion and
43 commutation’. The Tribunal quoted the example of human rights treaties where broad
44 provisions for the promotion of universal respect for and observance of human rights
45 and the international obligation to co-operate for the achievement of those purposes
46 found in Articles 1, 55 and 56 of the Charter of the United Nations, have not been
47 discharged for States Parties by their ratification of the Human Rights Covenants and
48 other human rights treaties.³⁹ The same might be concluded regarding the treaties on

54
55 ³⁶ Article 30 (2) of the Vienna Convention.

56 ³⁷ *Southern Bluefin Tuna Case (Australia and New Zealand v Japan) (Jurisdiction and Admissibility)* (Arbitral
57 Tribunal constituted under annex VII of the *United Nations Convention on the Law of the Sea*) (Award of
58 4 August 2000), the award is available at http://untreaty.un.org/cod/riaa/cases/vol_XXIII/1-57.pdf. For
59 detailed analysis of the award see Kwiatkowska Barbara, ‘The Ireland v United Kingdom (Mox Plant
60 Case): Applying the Doctrine of Treaty Parallelism’, *IJMCL* (Mar 2003, Vol. 18 Issue 1), at 1-58.

³⁸ *Southern Bluefin Tuna Case*, *ibid*, para 52.

³⁹ *ibid*.

1
2
3 protection and preservation of environment and the treaties providing labour
4 standards.
5
6

7 In this context, the ECJ has differentiated between those parts of Article 56(1) and (2) of
8 the EC Treaty that are not incompatible with BITs.⁴⁰ This distinction seems significant
9 with a view to suggest that both the EC Treaty and the extra-EU BITs can co-exist as
10 long as they do not create conflicting obligations even if they reiterate the identical
11 ones. This is an affirmation of the general notion that a state can conclude treaties
12 containing identical obligations with as many states as it likes. On the other hand, the
13 necessary inference is also that the intra-EU BITs may also co-exist as long as they do
14 not provide incompatible obligations. This appears to be the confirmation by the ECJ of
15 the doctrine of parallelism as applicable within the EU legal framework.
16
17

18 19 **B The Chronology Test**

20
21 When two treaties are dealing with the same subject matter and contain express rules
22 to determine their mutual priority relationship, then the Article 30(2) clarifies the rules
23 of priority in accordance with the autonomy principle discussed above. If, however, two
24 States have concluded consecutive treaties dealing with the same subject matter
25 providing conflicting obligations being incompatible with each other and both treaties
26 are silent on their mutual trumps, Article 59 of the Vienna Convention provides a rather
27 simpler solution. Article 59 reiterates the rules of *lex posterior* by which a treaty prior in
28 time is impliedly terminated on the conclusion of a later treaty dealing with the same
29 subject matter if the following conditions are met:
30
31

- 32
33 1 All the parties in the prior treaty are also parties to the later treaty;
- 34 2 It appears from the later treaty or is otherwise established that the parties
35 intend that the matter should be governed by the later treaty;
- 36 3 The provisions of the later treaty are so far incompatible with those of the earlier
37 one that the two treaties are not capable of being applied at the same time.
38
39

40
41 Article 30(3) clarifies the situation where the above conditions of the Article 59 are met
42 in two treaties but the earlier treaty still remains operative to govern the matters which
43 have not been governed by the later treaty. In other words, Article 30(3) provides that
44 where the earlier treaty also imposes other obligations which are not incompatible with
45 the later treaty obligations, then those parts of the earlier treaty would remain
46 operative which are not incompatible with the later treaty.
47
48

49 **C The Contracting Parties Test**

50
51 If two treaties are dealing with the same subject matter and are concluded by the same
52 parties, then the treaty later in time shall prevail over the earlier treaty in accordance
53 with the foregoing analysis of the Article 59. Article 30(4) of the Vienna Convention
54 dealing with the 'application of successive treaties relating to the same subject matter'
55 which involve different parties provides:
56
57

58
59 When the parties to the later treaty do not include all the parties to the earlier one:
60

⁴⁰ Swedish BITs Case, n 9 supra, para 26.

- 1 As between States parties to both treaties the same rule applies as in paragraph 3 (the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty);
- 2 As between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

By virtue of paragraph (4)(b) of the Article 30 where the conflicting treaties have been concluded by different States, treaty conflicts are apparently resolved in a way that favours the preservation of the validity of both of the incompatible treaties rather than determining priority *inter se*. Any of the treaties in question is not declared void, suspended or superseded by the operation of Article 30. On the contrary, the State that is party to both of the treaties seems to be entitled to choose which obligation it will honour and which it will violate in the light of relative effects of such violations. This provision shifts the problem away from the issue of priority and validity of the conflicting treaties to the state responsibility under international law as a consequence of the violation of one of the treaties.⁴¹ Article 30(5) affirms this position by making Article 30(4) without prejudice to the potential responsibility of a state arising out of treaty violation due to the legal consequences of incompatibility maintained by Article 30(4).

This legal proposition seems to support the failed argument of the defendants in the *Swedish BITs Case* that they would prevent the application of BITs obligations at the event of Council's safeguard measures through simple default.⁴² It might be argued, since the only remedy available in international law against violation of a treaty obligation is compensation, the default of treaty obligation resulting in comparatively lesser burdens is a readily available and relatively uncomplicated option. The recent trends in the investment treaty arbitration, however, where tribunals are willing to award other remedies like restoration of legal framework,⁴³ the possibility that the tribunals would not resort to remedies like specific performance cannot entirely be ruled out.

V Corpus of Bilateral Investment Treaties in the EU⁴⁴

The following analysis is intended to reveal in quantitative terms the intensity of the problem posed by the BITs concluded by the EU Member States as on June 1, 2008. From 1958 to 1986, the total number of EU Member States was 12. Belgium and Luxemburg have signed their BITs together due to their own internal arrangements. The following tables show that none of these 12 EU Member States had concluded any pre-accession extra-EU BIT. Austria and Sweden acceded to the EU on January 1, 1995. At the time of accession, Austria had concluded 12 BITs from which 8 were extra-EU and Sweden had concluded 21 BITs out of which 17 were extra-EU. It means that the

⁴¹ Magdalena Lickova, n 20 supra, at 469-471.

⁴² See n 12 supra.

⁴³ ICSID Case No. ARB/05/20, *Ioan Micula and others v. Romania* (Decision on Jurisdiction and Admissibility), at paras 167-168.

⁴⁴ Country-wise list of BITs has been taken from UNCTAD and is available at http://www.unctadxi.org/templates/DocSearch_779.aspx.

ECJ decisions on Austrian and Swedish BITs has directly affected only 25 BITs. The implication of these decisions is however far greater than this. Finland also acceded to the EU on the same date along with Austria and Sweden.

Ten more States joined the EU on May 1, 2004 and two more on January 1, 2007. The following tables give a detailed picture of all BITs concluded by all the EU Member States. It should be noted that for the purposes of this study, the date of entry into force of the treaties has been treated as the operative date since there is a general agreement upon the rule that unless a treaty otherwise provides expressly or by implication, it will begin to operate on the date on which it enters into force.⁴⁵ The date of entry into force can be the same date on which it is signed by the parties but in case the treaty itself requires ratification, the date of exchange or deposit of ratifications is the date on which it becomes operative. The ECJ has also clarified that mere signing of a treaty does not create any rights or obligation by itself, unless it subsequently enters into force as well.⁴⁶ Treaties that have not entered into force have not been included in this analysis.

A January 1, 1958 Ratification

Country	Extra-EU			Intra-EU			Grand Total
	Pre Accession	Post Accession	Sub Total	Pre Accession	Post Accession	Sub Total	
Belg&Luxm	0	41	41	0	12	12	53
France	0	80	80	0	11	11	91
Germany	0	103	103	0	12	12	115
Italy	0	65	65	0	11	11	76
Netherlands	0	70	70	0	11	11	81
Grand Total	0	359	359	0	57	57	416

B January 1, 1973, 1981 & 1986 Accessions

Country	Extra-EU			Intra-EU			Grand Total
	Pre Accession	Post Accession	Sub Total	Pre Accession	Post Accession	Sub Total	
Denmark	0	36	36	0	10	10	46
Ireland	0	0	0	0	1	1	1
UK	0	81	81	0	10	10	91
Greece	0	26	26	1	10	11	37
Spain	0	47	47	0	10	10	57

⁴⁵ For a detailed discussion on the different effects of signatures and ratification of treaties, see McNair, *The Law of Treaties* (1961), at 191-205.

⁴⁶ See eg Case C 124/95, *R. v. HM Treasury ex parte Centro-Com Srl* [1997] ECR 181, para 61. cf Pietro Manzini, 'The Priority of Pre-Existing Treaties of EC Member States within the Framework of International Law', *EJIL* (2001, Vol. 12 No. 4), at 781-792. cf Article 18 of the Vienna Convention.

Portugal	0	28	28	1	9	10	38
Grand Total	0	218	218	2	50	52	270

C January 1, 1995 Accession

Country	Extra-EU			Intra-EU			Grand Total
	Pre Accession	Post Accession	Sub Total	Pre Accession	Post Accession	Sub Total	
Austria	8*	39	47	4	7	11	58
Sweden	17	32	49	4	6	10	59
Finland	4	43	47	7	3	10	57
Grand Total	29	114	143	15	16	31	174

*Austria-Argentina BIT entered into force on January 1, 1995, the same day Austria acceded to EU. Since this BIT had been signed on August 7, 1992 which is prior to the EU accession, therefore I have added it in the pre accession BITs.

Total 8 Austrian BITs with Argentina, Cape Verde, China, Republic of Korea, Malaysia, Namibia, Russian Federation, Tajikistan and Turkey. (The Commission however did not challenge the BIT with Argentina)

Total 17 Swedish BITs with Argentina, Bolivia, Côte d'Ivoire, Egypt, Hong Kong and China, Indonesia, Madagascar, Malaysia, Morocco, Pakistan, Peru, Senegal, Serbia and Montenegro, Sri Lanka, Tunisia, Viet Nam, and Yemen. (The Commission did not challenge the BIT with Serbia and Montenegro)

D May 1, 2004 Accession

Country	Extra-EU			Intra-EU			Grand Total
	Pre Accession	Post Accession	Sub Total	Pre Accession	Post Accession	Sub Total	
Cyprus	7	1	8	8	0	8	16
Czech Rep.	46	3	49	25	0	25	74
Estonia	7	0	7	16	0	16	23
Hungary	32	3	35	22	0	22	57
Latvia	17	4	21	20	1	21	42
Lithuania	20	5	25	20	1	21	46
Malta	5	0	5	13	0	13	18
Poland	36	0	36	23	0	23	59
Slovakia	17	3	20	21	0	21	41
Slovenia	11*	3	14	21	0	21	35
Grand Total	198	22	220	189	2	191	411

*Slovenia-Serbia & Montenegro BIT entered into force on May 1, 2004, the same day Slovenia acceded to EU. Since this BIT had been signed on June 18, 2002 which is prior to the EU accession, I have added it in the pre accession BITs.

E January 1, 2007 Accession

Country	Extra-EU			Intra-EU			Grand Total
	Pre Accession	Post Accession	Sub Total	Pre Accession	Post Accession	Sub Total	
Bulgaria	35	0	35	23	0	23	58
Romania	56	0	56	22	0	22	78
Grand Total	91	0	91	45	0	45	136

F The Aggregate

The aggregate sum of treaties entered into by the acceding countries is shown below:

Accessions	Extra-EU			Intra-EU			Grand Total
	Pre Accession	Post Accession	Sub Total	Pre Accession	Post Accession	Sub Total	
01.03.1957	0	359	359	0	57	57	416
1973,81,86	0	218	218	2	50	52	270
01.01.1995	29	114	143	15	16	31	174
01.05.2004	198	22	220	189	2	191	411
01.01.2007	91	0	91	45	0	45	136
Grand Total	318	713	1031	251	125	376	1407

It is clear from the aggregate numbers that a total number of 318 pre-accession extra-EU BITs are affected by the ECJ decisions on the Austrian and Swedish BITs by necessary implication.

VI BITs-EC Treaty Incompatibilities: The Corollaries of Article 307 EC Treaty

Article 307 EC Treaty reads:

‘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.

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.

1
2
3
4
5 In applying the agreements referred to in the first paragraph, Member States
6 shall take into account the fact that the advantages accorded under this
7 Treaty by each Member State form an integral part of the establishment of
8 the Community and are thereby inseparably linked with the creation of
9 common institutions, the conferring of powers upon them and the granting of
10 the same advantages by all the other Member States.’
11

12
13 The concept of incompatibility in Article 307 EC Treaty is logically composed of two
14 conflicting elements: an EC Treaty obligation and an obligation arising from an extra-EU
15 treaty. Obligation arising out of the EC Treaty can be one of the two kinds. It can be a
16 primary obligation envisaged in the provisions of the EC Treaty or a secondary
17 obligation arising from any legislation enforced by the Community from time to time.⁴⁷
18 Furthermore, the ECJ declared in the *Austrian BITs Case* that secondary obligation may
19 be ‘real’ that is based on an actual legislation enforced by the Community or
20 ‘anticipatory’ that is based on hypothecation that such obligation will exist in the event
21 of a secondary legislation.⁴⁸ Once an obligation is established; whether primary or
22 secondary, real or anticipatory, there must be a conflicting obligation under an extra-EU
23 treaty for the application of Article 307. Article 307 comes into play when this
24 conflicting obligation is liable to compromise the application of a Community law and is
25 thus incompatible with the EC Treaty.
26
27
28
29

30 **A First Paragraph: Subordination of the EC Treaty to Pre-Accession Treaties**

31
32 The first paragraph of Article 307 (hereinafter the ‘Article 307(1)’) enunciates
33 subordination of the EC Treaty to the pre-accession extra-EU treaties. In the *Italian Case*,
34 ECJ limited the extent of application of Article 307(1) to only conflicting obligations
35 levied on the Member States arising out of the pre-accession extra-EU treaties.⁴⁹ Given
36 that if a Member State has only ‘rights’ instead of ‘obligations’ arising out of such treaty,
37 by assuming a new obligation under the EC Treaty which is incompatible with rights
38 held under the prior treaty, a state *ipso facto* gives up the exercise of these rights to the
39 extent necessary for the performance of its new obligations.⁵⁰ The circumstances where
40 the obligation arising out of an extra-EU treaty is only discretionary for the Member
41 State, but is contrary to the Community law, the ECJ in the *Evan Case* declared that the
42 Member State must refrain from opting to perform the extra-EU obligation.⁵¹ By
43 impeding the acts contrary to the EU law which are found in the extra-EU treaties but
44 are not mandatory, the Court has confirmed the application of Article 307(1) in
45 accordance with the international norm codified in Article 26 of the Vienna Convention
46 requiring that every treaty must be performed in good faith.⁵²
47
48
49
50
51
52
53

54 ⁴⁷ Case C-84/98, *Commission v. Portuguese Republic* [2000] ECR I-5215, para 57.

55 ⁴⁸ The Austrian BITs Case, n 5 supra. cf AG’s Opinion, n 14 supra, para 21 to 46.

56 ⁴⁹ Case 10/61, *Commission v. Italian Republic* [1962] ECR 1 (hereinafter the ‘Italian Case’).

57 ⁵⁰ Italian Case, *ibid.*

58 ⁵¹ Case C-324/93, *R.v. Secretary of State for the Home Department, ex parte Evans Medical Ltd* [1995] ECR
59 I-563, para 32, also confirmed by subsequent judgement Case 124/95, *The Queen, ex parte Centro-Com Srl*
60 *v. HM Treasury and Bank of England* (1997), ECR I-81, para 60.

⁵² cf Pietro Manzini, ‘The Priority of Pre-Existing Treaties of EC Member States within the Framework of International Law’, *EJIL* (2001), Vol. 12 No. 4, at 784.

1
2
3 The ECJ had also illustrated in the *Burgoa Case* that Article 307(1) is of general scope
4 and applies to any international agreement, irrespective of the subject matter which is
5 capable of affecting the application of the EC Treaty.⁵³ The Court clarified the purpose of
6 Article 307(1) is to uphold the international norm that the subsequent EC Treaty does
7 not affect the right and obligations of Member States arising out of prior treaties with
8 non-member states.⁵⁴ One of the questions before the ECJ in the *Burgoa Case* was
9 whether Article 307 (Article 234 at that time) creates rights and obligations for only the
10 Member States or also for the Community institutions.⁵⁵ The Court categorically
11 provided:⁵⁶
12
13
14

15 [A]lthough the first paragraph of article 234 makes mention only of the
16 obligations of the member states, it would not achieve its purpose if it did not
17 imply a duty on part of the institutions of the community not to impede the
18 performance of the obligations of member states which stem from a prior
19 agreement. However, that duty of the community institutions is directed only
20 to permitting the member states concerned to perform its obligations under
21 the prior agreement and does not bind the community as regards the non-
22 member is concerned.
23
24
25

26 This finding raises the question whether the Council or the Commission, on basis of the
27 primary or secondary legislation, has competence to impose measures like restricting
28 the free movement of capital guaranteed by the pre-accession extra-EU BITs? In another
29 relatively recent case, the Court dealt with the specific question whether the
30 Community institutions are prevented under Article 307(1) from applying all conflicting
31 primary and secondary Community law until the conflicts with pre-accession extra-EU
32 treaty are, by denunciation or otherwise, resolved.⁵⁷ The Court again unequivocally
33 confirmed that such conflicting provisions of pre-accession extra-EU treaties still in
34 force and binding on Member States under international law shall prevail over the
35 Community law.⁵⁸ To ascertain whether the obligation contained in the pre-accession
36 treaty is still in force, the ECJ again in the *Levy Case* affirmed the established
37 international norm that if the non-member state is still under an obligation to perform,
38 the treaty obligation is in force.⁵⁹
39
40
41
42

43 These conclusions are principally based on those cases where the treaties in conflict of
44 the EU law were mostly bilateral. Regarding the treaties of more global character like
45 the WTO agreements, the Court has declared that the lawfulness of a Community
46 instrument does not depend on its conformity with an international agreement to which
47 the Community is not a party.⁶⁰ The Court further declared that the lawfulness of a
48 Community instrument cannot also be assessed in the light of instruments of
49 international law such as WTO agreements because they are not, having regard to their
50 nature and structure, among the rules in the light of which the Court is to review the
51
52
53

54 AG's Opinion in The Swedish BITs Case, n 14 supra, para 23; Judgement of 14 October, 1980, Case 812/79, *Attorney-General v. Burgoa* [1980] ECR 2787, para 6 (hereinafter the 'Burgoa Case').

55 *Burgoa Case*, *ibid.*, para 9.

56 *Burgoa Case*, *ibid.*, para 5.

57 *Burgoa Case*, *ibid.*, para 9 and 11(a).

58 Case C-377/98, *Netherlands v. Parliament and Council* [2001] ECR I-7079, para 115.

59 *ibid.*, para 173.

60 Case C-158/91, *Tribunal de Police, Metz (France) v. Jean-Claude Levy* [1993], ECR I-04287.

61 Case C-377/98, *Netherlands v. Parliament and Council* [2001] ECR I-7079, para 52.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60

lawfulness of measures adopted by the Community institutions.⁶¹ On the matters related to the UN Security Council Resolutions however, the Court has declared that:

'[I]t has no authority to call in question, even indirectly, their lawfulness in the light of Community law. on the contrary, the Court is bound, so far as possible, to interpret and apply that law in a manner with the obligations of the Member States under the Charter of the United Nations.....None the less the Court is empowered to check, indirectly, the lawfulness of the resolution of the Security Council in question with regard to *jus cogens*, understood as a body of higher rule of public international law binding on all subjects of international law, including the bodies of the United Nation, and from which no derogation is possible.'⁶²

Article 307(1) however does not cover the post-accession extra-EU treaties. As stated above, many Member States have concluded extra-EU BITs containing identical clauses after their accession to the EU which are incompatible with the EC Treaty.⁶³ Since foreign investment is not included in the supra-national mandate of Common Commercial Policy (hereinafter the 'CCP') provided by the Article 131 EC Treaty, the competence in this area remained the domestic subject of the Member States. Policy decisions had been made for the progressive standardisation of BITs but were never implemented.⁶⁴ The EU will have competence on foreign investment once the Treaty of Lisbon comes into force.⁶⁵ In addition, the 2004 accession documents have added a more onerous duty on acceding States to renegotiate or denounce international engagements not compatible with the EC law.⁶⁶ However, the ECJ has declared in the *International Fruits Case* and reaffirmed in the recent *Yusuf and Al Barakaat Case* that by concluding a treaty between them (meaning the EC Treaty), the Member States could not transfer to the Community more powers than they possessed or withdraw from their obligation to third countries.⁶⁷ Though the new Members were required to have brought their treaties into complete harmony with the EC Treaty, renegotiations necessarily involves third country interests and consent. The EU itself negotiated Memorandum of Understandings (hereinafter the 'MOUs') with USA and Canada to this

⁶¹ *ibid.*; See also Case C-149/96, *Portugal v. Council* [1999] ECR I-8395, para 47.

⁶² Case T-315/01, *Kadi v. Council and Commission* [2005] ECR II-3649, para 5; for detailed analysis on the issue see Case T-306/01, *Yusuf and Al Barakaat International Foundation v. Council and Commission* [2005] ECR II-3533, paras 235-245.

⁶³ For detailed analysis of other potential EU-BITs incompatibilities see Anca Radu, 'Foreign Investors in the EU-Which 'Best Treatment'? Interactions between Bilateral Investment Treaties and EU Law', *ELJ*, (Vol. 14, No. 2, March 2008), at 237-260.

⁶⁴ See Council Doc. 69/494/EEC of 16 Dec. 1969 on the progressive standardization of agreements concerning commercial relations between Member States and third countries and on the negotiation of Community agreements, OJ (1969) L 326/39.

⁶⁵ Treaty of Lisbon introduces an amendment in the Article 207 of the Treaty on the Functioning of the EU adding foreign direct investment in the purview of CCP.

⁶⁶ cf Magdalena Lickova, n 20 *supra*, at 473. See also Articles. 10(6) and 12 of the Act of Accession of the Czech Republic and documents concerning the accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia, and the Slovak Republic to the EU, OJ (2003) L 236/1, the Act of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia, and the Slovak Republic, OJ (2003) L 236/33, the Treaty concerning the Accession of Bulgaria and Romania to the EU, OJ (2005) L 157/1 and especially the Act of Accession of Bulgaria and Romania, OJ (2005) L 157/203.

⁶⁷ Case T-306/01, *Yusuf and Al Barakaat International Foundation v. Council and Commission* [2005] ECR II-3533, para 245.

1
2
3 effect.⁶⁸ Keeping in view the number of BITs and the list of States involved with varying
4 inclinations to consider the specific accession situation of the 10 States, the problem is
5 far from any universal resolution. This exercise will be a real challenge for both the EU
6 Commission and the Member States to bring the vast majority of relevant agreements in
7 line with the EC Treaty.
8
9

10
11 The provisions in the post-accession intra-EU BITs which are in conflict of the EC Treaty
12 may have priority over the EC Treaty in accordance with the rules of chronology unless
13 there is an express provision in either of the treaties reserving priority of the EC Treaty.
14 There is no express provision in the EC Treaty or the traditional BITs of the Member
15 States; however they have no priority over the EC Treaty within the EU legal framework
16 at least.⁶⁹ The ECJ has found that post-accession intra-EU treaty containing incompatible
17 obligations with the EC Treaty amount to amending the provisions of the EC Treaty
18 without following the proper procedure contained in Article 309 and thus are
19 inoperative and unenforceable.⁷⁰
20
21

22
23 The Commission took up the issue of intra-EU BITs after the 2004 accession and sent an
24 informal note to the Economic and Financial Committee (hereinafter the 'EFC'), which
25 reviews the EU's internal market policies.⁷¹ The Commission took the position that the
26 EU law should in effect overrides the provisions of BITs that the acceding States had
27 previously concluded with the existing EU Member States.⁷² The EFC however did not
28 entirely agree with the Commission and stated that in order to avoid legal uncertainties
29 and unnecessary risks for the Member States in the unclear situation, the Member
30 States are invited to review the need for such agreements.⁷³
31
32
33

34 **B Second Paragraph: Elimination of the Incompatible Obligations**

35
36
37 Second paragraph of Article 307 (hereinafter the 'Article 307(2)') gives a direction to
38 the Member States to take all appropriate steps to eliminate the incompatibilities
39 established in their pre-accession treaties. The question however is that, what could be
40 included in 'all appropriate measures'? The ECJ has already declared at least in two
41 cases against Belgium and Portugal that one of the appropriate steps might be the
42 denouncing of incompatible treaty.⁷⁴ In both these cases however the non-EU States
43
44
45

46
47 ⁶⁸ The MOU with USA is available at:

48 http://useu.usmission.gov/Dossiers/EU_Enlargement/Sep2203_BITs_Signing.asp.

49 ⁶⁹ Case 69/89, *Radio Telefis Eireann v. Commission* [1991] ECR II-485, para 103; Joined Cases 241/ 91 P
50 and 242/91 P, *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v. Commission*
51 [1995] ECR I-743, para 73.

52 ⁷⁰ Joined Cases 241/ 91 P and 242/91 P, *Radio Telefis Eireann (RTE) and Independent Television*
53 *Publications Ltd (ITP) v. Commission* [1995] ECR I-743, paras 72-87 especially para 86.

54 ⁷¹ Stanimir Alexandrov, Joshua Robbins and Marinn Carlson, 'The Future of Investment Treaty Protection
55 in Eastern Europe', *The European & Middle Eastern Arbitration Review* (2009), available at
56 [http://www.globalarbitrationreview.com/handbooks/14/sections/53/chapters/511/the-future-](http://www.globalarbitrationreview.com/handbooks/14/sections/53/chapters/511/the-future-investment-treaty-protection-eastern-europe)
57 [investment-treaty-protection-eastern-europe](http://www.globalarbitrationreview.com/handbooks/14/sections/53/chapters/511/the-future-investment-treaty-protection-eastern-europe).

58 ⁷² 'EU Members Review Intra-European BITs in Light of Potential Overlap with EU Law', *Investment*
59 *Treaty News*, 30 June 2007.

60 ⁷³ *ibid.*

⁷⁴ Case C-170/98, *Commission v. Kingdom of Belgium* [1999] ECR I-5493, para 42; Case C-8498
(hereinafter the 'Belgian Case'), *Commission v. Portuguese Republic* [2000] ECR I-5215; Case C-216/01
(hereinafter the 'Portuguese Case').

1
2
3 parties to the incompatible treaties were going through difficult political situations and
4 the defendants' tried to justify their inability to renegotiate with them. The Court
5 rejected these arguments and held that in such circumstances, in so far as denunciation
6 of such treaty is possible under international law, it is incumbent upon the Member
7 States to denounce it.
8
9

10
11 In the *Portuguese Case*, the finding of the Court was also based on an express clause in
12 the treaty enabling contracting parties to denounce it.⁷⁵ This was the reason why the
13 Court did not endeavour to answer the specific question raised by Portugal on the
14 interpretation of Article 307(2). Portugal argued that though Article 307(2) requires the
15 Member States to take all appropriate steps to eliminate incompatibilities between an
16 extra-EU treaty and an EC Treaty provisions, it does not impose the obligation to
17 achieve a specific result in the sense of requiring them, regardless of the legal
18 consequences and political price, to eliminate the incompatibility.⁷⁶ Denunciation,
19 according to Portugal, must therefore be an exceptional obligation in the context of
20 Article 307(2).⁷⁷ It further expanded its argument referring to the second sentence of
21 Article 307(2),⁷⁸ which requires the Member States to assist each other and where
22 necessary, adopt a common attitude in resolving the incompatibility.⁷⁹
23
24
25

26 Portugal insisted that the act of denunciation is a unilateral act and would not require
27 any such 'assistance' or 'common attitude' required by the second sentence. It was an
28 opportunity passed over by the Court to explain the relationship between the two
29 sentences of Article 307(2). There was another rather sceptical argument in the *Belgian*
30 *Case* regarding the proportionality of the act of denunciation where large parts of the
31 treaties were not incompatible with each other.⁸⁰ The Court gave a uniform solution
32 that if a Member State encounters difficulties which make it impossible to adjust a
33 treaty, it must denounce the treaty.⁸¹ The Advocate Generals however in both the
34 *Portuguese Case* and the latest *Austrian Case* considered denunciation an *ultima ratio*
35 because the EC Treaty favours avoiding, as far as possible, any interference with pre-
36 existing treaties.⁸²
37
38
39
40

41 **VII BIT Claims Before Arbitral Tribunals: The Other Side of the Picture**

42
43 One of the essential components of BITs is the dispute settlement mechanism between
44 an investor and a State party. The salient feature of this component is empowering the
45 foreign investors to bring claims before international arbitration in any case where the
46 State or State entity causes loss to its investment. The recently acceding States were
47 required by the EU to make certain changes in their domestic laws and policies to align
48 them with the Community law. In compliance of such EU requirements, they had to
49 make certain changes which violate their agreements with the foreign investors and
50
51
52

53 ⁷⁵ Portuguese Case, *ibid.*, para 55.

54 ⁷⁶ Portuguese Case, *ibid.*, para 30.

55 ⁷⁷ *ibid.*

56 ⁷⁸ 'Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt
57 common attitude.'

58 ⁷⁹ Portuguese Case, n 74 *supra*, para 32.

59 ⁸⁰ Belgian Case, n 74 *supra*, para 36.

60 ⁸¹ Belgian Case, n 74 *supra*, para 42.

⁸² The AGs Opinion in Swedish BITs Case, n 14 *supra*, para 70 and the Opinion of AG in Portuguese Case, n
74 *supra*, para 50.

1
2
3 may be taken by an arbitral tribunal to violate a BIT. Investors from other Member
4 States have brought BITs claims before arbitral tribunals which assume to maintain
5 their autonomous jurisdiction uninfluenced by the EU legislation or the ECJ rulings on
6 the status of intra-EU BITs.⁸³ In line with the Commission's view,⁸⁴ and in accordance
7 with Article 59 of the Vienna Convention, the acceding EU Member States have tried to
8 argue that their intra-EU BITs have been implicitly terminated because all the
9 conditions for termination of a subsequent treaty between two States set out by Article
10 59 have met after they acceded to the EU.
11
12

13
14
15 Czech Republic, in an arbitration initiated by a Dutch investor at an *ad-hoc* tribunal of
16 Stockholm Chamber of Commerce, claimed that if same two States have entered into a
17 subsequent treaty covering the 'same subject matter' as the first treaty and if either of
18 the States indicate their intent that the later treaty shall govern the matter, or the
19 provisions of the two treaties are so incompatible that they cannot both be applied at
20 the same time; the treaty prior in time is superseded by the subsequent treaty.⁸⁵ The
21 claim of the Dutch investor was based on allegedly discriminatory enforcement of
22 agricultural quota rules, which it claimed had violated the Netherlands-Czech BIT. The
23 Czech Republic argued that all of its intra-EU BITs had been implicitly terminated at the
24 time when it acceded to the EU.⁸⁶ Czech Republic quoted a number of the EC Treaty
25 provisions providing for the principles of 'mutual trust' and 'equality of treatment'
26 among the EU Member States arguing that it is impossible to simultaneously apply these
27 BITs and intra-EU investment regime.⁸⁷
28
29
30

31
32 In defence, the investor argued that the BIT parties have not formally terminated their
33 BITs. The Tribunal was not convinced with the Czech Republic's arguments and decided
34 in favour of the Dutch investor. The Tribunal observed that the EU Commission has not
35 initiated any infringement proceedings against the Netherlands and Czech Republic or
36 other EU Member States having the same kind of intra-BITs for failing to terminate their
37 BITs.⁸⁸ The tribunal seems to have suggested that if the intra-EU BITs were
38 incompatible with the EC Treaty, the EU Commission should have initiated infringement
39 proceeding against Member States just like it did against Austria, Sweden and Finland
40 for their extra-EU BITs. Even if the infringement proceedings were initiated, it is
41 uncertain as to what could be the effect of such proceedings on the Tribunal's
42 jurisdiction to entertain the BIT claim.
43
44
45
46
47
48
49

50 ⁸³ See eg *The Rompetrol Group N.V. v. Romania* (ICSID Case No. ARB/06/3); *Ioan Micula and others v.*
51 *Romania* (ICSID Case No. ARB/05/20); *AES Summit Generation Limited and AES-Tisza Erőmű Kft. V.*
52 *Romania* (ICSID Case No. ARB/07/22); *Telenor Mobile Communications v Hungary*, Final award 13
53 September 2006, (ICSID Case No ARB/04/15). There were twelve arbitration proceedings against Czech
54 Republic in 2006 based on intra-EU BITs according to a letter written by the Czech Ministry of Finance to
55 the Czech Government, reproduced in the Eastern Sugar, n 85 infra, para 127.

56 ⁸⁴ See n 72 supra.

57 ⁸⁵ See *Eastern Sugar BV v. Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007, at paras
58 100-104, available at http://www.iisd.org/pdf/2007/itn_eastern_sugar.pdf. (hereinafter the 'Eastern
59 Sugar Case').

60 ⁸⁶ *ibid.*, para 97.

⁸⁷ *ibid.*, paras 105-106.

⁸⁸ *ibid.*, para 121.

1
2
3 The Tribunal further observed that neither Czech Republic and Netherlands nor any
4 other Member State had filed a complaint to the EU Commission for failure of the
5 Member States to comply with the EU law by not terminating their intra-EU BITs.⁸⁹ It is
6 again difficult to assert that the Tribunal would have reached to a different conclusion if
7 such a complaint had already been brought. Another Tribunal has reportedly reached at
8 the same conclusion in a separate case brought against the Czech Republic by a German
9 investor addressing a similar Czech Republic argument.⁹⁰ An ICSID Tribunal has also
10 commented on the irrelevance of the EU law in an intra-EU BIT dispute.⁹¹
11
12
13

14
15 Czech Republic tried to convince the Tribunal to refer the matter to the ECJ under
16 Article 234 EC Treaty relying on the *Mox Plant* arbitration. In *Mox Plant* arbitration the
17 Arbitral Tribunal referred the matter of interpretation of a treaty to which the litigants
18 EU Member States as well as the EU itself were parties.⁹² Czech Republic also cited an
19 ECJ ruling,⁹³ which declared that an arbitral tribunal is not a Court of a Member State
20 within the meaning of Article 234 EC Treaty.⁹⁴ The Tribunal did not agree with this
21 assertion and declared that the parties are free to agree to arbitration which is purely
22 voluntary without any compulsions and once they have agreed, they are bound by it.⁹⁵
23
24
25

26 It must however be observed that it might be possible to reconcile the competing
27 obligations of the BITs and the EU law.⁹⁶ Especially after the proposed Lisbon Treaty
28 comes into force, the subject of foreign investment would come within the EU
29 competence. This would be the situation where the doctrine of parallelism may come
30 into play as laid down by the *Southern Bluefin Tuna Case*.⁹⁷ In particular respect of the
31 dispute settlement provisions, the doctrine might bring the investor-to-state arbitration
32 parallel to the ECJ jurisdiction on intra-EU investment related matters. The availability
33 of more than one forum for settlement of disputes would ignite forum shopping which
34 in turn would undermine the jurisdiction of ECJ on intra-EU investment disputes.
35
36
37

38 Similarly in an ICSID arbitration, Romania submitted that exemptions from customs
39 duties and taxes which had been granted to a Swedish investor prior to Romania's
40 accession to the EU would be considered State aid incompatible with the common
41 market, in the context of EU competition policy and, therefore, inconsistent with
42 Romania's EU obligations.⁹⁸ In response, the Claimants contended that they have
43
44
45

46
47 ⁸⁹ *ibid.*, para 122.

48 ⁹⁰ See 'Czech Republic Quietly Pursues Challenge to Jurisdictional Ruling in Prague Court', *Investment*
49 *Treaty News*, 17 January 2008.

50 ⁹¹ ICSID Case No ARB/04/15, *Telenor Mobile Communications v Hungary*, Final award 13 September 2006,
51 para 50.

52 ⁹² Eastern Sugar Case, n 85 supra, para 109-110; *The Mox Plant Case, (Ireland v. United Kingdom)* (Arbitral
53 Tribunal constituted under annex VII of the *United Nations Convention on the Law of the Sea*), available at
54 http://www.itlos.org/cgi-bin/cases/case_detail.pl?id=10&lang=en.

55 ⁹³ Case C-125/04, *Guy Denuit and Betty Cordenier v. Transorient - Mosaique Voyages and Culture SA* [2005]
56 ECR I-00923.

57 ⁹⁴ Eastern Sugar Case, n 85 supra, para 132.

58 ⁹⁵ Eastern Sugar Case, n 85 supra, paras 134-139.

59 ⁹⁶ See for example Seyed Ali Sadat Akhavi, *Methods of Resolving Conflicts Between Treaties*, at 5-24.

60 ⁹⁷ Southern Bluefin Tuna Case, n 37 supra.

⁹⁸ ICSID Case No. ARB/05/20, *Ioan Micula and others v. Romania* (Decision on Jurisdiction and
Admissibility) at para 41.

suffered damage because the customs duties resulted in lowered profits and due to the revocation of these incentives, the costs for the import of raw material increased to such an extent that Claimants had to stop the production of certain products.⁹⁹ With this stand, the Claimants sought for the restitution of legal framework as existed before the revocation of incentives.¹⁰⁰ While the case was in the phase where the Tribunal needed to decide on its jurisdiction only, it found that the dispute relate to the affects of certain regulatory changes on Claimants' business and they have made a prima facie case for entitlement.¹⁰¹ On the Tribunal's competence to award restitution of legal framework, it concluded that it has such competence though it will be considered in the merits stage of the case whether or not it would be an appropriate remedy for this case.¹⁰²

It would be interesting to see how Romania will defend against the restitution of legal framework claim in the merits phase of the arbitration. The Tribunal's stance has, however, raised the EU stakes and the Commission has decided to join the proceedings as *amicus curie*.¹⁰³ Once the Treaty of Lisbon comes in giving EU competence on foreign investment, the Commission would likely be able to join such proceedings and necessary party or co-defendant.

VIII Options Available to Resolve the Issue

In light of the foregoing triangular study of the general international norms, the EU legal framework and the autonomous BITs jurisprudence, what could be the appropriate solution or solutions for the EU Member States - within the parameters set out by these overlapping as well as conflicting regimes - to eliminate these incompatibilities? Let us have a look at the individual options for the Member States first, followed by the collective options under the Community mandate.

A Individual Options

1 Intra-EU BITs

In so far as the intra-EU BITs are concerned, the European Commission's Internal Services and Markets DG has sent a note to the Economic and Financial Committee stating that there is no need for BITs in the EU single market.¹⁰⁴ After referring to some of the complexities these intra-EU BITs have caused, the DG has suggested that the 'Member States should exchange notes to the effect that such BITs are no longer applicable and also formally rescind such agreements'.¹⁰⁵

Termination of intra-EU BITs by mutual agreement of the Member States seems to be a viable option to preclude future investor-state disputes. There are, however, two main problems with the termination of these BITs. First, such termination cannot be retrospectively applied. Article 70(b) of the Vienna Convention provides that the

⁹⁹ *ibid.*, para 133.

¹⁰⁰ *ibid.*, para 134.

¹⁰¹ *ibid.*, para 137.

¹⁰² *ibid.*, paras 167-168.

¹⁰³ *Investment Arbitration Reporter*, Vol.2, No.8, May 11, 2009. Available at www.iareporter.com.

¹⁰⁴ The abstracts from the note have been quoted in the Eastern Sugar Case, n 68 *supra*, para 126.

¹⁰⁵ *ibid.*

1
2
3 termination of a treaty 'does not affect any right, obligation or legal situation of the
4 parties created through the execution of the treaty prior to its termination'. Accordingly,
5 the termination is not going to impede the already initiated investor-state disputes
6 under such BITs. It would also be impracticable to prevent the BIT claims with respect
7 to those investments that have already been made during the life of these BITs.
8 Secondly, most of the BITs in question contain somewhat 'freezing clause' which has the
9 effect of keeping the rights and obligations generating from them alive for considerable
10 number of years even after their termination. Keeping in view the long durations of the
11 projects for which investments have been made, this freezing clause is meant to "freeze"
12 the applicable law with respect to the investment project provided by BIT provisions
13 over the life of the project. Article 14(3) of the Czech-Netherlands BIT, for example,
14 provides:¹⁰⁶
15
16
17

18
19 'In respect of investments made before the date of the termination of the
20 present Agreement the foregoing Articles thereof shall continue to be
21 effective for a further period of fifteen years from that date'.
22
23

24 In the presence of freezing clause in these BITs, their termination is likely to bring no
25 change in the present situation.
26

27 2 Extra-EU BITs 28 29

30 The Member States might not want to denounce their extra-EU BITs, which are designed
31 to give the degree of protections to their investors they could not otherwise have. The
32 Commission in the *Austrian BITs Case* contended that these BITs do not contain any
33 clause reserving the right on part of the Member States to abide by the EU law in case of
34 BIT-EU conflict.¹⁰⁷ The Court also appears to have suggested that the problem of
35 incompatibilities could have been cured if the BITs would have contained any provision
36 reserving possibility for the Council to restrict movements of capital connected with
37 investments.¹⁰⁸ Such clause can be a viable solution to resolve the incompatibility
38 problem. Austria informed the Court that it is negotiating a Regional Economic
39 Integration Organisation (hereinafter the 'REIO') clause with some of its BIT parties.
40
41

42
43 REIO exception, originally invented for the Most Favoured Nation clause of BITs, would
44 allow the REIO party investor a preferential treatment than a non-REIO party
45 investor.¹⁰⁹ Where REIO States would have agreed upon their own internal investment
46 regime in pursuit of their integration policy different from the BIT regime, non-REIO
47 States would be concerned about the particular effects of such an exception upon their
48 ability to benefit from BITs with REIO States.¹¹⁰ Furthermore, individual negotiations on
49 part of each EU Member State and incorporation of such REIO exception to all extra-EU
50 BITs would be extremely chaotic. It is also unclear whether or not the amendments in
51
52
53

54
55 ¹⁰⁶ Article 10(3) of Sweden-Romania BIT and Article 13(3) of Hungary-UK BIT provide a period of twenty
56 years.

57 ¹⁰⁷ *Austrian BITs Case*, n 5 supra, para 32.

58 ¹⁰⁸ The AG's Opinion in *Swedish BITs Case*, n 14 supra, para 33 (the AG gave one opinion for both the
59 Austrian and Swedish BITs Cases).

60 ¹⁰⁹ The REIO Exception in MFN Treatment, UNCTAD Publication, Available at

<http://www.unctad.org/Templates/webflyer.asp?docid=5736&intItemID=2340&lang=1>.

¹¹⁰ *ibid*.

1
2
3 shape of REIO clauses would be able to bring retrospective effect on the rights and
4 obligations created by these BITs.
5
6

7 With respect to the post-accession extra-EU BITs, the Commission may challenge their
8 validity before the ECJ with respect to the general loyalty clause i.e., Article 10 EC
9 Treaty. This may lead to a similar declaration of incompatibility by the ECJ with respect
10 to these BITs as that of the pre-accession BITs. The problem, however, remains the
11 same that what steps the Member States would take to eliminate the incompatibilities of
12 these BITs with the EC Treaty? The Commission's challenging of post-accession extra-
13 EU BITs would, however, bring them within the problem area required to be addressed
14 by the Member States.
15
16

17 **B Collective Options**

18
19
20 The EU Commission expressed concern with the Economic and Financial Committee
21 (hereinafter the 'EFC') in 2006 that any future investment disputes before the arbitral
22 tribunals may lead to undermining the application of the EU law. The Commission has
23 also expressed its concern over the most favoured nation treatment provided by the
24 intra-EU BITs rendering the investors of BIT contracting States in a more advantageous
25 position than the investors of those EU States which do not have such BITs
26 acknowledging that this amounts to infringement of the principle of non-discrimination
27 within the EU States under the EU law.¹¹¹
28
29
30

31 Article 307(2) EC Treaty requires the Member States to assist each other in the
32 elimination of incompatibilities where necessary and must adopt common attitude
33 where appropriate. In accordance with the existing EC law, the area of foreign
34 investment is in the shared competence of the EU and its Member States.¹¹² The original
35 Articles 110 to 115 (now 131 to 134) EC Treaty empowered the EU to negotiate
36 commercial treaties under the CCP.¹¹³ The subsequent Treaty of Nice (2003) added
37 trade in services and trade in commercial aspects of intellectual property to the CCP.¹¹⁴
38 Moreover, the EU Constitution (2004)¹¹⁵ and Treaty of Lisbon (2007) though not yet
39 attained the force of law, include the EU mandate over investment treaties.¹¹⁶
40
41
42

43 Above all, in accordance with the currently available 'principle of subsidiarity' as
44 contained in Article 5 of the EC Treaty, the Community is empowered to take action
45 even in areas it does not have exclusive competence when the objectives of the
46
47
48

49 ¹¹¹ Anca Radu, 'Foreign Investors in the EU-Which 'Best Treatment'? Interaction Between Bilateral
50 Investment Treaties and EU Law', *ELJ* (Vol. 14, No. 2, March 2008), at 237-260.

51 ¹¹² The AG's Opinion in Swedish BITs Case, n 14 supra, para 28.

52 ¹¹³ Consolidated Version of the Treaty Establishing the European Community is available at
53 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:321E:0001:0331:EN:pdf>.

54 ¹¹⁴ The AG's Opinion in Swedish BITs Case, n 14 supra, para 29; In effect, most of the EU's external
55 competence is now joint or shared in nature. See Lorenza Mola, 'Which Role for the EU in the
56 Development of International Investment Law?' (2 July, 2008), *Society of International Economic Law*
57 (*SIEL*) Inaugural Conference, available at <http://ssrn.com/abstract=1154583>.

58 ¹¹⁵ FDI was included in the CCP in the Treaty Establishing the European Constitution (Article III-315).

59 ¹¹⁶ Armand de Mestral, 'The EU as a Maker of Investment Agreements: the Potential Impact on Canada and
60 the Broader World System of Bilateral Investment Treaties', Available at
[http://www.carleton.ca/europecluster/publications/2008-12-18-InvestmentAgreements\(deMestral\).pdf](http://www.carleton.ca/europecluster/publications/2008-12-18-InvestmentAgreements(deMestral).pdf).

1
2
3 proposed action cannot be achieved by the Member States or depending upon the large
4 scale and effect of the action. The Council had taken a Decision to resolve divergences
5 between bilateral commercial treaties of the Member States and the EC Treaty long ago
6 in 1969.¹¹⁷ The aim of this initiative was the progressive standardisation of agreements
7 concerning commercial relations between the Member States and third countries.
8 Article 2 of the Council Decision purports to establish a consultation process to judge
9 whether such extra-EU treaties contain provisions, expressly or tacitly, relating to and
10 causing obstacle in the implementation of CCP. The Decision also provided for the
11 Community negotiations with third countries in case any divergence from CCP was
12 found in those treaties.¹¹⁸ Since the subject of foreign investment was not included
13 within the scope of CCP, the Council Decision could not have extended to BITs of the
14 Member States.
15
16
17
18

19 The EU has, however, concluded treaties with chapters on investment like the Energy
20 Charter Treaty and treaty with the Republic of Chile.¹¹⁹ In 2003, the EU also signed a
21 Memorandum of Understanding with USA to eliminate the incompatibilities with the EC
22 law of pre-existing BITs between USA and the eight new acceding States.¹²⁰ Negotiations
23 on similar understanding were expected to initiate with Canada in 2009. The stage now
24 seems to be set for the EU to exercise its shared competence (or exclusive competence
25 once the Treaty of Lisbon comes into force) and act on behalf of all the Member States to
26 cure the incompatibilities existing in the individual BITs. The AG in the *Austrian BITs*
27 *Case* appears to have suggested the same.¹²¹
28
29
30

31 IX Conclusions

32

33 The ECJ decisions against the compatibility of the pre-accession extra-EU BITs of Austria
34 and Sweden will also affect the identical BITs of Finland on the same legal basis. In
35 addition, a total number of 318 pre-accession extra-EU BITs of all the EU Member States
36 could be liable to get similar treatment on same legal grounds. This, however, does not
37 end here. In the light of foregoing discussions on the international norms provided by
38 the Vienna Convention and the freezing clauses in BITs and the autonomous BITs
39 jurisprudence as expounded by the arbitral tribunals uninfluenced by the ECJ findings,
40 the Member States are likely to face many arbitral awards against them when they are
41 required to implement conflicting EU requirements. The denunciation of such BITs
42 would not immediately solve the problem. In addition, the REIO clauses will have only
43 retroactive effect and will not score a distinction on the existing arbitral proceedings.
44
45
46
47
48
49
50
51
52

53 ¹¹⁷ See Council Doc. 69/494/EEC of 16 Dec. 1969 on the progressive standardization of agreements
54 concerning commercial relations between Member States and third countries and on the negotiation of
55 Community agreements, OJ (1969) L 326/39.

56 ¹¹⁸ *ibid.*, Article 4.

57 ¹¹⁹ Agreement establishing an association between the European Community and its Member States, of the
58 one part, and the Republic of Chile, of the other part (2002) available at
59 http://trade.ec.europa.eu/doclib/docs/2004/november/tradoc_111620.pdf.

60 ¹²⁰ The MOU is available at
http://useu.usmission.gov/Dossiers/EU_Enlargement/Sep2203_BITs_Signing.asp.

¹²¹ The AG's Opinion in *Swedish BITs Case*, n 14 *supra*, para 29.

1
2
3 The post-accession extra-EU BITs also contain substantially similar free movement of
4 capital clauses as are in the pre-accession BITs.¹²² The *ex-ante* action by the Commission
5 against Austria and Sweden was based on the grounds that these Member States would
6 be unable, without violating their BITs obligations, to abide by the restrictions imposed
7 by the Council on such free movement of capital under Articles 57(2), 59 and 60(1) EC
8 Treaty. The same *ex-ante* action might be taken by the Commission with respect to these
9 BITs under Article 10 of the EC Treaty which may result in a similar declaration of
10 incompatibility by the ECJ. Nevertheless, whatever way the Commission or the ECJ treat
11 these BITs, nothing prevents the arbitral tribunals to assume jurisdiction on the basis of
12 distinctive dispute resolution provisions contained in these BITs.
13
14
15

16
17 The pre-accession intra-EU BITs are not covered by the Article 307(1) and cannot be
18 relied on to justify the breach of EU law as far as it is incompatible with such BITs.¹²³
19 Thus the pre-accession intra-EU BITs would be construed in light of the EC Treaty as
20 long as they are dealing with the same subject matter,¹²⁴ but will have precedence over
21 EC Treaty when they are dealing with different subject matter - as there is no express
22 conflict resolving provision found in the EC Treaty reserving its precedence over such
23 BITs. Especially the right of the investors to invoke arbitral jurisdiction still remains at
24 odds. The investment related areas covered by such BITs, especially the dispute
25 settlement provisions, would continue to be governed by these BITs which are still not
26 part of the CCP and the EC Treaty. Though the provisions on investment regime have
27 been included in the Treaty of Lisbon, it has still not come into force. Even after the
28 enforcement of Treaty of Lisbon - which is after all a 'treaty' itself - the conflicting
29 provisions especially regarding the dispute settlement would have a concurrent effect.
30
31
32

33
34 The provisions in the post-accession intra-EU BITs which are in conflict with the EC
35 Treaty may have priority over the EC Treaty in accordance with the rules of chronology
36 unless there is an express provision in either of the treaties reserving priority of the EC
37 treaty. Though there is no express provision in the EC Treaty or the typical BITs of the
38 Member States, they have no priority over the EC Treaty at least within the ECJ
39 jurisdiction.¹²⁵ The ECJ has found that a post-accession intra-EU treaty containing
40 incompatible obligations with EC Treaty essentially amount to amending the provisions
41 of the EC Treaty without following the proper procedure contained in Article 309 and
42 thus are inoperative and unenforceable.¹²⁶ Nonetheless, the doctrine of parallelism of
43 treaties and the doctrine of reconciliation can still have justification for the arbitral
44 tribunals to assume jurisdiction as we have seen in the Czech Republic arbitration. It is
45 argued that this is even a stronger case for the primacy of BITs over the EU law because
46 of their post-accession chronology.
47
48
49

50
51 ¹²² For example see Article 7 of Germany-India BIT entered into force on 13 July, 1998, Article 4 of
52 Germany-Pakistan BIT entered into force on 28 April 1962. Germany has concluded most number of
53 extra-EU BITs and many other EU Member States have by and large followed the same format.

54 ¹²³ Case 121/85, *Conegate Ltd v. H.M. Customs and Excise* [1986] ECR 1007, paras 23-26; Case 69/89,
55 *Radio Telefis Eireann v. Commission* [1991] ECR II-485, paras 102-103; Case T-70/89, *British*
56 *Broadcasting Corporation and BBC Enterprises Ltd v. Commission* [1991] ECR II-535, paras 76-77; Case
57 76/89, *Independent Television Publications Ltd v. Commission* [1991] ECR II-575, paras 75-76.

58 ¹²⁴ Case 10/61, *Commission v. Italian Republic* [1962] ECR 1.

59 ¹²⁵ Case 69/89, *Radio Telefis Eireann v. Commission* [1991] ECR II-485, para 103; Joined Cases 241/ 91 P
60 and 242/91 P, *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v. Commission*
[1995] ECR I-743, para 73.

¹²⁶ *ibid.*, paras 72-87 especially para 86.

1
2
3
4
5 The ECJ decision declaring 'free movement of capital' BIT clauses incompatible with the
6 EC Treaty, being capable of impeding the restrictions on movement of capital which the
7 Council of the EU might adopt under the EC law has far reaching consequences for all
8 the EU Member States' BITs with non-EU States. The same rule might extend to the
9 intra-EU BITs being in violation of the principle of indiscriminatio maintained in the
10 EC Law. Keeping in view the number of BITs required to be amended and the number of
11 States involved, individual efforts on part of the EU Member States to eliminate these
12 incompatibilities would not suffice. It is the collective responsibility of all the EU
13 Member State to assist each other in the elimination of incompatibilities where
14 necessary and must adopt common attitude where appropriate. The Commission should
15 acquire an extended role in future to resolve the issues on the basis of shared or
16 exclusive competence in the field of EU foreign investment regime. Even if all this is
17 accomplished in the quickest possible time, the BITs will continue to bear legal
18 consequences for a considerable number of years and the investor-state arbitration
19 shall continue to pose a significant risk to the governing authority of the EU and
20 Member States.
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60