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

Ahmad Ali Ghouri
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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 provides for the primacy of pre-accession treaties over the EC Treaty and simultaneously requires the Member States to eliminate their mutual incompatibilities. The European Court of Justice has declared that free movement of capital clauses of Austrian and Swedish pre-accession extra-EU BITs are incompatible with the EC Treaty as they will impede any restrictions on the movement of capital imposed as future Community legislation. A 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 provides 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 indiscrimination by the host state, and free movement of capital between party states arising out of or relating to

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investments. 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 supranational arbitral tribunal. In this respect, BITs deviate from the traditional state-to-state diplomatic protection by providing investor-to-state arbitration commonly by the International Centre for Settlement of Investment Disputes (ICSID) or United Nations Commission on International Trade Law (UNCITRAL) tribunals. The investors may themselves bring claims against the states hosting the 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 remedy. The objective behind conclusion of BITs is to document the investors’ rights and protections as these were either not lucid or not provided at all by customary international law.

The number of states joining the EU has grown over a period of time and the EU legal order has also evolved into a collective Community regime in almost all areas of commercial activity except foreign investment. The following analysis reveals that, in the absence of a Community regime, the EU foreign investments are currently governed by a total of 1,407 Bilateral Investment Treaties (the BITs) concluded by the EU Member States, out of which 376 are concluded by the Member States inter-se (the intra-EU BITs) and 1031 are with non-EU States (the extra-EU BITs) (see Table 6 below). A total 569 of these BITs have been concluded by Member States prior to their joining the EU and 838 have been concluded thereafter (Table 6 below). The account of contemporary BITs of the EU Member States was first opened in 1962 by the first ever Germany-Pakistan BIT. The total number of BITs has constantly grown over time and many states who were not EU members when they signed their BITs with then Member States, have later acceded to the EU themselves.

In this landscape, the aim of this article is to highlight and seek to resolve the current issues in the foreign investment regime for EU Member States. The study was motivated by the recent European Court of Justice (ECJ) decisions against Austria and Sweden, declaring the ‘free transfer of capital’ clause in their extra-EU BITs incompatible with the Treaty Establishing the European Community (the EC Treaty). The

1 For more information about BITs, see online UNTAD Compendium, ‘Bilateral Investment Treaties (BITs): A Compilation’, available at http://www.unctad.org/Templates/webflyer.asp?docid=907&amp;itemID=3138&amp;lang=1&amp;mode=downloads.


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

5 Case C-205/06, Commission of the European Communities v Republic of Austria, judgment 3 March 2009 (Austrian BITs case) and Case C-249/06, Commission of European Communities v Kingdom of Sweden, judgment 3 March 2009.

ECJ found that Austria and Sweden had violated their duty under Article 307 of the EC Treaty by which they were required to take measures to remove such incompatibilities of their pre-accession extra-EU treaties. These rulings have far-reaching ramifications on the EU’s external relations in the field of foreign investment since they have jeopardised the future of all pre-accession extra-EU BITs of all the EU Member States containing similar provisions on transfer of capital.

Moreover, this finding raises important questions about the compatibility of those extra-EU BITs that have been concluded by the EU Member States after they acceded to the EU containing similar free transfer of capital clauses. This article asserts that the objectives the EU Commission intended to achieve from cases against Austria and Sweden cannot be accomplished in the presence of all existing extra-EU BITs, whether pre- or post-accession. Since the Article 307 obligation extends only to pre-accession BITs, there is no provision in the EC Treaty maintaining the primacy of EU law over the post-accession extra-EU BITs. Article 10 EC, however, requires general loyalty from the EU Member States, abstaining them from taking any measure which could jeopardise the attainment of the objectives of the EC Treaty. After the latest ECJ decisions on Austrian and Swedish BITs, the Commission might take appropriate measures requiring the Member States to deal with their post-accession extra-EU BITs as they need to do with such pre-accession BITs, and might also challenge them before the ECJ. Such measures by the Commission may bring these BITs on par with the pre-accession BITs as being incompatible with the EC Treaty.

In addition to the extra-EU BITs, the intra-EU BITs may also raise questions of incompatibility with the EC Treaty. All intra-EU BITs provide for dispute resolution by a supranational arbitral tribunal and the investors from BIT party states are empowered to bring claims before the BIT designated supranational arbitral tribunals. The application of these intra-EU BITs grant investors from BIT party states access to the investor-to-state dispute-resolution system which is not available to the investors from the EU Member States who have not concluded BITs with those Member States. It is contended that this amounts to discrimination leading to a more favourable treatment of investors and investments between the parties covered by BITs and may distort the principle of equal treatment within the EU Member States envisaged by Article 12 of the EC Treaty.

This article further analyses the complexities emerging from the investor-to-state dispute-settlement system granted by the intra-EU BITs. On the basis of these BITs, the acceding EU states are facing extensive BIT claims when they implement the newly acquired EU obligations within their respective territories. This article argues that the internal EU jurisprudence delivered by way of ECJ decisions maintaining the primacy of EU law on intra-EU treaties cannot impede the BIT arbitrations. The arbitrators have assumed jurisdiction on BIT claims in disregard of EU law and ECJ decisions on the status of intra-EU BITs, and this is not bound for any change even after these BITs are terminated. The Treaty of Lisbon proposes to give the EU an exclusive competence over future investment agreements but it remains to be seen whether or not the EU competence would extend to renegotiate, amend or terminate the Member States’ existing BITs. This article, however, argues that, even if these BITs are terminated by the individual Member States or in the future by the EU exclusive competence, they contain self-styled ‘freezing’ provisions keeping the rights and liabilities of investors and party states alive for a considerable length of time even after their termination, and it appears that there is no possible way to prevent or defend these BIT arbitrations.
Founded on comprehensive empirical evidence on the enormity of BITs concluded by the EU Member States over the past 50 years, this article aims to illuminate two relatively conventional theoretical issues in the context of the EC Treaty: first, do conflicts of treaties actually arise; and, second, how have these conflicts been or could these conflicts be resolved? With the help of a triangular study into the competing international treaty norms, the EU legal framework and the indigenous BIT arbitrations, this article endeavours to analyse the antagonistic and conflicting international obligations acquired by the EU Member States within their evolved foreign investment regime. The analysis reflects on the options available in response to these issues to both the individual EU Member States and the EU Commission collectively on behalf of all the Member States. The starting point is an analysis of the ECJ decision declaring Austrian and Swedish pre-accession extra-EU BITs incompatible with the EC Treaty.

II The ECJ Decision on Austrian and Swedish BITs

In 2006, the EU Commission brought actions against Austria and Sweden under Article 226 EC claiming that these Member States had failed to adopt appropriate measures to eliminate the incompatibilities with the EC Treaty required by Article 307(2) of their extra-EU BITs concluded prior to the EU accession.8 The ECJ on 3 March 2009 declared that the ‘free transfer of capital’ guarantees of those extra-EU BITs are incompatible with the EC Treaty. The court approved the Commission’s claim that these guarantees to non-EU states would create conflicting international obligations rendering the defendants incapable of abiding by any future safeguard measures taken to restrict the transfer of capital under Articles 57(2), 59 and 60(1) EC. The defendants failed to amend these pre-accession BITs as required by Article 307(2) EC when earlier notified by the Commission.

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

A Background

Article 307(2) of the EC Treaty requires Member States to take all appropriate steps to eliminate any incompatibility with the EC Treaty existing in their pre-accession treaties. The Commission notified Austria and Sweden that their BITs with several non-EU countries containing guarantees for free movement of capital to or from these countries were incompatible with the EC Treaty. The Commission is empowered in certain circumstances to impose restrictions as safeguard measures on the

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7 In this context, this article treats the EC Treaty only as a treaty as it stands in international law rather 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 from other treaties existing on an international plane.
8 n 5 supra.
9 Judgment of the ECJ, Case No C-249/06, European Communities v Kingdom of Sweden, judgment of 3 March 2009 (Swedish BITs case), para 43.
10 ibid, para 22.
flow of capital under Articles 57(2), 59 and 60(1) EC. Though the Commission has
not yet resorted to any such measures, any compelling economic or other reason may
lead to such protectionism. In case restrictions are imposed by way of safeguard
measures, the EU Member States having reciprocal guarantees of free transfer of
capital under these extra-EU BITs would either fail to abide by these measures or be
compelled to infringe their international BIT obligations. If the EU Member States
would prefer to abide by the EU safeguard measure over the infringement of their
BIT obligations, they would likely be compelled by the BIT arbitral tribunals to pay
compensation for such infringements or even restitution the legal framework existing
prior to the safeguard measures. This results in an incompatibility of these BITs with
the EC Treaty, which the ECJ found that the defendants are obliged to remove under
Article 307(2).11

B Legal Issues

Austria and Sweden, also joined by Finland, Lithuania, Germany and Hungary,
argued that the safeguard measures in question have hitherto not been applied by the
Commission and thus the question of their incompatibility is hypothetical. The ECJ
rejected this plea by providing that compatibility must be anticipated because the
urgent and immediately enforceable character of the safeguards is incompatible with
the maintenance of contrary pre-existing international obligations. The court favoured
an ex-ante action and upheld that waiting for an actual conflict between Community
legislation and international obligations would deprive the Community legislation of
its effect.12 The court also rejected the defendants’ arguments that they would be able,
in any event, to prevent the application of BITs obligations of the Council’s safeguard
measures through interpretive devices, international law or simple default. The defen-
dants argued that the exceptional nature of these safeguard measures would bring the
application of the principle of rebus sic stantibus provided by the Vienna Convention on
the Law of Treaties13 (the Vienna Convention), and the BIT obligations would not be
enforceable against the Community legislation.

The Advocate-General (AG), however, suggested that the principle of rebus sic
stantibus is applied in very limited circumstances and its application on present facts in
issue is controversial.14 The court approved the opinion of AG and observed that the
possibility of relying on mechanisms offered by international law, such as suspension or
even denunciation of BITs provisions, are too uncertain in their effects to guarantee
that the measures adopted by the Council could be applied effectively.15 Although the
AG agreed with the defendants’ right and need to protect their investors in foreign
states but alleged that this might not be achieved by infringing the obligations arising

11 ibid.
12 ibid., para 52.
illuminates the legal doctrine rebus sic stantibus allowing for a treaty to become inapplicable because of
a fundamental change in circumstances. The Vienna Convention was adopted on 23 May 1969, and
entered into force on 27 January 1980, 1155 UNTS 331. To date the Vienna Convention has 45 signatories
and 108 parties. The majority of the EU Member States have ratified, with the exception of France, Malta
and Romania.
14 Opinion of Advocate General, Case C-249/06, European Communities v Kingdom of Sweden, 10 July 2008
(AG’s Opinion in the Swedish BITs case), para 61.
15 Swedish BITs case, n 9 supra, para 41.
out of the Community legislation. The AG further pressed that in resolution of incompatibilities, only lawful means ought to be adopted and denunciation in violation of these BITs’ provisions should be considered only as a last resort. In the perspective of any measures which should be adopted by the Member States to remove such incompatibilities, however, the ECJ decision is only declaratory in nature, finding these BITs incompatible with the EC Treaty, and do not suggest any particular action to be taken by the respondent states.

III Application of the Vienna Convention to the EC Treaty

Obligations arising under EU law are primarily based on the EC Treaty. The ECJ, while explaining the nature of EU law, has declared the EU legal framework as ‘new legal order of international law’ distinguished from both the domestic laws of its Member States and the ‘ordinary international treaties’. 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, Member States as the constituent parts of the federation and the EC Treaty its constitution. 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. Moreover, under the present state of its legal framework, where the EU can act only when authorised by the Member States and only to the authorised extent, the EU federalism appears to be a mere rumination. 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.

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. 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 EU law declared by the ECJ.25 It contemplates that the 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 conclusion that the EU Member States cannot justify the violation of their BITs even on the basis of their obligations arising from EU law.

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

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

IV The Vienna Convention Norms: Termination of a Treaty by Conclusion of a Later Treaty

Treaties are agreements, though between states, not persons, and enjoy the same principle of autonomy (self-governing rules) for their construction where each treaty may provide its own conflict of laws rules. These rules invariably include different types of clauses which typically preserve the applicability of previous or subsequent treaties of the same subject matter or which lay down the hierarchical primacy of a given

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24 ibid, at 470.
25 See nn 18 and 19 supra.
26 cf Lickova, op cit n 20 supra. The rule of Article 27 ‘A party may not invoke provisions of its internal law as justification for its failure to perform a treaty’ is incorporated in the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. This convention (adopted on 21 March 1986, doc. A/CONF.129/15) has not yet entered into force. The EU has not signed it, though a minority of EU Member States have signed or ratified.
28 Art 5 of the Vienna Convention.
Where the Vienna Convention allows the autonomy principle, it also establishes the interpretive rules to determine hierarchy between two treaties in the absence of specific rules in either of the two successive treaties.30

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

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

- What is the subject matter of the treaties in question (the subject matter test)?
- What is the chronology of their adoption or accession (the chronology test)?
- Who are the parties to the conflicting treaties (the contracting parties test)?

A The Subject Matter Test

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

The subject matter of a treaty is the area of activity it is supposed to govern. For example, treaties on protection and promotion of investment, free trade agreements, extradition treaties, human rights treaties, taxation treaties and treaties of friendship, commerce and navigation tend to separate themselves out into special groups in respect of their subject matter.33 Title of a treaty might play a role in the ascertainment of its subject matter, while determining incompatibility with another treaty at the macro level.34 In an indiscernible situation, however, the subject matter of the treaty may be determined by the outcome, applicability and intended effect, the phraseology of each treaty provision within its genre, the hermeneutics in its interpretation and the inferences from omissions, additions and changes in terminology at the micro level.35

Successive treaties between same states perceptibly dealing with the same subject matter invariably provide their own rules of priority inter se. However, in a covert finding of

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29 eg Art 103 of the UN Charter provides: ‘[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail’. Similar rules have been included in Art 30(1) of the Vienna Convention and Arts 103 and 104 of the North American Free Trade Agreement.

30 See n 13 supra.


34 ibid.

35 ibid.
incompatibility, it is possible that a treaty does not contain any express provision subjecting it to or giving it an overriding effect on another treaty dealing with the same subject matter. In this unanticipated situation of conflict and incompatibility between two treaties, the chronology test of the Vienna Convention becomes decisive for the application of conflicting treaty provisions.

Article 30(2) deals with the situation where one of the two successive treaties expressly provides that both of them deal with the same subject matter. In accordance with the principle of autonomy, Article 30(2) provides that the rights and liabilities of state parties to successive treaties relating to the same subject matter are governed first by the treaties in question themselves. Article 30(2) reads: ‘When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail’. The terms of Article 30(2) suggest two possible wordings in a treaty which determine the question of its priority to another treaty, irrespective of chronological order of the treaties in question. First, when it states that it is ‘subject to’ another treaty (whether earlier or later in time) then that other treaty shall have priority. Second, when a treaty states that it is ‘not incompatible with’ another treaty (whether earlier or later in time), again that other treaty shall have priority. If, however, no such provision is provided in either of the treaties dealing with the same subject matter, then the question of compatibility inter se becomes the decisive mean to determine their fate. If they are incompatible with each other, one of them shall have priority in accordance with the rules of chronology discussed below.

If, however, they are not incompatible, ie if both treaties with the same parties dealing with the same subject matter impose identical obligations having the same effect, then the doctrine of parallelism of treaties would come into play as contemplated in the Southern Bluefin Tuna case. The tribunal has observed:

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

On the combined application and effect of treaties dealing with the same subject matter and providing identical obligations for party states, the tribunal observed that the current range of international legal obligations benefits from a ‘process of accretion and commutation’. The tribunal quoted the example of human rights treaties, where broad provisions for the promotion of universal respect for and observance of human rights and the international obligation to cooperate for the achievement of those purposes found in Articles 1, 55 and 56 of the Charter of the United Nations, have not been discharged for state parties by their ratification of the human rights covenants and other human rights treaties. The same might be concluded regarding the treaties on

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36 Art 30(2) of the Vienna Convention.
38 Southern Bluefin Tuna Case, ibid, para 52.
39 ibid.
protection and preservation of the environment and the treaties providing labour standards.

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

B The Chronology Test

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

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

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

C The Contracting Parties Test

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

\(^{40}\) \textit{Swedish BITs} case, n 9 supra, para 26.
When the parties to the later treaty do not include all the parties to the earlier one:

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 \textit{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 state responsibility under international law as a consequence of the violation of one of the treaties.\footnote{Lickova, \textit{op cit} n 20 \textit{supra}, at 469–471.} 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 \textit{Swedish BITs} case that they would prevent the application of BITs obligations at the event of Council’s safeguard measures through simple default.\footnote{See n 12 \textit{supra}.} It might be argued, since the only remedy available in international law against violation of a treaty obligation is compensation, the default of the 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 such as restoration of legal framework,\footnote{ICSID Case No ARB/05/20, \textit{Ioan Micula and Others v Romania} (Decision on Jurisdiction and Admissibility), paras 167–168.} the possibility that the tribunals would not resort to remedies such as specific performance cannot entirely be ruled out.

\section{Corpus of Bilateral Investment Treaties in the EU\footnote{Country-wise list of BITs has been taken from UNCTAD and is available at http://www.unctadxi.org/templates/DocSearch____779.aspx.}}

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 at 1 June 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 1 January 1995. At the time of accession, Austria had concluded 12 BITs from which eight were extra-EU and Sweden had concluded 21 BITs, out of which 17 were extra-EU. It means that the 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 1 May 2004 and two more on 1 January 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.

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

Article 307 EC 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.

In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under this Treaty by each Member State form an integral part of the establishment of the Community and are thereby inseparably linked with the creation of common

Table 3. 1 January 1995 Accession

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*Austria-Argentina BIT entered into force on 1 January 1995, the same day Austria acceded to EU. Since this BIT had been signed on 7 August 1992, which is prior to the EU accession, therefore it has been included 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).

Table 4. 1 May 2004 Accession

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*Slovenia-Serbia and Montenegro BIT entered into force on 1 May 2004, the same day Slovenia acceded to the EU. Since this BIT had been signed on 18 June 2002, which is prior to the EU accession, it has been included in the pre-accession BITs.
institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States.

The concept of incompatibility in Article 307 EC is logically composed of two conflicting elements: an EC Treaty obligation and an obligation arising from an extra-EU treaty. An obligation arising out of the EC Treaty can be one of the two kinds. It can be a primary obligation envisaged in the provisions of the EC Treaty or a secondary obligation arising from any legislation enforced by the Community from time to time.47 Furthermore, the ECJ declared in the Austrian BITs case that a secondary obligation may be ‘real’, that is based on an actual legislation enforced by the Community, or ‘anticipatory’, that is based on hypothecation that such obligation will exist in the event of a secondary legislation.48 Once an obligation is established, whether primary or secondary, real or anticipatory, there must be a conflicting obligation under an extra-EU treaty for the application of Article 307. Article 307 comes into play when this conflicting obligation is liable to compromise the application of a Community law and is thus incompatible with the EC Treaty.

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

The first paragraph of Article 307 (Article 307(1)) enunciates subordination of the EC Treaty to the pre-accession extra-EU treaties. In the Italian case, the ECJ limited the extent of application of Article 307(1) to only conflicting obligations levied on the Member States arising out of the pre-accession extra-EU treaties.49 Given that if a

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48 Austrian BITs case, n 5 supra; cf AG’s Opinion in the Swedish BITs case, n 14 supra, paras 21–46.
Member State has only ‘rights’ instead of ‘obligations’ arising out of such a treaty, by assuming a new obligation under the EC Treaty which is incompatible with rights held under the prior treaty, a state ipso facto gives up the exercise of these rights to the extent necessary for the performance of its new obligations. The circumstances where the obligation arising out of an extra-EU treaty is only discretionary for the Member State, but is contrary to the Community law, the ECJ in the Evan case declared that the Member State must refrain from opting to perform the extra-EU obligation. By impeding the acts contrary to the EU law which are found in the extra-EU treaties but are not mandatory, the court has confirmed the application of Article 307(1) in accordance with the international norm codified in Article 26 of the Vienna Convention, requiring that every treaty must be performed in good faith.

The ECJ had also illustrated in the Burgoa case that Article 307(1) is of general scope and applies to any international agreement, irrespective of the subject matter which is capable of affecting the application of the EC Treaty. The court clarified that the purpose of Article 307(1) is to uphold the international norm that the subsequent EC Treaty does not affect the rights and obligations of Member States arising out of prior treaties with non-Member States. One of the questions before the ECJ in the Burgoa case was whether Article 307 (Article 234 at that time) creates rights and obligations for only the Member States or also for the Community institutions. The court categorically provided:

Although the first paragraph of article 234 makes mention only of the obligations of the member states, it would not achieve its purpose if it did not imply a duty on part of the institutions of the community not to impede the performance of the obligations of member states which stem from a prior agreement. However, that duty of the community institutions is directed only to permitting the member states concerned to perform its obligations under the prior agreement and does not bind the community as regards the non-member is concerned.

This finding raises the question whether the Council or the Commission, on the basis of the primary or secondary legislation, has competence to impose measures such as restricting the free movement of capital guaranteed by the pre-accession extra-EU BITs. In another relatively recent case, the court dealt with the specific question whether the Community institutions are prevented under Article 307(1) from applying all conflicting primary and secondary Community law until the conflicts with the pre-accession extra-EU treaty are, by denunciation or otherwise, resolved. The court again unequivocally confirmed that such conflicting provisions of pre-accession extra-EU treaties still in force and binding on Member States under international law shall prevail over the Community law. To ascertain whether the obligation contained in the pre-accession treaty is still in force, the ECJ, again in the Levy case, affirmed the

50 ibid.
52 cf Manzini, op cit n 46 supra, at 784.
54 ibid, para 9.
55 ibid, para 5.
56 ibid, paras 9 and 11(a).
58 ibid, para 173.
established international norm that if the non-Member State is still under an obligation to perform, the treaty obligation is in force. 59

These conclusions are principally based on those cases where the treaties in conflict of the EU law were mostly bilateral. Regarding the treaties of more global character like the World Trade Organisation (WTO) agreements, the court has declared that the lawfulness of a Community instrument does not depend on its conformity with an international agreement to which the Community is not a party. 60 The court further declared that the lawfulness of a Community instrument cannot also be assessed in the light of instruments of international law such as WTO agreements because they are not, having regard to their nature and structure, among the rules in the light of which the court is to review the lawfulness of measures adopted by the Community institutions. 61 On 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 . . . Nonetheless 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 Nations, 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 supranational mandate of the Common Commercial Policy (CCP) provided by Article 131 EC, the competence in this area remains 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 which are not compatible with EC law. 66 However, the ECJ has declared in the *International Fruits* case

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59 Case C-158/91, *Tribunal de Police, Metz (France) v Jean-Claude Levy* [1993] ECR I-4287.
60 Case C-377/98, n 57 supra, para 52.
61 *ibid*; see also Case C-149/96, *Portugal v Council* [1999] ECR I-8395, para 47.
65 The Treaty of Lisbon introduces an amendment in Art 207 of the Treaty on the Functioning of the EU, adding foreign direct investment in the purview of the CCP.
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 involve third country interests and consent. The EU itself negotiated memorandums of understanding (MOUs) with the USA and Canada to this effect.\(^{68}\) Keeping in view the number of BITs and the list of states involved with varying inclinations to consider the specific accession situation of the ten states, the problem is far from any universal resolution. This exercise will be a real challenge for both the EU Commission and the Member States to bring the vast majority of relevant agreements in line with the EC Treaty.

The provisions in the post-accession intra-EU BITs which are in conflict of the EC Treaty may have priority over the EC Treaty in accordance with the rules of chronology, unless there is an express provision in either of the treaties reserving the priority of the EC treaty. There is no express provision in the EC Treaty or the traditional BITs of the Member States; however they have no priority over the EC Treaty within the EU legal framework at least.\(^{69}\) The ECJ has found that post-accession intra-EU treaties containing incompatible obligations with the EC Treaty amount to amending the provisions of the EC Treaty without following the proper procedure contained in Article 309 and thus are inoperative and unenforceable.\(^{70}\)

The Commission took up the issue of intra-EU BITs after the 2004 accession and sent an informal note to the Economic and Financial Committee (EFC), which reviews the EU’s internal market policies.\(^{71}\) The Commission took the position that EU law should, in effect, override the provisions of BITs that the acceding states had previously concluded with the existing EU Member States.\(^{72}\) The EFC however did not entirely agree with the Commission and stated that, in order to avoid legal uncertainties and unnecessary risks for the Member States in the unclear situation, the Member States are invited to review the need for such agreements.\(^{73}\)

### B  Second Paragraph: Elimination of the Incompatible Obligations

The second paragraph of Article 307 (Article 307(2)) gives a direction to the Member States to take all appropriate steps to eliminate the incompatibilities established in their pre-accession treaties. The question however is what could be included in ‘all appropriate measures’? The ECJ has already declared, at least in two cases against Belgium and Portugal, that one of the appropriate steps might be the denouncing of the

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\(^{67}\) Case T–306/01, n 62 *supra*, para 245.

\(^{68}\) The MOU with the USA is available at http://useu.usmission.gov/Dossiers/EU_Enlargement/Sep2203_BITs_Signing.asp.


\(^{73}\) *ibid*. 

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incompatible treaty. In both these cases, however, the non-EU state parties to the incompatible treaties were going through difficult political situations and the defendants tried to justify their inability to renegotiate with them. The court rejected these arguments and held that, in such circumstances, insofar as denunciation of such a treaty is possible under international law, it is incumbent upon the Member States to denounce it.

In the Portuguese case, the finding of the court was also based on an express clause in the treaty enabling contracting parties to denounce it. This was the reason why the court did not endeavour to answer the specific question raised by Portugal on the interpretation of Article 307(2). Portugal argued that, although Article 307(2) requires the Member States to take all appropriate steps to eliminate incompatibilities between an extra-EU treaty and an EC Treaty provisions, it does not impose an obligation to achieve a specific result in the sense of requiring them, regardless of the legal consequences and political price, to eliminate the incompatibility. Denunciation, according to Portugal, must therefore be an exceptional obligation in the context of Article 307(2). It further expanded its argument referring to the second sentence of Article 307(2), which requires the Member States to assist each other and, where necessary, adopt a common attitude in resolving the incompatibility.

Portugal insisted that the act of denunciation is a unilateral act and would not require any such ‘assistance’ or ‘common attitude’ required by the second sentence. It was an opportunity passed over by the court to explain the relationship between the two sentences of Article 307(2). There was another rather sceptical argument in the Belgian case regarding the proportionality of the act of denunciation where large parts of the treaties were not incompatible with each other. The court gave a uniform solution that, if a Member State encounters difficulties which make it impossible to adjust a treaty, it must denounce the treaty. The AGs, however, in both the Portuguese case and the latest Austrian case considered denunciation an ultima ratio because the EC Treaty favours avoiding, as far as possible, any interference with pre-existing treaties.

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

One of the essential components of BITs is the dispute-settlement mechanism between an investor and a state party. The salient feature of this component is empowering the foreign investors to bring claims before international arbitration in any case where the state or state entity causes loss to its investment. The recently acceding states were required by the EU to make certain changes in their domestic laws and policies to align them with the Community law. In compliance of such EU requirements, they had to

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75 Portuguese case, ibid., para 56.
76 ibid., para 38.
77 ibid.
78 ‘Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt common attitude.’
79 Portuguese case, n 74 supra, para 32.
80 Belgian case, n 74 supra, para 36.
81 ibid., para 42.
82 AG’s Opinion in the Swedish BITs case, n 14 supra, para 70 and the Opinion of AG in Portuguese case, n 74 supra, para 50.
make certain changes which violate their agreements with the foreign investors and may be taken to an arbitral tribunal for violating a BIT. Investors from other Member States have brought BITs claims before arbitral tribunals which assume autonomous jurisdiction uninfluenced by the EU legislation or the ECJ rulings on the status of intra-EU BITs. In line with the Commission’s view, and in accordance with Article 59 of the Vienna Convention, the acceding EU Member States have tried to argue that their intra-EU BITs have been implicitly terminated because all the conditions for termination of a subsequent treaty between two states set out by Article 59 have been met since they acceded to the EU.

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

In defence, the investor argued that the BIT parties had not formally terminated their BITs. The tribunal was not convinced with the Czech Republic’s arguments and decided in favour of the Dutch investor. The tribunal observed that the EU Commission has not initiated any infringement proceedings against the Netherlands and the Czech Republic nor other EU Member States having the same kind of intra-EU BITs for failing to terminate their BITs. The tribunal seems to have suggested that if the intra-EU BITs were incompatible with the EC Treaty, the EU Commission should have initiated infringement proceedings against Member States just as it did against Austria, Sweden and Finland for their extra-EU BITs. Even if the infringement proceedings were initiated, it is uncertain as to what could be the effect of such proceedings on the tribunal’s jurisdiction to entertain the BIT claim.

The tribunal further observed that neither the Czech Republic and the Netherlands nor any other Member State had filed a complaint to the EU Commission for failure of the Member States to comply with the EU law by not terminating their intra-EU BITs.
BITs. It is again difficult to assert that the tribunal would have reached a different conclusion if such a complaint had already been brought. Another tribunal has reportedly reached the same conclusion in a separate case brought against the Czech Republic by a German investor addressing a similar Czech Republic argument. An ICSID tribunal has also commented on the irrelevance of the EU law in an intra-EU BIT dispute.

The Czech Republic tried to convince the tribunal to refer the matter to the ECJ under Article 234 EC, relying on the Mox Plant arbitration. In the Mox Plant arbitration, the Arbitral Tribunal referred the matter of interpretation of a treaty to which the litigant EU Member States, as well as the EU itself, were parties. The Czech Republic also cited an ECJ ruling, which declared that an arbitral tribunal is not a court of a Member State within the meaning of Article 234 EC. The tribunal did not agree with this assertion and declared that the parties were free to agree to arbitration, which is purely voluntary and without any compulsions, and, once they have agreed, they are bound by it.

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

Similarly, in an ICSID arbitration, Romania submitted that exemptions from customs duties and taxes which had been granted to a Swedish investor prior to Romania’s accession to the EU would be considered state aid incompatible with the common market, in the context of EU competition policy and, therefore, inconsistent with Romania’s EU obligations. In response, the claimants contended that they had 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 materials increased to such an extent that the claimants had to stop the production of certain products. With this stand, the claimants sought for the restitution of the legal framework as it existed.
before the revocation of incentives.\textsuperscript{100} While the case was in the phase where the tribunal needed to decide on its jurisdiction only, it found that the dispute related to the affects of certain regulatory changes on the claimants’ business and they had made a \textit{prima facie} case for entitlement.\textsuperscript{101} On the tribunal’s competence to award restitution of the 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.\textsuperscript{102}

It would be interesting to see how Romania will defend against the restitution of the 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 \textit{amicus curie}.\textsuperscript{103} Once the Treaty of Lisbon comes in, giving EU competence on foreign investment, the Commission would likely be able to join such proceedings as a necessary party or co-defendant.

\section*{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.

\subsection*{A Individual Options}

\textbf{a) Intra-EU BITs}

Insofar as the intra-EU BITs are concerned, the European Commission’s Internal Services and Markets Directorate-General (DG) has sent a note to the EFC stating that there is no need for BITs in the EU single market.\textsuperscript{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’.\textsuperscript{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 termination of a treaty ‘does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination’. Accordingly, the termination is not going to impede the already initiated investor–state disputes under such BITs. It would also be impracticable to prevent the BIT claims with respect to those investments that have already been made during the life of these BITs. Second, most of the BITs in question contain a ‘freezing clause’, which has the effect of keeping the rights and

\begin{itemize}
\item \textsuperscript{100} ibid, para 134.
\item \textsuperscript{101} ibid, para 137.
\item \textsuperscript{102} ibid, paras 167–168.
\item \textsuperscript{104} The abstracts from the note have been quoted in the \textit{Eastern Sugar} case, n 85 supra, para 126.
\item \textsuperscript{105} ibid.
\end{itemize}
obligations generating from them alive for a considerable number of years even after their termination. Keeping in view the long durations of the projects for which investments have been made, this freezing clause is meant to ‘freeze’ the applicable law with respect to the investment project provided by the BIT provisions over the life of the project. Article 14(3) of the Czech-Netherland BIT, for example, provides: ‘In respect of investments made before the date of the termination of the present Agreement the foregoing Articles thereof shall continue to be effective for a further period of fifteen years from that date’. In the presence of a freezing clause in these BITs, their termination is likely to bring no change to the present situation.

b) Extra-EU BITs

The Member States might not want to denounce their extra-EU BITs, which are designed to give a degree of protection to their investors which they would not otherwise have. The Commission in the Austrian BITs case contended that these BITs do not contain any clause reserving the right on the part of the Member States to abide by the EU law in case of BIT–EU conflict. The court also appears to have suggested that the problem of incompatibilities could have been cured if the BITs would have contained any provision reserving possibility for the Council to restrict movements of capital connected with investments. Such a clause can be a viable solution to resolve the incompatibility problem. Austria informed the court that it is negotiating a Regional Economic Integration Organisation (REIO) clause with some of its BIT parties.

The REIO exception, originally invented for the most favoured nation (MFN) clause of BITs, would allow the REIO party investor a preferential treatment than a non-REIO party investor. Where REIO states would have agreed upon their own internal investment regime in pursuit of their integration policy different from the BIT regime, non-REIO states would be concerned about the particular effects of such an exception upon their ability to benefit from BITs with REIO states. Furthermore, individual negotiations on the part of each EU Member State and incorporation of such REIO exceptions to all extra-EU BITs would be extremely chaotic. It is also unclear whether or not the amendments in shape of REIO clauses would be able to bring retrospective effect on the rights and obligations created by these BITs.

With respect to the post-accession extra-EU BITs, the Commission may challenge their validity before the ECJ with respect to the general loyalty clause, ie Article 10 EC. This may lead to a similar declaration of incompatibility by the ECJ with respect to these BITs as that of the pre-accession BITs. The problem, however, remains the same: what steps could the Member States take to eliminate the incompatibilities of these BITs with the EC Treaty? The Commission’s challenging of post-accession extra-EU BITs would, however, bring them within the problem area required to be addressed by the Member States.

106 Art 10(3) of Sweden-Romania BIT and Art 13(3) of Hungary-UK BIT provide a period of 20 years.
107 Austrian BITs case, n 5 supra, para 32.
108 AG’s Opinion in the Swedish BITs case, n 14 supra, para 33 (the AG gave one opinion for both the Austrian and Swedish BITs cases).
110 ibid.
B Collective Options

The EU Commission expressed concern with the EFC in 2006 that any future investment disputes before the arbitral tribunals may lead to an undermining of the application of EU law. The Commission has also expressed its concern over the MFN treatment provided by the intra-EU BITs rendering the investors of BIT contracting states in a more advantageous position than the investors of those EU states which do not have such BITs, acknowledging that this amounts to infringement of the principle of non-discrimination within the EU states under EU law.\textsuperscript{111}

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

Above all, in accordance with the currently available ‘principle of subsidiarity’ as contained in Article 5 of the EC Treaty, the Community is empowered to take action even in areas where it does not have exclusive competence when the objectives of the proposed action cannot be achieved by the Member States or depending upon the large scale and effect of the action. The Council had taken a decision to resolve divergences between bilateral commercial treaties of the Member States and the EC Treaty long ago in 1969.\textsuperscript{117} The aim of this initiative was the progressive standardisation of agreements concerning commercial relations between the Member States and third countries. Article 2 of the Council Decision purports to establish a consultation process to judge whether such extra-EU treaties contain provisions, expressly or tacitly, relating to and causing obstacles in the implementation of the CCP. The decision also provided for the Community negotiations with third countries in case any divergence from the CCP was found in those treaties.\textsuperscript{118} Since the subject of foreign investment was not included within the scope of the CCP, the Council Decision could not have been extended to BITs of the Member States.

\begin{thebibliography}{9}
\bibitem{Radu} Radu, \textit{op cit} n 63 \textit{supra}.
\bibitem{AG} AG’s Opinion in the \textit{Swedish BITs} case, n 14 \textit{supra}, para 28.
\bibitem{Constitution} Foreign direct investment was included in the CCP in the Treaty Establishing the European Constitution (Art III-315).
\bibitem{Council} See Council Doc 69/494/EEC, n 64 \textit{supra}.
\bibitem{ibid} \textit{ibid}, Art 4.
\end{thebibliography}
The EU has, however, concluded treaties with chapters on investment, such as the Energy Charter Treaty and the Treaty with the Republic of Chile. In 2003, the EU also signed an MOU with the USA to eliminate the incompatibilities with EC law of pre-existing BITs between the USA and the eight new acceding states. Negotiations on a similar understanding were expected to be initiated with Canada in 2009. The stage now seems to be set for the EU to exercise its shared competence (or exclusive competence once the Treaty of Lisbon comes into force) and act on behalf of all the Member States to cure the incompatibilities existing in the individual BITs. The AG in the Austrian BITs case appears to have suggested the same.

IX Conclusions

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

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

The pre-accession intra-EU BITs are not covered by Article 307(1) and cannot be relied on to justify the breach of EU law as far as it is incompatible with such BITs.


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

121 AG’s Opinion in the Swedish BITs case, n 14 supra, para 29.

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

Thus, the pre-accession intra-EU BITs would be construed in light of the EC Treaty as long as they are dealing with the same subject matter, but will have precedence over the EC Treaty when they are dealing with different subject matter—as there is no express conflict-resolving provision found in the EC Treaty reserving its precedence over such BITs. Especially, the right of the investors to invoke arbitral jurisdiction still remains at odds. The investment-related areas covered by such BITs, especially the dispute-settlement provisions, would continue to be governed by these BITs, which are still not part of the CCP and the EC Treaty. Though the provisions on the investment regime have been included in the Treaty of Lisbon, it has still not come into force. Even after the enforcement of the Treaty of Lisbon—which is after all a ‘treaty’ itself—the conflicting provisions, especially regarding the dispute settlement, would have a concurrent effect.

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

The ECJ decision declaring ‘free movement of capital’ BIT clauses incompatible with the EC Treaty, being capable of impeding the restrictions on movement of capital which the Council of the EU might adopt under the EC law, has far-reaching consequences for all the EU Member State BITs with non-EU states. The same rule might extend to the intra-EU BITs being in violation of the principle of indiscrimination maintained in EC law. Keeping in view the number of BITs required to be amended and the number of states involved, individual efforts on the part of the EU Member States to eliminate these incompatibilities would not suffice. It is the collective responsibility of all the EU Member States to assist each other in the elimination of incompatibilities, where necessary, and must adopt common attitude, where appropriate. The Commission should acquire an extended role in the future to resolve the issues on the basis of shared or exclusive competence in the field of the EU foreign investment regime. Even if all this is accomplished in the quickest possible time, the BITs will continue to bear legal consequences for a considerable number of years and the investor–state arbitration shall continue to pose a significant risk to the governing authority of the EU and Member States.

124 Italian case, n 49 supra.
125 Case 69/89, n 69 supra, para 103; Joined Cases 241/91P and 242/91P, n 69 supra, para 73.
126 Joined Cases 241/91P and 242/91P, ibid, paras 72–87, esp para 86.