OPINION OF ADVOCATE GENERAL MISCHO

delivered on 2 March 1999 *

1. The proceedings before the national court are between the Compagnie de Saint-Gobain, Zweigniederlassung Deutschland (hereinafter 'Saint-Gobain ZN'), the German branch of the company limited by shares Compagnie de Saint-Gobain SA, established in France, and the German tax authorities, in this case the Finanzamt (Tax Office) Aachen-Innenstadt.

2. Saint-Gobain ZN is treated for tax purposes as a permanent establishment of the French company, which in German law is subject to limited tax liability in Germany, since neither its seat nor its business management is in Germany. That liability relates to both the income received in Germany through its branch establishment and the assets held by that establishment.

3. In 1988, Saint-Gobain SA held the following shareholdings through Saint-Gobain ZN's operating capital:

— 10.2% of the shares of the Certain Teed Corporation (CTC), established in the United States of America;

— 98.63% of the share capital of Grünzweig & Hartmann AG, established in Germany, whose profits, which were transferred to Saint-Gobain ZN under an agreement whereby they are treated as a single entity for tax purposes, incorporating an agreement to transfer dividends, concluded with Saint-Gobain ZN, included intercorporate dividends ('Schachteldividenden') distributed by two subsidiaries, Isover SA, established in Switzerland, and Linzer Glasspinnerei Franz Haider AG, established in Austria;

— 99% of the share capital of Gevetex Textilglas GmbH, established in Germany, whose profits were also transferred to Saint-Gobain ZN in 1988 under a contract of the same type and included dividends from an Italian subsidiary, Vitrofil SpA.

4. Since each of the two subsidiaries established in Germany has concluded an agreement with Saint-Gobain ZN to be treated as a single entity for tax purposes ('Organvertrag'), the dividends which they receive from their foreign sub-subsidiaries are regarded, in tax law, as being directly taxable in the hands of Saint-Gobain ZN, and therefore of Saint-Gobain SA, which is subject to limited tax liability. They are not therefore treated as resident companies, as

* Original language: French.

they would be in the absence of such agreements to be treated as a single entity for tax purposes.

5. In the main proceedings, Saint-Gobain ZN objects to various measures adopted by the Finanzamt in charging corporation tax for 1988 and assessing the value for tax purposes of the business assets on 1 January 1989.

6. First, the Finanzamt did not grant the plaintiff an exemption in respect of dividends from the United States and Switzerland provided for in the double-taxation agreements which the Federal Republic of Germany had concluded with those countries ('internationales Schachtelprivileg' (international group relief)).

7. That relief is provided for, in particular, in Article XV of the US-German Tax Convention of 1954/1965 [1] and Article 24 of the German-Swiss Tax Convention of 1971, in the version in force in 1988. [2]

8. Article XV of the US-German Convention provides that, in the case of *a German company limited by shares*, income from sources within the United States liable to taxation there is to be excluded from the basis upon which German tax is imposed. This includes income from dividends where they are paid by an American corporation to a German company limited by shares which holds at least 25% of the voting shares of the American corporation (this rate is reduced to 10% under Paragraph 26(7) of the Körperschaftsteuergesetz (Law on Corporation Tax, hereinafter 'the KStG')).

9. Article 24 of the German-Swiss Convention provides that dividends which a company limited by shares established in Switzerland distributes to a *company limited by shares whose liability to tax in Germany is unlimited* are to be excluded from the basis upon which German tax is imposed where, under German tax law, the Swiss tax levied on the profits of the distributing company can also be credited against German corporation tax.

10. Second, although the Finanzamt did indeed credit against corporation tax the tax withheld at source in the various States in which the distributing company is established (the direct credit provided for in Paragraph 26(1) of the KStG), it refused to credit the tax paid on profits distributed by foreign subsidiaries and sub-subsidiaries in the States in which they are established. This is the indirect credit provided for in Paragraph 26(2) of the KStG, which provides that where a parent company whose liability for tax is unlimited holds a share in

1 — Convention concluded on 22 July 1954 between the Federal Republic of Germany and the United States of America for the Avoidance of Double Taxation with respect to Taxes on Income and to certain other Taxes, as amended by the Protocol of 17 September 1965 (BGBl. 1954 II, p. 1118; 1996 II, p. 745).

2 — Convention between the Federal Republic of Germany and the Swiss Confederation for the Avoidance of Double Taxation with respect to Taxes on Income and Capital of 11 August 1971, as amended by the Protocol of 30 November 1978 (BGBl. 1972 II, p. 1022; 1980 II, p. 750).

the capital of a foreign subsidiary it may, upon application and under certain conditions, be allowed to credit against the corporation tax payable on the dividends distributed to it by its subsidiary any tax on the profits paid by that subsidiary.

11. Last, as regards capital tax, the Finanzamt did not exclude from the national assets of the permanent establishment the shareholding in the American subsidiary and did not therefore grant Saint-Gobain ZN the international group relief available in respect of capital tax provided for in Paragraph 102(2) of the Bewertungsgesetz (Law on the Evaluation of Assets, hereinafter 'th BewG').

12. That provision provides that on certain conditions where a German company limited by shares has a direct share in the capital of a foreign subsidiary it may request that its shareholding be excluded from its business assets.

13. In support of its action before the Finanzgericht (Finance Court) Köln Saint-Gobain ZN claims that the fact that the German establishment of a company limited by shares established in another Member State is not allowed the indirect credit and the group relief available in respect of corporation tax and capital tax constitutes an infringement of Articles 52 and 58 of the EC Treaty.

14. The Finanzgericht Köln found that disallowance of that credit and that group relief to a German establishment of a foreign company limited by shares was consistent with the German law in force in 1988. The relevant provisions applied only to companies whose liability for tax in Germany was unlimited, that is to say those having their seat or business management there. Accordingly, the plaintiff, a branch of a company established in another Member State, did not meet that condition.

15. None the less, the national court wondered whether such a refusal might constitute discrimination contrary to Articles 52 and 58 of the Treaty. It refers, in particular, to the judgment in *Commission* v *France* (the '*Tax credit*' judgment). [3]

16. The Finanzgericht Köln therefore referred the following questions to the Court:

'1. Is it compatible with the applicable Community law, and in particular with Articles 52 and 58 of the EC Treaty, read together, for a branch establish-

3 — Case 270/83 *Commission* v *France* [1986] ECR 273.

ment in Germany of a company having its seat in another Member State not to be accorded *Schachtelprivileg* in respect of dividends under a double-taxation agreement with a non-member State under the same conditions as for a company having its seat in Germany?

2. Is it compatible with the applicable Community law, and in particular with Articles 52 and 58 of the EC Treaty, read together, for the tax levied in a non-member State on the profits of a subsidiary in that State of a branch establishment in Germany of a company having its seat in another Member State not to be credited against the German corporation tax on that German branch establishment under the same conditions as for a company having its seat in Germany?

3. Is it compatible with the applicable Community law, and in particular with Articles 52 and 58 of the EC Treaty, read together, for a branch establishment in Germany of a company having its seat in another Member State not to be accorded *Schachtelprivileg* in respect of capital tax under the same conditions as for a company having its seat in Germany?'

17. It should be pointed out that the provisions described above have undergone significant amendments since the time of the material events. With effect from the 1994 tax period, under the Standortsicherungsgesetz of 13 September 1993 (Law to maintain and improve the Federal Republic of Germany as a location for economic activity), [4] the German legislature extended to permanent establishments of foreign companies certain tax advantages previously reserved for companies whose liability for tax in Germany was unlimited. Thus, Paragraph 8b(4) of the KStG provides that persons subject to limited tax liability are entitled, in respect of their permanent establishments in Germany, to the tax exemptions provided for in double-taxation agreements in respect of dividends from associated foreign companies. Paragraph 26(7) of the KStG accords permanent establishments in Germany the indirect credit provided for in Paragraph 26(2) of the KStG.

18. I would also observe at this point that the facts of the case predate the adoption of Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States. [5] Accordingly, there is no need to

4 — BGBl. I, p. 1569.
5 — OJ 1990 L 225, p. 6.

consider any impact which that directive might have had on the present case.

19. The provision relating to capital tax group relief was not amended by the Standortsicherungsgesetz, but since 1 January 1997 that tax has no longer been levied on the ground that it is in part unconstitutional.

20. We have seen that the national court refers to the Court's judgment in the *Tax credit* case. So do the various interveners. That judgment concerned a tax advantage in respect of the tax on company dividends provided for under French law.

21. The Court established the following principles.

22. It considered, first, that a distinction based on the Member State in which a company has its seat may, under certain conditions, be justified in an area such as tax law.

23. However, where the legislation of a Member States places companies whose registered office is in its national territory and branches and agencies situated in its territory of companies whose seat is abroad on the same footing for tax purposes, it cannot, for the purposes of the same tax, treat them differently in regard to the grant of an advantage related to that tax. By treating the two forms of establishment in the same way for the purposes of taxing their profits, the legislature of that Member State has admitted that there is no objective difference between their positions in regard to the detailed rules and conditions relating to that taxation which could justify different treatment.

24. The Court further stated that a Member State cannot adopt discriminatory tax provisions which restrict the freedom of traders of other Member States to choose the form of establishment. The fact that setting up a subsidiary would allow them to avoid discrimination against branches cannot justify such discrimination.

25. Last, the Court held that the rights conferred by Article 52 of the Treaty are unconditional and that a Member State cannot make respect for them subject to the contents of a double-taxation agreement concluded with another Member State (meaning the Member State in which the company has its seat).

26. The question which arises is whether that judgment, which, unlike the present case, concerned shareholdings in domestic

companies, is capable of being transposed to this case.

27. The three questions referred to the Court raise the same fundamental problems and should therefore be examined from the same perspective, notwithstanding that there are certain aspects specific to each of them. I shall therefore examine them together, as, moreover, the various interveners do.

Observations on the questions as a whole

28. It follows from the order of reference, and it is not disputed between the parties, that the unfavourable treatment alleged by Saint-Gobain ZN could have been avoided had the latter been a company formed under German law. The tax advantages at issue in the second and third questions are conferred by national provisions which apply solely to companies whose liability for taxation in Germany is unlimited. According to German tax law, [6] companies regarded as such are those whose seat, whether according to their statutes or *de facto*, is in Germany.

29. As regards the advantage at issue in the first question, it follows from the national court's file that it is because the bilateral agreements apply only to companies having their seat in the signatory States that Saint-Gobain ZN is unable to take advantage of them, unlike a company established in Germany.

30. In all three cases there are, admittedly, other conditions which must be met before the advantages in question may be granted. However, they are not at issue in the present case.

31. According to the Court's case-law, [7] it is a company's seat that determines whether it belongs to the legal order of a State and the seat is therefore the same as nationality as far as natural persons are concerned.

32. The discrimination of which Saint-Gobain ZN complains therefore clearly depends on the nationality of the parent company. It is the Compagnie de Saint-Gobain SA, established in France, which is the actual taxpayer in the case before the

6 — Paragraph 1(1) of the KStG and Paragraph 1(1)(2) of the Vermögensteuergesetz (Law on Capital Tax).

7 — See, as an example of a consistent line of decisions, Case C-1/93 *Halliburton Services* v *Staatssecretaris van Financien* [1994] ECR I-1137, paragraph 15.

national court, although it is its German branch that is the plaintiff before the Finanzgericht.

33. Subject to a specific argument concerning capital tax, to which I shall return, it is common ground that the treatment of non-resident companies is unfavourable in comparison to that of companies established in Germany (including subsidiaries of foreign companies). The provisions in question have the effect of reducing the tax burden borne by those companies by eliminating economic or legal double taxation. Companies which are not resident in Germany are at a disadvantage, since they are denied that relief, in the final analysis, solely because they are not resident in Germany.

34. Thus, the international group relief referred to in the first question is granted under bilateral agreements and makes it possible to avoid the double taxation of dividends distributed by foreign subsidiaries by excluding such dividends from the amount on which tax is assessed in the State in which the parent company is established. In this case, therefore, it leads to a tax exemption from which, as we have seen, companies not having their seat in Germany do not benefit.

35. The indirect tax credit to which the second question relates operates differently but has a similar effect. It leads to a reduction in the tax payable by the parent company by crediting to the amount of that tax the foreign corporation tax already paid by its subsidiaries and sub-subsidiaries. Here, too, the possibility of reducing the tax payable is available only to companies resident in Germany.

36. Last, the third question also concerns international group relief, but in the context of capital tax. The effect of this relief is that the parent company's shareholding in a subsidiary situated outside Germany is exempt from capital tax. This also constitutes a possibility to reduce the tax burden, which again is reserved for companies resident in Germany.

37. Since the unfavourable nature of the treatment conferred on non-resident taxpayers has been established, apart from one aspect specific to capital tax to be considered below, it remains to examine the arguments relied upon in support of the national provisions at issue.

38. The German Government denies that there is any discrimination in the present case. In that regard, it refers to the consistent case-law of the Court, according to which there is discrimination where the same situations are treated differently or where different situations are treated in the same way. In tax matters, however, the situation of non-residents is fundamentally

different from that of residents, as the Court confirmed in the *Schumacker* judgment. [8]

39. The German Government also observes that in the *Tax credit* judgment the Court attached much significance to the fact that, since the rules at issue placed 'companies whose registered office is in France and branches and agencies situated in France of companies whose registered office is abroad on the same footing for the purposes of taxing their profits, those rules cannot, without giving rise to discrimination, treat them differently in regard to the grant of an advantage related to taxation, such as shareholders' tax credits'. [9] The German Government points out that, unlike the position under French tax law, German companies limited by shares are not placed on the same footing as permanent establishments of foreign companies for the purpose of either the basis on which tax is assessed or the rate of tax.

40. The Commission acknowledges the truth of the German Government's argument, but claims that the actual differences are not fundamental as regards companies limited by shares. [10] It maintains that these differences result essentially from the nature of things and cannot justify excluding foreign companies from the relief at issue in the present case.

41. I shall therefore examine the differences to which the German Government refers.

42. The German Government maintains that the situation of non-residents, whose liability for tax is limited to profits made in Germany, cannot be compared with that of residents, whose liability for tax is unlimited and whose entire income (global income) is therefore taxable in Germany.

43. The German Government concludes that in the present case there is no discrimination contrary to the Treaty, since the different treatment borne by non-residents corresponds to the difference in nature between permanent establishments of foreign companies and resident companies.

44. Quite clearly, however, the German Government is merely referring in general terms to the admittedly indisputable difference between limited tax liability and unlimited tax liability which results from the limited fiscal sovereignty of the State in which the income originates compared with that of the State in which the main undertaking is established.

45. The very facts of the present case show that that distinction must be qualified. First, it is clear from the facts that companies whose liability for tax is unlimited are able to benefit from considerable reduc-

8 — Case C-279/93 *Finanzamt Köln-Altstadt* v *Schumacker* [1995] ECR I-225.

9 — Paragraph 20.

10 — Point 10 of its observations.

tions in the basic amount on which the tax to which they are subject is assessed, whether by virtue of German legislation in the strict sense or by the effect of the wide network of bilateral double-taxation agreements concluded by the Federal Republic of Germany.

46. Second, the plaintiff's situation shows that tax liability which in principle is limited to profits made in Germany includes the effects of transactions actually carried out outside Germany. As the plaintiff states in its written submissions, the concept of limited tax liability is therefore given a broad interpretation by the German authorities.

47. As the plaintiff and the Commission observe, it is also paradoxical to rely on the fact that subsidiaries must in principle be taxed on their global income and branch establishments on their domestic income to justify provisions whose effect is, in the former case, to reduce the burden of the non-domestic portion of the global income and therefore to bring the global income closer to the domestic income. As the Commission observes, this even leads to the paradoxical result that in Germany German companies are not taxed in respect of their shareholdings: only foreign companies are.

48. I therefore disagree with the German Government and consider that the difference between the situation of resident companies, with unlimited tax liability, and that of non-resident companies, with limited tax liability, is not such that they cannot be regarded as comparable for the purpose of determining the basis on which corporation tax or capital tax is assessed.

49. On that point, the Commission rightly observes that the sole issue in the present case is the taxation of certain shareholdings and the dividends payable in respect of those shareholdings.

50. Those tax objects, as the Commission refers to them, are subject to German tax, irrespective of whether the taxable person is resident in Germany or not.

51. Since the tax liability exists independently of that question, the advantages associated with that liability, such as measures intended to avoid double taxation, must also be granted, as a matter of principle, independently of the residence criterion.

52. As the Commission stated at the hearing, it is a question of both sides of the same coin.

53. It is also permissible to observe that in the cases cited [11] where the Court accepted that there was in principle a difference in nature between the situation of residents and non-residents that did not prevent it from concluding that, for the purpose of the provisions at issue in those cases, the two situations were comparable.

54. Any difference in treatment on a point where the situations are comparable must therefore be justified by a mandatory requirement recognised by Community law.

55. As the Court stated in the *Tax credit* judgment, or again in the *Commerzbank* case, [12]

'acceptance of the proposition that the Member State in which a company seeks to establish itself may freely apply to it different treatment solely by reason of the fact that its seat is situated in another Member State would deprive [Article 52] of all meaning'.

56. The German Government refers to the fact that the provisions at issue are designed to avoid double taxation, or even multiple taxation. In its view, the interest in avoiding such taxation is strongest for the State in which a company has its seat. Consequently, it is for that State, and not the State in which the permanent establishment is situated, to eliminate the consequence of any double taxation which might be borne by its resident companies.

57. That is even more so where the State in which the company has its seat could offset the loss in revenue resulting from provisions such as those at issue in the present case, since it taxes the parent company in respect of all its activities, unlike the State in which the permanent establishment is situated.

58. That argument is not convincing.

59. The aim of avoiding double taxation of companies established in Germany is perfectly capable of being achieved without recourse to discriminatory provisions. The fact that the benefit of the latter provisions is also granted to the branch establishments of non-resident taxpayers does not in any way jeopardise their capability of attaining the objective pursued by the legislature. As regards the advantages referred to in the first two questions, that observation finds further confirmation in the fact that, as I have said, the German legislature found it appropriate to amend the domestic provi-

11 — See the *Tax credit* and the *Schumacker* judgments, cited above, and also, for example, Case C-80/94 *Wielockx* v *Inspecteur der Directe Belastingen* [1995] ECR I-2493.

12 — Case C-330/91 *The Queen* v *Inland Revenue Commissioners, ex parte Commerzbank* [1993] ECR I-4017, paragraph 13.

sions in question in 1993 and since then to confer equality of treatment on permanent establishments.

60. It is a fact that such an extension of the scope of those provisions would be likely to lead to a loss in revenue for the German tax authorities. However, it is settled law that such an argument is not capable of justifying discrimination contrary to a fundamental freedom laid down in the Treaty. [13]

61. This also renders untenable the argument that it is for the Member State in which the company has its seat to eliminate the double taxation in question, on the ground that it could offset the resulting loss in revenue by taxing the dividends distributed by the parent company, which the State in which the permanent establishment is situated would be unable to do. Such an argument is also of an essentially budgetary nature.

62. Nor can a Member State justify a restriction of a fundamental freedom laid down in the Treaty by the fact that responsibility for avoiding the restriction lies with another Member State.

63. It is also necessary to consider whether the national measures at issue might be justified by the need to maintain coherence in the tax system. That might be the case if, notwithstanding the fundamentally comparable nature of the situations in question, there were none the less actual differences in the German tax system between the taxation of branches and that of subsidiaries which rendered the discrimination in question necessary.

64. The Swedish and Portuguese Governments refer to that possibility. The Commission and the plaintiff, however, conclude on the basis of a detailed comparative analysis that no such differences in the treatment for tax purposes of branches and subsidiaries can be found. That conclusion is confirmed by the national court.

65. The Portuguese Government refers more particularly to the possibility that the fact that tax is deducted at source from the dividends distributed by the subsidiary to the parent company represents a disadvantage to the subsidiary compared with the branch, whose dividends are transferred to the parent company without being taxed.

66. It cannot, however, be reasonably inferred that the existence of such a deduction

13 — See, for example, Case 238/82 *Duphar* [1984] ECR 523.

justifies the differences in treatment at issue in the present case.

67. First, it follows from the submissions of the Commission and the plaintiff, which were not contradicted by the German Government on this point, that the proportion of the dividend of the subsidiary which is distributed to the parent company is taxed at a lower rate (36%) than the rate applied to the dividend transferred to the parent company by the branch (50%). That represents an advantage for the subsidiary. I therefore consider it far from clear that the disadvantage for the subsidiary resulting from a deduction at source should necessarily be offset by a supplementary advantage when the level of the amount on which the tax is assessed is determined.

68. In any event, the argument must be rejected as a matter of principle. It follows from the case-law of the Court that a Member State is not entitled to apply, in some regards, less favourable treatment to branches and agencies to offset the advantages which they enjoy in other regards compared with subsidiaries. [14]

69. Furthermore, such a deduction at source does not concern the taxation of the dividends of the subsidiary or the branch but the taxation of the income of the recipients of the dividend distribution. The rules governing the taxation of those recipients, which are distinct taxpayers, cannot be taken into consideration for the purpose of drawing distinctions between the taxation of the branch and that of the subsidiary.

70. Such an approach implies a broad interpretation of the concept of tax system coherence underlying the *Bachmann* judgment, [15] whereas, as an exception to the fundamental freedoms laid down in the Treaty, a mandatory requirement must be interpreted strictly.

71. The Commission further considers that the wording of the statement of reasons of the 1993 Standortsicherungsgesetz, whereby, as we have seen, the German legislature extended to resident companies the forms of relief at issue in the first two questions referred to the Court, amounts to recognition by the German Government of the discriminatory nature of the provisions at issue prior to their amendment.

72. The relevant passage in the statement of reasons states that:

'Equality of treatment between permanent establishments of foreign companies and companies subject to unlimited tax liability

14 — See the *Tax credit* judgment, paragraph 21.

15 — Case C-204/90 *Bachmann* v *Belgian State* [1992] ECR I-249.

must respect the freedom of establishment provided for in Article 52 of the EC Treaty and exclude discrimination prohibited by that provision.'

73. That passage is not entirely unambiguous. The German Government considers that it does not imply any recognition on its part of any infringement of the Treaty but that it refers solely to certain views expressed by legal writers and that the amendment was intended to preclude any criticism in the future.

74. I myself consider that, no matter what meaning is to be ascribed to the passage, it has no relevance to the interpretation which the Court is called upon to give of Articles 52 and 58 of the Treaty.

Specific observations in regard to the impact of the international agreements

75. A number of the interveners put forward arguments based on the impact on the present case of international double-taxation agreements.

76. It was claimed, first, that the determination of those entitled to benefit from the double-taxation agreements falls within the exclusive competence of the Member States.

77. To my mind, however, it is the entire area of direct taxation that continues to remain within the competence of the Member States and there is no need to distinguish between a Member State's provisions on direct taxation which are purely domestic in origin and those which derive from a double-taxation agreement with another Member State or a non-member country. Once these agreements have been ratified by the national parliament, they form part of the national law on direct taxation, in the same way as purely domestic provisions.

78. Accordingly, the principle laid down by the Court that

'[a]lthough direct taxation falls within the competence of the Member States, the latter must none the less exercise that competence consistently with Community law and therefore avoid any overt or covert discrimination by reason of nationality' fully applies in this regard. [16]

16 — See, in particular, the *Wielockx* judgment, paragraph 16.

79. Other interveners pointed out that double-taxation agreements are based on the principle of reciprocity and that the balance inherent in those agreements would be upset if the advantages which they confer were extended to companies established in Member States which are not parties to the agreements.

80. It is not enough to answer that argument, as some interveners have, by stating that the Court has already held in the French *Tax credit* case that the rights which the Treaty confers on nationals of Member States are unconditional and that their content cannot therefore depend on the reciprocal application of agreements concluded between Member States. [17] In the present case, the competent Finanzamt has never maintained that the grant of the tax advantages sought depended on corresponding advantages being granted by the French Republic to branches of German companies in France.

81. What is decisive in the present case, in which agreements concluded by a Member State with non-member countries are at issue, is that, as the plaintiff and the Commission have rightly pointed out, there is no potential conflict between the obligations which Community law places on the Federal Republic of Germany and those which follow from its commitments to various non-member States with which it has concluded double-taxation agreements.

82. Those agreements do not prevent the Federal Republic of Germany from extending the advantages which they contain to non-resident taxpayer companies. Extending the advantages in this way does not compromise the rights of the non-member States which are parties to the agreements and does not place them under any fresh obligation. It therefore raises no problem from the aspect of balance or reciprocity.

83. A perfect illustration of this is provided by the practice of the German legislature in relation to agreements of the type at issue in the present case. By reducing the minimum rate of the shareholding in an American subsidiary which a German company must own in order to qualify for the advantages under the relevant agreements, by adopting Paragraph 26(7) of the KStG, the German legislature unilaterally extended the scope of the agreement in Germany without causing any problem in its relations with the other party to the agreement.

84. The same happened when, by means of the Standortsicherungsgesetz of 1993, the German legislature conferred on permanent establishments of companies of other Member States the international group relief provided for in the bilateral agreements. It therefore saw no difficulties resulting from the nature of the agreements which would prevent it from extending the scope of that relief in the way sought by the plaintiff.

17 — See the *Tax credit* judgment, paragraph 26.

85. It is true that extending the scope of tax relief in this way entails a further loss of revenue, which, other things being equal, follows from the application of the agreements. As we have already seen, however, it is settled law that such an argument, of a budgetary nature, can be no ground for restricting a fundamental freedom provided for in the Treaty.

86. Finally, the Swedish Government relies on what might be described as systemic arguments in demonstrating that, in certain particularly complex situations, extending the scope of bilateral double-taxation agreements may have the consequence that no tax is payable at all.

87. However, that consideration apparently did not prevent the German Government from extending the scope of agreements, at least as regards the advantages at issue in the main proceedings.

88. Furthermore, the situations to which the Swedish Government refers, which concern quite specific hypothetical situations, differ from the present case, where it is not alleged that there is a danger that the dividends will not be taxed in any country.

89. Just as different is the situation where a company established in Member State A asks Member State B to apply to it the provisions of a bilateral agreement concluded between Member State B and Member State C rather than that concluded between A and B, a hypothesis which forms the subject-matter of the *Metallgesellschaft* and *Hoechst* cases,[18] to which reference was made at the hearing. The agreements from which Saint-Gobain ZN seeks to benefit were concluded with non-member States.

90. Moreover, in the above hypothesis, the company established in Member State A does not necessarily have any connection with Member State C, unlike in the present case, where the treatment of shareholdings in companies established in State C is in issue.

91. Lastly, it must be pointed out that the two cases concern claims which are fundamentally different. In the hypothesis outlined above, the company established in Member State A does not seek to be treated by Member State B as a company established in that State but as a company established in another Member State, C. That case therefore concerns a difference in treatment between non-resident companies rather than between resident companies and non-resident companies.

92. The basic problem is therefore not the same as that which arises in the present

18 — Case C-397/98 *Metallgesellschaft and Others* v *Commissioners of Inland Revenue and HM Attorney General* and Case C-410/98 *Hoechst and Others* v *Commissioners of Inland Revenue and HM Attorney General*, OJ 1999 C 1, pp. 7 and 11.

case, where what the plaintiff claims is equality of treatment with companies established in Germany, even though the provisions which provide the basis for that treatment are found in an agreement concluded with a non-member State.

Specific observations in regard to capital tax

93. With more specific regard to capital tax, the German Government claims that the tax burden ultimately borne by the parent company is no different whether the shareholdings at issue are held through a branch or through a subsidiary.

94. It is certainly correct that a shareholding in a sub-subsidiary does not form part of the assets of the subsidiary for the purpose of capital tax, owing to the international group relief available, whereas, since that relief is not available to a branch, the branch is liable for capital tax on the value of the shareholding. According to the German Government, however, the advantage enjoyed by the subsidiary is offset by the fact that, for the purposes of capital tax, the assets of the parent company include the value of its shareholding in the subsidiary in Germany, the assessment of which takes into account the subsidiary's holding in the sub-subsidiary.

95. Saint-Gobain ZN and the Commission do not dispute that in principle that is so (Paragraph 121(2)(4) of the BewG). They point out, however, that as a general rule the effect of that provision is excluded by bilateral double-taxation agreements concluded by the Federal Republic of Germany.

96. Thus, Saint-Gobain ZN argued at the hearing, without being contradicted by the German Government on this point, that in the present case the application of Paragraph 121(2)(4) of the BewG is excluded under Article 19 of the double-taxation agreement in force between the French Republic and the Federal Republic of Germany.

97. It follows that the treatment of permanent branch establishments of French parent companies is unfavourable compared with that of subsidiaries.

98. It is for the national court to determine whether that provision, taken together with those of the BewG, actually has the effect that capital tax in respect of the shareholdings in question constitutes a greater burden for permanent branch establishments than for subsidiaries. Should that be the case the discriminatory treatment of the plaintiff is established.

99. I would further point out that the German authorities are not being asked to

grant the group relief also where there is no bilateral agreement. They are obliged to do so only where the refusal to grant relief entails discrimination, that is to say where there is no provision deriving from an agreement which has the effect of excluding the operation of Paragraph 121(2)(4) of the BewG. Consequently, the danger of discrimination against subsidiaries to which the German Government refers does not exist.

100. I would also observe, in passing, that the German Government's argument implies that it accepts the existence of a principle of equality of treatment between subsidiaries and branches.

101. It follows from the foregoing that the difference in treatment, should it be established, would be unjustified. It would therefore be precluded by Articles 52 and 58 of the Treaty.

Final considerations

102. It follows from all the foregoing, therefore, that the effect of the national provisions is that, without objective justification, they treat companies whose seat is in another Member State unfavourably compared with the way in which they treat companies established in Germany.

103. As we have seen, however, and as both the Commission and the Finanzgericht rightly point out, Article 58, and the first sentence of the first paragraph and the second paragraph of Article 52 of the Treaty, taken together, require that companies established in another Member State which set up a permanent establishment in the territory of the Member State in question are to be treated in the same way as national companies, except where there are objectively justified differences.

104. Furthermore, the national provisions in question have the effect of hindering the freedom of companies from other Member States to choose the form under which they wish to exercise their right to freedom of establishment. It follows from the second sentence of the first paragraph of Article 52 that a company from one Member State which wishes to exercise its right to freedom of establishment is entitled to choose between setting up a subsidiary or merely an agency or a branch in the Member State of establishment. This choice is hindered where unjustified differences in treatment exist to the detriment of one or other of these forms of establishment.

Conclusion

105. I therefore propose that the Court answer the questions referred by the Finanzgericht Köln in the negative, and rule as follows:

(1) Articles 52 and 58 of the EC Treaty preclude a permanent branch establishment in Germany of a company limited by shares having its seat in another Member State from not being accorded international group relief ('Schachtelprivileg') granted in respect of dividends under a double-taxation agreement with a non-member State on the same conditions as for a company having its seat in Germany.

(2) Articles 52 and 58 of the Treaty preclude the tax levied in a non-member State on the profits of a subsidiary in that State of a permanent branch establishment in Germany of a company having its seat in another Member State from not being credited against the German corporation tax payable by that German branch on the same conditions as for a company having its seat in Germany.

(3) Articles 52 and 58 of the Treaty preclude a permanent branch establishment in Germany of a company having its seat in another Member State from not being accorded the international group relief ('Schachtelprivileg') in respect of capital tax on the same conditions as for a company having its seat in Germany.