JUDGMENT OF THE COURT (Grand Chamber)

3 March 2009 *

In Case C-249/06,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 29 May 2006,

Commission of the European Communities, represented by C. Tufvesson, B. Martenczuk and H. Støvlbæk, acting as Agents,

applicant,

v

Kingdom of Sweden, represented by A. Falk and K. Wistrand, acting as Agents,

defendant,

* Language of the case: Swedish.

supported by:

Republic of Lithuania, represented by D. Kriaučiūnas, acting as Agent,

Republic of Hungary, represented by J. Fazekas, K. Szíjjártó and M. Fehér, acting as Agents,

Republic of Finland, represented by A. Guimaraes-Purokoski and J. Heliskoski, acting as Agents,

interveners,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Lenaerts, M. Ilešič, A. Ó Caoimh and J.-C. Bonichot (Rapporteur), Presidents of Chambers, G. Arestis, A. Borg Barthet, J. Malenovský, U. Lõhmus and E. Levits, Judges,

Advocate General: M. Poiares Maduro,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 6 May 2008,

after hearing the Opinion of the Advocate General at the sitting on 10 July 2008,

gives the following

Judgment

1 By its application, the Commission of the European Communities requests the Court to declare that, by not having taken appropriate steps to eliminate incompatibilities concerning the provisions on transfer of capital contained in the investment agreements entered into with the Argentine Republic, the Republic of Bolivia, the Republic of Côte d'Ivoire, the Arab Republic of Egypt, Hong Kong, the Republic of Indonesia, the People's Republic of China, the Republic of Madagascar, Malaysia, the Islamic Republic of Pakistan, the Republic of Peru, the Republic of Senegal, the Democratic Socialist Republic of Sri Lanka, the Republic of Tunisia, the Socialist Republic of Vietnam, the Republic of Yemen and the former Socialist Federal Republic of Yugoslavia, the Kingdom of Sweden has failed to fulfil its obligations under the second paragraph of Article 307 EC.

Legal framework

2 Prior to its accession to the European Union, the Kingdom of Sweden entered into bilateral investment agreements, published in the *Sveriges internationella överenskommelser* ('the SÖ'), with the Argentine Republic (this agreement entered into force on 28 September 1992 (SÖ 1992:91)), the Republic of Bolivia (this agreement entered into force on 3 July 1992 (SÖ 1992:19)), the Republic of Côte d'Ivoire (this agreement entered into force on 3 November 1966 (SÖ 1966:31)), the Arab Republic of Egypt (this agreement entered into force on 29 January 1979 (SÖ 1979:1)), Hong Kong (this agreement entered into force on 26 June 1994 (SÖ 1994:19)), the Republic of Indonesia (this agreement entered into force on 18 February 1993 (SÖ 1993:68)), the People's Republic of China (this agreement entered into force on 29 March 1982 (SÖ 1982:28)), the Republic of Madagascar (this agreement entered into force on 23 June 1967 (SÖ 1967:33)), Malaysia (this agreement entered into force on 6 July 1979 (SÖ 1979:17)), the Islamic Republic of Pakistan (this agreement entered into force on

14 June 1981 (SÖ 1981:8)), the Republic of Peru (this agreement entered into force on 1 August 1994 (SÖ 1994:22)), the Republic of Senegal (this agreement entered into force on 23 February 1968 (SÖ 1968:22)), the Democratic Socialist Republic of Sri Lanka (this agreement entered into force on 30 April 1982 (SÖ 1982:16)), the Republic of Tunisia (this agreement entered into force on 13 May 1985 (SÖ 1985:25)), the Socialist Republic of Vietnam (this agreement entered into force on 2 August 1994 (SÖ 1994:69)), the Republic of Yemen (this agreement entered into force on 23 February 1984 (SÖ 1983:110)) and the former Socialist Federal Republic of Yugoslavia (this agreement entered into force on 21 November 1979 (SÖ 1979:29)).

3 Each of those agreements contains a clause under which each party guarantees to the investors of the other party, without undue delay, the free transfer, in freely convertible currency, of payments connected with an investment.

Pre-litigation procedure

4 As it took the view that those bilateral agreements were capable of impeding the application of restrictions on movements of capital and on payments which the Council of the European Union might adopt under Articles 57(2) EC, 59 EC and 60(1) EC, the Commission sent a letter of formal notice to the Kingdom of Sweden on 12 May 2004.

5 By letter of 12 July 2004, the Kingdom of Sweden submitted its observations to the Commission on that letter of formal notice. It maintained that the disputed provisions of the investment agreements at issue did not preclude it from complying with its obligations under Articles 57(2) EC, 59 EC and 60 EC.

6 Taking the view that the arguments put forward by the Kingdom of Sweden were inadequate and that it had failed, contrary to the requirements of the second paragraph of Article 307 EC, to take appropriate steps to eliminate the incompatibilities concerning the provisions on transfer contained in the various investment agreements at issue, the Commission sent a reasoned opinion to that Member State on 21 March 2005.

7 By letter of 19 May 2005, the Kingdom of Sweden submitted to the Commission its observations on that reasoned opinion. It maintained the arguments put forward in its observations on the letter of formal notice.

8 As it took the view that those arguments were not capable of rebutting the complaints made in the reasoned opinion, the Commission decided to bring the present action.

The action

The request to reopen the oral procedure

9 By letter of 18 July 2008, the Kingdom of Sweden requested the Court to reopen the oral procedure under Article 61 of the Rules of Procedure, on the ground that the Commission had unlawfully introduced a new head of complaint during the oral procedure and that, as a consequence, the Advocate General's Opinion was based on facts and arguments which it had not been possible for the parties to debate properly.

10 The Commission, it argued, had, for the first time, claimed that the maintenance in force of the bilateral investment agreements at issue was incompatible with Article 10 EC.

11 The Advocate General, it contends, proposes, in points 33 to 43 and 71 of his Opinion, that the Court base the alleged failure to fulfil obligations on Article 10 EC as well as on Articles 57(2) EC, 59 EC and 60(1) EC.

12 In that regard, it must be pointed out, first, that the Court may, of its own motion, on a proposal from the Advocate General or at the request of the parties, order the reopening of the oral procedure under Article 61 of its Rules of Procedure if it considers that it lacks sufficient information or that the case must be dealt with on the basis of an argument which has not been debated between the parties (see Case C-210/03 *Swedish Match* [2004] ECR I-11893, paragraph 25; Case C-138/05 *Stichting Zuid-Hollandse Milieufederatie* [2006] ECR I-8339, paragraph 23; and order in Case C-17/98 *Emesa Sugar* [2000] ECR I-665, paragraph 18).

13 Second, under the second paragraph of Article 222 EC, it is the Advocate General's duty, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice, require his involvement. Since the Court is not bound either by the Advocate General's Opinion or by the reasoning on which it is based, it is not absolutely necessary to reopen the oral procedure, under Article 61 of the Rules of Procedure, each time the Advocate General raises a point of law which was not the subject of debate between the parties.

14 In the present case, since the Court considers that it has sufficient information to make a ruling and since the case does not have to be dealt with on the basis of arguments which were not the subject of debate between the parties, in particular in the course of the hearing, it is not appropriate to grant the request that the oral procedure be reopened.

The incompatibility of the investment agreements with the EC Treaty

Arguments of the parties

15 The Commission takes the view that the absence, in the agreements at issue, of any provision expressly reserving for the Kingdom of Sweden the possibility of applying measures which may, where appropriate, be decided upon by the Council on the basis of Articles 57 EC, 59 EC and 60 EC is liable to make it more difficult, or even impossible, for that Member State to comply with its Community obligations and that, by not taking appropriate steps to remove such an incompatibility, that Member State has failed to fulfil its obligations under the second paragraph of Article 307 EC.

16 The Commission claims that, were the Council to adopt restrictions on movements of capital and on payments, the period of time required for the denunciation or renegotiation of the agreements at issue would have the consequence that the Kingdom of Sweden would be obliged, in the intervening period, under international law, to continue to apply the agreements in question, including their respective transfer clauses, in accordance, moreover, with the first paragraph of Article 307 EC. As a result, the measures adopted by the Council would not be uniformly applied within the European Community.

17 The Kingdom of Sweden, supported by the interventions of the Republic of Hungary and the Republic of Finland and, at the hearing, by the Republic of Lithuania, takes the view that the Commission may prove an infringement resulting from the disputed provisions of the bilateral agreements at issue only if it establishes that, by reason of the rights guaranteed in those agreements to investors in third countries, it was not possible for the Kingdom of Sweden to implement the actual restrictive measures introduced by Community law.

18 The situation envisaged in the second paragraph of Article 307 EC will therefore arise only following the actual adoption of the measures authorised by the relevant

provisions and in circumstances where mechanisms derived from international law, and designed to remedy an incompatibility in a given case, do not exist or are inadequate. Only then may the Commission commence an action based on infringement of the second paragraph of Article 307 EC, by relying on an actual restrictive measure, the genuine conflict between that measure and the agreement at issue, and the measures which may or may not have been adopted in order to bring an end to that conflict.

19 The Republic of Hungary and the Republic of Finland dwell on the serious consequences liable to result from the position of the Commission, which would make it possible to establish a failure to fulfil obligations on the basis of the second paragraph of Article 307 EC in any case in which an agreement, entered into with a third country either before the entry into force of the Treaty or prior to accession of the Member State concerned, applies in an area in which the Community has not yet exercised the powers available to it under the Treaty, that is, in an area in which it has not yet legislated. Such an interpretation, they argue, would confer on the second paragraph of Article 307 EC an unlimited scope which would be open to challenge from the perspective both of legal certainty and of the distribution of powers between the Community and the Member States, and would upset the balance created by the first and second paragraphs of Article 307 EC.

20 It is further argued that the potential future incompatibility with secondary Community legislation of an agreement entered into with a third country does not fall within the scope of Article 307 EC and is capable of being established only if the Council were actually to exercise its powers in that area.

21 In that regard, the Kingdom of Sweden contends that measures restricting the movement of capital adopted against the Republic of Côte d'Ivoire and the former Socialist Federal Republic of Yugoslavia have not been impeded by the investment agreements concluded between those States and the Kingdom of Sweden, a contention which is, moreover, not contested by the Commission.

22 The Republic of Hungary also questions the implications of the Commission's approach in so far as the Member States have entered into some 1 000 bilateral investment agreements with third countries containing comparable clauses on transfers, the compatibility of which with Community law has never been called into question by the Commission.

23 The Kingdom of Sweden, the Republic of Lithuania, the Republic of Hungary and the Republic of Finland take the view that, contrary to what the Commission claims, the safeguard measures referred to in Articles 57(2) EC, 59 EC and 60(1) EC may be implemented only in exceptional, clearly specified cases which could not have been foreseen when the agreements at issue were concluded. Thus, the Kingdom of Sweden could allow the principle *rebus sic stantibus* to operate in order provisionally to suspend the provisions concerning free transfer were the Community to adopt safeguard measures on the basis of those Treaty provisions.

24 The Member States which have submitted observations contend that the Commission has failed to prove the existence of the alleged failure to fulfil obligations and that it may not, according to the case-law of the Court, act on the basis of assumptions.

Findings of the Court

25 The various investment agreements at issue concluded by the Kingdom of Sweden contain equivalent provisions which guarantee the free transfer, without undue delay and in freely convertible currency, of payments connected with an investment.

26 In particular, the following matters are thus guaranteed: the free transfer of funds in order to create, manage or extend an investment; the freedom to repatriate the income

from that investment; and the freedom to transfer the funds necessary to repay loans and the funds arising from the liquidation or assignment of that investment.

27 Those agreements are to that extent consistent with the wording of Article 56(1) EC, according to which '… all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited', and of Article 56(2) EC, under which 'all restrictions on payments between Member States and between Member States and third countries shall be prohibited', and are in line with the objective pursued by that article.

28 It is true that the Treaty provisions to which the present action by the Commission refers grant the Council the power to restrict, in certain circumstances, the movement of capital and payments between Member States and third countries, including the movements covered by the transfer clauses at issue.

29 The provisions in question, contained in Articles 57(2) EC, 59 EC and 60(1) EC, introduce exceptions to the principle of free movement of capital and payments between Member States and between Member States and third countries, with a view to protecting the general Community interest and enabling the Community to comply, as appropriate, with its international obligations and with those of the Member States.

30 Article 57(2) EC allows the Council, acting by qualified majority on a proposal from the Commission, to adopt certain measures restricting the movement of capital to or from third countries involving, inter alia, direct investment. Where those measures constitute a 'step back' in Community law as regards the liberalisation of the movement of capital to or from third countries, unanimity is required.

31 Article 59 EC authorises the Council, on a proposal from the Commission and after consulting the European Central Bank, to adopt safeguard measures where movements of capital to or from third countries 'cause, or threaten to cause, serious difficulties for the operation of economic and monetary union', provided that those measures are strictly necessary and that they relate to a period 'not exceeding six months'.

32 Article 60(1) EC allows the Council, on a proposal from the Commission, in order to implement a common position or a joint action in the area of the common foreign and security policy, to take 'necessary urgent measures' on the movement of capital and on payments. Such action could, for example, be required in order to give effect to a resolution of the Security Council of the United Nations Organisation.

33 It is common ground that the agreements at issue do not contain any provision reserving such possibilities for the Community to restrict movements of funds connected with investments. It is therefore necessary to examine whether the Kingdom of Sweden was, for that reason, under an obligation to take the appropriate steps to which the second paragraph of Article 307 EC refers.

34 Under the first paragraph of Article 307 EC, the rights and obligations arising from an agreement concluded before the date of accession of a Member State between it and a third country are not affected by the provisions of the Treaty. The purpose of that provision is to make it clear, in accordance with the principles of international law, that application of the Treaty is not to affect the duty of the Member State concerned to respect the rights of third countries under a prior agreement and to perform its obligations (see Case 812/79 *Burgoa* [1980] ECR 2787, paragraph 8; Case C-84/98 *Commission* v *Portugal* [2000] ECR I-5215, paragraph 53; and Case C-216/01 *Budějovický Budvar* [2003] ECR I-13617, paragraphs 144 and 145).

35 The second paragraph of Article 307 EC obliges the Member States to take all appropriate steps to eliminate incompatibilities with Community law which have been established in agreements concluded prior to their accession. Under that provision, the Member States are required, where necessary, to assist each other to that end and, where appropriate, to adopt a common attitude.

36 The provisions of Articles 57(2) EC, 59 EC and 60(1) EC confer on the Council the power to restrict, in certain specific circumstances, movements of capital and payments between the Member States and third countries.

37 In order to ensure the effectiveness of those provisions, measures restricting the free movement of capital must be capable, where adopted by the Council, of being applied immediately with regard to the States to which they relate, which may include some of the States which have signed one of the agreements at issue with the Kingdom of Sweden.

38 Accordingly, those powers of the Council, which consist in the unilateral adoption of restrictive measures with regard to third countries on a matter which is identical to or connected with that covered by an earlier agreement concluded between a Member State and a third country, reveal an incompatibility with that agreement where, first, the agreement does not contain a provision allowing the Member State concerned to exercise its rights and to fulfil its obligations as a member of the Community and, second, there is also no international-law mechanism which makes that possible.

39 Contrary to the arguments of the Kingdom of Sweden, the measures put forward by it and which, in its view, are such as to enable it to fulfil its Community obligations do not appear to guarantee that this will be the case.

40 In the first place, the periods of time necessarily involved in any international negotiations which would be required in order to reopen discussion of the agreements at issue is inherently incompatible with the practical effectiveness of those measures.

41 In the second place, the possibility of relying on other mechanisms offered by international law, such as suspension of the agreement, or even denunciation of the agreements at issue or of some of their provisions, is too uncertain in its effects to guarantee that the measures adopted by the Council could be applied effectively.

42 It is common ground that, in the cases referred to by the Commission, the Kingdom of Sweden did not take any steps, within the period prescribed by the Commission in its reasoned opinion, with regard to the third countries concerned in order to eliminate the risk of conflict with measures liable to be adopted by the Council under Articles 57(2) EC, 59 EC and 60(1) EC which might arise from the application of the investment agreements concluded with those third countries.

43 It must be added that, as follows from the judgment delivered today in Case C-205/06 *Commission* v *Austria* [2009] ECR I-1301, the incompatibilities with the Treaty to which the investment agreements with third countries give rise and which militate against the application of the restrictions on movement of capital and on payments which the Council may adopt under Articles 57(2) EC, 59 EC and 60(1) EC are not limited to the Member State which is the defendant in the present case.

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

45 It follows from the foregoing that, by not having taken appropriate steps to eliminate incompatibilities concerning the provisions on transfer of capital contained in the investment agreements concluded with the Argentine Republic, the Republic of Bolivia, the Republic of Côte d'Ivoire, the Arab Republic of Egypt, Hong Kong, the Republic of Indonesia, the People's Republic of China, the Republic of Madagascar, Malaysia, the Islamic Republic of Pakistan, the Republic of Peru, the Republic of Senegal, the Democratic Socialist Republic of Sri Lanka, the Republic of Tunisia, the Socialist Republic of Vietnam, the Republic of Yemen and the former Socialist Federal Republic of Yugoslavia, the Kingdom of Sweden has failed to fulfil its obligations under the second paragraph of Article 307 EC.

Costs

46 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs to be awarded against the Kingdom of Sweden, and the latter has been unsuccessful, the Kingdom of Sweden must be ordered to pay the costs. In accordance with the first subparagraph of Article 69(4) of those Rules, the Republic of Lithuania, the Republic of Hungary and the Republic of Finland, which have intervened in the proceedings, are to bear their own costs.

On those grounds, the Court (Grand Chamber) hereby:

1. **Declares that, by not having taken appropriate steps to eliminate incompatibilities concerning the provisions on transfer of capital contained in the investment agreements concluded with the Argentine Republic, the Republic of Bolivia, the Republic of Côte d'Ivoire, the Arab Republic of Egypt, Hong Kong, the Republic of Indonesia, the People's Republic of China, the Republic of Madagascar, Malaysia, the Islamic Republic of Pakistan, the Republic of Peru, the Republic of Senegal, the Democratic Socialist Republic of Sri Lanka, the Republic of Tunisia, the Socialist Republic of Vietnam, the Republic of Yemen and the former Socialist Federal Republic of Yugoslavia, the Kingdom**

of Sweden has failed to fulfil its obligations under the second paragraph of Article 307 EC;

2. Orders the Kingdom of Sweden to pay the costs;

3. Orders the Republic of Lithuania, the Republic of Hungary and the Republic of Finland to bear their own respective costs.

[Signatures]