# OPINION OF ADVOCATE GENERAL SHARPSTON

delivered on 10 September 2009 [1]

1. Before it joined the European Union, Finland concluded bilateral investment treaties with the Russian Federation, [2] Belarus, [3] China, [4] Malaysia, [5] Sri Lanka, [6] and Uzbekistan. [7] Those agreements guarantee to investors of each party freedom of transfer of payments relating to an investment in freely convertible currency. [8]

2. The Commission takes the view that such unrestricted free movement of capital is incompatible with Articles 57(2), 59 and 60(1) EC, which provide for the possibility for the Council under certain circumstances to restrict capital movements and payments to or from third countries. It considers that Finland should have renegotiated those treaties pursuant to the second paragraph of Article 307 EC to render them compliant with Community law and to put in place mechanisms that would permit the Council to decide on possible future restrictions.

3. The Commission therefore asks the Court to declare that, by not using the appropriate means to eliminate those incompatibilities, Finland has failed to comply with its obligations under the second paragraph of Article 307 EC.

4. The Commission also brought analogous infringement proceedings against Austria and Sweden. Judgment in those cases was given on 3 March 2009. [9] The present infringement proceedings pertain to substantially the same matters as those at issue there.

1 — Original language: English.

2 — No 58/1991, signed on 8 February 1989, which entered into force on 15 August 1991.

3 — No 89/1994, signed on 28 October 1992, which entered into force on 11 December 1994.

4 — No 4/1986, signed on 4 September 1984, which entered into force on 26 January 1986.

5 — No 79/1987, signed on 15 April 1985, which entered into force on 3 January 1988.

6 — No 54/1987, signed on 27 April 1985, which entered into force on 25 October 1987.

7 — No 74/1993, signed on 1 October 1992, which entered into force on 22 October 1993.

8 — See further in general: T. Eilmansberger, 'Bilateral Investment Treaties and EU Law', *Common Market Law Review* 2009, pp. 383 to 429, and specifically on some of the issues arising in the present case, pp. 409 to 413.

9 — Case C-205/06 *Commission* v *Austria* [2009] ECR I-1301; and Case C-249/06 *Commission* v *Sweden* [2009] ECR I-1335.

5. My analysis in the present Opinion will therefore essentially be based on what the Court held in those two judgments. I shall, however, specifically address the new issue arising in the present case, namely the impact of a clause guaranteeing investment protection *within the limits of the national legislation of the contracting party* ('the contested clause') included by Finland in the agreements at issue: [10]

'Every contracting party guarantees under all circumstances, within the limits authorised by its own laws and decrees and in conformity with international law, a reasonable and appropriate treatment of investments made by citizens or companies of the other contracting party.' [11]

6. Specifically, I shall examine whether, as the Finnish Government maintains, the phrase 'within the limits authorised by its own laws and decrees' would allow Finland to apply restrictions to capital movements and to payments as provided for in Articles 57(2), 59 and 60(1) EC.

7. If it does, Finland will not be in breach of its obligations under the second paragraph of Article 307 EC. [12] That provision 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. The Member States are required, where necessary, to assist each other to that end and, where appropriate, to adopt a common attitude. [13]

**Relevant legal provisions**

*The Vienna Convention on the Law of Treaties*

8. Article 31 of the Vienna Convention on the Law of Treaties [14] contains a general rule of treaty interpretation:

'1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to

10 — The Commission notes that the clause is not included in the agreements with Belarus, the Russian Federation and Uzbekistan, while Finland maintains that it is included in all agreements except the one with the Russian Federation. In view of the conclusion that I reach, I have not investigated this point further.

11 — Article 3 of the agreement with Sri Lanka. It is common ground that this is a typical version of the contested clause.

12 — Except, as the case may be, with regard to the agreements with Belarus, the Russian Federation and Uzbekistan: see footnote 10 above.

13 — See *Commission* v *Austria*, paragraphs 32 and 34, and *Commission* v *Sweden*, paragraphs 33 and 35, both cited in footnote 9.

14 — Done at Vienna on 23 May 1969, which entered into force on 27 January 1980, UN Doc.A/Conf.39/27, 1155 UNTS 331, 8 ILM 679 (1969) ('the Vienna Convention').

be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.'

9. Article 62 of the Vienna Convention provides for the possibilities where there is a fundamental change of circumstances (*clausula rebus sic stantibus*):

'1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

(a) if the treaty establishes a boundary; or

(b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.'

*The EC Treaty*

10. Article 57(2) EC provides:

'Whilst endeavouring to achieve the objective of free movement of capital between Member States and third countries to the greatest extent possible and without prejudice to the other Chapters of this Treaty, the Council may, acting by a qualified majority on a proposal from the Commission, adopt measures on the movement of capital to or from third countries involving direct investment — including investment in real estate — establishment, the provision of financial services or the admission of securities to capital markets. Unanimity shall be required for measures under this paragraph which constitute a step back in Community law as regards the liberalisation of the movement of capital to or from third countries.'

11. Article 59 EC provides:

'Where, in exceptional circumstances, movements of capital to or from third countries cause, or threaten to cause, serious difficulties for the operation of economic and monetary union, the Council, acting by a qualified majority on a proposal from the Commission and after consulting the ECB, may take safeguard measures with regard to third countries for a period not exceeding six months if such measures are strictly necessary.'

12. Article 60(1) EC provides:

'If, in the cases envisaged in Article 301, action by the Community is deemed necessary, the Council may, in accordance with the procedure provided for in Article 301, take the necessary urgent measures on the movement of capital and on payments as regards the third countries concerned.'

13. Article 307 EC provides:

'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 institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States.'

**Procedure**

14. In response to the letter of formal notice of 7 May 2004, the reasoned opinion of 16 March 2005, and the additional reasoned opinion of 4 July 2006, the Finnish Government maintained that the provisions at issue in the bilateral investment treaties respected its obligations under Articles 57(2), 59 and 60(1) EC. It did not therefore see the need to take any measure pursuant to Article 307 EC to eliminate the alleged incompatibilities. [15]

15. The Commission brought the present action on 20 February 2007.

16. It asks the Court to

— declare that, by failing to take the appropriate steps in accordance with the second paragraph of Article 307 EC to eliminate the incompatibilities relating to provisions on transfers in the bilateral investment treaties concluded with the Russian Federation (the former Soviet Union), Belarus, China, Malaysia, Sri Lanka and Uzbekistan, the Republic of Finland has failed to fulfil its obligations under Article 307 EC;

— order Finland to pay the costs.

17. Written observations have been submitted by the Austrian, Finnish, German, Hungarian, Lithuanian and Swedish Governments and by the Commission.

18. The Finnish Government submitted a request for a hearing which it subsequently withdrew. No hearing was therefore held.

**The incompatibility of the agreements with the EC Treaty**

19. Finland and the intervening Member States submit that, in the absence of any measure taken by the Council against the

15 — By letter of 27 October 2006, Finland informed the Commission that it had concluded a new bilateral investment treaty with China, which was due to enter into force on 15 November 2006. However, it did not show the Commission a copy of the text or indicate whether the date of entry into force was definitive. There the matter rests.

third countries concerned, the alleged breach is purely hypothetical because there are no 'incompatibilities established' within the meaning of the second paragraph of Article 307 EC. Only as and when the Commission establishes the existence of such an incompatibility does the obligation for the Member States arise to eliminate the 'incompatibilities established'. The same argument was advanced by the Austrian and Swedish Governments and by the intervening Member States, including Finland, in the proceedings leading up to *Commission* v *Austria* and *Commission* v *Sweden*. [16]

20. While not responding explicitly to that argument, the Court held that, in order to ensure the effectiveness of Articles 57(2), 59 and 60(1) EC, 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 Member State concerned. It therefore seems that the 'no incompatibilities (yet) established' argument was not considered pertinent.

21. The Court further held that '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'. [17]

22. I shall examine each of those conditions for incompatibility in turn.

*Do the agreements at issue contain a provision allowing Finland to exercise its rights and to fulfil its obligations as a member of the Community?*

23. It is common ground that the agreements at issue contain no provision explicitly reserving the possibility for the Community to apply restrictions to capital movements and to payments as provided for in Articles 57(2), 59 and 60(1) EC.

16 — *Commission* v *Austria*, paragraphs 18 to 23, and *Commission* v *Sweden*, paragraphs 17 to 21, both cited in footnote 9.

17 — *Commission* v *Austria*, paragraph 37, and *Commission* v *Sweden*, paragraph 38, both cited in footnote 9.

24. The Finnish and Lithuanian Governments nevertheless maintain that the contested clause allows Finland to respect the restrictive measures taken by the Council on the basis of those EC Treaty provisions.

25. The Finnish Government submits that those provisions could be applied immediately, because any restrictive measures adopted by the Council would form part of the Finnish legislation to which that clause refers through the operation of the principle of direct effect of Community law. It is neither here nor there that the Community itself is not a party to the agreements in question. For its part, the Lithuanian Government recalls that Community law forms part of national law.

26. However, to my mind the issue is not whether (as it indeed does) Community law forms part of national law. Rather, the crux of the matter is whether Finland's potential ability to rely on the phrase 'within the limits authorised by its own laws and decrees' against the third countries with which it has concluded those agreements constitutes *a sufficient guarantee* that restrictions to capital movements and to payments involving third countries, as provided for in Articles 57(2), 59 and 60(1) EC, could be applied.

27. I do not believe that it does. Like Advocate General Poiares Maduro, I consider that the application of Article 307 EC is not adequately safeguarded by the uncertain interpretation of clauses in an international agreement. [18] Rather, Article 307 EC is 'of general scope and it applies to any international agreement, irrespective of subject-matter, which is *capable of affecting* the application of the Treaty'. [19]

28. Here, I should like to draw a parallel with the Court's case-law on the inadequate implementation of directives by a Member State.

29. According to settled case-law, whilst a Member State does not necessarily need to take legislative action in order to implement a directive, it is none the less essential that the national law at issue *effectively guarantees* that the directive will be applied in full, that the legal position under national law is sufficiently precise and clear and that individuals are made fully aware of their rights and, where appropriate, may rely on them before the national courts. [20]

18 — Opinion in *Commission* v *Austria* and *Commission* v *Sweden*, both cited in footnote 9, point 62.

19 — Case 812/79 *Burgoa* [1980] ECR 2787, paragraph 6 (emphasis added); and Case C-466/98 *Commission* v *United Kingdom* [2002] ECR I-9427, paragraph 23 and the case-law cited there.

20 — See Case 70/03 *Commission* v *Spain* [2004] ECR I-7999, paragraph 15 and the case-law cited there. For example, the Court has held that 'the existence of general principles of constitutional or administrative law' (Case 29/84 *Commission* v *Germany* [1985] ECR 1661, paragraph 23) or 'an existing legal framework' (Case C-190/90 *Commission* v *Netherlands* [1992] ECR I-3265, paragraph 17) may suffice to implement the directive, provided that they comply with these minimum requirements.

30. The Court has also held that the mere existence of an administrative practice that complies with the directive [21] or the possibility for the judiciary to interpret national law in conformity with the directive [22] does not absolve the Member State from enacting proper, binding implementation measures. The Court has indicated that there must be no possibility, whether practical or even theoretical, that the manner in which the directive has been implemented is liable to jeopardise the due implementation of the rules it lays down. [23]

31. Furthermore, the Court has made it clear that a Member State cannot invoke the direct effect of directives to defend itself against the allegation that it has failed to transpose a directive in full. [24]

32. In my view, those principles can and should be applied here, *mutatis mutandis*. Indeed, the Court in *Commission* v *Austria* and *Commission* v *Sweden* appears to have adopted a standard very similar to that set by that case-law; and has effectively required *a guarantee* that restrictions to capital movements and to payments, as provided for in Articles 57(2), 59 and 60(1) EC, could if necessary be applied. [25]

33. I do not believe that Finland can provide such a guarantee.

34. Clearly, its ability to do so would depend, ultimately, on how an international court or an arbitral tribunal interprets the phrase 'within the limits authorised by its own laws and decrees'. In accordance with settled case-law, an international treaty must be interpreted by reference to the terms in which it is worded and in the light of its objectives. Article 31 of the Vienna Convention, [26] which expresses in this respect general customary international law, [27] states that a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. [28] Possibly, an argument could be made applying that provision to persuade an international court or an arbitral tribunal to interpret the contested clause as referring to Community law.

21 — See, for example, Case C-339/87 *Commission* v *Netherlands* [1990] ECR I-851, paragraph 36.

22 — See, for example, Case C-338/91 *Steenhorst-Neerings* [1993] ECR I-5475, paragraphs 32 to 34.

23 — See, for example, Case 363/85 *Commission* v *Italy* [1987] ECR 1733, paragraphs 10 and 12.

24 — See, for example, Case 102/79 *Commission* v *Belgium* [1980] ECR 1473, paragraph 12; Case C-208/90 *Emmott* [1991] ECR I-4269, paragraph 20; and Case C-96/95 *Commission* v *Germany* [1997] ECR I-1653, paragraph 37.

25 — See *Commission* v *Austria*, paragraphs 38 and 40, and *Commission* v *Sweden*, paragraphs 39 and 41, both cited in footnote 9.

26 — See point 8 and footnote 14 above.

27 — See, for example, International Court of Justice, *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, p. 625, paragraph 37.

28 — See Case C-268/99 *Jany and Others* [2001] ECR I-8615, paragraph 35; and Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 40.

35. However, I regard that as too uncertain. Without it being necessary to examine the issue in detail, I do not believe that the application of Article 31 of the Vienna Convention or any other relevant rule of treaty interpretation can provide a sufficient guarantee that Finland could apply restrictions to capital movements and to payments in accordance with Articles 57(2), 59 and 60(1) EC. The mere possibility that an international court or an arbitral tribunal might interpret the contested clause in that way does not suffice to discharge Finland's obligations.

36. By contrast, in *Commission* v *Austria*, the Court noted that Austria intended to introduce, in its investment agreements under negotiation or when the existing agreements were renewed, a clause which would reserve certain powers to regional organisations, thereby making it possible to apply any measures restricting movements of capital and payments which might be adopted by the Council. The Court acknowledged that such a clause should, in principle, be considered capable of removing the established incompatibility. [29] A clause with those characteristics is, however, quite different from the contested clause.

37. What the Court said about the clause that Austria intended to include in future agreements cannot therefore be applied by analogy.

38. I therefore conclude that the agreements at issue do not contain a provision allowing Finland to exercise its rights and to fulfil its obligations as a member of the Community.

*Is there an international law mechanism which makes it possible for Finland to exercise its rights and to fulfil its obligations as a member of the Community?*

39. The Lithuanian and Hungarian Governments consider that a Member State could take restrictive measures by making use of the possibilities provided for by international law, such as the suspension or termination of the

29 — *Commission* v *Austria*, cited in footnote 9, paragraphs 40 and 41. However, the Court noted that it was common ground that Austria had not taken any steps, 'within the period prescribed by the Commission in its reasoned opinion, with regard to the third countries concerned, designed 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 may arise from the application of the investment agreements concluded with those third countries' (point 42).

treaty by application of the *clausula rebus sic stantibus*. [30]

40. In the procedure leading up to *Commission* v *Austria* and *Commission* v *Sweden*, the defendant Member States put forward various mechanisms under international law, including the *clausula rebus sic stantibus*, that they suggested would enable them to exercise their rights and to fulfil their obligations as members of the Community. [31]

41. The Court was categorical in rejecting these arguments. [32] It held that the mechanisms identified by Austria and Sweden did not appear to guarantee that they would be able to fulfil their Community obligations, for two reasons: '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 are inherently incompatible with the practical effectiveness of those measures. 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'. [33]

42. I conclude that there is no international law mechanism which guarantees that Finland will be able to exercise its rights and to fulfil its obligations as a member of the Community.

*Conclusion as to the incompatibility of the agreements with EC law*

43. The agreements at issue contain no express provision allowing Finland to exercise its rights and to fulfil its obligations as a member of the Community. Furthermore, there is no international law mechanism which guarantees that Finland will be able to do so. I therefore conclude that the agreements at issue are incompatible with the powers of the Council to restrict capital movements and payments as provided for in Articles 57(2), 59 and 60(1) EC; and that Finland is under an obligation to take the steps referred to in the second paragraph of Article 307 EC.

30 — See Article 62 of the Vienna Convention, cited at point 9 above.

31 — See the Opinion of Advocate General Poiares Maduro in *Commission* v *Austria* and *Commission* v *Sweden*, both cited in footnote 9, points 55 to 62.

32 — *Commission* v *Austria*, paragraphs 38 to 40, and *Commission* v *Sweden*, paragraphs 39 to 41, both cited in footnote 9.

33 — See further International Court of Justice, *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, paragraph 104: 'The negative and conditional wording of Article 62 of the Vienna Convention on the Law of Treaties is a clear indication moreover that the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases', referred to by this Court in Case C-162/96 *Racke* [1998] ECR I-3655, paragraph 50.

**Has Finland taken the appropriate steps pursuant to the second paragraph of Article 307 EC?**

44. Finland has maintained throughout that the bilateral investment treaties at issue are not incompatible with the Treaty and that therefore no action pursuant to the second paragraph of Article 307 EC is necessary. It is common ground that Finland has indeed taken no steps pursuant to that provision.

45. The Austrian, Hungarian and German Governments submit that, given the economic and political importance of the bilateral investment treaties at issue, terminating them in order to achieve compliance with Community law could only be envisaged as a last resort. Indeed, because restrictive measures are generally temporary in character, definitively terminating the existing treaties would be disproportionate.

46. In *Commission* v *Austria* and *Commission* v *Sweden*, the Court nowhere indicated that the defendant Member States were obliged to terminate the bilateral investment treaties there at issue.

47. The Court merely commented that the incompatibilities with the Treaty to which those bilateral investment treaties gave rise were not limited to the defendant Member State in each individual case. The Court therefore held that, in accordance with the second paragraph of Article 307 EC, the Member States must, where necessary, assist each other with a view to eliminating the incompatibilities established and must adopt, where appropriate, a common attitude. The Court added that it was for the Commission, in the context of its duty under Article 211 EC to ensure that the provisions of the Treaty are applied, to take any steps which might facilitate mutual assistance between the Member States concerned and their adoption of a common attitude. [34]

48. Those remarks apply equally to the present case.

49. Moreover, in *Commission* v *Portugal* [35] the Court explained how an infringement of Article 307 EC can be remedied. It held that although, in the context of Article 307 EC, 'the

34 — *Commission* v *Austria*, paragraphs 43 and 44, and *Commission* v *Sweden*, paragraphs 43 and 44 (both cited in footnote 9).

35 — Case C-62/98 [2000] ECR I-5171.

Member States have a choice as to the appropriate steps to be taken, they are nevertheless under an obligation to eliminate any incompatibilities existing between a pre-Community convention and the EC Treaty. If a Member State encounters difficulties which make adjustment of an agreement impossible, an obligation to denounce that agreement cannot … be excluded.' [36] In response to Portugal's argument that such denunciation would involve a disproportionate disregard of its foreign policy interests as compared with the Community interest, the Court pointed out that the balance between the foreign policy interests of a Member State and the Community interest is already incorporated in Article 307 EC, in that that provision 'allows a Member State not to apply a Community provision in order to respect the rights of third countries deriving from a prior agreement and to perform its obligations thereunder. That article also allows them to choose the appropriate means of rendering the agreement concerned compatible with Community law.' [37]

50. I therefore conclude that, by failing to take the appropriate steps in accordance with the second paragraph of Article 307 EC to eliminate the incompatibilities relating to provisions on transfers in the bilateral investment treaties concluded with the Russian Federation (the former Soviet Union), Belarus, China, Malaysia, Sri Lanka and Uzbekistan, the Republic of Finland has failed to fulfil its obligations under Article 307 EC.

**The principle of non-discrimination**

51. The Hungarian and German Governments submit that establishing an incompatibility on the basis of the second paragraph of Article 307 EC would be contrary to the principle of freedom of competition within the internal market and to the principle of non-discrimination. Both Finland and the EU citizens and companies to which the treaties apply would be disadvantaged in comparison with other Member States and persons to which bilateral investment treaties that have *not* been criticised by the Commission apply.

52. It is settled case-law that the principle of non-discrimination requires that comparable situations must not be treated differently and

36 — *Commission* v *Portugal*, cited in footnote 35, paragraph 49.
37 — *Commission* v *Portugal*, cited in footnote 35, paragraph 50.

that different situations must not be treated in the same way unless such treatment is objectively justified. [38]

53. However, the situation of Member States that have been the subject of proceedings under Article 226 EC is objectively different from that of Member States that have not been the subject of such proceedings. The contrary position would seriously undermine the freedom of the Commission to bring infringement proceedings as it deems necessary in fulfilment of its role as guardian of the Treaty.

54. In that role, the Commission alone is competent to decide whether it is appropriate to bring proceedings against a Member State for a declaration that it has failed to fulfil its obligations, and on account of which conduct or omission attributable to the Member State concerned those proceedings should be brought. In exercising its powers under Article 226 EC, the Commission does not have to show that there is a specific interest in bringing an action. [39]

55. Moreover, it is settled law that a Member State may not rely on the fact that other Member States have also failed to perform their obligations in order to justify its own failure to fulfil its obligations under the Treaty. In the Community legal order established by the Treaty, the implementation of Community law by the Member States cannot be made subject to a condition of reciprocity. Articles 226 EC and 227 EC provide the appropriate remedies in such cases. [40]

56. The argument based on the prohibition of discrimination must therefore be rejected.

**Costs**

57. 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. The Commission has asked for costs. Finland should therefore be ordered to bear the costs.

38 — Case C-34/08 *Azienda Agricola Disarò Antonio and Others* [2009] ECR I-4023, paragraph 67 and the case-law cited there.

39 — See Case C-476/98 *Commission* v *Germany* [2002] ECR I-9855, paragraph 38 and the case-law cited there.

40 — See Case C-163/99 *Portugal* v *Commission* [2001] ECR I-2613, paragraph 22 and the case-law cited there.

**Conclusion**

58. I therefore consider that the Court should:

— declare that, by failing to take the appropriate steps in accordance with the second paragraph of Article 307 EC to eliminate the incompatibilities relating to provisions on transfers in the bilateral investment treaties concluded with the Russian Federation (the former Soviet Union), Belarus, China, Malaysia, Sri Lanka and Uzbekistan, the Republic of Finland has failed to fulfil its obligations under Article 307 EC;

— order Finland to pay the costs.