Currently, the CCP (Articles 131-133 EC) includes:

1) tariff rates
2) conclusion of trade agreements including trade in services and the commercial aspects of intellectual property
3) uniformity in trade liberalization measures
4) trade defence instruments

Changes under Lisbon Treaty (Articles 206, 207 TFEU)

1) The scope of CCP is extended to include foreign direct investments (Article 207(1))
2) The role of the European Parliament in the negotiation and conclusion of trade agreements is enhanced:
   a. measures defining the framework for implementing CCP are to be taken by the Council and the European Parliament in accordance with the ordinary legislative procedure (207(2))
   b. the Commission must inform the Parliament on the progress of negotiation (207(3))

   However, initiative for the conclusion and negotiation of trade agreements is entrusted to the Council and the Commission (207(3))

   The negotiation and conclusion of agreements on FDI requires unanimity “where such agreements include provisions for which unanimity is required for the adoption of internal rules” (207(4))

3) Agreements relating to trade in cultural, audiovisual, educational, social and human health services which currently fall within shared competence and must be concluded by both the EC and the Member States (Article 133(6) EC), under Lisbon are to be concluded by the Council only acting by unanimity (207(4)).

What is FDI?

Under Article 3(1)(e) TEU, the competence of the Community in CCP matters is exclusive. But what does exclusivity mean? Under Article 2(1) TEU, only the EU may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the EU or for the implementation of acts of the Union.

Do the Member States lose their competence to conclude BITs in the future?

Will FDI agreements be concluded by the Community alone or as mixed agreements in the future?

What happens to existing BITs?

In so far as they are incompatible with EC obligations, Article 307 EC applies:
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.

What does incompatibility mean?

Does the inclusion of FDI in CCP in itself create an incompatibility between existing BITs and the EC Treaty?

What are the obligations of Member States under Article 307(2)?

Article 307(2) imposes a best efforts obligation which has received an interpretation favourable to the Community. The case law seeks to minimize as far as possible the breach to the integrity of the Community legal order caused by a pre-existing international obligation rather than to give a carte blanche to the Member States to depart from fundamental constitutional principles. The ECJ has held that Article 307 EC is of general scope and applies to any international agreement, irrespective of subject-matter, which is capable of affecting application of the Treaty (see e.g. Case 812/79 Attorney General v Burgoa [1980] ECR 2787). Whilst Article 307 EC allows Member States to honour obligations owed to non-member States under international agreements preceding the Treaty, it does not authorise them to exercise rights under such agreements in intra-Community relations (Case C-473/93 Commission v Luxembourg [1996] ECR I-3207). It requires the Member State to take specific steps and exhaust all avenues available in order to eliminate all incompatibilities arising from the international agreement in question. Thus, the Member State must take steps to adjust the agreement in accordance with its terms or, if such adjustment is not possible, to renegotiate it. It appears that, if such renegotiation fails, and the agreement provides for the possibility of denunciation, the Member State must in principle denounce the agreement unless there is a good reason not to do so. Although the possibility of safeguarding the Community interest by political means is not excluded, the balance here it tilted heavily against the Member State. In Commission v Portugal1 which concerned a pre-existing agreement on merchant shipping with Angola, the Portuguese government argued that denunciation would involve a disproportionate disregard of the interests linked to its foreign policy as compared with the Community interest. The ECJ dismissed that argument without looking into its merits stating that the balance between the foreign-policy interests of a Member State and the Community interest is already incorporated in Article 307 EC.

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