CHALLENGING THE NOTION OF COHERENCE IN EU FOREIGN INVESTMENT POLICY

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There have long been demands for more coherence in EU external action. The Lisbon Treaty has introduced important institutional changes in this respect. However, coherence – in the broad sense of a positive process that is focused on establishing synergies between various policy fields and actors – is still largely lacking for an EU foreign investment policy. An institutional bifurcation of different Directorates-General puts fuel to the fire of a conceptual confusion of intra-EU and extra-EU investment agreements. As a consequence, overarching concerns such as compatibility with the principle of autonomy or effects of investor-state arbitration on the internal market are missing a coherent approach.

Keywords: BITs, coherence, intra-EU, extra-EU, EU foreign investment policy

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I. INTRODUCTION

'Who do I call if I want to speak to Europe?' Although Henry Kissinger probably never actually made this remark,[1] it may by now be one of the most often quoted sentence in textbooks on EU law. It does indeed convey a discomforting sense of reality. EU external relations law is a

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[1] Gideon Rachman, 'Kissinger never wanted to dial Europe', *FT Blogs: The World* http://blogs.ft.com/the-world/2009/07/kissinger-never-wanted-to-dial-europe/, accessed on 18 December 2015.

confusing and complex, almost impenetrable aspect of EU law. This is partly due to technical legal dimension such as the delimitation of competences. More importantly, though, the EU lacks a sense of persistence and reliability when acting internationally. There is in fact a requirement of coherence underlying EU external action. Falling short of a legal principle, however, it is more of an idea; a notion of unity in EU internal and external policy. The Lisbon Treaty meant to make the requirement of coherence more tangible. Using the example of investor-state arbitration (ISDS), the present essay, however, challenges the idea of coherence as an underlying principle of EU foreign investment policy. Whereas the Commission strongly opposes ISDS in intra-EU bilateral investment agreements (BITs), i.e. BITs concluded between two Member States, it vigorously supports the inclusion of ISDS in EU investment agreements. Additionally, the position of Member States diverges significantly on the question of validity of ISDS provisions in intra-EU BITs. This essay claims that the resulting incoherence is rooted in the misconceived application of 'intra-EU' and 'extra-EU' as more than descriptive concepts and the lack of political willingness of Member States.

This first part introduces the requirement for coherence and briefly discusses how it relates to the field of EU foreign investment policy. The second part discusses the Commission's and the Member States' position *vis-à-vis* ISDS in intra-EU and extra-EU BITs. The last part demonstrates that a misconception of 'intra-EU' and 'extra-EU' as distinct concepts or categories of international agreements is causing contradictory positions within the Commission, and prevents the formation of a coherent EU foreign investment policy.

II. Coherence in EU External Action: The Legacy of Lisbon

The requirement of coherence must principally be understood in the context of the Treaty of Maastricht, which left the EU divided along three distinct and separate pillars. While the Community was supranational in character, the common foreign and security policy (CFSP), and police and judicial cooperation in criminal matters remained intergovernmental.[2] The pillars made it virtually impossible for the EU to engage as a unified entity in foreign policy, hence the desire for a single contact point for third countries. The 2007 Inter-Governmental Conference (IGC) was thus explicitly endowed with '... enhancing the efficiency and democratic legitimacy of the enlarged Union, as well as the *coherence of its external action*.'[3] The Commission emphasizes in similar terms the importance of '...

[2] Ramses A Wessel, 'The Inside Looking Out: Consistency and Delimitation in EU External Relations' (2000) 37(5) Common Market Law Review 1135.

[3] IGC 2007 mandate, para 1, emphasis added; the mandate was concluded by the European Council of 21-22 June 2007 and a draft mandate was attached to the Presidency Conclusions of 20 July 2007 (Doc ST 11177/1/07 REV 1).

articulating coherent and effective external policies…'.[4]The Lisbon Treaty subsequently delivered a wide-ranging reform.[5] It abolished the pillars and further integrated CFSP into the unified institutional framework. It shifted responsibility for external representation on issues concerning CFSP from the rotating presidency of the Council to the president-elect of the European Council.[6] It strengthened the role of the High Representative, who presides over the Foreign Affairs Council, is vice-president of the Commission, and also takes part in the work of the European Council.[7] And most importantly, it consolidated a substantive requirement of coherence in Article 13(1) of the Treaty on European Union (TEU), which now reads: 'The Union shall have an institutional framework which shall […] ensure the consistency, effectiveness and continuity of its policies and actions.' Additionally, Article 21(3) TEU requires explicitly that, '[t]he Union shall ensure consistency between the different areas of its external action and between these and its other policies.'

In order to understand the content of this requirement, it is paramount to first address a linguistic discrepancy of the different language versions of the TEU. Where the English language version refers to 'consistency' the French and German language versions, for instance, refer to '*cohérence*' and '*Kohärenz*', respectively. This could be dismissed as mere linguistic variance, which defied the constitutional reform. Nonetheless, as a lawyer one cannot ignore that coherence and consistency transcend language and manifest themselves in two substantively distinct concepts. While consistency is limited to the absence of substantive incompatibility, coherence refers to a positive and dynamic process focused on creating synergies between various policies and actors.[8] 'Hence, coherence in law would be a matter of degree, whereas consistency would be a static notion in the sense that concepts of law can be more or less coherent but cannot be more or less consistent. They are either consistent or not.'[9]

Thus, the Treaty requires a dynamic process that establishes synergies, rather than laying out the static objective of achieving overall compatibility.[10] In this respect, however, the Lisbon Treaty merely puts lipstick on a pig, a futile attempt to conceal real impediments for policy

[4] Commission Communication, 'Europe in the World – Some Practical Proposals for Greater Coherence, Effectiveness and Visibility', (COM(2006) 278 final), 5.
[5] On the structural and institutional changes see Jan Gaspers, 'The quest for European foreign policy consistency and the Treaty of Lisbon' (2008) Humanitas Journal of European Studies, accessible at http://www.sbc.org.pl/dlibra/publication?id=13362&tab=3.
[6] Art 15(6) TEU.
[7] Arts 18(4) and 15(2) TEU, respectively.
[8] Christophe Hillion, 'Tous pour un, un pour tous! Coherence in the External Relations of the European Union' in Marise Cremona (ed), *Developments in EU External Relations Law* (OUP 2008), 13-14; Wessel (n 2), 1150.
[9] Hillion (n 8), 14; Wessel (n 2), 1150.
[10] Pascal Gauttier, 'Horizontal Coherence and the External Competences of the European Union' (2004) 10(1) European Law Journal 23, 26; Hillion (n 8), 15.

coherence with institutional appearances. If anything, Lisbon enhanced horizontal cross-pillar coherence, albeit that CFSP still remains the odd-one-out amongst the EU's external policies.[11] But the need for coherence goes beyond managing the intergovernmental and supranational structures of the post-Maastricht pillar architecture.[12] Article 13 TEU indicates that coherence stretches across all policy fields, external as well as internal. More importantly, though, it is a multi-dimensional concept. In addition to its horizontal cross-pillar dimension, coherence must also be pursued horizontally within a policy field. It, furthermore, extends vertically, i.e. in an EU-Member State relationship, and institutionally, i.e. between policies of different EU institutions as well as policies formulated in different departments of the same EU institution.[13]

This is of particular importance for EU foreign investment policy. Internally, investment is largely regulated through the internal market provisions in the Treaty on the Functioning of the European Union (TFEU), and in particular the free movement of capital and the right of establishment. However, there still is a tight network of intra-EU BITs in force. Externally, on the other hand, the EU was endowed with external competence in the regulation of foreign direct investment (FDI) only with the Lisbon Treaty. Nonetheless, there are already a number of EU investment agreements[14] under negotiation, i.e. EU-Singapore free trade agreement (FTA)[15] and the EU-Canada Comprehensive Economic and Trade Agreement (CETA),[16]. Moreover, the EU approach to drafting ISDS provisions currently transitions towards a permanent investment court in the EU-Vietnam FTA[17] and the EU-US Transatlantic Trade and Investment Partnership[18] (TTIP) agreement.[19] One might, therefore,

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[11] Piet Eeckhout, 'The EU's Common Foreign and Security Policy after Lisbon: From Pillar Talk to Constitutionalism' in Andrea Biondi, Piet Eeckhout and Stefanie Ripley (eds), *EU Law after Lisbon* (OUP 2012), 269.

[12] Gauttier (n 10), 27; Hillion (n 8); Wessel (n 2).

[13] Carmen Gebhard, 'Coherence' in Christopher J Hill and Michael Smith (eds), *International relations and the European Union*, 2nd vol (OUP 2011), 107-109.

[14] For the purpose of this paper the term 'EU investment agreement' includes EU trade agreements with comprehensive chapters on investment, and which provide for investor-state dispute resolution.

[15] Commission Press Release, 'Singapore: The Commission to request a Court of Justice Opinion on the trade deal', Brussels, 30 October 2014, http://europa.eu/rapid/press-release_IP-14-1235_en.htm, accessed on 19 Dec 2015.

[16] Commission Press Release, 'Canada–EU Summit – A new era in Canada–EU relations: Declaration by the Prime Minister of Canada and the Presidents of the European Council and the European Commission', Ottawa, 29 September 2014 http://europa.eu/rapid/press-release_STATEMENT-14-288_en.htm accessed on 19 December 2015.

[17] Press Statement by the President of the European Commission Jean-Claude Juncker, the President of the European Council Donald Tusk and the Prime Minister of Viet Nam Nguyen Tan Dung, Brussels, 2 December 2015 http://europa.eu/rapid/press-release_IP-15-5467_en.htm accessed on 19 Dec 2015.

[18] Council of the European Union, 'Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America' (Doc ST 11103/13).

expect the Commission and the Member States to work together towards a coherent approach on ISDS provisions in investment agreements. On the contrary, however, as we will see the schizophrenic position of the Commission on ISDS in intra-EU BITs and EU investment agreements is only exacerbated by the Member States' pursuit of diverging national interests in intra-EU investment disputes.

III. The Commission's Position on Investor-State Arbitration

1. The Case of intra-EU BITs
Intra-EU BITs are in fact a peculiar phenomenon of EU enlargement. Most of the Eastern European and Mediterranean countries that acceded to the EU in 2004 and 2007 transitioned from heavily state-controlled to free-market economies only since the early 1990s. In the eyes of the EU, these economies had to become more stable, more investor friendly and more integrated into the EU market. Unsurprisingly, these states moved on to conclude numerous BITs with 'old' Member States. It is ironic, though, that the conclusion of these BITs was explicitly encouraged by the EU,[20] seemingly unaware that they would turn into BITs between Member States upon accession. Having turned into a threat for the integrity of the internal market, the Commission is now fighting intra-EU BITs as a beast of its own creation.

Even less comprehensible is the fact that the EU was distinctly aware of the problem, but refused to address it. Reports of the Economic and Financial Committee have raised the issue as early as 2006, but neither the Member States nor the EU have demonstrated much interest in resolving it. The EU sat on a ticking bomb and decided to simply wait and see whether, and to what extent, an explosion would materialize on the internal market. In the meantime, the Commission focused its action on interventions as *amicus curiae*, in a number of intra-EU investment disputes. In *US Steel v. Slovakia*[21] and *EURAM v. Slovakia*,[22] for instance, the Commission submitted briefs emphasizing above all that ISDS in intra-EU BITs constitutes a violation of the EU principle of non-discrimination. In

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[19] The Commission presented a revised textual proposal for a permanent investment court in TTIP on 12 November 2015 http://trade.ec.europa.eu/doclib/press/index.cfm?id=1396&title=EU-finalises-proposal-for-investment-protection-and-Court-System-for-TTIP accessed on 19 December 2015.
[20] See, for instance, OJ L 357/2, 31.12.1994, Europe Agreement Establishing an Association Between the European Economic Communities and their Member States, of the One Part, and Romania, of the Other Part signed on 21.12.1993, art 74(2).
[21] *U.S. Steel Global Holdings I B.V.* v. *Slovak Republic*, UNCITRAL, (PCA Case No. 2013-16).
[22] *European American Investment Bank AG (EURAM) v. Slovak Republic,* UNCITRAL, (PCA Case No. 2010-17).

Micula v. Romania[23] the Commission focused on the supremacy of EU law over the intra-EU BIT. Investment tribunals have, however, largely ignored interventions of the Commission on these points. Other arguments of the Commission are based on international law, and in particular Articles 30(3) and 59 of the Vienna Convention on the Law of Treaties of 1969. Accordingly, in three disputes against Slovakia the Commission reasoned that EU Treaties supersede or alternatively impliedly terminate pre-accession intra-EU BIT.[24]

However, the number of investment disputes initiated under intra-EU BITs has significantly increased during the last decade. And not least since the *Micula* award, which effectively reinstated illegal state aid, the issue now puts increasingly more pressure on the EU. On June 18, 2015 the Commission finally took a proactive approach by formally notifying five Member States of the initiation of infringement proceedings over the termination of intra-EU BITs.[25] The formal letter of notification sent to the Swedish government[26] is for present purposes considered to illustrate the Commission's general position *vis-à-vis* intra-EU BITs. In this letter, the Commission pursues a number of arguments. Most relevant, and by all means most convincing is the reasoning that the substantive as well as procedural protection provided under intra-EU BITs violates the principle of non-discrimination on the ground of nationality, a cornerstone of the EU's internal market. In as far as BITs simply provide more favorable rights to investors than those available under the Treaty, these agreements do not present a *prima facie* violation of EU law.[27] However, investors of a nationality other than that of either State Party to an intra-EU BIT will neither benefit from the substantive rights nor have access to procedural dispute resolution mechanisms, such as investor-state arbitration. In other words, these investors are effectively discriminated against on the ground of their (corporate) nationality. In this respect, it is noteworthy that the general principle of non-discrimination, now enshrined in Article 18

[23] *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L.* v. *Romania*, ICSID (Case No. ARB/05/20).

[24] *U.S. Steel* (n 21); *EURAM* (n 22); and *Achmea B.V. (formerly Eureko)* v. *The Slovak Republic*, UNCITRAL, (PCA Case No. 2008-13).

[25] Commission Press Release, 'Commission asks Member States to terminate their intra-EU bilateral investment treaties', Brussels, 18 June 2015, http://europa.eu/rapid/press-release_IP-15-5198_en.htm, accessed on 19 December 2015; for a comprehensive analysis of the Commission's reasoning see Joel Dahlquist, Hannes Lenk, Love Rönnelid, 'The infringement proceedings over intra-EU investment treaties – an analysis of the case against Sweden' (2016) SIEPS European Policy Analysis, forthcoming.

[26] Formell underrättelse – överträdelse nummer 2013/2207, skrivelse från Europeiska kommissionen, Generalsekretariatet till Sveriges ständiga representation vid Europeiska unionen, June 18 2015 (only available in Swedish).

[27] Angelos Dimopoulos, 'The Validity and Applicatbility of International Investment Agreements Between EU Member States under EU and International Law' (2011) 48 *Common Market Law Review* 63, 78; Hanno Wehland, 'Intra-EU Investment Agreements and Arbitration: Is European Community Law an Obstacle?' (2009) 58(2) International and Comparative Law Quarterly 297, 310.

TFEU, not only applies to natural persons but also extends to legal entities on the internal market.[28]

All in all, the focus of the Commission in respect of ISDS in intra-EU BITs is clear: presenting a Treaty violation they need to go! This position is equally reflected in the Commission's *amicus* briefs, which broadly attack the jurisdiction of tribunals and claim the inapplicability of intra-EU BITs. One might expect similar concerns to arise in the context of EU investment agreements. Paradoxically, though, the compatibility of ISDS in these agreements with EU law plays no significant role in EU foreign investment policy.

2. The Case of EU Investment Agreements

With the coming into force of the Lisbon Treaty Article 207 TFEU endowed the EU with exclusive competence in FDI as part of its common commercial policy. BITs traditionally cover FDI as well as portfolio investments and it remains unclear in this respect if the conclusion of traditional investment agreements falls entirely within EU competence.[29] The issue has recently been brought before the CJEU in a request for an opinion under Article 218(11) TFEU on the EU-Singapore FTA.[30] Regardless of the outcome of the CJEU's opinion, as long as the subject matter of EU investment agreements falls broadly within the scope of the post-Lisbon common commercial policy the EU is in principle also competent to negotiate ISDS provisions.

In July 2010 the Commission issued a communication clarifying how it plans on using its new competence. The communication emphasizes the link between FDI and economic growth and welfare, and underlines the importance of investment agreements as an instrument to harness these benefits. On investor-state arbitration, the communication reads:

> Investor-state [arbitration] is such an established feature of investment agreements that its absence would in fact discourage

[28] Case C-221/89 *The Queen/Secretary of State for Transport, ex parte Factortame* EU:C:1991:320.

[29] The Commission rather strongly argues in favor of a comprehensive investment competences, see Proposal for a Regulation of the European Parliament and of the Council establishing a framework for managing financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the European Union is party (COM (2012) 335 final), pt 1.2.

[30] OJ C 363/18, 3.11.2015, Request for an opinion submitted by the European Commission pursuant to Article 218(11) TFEU, (2015/C 363/22). The request reads: 'Does the Union have the requisite competence to sign and conclude alone the Free Trade Agreement with Singapore? More specifically:

- Which provisions of the agreement fall within the Union's exclusive competence?
- Which provisions of the agreement fall within the Union's shared competence? and

Is there any provision of the agreement that falls within the exclusive competence of the Member States?'

> investors and make a host economy less attractive than others. For these reasons, future EU agreements including investment protection should include investor-state dispute settlement.[31]

The communication also acknowledges that the inclusion of ISDS provisions in EU agreements presents challenges in broadly two respects. First, the respective responsibility of the EU and its Member States for measures challenged in investment arbitration needs to be clarified. Second EU investment agreements should endeavor to reform ISDS by increasing transparency, foreseeability and independence of arbitrators.

The Commission addressed the first challenge in its proposal for a regulation, which was adopted in July 2014.[32] Regulation 912/2014 lays out the internal framework for the attribution of financial responsibility between the EU and the Member States and governs the question on who is best placed to act as respondent before an investment tribunal. It is, thus, based on the assumption that future EU investment agreements provide for ISDS provisions and the Commission's proposal, referring to the Commission's earlier communication, was explicit in this respect.[33] The second challenge found strong reinforcement in public protest surrounding the TTIP negotiations. The vociferous criticism of ISDS in TTIP focuses on the disruptive effect of allegedly pro-investor tribunals on domestic regulation. The Commission swiftly responded with a far-reaching transparency campaign and provided open access to a number of key policy and negotiating documents.[34] The categorical rejection of ISDS in TTIP was even more clearly reflected in the nearly 150,000 replies to the public consultation that was launched in March 2014.[35] However, rather than outright excluding ISDS from the TTIP negotiations, which would have appeared to be the obvious consequence of the public consultation, the Commission wrapped investor-state dispute resolution into a mantle of democratic reform. A 'new system […] which is subject to democratic principles and scrutiny' was also the explicit *conditio sine qua non*

[31] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, 'Towards a Comprehensive European International Investment Policy' (COM(2010)343 final, 2010), 10.

[32] OJ L 257/121, 28.8.2014, Regulation 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party.

[33] Proposal for a Regulation financial responsibility (n 29) , pt. 1.1.

[34] Commission Press Release, 'European Commission publishes TTIP legal texts as part of transparency initiative', Brussels, 7 January 2015 http://europa.eu/rapid/press-release_IP-15-2980_en.htm accessed on 19 Dec 2015.

[35] Commission Staff Working Document, 'Report on Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement' (SWD(2015) 3 final), in particular see pt. 3.1.

for the European Parliament's consent to TTIP.[36] It is on this backdrop that one has to read the Commission proposal for a permanent investment court in TTIP, and broader ambition for multilateral efforts in this respect.[37] Bottom line: investor-state dispute resolution is inseparable from EU trade and investment agreements, although perhaps in different form and shape.

In her concept paper of May 2015,[38] Trade Commissioner Cecilia Malmström discusses the opportunity for the EU to reform the traditional ISDS system in order to fully ensure the right to regulate for the EU and its Member States. The concept paper highlights the progress that has already been made in the EU-Singapore FTA and CETA, which, absurdly enough, feature traditional ISDS provisions. It also underlines the aspirations to develop a permanent investment court with an appeal mechanism. Whereas the prospects for such a mechanism are unclear in the context of TTIP, it appears to be already part of the EU-Vietnam FTA.[39] Then, in October 2015, the Commission released its new trade strategy that once again lays focus on the EU as a reform actor in the field of investment protection by reinforcing the right to regulate and transparency, particularly with regard to enhancing legitimacy of investor-state dispute resolution.[40]

The transition towards a more institutionalized and more court-like ISDS mechanism in future EU trade and investment agreements responds to the concerns voiced by public society and demands from the European Parliament. Nevertheless, none of these aspects addresses the compatibility of ISDS provisions with EU law. Considering the Commission's forceful attempts to wipe out intra-EU BITs specifically because of the effect that ISDS has on the internal market, it is startling that none of the above documents addresses the effect of ISDS in EU investment agreements. On the contrary, the positive effects of ISDS on the level of investment protection in these agreements have clearly been endorsed. And on the wider issue of compatibility, only the concept paper

[36] European Parliament resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (2014/2228(INI), pt. 2.xv.

[37] Commission Press Release, 'EU finalises proposal for investment protection and Court System for TTIP', Brussels, 12 November 2015, http://europa.eu/rapid/press-release_IP-15-6059_en.htm, accessed on 19 Dec 2015; for the revised negotiating text see n 19.

[38] Cecilia Malmström, 'Investment in TTIP and beyond – the path for reform: Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court', Concept Paper, 5 May 2015 http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF accessed on 20 December 2015.

[39]Cecilia Malmström, 'Done deal with Vietnam', *Blog*, 2 Dec 2015 http://ec.europa.eu/commission/2014-2019/malmstrom/blog/done-deal-vietnam_enaccessed on 20 December 2015.

[40] European Commission, 'Trade for all - Towards a more responsible trade and investment policy', 14 October 2015, pt. 4.1.2.

briefly acknowledges the relevance of the principle of autonomy, before quickly dismissing any risk of incompatibility on that basis. In the light of Opinion 2/13,[41] however, there remain legitimate concerns that ISDS provisions clash with the principle of autonomy.[42] And even though these concerns can be addressed through drafting,[43] a shift from traditional ISDS to a permanent investment court are not going to do the trick.

3. The Position of the Member States

Now turning to the position of the Member States, it is noteworthy that, the unaligned EU approach towards ISDS is not only reflected institutionally within the Commission, but also perpetuated vertically in the EU-Member State relationship. Despite the commonly acknowledged inconsistencies of intra-EU BITs with the internal market, Member States have thus far lacked a common approach on the validity of ISDS provisions in intra-EU BITs. This gap is particularly obvious when comparing the submissions of respondent states with those of the investor's home country, i.e. the Member State of which the investor is a national. Moreover, Member State submissions are often not in line with observations advanced by the Commission. In *Achmea*, for instance, the Commission intervened as *amicus curiae* challenging the jurisdiction of the tribunal.[44] In its observations the Commission takes the position that, although the Netherlands-Slovakia BIT was not impliedly terminated (Article 59 VCLT), in accordance with Article 30(3) VCLT the provisions on dispute resolution are no longer applicable.[45] Although Slovakia generally supports the Commission's line of reasoning, it does not, unlike the Commission, pursue arguments purely based on EU law such as a violation of the EU principle of non-discrimination. The Netherlands also intervened as *amicus curiae* before the tribunal, forcefully arguing in favour of the continuous application of the BIT.[46] The tribunal in *Achmea* largely ignored the arguments made by the Commission on the basis of EU law, and disagreed with Slovakia on its interpretation of Articles 59 and 30(3) VCLT.

Subsequently in *EURAM* the Commission also submitted written observations, challenging the jurisdiction of the tribunal on similar grounds. This time, however, the Commission '*... confines its arguments to EU law*'.[47] The Commission maintains that the subject matter of the BIT falls squarely within the scope of the TFEU and presents a violation of the non-

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[41] Opinion 2/13, *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms,* EU:C:2014:2454.
[42] Hannes Lenk, 'Investor-state arbitration under TTIP: Resolving investment disputes in an (autonomous) EU legal order' (SIEPS Report (2015:3), 2015).
[43] Stephan W Schill, 'Editorial: Opinion 2/13 – The End for Dispute Settlement in EU Trade and Investment Agreements?' (2015) 16(3) The Journal of World Investment and Trade 379.
[44] *Achmea* (n 24), Award on Jurisdiction, paras 175 ff.
[45] ibid, paras 187-193.
[46] ibid, paras 155-163.
[47] *EURAM* (n 22), Award on Jurisdiction para 117, emphasis added.

discrimination principle under EU law. The Commission furthermore relies on the supremacy of EU law, the *sui generis* character of EU Treaties, the rule of domestic courts as ordinary courts of the EU legal order, and Article 344 TFEU.[48] Grounding its reasoning more substantively in international law, Slovakia supports the position of the Commission, based on Article 59 and Article 30(3) VCLT.[49] The Czech Republic also intervened as *amicus*, supporting the Commission and Slovakia in its reasoning.[50] Austria, on the other hand, took an opposing stand in its own *amicus* brief, submitting that the BIT remains in force and explicitly endorsing the tribunals reasoning in *Achmea* to this extent.[51]

The above is indicative of a split between the Member States, which are commonly on the receiving end of disputes, i.e. Slovakia and the Czech Republic, and those that historically have been home to investors, i.e. the Netherlands. While the former have an interest in ceding their role as a 'punching ball' for foreign investors, the latter have a legitimate policy interest in protecting their investors, on whose well being the economy of the Member States, such as the Netherlands, largely depends. But even the reasoning of respondent States often appears to deviate from arguments brought by the Commission. The inconsistency between positions of individual Member States and that of the Commission unsurprisingly fails to convince investment tribunals of any existing EU position on this matter.

IV. Synthesis: The 'Intra-EU' vs. 'Extra-EU' Misconception

The diverging positions of the Commission *vis-à-vis* investor-state arbitration in respectively intra-EU and extra-EU BITs are seemingly easy to explain. Intra-EU BITs only involve actors on the internal market and are thus conceived as an internal matter. EU investment agreements, broadly subsumed under the concept of extra-EU BITs, involve relationships with third countries, which is a matter of EU external relations. This is also institutionally reinforced. Intra-EU BITs are the responsibility of the Directorate-General for Financial Stability, Financial Services and Capital Markets Union (DG FISMA), whereas EU investment agreements (including the management of existing BITs between the Member States and third countries) fall within the ambit of the Directorate-General for Trade (DG TRADE). However, although a comparison of the two concepts of 'extra-EU' and 'intra-EU' are helpful for the purpose of contextualization, they risk being misconceived as diametrical opposites. 'Intra-EU' and 'extra-EU' are in fact adjectives that denominate a common legal complex, i.e. BITs and their ISDS provisions, and merely define the broader context of contractual relationships

[48] ibid, paras 118-120.
[49] ibid, paras 83-105.
[50] ibid, paras 121-125.
[51] ibid, para 61.

underlying the investment arbitration. The Commission has acknowledged that external EU policies can have an internal effect, and *vice versa*.[52] This is, however, not reflected in the Commission's approach towards ISDS in intra-EU and extra-EU BITs. Indeed, here the Commission largely ignores that ISDS raise similar concerns, for instance its effect on the internal market and its compatibility with the principle of autonomy.

ISDS allows investors to pursue actions for damages before an international tribunal. Where this benefit is available to a selected group of investors on the internal market, while other investors in a comparable situation are left with judicial recourse before domestic courts only, the system is discriminatory. Unlike domestic courts, investment tribunals are neither entitled to refer questions on the interpretation of EU law to the Court of Justice of the European Union (CJEU), nor bound by the primacy of EU law and the case law of the CJEU.[53] More generally, it facilitates certain investors to pick-and-choose the more favorable procedural framework.[54] This situation may be problematic for the internal market, but it is by no means only symptomatic for investor-state arbitration under intra-EU BITs. On the contrary, a company that is incorporated in a Member State but which is owned or controlled by a national of a third country constitutes a company in accordance with Article 49 TFEU as well as, under certain circumstances, an investor under an extra-EU BIT.[55] It is noteworthy, that the CJEU has already addressed this issue and determined that the nationality of a person or entity, which owns or controls a corporation, is not a criterion that justifies differential treatment.[56] However, while the effect is similar to that under intra-EU BITs, it has not received any attention in the extra-EU context. Additionally, the *Micula* dispute has illustrated how investment awards might have an adverse effect on the internal market. In *Micula*, a dispute brought under the Sweden-Romania BIT, the award effectively reinstated illegal state aid, which Romania formerly withdrew in accordance with the Treaty. In these instances, the investment award constitutes a direct violation of EU law.[57] EU rules on state aid apply to all entities on the internal market including those in foreign ownership. A scenario *à la Micula* is, thus, also conceivable in an extra-EU context.

[52] ibid, paras 127-129.
[53] Wehland (n 27), 300.
[54] Miron discusses the relationship of arbitration tribunals with the CJEU and points out that: '[the CJEU case law] may be identifying arbitration as a "safe shore" from the application of EU law, whenever the European norms may be disadvantageous for the party commencing arbitral proceedings', see Smaranda Miron, 'The Last Bite of the BITs – Supremacy of EU Law versus Investment Treaty Arbitration' (2014) 20(3) European Law Journal 332, 334.
[55] Markus Burgstaller, 'Nationality of Corporate Investors and International Claims against the Investor's Own State' (2006) 7(6) The Journal of World Investment & Trade 857.
[56] *Factortame II* (n 28), paras 29-33.
[57] Christian Tietje and Clemens Wackernagel, 'Enforcement of Intra-EU ICSID Awards' (2015) 16(2) The Journal of World Investment and Trade 205.

As far as the principle of autonomy is concerned, the position of the Commission is remarkably ignorant. In accordance with Article 267 TFEU domestic courts of the Member States can, and in certain circumstances must, refer questions on the interpretation of EU law to the CJEU. In *Opinion 1/09* the CJEU clarified that international agreements, which establish an international court or tribunal, may not '...deprive [domestic] courts of their task, as "ordinary" courts within the European Union legal order, to implement European Union law and, thereby, of the power provided for in Article 267 TFEU.'[58] Relying on *Opinion 1/09* the Commission argues in its official letter of notification that intra-EU investment tribunals are incompatible with the Treaty. Consequently, the Commission believes these investment tribunals to be concerned with the interpretation of EU law. This view is explicitly supported by the Commission's reasoning in its *amicus* briefs in, *inter alia, EURAM*.[59] Yet again, this concern does not arise with regards to ISDS provisions in extra-EU BITs. This is nonsensical considering that the intra-EU or extra-EU character of an investor-state tribunal is irrelevant for the question of whether or not the tribunal is seized with questions on the interpretation of EU law.

Unlike the Member States,[60] the Commission appears to see no link between the exercise of its external competence under Article 207 TFEU and its policy towards intra-EU BITs.[61] This overreliance on 'intra-EU' and 'extra-EU' as distinct legal concepts or categories of international agreements is entirely misleading. They are indeed only relevant from an EU law perspective, but have no bearing whatsoever on international investment tribunals. Hence, it would be erroneous to confine intra-EU BITs to the internal market and extra-EU BITs to EU foreign trade policy, without addressing substantive overlaps.

V. CONCLUDING REMARKS

This essay challenges the notion of coherence in EU foreign investment policy. The brief assessment of policy documents and legal positions demonstrates that the internal and external aspects of this policy area are incoherent and partly inconsistent (horizontal incoherence), which is

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[58] Opinion 1/09 *European Patents Court* [2011] ECR I-1137 , para 80.

[59] *EURAM* (n 22), Award on Jurisdiction, para 120.

[60] Observations of the Netherlands, *Achmea* (n 24), Award on Jurisdiction, para 163:, 'Currently, the European Union Member States are awaiting proposals from the European Commission regarding the future policy towards the new competence pursuant to article 207 TFEU, which will also touch upon the matter of existing BITs of the Member States. [...] The Netherlands deems it inappropriate to anticipate or even predetermine the question of the status of intra-EU BITs [...]'.

[61] Observations of the Commission, ibid, para 176: '[U]nlike intra-EU BITs, it is important to clarify that the European Commission does not take issue with third party arbitration mechanisms set out in [extra-EU] BITs entered into with non-EU countries.'

manifested through diverging positions within the Commission (institutional incoherence). Vertically, this incoherence manifests itself through the lack of a common position amongst the Member States. The reason for the schizophrenic position of the Commission can be found in the overreliance on 'intra-EU' and 'extra-EU' as concepts with conclusive policy ramifications. This is institutionally reflected in an internal bifurcation underlying the delegation of responsibilities to DG FISMA and DG TRADE. It is pivotal that both DGs see beyond this conceptual differentiation and conceive ISDS as a creature of international law, with common characteristics irrespective of its origin in intra-EU or extra-EU BITs. Coherence in this context requires DG FISMA and DG TRADE to work closer together and to coordinate their positions. This does not mean that policies directed at ISDS in an intra-EU and extra-EU context must be identical. Indeed, they cannot! The intricate web of intra-EU BITs simply cannot be renegotiated in accordance with the internal market, while compatibility of ISDS in extra-EU BITs is almost exclusively a drafting issue. As a positive process, coherence merely requires that overlapping concerns be addressed clearly and comprehensively in a manner that is consistent and coherent across the internal and external dimension of this area of EU policy.

In the context of intra-EU BITs, coherence would furthermore be strengthened if the Member States were to align their positions. If the Member States that are commonly home countries to investors would suddenly act as *amicus* in support of a common EU position, it might finally also persuade investment tribunals. In the extra-EU context it would also be helpful if disagreements between Member States were addressed internally while displaying a common position externally. This could be achieved if the Commission becomes the *prima facie* respondent to investment disputes, not unlike the situation in the WTO. It is premature to predict how investment disputes will be handled, but the recently enacted regulation on financial responsibility under EU investment agreements provides a gateway in this respect.[62]

Lastly, while the Lisbon Treaty attempted to reinforce the notion of coherence through institutional reform, reality suggests that existing or subsisting incoherence is more deeply embedded in diverging inter-institutional and domestic policy interests. It is unhelpful that coherence is often referred to in terms of a notion, a concept, a guiding principle or even a mere idea, underlining its non-justiciability in EU law.[63] Coherence is accordingly achieved through other principles of EU law and first and foremost through the principle of loyal cooperation.[64] Loyal cooperation is

[62] Regulation 912/2014 (n 32); for a comprehensive analysis of the Regulation and the respondent mechanism see Hannes Lenk, 'Issues of attribution: responsibility of the EU in investment disputes under CETA' (2016) Transnational Dispute Management (forthcoming).
[63] Gauttier (n 10), 24; Wessel (n 2), 1152.
[64] Hillion (n 8).

indeed instrumental in achieving coherence, but compliance with the principle can be satisfied without ultimately resulting in positive coherence. Therefore, to avoid coherence from becoming a grand idea – which, although perceived desirable from afar, can never actually be achieved – the time may be ripe to reconsider coherence in terms of a legal principle of EU law.