In the recent years, the European Commission has consistently raised various arguments in support of the view on the incompatibility of the intra-EU investment arbitration and the European Union law, being that the settlement of disputes concerning investment is exclusively reserved to the institutional bodies of the Union.

Acting as *amicus curiae* (or "non-claiming party"), the Commission has often intervened in various intra-EU arbitrations, challenging the fact that these arbitration proceedings is in contrary to the EU law. In the leading case of *Micula v. Romania* (ICSID Case No. ARB/05/20), the Commission went further in ordering an ad hoc decision, ordering the losing Member State to refrain from paying the award to the investor.

So far, the Commission's proposed arguments had little success as these arguments had not been adopted or upheld by the arbitral tribunals. In contrast, these arbitral tribunals dismissed the Commission's arguments in brief.

However, this state of affairs has been shaken when the European Court of Justice took the view of the Commission in their decision of *Achmea v. Slovakia*, dated 6th March 2018.

The dispute concerned a Dutch investor who, after operating investment in the field of health in Slovakia, had initiated proceedings against the same Member State claiming compensation for the damages suffered due to the imposition of (temporary) restrictions on the repatriation of dividends by the national authorities.

The arbitral tribunal, established at the Stockholm Chamber of Commerce as per article 8 of the 1991 bilateral investment treaty on the protection of investment signed between the Netherlands and the (then) Czechoslovakia, has decided on 7th December 2012 to award damages against Slovakia for an amount of Euro 22,1 million.

As the seat of arbitration was in Frankfurt, Slovakia has challenged the award and sought for the arbitral award to be set aside before the German courts. The Bundesgerichtshof (Federal Court of Justice, Germany) has consequently asked the ECJ for a preliminary ruling on the matter in relation to the contravention of Treaties of the European Union.

In the decision, the European Court of Justice (ECJ) states that the Treaties of the EU entrust the Court with the fundamental function of interpreting European Union law for the purpose of its uniform application, and points out that arbitral tribunals have no power to refer matters to the ECJ for preliminary ruling.

On such premise, the Court further notes that the arbitral tribunal that was constituted under the bilateral investment treaty was called to apply Slovakia's domestic law, which also incorporates the EU law. The Court further opines that the settlement of a dispute by a body that has to apply EU law but is incapable of referring any question concerning its interpretation to the ECJ implies the risk of resulting in an inhomogeneous application of EU law.

Also, this assessment concerning the application of EU law cannot be operated while challenging the award before national courts, given that the ground for such challenges is usually quite restricted.

The Court concludes that the clause of a bilateral treaty that confers jurisdiction upon an arbitral tribunal for the settlement of disputes that concern foreign investments is against the EU law since a Member State is foreclosed from eluding the role attributed to the ECJ through the clauses of a bilateral investment treaty.

Can the decision of the ECJ be regarded as *de profundis* for intra-EU investment arbitration?

The answer to such question shall be highly positive, save for two exceptions.
The first exception concerns the applicable law in the investor-state dispute settlement. Article 8 of the bilateral investment treaty between the Netherlands and Slovakia expressly provides that the arbitral tribunal shall apply, although not exclusively, the domestic law of the host state. One may easily wonder whether the ECJ would have come to the same conclusions if the treaty had provided for the sole application of international law, to the exclusion of EU law.

The second exception concerns to the treaties directly stipulated by the European Union. In the ECJ's decision of 6th March 2018, the Court explicitly provides that the EU may derogate the jurisdiction of the ECJ by referring the settlement of investment disputes to other bodies, even if these bodies are incapable of making reference to the ECJ for a preliminary ruling. For example, the Energy Charter Treaty, which has been ratified by both the EU and each Member State.

Thus, it is significant to note that the investment arbitration, founded on the international treaties, is still safe.

Not all is lost.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.