Constitutional complaints challenging the reversal of an arbitral award and the act of approval to the Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union are unsuccessful

Press Release No. 77/2024 of 13 September 2024

Orders of 23 July 2024 - 2 BvR 557/19, 2 BvR 141/22

In orders published today, the Third Chamber of the Second Senate of the Federal Constitutional Court did not admit for decision two constitutional complaints lodged by a Dutch insurance group.

Constitutional complaint 2 BvR 557/19 challenged an order of the Federal Court of Justice that set aside an arbitral award. The arbitral tribunal had decided in favour of the complainant and ordered the Slovak Republic to pay the complainant damages amounting to EUR 22.1 million on the basis of a bilateral investment treaty between the Slovak Republic and the Netherlands. According to the arbitral tribunal, these damages were caused by a ban on distributing profits from health insurance activities that was in place from 2007 to 2011 in the Slovak Republic, which affected the complainant.

By constitutional complaint 2 BvR 141/22, the complainant challenged the German *Bundestag*'s act of approval to an agreement between multiple Member States of the European Union (EU) to terminate bilateral investment treaties concluded among the same, including the treaty concluded between the Slovak Republic and the Netherlands. The complainant was unsuccessful in its request for a preliminary injunction to prevent the act of approval from entering into force (cf. Press Release No. 13/2021 of 3 February 2021 [https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/DE/2021/bvg21-013.html]in German).

The constitutional complaints are inadmissible. In proceedings 2 BvR 557/19, the complainant failed to sufficiently substantiate a recognised legal interest. The complainant also failed to sufficiently show a violation of constitutional law. In proceedings 2 BvR 141/22, the complainant did not plausibly demonstrate that its rights are violated by the challenged act of approval.

Facts of the case:

In 1991, the Kingdom of the Netherlands and the Czech and Slovak Federative Republic concluded the Agreement on encouragement and reciprocal protection of investments (hereinafter: the Treaty). Art. 8 of the Treaty submits any dispute arising under the Treaty to an arbitral tribunal (arbitration clause). In 1993, the Slovak Republic succeeded to the Treaty in place of the Czech and Slovak Federative Republic. The Slovak Republic has been a member of the European Union since 2004.

The complainant, a Dutch insurance group, had a subsidiary in the Slovak Republic offering private health insurance. In 2007, the Slovak Republic prohibited the distribution of profits generated by health insurance activities. In 2011, the Slovak Constitutional Court declared this ban unconstitutional and the distribution of profits was again permitted.

In 2008, the complainant initiated arbitration proceedings against the Slovak Republic under Art. 8 of the Treaty, seeking damages for the ban on profit distributions. The arbitral tribunal chose Frankfurt am Main as the seat of arbitration and, by arbitral award, ordered the Slovak Republic to pay damages amounting to EUR 22.1 million. By order of 18 December 2014, the Frankfurt am Main Higher Regional Court rejected the application to set aside the arbitral award. The Federal Court of Justice suspended the proceedings and requested a preliminary ruling from the Court of Justice of the European Union on the question of whether arbitration clauses, such as the one under Art. 8 of the Treaty, were compatible with EU law. By judgment of 6 March 2018 (*Achmea* Judgment), the Court of Justice of the European Union ruled that arbitration clauses in international agreements between EU Member States like the one in Art. 8(2) of

the Treaty are incompatible with Arts. 267 and 344 of the Treaty on the Functioning of the European Union (TFEU). By order of 31 October 2018, the Federal Court of Justice reversed both the decision of the Higher Regional Court and the arbitral award. In its reasoning, the Federal Court of Justice stated that no arbitration agreement existed between the parties and, consequently, the arbitral award must be reversed under § 1059(2) no. 1 letter a of the Code of Civil Procedure (*Zivilprozessordnung* – ZPO). The Federal Court of Justice held that the arbitration clause under Art. 8(2) of the Treaty was not applicable because of its incompatibility with Arts. 267 and 344 TFEU.

On 5 May 2020, 23 EU Member States – including the Federal Republic of Germany, the Slovak Republic and the Kingdom of the Netherlands – signed the Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union (hereinafter: the Termination Agreement). Pursuant to Art. 4(2) in conjunction with Art. 16(2) of the Termination Agreement, bilateral investment treaties to which the Termination Agreement applies are terminated if 'the relevant Contracting Parties' have ratified, approved or accepted the Termination Agreement. The Treaty is included in the list of terminated treaties in an annex to the Termination Agreement. Slovakia and the Netherlands ratified the Termination Agreement. On 19 November 2020, the German *Bundestag* adopted the act of approval to the Termination Agreement. The Federal Constitutional Court dismissed an application for preliminary injunction that the complainant lodged to prevent the act of approval from entering into force (cf. Press Release No. 13/2021 of 3 February 2021 [https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/DE/2021/bvg21-013.html]Press Release No. 13/2021 of 3 February 2021, in German). The act of approval entered into force on 22 January 2021.

Key considerations of the Chamber:

I. Constitutional complaint 2 BvR 557/19 is primarily directed against the order of the Federal Court of Justice that set aside the arbitral award which benefitted the complainant. The constitutional complaint is inadmissible.

1. The complainant fails to sufficiently substantiate a recognised legal interest. The entry into force of the Termination Agreement has changed the factual and legal situation in a way that is relevant to the decision. In light of this, the complainant fails to consider the question of whether the legal protection sought is still obtainable.

a) From the outset, several factors argue in favour of the invalidity of the arbitration agreement between the complainant and the Slovak Republic, given that the Termination Agreement provides that the Treaty is retroactively terminated. If the case were remanded to the Federal Court of Justice, it would have to engage with this pertinent question. If the Federal Court of Justice concluded that the Treaty was retroactively terminated and the arbitration agreement retroactively invalid, the Federal Court of Justice would in all likelihood have to set aside the arbitral award once again (§ 1059(2) no. 1 of the Code of Civil Procedure). The complainant does not engage with this question in a substantiated manner.

b) Section 3 of the Termination Agreement contains 'provisions regarding claims made under bilateral investment treaties'; these provisions suggest that arbitral awards are to be set aside regardless of whether the arbitration proceedings are 'concluded' or 'pending'. The complainant does not engage with this in its submissions.

c) Constitutional complaint 2 BvR 141/22, which objects to the German act of approval to the Termination Agreement, is inadmissible and therefore of no relevance to constitutional complaint 2 BvR 557/19.

2. The constitutional complaint also fails to meet the requirements for substantiating a possible violation of rights pursuant to § 90(1) of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG). The complainant asserts that the challenged order of the Federal Court of Justice violates its constitutionally guaranteed, substantive fundamental rights because the Federal Court of Justice should not have considered itself bound by the *Achmea* Judgment of the Court of Justice of the European Union and the interpretation of Arts. 267 and 344 TFEU resulting from this judgment.

a) Generally, the binding interpretation of EU law, and thus the determination of whether the offer to submit disputes to an arbitral tribunal as in Art. 8(2) of the Treaty is compatible with EU law, is the task of the Court of Justice of the European Union. Given the precedence of application of EU law, the Federal Court of Justice is bound by the interpretation of the Court of Justice of the European Union. Only under very limited and special circumstances is there no such precedence of application.

b) To the extent that the complainant submits that the *Achmea* Judgment constituted an *ultra vires* act and the Federal Court of Justice should thus not have considered itself bound by it, the complaint fails to provide a substantive analysis showing that the way in which the Court of Justice of the European Union applied the law is manifestly unjustifiable and leads to a structural reordering of competences away from the Member States and to the EU.

c) To the extent that the complainant alleges a violation of constitutional identity, the only reasoning provided is the assertion that if the Federal Republic of Germany is unable to conclude bilateral investment treaties and arbitration agreements with other EU Member States, it will be permanently deprived of an essential enforcement mechanism in the international realm and thus lack key abilities to autonomously shape social and political life. However, the complainant

does not address whether the competences of the Federal Republic of Germany are at all adversely affected in the case at hand. The challenged order of the Federal Court of Justice, which implements the *Achmea* Judgment, only has the effect of setting aside an arbitral award that benefitted the complainant based on the Treaty concluded by the Netherlands and the Slovak Republic. The Federal Republic of Germany's scope of action is thus not affected.

d) Finally, the complainant also fails to substantiate that the implementation of fully harmonised EU law by the Federal Court of Justice in the case at hand would trigger the *Solange*, or 'as long as', reservation with respect to the constitutionally enshrined fundamental rights that the complainant asserts. Nor does the complainant substantiate that the Federal Court of Justice's decision would be incompatible with the applicable fundamental guarantees in any other way.

aa) The order of the Federal Court of Justice of 31 October 2018 is based on the implementation of binding obligations under EU law. In such a case, there is generally no review of the decision's compatibility with the fundamental rights under the Basic Law (*Grundgesetz* – GG). The Federal Court of Justice applied § 1059(2) no. 1 letter a of the Code of Civil Procedure and, in examining whether the complainant and the Slovak Republic had concluded a valid arbitration agreement, took into account the primary law obligations under Arts. 267 and 344 TFEU as interpreted by the Court of Justice of the European Union in the *Achmea* Judgment. The *Achmea* judgment does not afford any discretion to the Member States. It unambiguously states that arbitration clauses in bilateral investment treaties between EU Member States are incompatible with Arts. 267 and 344 TFEU. Primary law provisions thus dictate the legal consequence that follows in this case, i.e. setting aside the arbitral award. The legal relations between the complainant and the Slovak Republic are thus determined by EU law in a manner that leaves no discretion to the Federal Court of Justice.

To the extent that the complainant asserts a violation of its fundamental rights under the Basic Law, the complainant fails to engage, in substantive terms, with whether the challenged order by the Federal Court of Justice in fact does not meet the minimum standards of fundamental rights protection that Art. 23(1) first sentence of the Basic Law requires under the *Solange* reservation.

bb) The complainant fails to substantiate its claim that the challenged decision violates the guarantee of property. As EU law determines this guarantee, the applicable standard of review follows from Art. 17 of the Charter of Fundamental Rights of the European Union. In asserting a violation of the guarantee of property, the constitutional complaint only refers to Art. 14 of the Basic Law, i.e. national fundamental rights law, which is not applicable here. The complainant fails to show to what extent it can rely on Art. 17(1) of the Charter to claim that fundamental rights law obliges the Federal Republic of Germany to recognise and uphold the arbitral award.

Based on the complainant's submissions, the protection of legitimate expectations does not give rise to any factors that must be taken into account here.

cc) To the extent that the complainant alleges a violation of its freedom to practice an occupation, the complainant fails to substantiate a violation of Art. 16 of the Charter, which is the only applicable guarantee in this respect. Pursuant to § 1059 of the Code of Civil Procedure, the Federal Court of Justice had to examine whether an arbitral award settling a dispute between the complainant and the Slovak Republic could be considered valid under German law. Neither this statutory provision nor the proceedings are directly linked to the practice of any occupation. Rather, the only decisive question in the proceedings is whether the participants were parties to legally effective arbitration proceedings.

dd) The complainant also fails to substantiate a violation of the right to effective legal protection. The general right of access to justice is applicable in civil proceedings (Art. 2(1) in conjunction with Art. 20(3) of the Basic Law). By agreeing on a dispute settlement mechanism outside of the state justice system, the parties waived their right of access to justice. No other conclusion is warranted by the standard of review that is required by the fundamental right to an effective remedy under Art. 47(1) of the Charter.

ee) To the extent that the complainant asserts that the Federal Court of Justice violated the duty of referral under Art. 267(3) TFEU, the complainant fails to substantiate a violation of the right to one's lawful judge that is equivalent to a fundamental right (Art. 101(1) second sentence of the Basic Law). The complainant fails to analyse, in a sufficiently clear manner, the standards developed by the Federal Constitutional Court regarding the prerequisites for a violation of the duty of referral that amounts to a violation of the right to one's lawful judge.

ff) To the extent that the complainant asserts that the Federal Court of Justice violated Art. 101(1) second sentence of the Basic Law by not referring the case to the Federal Constitutional Court under Art. 100(2) of the Basic Law, the complainant fails to meet the applicable substantiation requirements. Proceedings under Art. 100(2) of the Basic Law are only interim proceedings to determine whether a general rule of international law is part of federal law. They do not concern the application of such a rule to a specific case.

II. In proceedings 2 BvR 141/22, the complainant fails to plausibly show that its rights were directly affected by the challenged act of approval.

The fact that the act of approval ratifies the provisions of the Termination Agreement terminating the bilateral investment treaties listed in the relevant annex does not directly affect the complainant. It is not sufficiently clear to what extent the German act of approval is supposed to affect the termination of the Treaty, which was concluded between the Slovak Republic and the Kingdom of the Netherlands. Pursuant to Art. 4(2) in conjunction with Art. 16(2) of the Termination Agreement, bilateral investment treaties to which the Termination Agreement applies are effectively terminated if 'the relevant Contracting Parties' have ratified, approved or accepted the Termination Agreement. The Treaty is terminated because the Kingdom of the Netherlands and the Slovak Republic have ratified the Termination Agreement. The fact that the Federal Republic of Germany ratified the Termination Agreement has no effect on the Treaty. Even if the Federal Republic of Germany had not ratified the Termination Agreement, this would be of no consequence for the termination of the Treaty. The result would also be the same if the German act of approval had been in violation of constitutional law, EU law or the European Convention on Human Rights and if it had thus been reversed by the Federal Constitutional Court.