Achmea Saga: Final Say from the German Federal Constitutional Court

A closer look at the two BVerfG orders 2 BvR 557/19, 2 BvR 141/22

The German Federal Constitutional Court (Bundesverfassungsgericht, "BVerfG") refused to accept for decision two constitutional complaints by the Dutch company Achmea in two rulings dated 23 July 2024 and published on 13 September 2024. In one complaint, Achmea challenged the constitutionality of the order of the German Federal Court of Justice (Bundesgerichtshof, "BGH"), which set aside an investment arbitration award rendered in favour of Achmea ("BGH Order").[1] In the other complaint, Achmea challenged the German Bundestag's act of approval[2] to the Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union ("Termination Agreement")[3].

Factual background

Back in 2012, Achmea won UNCITRAL arbitration against Slovakia in an investor-state dispute ("Achmea Award") based on the Netherlands-Slovakia bilateral investment treaty of 1991 ("Netherlands-Slovakia BIT"). Slovakia applied to the German state courts for setting aside the award, as the seat of arbitration was Germany. The case reached the BGH, which sought a preliminary ruling from the Court of Justice of the European Union ("CJEU"). In March 2018, in its well-known Achmea Judgment, the CJEU ruled that the investor-state dispute settlement clause in the Netherlands-Slovakia BIT was incompatible with EU law ("CJEU Achmea Judgment").[4] As a result, in October 2018, the BGH set aside the Achmea Award due to the inexistence of a valid arbitration agreement.[5] In 2020, EU Member States (including Slovakia, the Netherlands and Germany) signed the Termination Agreement. The German Bundestag adopted the approval act of the Termination Agreement, which entered into force in January 2021.[6]

Key conclusions regarding the constitutional complaint against the German act of approval of the Termination Agreement (case 2 BvR 141/22)

The German Bundestag's act of approval of the Termination Agreement does not directly affect rights of Achmea. Under the Termination Agreement, the relevant bilateral investment treaty is terminated if its respective Contracting Parties ratify the Termination Agreement. Accordingly, the Netherlands-Slovakia BIT was terminated solely because Slovakia and the Netherlands ratified the Termination

[1] BGH, October 31, 2018 - I ZB 2/15.
[2] Gesetz zu dem Übereinkommen vom 5. Mai 2020 zur Beendigung bilateraler Investitionsschutzverträge zwischen den Mitgliedstaaten der Europäischen Union, Bundesgesetzblatt 2021 II Nr. 1, S. 3ff.
[3] Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union, Official Journal of the European Union, no. L 169, 2020, pp. 1-41.
[4] CJEU, *Slovak Republic v. Achmea BV*, Case C-284/16, ECLI:EU:C:2018:158.
[5] BGH, October 31, 2018 - I ZB 2/15.
[6] Gesetz zu dem Übereinkommen vom 5. Mai 2020 zur Beendigung bilateraler Investitionsschutzverträge zwischen den Mitgliedstaaten der Europäischen Union, Bundesgesetzblatt 2021 II Nr. 1, S. 3ff.

Agreement. Even if Germany had not ratified the Termination Agreement, this would have no effect on the termination of the Netherlands-Slovakia BIT (see paras. 26–27).

Key conclusions regarding the constitutional complaint against the BGH order to set aside the Achmea award (case 2 BvR 557/19)

First, Achmea cannot achieve the legal protection sought with the constitutional complaint because no outcome other than a new setting aside of the Achmea Award could be expected. The entry into force of the Termination Agreement changed the factual and legal situation, i.e. the Termination Agreement retroactively terminated the Netherlands-Slovakia BIT (from the date of Slovakia's accession to the European Union in 2004), rendering the arbitration agreement between Achmea and Slovakia invalid. Hence, even if the constitutional complaint were upheld and the case referred back to the BGH, it would have to set aside the Achmea Award again (see para. 41 et seq.).

Second, Achmea failed to substantiate a violation of its constitutionally guaranteed substantive fundamental rights. The BVerfG dismissed the argument that the BGH should not have considered itself bound by the CJEU Achmea Judgment and its interpretation of EU law (see para. 52).

The BVerfG emphasised the primacy of EU law and importance of its uniform application as interpreted by the CJEU. The primacy of application of EU law was only subjected to constitutional review in narrowly limited circumstances: an obvious excess of competences (*ultra vires* act) by the European institutions, leading to a structural reordering of competences away from the Member States to the EU; a violation of constitutional identity protected by the Basic Law (Grundgesetz) by a measure of an EU institution; a qualified violation of the fundamental rights guaranteed by the Basic Law (so called *Solange* [German for "as long as"] reservation developed by BVerfG practice) (see paras. 53–64).

According to the BVerfG, Achmea's case did not meet the high requirements of these reservations:

- An action by EU institutions was *ultra vires* if their competence could not be justified from any legal point of view when applying general methodological standards. However, the BVerfG found no evidence that the CJEU's application of EU law in its Achmea Judgment was methodologically untenable and thus *ultra vires*. The consequence of the CJEU Achmea Judgment was that the Member States could no longer make an effective offer to arbitration under intra-EU investment agreements. This, however, was not an usurpation of any competences of the Member States but, at most, a limitation on certain their competences (see paras. 65–68).
- The BGH Order, which implemented the CJEU Achmea Judgment, merely had the effect of setting aside the arbitral award that benefitted Achmea, which was rendered based on the Netherlands-Slovakia BIT. It did not affect the constitutional identity of Germany (see para. 69).
- According to the *Solange* approach, the BVerfG does not review compatibility of EU law measures with the fundamental rights of the Basic Law *as long as* EU law offers effective protection of fundamental rights against EU organs, which is comparable to the minimum level of guarantees by

the Basic Law. The legal situation created by the CJEU Achmea Judgment still ensures sufficient protection of fundamental rights of affected investors, which, according to the BVerfG, can be asserted within the EU legal order, i.e. before the competent state courts or the European Court of Human Rights (see paras. 71–73).

- Achmea also failed to prove that the BGH Order was incompatible with guarantees of fundamental rights, such as Achmea's right to property, freedom to practise an occupation, or right to effective legal protection, or that the BGH violated its duty of referral to the CJEU and the BVerfG (see para. 74 et seq.).

Thus, the BVerfG made it clear that Achmea could not turn a blind eye to the consistent case law of the CJEU following its Achmea Judgment, as well as the perception of this Judgment in the literature, where even critical voices mostly do not expressly opine that the CJEU Achmea Judgment was an *ultra vires* act (see para. 66). Furthermore, the BVerfG stressed that since 2006 onwards, against the background of an official position adopted at the EU level, investors could no longer have a justified trust in the legality of arbitration clauses in intra-EU BITs or exclude the possibility that such arbitration awards would be subject to state control. Hence, Achmea could not invoke the protection of its legitimate expectations to challenge the setting aside of the Achmea Award (see paras. 78–80).

The BVerfG's theoretical optimism about sufficiency of legal protection available to investors in the European multi-level system even in the absence of valid BITs is promising. Yet, the jury is still out on whether investors will be adequately protected by a regime which is not specifically tailored to investment protection.

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