

Bye-Bye BITs? Poland Reviews Its Investment Policy

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Much ink has recently been spilt on the Investor State Dispute Settlement (“ISDS”) system, especially in the light of the Comprehensive Economic and Trade Agreement (“CETA”), and the Transatlantic Trade and Investment Partnership (“TTIP”) (summary of criticism recently collected by G. Kaufmann-Kohler, M. Potesta, at 10, available [here](#)). The existence of a potential overlap and conflict between Bilateral Investment Treaties (“BITs”) concluded between EU Members (intra-EU BITs) and the EU single market is also widely commented (see, for example, this [post](#), and a pending case before the Court of Justice of the European Union C-284/16, *Achmea*). The Republic of Poland (“Poland”), as an EU Member State, is naturally a part of the debate over the TTIP, CETA, and intra-EU BITs. In June 2015, the EU Commission commenced the EU PILOT procedure against Poland – a scheme designed to resolve compliance problems without having to resort to infringement proceedings – regarding intra-EU BITs.

Poland is a contracting party to approximately 60 BITs (23 of them are intra-EU BITs) and the Energy Charter Treaty. Interestingly, Poland is not a contracting party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. Unfortunately, investment arbitration cases involving Poland are not publicly available. Recently, public was informed that eleven investment proceedings were pending, with the estimated claim value reaching approximately 2 billion EUR.

During past years, after a few attempts were made via administrative courts to advocate for the publication of investment arbitral awards, superficial, very general, and scarce information about a few cases were made known to the public. The Regional Administrative Court in Warsaw (see judgement of 25.10.2012, [case no. II SAB/ Wa 252/12](#); judgement of 7.05.2013, [case no. II SA/Wa 2249/12](#); judgement of 17.06.2014, [case no. II SA/Wa 1390/13](#)) and the Supreme Administrative Court of Poland (see judgment dated 28.04.2016, [case no. I OSK 2456/14](#)) stated that an arbitral award rendered against Poland is public information which should be disclosed to the public under the Access to Information Act. The Supreme Administrative Court decided also that a settlement reached before an investment arbitral tribunal is public information (see judgement of 28.04.2016, [case no. I OSK 2706/14](#)). The issue whether mere information about the statement of claim against a state in investment arbitration or pending arbitration case is qualified as public information has not yet been resolved in the case law.

In February 2016, one of the high officials of the Ministry of Treasury of Poland stated in the Polish Parliament that investment arbitration constitutes a serious threat to Poland, which justifies an immediate termination of BITs (available in Polish [here](#)). This statement, however, was followed by

the official statement of the Ministry which focused on the termination of intra-EU BITs (available [here](#)).

Almost a year later, on 5 January 2017, the Prime Minister of Poland rendered the regulation no. 1 by which she appointed an interministerial group for the legal and international aspects of the investment policy of Poland ("Regulation" - published on 11 January 2016 in the Official Journal of the Republic of Poland, item 21, available in Polish [here](#)) ("Working Group"). The Working Group consists of permanent members and non-permanent members. Permanent members are the representatives of the ministries of the Polish Government and representatives of the State Treasury Solicitors' Office (as of 1 January 2017, General Counsel to the Republic of Poland). The Working Group is an advisory body to the Prime Minister of Poland (§ 3 of the Regulation). Non-permanent members (external experts) may take part in discussions of the Working Group with an advisory role (§ 3 sec. 3 of the Regulation).

The Working Group will prepare recommendations for the Prime Minister of Poland regarding issues related to the investment policy of Poland and ISDS mechanism included in International Investment Agreements ("IIAs"). The tasks of the Working Group can be categorized in the following way:

First, the revision and analysis of binding IIAs to which Poland is a Contracting Party in light of EU Law, economic interests of Poland, and economic interests of Polish investors. Additionally, the analysis of rules and consequences of the termination of the intra-EU BITs will be conducted. Even though the Regulation explicitly refers only to the potential termination of intra-EU BITs, wording of § 2 sec. 1 of the Regulation in connection with Justification to the Regulation ("Justification", available in Polish [here](#)) suggests that the Polish Government did not limit the revision to the intra-EU BITs, and that evaluation of the potential termination of other BITs will be provided as well.

According to the Justification, many investors these days abuse rights and protection granted to them in BITs by using BITs as an additional and free insurance for their investments (at 1-2 of the Justification). Further, the Justification raises question of whether any particular reason exists for the preference of investors protected by BITs, if Poland is, an EU Member State, established democracy which respects market rules and has a confident, independent, and impartial judiciary system (at 2 of the Justification). Moreover, it is stressed that BITs do not contain provisions upholding protection of labor, environment, and natural resources.

Finally, the Justification states the following:

"Polish investors do not benefit from the protection granted by BITs, but Poland is sued by foreign investors. According to the information from the State Treasury Solicitors' Office, despite the fact that 98% cases against Poland are won (cases settled are considered to be won as well), Poland bears the costs of arbitral proceedings".

All these arguments may justify revision, renegotiation, and termination of BITs (at 6 of the Justification).

Regarding intra-EU BITs, the Justification refers to the Polish declaration provided within the PILOT procedure. Namely, Poland is willing to terminate intra-EU BITs by joint declarations of all EU Members, or by a mutual agreement between BITs contracting parties, or by a unilateral termination (at. 5 of the Justification).

At this point, the Poland-Italy BIT, dated 10 May 1989, expired on 9 January 2013 due to Italy's termination (investments are protected until 8 January 2018). In 2016, Poland received official

notifications from Romania and Czech Republic as to the termination of their respective BITs concluded with Poland, with an immediate effect and without the application of sunset clauses. The Justification confirms that Denmark is also going to file a similar notification to Poland (at. 5-6 of the Justification).

It must be underlined again that there is no clear division between the intra-EU BITs and BITs with non-EU Members within the analysis to be conducted by the Working Group. Advantages and drawbacks of investment protection and ISDS system concern all BITs. However, it seems that there are more arguments for termination of intra-EU BITs.

Second, the Working Group will prepare a list of potential states with which Poland should conclude IIAs, and a new model BIT which can be concluded with these states. Moreover, a revision and analysis of draft IIAs negotiated by the EU will be conducted.

Even though the Justification contains a critical review of IIAs, it provides information that the Working Group should also try to establish a list of potential developing states with which Poland can potentially conclude BITs. In this part, the Justification underlines advantages of BITs for Polish investors (at 3 of the Justification). Consequently, the Justification shows that the statement of the Polish Government towards IIAs is ambivalent. On the one hand, Poland wants to revise, renegotiate, and terminate BITs as Polish investors do not benefit from BITs protection. On the other hand, Poland commences negotiations regarding new BITs.

According to the Justification, Poland is going to commence negotiations with Ethiopia, Angola, Nigeria, and Senegal. One of the tasks of the Working Group is to draft a new model BIT, using experience from the EU-US and EU-Canada negotiations on the TTIP and CETA (at 3 of the Justification).

Third, the Working Group will provide an analysis of disputes commenced by investors against Poland. The Justification does not provide any detail explanation as to this point. The Working Group will probably discuss internally all pending arbitrations against Poland, and share experiences regarding ISDS in a current form (at 6 of the Justification).

In conclusion, Poland is clearly sceptical regarding investment protection granted by BITs containing an ISDS system in a current form. That will most likely lead to the termination of some of the BITs (especially intra-EU BITs). On the other hand, Poland leaves some space for further discussion regarding the revision of current BITs (the scope of the protection granted to investors, new ISDS system), at least with non-EU Members. The establishment of the Working Group is welcome. It may help in the formulation of a new Polish investment policy, including the revision of the ISDS system.

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