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Let the Show Begin: Poland Has Commenced the Process of BITs' Termination

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After a few declarations of intention to terminate BITs (see my previous [post](#)), Poland put words into actions. On 18 July 2017, the Polish Government submitted to the Sejm (the lower house of Polish Parliament) a draft law (“Draft Law”, available in Polish [here](#)) which empowers the Polish President to unilaterally terminate the Agreement on the Promotion and Reciprocal Protection of Investments signed between Poland and Portugal on 11 March 1993 (“Poland-Portugal BIT”). Ironically, the process began at the worst possible time – when Poland’s governing party tries to put the judicial system under its political control.

As it can be read in the justification to the Draft Law (“Justification” available [here](#)), there are a few reasons for Poland-Portugal BIT’s termination.

The first and the most important are the objections of the European Commission to the so-called intra-EU BITs. The decision about the termination of the Poland-Portugal BIT complies with the Polish declaration provided within the PILOT procedure, namely that 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.

As it is stated in the Justification, Poland conducted informal consultations and invited Portugal to terminate the above-mentioned BIT (including a sunset clause which provides ten years of investment protection) by a mutual agreement; however, Portugal refused.

Taking into account the fact that the Poland-Portugal BIT is automatically renewed every five years, unless it is terminated within 12 months before the lapse of the current five year period, and the next deadline for termination is on 8 October 2017, Poland decided to unilaterally terminate the Poland-Portugal BIT. It is underlined in the Justification that Poland will conduct further consultations with Portugal in order to terminate the Poland-Portugal BIT (including sunset clause) by a mutual agreement until the Draft Law enters into force.

Interestingly, the Justification refers to the *Achmea* case pending before the European Court of Justice. Poland joined the proceedings before the ECJ and submitted a statement in which argues that intra-EU BITs do not comply with the EU law.

Second, according to the Polish government, the termination of the Poland-Portugal BIT should not have any political and social implications, as Poland and Portugal were called by the European

Commission to terminate intra-EU BITs. Moreover, as the Justification states:

“it should be expected that [termination of the Poland-Portugal BIT] will be positively received due to the public criticism of intra-EU BITs and international investment arbitration in Poland”.

Third, according to the Polish government, the termination of the Poland-Portugal BIT should not negatively impact on commercial relations between Poland and Portugal. The Poland-Portugal BIT was concluded before Poland became the member of the EU and currently, according to the Polish government:

“the law, as well as access to courts in Poland, guarantees foreign investors the protection of their investments with a possibility to execute investors’ rights before courts”.

This sounds at least questionable in the light of the recent attempts to reform the Polish judicial system, which were widely commented around the world (*see*, for example, [here](#), [here](#), [here](#), [here](#)). The Polish government, firstly, politically dealt with the Polish Constitutional Tribunal rendering it (at least partially) non-legitimate (*see* the report of the Venice Commission available [here](#)). In the past weeks, it tried to put the judicial system under its political control via three acts concerning common courts, the National Council of the Judiciary and the Supreme Court. An appalling provision was art. 87 of the Law on the Supreme Court, which would have forced the resignation of all Supreme Court Judges and allowed their replacement to be selected by the Minister of Justice. Fortunately, the President of Poland blocked the laws on the National Council and the Supreme Court. However, the law concerning common courts was signed by the President and published in the Official Journal on 28 June 2017 (available [here](#)). The European Commission has already launched infringement proceedings against Poland for alleged breaches of EU law (*see* [here](#)).

Finally, another argument in favor of Poland-Portugal BIT’s termination are consultations with Polish entrepreneurial organizations, according to which Polish investors do not use protection granted in intra-EU BITs, including investment arbitration as a dispute settlement mechanism, mainly due to the high costs of arbitration. The Ministry of Development presented similar data according to which both Polish and Portuguese investors have not commenced any arbitration under the Poland-Portugal BIT. Polish investors commenced only three arbitrations under intra-EU BITs (Poland-Romania BIT, Poland-Slovakia BIT, and Cyprus-Poland BIT). Since 2006 Poland was or still is a party to twenty-two arbitrations (twelve of them are under intra-EU BITs: BITs with Austria, France, Germany, Cyprus, Netherlands, Belgium, Luxembourg, Czech Republic). As it is set in the Justification, investment arbitrations are extremely expensive for Poland (even though a majority of them are won), so the termination of Poland-Portugal BIT may increasingly reduce the financial burden of the state.

To sum up, it is not surprising that Poland ultimately decided to terminate BITs. The Poland-Portugal BIT is the first in a line of twenty-three intra-EU BITs which will probably be terminated sooner rather than later. Arguments for the alleged nonconformity of intra-EU BIT with EU Law are well known. The Polish government argued in favor of termination of intra-EU BITs saying

that

“Poland is, an EU Member State, established democracy which respects market rules and has a confident, independent, and impartial judiciary system” (see [here](#)).

In the light of recent events in Poland concerning attempts of the governing party to put the judicial system under its political control, the termination of intra-EU BITs is not obvious and straightforward as it was before. The “Polish case” should definitely serve as an example taken into account by the opponents of investment law and arbitration. It should also be considered during the discussion about the proposed [reform of investment arbitration reform](#).

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