# Termination of BITs and Sunset Clauses – What Can Investors in Poland Expect?

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Agnieszka Zarowna (Hogan Lovells)

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A year ago, on 25 February 2016, it was reported that Poland intends to terminate its Bilateral Investment Treaties ("BITs"; see initial comments here). Earlier this year, by a resolution of 5 January 2017, an interministerial Working Group on Polish investment policy was officially established to, among other things, review and analyse existing BITs (as recently commented on here).

As we learn from the reasoning to the draft of this resolution issued on 27 October 2016, the fate of Polish BITs hinges on whether these were concluded with other EU Member States (such "intra-EU BITs" are likely to be terminated, in order to carry out Poland's position announced by its Committee of European Affairs on 3 June 2011), or with non-EU Member States (these "extra-EU BITs" are to be upheld, renegotiated, or terminated). Poland currently has over 60 BITs in force, including with all EU Member States save for Ireland and Malta (since no BIT was ever concluded with these States), and Italy (since Italy terminated its BIT with Poland in 2013).

Foreign investors in Poland covered by investment protection under those BITs that will survive the review by the Working Group and will be upheld, can sleep safe and sound. However, foreign investors currently protected under many Polish BITs, including all intra-EU BITs, may – sooner rather than later – wake up in a quite different legal landscape. This entry highlights the potential termination process of the treaties and the implications it may have for investors in Poland.

**Termination Process**

While the Vienna Convention on the Law of Treaties ("VCLT") lists various scenarios that result in a treaty ceasing to be in force, this entry focuses on two modes of terminating treaties as set out in Article 54 VCLT that Poland is most likely to rely on.

First, under Article 54(b) VCLT a treaty may be mutually terminated at any time by consent of all the parties after consultation with the other contracting States. With respect to intra-EU BITs, it appears that Poland's preferred option would be the simultaneous termination thereof by all EU Member States. Given that the political and economic interests of the 28 States do not seem to be sufficiently aligned with respect to the role and fate of these treaties (considering that the European Commission's repeated calls to terminate BITs have not been successful to date), such a coordinated annihilation of intra-EU BIT regime seems unlikely. Even when a proposal for a comprehensive phasing out of intra-EU BITs was made in April 2016, it suggested replacing the system rather than extinguishing it, and did not appear to meet with a wider interest from other EU Member States.

On a more moderate scale, Poland is likely to approach its counter-parts to proceed with a "BIT-by-

BIT" termination by consent. Since at least some States, including some EU Member States, can be expected to share Poland's willingness to extinguish BITs, this strategy may result in the mutual termination of at least some of the BITs in question.

To date, the only Polish BITs that have been terminated were those with Italy, as noted above, and Finland (replaced by a subsequent BIT in 1998). However, in the course of 2016, Poland received notices from the Czech Republic and Romania regarding the mutual termination of their respective BITs with Poland (together with sunset clauses), while Denmark was reported to be considering a similar notice. It will certainly be interesting to see what Poland's approach to the BIT concluded with the UK will be, as the UK's investment protection climate may also change in the aftermath of Brexit.

Second, under Article 54(a) VCLT, a treaty may be terminated unilaterally if it so provides. Polish BITs typically provide for an option of unilateral termination by notice. Notice must be provided to the other Contracting Party, upon expiry of which the treaty ceases to be in force. Some treaties further specify that the notice may only be given after the expiry of the initial period (of 10 to 30 years) for which a treaty was concluded, or after specified subsequent periods (of 5 to 30 years), if any. For example, the Netherlands-Poland BIT may be terminated only upon notice of at least six months before the date of expiry of the initial period of 15 years (which lapsed in 2009) or of each subsequent 10-year-long period of validity (the current period will end in 2019).

**Implications of Termination**

One question arising in the case of Poland terminating its BITs is what implications this has on the rights of foreign investors.

In the case of a unilateral termination, during the notice period as stipulated in a BIT, any obligations Poland assumed thereunder would remain in force and Poland would remain responsible for any treaty violations that occur prior to or during the notice period.

In addition, even where a BIT is terminated, many Polish BITs include sunset clauses, which stipulate that a treaty will continue to be effective for a further period from the date of the termination in respect of investments made before that date. For example, the Netherlands-Poland BIT provides that investments are protected for a period of 15 years after termination.

Poland would therefore remain liable for any treaty violations throughout the sunset period, where so provided. This approach appears to be uncontroversial. For example, in Marco Gavazzi and Stefano Gavazzi v. Romania (ICSID Case No. ARB/12/25), the investors initiated arbitration under the Italy-Romania BIT in 2012 after the treaty had already been terminated in 2010, but while the sunset period was still running. Reportedly, the effectiveness of the sunset clause was not disputed.

Sunset clauses clearly apply in the case of a unilateral termination of a treaty. One issue is whether, in the event of termination by consent, the Contracting States may agree to terminate the treaty together with its sunset clause or modify the latter with the effect of shortening the relevant sunset period. There are precedents indicating that States may seek to avoid prolonging effects of sunset clauses. Recently, the Czech Republic, Indonesia, and Peru terminated at least some of their BITs together with the sunset clauses.

If Poland wanted to extinguish its BITs sooner rather than later (and some BITs provide for a survival period as long as 20 years), it is likely to invite its counter-part to terminate the sunset clause. It would not be surprising given that, back in 2008 when replying to Italy's notice of (unilateral) termination of the Italy-Poland BIT, Poland suggested terminating the BIT by consent and agreeing on an early extinguishment thereof.

Whether or not such a termination or modification of a sunset clause would be effective towards investors protected under a BIT constitutes a point of contention. In a scenario where Poland agrees with the other Contracting State to terminate the BIT together with its sunset clause, and an investor initiates arbitration only thereafter, then it would ultimately be for the tribunal to decide whether the termination of the sunset clause extinguished the investor's rights. It appears that this issue has not yet been tested by international arbitral practice.

Good arguments can be made for both sides. In principle, Poland could argue that States are "masters" of any such treaty between them, and they may freely alter or terminate any of its provisions, including sunset clauses, if they so agree. Potentially, Poland could strengthen its position by claiming that there will be a superseding treaty (e.g., one of the trade agreements, including an investment chapter, currently being negotiated by the EU) or a similar regime (e.g., EU law with regard to intra-EU BITs), ensuring that investors' rights will be protected despite the termination of the treaty.

Investors, on the other hand, would claim that they have direct (rather than derivative) rights under the treaty, which cannot be terminated at whim. The nature of investors' rights and the effect of any treaty modification or termination should be analysed under the terms of a particular treaty. For example, it could be considered in this context whether a rather uncommon wording of Article 12(3) Mongolia-Poland BIT (stipulating that any revision or termination thereof "shall be effected without prejudice to any right or obligation accruing or incurred under this Agreement prior to the effective date of such revision or termination") would be supportive of investors' position.

One consideration regarding the implications of the termination of sunset clauses on investors' rights would be whether investors have already exercised their rights under a BIT by commencing arbitration. Although Article 70(1) VCLT indicates a presumption against any retroactive effect of termination, such a presumption can nevertheless be rebutted by the parties' consent to the contrary. However, it may be difficult to convince a tribunal that has already been seized by an investor that a subsequent treaty termination, effectively pulling the rug out from under the investor, was effective. A stronger argument could be made where investors have not yet commenced arbitration at the time of termination.