

FOREIGN INVESTMENTS MADE BEFORE 9 JANUARY 2013 WILL SOON NO LONGER BENEFIT FROM THE PROTECTION STANDARDS AFFORDED BY THE POLISH-ITALIAN BIT

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Alternative Dispute Resolution Alert

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The bilateral treaty between the Republic of Poland and the Republic of Italy on the promotion and protection of investments signed in Warsaw on 10 May 1989 (the "Polish-Italian BIT") expired on 9 January 2013. However, Italian investors who made their investments in Poland or Polish investors who invested in Italy before 9 January 2013 may still benefit from the protection of this treaty until 9 January 2018.

WHAT DOES IT MEAN?

For Italian investors (i.e. physical persons or companies) who invested in Poland or for Polish investors (i.e. physical persons or companies) who made investments in Italy before 9 January 2013, it is the last call to evaluate whether their investments suffered any losses, making their business operations no longer viable due to the actions or inactions of the host state or of other state entities, including state-owned or -controlled companies. If this is indeed the case, then any notice of a dispute demanding compensation for the losses suffered must be submitted to the host state before or at the latest on 9 January 2018. It would allow, after the lapse of a three-month period, submission of the dispute to a neutral arbitral institution for resolution.

WHAT ARE PRACTICAL EXAMPLES OF CASES WHERE PROTECTION OFFERED BY THE POLISH-ITALIAN BIT MAY PLAY A ROLE?

Example: After an assurance is given to an investor that it has all the permits to run its facility, a local municipality claims that another permit is needed. The permit is refused because of local politics. Then the entire area is suddenly converted into a national park.

Example: An investor is granted a contract and concession to create and operate a project in a host state. Afterwards, the state implements a new legal act which authorises a state body to unilaterally renegotiate the terms of public contracts. The state body subsequently offers new, non-negotiable terms to the investor and shortly thereafter terminates the contract.

Example: A state signs a 30-year concession agreement with an international company. Following a wave of public protests, the state annuls the concession on a technicality or based on the alleged non-performance by the investor.

Example: A state concludes a contract with a foreign investor for the development and operation of a project. Then it denies a permit necessary for the development of that project, and finally terminates the contract.

Example: A state changes its privatization strategy after elections are won by a different party. The law is changed so that the transaction cannot go ahead.

Example: A state-owned entity concludes a lease agreement with a foreign investor. Then it decides to modernise its premises and the host state adopts a legal act which introduces a special procedure, allowing for the premature termination of such lease agreements with immediate effect upon an administrative act and followed by adequate compensation. The state-owned entity terminates the lease agreement with immediate effect without compensation, arguing that the investor had materially breached the lease agreement due to minor irregularities.

Example: A state promotes a certain industry by way of subsidies. On that basis, a number of long-term projects are started. Subsequently, the state policy is changed and the subsidies are severely cut or cancelled. The projects are now no longer feasible.

Example: A rapid rise in the market prices of a commodity causes windfall profits for an investor under a long-term concession agreement. After a state fails to renegotiate the concession agreement, it imposes a new tax on the profits from the sale of that commodity.

HOW TO LEARN MORE?

Please do not hesitate to contact any member of the Dispute Resolution Practice Group of K&L Gates with questions on whether the actions targeting your investment justify recourse to the Polish-Italian BIT.

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