

Planned amendments in the Polish legislation may result in a violation of the country's obligations under investment treaties and lead to future compensation, including lost profits.

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FILIP BALCERZAK, ASSOCIATE, FOREIGN LAWYER

Investments protected under international law

Poland is close to adopting new legislation that will affect oilfield investments including shale gas. The changes in the regulatory framework can result in: (i) the implementation of a hydrocarbon tax of such value that it prevents profits based on expected production; (ii) the inability to secure the production concession by the entity which explored and documented a given resource, and (iii) establishing a new authority – the Polish National Fossil Fuel Operator (NOKE) whose competences include the compulsory participation in profits of an investment project without taking part in expenses. In addition, NOKE is also being given the right of veto against investment-related decisions.

These measures can be considered from the perspective of international agreements on mutual support and protection of investments (“investment treaties”). Poland is a party to sixty investment treaties, which it undertook to observe certain standards to protect investors’ rights. These standards include:

Fair and equitable treatment

Among other aspects, this standard sets a minimum level of protection of investors’ legitimate expectations. This standard includes the expectation that the legal system of the host state is stable.

Although the fair and equitable treatment standard does not preclude any changes in legislature, radical changes of a fundamental legal framework, which in a given sector establishes the grounds for assessing profitability of an investment project, may lead to its violation.

Prohibition of expropriation without due compensation

Under international investment law, prohibition of expropriation goes beyond direct expropriation and covers also prohibition of measures which results in something equivalent to expropriation, including acts of law. Expropriation is permitted only for reason of the public interest, under due process of law, in a non-discriminatory manner and against prompt, adequate and effective compensation.

Prohibition of discrimination

Measures taken by a state cannot con-

stitute discrimination against foreign investors. Planned changes in the Polish regulatory framework, being very unusual compared to the foreign legal frameworks, may result in discriminatory treatment towards operators in the upstream industry.

Arbitration

An investor whose rights under investment treaties have been violated can defend its rights by bringing a claim in international arbitration. It means that the actions of the respondent state are assessed in a neutral forum from the perspective of international law, without regard to decisions of the domestic courts or other authorities of the State. If any violation of these standards guaranteed in investment treaties are to be found, this may result in compensation to be paid by the state, covering the actual loss as well as lost profits.

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