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Pre-investment in modern IIAs
and its interpretation in arbitration

Markus Burgstaller

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Pre-investment protection

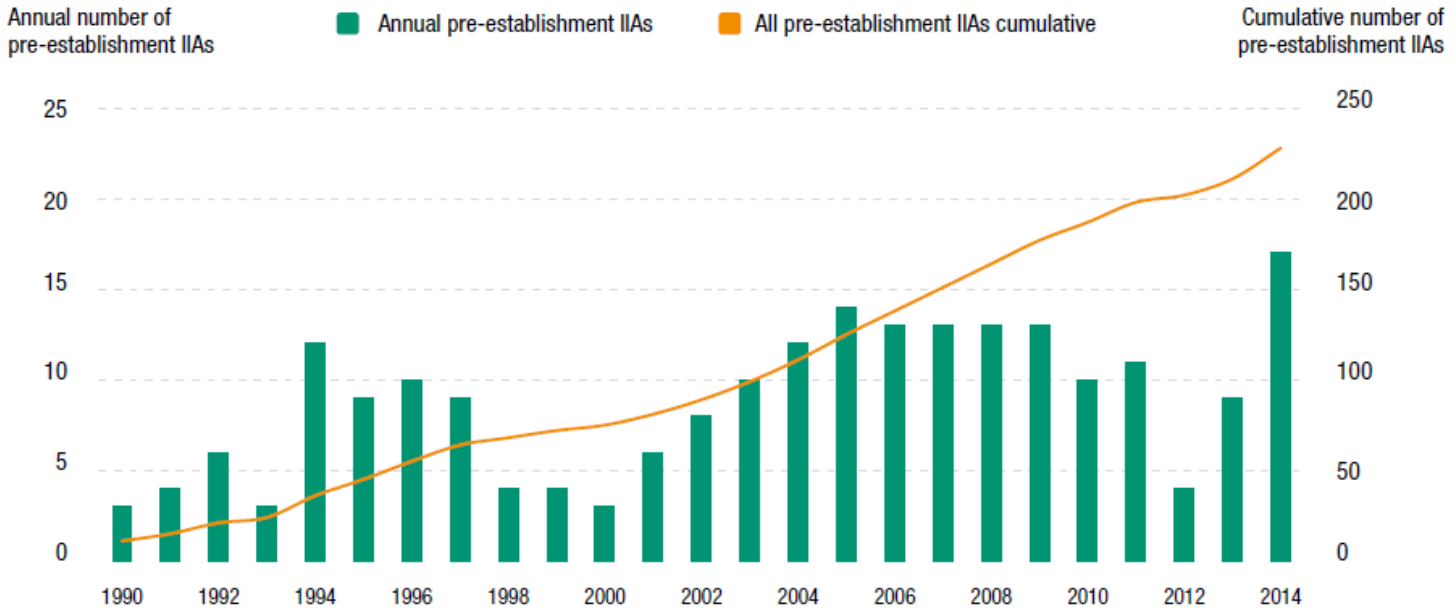
- Extension of certain standards of protection to the "establishment, acquisition and expansion" of investments ("pre-entry model")
- Standards of protection typically concerned:
  - National treatment
  - MFN
  - Prohibition of performance requirements
  - Prohibition of nationality requirements for senior management and board members

Types of pre-investment protection regulation

- Positive listing
  - Pre-investment protections apply only to sectors and measures that are explicitly listed
- Negative listing
  - Pre-investment protections apply to all sectors and measures that are not explicitly excluded
- Market access clause
  - Prohibits certain non-discriminatory practices that can inhibit the right of establishment
- Reservations
  - Exemptions for existing non-conforming measures ("standstill")
  - Right to adopt new measures
  - Some IIAs exclude pre-investment matters from the scope of ISDS

Pre-investment regulation in IIAs

- The number of treaties covering pre-investment protection is growing
- By the end of 2014: 228 instruments containing pre-investment protections (125 "other IIAs" and 103 BITs)



Source: UNCTAD, *"Recent Policy Development and Key Issues 2015"*

Pre-investment regulation in recent IIAs

- CETA
  - Broad definition of "investor" ("*that seeks to make, is making or has made an investment*", Section 1 Article X.3)
  - Broad pre-establishment protection (Sections 2-3)
  - National treatment, MFN, and prohibition of performance requirements apply to establishment, acquisition and expansion of investments
  - Market access clause
  - Reservations (Section 1 Article X.1.2)
- TPP
  - National treatment, MFN, and prohibition of performance requirements apply to establishment, acquisition and expansion of investments
  - Reservations (Article 9.11)
- TTIP
  - No pre-investment protections
  - EU perspective (2014): with regard to the right of establishment, "*the Parties may choose whether or not to open certain markets or sectors, as they see fit*"

Pre-investment regulation in the ECT

- "Soft" / "best efforts" pre-investment protection (Article 10(2) ECT):
  - *"Each Contracting Party shall endeavour to accord to Investors of other Contracting Parties, as regards the Making of Investments in its Area [national treatment and MFN]."*
  - Some authors claim that these obligations are arbitrable as Article 26(1) ECT does not exclude "*making of investment*" from its scope
- Intended supplementary treaty obliging each party to accord to Investors of other parties, as regards the Making of Investments in its Area, national treatment and MFN (Article 10(4) ECT)
  - Negotiations began in 1995; draft Supplementary Treaty published in 1998; still not adopted.
- Article 10(6)(b) ECT allows Contracting Parties to make at any time a legally binding voluntary commitment providing national treatment and MFN to pre-investment (none did)

Arbitration practice

- Early cases:
  - Whether expenses constitute investment in their own right
  - Mihaly v Sri Lanka (no, but did not exclude that in some cases expenses may be part of investment)
  - Zhinvali v Georgia (no)
  - Nagel v Czech Republic (no)
- More recent cases:
  - Whether expenses constitute part of an investment in a broad sense (investment as a complex operation)
  - PSEG v Turkey (yes, because investment was made)
  - Aucoven v Venezuela (yes, negotiation costs were found to be recoverable due to the contract's wording)

Arbitration practice

- Mihaly v Sri Lanka (ICSID Case No. ARB/00/2), Award of 15 March 2002 (US-Sri Lanka BIT)
  - Purported investment: expenditures of money upon the execution of a certain letter of intent entered into with the government in preparation for an investment project
  - Result: Jurisdiction declined
  - Pre-investment and development expenditures – no investment
  - Parties never signed a contract and expressly disclaimed any obligations arising from the preparatory work undertaken
  - Tribunal did not exclude that the moneys spent or expenses incurred in their preparation of investments can constitute an investment in other cases

Arbitration practice

- PSEG v Turkey (ICSID Case No. ARB/02/5), Decision of 4 June 2004, Award of 19 January 2007 (US-Turkey BIT)
  - Investment had been made in the form of a Concession Contract (as distinguished from Mihaly, where no contract was entered into)
  - Pre-investment expenses:
    - Most compensated to the claimants
      - The tribunal noted that the Contract at hand extended the total investment cost of the Project to "*all the expenses made by the Company regarding the facilities in accordance with the feasibility report, until the commercial operation date*."
    - Some not compensated
      - Expenses made by entities other than the claimants and made prior to the feasibility report as agreed in the Contract

Conclusions

- Pre-investment protection is a growing trend in modern IIAs
- Cases under pre-investment protection provisions are yet to be seen
- Currently, pre-investment expenses may be recovered as a part of an investment, if there was one
- Tribunals will look into the underlying documents to assess if such expenses may be recoverable

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