Pre-investment in modern IIAs and its interpretation in arbitration

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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)

- 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
Pre-investment in modern IIAS
Regulation and arbitration practice

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