

Kluwer Arbitration Blog

Brexit and Foreign Investors' Legitimate Expectations

Roger Alford (General Editor) (Notre Dame Law School) · Saturday, December 17th, 2016

Last month I was privileged to organize a conference at the University of Notre Dame's London Global Gateway on the topic of UK trade and Brexit. The conference had three sessions: (1) UK trade negotiations with the EU; (2) UK trade negotiations outside the EU; and (3) UK's post-Brexit status within the WTO. You can watch all three sessions [here](#). The participants were all trade experts, including Lorand Bartels at Cambridge, Meredith Crowley at Cambridge, Piet Eeckhout at UCL, Jennifer Hillman at Georgetown, Rob Howse at NYU, Simon Lester of the CATO Institute, Sophie Robin-Olivier at Paris II Sorbonne, and yours truly.

In this post, I want to focus on the question of whether Brexit might trigger foreign investor claims against the United Kingdom. In my discussion, (beginning at 1:06:30) I discuss Brexit in the context of the UK's obligation to foreign investors to maintain regulatory stability. I draw the analogy of the Argentina arbitration cases suggesting that a fair and equitable treatment standard gives rise to legitimate expectations. As discussed in detail by Michele Potesta [here](#), legitimate expectations can be created through the general regulatory framework, and those expectations are greater in developed countries like the United Kingdom.

If British and other foreign investors are able to succeed in Argentina for that country's relatively modest change to its laws, will foreign investors be able to succeed in claims against the UK for fundamental changes to its regulatory environment? What is good for the goose is good for the gander. Does a change in the regulatory framework by withdrawing from the EU and EU FTA network constitute a change so severe and radical that an arbitral tribunal would find a violation of fair and equitable treatment by reference to an investor's frustration of its legitimate expectations. Every investor makes reasonable assumptions when it decides to invest in the UK, and those assumptions will arguably be undermined if and when the UK withdraws from the EU and its free trade network.

For example, will automakers that decided to invest in the UK on the legitimate expectation that its automobiles will be exported duty-free to the EU and the EU's free trade network, be able to argue that the UK's withdrawal resulting in 10 percent duties on cars from the UK to the EU constitute a BIT violation? Or will the banking industry that established themselves in the UK on certain assumptions about access to the EU be able to argue that they invested in the UK with the reasonable and legitimate expectation that they could access the EU market? These claims seem at least plausible. In short, it is safe to say that when the UK is negotiating its withdrawal from the EU, they must consider the possibility that if the regulatory framework changes too much, they

open themselves up to the potential liability for fundamentally altering the regulatory environment so as to violate the fair and equitable treatment standard.

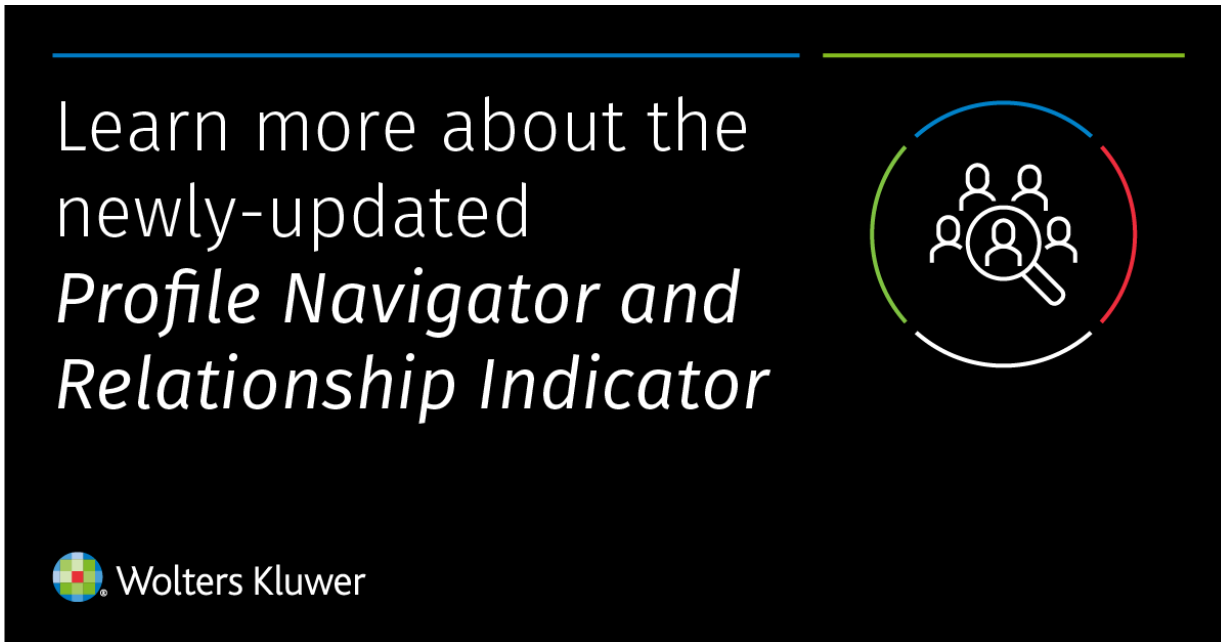
With the UK not yet triggering Article 50, these issues are only now beginning to be explored. But I know from personal conversations with investment arbitration practitioners, the possibility is real and the risk to the UK is genuine.

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This entry was posted on Saturday, December 17th, 2016 at 3:51 pm and is filed under [Brexit](#), [Fair and Equitable Treatment](#), [Investment Arbitration](#)

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