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Is America First the End of FET?

Eric van Eyken (Hanotiau & van den Berg) · Thursday, August 3rd, 2017 · Young ICCA

Despite apparent "America First" language in the US Summary of Objectives for the NAFTA renegotiation which appear contrary to the minimum standards of treatment and fair and equitable treatment, those protections are likely to remain in a new NAFTA.

On 17 July 2017, the US Trade Representative published the "Summary of Objectives for the NAFTA renegotiation" as required by US law (the "Summary"). This Summary outlines the negotiating position of the United States with regard to the re-negotiation of the NAFTA announced on 18 May 2017 and on which President Trump campaigned.

With regard to investor state dispute settlement ("ISDS"), the Summary is brief, providing in full:

> – Establish rules that reduce or eliminate barriers to U.S. investment in all sectors in the NAFTA countries.
> – Secure for U.S. investors in the NAFTA countries important rights consistent with U.S. legal principles and practice, while ensuring that NAFTA country investors in the United States are not accorded greater substantive rights than domestic investors.

The second bullet in the Summary appears to contain a bombshell with regard to fair and equitable treatment (i.e., FET). The statement that "investors in the United States are not accorded greater substantive rights than domestic investors" would appear to run contrary to the international law concept of a minimum standard of treatment as reflected in NAFTA Article 1105. NAFTA Article 1105 provides for the customary international law standard of minimum treatment, i.e., FET, with regard to foreign investment:

> Article 1105: Minimum Standard of Treatment
> 1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

The FET standard is based upon the customary international law rule that host states are required to provide foreign investors and their investments with a minimum standard of treatment, regardless of whether such substantive protections are offered to the domestic citizens of the host state.

The FET standard is not without controversy, going back to the modern origins of the debate on this customary international law standard. As explained by Professor Rob Howse of NYU in a blog posting of 18 July 2017 regarding ISDS in the Summary, the 2017 US position appears to reverse the long running American (and capital exporting world's) stance against the 19th century Calvo Doctrine, as explained by Professor Howse:

> Those familiar with the history of international investment law will recognize this principle as part of the Calvo Doctrine, which was, ironically, a position taken by states in the global South against the United States, and other developed-country exporters of capital; they should not have to provide rights to foreign investors beyond those provided to domestic investors in the same circumstances. Now with the Trump Administration, the United States is propounding the Calvo Doctrine (or at least that part that concerns substantive rights rather than dispute settlement) against its NAFTA partners, Canada and Mexico.

Such a stance, while consistent with Trump's "America First" nationalistic views is even more remarkable given that the US does not appear to have ever lost a NAFTA or BIT ISDS arbitration. To the contrary, US investors in Canada, Mexico, and beyond win their fair share of investment arbitration cases.

Why would the US Trade Representative adopt a stance that appears completely against US commercial interests, America First rhetoric aside? The answer is that the US Trade Representative is required by the US Congress to adopt the position set forth in the 2017 Summary.

Identical wording is found in US law going back at least until the early 2000s.

This position is found in Section 2(b)(4) of the 2015 Trade Promotion Authority (TPA) for the Trans-Pacific Partnership (TPP) Act, which establishes this position as part of the US TPP trade negotiating objectives:

> …ensuring that foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than United States investors in the United States…

It is similarly found in the 10 May 2007 US Bipartisan Agreement on Trade Policy.

Going back further, the same wording is found in the US Trade Act of 2002:

> …ensuring that foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than United States investors in the United States…

And yet, despite this statutory requirement, FET protection is included in the text of the TPP (Article 9.6), the US-Peru Agreement (Article 10.5), the US-Chile Agreement (Article 10.4), and

the US-Colombia Agreement (Article 10.5), all agreements post-dating the US Trade Act of 2002.

The answer to this apparent contradiction is in the elaboration provided in the US Trade Act of 2002 regarding FET. Section 2012(b)(E)(3) of the Trade Act provides that the US objectives in this regard are met by:

> seeking to establish standards for fair and equitable treatment consistent with United States legal principles and practice, including the principle of due process

This identical requirement is maintained under Section 2(b)(4)(E) of the 2015 Trade Promotion Authority under which the TPP was negotiated and under which President Trump is acting in his renegotiation of the NAFTA, including the 17 July 2017 Summary position.

As such, while my own initial reaction to the US Summary of its position on the NAFTA renegotiations was similar to Professor Howse, that Trump's nationalism has killed FET, it appears that like so much in the Trump era, the reality is far different than the rhetoric.

America First is not the end of the FET standard. Indeed, given that the United States, Canada, and Mexico already agreed on modern language regarding ISDS as part of the TPP, it would be unsurprising to see Article 9.6 of the TPP text on FET included in a re-negotiated NAFTA.

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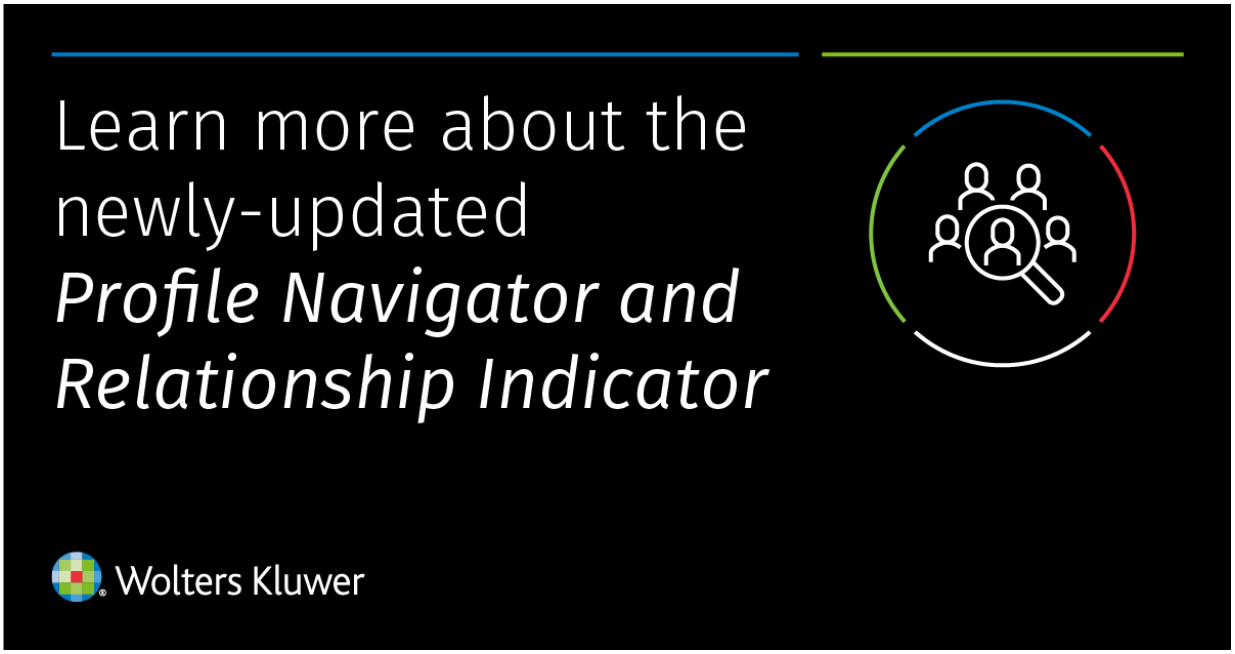

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