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Using Trade Remedies to Enforce Arbitration Awards

Roger Alford (General Editor) (Notre Dame Law School) · Saturday, March 22nd, 2014

As I discuss in a [recent article](#) published in the Santa Clara Journal of International Law, one of the most significant developments signaling the convergence of trade and arbitration is the use of trade remedies to enforce arbitration awards. This is done primarily when a developed country threatens to remove preferential trade benefits to a developing country if that country does not honor its international arbitration commitments.

The WTO allows (but does not require) developed countries to grant preferential trade benefits to “promote the development, financial and trade needs of developing countries.” [Many developed countries](#)—including Australia, Canada, the European Union, and the United States—have established such “Generalized System of Preferences” or GSPs to promote trade with developing countries. The major benefit of GSP schemes is the unilaterally lowering of tariff barriers for products from beneficiary countries without a corresponding reduction in tariffs for the developed country’s products.

The discretionary nature of these schemes means that the trade benefits come with strings attached. In the [United States](#) and the [European Union](#), for example, developing countries are subject to performance obligations with respect to matters such as drug trafficking, international terrorism, democracy, human rights, environmental protection, government corruption, unlawful expropriation, the rule of law, and good governance.

The United States imposes a number of conditions on beneficiary countries, including that they recognize and enforce arbitral awards in favor of United States nationals. Any country that wishes to secure beneficiary status under the GSP scheme must satisfy this criterion, and any country that fails to maintain this commitment jeopardizes their beneficiary status. The provision was added to the Trade Act of 1974 because of concerns that it was “contrary to sound U.S. policy to give...any...developing nation the favored treatment contemplated by the present legislation in the face of unwillingness to abide by solemn agreements to recognize as final and binding arbitration awards rendered in disputes between it and American parties.” (120 Cong. Rec. 39831).

The use of trade remedies to enforce arbitration awards is best illustrated by the

ongoing dispute over Argentina's refusal to honor adverse investment awards. On March 26, 2012, the Obama Administration [announced](#) that Argentina's GSP beneficiary designation would be suspended "because it has not acted in good faith in enforcing arbitral awards in favor of United States citizens." It was the [first time in American history](#) the United States denied GSP trade benefits to a developing country for its failure to honor arbitration commitments.

The decision was the culmination of an intense lobbying effort by American corporations who had succeeded in arbitration against Argentina pursuant to the United States-Argentina Bilateral Investment Treaty, but were unsuccessful in securing enforcement of those awards. The threat to suspend GSP benefits became a matter of intense bilateral concern. When President Barack Obama and Argentine President Christine Fernandez met for the first time in November 2011, the two heads of state spent the majority of their time discussing Argentina's obligation to pay the arbitration awards, and the consequences that would flow from its failure to do so.

The United States is [clearly calculating](#) that such trade sanctions will alter Argentina's cost-benefit analysis. Buenos Aires is [set to pay approximately \\$18 million](#) annually in increased duties as a result of the GSP suspension, far below the \$300 million it owes to American corporations from the arbitration awards. Standing alone, the GSP suspension may be an insufficient incentive to comply given that the annual cost in additional duties represents only six percent of one arbitration award. But when the trade sanctions are considered in the context of [other measures](#)—such as limiting access to World Bank and Inter-American Development Bank credit and loan facilities or refusing to support the restructuring of Argentina's \$7 billion Paris Club debt—the combined result may nudge Argentina toward compliance, or at least a post-award settlement. The combined approach exposes Argentina to substantial risks, such as limiting its access to credit, altering its credit rating, constricting its export market, and discouraging foreign investment.

With the successful campaign to suspend Argentina's GSP benefits, U.S. corporations are now actively pursuing a similar tactic with respect to other countries. Chevron, in particular, is lobbying the United States Trade Representative to suspend Ecuador's preferential trade status under the [Andean Trade Preference Act](#) ("ATPA") because of that country's failure to honor arbitration awards in Chevron's favor. [USTR has warned](#) that Ecuadorian President Rafael Correa that he is in jeopardy of losing ATPA beneficiary status. Ecuador is particularly vulnerable to losing its beneficiary status because the other three ATPA beneficiary countries have already, or soon will no longer be part of the program. The ATPA is unlikely to remain with Ecuador as the sole beneficiary.

The [USTR has been reluctant to accept Section 301 petitions](#) when an investor alleges that a host country has expropriated its investment, reasoning that such claims should be pursued in investment arbitration. But if an investor successfully pursues arbitration and still is unable to collect against the host country, the justification for pursuing a Section 301 action is enhanced. The overwhelming majority of Section 301 cases are concerned with foreign trade practices that impede exports or impose impediments to U.S. investments abroad. Section 301 measures almost always are designed with the same objectives as bilateral investment treaties: to benefit the U.S.

economy by promoting trade, foreign investment and export opportunities. Therefore, a Section 301 action for refusing to recognize and enforce an arbitration award is plausible.

It appears that the strategy worked. Although one cannot draw a causal connection, in the wake of these trade actions, [Argentina settled](#) several ICSID cases, including the cases against American corporations. The United States has [announced](#) that Argentina GSP benefits could be restored if Argentina settles the ICSID arbitral awards, but it is doubtful that it will do so while other ICSID claims are pending or not enforced.

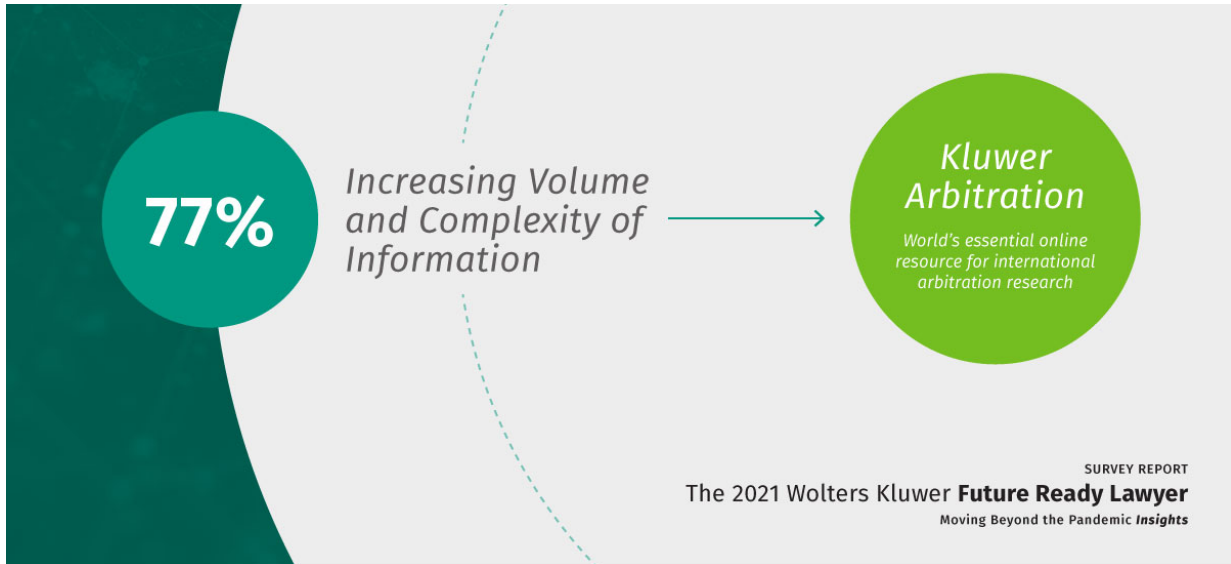
Investment arbitration was designed in a manner such that recognition and enforcement of adverse investment awards was presumed. That is not how things have played out, and the Argentina kerfuffle suggests that foreign investors increasingly may pursue trade remedies to secure enforcement of investment arbitration awards.

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