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Using Trade Remedies to Enforce Arbitration Awards: The WTO-Consistency Question

Roger Alford (General Editor) (Notre Dame Law School) · Wednesday, March 26th, 2014

Simon Lester has a thoughtful response to my earlier post about using trade remedies to enforce arbitration awards. He questions whether conditioning GSP benefits on compliance with arbitration awards is consistent with WTO obligations. My answer is essentially yes. Because there are so many issues at play, I thought it best to respond in a new post rather than respond in the comment section to his post.

First, there is no question that granting preferential treatment for developing countries does not violate MFN rules. That was settled with the so-called Enabling Clause. The real question is whether a particular GSP-scheme is consistent with the Enabling Clause. The Enabling Clause provides that Member States may accord differential and more favorable treatment to developing countries, provided (a) such treatment is non-discriminatory as between similarly-situated developing countries; and (b) is designed to promote the development, financial and trade needs of the developing countries.

As to the first requirement, the Enabling Clause requires GSP benefits to be conferred in a non-discriminatory manner among similarly-situated developing countries. This, according to *EC-Tariff Preferences*, requires that the relevant preference be made available to all beneficiaries that share that need. (*EC-Tariff Preferences*, para. 180). That requirement appears to be met. The U.S. obligation on compliance with arbitration awards is applied to all GSP beneficiaries alike. Argentina might have a discrimination argument if other beneficiary countries refuse to honor arbitration awards but still enjoy GSP benefits. But I am not aware of any such examples, and if anything, it appears that other developing countries like Ecuador will soon face a similar fate as Argentina.

Second, the GSP conditional benefit must be imposed to meet particular development, financial or trade needs. In other words, if you are granted benefits with strings attached, those strings must be for the benefit of the developing country. Simon Lester questions whether conditional tariff benefits can ever meet that requirement. I disagree. If you look at the various GSP schemes, the list of such needs are legion, addressing issues such as drug-trafficking, communism, terrorism, human rights, environmental protection, expropriation, contractual compliance, intellectual property protections, etc.

At one level one might view many of these concerns as primarily about protecting developed countries' interests more than promoting the developing country needs. But, of course, these goals

are mutually-beneficial. Goals such as promoting the rule of law, creating a safe and stable legal climate, encouraging foreign investment, good governance, reducing crime and corruption, guaranteeing human rights, and encouraging environmental sustainability are all legitimate objectives that developed countries legitimately can ask developing countries to pursue.

In the specific case of honoring arbitration awards, developing countries that do not recognize and enforce investment awards are sending a signal to existing and future foreign investors that they are not predictable and reliable trading partners. There is significant empirical research supporting the relationship between robust investment protections and the promotion of foreign investment. In the words of the Enabling Clause, the GSP condition for failing to honor arbitration awards is designed so that a developing country will "respond positively to the development, financial and trade needs" concerning the promotion of the rule of law and encouragement of foreign investment.

If the GSP scheme satisfies the Enabling Clause requirements, then the measure does not violate MFN obligations and there is no need to rely on general exceptions. Assuming an MFN violation, however, Article XX(d) is the most obvious exception. That exception provides that the measure is "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement." The federal law at issue is not inconsistent with WTO obligations—it simply creates a private right of action for the successful claimant and requires investment awards to be enforced and given the same full faith and credit as if the award were a final state court judgment.

That the GSP conditional benefit is "necessary" to secure compliance depends on the circumstances, but in the case of Argentina it appears that a variety of carrots and sticks were critical to encourage Argentina to honor the investment awards addressed in the federal legislation. Simon Lester questions whether the conditional GSP-benefit scheme satisifies the necessity test. I think it could, as part of a comprehensive policy seeking to secure compliance with arbitration awards. In the words of *Brazil-Tyres*, the GSP conditional benefit is necessary if it can be shown to have made "a material contribution to the achievement of that objective." (*Brazil-Tyres*, para. 150). If the United States adopted a comprehensive policy that included a GSP conditional benefit, the total effect of complementary measures may have been enough to secure compliance. (*Brazil-Tyres*, para. 172). This would satisfy the necessity test.

Finally, as to whether compliance with arbitration awards is similar to the non-exhaustive list of regulations set forth in Article XX(d), Simon Lester suggests that regulating customs enforcement, anti-competitive or deceptive trade practices, and such are not similar to efforts to secure compliance with arbitration awards. I disagree. The common theme of that Article XX(d) list is, in the words of *Mexico-Soft Drinks*, government regulation of "activity undertaken by a variety of economic actors (e.g., private firms and State enterprises)… [and] refer[s] to rules that form part of the domestic legal system of a WTO Member." (*Mexico-Soft Drinks*, para. 70). Federal regulation such as 22 U.S.C. § 1650a and 9 U.S.C. § 207 recognizing and enforcing arbitral awards are the kind of domestic economic regulations that apply to both private and public entities on the losing end of a foreign arbitral award. They are designed to enhance the position of arbitration award creditors vis-à-vis arbitration award debtors. They are designed to place foreign arbitral awards on the same footing as domestic money judgments. This type of measure strikes me as the kind of domestic economic regulation that Article XX(d) was intended to address.

In sum, there is insufficient WTO jurisprudence about GSP programs, and Simon Lester and I are

both offering our best guess as to whether this GSP conditional benefit scheme would pass WTO muster. On balance, I think a scheme that encouraged developing to recognize arbitral awards by conditioning GSP benefits on such recognition would survive a WTO challenge.

UPDATE: Simon Lester responds to my post here.

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