The Intersection of International Trade and International Arbitration: The Use of Trade Benefits to Secure Compliance with Arbitral Awards
THE INTERSECTION OF INTERNATIONAL TRADE AND INTERNATIONAL ARBITRATION: THE USE OF TRADE BENEFITS TO SECURE COMPLIANCE WITH ARBITRAL AWARDS

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ABSTRACT

This Article examines a recent example of the intersection of the two related fields of international trade and international arbitration: the suspension of international trade benefits to secure compliance with international arbitral awards. On May 28, 2012, the United States suspended Argentina’s preferential trade status under the Generalized System of Preferences (GSP) due to Argentina’s purported failure to comply with the International Centre for Settlement of Investment Disputes (ICSID) arbitral awards in Azurix and CMS Gas. This was the first time in the history of the GSP that the United States has suspended a state’s preferential trade status for failing to pay an arbitral award. This Article endorses the United States’ novel approach as it would seem to further compliance with international arbitral awards, thereby strengthening the legitimacy of international arbitration, particularly ICSID arbitration, as a meaningful form of alternative dispute resolution.

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I. INTRODUCTION

The term “international law” is vague and encompasses a multitude of fields, including international arbitration, international business transactions, international project finance, international tax, and international trade. Although mostly taught in law schools as distinct seminars and organized within law firms as separate practice groups, these fields do not always operate in separate vacuums. Rather, in practice they often overlap. This Article examines a recent example of the intersection of the two related fields of international trade and international arbitration: the suspension of preferential trade benefits to secure compliance with arbitral awards.

On May 28, 2012, the United States suspended Argentina’s preferential trade status under the Generalized System of Preferences (GSP), a program that provides duty-free treatment to imports from certain developing states. The suspension was in response to Argentina’s purported failure to comply with the International Centre for Settlement of Investment Disputes (ICSID or Centre) arbitral awards in Azurix and CMS Gas in favor of U.S. investors. Furthermore, it was a novel attempt to use international trade to secure compliance with arbitral awards.

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1. See Proclamation No. 8788, 77 Fed. Reg. 18, 899 (Mar. 29, 2012). The suspension, which was made pursuant to 19 U.S.C. §§ 2462(b)(2)(E) and (d)(2), took place on May 28, 2012, sixty days after the presidential proclamation was published in the Federal Register.


3. The term “purported” is used because, as discussed infra, Argentina contends that, under its interpretation of the ICSID Convention, it has not failed to “abide by and comply with” the Azurix and CMS Gas awards in violation of Article 53 of the ICSID Convention. See infra Section III. It is outside the scope of this Article to assess Argentina’s interpretation of the ICSID Convention. See infra note 68 and accompanying text (noting that commentators are on both sides of the debate).

4. By “ICSID award,” this Article refers to arbitral awards rendered under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). Arbitral awards rendered under the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes (ICSID Additional Facility Rules) are excluded. The ICSID Additional Facility Rules are outside the jurisdiction of the Centre and, therefore, the ICSID Convention (including Article 53 of the Convention discussed infra) is not applicable to awards rendered under the ICSID Additional Facility Rules. See ICSID Additional Facility Rules, art. 3 (“Since . . . [arbitration proceedings conducted under the ICSID Additional Facility Rules] are outside the jurisdiction of the Centre, none of the provisions of the Convention shall be applicable to them or to recommendations, awards, or reports which may be rendered therein.”).

5. Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Award (July 14, 2006), 14 ICSID Rep. 374 (2009) (awarding $165.2 million for breaches of the fair and equitable...
This Article examines the United States’ decision to suspend international trade benefits to secure compliance with international arbitral awards, in particular investment arbitration awards rendered under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). Section II briefly describes the ICSID Convention and then discusses the Convention’s requirement in Article 53 that parties shall “abide by and comply with” ICSID awards. While states normally comply with ICSID awards, investors have complained that a handful of states, including Argentina, have failed to do so. In light of Argentina’s significant caseload at the Centre, Section III examines Argentina’s interpretation of the ICSID Convention that, according to Argentina, confirms that it has not failed to “abide by and comply with” ICSID awards. Section IV discusses the spectrum of means to secure compliance with ICSID awards, with a focus on the United States’ suspension of Argentina’s preferential trade status under the GSP. Section V concludes by endorsing the United States’ novel decision, as it would seem to strengthen the legitimacy of international arbitration, particularly ICSID arbitration, as a meaningful form of alternative dispute resolution.

II. The ICSID Convention and Its Requirement to “Abide by and Comply with” ICSID Awards

The ICSID Convention is a multilateral treaty that was formulated by the Executive Directors of the International Bank for Reconstruction
and Development (the World Bank). The Convention offers a detailed framework for the settlement of international investment disputes by creating the Centre, which provides facilities and procedural rules for the arbitration of international investment disputes between Contracting States and nationals of other Contracting States. ICSID Convention jurisdiction is limited to "any legal dispute arising directly out of an investment, between a Contracting State . . . and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre." Mere ratification of the Convention is insufficient to submit a particular dispute to arbitration; there must be a separate basis for consent, which is usually contained in an investment treaty or free trade agreement or, to a much lesser extent, a concession agreement or the investment law of a host state. The Convention was opened for signature on March 18, 1965, entered into force on October 14, 1966, and currently has 147 Contracting States; notable exceptions include Brazil, Canada, India, Mexico, the Russian Federation, and South Africa.

ICSID arbitration, like other forms of international arbitration, gener-

10. See ICSID Convention, supra note 8, at art. 1(1). The drafters of the ICSID Convention adopted a concept of "procedure before substance" by "provid[ing] for effective procedures for impartial settlement of disputes, without attempting to seek agreement on substantive standards [which would be found in, for example, an investment treaty or free trade agreement]." See Rudolf Dolzer & Christoph Schreuer, Principles of International Investment Law 20 (2008); see also infra notes 13-14 and accompanying text (discussing the ICSID Convention’s requirement of a separate basis for consent).
11. See ICSID Convention, supra note 8, at art. 1(2).
12. See id. at art. 25(1).
13. See id. at Preamble (" Declaring that no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration.").
14. See Int’l Ctr. for Settlement of Inv. Disputes, The ICSID Caseload—Statistics (Iss. 2012-2) 10, http://icsid.worldbank.org (follow “ICSID Publications” hyperlink) (reporting that investment treaties and free trade agreements were the basis of consent invoked to establish ICSID jurisdiction in 74% of cases registered under the ICSID Convention and the ICSID Additional Facility Rules).
ally results in a tribunal rendering an award.\textsuperscript{17} Article 53(1) of the Convention provides that ICSID awards “shall be binding on the parties” and that “[e]ach party shall abide by and comply with the terms of the award.”\textsuperscript{18} Professor Christoph H. Schreuer explains in his authoritative treatise:

The obligation to abide by and comply with the terms of the award is a logical consequence of its binding nature. The principle was contained in all drafts leading to the Convention...and was never cast into doubt during the deliberations.\textsuperscript{19}

Professor Schreuer further emphasizes that “[t]he obligation to comply applies equally to both parties.”\textsuperscript{20}

The drafters of the ICSID Convention shared “a general expectation that compliance by the host State with ICSID awards would not be a practical problem and that voluntary compliance would be a natural consequence of the treaty obligation expressed in Art. 53.”\textsuperscript{21} In practice, this has proven true: states have generally respected the international law maxim \textit{pacta sunt servanda}\textsuperscript{22} and performed in good faith their treaty obligation to “abide by and comply with” ICSID awards.\textsuperscript{23} This is likely because states are reluctant to take actions that might damage their investment environment or credibility in the international community.\textsuperscript{24} A foreign investor might, for instance, have reservations about investing in a state that has refused to pay an ICSID award.\textsuperscript{25}

\begin{thebibliography}{9}
\bibitem{17} See ICSID Convention, supra note 8, at arts. 48-49.
\bibitem{18} Id. at art. 53(1) (“The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.”).
\bibitem{20} See id. (noting that “[t]here is no difference between a host State and a foreign investor in this respect.”).
\bibitem{21} See id. at 1107; see also id. at 1102 (“It was considered highly unlikely that a State party to the Convention would not carry out its treaty obligation under the Convention to comply with an award.”).
\bibitem{22} See Vienna Convention on the Law of Treaties art. 26, May 23, 1969, \textit{1155 U.N.T.S. 331} (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”).
\bibitem{23} See Stanimir A. Alexandrov, Enforcement of ICSID Awards: Articles 53 and 54 of the ICSID Convention, 6(1) \textit{TRANSNAT’L DISPUTE MGMT.} (2009), at 10.
\bibitem{24} See, e.g., SCHREUER, supra note 19, at 1107; Georges R. Delaume, Sovereign immunity and transnational arbitration, in \textit{CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION} \textit{313}, 322 (Julian D.M. Lew ed., 1986) (“[R]efusal by a State to comply with an ICSID award would deprive that state of any credibility in the international community.”).
\bibitem{25} See Andrea K. Bjorklund, Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The Re-Politicization of International Investment Disputes, 21 \textit{AM. REV. INT’L ARB.} \textit{211},
\end{thebibliography}
However, in recent years investors have criticized certain states, including Argentina, Congo, Kazakhstan, Liberia, Senegal, and Zimbabwe, for refusing to comply with ICSID awards. Furthermore, there are signs that additional states might refuse to comply with ICSID awards in the future. One example is Venezuela, which denounced the ICSID Convention in January 2012 but still has around thirty cases pending at the Centre. In fact, the late Venezuelan President Hugo Chavez threatened

233 (2010) ("One possible strategy investors will employ if debtor states avoid their obligations in significant numbers is to shift their investments away from states viewed as risky places to invest and which are unlikely to pay in the event of a dispute."); Cf. Embassy of the U.S. in Buenos Aires, Arg., GSP Fact Sheet, http://argentina.usembassy.gov/gsp2.html (noting that if Argentina pays the Azurix and CMS Gas awards, it will "send[] a strong signal to U.S. investors that Argentina welcomes and protects foreign investment.").

26. See infra Section III.


30. See Baldwin et al, supra note 29, at 7-8; see also Société Ouest Africaine des Bétons Industriels v. Senegal, ICSID Case No. ARB/82/1, Award (Feb. 25, 1988), 2 ICSID Rep. 190 (1994).


in 2012 that Venezuela would not comply with an ICSID award in the contentious *Mobil v. Venezuela* dispute.\(^{34}\) A similarly defiant stance might be adopted in the future by other critics of the ICSID system, such as Bolivia\(^ {35}\) and Ecuador,\(^ {36}\) which also denounced the ICSID Convention and still have a handful of cases pending at the Centre.\(^ {37}\)

A state’s refusal to comply with an ICSID award “could set a precedent for other sovereign states to follow suit.”\(^ {38}\) The failure to comply thus raises important systemic issues and calls into question “the value of ICSID arbitration as a meaningful mechanism for the resolution of investment

that a state’s denunciation of the Convention “shall not affect the rights or obligations under this Convention of that State . . . arising out of consent to the jurisdiction of the Centre given . . . before such notice was received by the depositary.” See ICSID Convention, supra note 8, at art. 72; see also Schreuer, supra note 19, at 1278 (“A denunciation does not affect pending proceedings.”).

34. Mobil Corp. v. Bolivarian Republic of Venez., ICSID Case No. ARB/07/27, Decision on Jurisdiction (June 10, 2010), https://icsid.worldbank.org. See Chavez Says He Won’t Respect World Bank Panel’s Decision, CNN (Jan. 9, 2012), http://edition.cnn.com/2012/01/09/business/venezuela-exxon/index.html (quoting the late President Chavez as follows: “I will say it once. We will not recognize any decisions of the ICSID. We will not recognize them.”); see also 2012 National Trade Estimate Report on Foreign Trade Barriers, Office of the U.S. Trade Representative, at 400, http://wwwustr.gov/sites/default/files/Venezuela.pdf (“On December 23, 2011, PDSVA, Venezuela’s state-owned oil conglomerate, lost an International Chamber of Commerce arbitration case against a major international oil company. With another case involving the same company pending before the World Bank’s International Centre for the Settlement of Investment Disputes (ICSID), President Chavez announced on January 8, 2012 that the Venezuelan government would not recognize any ICSID decision related to the company’s claim and stated that his government should withdraw from ICSID.”).


36. See List of Contracting States and Other Signatories of the Convention, supra note 15, at Note (noting that Ecuador’s denunciation of the ICSID Convention on July 6, 2009 took effect on January 7, 2010); see also infra notes 138-42 and accompanying text.

37. As of March 1, 2013, there were two ICSID arbitrations pending against Bolivia and three pending against Ecuador. See Pan American Energy LLC v. Plurinational State of Bolivia, ICSID Case No. ARB/10/8; Quiborax S.A., Non-Metallic Minerals S.A. & Allan Fosk Kaplun v. Plurinational State of Bolivia, ICSID Case No. ARB/06/2; Perenco Ecuador Limited v. Republic of Ecuador, ICSID Case No. ARB/08/6; Burlington Resources, Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/3; Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador, ICSID Case No. ARB/06/11.

The utility of ICSID arbitration as a binding means of resolving international investment disputes between investors and states necessarily hinges, like any form of alternative dispute resolution, on the resulting awards being honored and respected by both parties to the dispute.

### III. Argentina’s Purported Failure to Comply with ICSID Awards

The claim by investors that Argentina has refused to “abide by and comply with” ICSID awards is especially significant because Argentina has faced the most ICSID claims of any state. Moreover, Argentina has around two dozen cases currently pending at the Centre. In light of the large number of foreign investment disputes involving Argentina and the corresponding likelihood that ICSID awards may be rendered against Argentina, this Section examines Argentina’s interpretation of the ICSID Convention that, according to Argentina, confirms that it has not failed to “abide by and comply with” ICSID awards.

Argentina maintains that Article 53 of the ICSID Convention cannot...
be read in isolation.\textsuperscript{43} Rather, Article 53 must be read in context with Article 54 because these provisions, which are both included in Section 6 of Chapter IV of the ICSID Convention, “complement each other.”\textsuperscript{44} Article 54 is therefore operative from the moment the award becomes binding and not from when the award debtor fails to comply with the award. Article 54(1) of the ICSID Convention provides in relevant part: “Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.”\textsuperscript{45}

Argentina further contends that one of the consequences of Article 54 is that Argentina “is at least entitled to subject compliance with ICSID awards to the same or substantially the same procedures that are applicable to compliance with final judgments of local courts against the State.”\textsuperscript{46} Accordingly, Argentina maintains that it is not required to pay ICSID awards until the award holder pursues formal proceedings in the Argentine courts to collect payment:

As it is the case with any final judgment of an Argentine court, compliance with administrative procedures is required in order to satisfy awards against the State . . . The ICSID mechanism provides a dispute settlement procedure which improves vis-à-vis other international arbitration systems (inter alia the 1958 New York Convention) but does not provide its award holders with a super-right that renders meaningless the administrative requirements of ICSID Contracting States.\textsuperscript{47}

Argentina relies on the early decisions of the \textit{ad hoc} annulment committees in \textit{MTD v. Chile} and \textit{CMS Gas v. Argentina}, which both stated, in the context of granting a stay of enforcement of an ICSID

\begin{footnotesize}
\begin{enumerate}
\item See Siemens AG v. Argentine Republic, ICSID Case No. ARB/02/8, Argentina’s Response to the U.S. Department of State’s Letter, ¶¶ 3-5 (June 2, 2008) [hereinafter \textit{Argentina’s Response in Siemens}].
\item See id.
\item ICSID Convention, supra note 8, at art. 54(1).
\item See \textit{Argentina’s Response in Siemens}, supra note 43, at ¶ 10.
\end{enumerate}
\end{footnotesize}
award pending the outcome of an annulment application.48

The key feature of the situation is that, by the express terms of Article 54 of the Convention, an ICSID award is to be given the same effect as a final judgment of the courts of the Respondent State. As compared with other international arbitral arrangements, final awards under the ICSID Convention are directly enforceable, upon registration and without further jurisdictional control, as final judgments of the courts of the host State . . . States Parties to the Convention have an obligation to give effect to Article 54 of the Convention in their internal law. Exactly how this is done depends on the constitutional arrangements of the State Party concerned; the point for the Committee is to be satisfied that the State Party has taken appropriate steps in accordance with its constitutional arrangements to give effect to Article 54.49

Others, however, have characterized Argentina’s position as “novel,”50 “self-serving,”51 “far-reaching,”52 a “red herring,”53 and a “serious threat.”54 They point to the more recent ad hoc annulment committee decisions in Enron,55 Vivendi,56 Sempra,57 and Continental,58 which all

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48. The ICSID Convention provides that an ad hoc annulment committee “may, if it considers that the circumstances so require, stay enforcement of the award pending its decision.” See ICSID Convention, supra note 8, at art. 52(5).

49. See MTD Equity Sdn Bhd. v. The Republic of Chile, ICSID Case No. ARB/01/7, Decision on the Respondent’s Request for a Continued Stay of Execution (Annulment), ¶¶ 31-32 (June 1, 2005); CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Decision on the Argentine Republic’s Request for a Continued Stay of Execution (Annulment), ¶¶ 40-41(Sept. 1, 2006).

50. See Maria Vicien-Milburn & Yulia Andreeva, There is Nothing More Permanent Than Temporary—a Critical Look at ICSID Article 52(5) on Stay of Enforcement in Cases Against Argentina, 15(1) IBA A R B. N EWS 58 (2010).


52. See NIGEL BLACKABY, CONSTANTINE PARTASIDES, ALAN REDFERN & MARTIN HUNTER, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 663 (2009).

53. See GSP 2009 Annual Review Hearing, supra note 51, at 87:2 (testimony of Rodrigo Castillo, President of Azurix Corp.).

54. See Alison Ross, Argentina: What can be done?, GLOBAL ARB. REV. (Nov. 23, 2009) (quoting Carolyn Lamm, partner at White & Case LLP and former President of the American Bar Association).

55. Enron Corp. Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3 (Annulment), Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award, ¶ 69 (Oct. 7, 2008) (“The Committee therefore concludes that under a good faith interpretation of Article 53(1) of the ICSID Convention in accordance with the ordinary
found that Article 53 of the ICSID Convention provides an independent obligation to abide by and comply with an ICSID award without the need to submit to enforcement proceedings pursuant to Article 54 of the Convention. 59

In Enron, the first (and most reasoned) of these decisions, the committee noted:

[Previous decisions of ad hoc committees have not discussed directly the relationship between Article 53(1) and Article 54(1) of the ICSID Convention . . . These passages [in MTD and CMS Gas quoted above] make no mention of a separate and independent obligation under Article 53 . . . [L]ittle if any meaning to be given to its terms in their context and in the light of its object and purpose, that provision imposes on Argentina, in the event that the Award is not annulled, an obligation under international law vis-à-vis the United States to abide by and comply with the terms of the Award, without the need for action on the part of the Claimants pursuant to the enforcement machinery under Argentine law to which Article 54 of the ICSID Convention refers.

56. Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3 (Annulment), Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award rendered on 20 August 2007, ¶ 36 (Nov. 4, 2008) (“In the opinion of the Committee, it would be contrary to the interpretation provisions of the Vienna Convention on the Law of Treaties to pretend that any organ of the host State can extend an administrative certification function to exercise any possible control over the enforcement process of pecuniary obligations under a finally binding ICSID award. Such activity would contradict the declared objectives of the ICSID Convention. Any possible intervention by a judicial authority in the host State is unacceptable under the ICSID Convention, as it would render the awards simply a piece of paper deprived from any legal value and dependent on the will of state organs.”).

57. Sempra Energy Int’l v. Argentine Republic, ICSID Case No. ARB/02/16 (Annulment), Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award, ¶ 52 (Mar. 5, 2009), (“[T]he Committee concludes that a State Party against which an award has been made must (like a foreign investor party) abide by and comply with an ICSID award without the award creditor having to submit to any agency of the State Party to enforce the award as envisaged by Article 54 of the ICSID Convention.”).

58. Continental Casualty Co. v. The Argentine Republic, ICSID Case No. ARB/03/9 (Annulment), Decision on Argentina’s Application for a Stay of Enforcement of the Award, ¶ 12 (Oct. 23, 2009), (“[T]he Committee notes that at the 2 July 2009 first session, a representative of Argentina stated Argentina’s position that in order for Continental to obtain payment of the Award, it would be necessary for Continental to follow the formalities applicable to enforcement in Argentina of final judgments of Argentine courts, pursuant to Article 54 of the ICSID Convention. The Committee notes that in three other cases, ad hoc committees have found that this position of Argentina is inconsistent with Argentina’s obligation under Article 55 of the ICSID Convention to carry out without delay the provisions of the award without the need for enforcement action under Article 54 of the ICSID Convention. The Committee agrees with the conclusions in those earlier cases in respect of the obligation of the award debtor under Article 53 of the ICSID Convention.”).

59. Likewise, Professor Schreuer notes in his treatise that “[t]he obligation to comply is independent of any enforcement proceedings.” See Schreuer, supra note 19, at 1106.
weight can be given to this aspect of these decisions, given that these decisions do not take an express view on the question, let alone a considered and reasoned view . . .

The Enron committee further found that “nothing in the language of these provisions suggests that these two obligations are related,” since Article 53(1) refers to a “party” to an award while Article 54(1) refers to “each Contracting State to the ICSID Convention.”

By contrast, the committee noted that Article 27(1) of the ICSID Convention—which provides that an investor may seek diplomatic protection from his home state if the respondent state fails “to abide by and comply with the award”—mirrors the language of Article 53(1):

[I]t is clear when these two provisions are examined together that the failure of a State to abide by and comply with an award, as required by Article 53(1), is a breach of the ICSID Convention, entitling the national State of the award creditor to give diplomatic protection or bring an international claim. If a Contracting State was entitled to require an award creditor to use enforcement mechanisms established under Article 54(1) as a precondition to compliance with the award, the Committee considers that the final words of Article 27(1) would have reflected the language of Article 54(1), rather than that of Article 53(1).

Finally, the committee considered that Argentina’s interpretation “would be inconsistent with the purpose of the ICSID Convention” since ICSID is intended to be an international method of dispute settlement, not subject to national law. The Sempra and Vivendi committees further elaborated on this point by distinguishing the ICSID Convention, which does not offer any scope for review by

60. Enron, supra note 55, at ¶¶ 74, 77.
61. See id. at ¶¶ 61-62; see also Sempra Energy, supra note 57, at ¶¶ 38-39.
62. See ICSID Convention, supra note 8, at art. 27(1) (“No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.”).
63. Enron, supra note 55, at ¶ 65; see also Sempra Energy, supra note 57, at ¶¶ 43-44.
64. See Enron, supra note 55, at ¶ 68.
65. See ICSID Convention, supra note 8, at art. 53(1) (“The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention.”).
national courts, with the New York Convention, which provides for limited grounds on which an award may be subject to judicial review by domestic courts.

While it is outside the scope of this Article to assess whether Argentina has failed to “abide by and comply with” ICSID awards in violation of Article 53 of the Convention, it should be noted that, like the divergent annulment decisions mentioned above, commentators are on both sides of the debate.


67. See Sempra Energy, supra note 57, at ¶¶ 40-42 (concluding that “[f]or this reason, there would simply be no rationale for a requirement that an award creditor seeking payment should first subject itself to any form of local enforcement procedure”); Compañía de Aguas del Aconquija, supra note 56, at ¶ 35 (“[O]ne of the fundamental issues which the drafters of the ICSID Convention were keen to achieve was a total divorce from the recognition and enforcement system which prevailed under domestic laws or under the 1958 New York Convention governing commercial arbitration in the Member States . . . To eliminate state intervention in the field of investment disputes, and as a necessary consequence of creating an international mechanism to adjudicate such investment disputes under the auspices of ICSID, all sort of recourse to domestic courts (in cases other than those provided by the Convention itself) was to be avoided in all States who are Members of the ICSID Convention, including the host State, in respect of the recognition or enforcement of a finally binding ICSID award rendered against a given State.”).

68. Compare Alexandrov, supra note 23, at 12-13 (“Article 53’s obligation to abide by and comply with an award is independent of the enforcement mechanisms provided for in Article 53. States cannot require that investors holding an award against the respondent State submit themselves to the procedures of Article 54 before an obligation to honor the award under Article 53 can arise.”), and Irina Natacha Gedwillo, The Enforcement of ICSID Awards Before Argentine Courts, 8(2) TRANSNAT’L DISPUTE MGMT. (2011), at 19 (“Having analysed the topic in the light of Argentine law and the relevant Argentine courts’ case law, we can conclude that there is not a basis for reviewing a final judgment. There are only some few limited grounds that can be invoked to resist the enforcement of a final judgment. However, those limited grounds cannot be applied to enable an Argentine court to review an ICSID award on the grounds that the ICSID Convention entitled to enforce the ICSID award as if it were a final judgment rendered by an Argentine court.”), and Schreuer, supra note 19, at 1106 (“The obligation to comply is independent of any enforcement proceedings. In particular, an award debtor may not insist on the initiation of enforcement proceedings to delay compliance. The need for enforcement measures under Art. 53 implies defaults and hence a breach of Art. 53.”), with Gabriel Bottini, Recognition and enforcement of ICSID awards, 6(1) TRANSNAT’L DISPUTE MGMT. (2009), at 3, 6 (“Article 53 and 54 of the ICSID Convention complement each other, and while the latter applies to all Contracting States, as regards the State party to the arbitration proceeding both articles together constitute the bundle of obligations that arise for it as of the adoption of the award . . . Foreign investors should expect that the rule of law is respected in relation to them to the same extent that it is respected in relation to creditors of final local judgments . . . even if this entails having to comply with certain local procedures.”), and Posting of Ricardo Beltramino to US Suspends Argentina from Trade Preference Scheme, INT’L CTR. FOR TRADE AND SUSTAINABLE DEV., http://ictsdl.org/i/news/
IV. MEANS OF SECURING COMPLIANCE WITH ICSID AWARDS

If a state refuses to “abide by and comply with” an ICSID award, what are the repercussions? In other words, what avenues are available to an aggrieved investor to secure a state’s compliance with an ICSID award? As discussed below, a wide spectrum of options is available.69

A. The Two Extremes

On one end of the spectrum is lobbying the investor’s home state to exert diplomatic pressure on the host state, especially by using leverage at international financial institutions, such as the World Bank and International Monetary Fund. Former International Court of Justice (ICJ) Judge Stephen Schwebel has commented on the utility of diplomacy in securing compliance with ICSID Convention obligations:

I believe it is important to impress on states that have adhered to the Washington [ICSID] Convention that the obligations of that instrument must be taken seriously and complied with in good faith. Other ICSID member states should support this aim by making diplomatic representations as appropriate, and instructing their representatives on the executive boards of the World Bank, the International Monetary Fund and other international institutions to take states’ fulfilment or avoidance of their ICSID obligations into account.70

U.S. lawmakers recently have become more vocal about this form of diplomatic pressure. In June 2011, for example, U.S. Senator Mark Kirk (R-IL) wrote to U.S. Treasury Secretary Timothy Geithner “express [ing] concern about United States taxpayer dollars providing funding for World Bank loans to Argentina and . . . request[ing] a suspension of loans to sovereigns not in compliance with . . . ICSID . . .

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rulings.”71 A month later, U.S. Representative John Culberson (R-TX), on behalf of his constituent Azurix Corp. (Azurix), also wrote to Secretary Geithner regarding Argentina’s alleged failure to “abide by and comply with” Azurix’s ICSID award.72 Culberson requested that the U.S. Government “pursue all courses of action available to encourage Argentina to immediately comply” with its obligations under the Argentina-United States Bilateral Investment Treaty (BIT)73 and ICSID Convention, including conditioning:

(a) approval of disbursements of credit and loan facilities to Argentina by the World Bank and the Inter-American Development Bank, (b) approval of any general capital increase to these multilateral development banks for the creation of additional such credit and loan facilities, and (c) support of Argentina’s attempt to restructure its Paris Club debt, on Argentina’s compliance with its BIT and ICSID obligations.74

Two months later, the United States voted against extending certain World Bank and Inter-American Development Bank loans to Argentina.75


72. See Letter from John A. Culberson, U.S. Representative, to Timothy F. Geithner, U.S. Treasury Secretary, July 15, 2011, http://www.embassyofargentina.us/v2011/files/culbersonagothers15july.pdf [hereinafter Culberson Letter]. On August 25, 2011, the Argentinean Ambassador to the United States wrote to Secretary Geithner responding to Representative Culberson’s letter: “Argentina considers itself in full compliance with its obligations under the ICSID Convention . . . [and] [s]hould there be any discrepancy arising from the text of the Convention, Argentina would be prepared to submit the issue to the International Court of Justice, as provided for in Article 64 of such Convention.” See Argentina’s Response to Culberson Letter, supra note 47.

73. See Treaty Between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, U.S.–Arg., art. VII(6), Nov. 14, 1991, S. TREATY DOC. No. 103-2 (1993) (“Any arbitral award rendered pursuant to this Article shall be final and binding on the parties to the dispute. Each Party undertakes to carry out without delay the provisions of any such award and to provide in its territory for its enforcement.”).

74. Culberson Letter, supra note 72.

Besides voting against development loans, states also engage in other forms of diplomatic protection, including: negotiations, withholding payments due to the host state, offsetting the claim arising from the award against claims that the host state has against the home state, and freezing assets that belong to the host state.\(^\text{76}\)

On the other end of the spectrum is state-to-state arbitration at the ICJ, pursuant to Articles 27(1) and 64 of the ICSID Convention. Article 27(1) of the Convention provides:

No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.\(^\text{77}\)

Article 64 of the Convention further provides that “[a]ny dispute arising between Contracting States concerning the interpretation or application of this Convention . . . shall be referred to the International Court of Justice.”\(^\text{78}\) A dispute between Contracting States over non-compliance with an ICSID award would be characterized as a “dispute . . . concerning the interpretation or application of this Convention,” pursuant to Article 64.\(^\text{79}\) To date, however, no state has initiated state-to-state arbitration proceedings regarding another state’s failure to comply with an ICSID award.\(^\text{80}\) This is likely due to the politically sensitive nature of inter-state adjudication, as well as the discretionary aspect of “espousal” (i.e., the decision of a state to take up the case of its national and resort to international judicial proceedings on its behalf).\(^\text{81}\) For

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\(^\text{76}\). \(\text{See Schreuer, supra note 19, at 1109.}\)

\(^\text{77}\). ICSID Convention, \(\text{supra note 8, at art. 27(1).}\)

\(^\text{78}\). \(\text{See id. at art. 64.}\)

\(^\text{79}\). \(\text{See Schreuer, supra note 19, at 1109.}\)

\(^\text{80}\). However, on August 25, 2011, the Argentinean Ambassador to the United States wrote to Secretary Geithner emphasizing that “Argentina considers itself in full compliance with its obligations under the ICSID Convention . . . [and] [s]hould there be any discrepancy arising from the text of the Convention, Argentina would be prepared to submit the issue to the International Court of Justice, as provided for in Article 64 of such Convention.” \(\text{See Argentina’s Response to Culberson Letter, supra note 47.}\)

\(^\text{81}\). \(\text{See Dolzer, supra note 10, at 211-12; see also id. at 213 (‘In actual practice, diplomatic protection to secure the compliance with awards appears to have played little if any practical role.’).}\)
example, it has been reported that German businessman Franz Sedelmayer has received “scant support from his own government” in enforcing his 1998 investment treaty award against the Russian Federation. The German Government in fact “pressured him to not create a diplomatic incident” by attempting to enforce against Russian assets brought into Germany as part of an international aviation show.

B. A Middle Path: Suspending Trade Benefits

Somewhere towards the middle of the spectrum is the use of international trade (specifically the suspension of preferential trade benefits) to secure compliance with ICSID awards. As recently discussed, in recent years U.S. companies have directed their attention to the GSP to pressure Argentina to pay the Azurix and CMS Gas awards.

The GSP allows World Trade Organization (WTO) member states to lower or eliminate import tariffs for developing states, without needing to also reduce import tariffs for developed states. The GSP concept stems from Article I of the General Agreement on Tariffs and Trade 1947 (GATT), which requires GATT Contracting Parties to provide most-favored nation (MFN) treatment to imports from other Contracting Parties. In 1971, the GATT Contracting Parties approved a temporary ten-year waiver to the MFN provisions in Article I of the GATT, recognizing that a principal aim of the Contracting Parties is promotion of the trade and export earnings of developing countries.

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82. See Peterson, supra note 32; see also Sedelmayer v. Russian Federation, Arbitration Award, supra note 32 (awarding claimant $2.35 million for an expropriation under the Germany-Russian Federation BIT).

83. See Peterson, supra note 32.


85. See GATT 1994: General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, art. 1(1), 1867 U.N.T.S. 187 (“With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports . . . any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.”).

86. See Generalized System of Preferences (June 25, 1971) GATT B.I.S.D. (18th Supp.) at art.(a) (1972). (“[T]he provisions of Article I [of the GATT 1947] shall be waived for a period of ten years to the extent necessary to permit developed contracting parties, subject to the procedures set out hereunder, to accord preferential tariff treatment to products originating in developing countries and territories with a view to extending to such countries and territories generally the preferential tariff treatment referred to in the Preamble to this Decision, without according such treatment to like products of other contracting parties.”).
for the furtherance of their economic development.”

In 1979, the Contracting Parties adopted the Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (referred to as the Enabling Clause), which created a permanent waiver to the MFN clause to allow preference-giving states to grant preferential tariff treatment under their respective GSP schemes. The Enabling Clause specifies that any differential or preferential treatment “shall in the case of such treatment accorded by developed contracting parties to developing countries be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries.” Taken together, Articles 1 and 2(a) of the Enabling Clause are the WTO legal basis for GSP.

By providing preferential treatment to imports from developing states, GSP is thus designed to promote economic growth in the developing world. Only a select number of developed states grant GSP preferences, including Australia, Canada, the European Union, Japan, New Zealand, Switzerland, and the United States.

The United States boasts that its GSP program “provid[es] preferential duty-free entry for up to 5,000 products when imported from one of 128 designated beneficiary countries and territories.” Curiously, the United States provides preferential trade benefits under the GSP to the following states that purportedly have failed to comply with ICSID awards: Congo, Kazakhstan, Liberia, Senegal, and Zimbabwe.

87. See id. at Preamble.
88. See Differential and More Favorable Treatment Reciprocity and Fuller Participation of Developing Countries (Nov. 28, 1979), GATT B.I.S.D. (26th Supp.) at arts. 1, 2(a) (1980) (“1. Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties. 2. The provisions of paragraph 1 apply to the following: a) Preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences”).
89. See id. at art. 3(c).
92. See Countries Eligible for GSP (June 2012), Office of the U.S. Trade Rep., http://www.ustr.gov/sites/default/files/List%20of%20countries%20eligible%20for%20GSP%20June%202012.pdf. Bolivia, Ecuador, Kyrgyzstan, Thailand, Russia, and Venezuela are also beneficiary countries under the U.S. GSP. See id.; see also supra notes 32-37 and accompanying text. In 2011, Thailand was the second largest GSP beneficiary with $3.7 billion in exports of duty-free products to the United States, Russia was the eighth largest beneficiary with $575 million in exports, Ecuador was the thirteenth largest beneficiary with $147 million in exports, Venezuela was the
The U.S. GSP statute provides that the President may designate a country as a beneficiary developing country (BDC) after considering certain factors, including the effect on furthering the economic development of developing states and the anticipated impact on U.S. producers. The statute contains both “mandatory” factors and “discretionary” factors for the President to use in making his determination. Regarding the former, the President may not designate a state as a BDC if, for example, it is communist, has not taken steps to afford internationally recognized labor rights to workers, or has not implemented its commitments to eliminate the worst forms of child labor. An additional “mandatory” factor is provided for in 19 U.S.C. § 2462(b)(2)(E):

The President shall not designate any country a beneficiary developing country . . . if . . . [s]uch country fails to act in good faith in recognizing as binding or in enforcing arbitral awards in favor of United States citizens or a corporation, partnership, or association which is 50 percent or more beneficially owned by United States citizens, which have been made by arbitrators appointed for each case or by permanent arbitral bodies to which the parties involved have submitted their dispute.

This “mandatory” factor was added to what would become the Trade Act of 1974 through an amendment offered (and accepted) on the floor of the U.S. Senate by U.S. Senator Robert Taft, Jr. (R-OH), who

eighteenth largest beneficiary with $116 million in exports, and Kazakhstan was the twentieth largest beneficiary with $93 million in exports. See GSP by the Numbers, OFFICE OF THE U.S. TRADE REPRESENTATIVE, http://www.ustr.gov/sites/default/files/GSP%20by%20the%20numbers.pdf.

94. See 19 U.S.C. § 2461(b)(2) (2012) (“The President shall not designate any country a beneficiary developing country under this subchapter if any of the following applies . . . .”) (emphasis added); 19 U.S.C. § 2461(c) (2012) (“In determining whether to designate any country as a beneficiary developing country under this subchapter, the President shall take into account . . . .”) (emphasis added).
95. Unless: (i) the products of the communist state receive nondiscriminatory treatment; (ii) the communist state is a member of the World Trade Organization and International Monetary Fund; and (iii) the state is “not dominated or controlled by international communism.” See 19 U.S.C. § 2462(b)(2)(A) (2012).
was “extremely concerned” about the government of India’s “apparent refusal” to honor arbitral awards in favor of U.S. persons. Senator Taft explained that the Indian government has “throw[n] any adverse [arbitral] awards to its courts, which . . . refuse to act with the result that the award never becomes final.” Senator Taft emphasized:

I believe it is contrary to sound U.S. policy to give India or any other 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.

Regarding the “discretionary” factors, the President may “take into account,” inter alia, the level of economic development of the state, the extent to which the state has assured the United States that it will provide access to its market, and the extent to which the state protects intellectual property rights. The President is authorized to withdraw or suspend the BDC designation of any state if the President determines that “as the result of changed circumstances such country would be barred from designation” as a BDC under the “mandatory” factors. Termination of GSP benefits occurs sixty days after the President has notified the recipient state and the U.S. Congress.
C. Leveraging Argentina

The GSP Subcommittee of the Trade Policy Staff Committee (TPSC), which is chaired by the Office of the United States Trade Representative (USTR) and is comprised of representatives of executive branch agencies, conducts an annual administrative review to consider whether changes should be made to the lists of articles and states eligible for duty-free treatment under GSP. Any person may petition the GSP Subcommittee to request modifications to the list of states eligible for GSP treatment.

In May 2009, the GSP Subcommittee initiated the 2009 GSP Annual Review, announcing that it would solicit petitions “to modify the GSP status of certain GSP beneficiary developing countries because of country practices.” In response, Azurix submitted a petition in December 2009 requesting that the United States withdraw Argentina’s designation as a BDC for its purported failure to enforce the Azurix award. In June 2010, Blue Ridge Investments, L.L.C. (Blue Ridge) filed a similar petition based on Argentina’s alleged failure to enforce the CMS Gas award (Blue Ridge, a Bank of America subsidiary, had previously purchased the CMS Gas award). Both Azurix’s and Blue Ridge’s petitions requested suspension of Argentina’s BDC status on the basis that Argentina has failed to “act in good faith in recognizing as binding or in enforcing arbitral awards in favor of United States citizens or a corporation, partnership, or association.”

The petitions were accepted for review in August 2010, briefs and

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108. The USTR is part of the Executive Office of the President and is responsible for “developing and coordinating U.S. international trade, commodity, and direct investment policy, and overseeing negotiations with other countries.” See Mission of the USTR, Office of the U.S. Trade Representative, http://www.ustr.gov/about-us/mission.


111. See id. at 9.


comments were filed by interested parties, including Azurix, Blue Ridge, Argentina, U.S. importers, and Argentinean exporters, and a hearing was held at the end of September 2010.¹¹⁷ Review of the petitions was continued through the 2010 and 2011 Annual GSP Reviews¹¹⁸ until March 26, 2012, when U.S. President Barack Obama issued a proclamation declaring that “it is appropriate to suspend Argentina’s designation as a GSP beneficiary developing country because it has not acted in good faith in enforcing arbitral awards in favor of United States” persons.¹¹⁹ The suspension took place on May 28, 2012, sixty days after the proclamation was published in the Federal Register on March 29, 2012.¹²⁰ Notably, this is the first time in the history of the GSP that the United States has suspended a state’s preferential trade status for failing to pay an arbitral award.¹²¹

The suspension of Argentina’s status as a BDC under the U.S. GSP will likely have a number of adverse effects on Argentina. Argentina was the ninth-largest GSP beneficiary in 2011 with $477 million in exports of duty-free products to the United States,¹²² which amounted to $17 million in exempted import duties.¹²³ The primary beneficiaries of Argentina’s preferential trade status were exporters of cheese, strawberries, sugar confections, grape wine, leather, and lithium.¹²⁴ These industries will now be subject to the higher U.S. MFN import tariff

¹¹⁷. See GSP 2009 Annual Review Hearing, supra note 51.
¹²⁰. See Proclamation No. 8788, supra note 1.
¹²¹. See US Suspends Special Tariffs for Argentina, supra note 7.
¹²². See US Suspends Special Tariffs for Argentina, supra note 7.
¹²³. See GSP Fact Sheet, supra note 25.
¹²⁴. See id.
rate, making exporting Argentinean goods to the United States more expensive, as highlighted by Fundicio San Cayetano S.A., an Argentinean exporter of rolls for rolling mills:

The additional cost of importing, without the GSP tariff preference, from Argentina would place our company at not fair competitive disadvantage. Most of our major competitors in the US market are domestic companies and foreign ones which have duty-free benefits. The removal of GSP benefits would result in additional costs to our company not borne by our main competitors.

As a result, employment and economic development in Argentina are predicted to suffer. According to the government of Argentina:

[E]xports continue to play an important role in stimulating economic activity and creating new jobs . . . Duty-free access under the GSP creates for a large number of Argentine firms, especially small and medium-size businesses, a leveled playing field enabling them to compete in the U.S. market. These companies are responsible for the bulk of job creation in Argentina and their contribution is important across the whole country as are, on many occasions, the sole and most important factor of development available for several regional economies, especially in the more disadvantaged provinces.

125. See id.

126. Comment by Fundicio San Cayetano S.A., 2009 GSP ANNUAL REVIEW, Oct. 15, 2010, at 1; see also Comment by William D. Kramer, Counsel to Globe Specialty Metals, Inc., 2009 GSP ANNUAL REVIEW, Oct. 15, 2010, at 2 (“The removal of GSP status for Argentina would affect Globe’s operations in both Argentina and the United States, where much of Globe Metales’ [sic] output is sold in competition with other sources of calcium silicon imports. Calcium silicon imports from Argentina would be particularly disadvantages in competing with imports from Brazil, which enjoy GSP benefits; from Mexico, which are duty-free under the North American Free Trade Agreement; and from China, which are produced in a nonmarket economy country.”); Comment by Richard S. Baum, Metallurgical Products, 2009 GSP ANNUAL REVIEW, Oct. 12, 2010, at 1 (“It is important to continue the current GSP benefits in order to remain competitive against supply of powder from other countries including Brazil and China . . .”).

127. Post-Hearing Brief of the Republic of Argentina, 2009 GSP ANNUAL REVIEW, Oct. 15, 2010, at 10; see also Comment by Gerardo Venutolo and Juan Carlos Lascuarain, Association of Metallurgical Industries of Argentina, 2009 GSP ANNUAL REVIEW, Oct. 15, 2010 at 1 (“The GSP Program has made it easier for many Argentinean small and medium-sized companies to get into a complex market such as the American one, and its elimination as an eligible country would lead most of these companies to a difficult situation since they have adapted their production and marketing
For similar reasons, U.S. companies that have invested in Argentina may potentially suffer as well. U.S.-based FMC Corporation filed a comment in the 2009 GSP Annual Review regarding the economic development of the Salta province in Argentina where FMC has a mining facility:

In part because of the GSP tariff benefits for lithium products, FMC made a significant capital investment in Argentina in a mining facility in Salta, Argentina. From its inception in 1977, FMC’s facility in Argentina has exported to the United States duty-free under the GSP program. This has contributed greatly to the economic development of the rural Salta region, where FMC is a major exporter and employer. GSP benefits are still required to make this region export-competitive, and the removal of GSP benefits for lithium would have a more significant negative consequence on Salta’s economy than the limitation of GSP would have in other, more advanced regions of Argentina.  

The United States’ suspension of Argentina’s BDC status will also adversely affect other U.S. constituents. For instance, U.S. importers will

strategies to the USA and they have now few possibilities of readapting to other international markets. [C]hanging the rules of the game would trigger a significant setback in their production, thus resulting in deleterious effects in economic, social and development terms. [W]e believe that an action like this would hinder the country’s productive strengthening and would negatively affect the present employment rate.

128. Comment by Jonathan D. Evan, FMC Corporation, Lithium Division, 2009 GSP Annual Review, Aug. 30, 2010, at 3; see also Comment by Francisco Diez, Transnational Foods, Inc., 2009 GSP Annual Review, Oct. 14, 2010, at 1 (“[A]s a consequence of such action, many workers on a developing country such as Argentina would lose their jobs aggravating an already installed economical crisis in that country.”).  

129. According to the USTR, the U.S. GSP: (i) supports U.S. jobs; (ii) keeps U.S. companies competitive; (iii) supports U.S. producers of manufactured goods; (iv) helps American families on a budget; and (v) helps U.S. small businesses compete. See GSP: Critical to the United States and Developing Countries, Office of the U.S. Trade Representative (Dec. 12, 2009), http://www.ustr.gov/about-us/press-office/fact-sheets/2009/december/gsp-critical-united-states-and-developing-countries. A number of U.S. companies submitted comments in the 2009 GSP Annual Review that indicated that the suspension of Argentina’s BDC status could negatively affect U.S. jobs. See, e.g., Comment by Brent Bullock, PB Leiner USA Corp., 2009 GSP Annual Review, Oct. 15, 2010, at 2 (noting that the removal of Argentina from the U.S. GSP would “potentially result in job losses at our Davenport, Iowa, facility”); Comment by Diego J. Ganuza, Mi Tia Ventures, LLC DBA Rudy’s Candies and Confections, 2009 GSP Annual Review, Oct. 14, 2010, at 2 (“[R]emoving Argentina from the GSP will negatively affect laborers from both countries, as increased costs will affect all employees involved in production and distribution. Rudy’s Candy and Confections has 20 full-time employees, but would have to consider restructuring and lay-offs if costs were to increase.”) [hereinafter Comment by Rudy’s Candies and Confections]; Comment by Marshall Miller, counsel to Kawasaki Motors Manufacturing Corp., USA, 2009 GSP Annual Review, Oct. 14, 2010, at 2 (“The loss of GSP
have to pay more for certain Argentinean goods, and such costs likely will be passed on, in full or in part, to U.S. consumers.\textsuperscript{130} Higher prices also result in fewer choices for U.S. consumers, as emphasized by Rudy’s Candies and Confections, a U.S.-based importer of candy from Argentina:

Rudy’s Candies and Confections supplements its product mix with imports from Argentina to meet US consumers’ growing demand for candies and confections of distinct varieties and quality. Argentine candies have different colors, tastes, and consistencies than those produced domestically. The removal of Argentina from the GSP would limit the number of sources and increase costs for Rudy’s Candies and Confections. Ultimately, the US consumer would be penalized with higher prices and a limited selection of high-quality confections.\textsuperscript{131}

Alternatively, basic economics dictate that U.S. suppliers and consumers might substitute other goods for Argentinean goods (e.g., Chilean wine instead of Argentinean wine). Substitution away from Argentinean goods will likely have deeper adverse effects on Argentinean industries and the Argentinean economy.

Based on the negative implications for Argentina, the suspension of preferential trade status may induce Argentina to pay the Azurix and privileges . . . for Argentina would negatively impact KMM’s U.S. manufacturing operations and U.S. exports of its products by driving up material costs. These increased costs would have a direct injurious impact on the profitability and job growth of U.S. engine manufacturers like KMM.”).

\textsuperscript{130} See, e.g., Comment by Dean Charles, Millwork & Door Sales Group, 2009 GSP ANNUAL REVIEW, Oct. 7, 2010, at 1 (“A loss of the GSP benefit would diminish the competitiveness of our product versus those of its offshore rivals. Increased duty costs ultimately must be passed on to domestic and global customers at the risk of lost sales.”); Comment by Gregory P. Marzel, Affival, Inc., 2009 GSP ANNUAL REVIEW, Oct. 15, 2010, at 2 (“Removing these [GSP] benefits would adversely affect the competitive position of calcium silicon imports from Argentina in the U.S. marketplace and ultimately would lead to increased costs for U.S. steel producers and consumers.”).

\textsuperscript{131} Comment by Rudy’s Candies and Confections, supra note 129, at 1; see also Comment by Leslie Alan Glick, Counsel to Arthur Schuman Inc., 2009 GSP ANNUAL REVIEW, Sept. 3, 2010, at 2 (“Schuman both manufactures cheese in the United States, as well as imports cheese from Argentina, because demand for these types of cheeses are different in color, taste, functionality, and shape from cheese produced domestically. In addition, many U.S. consumers have different preferences for cheese, often preferring cheese produced in the United States, or other countries such as Argentina or Italy . . . [C]ontinuing GSP benefits for Argentina benefits not only Schuman, a U.S. based manufacturer and importer, but U.S. consumers as well, by providing them with economical market alternatives for products that are distinct from domestically-produced products.”); Comment by Peter Fleming, Fleming Electric, 2009 GSP ANNUAL REVIEW, Oct. 14, 2010, at 1 (“The removal of Argentina from the GSP . . . would harm U.S. consumers for they would have a more limited choice of purchase . . . ”).
CMS Gas awards, notwithstanding its interpretation of Articles 53 and 54 of the ICSID Convention.

D. Future Uses of Trade Benefits to Leverage Compliance with ICSID Awards

The U.S. GSP is not the only preference program that conditions trade benefits on compliance with arbitral awards. Another is the Caribbean Basin Initiative (CBI), which provides duty-free access to the U.S. market for most goods from seventeen states in the Caribbean and Central America.\footnote{132. See generally Caribbean Basin Initiative (CBI), Office of the U.S. Trade Representative, http://www.ustr.gov/trade-topics/trade-development/preference-programs/caribbean-basin-initiative-cbi. The seventeen current beneficiary states are Antigua and Barbuda, Aruba, the Bahamas, Barbados, Belize, British Virgin Islands, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Panama, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, and Trinidad and Tobago. See id. The total value of U.S. imports from CBI countries in 2010 was $10.1 billion. See Office of the United States Trade Representative, Ninth Report to Congress on the Operation of the Caribbean Basin Economic Recovery Act 11, Dec. 31, 2011, http://www.ustr.gov/webfm_send/3214.} Initially launched in 1983 and substantially expanded in 2000,\footnote{133. See CBI, supra note 132.} the CBI provides for the suspension of preferential treatment if a beneficiary state fails to act in good faith in enforcing arbitral awards.\footnote{134. See 19 U.S.C. § 2702(b)(3) (2012) ("[T]he President shall not designate any country a beneficiary country . . . if such country fails to act in good faith in recognizing as binding or in enforcing arbitral awards in favor of United States citizens or a corporation . . . which is 50 per cent or more beneficially owned by United States citizens . . . ").}

Another example is the Andean Trade Preference Act (ATPA), which provides reduced-duty or duty-free treatment for most goods from the four Andean countries: Bolivia, Colombia, Ecuador, and Peru.\footnote{135. See generally Andean Trade Preferences Act (ATPA), Office of the U.S. Trade Representative, http://www.ustr.gov/trade-topics/trade-development/preference-programs/andean-trade-preference-act-atpa. The total value of U.S. imports from ATPA countries in 2011 was $31.9 billion. See Office of the United States Trade Representative, Sixth Report to the Congress on the Operation of the Andean Trade Preferences Act as Amended 6, June 30, 2012, http://www.ustr.gov/webfm_send/3488 [hereinafter ATPA Report].} (However, Equador is the only remaining beneficiary. The ATPA expressly allows for suspension of preferential treatment for failing to enforce arbitral awards.\footnote{136. See 19 U.S.C. § 3202(c)(3) (2012) ("The President shall not designate any country a beneficiary country . . . if such country fails to act in good faith in recognizing as binding or in enforcing arbitral awards in favor of United States citizens or a corporation . . . which is 50 percent or more beneficially owned by United States citizens . . . "); see also Lee M. Caplan, Post-Annulment Options: Possible Recourse by Investor’s Home State, 6(1) Transnat’l Dispute Mgmt. (2009), at 7-8} In its most recent annual report on the ATPA, the USTR noted that certain “developments in the past few
years give rise to concerns about the [Ecuadorian] government’s long-term commitment to international arbitration for the settlement of investor disputes,” including Ecuador’s termination of BITs, denunciation of the ICSID Convention, and handling of the Chevron v. Ecuador dispute. As a consequence, the USTR cautioned that the “[Obama] Administration is monitoring developments in connection with these matters under the relevant ATPA eligibility criteria.”

Tellingly, in September 2012, Chevron submitted a petition to the USTR requesting “the withdrawal or suspension of the designation of Ecuador as a beneficiary country under the” ATPA. Like Azurix’s and Blue Ridge’s petitions against Argentina, Chevron’s petition was based on Ecuador’s purported failure to act in good faith in complying with two arbitral awards in favor of Chevron.

Finally, a handful of other developed states, including the European Union, also maintain GSP and other similar preferential trade programs. These states too might consider suspending international trade benefits to secure compliance with international arbitral awards. The European Parliament, for example, issued a resolution in April 2012 urging the European Commission and Council to partially suspend Argentina’s trade preferences under the EU GSP due to Argentina’s decision to

(discussing the possibility of suspending preferential trade status under the Andean Trade Preferences Act for failing to enforce ICSID awards).


139. See id.


141. See id.; see also Chevron Corp., First Interim Award on Interim Measures (Jan. 25, 2012), Second Interim Award on Interim Measures (Feb. 16, 2012), supra note 137.

142. See supra note 90 and accompanying text.
nationalize oil company YPF, a subsidiary of Spanish Repsol.\textsuperscript{143}

V. Conclusion

International trade refers to the exchange of goods and services across international borders, while international arbitration refers to a form of alternative dispute resolution between parties from different states. Although not self-evident from a review of a law school course catalogue or a law firm website, these two related fields do not operate in separate vacuums. Rather, they often intersect, as illustrated by the recent suspension of Argentina’s preferential trade status under the U.S. GSP to secure compliance with the Azurix and CMS Gas awards. This development is significant given that states are periodically accused of refusing to comply with ICSID awards and that Venezuela, which has a significant caseload at the Centre, has publicly threatened non-compliance in Mobil. In addition, the GSP is not the only preferential trade program that conditions trade benefits on compliance with arbitral awards, as illustrated by Chevron’s recent petition to suspend Ecuador’s ATPA benefits.

On the one hand, if Argentina pays the Azurix and CMS Gas awards, it would confirm the effectiveness of suspending trade benefits to secure compliance with ICSID awards. On the other hand, if Argentina refuses to pay the awards, the adverse effects on Argentinean industries might cause other states to comply with their ICSID awards, notwithstanding their interpretation of the ICSID Convention.\textsuperscript{144} Either way the United States’ novel approach should be embraced because it would seem to further compliance with international arbitral awards, thereby strengthening the legitimacy of international arbitration, particularly ICSID arbitration, as a meaningful form of alternative dispute resolution.


\textsuperscript{144.} See Edward Machin, US suspends Argentine trade benefits over unpaid arbitral awards, COMMERCIAL DISPUTE RESOLUTION (Mar. 28, 2012), http://www.cdr-news.com/component/content/article/2049-us-suspends-argentina-trade-benefits-over-unpaid-arbitral-awards (commenting that the suspension of Argentina’s preferential trade status “sends a very strong signal that countries which benefit from the GSP system need to comply with, and honour, international arbitration awards.”).