Lessons from the US v. Guatemala Case

Socially Responsible Trade Policy in Canada and Abroad
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Overview

1. Interpretation of Article 16.2.1(a) and its implications for understanding and proving violations of labour chapters
   - “Effectively enforce”
   - “Sustained or recurring course of action or inaction”
   - “In a manner affecting trade”

2. Evidence, procedure, and administration – a Panelist’s perspective
   - Party definition of legal and factual issues
   - Party production of the factual record in advance of the hearing
   - Receiving evidence from persons fearing reprisal
   - Lack of resources creates systemic risk of delay
Article 16.2.1(a)

A Party shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement.
“Shall not fail to effectively enforce”

An obligation to compel compliance with labor laws (or, more precisely, not neglect to compel or be unsuccessful in compelling such compliance) in a manner that is sufficiently certain to achieve compliance that it may reasonably be expected that employers will generally comply with those laws, and employers may reasonably expect that other employers will comply with them as well. (139)
“Effectively enforce”

• Effective enforcement generally will be evident in results – in particular, compliance by employers. (134)

• Effective enforcement generally will require that when enforcement authorities find an employer to be out of compliance they will take appropriate action to bring it into compliance. (135)

• Enforcement authorities will both detect and remedy non-compliance with the law sufficiently that employers will reasonably expect that other employers will comply with the law. (136)

• Individual instances of non-compliance do not *ipso facto* prove that enforcement is ineffective. (137)
“Sustained or recurring course”

A “sustained or recurring course of action or inaction” is composed of (i) a repeated behavior which displays sufficient similarity, or (ii) prolonged behavior in which there is sufficient consistency in sustained acts or omissions as to constitute a line of connected behavior. (152)

Line of connected behaviour = instances relating to each other in a way that creates a reasonable expectation of increased likelihood of failure above a baseline of isolated events. (439)

- Need not be representative of overall conduct, system-wide or pervasive. (para 435)
- Can be established through evidence of custom or practice that routinely produces failures, bias, or lack of institutional capacity or political will, but this is not required. (438)
- It is not necessary to prove why a line of acts or omissions is connected. (438)
“In a manner affecting trade”

- Terms “affecting” and “trade” have to be given some meaning.
- The parties argued that “affecting” means to “influence” or “make a material impression upon”. The Panel accepted this plain and ordinary meaning.
- “Affecting” has to mean more than occurring within a traded sector or employer engaging in trade (unless the Parties specifically say otherwise). Something can occur in a traded sector without exerting any influence on any aspect of trade.
- The next question was which aspects of trade needed to be affected.
- The Panel accepted that affects on conditions of competition were affects on trade, as the US had argued.
- The Panel did not preclude the possibility that other types of effects could affect trade. But there was no relevant argument of this sort presented to it, and it saw no basis upon which to consider another type of effect.
Affecting conditions of competition

A failure to effectively enforce labor laws through a sustained or recurring course of action or inaction affects conditions of competition if it confers some competitive advantage on an employer or employers engaged in export or competing with imports. (174)

While we ordinarily would expect a failure to effectively enforce labor laws to have some effect on employer costs, such effects may in some cases be too brief, too localized or too or small to confer a competitive advantage. (193)
How failures to enforce can affect conditions of competition

172. A failure to effectively enforce labor laws may affect costs, risks or potential liabilities associated with production processes so as to provide a potential competitive advantage to producers that fail to comply with labor laws, ... for example

- by requiring the payment of a minimum wage
- by requiring the payment of a premium wage rate for overtime,
- by requiring the purchase of equipment to protect the health and safety of employees,
- by enabling employees to bargain collectively for higher wages and benefits or more consistent application of workplace laws and contract terms, or
- by increasing the risk that they will do so.

173. A failure to effectively enforce labor laws may relieve an employer or group of employers of such costs or risks.
Proof: evidence and inference

• Competitive advantage may be inferred on the basis of likely consequences of a failure or of failures to effectively enforce labor laws, or other aspects of the totality of the circumstances. (194)

• Proving competitive advantage did not require proof of cost or other effects with any particular degree of precision. (195)

• Proof of competitive advantage did not require evidence drawn from employer records. (194)
Effects can be at the enterprise level, or systemic, or both

502. “There are different ways in which a group of failures to effectively enforce may be both through a sustained or recurring course of action or inaction and in a manner affecting trade.”

- “One possibility is that each such failure is in a manner affecting trade, and the failures taken together relate to one another so as to constitute a sustained or recurring course of action or inaction.”
- “Another possibility is that while no individual failure is shown to be in a manner affecting trade (or only some but not all such failures are shown to be in a manner affecting trade), the failures taken together constitute a sustained or recurring course of action or inaction, and the existence of that course has an impact on employers that affects trade, thus causing the failures collectively to be in a manner affecting trade.”
- “For example, if the failures making up a course of action or inaction occurred with sufficient frequency and notoriety among employers, they might incentivize employers to violate the law with an expectation of impunity, and the cumulative impact of such violations might be to reduce employers’ costs so as to gain a competitive advantage and affect trade. This might be so even if each individual failure on its own had no discernible impact on trade.”
How failures to enforce trade union rights can affect conditions of competition

“As a general matter, we note that employer dismissals in reprisal for union activity pose a serious threat to the ability of employees to exercise their legal rights to organize and bargain collectively. Employees represented by a union cannot help but take note of the absence of those who sought to represent them or who expressed support for the union following retaliatory dismissals. Retaliatory dismissal of union organizers and supporters tends to send a clear message to employees that they risk serious economic consequences for trying to organize or participate in a union.” (482)
How failures to enforce trade union rights can affect conditions of competition

“If an employer enjoys impunity for retaliatory dismissals it will face significantly lower risk on an ongoing basis that its employees will organize a union or bargain collectively in an effective manner. This in turn will provide such an employer with a competitive advantage by substantially lowering the risk of unionization within its facilities on an ongoing basis. The practically automatic effects of depriving employees of effective access to the right to bargain collectively are to reduce the risk that they will do so, and thus to reduce their bargaining power in relation to the employer.” (483)
Proof of effects of failure to enforce trade union rights

• “To prove its case a complainant will generally be required to introduce evidence of the extent and duration of effects of the failure to enforce on the ability of workers to exercise their rights to organize.” (485)

• “A complainant might do so by producing first-hand evidence from those involved in seeking to organize the union or to bargain collectively.” (485)
  – “a statement, for example, by a union organizer or worker describing the effects of the dismissals on the efforts of the union to represent workers.” (476)

• “There may nonetheless be circumstances in which the consequences of a failure to remedy serious violations would be so evident on the face of the failure that further proof would not be necessary, and a Panel could conclude that the failure was in a manner affecting trade.” (485)
Party Definition of Legal and Factual Issues

- Art. 20.13 requires panel to base report on the submissions and arguments of the disputing parties
- Art 20.10.2 – requires the Panel to follow the Rules
- Rules of Procedure are extensive
- Rule 35 – reinforces 20.13 requirements
- Rules 54(a), 59 and 62 limit extent to which Panel can consider issues raised by NGEs.
Party production of the factual record in advance of the hearing

- Under the Rules, the factual record is provided with written submissions. It is compiled prior to any hearing.
- Timelines for written submissions are tight.
- The Rules of Procedure contemplate no examination of witnesses at the hearing. (This does not shorten fact finding as much as one might expect.)
- The Rules impose no duty upon the Parties to produce information at the request of the Panel.
- The Panel may seek information or technical advice from a person or body that it deems appropriate, but only with the consent of the disputing Parties.
Production of the factual record in advance of hearing: some challenges

Procedures place a heavy burden of investigation and anticipatory analysis on the complainant Party.

— Panels may be called upon to draw inferences from failure of a responding Party to cooperate. (This issue did not arise on the facts of the US/Guatemala case.)

Query whether giving Panels more opportunity to identify and ask questions + requiring parties to cooperate with Panel requests for further information would help to sharpen the focus and produce more complete dispute resolution, or instead place Panels in difficult situations (perception that they are “making the case” for a complainant).
Receiving evidence from persons fearing reprisal

- Panel admitted anonymous, redacted evidence, subject to evaluation of probative value.
- Anonymity and redactions limit ability of Panels to assess reliability of evidence.
- Fear of reprisal may be a recurring problem in labour rights cases.
- Would procedures allowing Panels to hear from witnesses in person and in confidence enable a better search for the truth? Would Parties entrust Panels with such powers? With deciding whether to exercise them?
Lack of resources creates systemic risk of delay

- Remuneration Directive contemplates payment for about 250 hours of work per Panelist, at a relatively modest rate of pay.
- There is no assurance in law or in fact of payment for significant additional work.
- Time frames are the hands of the Parties, and very unpredictable.
- Most panelists cannot therefore afford to take leave from current engagements.
- Remuneration of assistants is very modest ($15 US/hour - insufficient to hire translators).
- Panelists may not be reimbursed fully for expenses incurred in hiring assistants or travelling to meet.
- Quality of logistical and translation support varies widely.
- As a result, proceedings can easily be bogged down by preliminary objections, translation, or complex fact finding requirements.