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MEXICO IN THE WTO AND NAFTA

LITIGATING INTERNATIONAL TRADE DISPUTES

Jorge Alberto Huerta-Goldman

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Law & Business

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... because we are the result of endless efforts...

About the Author

Jorge A. Huerta-Goldman, born in Guadalajara, Mexico, is a WTO law practitioner and researcher. He is currently working for the Permanent Mexican Mission to the WTO in Geneva.

With almost ten years of experience as a government official, he has been a Doha negotiator (NAMA, Dispute Settlement reforms, Trade Remedies, and Development among others) as well as a WTO litigator (litigating several cases as a member of the Mexican team). He started his career at the trade remedies investigating authority (UPCI) in Mexico City. Mr. Huerta-Goldman also litigated civil and commercial law cases before Mexican courts.

Mr. Huerta-Goldman was a visiting scholar at Columbia Law School, New York, during the Fall 2006. He has spoken at different universities in Mexico, Europe and the US. He received a *doctorat en droit* (Ph.D.) at the University of Neuchâtel with *Magna Cum Laude*, in Switzerland. He received the LLM in European Law from the College of Europe, Bruges, Belgium, in 2001, and the LLM in International Trade Law from the University of Arizona in 1998. He was admitted to practice law in Mexico in 1996, after completing his law studies at ITESO, in Guadalajara.

The opinions expressed in this work are entirely those of the author.

You may contact him at jahg@mexico-wto.org or Jorge.huerta@unine.ch

Preface

This volume by Jorge Alberto Huerta-Goldman fills a vacuum in the specialized literature available to us both in respect of his analysis of Mexico's practice and record in international economic disputes, and, more generally, in the field of investigation country by country into the use of such litigation.

Mexico is in this respect an interesting case. Though not one of the economic super-powers, it is an important middle size player and one of the largest from the developing world. Moreover, Mexico is party to an almost unique web of regional and bilateral agreements with dispute settlement mechanisms. Finally, it has been a frequent user of these proceedings, even to the point of finding itself arguing or defending substantially the same case, or related cases, in different fora. Thus, Mexico is an excellent example of how a country can sort out, and make the best use of, the ever growing multiplicity of third-party adjudication mechanisms. On the one hand, such mechanisms expand internationally the application of the rule of law in the interests of the security of cross border economic exchange. On the other hand, their very multiplicity presents the risk of fragmentation as different sets of international norms are developed and applied, to the point that a country may be faced with conflicting obligations and real difficulties in managing the 'spaghetti bowl' of the array of options.

Jorge's research is of great interest for those who wish to know in detail the disputes to which Mexico has been a party in the first place. The accuracy of the examination of individual cases, the supporting statistical data and his personal insight into many of the disputes render the work invaluable in this respect and a model for similar research into the practice of other economies.

As noted above, more generally, this work makes a valuable contribution to the knowledge and evaluation of the functioning of trade dispute settlement mechanisms in various contexts – global, regional and bilateral – and under different sets of procedural rules.

I am pleased, therefore, to recommend highly this work to all those interested in this growing and fascinating field at the cross roads of international law and economics.

Giorgio Sacerdoti
Bocconi University, Milano, and Appellate Body of the WTO, Geneva
October 2009.

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I would like to thank the professors at Columbia University in the United States for the very generous invitation they gave me as a visiting scholar at a crucial time for this book. I learned a lot from Prof. Jagdish Bhagwati and Prof. George A. Bermann. I thank Prof. Kyle Bagwell, currently at Stanford University, for his time and suggestions during my period in New York.

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Finally, I am enormously grateful to my beloved Ilaria Accorsi, not only for her technical input and comments, but also for her always being there and for her enormous patience when I was focusing my energy on the book.

Jorge A. Huerta-Goldman
Carouge, Switzerland, June 2009

Introduction

This work is about the conduct of Mexico's international trade litigation from 1986 to 2007. My research is limited to the multilateral and bilateral[1] forums and is set in the context of the specificities of these legal regimes – I do not aim to advance ideas on how such regimes should be modified to better address Mexico's concerns. Mexico operated within these parameters and I have taken them for granted. Chapter I explains the various (multi- and bilateral) options for trade litigation available to Mexico.

Throughout the research, I have sought to analyse the data from three distinct perspectives: administrative capacity, bargaining power and political economy considerations. These three areas provide support for my conclusions regarding Mexico's conduct of its trade disputes. In a nutshell, Mexico's participation is constrained by its administrative capacity, which in turn imposes a need to prioritize which disputes to pursue and how far, in light of political economy considerations. Bargaining power is a vital element in explaining the use of legal remedies.

The cases adjudicated through the multilateral dispute settlement mechanisms include those under the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO). Mexico participated in these cases either as a main Party to the dispute (complainant or defendant) or as a Third Party under both jurisdictions. Chapter II describes these cases.

In Chapter III, I move to discuss cases under Preferential Trade Agreements (PTAs). They are Free Trade Agreements, plus ALADI, that Mexico is Party to – essentially cases under the North American Free Trade Agreement (NAFTA). I distinguish between country versus country cases and private party versus country cases. All of the PTAs where Mexico is a Party contain country versus country

1. Twelve PTAs plus the *Asociación Latinoamericana de la Integración*, or Latin American Integration Association (ALADI).

dispute settlement mechanisms,[2] but only three have been used. The private party versus country dispute settlement mechanism is included in Chapter 19 of NAFTA.

Chapter IV presents a comparison of key data drawn from the WTO cases, using specific variables.

Finally, I present my interpretation of the data in Chapter V. My main findings are reflected in this chapter. It presents conclusions regarding Mexico's administrative capacity with respect to the initiation and litigation of disputes. There is an analysis of cases negotiated versus cases litigated. The lobbying power of Mexican economic interests is discussed, both when Mexico acts as complainant and when it acts as defendant. The utilization of legal remedies and issues of double forums are also covered.

2. This is not the case for ALADI, where the parties have to negotiate specific dispute settlement mechanisms.

Summary of Findings

When litigating trade disputes, Mexico must work within a specific regulatory framework that is both multilateral (WTO) and bilateral (PTAs).[3] Its involvement is constrained domestically by its administrative capacity, which in turn imposes a need to prioritize, in the light of political economy, which disputes to pursue and how far. Bargaining power is a vital element in explaining Mexico's use of legal remedies.

I. THE MULTILATERAL AND BILATERAL FORUMS

Mexico has access to country versus country dispute settlement procedures and to procedures triggered by private parties against countries (private party versus country). The WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Chapter 20 of NAFTA deal with disputes among countries, whereas Chapter 19 of NAFTA (Article 1904 Panel) deals with antidumping/countervailing duties (AD/CVD) disputes between a private party and a country. Each procedure has its jurisdictional limitations, but there can be some concurrent jurisdiction.

At the end of the day, the WTO and Chapter 20 of NAFTA require compliance with the Panel report – temporary compensation or retaliation are transitional options. A dispute can, of course, always be settled through a mutually agreed solution (MAS). Compliance, and to some extent MAS, are usually referred to as 'property rules', where the author of an illegal act must change its behaviour so as to eliminate the illegality. Compensation and retaliation are 'liability rules' – the author of an illegal act can pay and compensate those affected by the illegality without, however, incurring the obligation to change its behaviour. The WTO DSU takes an unambiguous stance in favour of 'property rules' (compliance). For instance, if a 'liability rule' such

3. Twelve PTAs plus ALADI.

as compensation has been agreed, but the illegality persists, the author of the illegal measure may face new complaints by other WTO Members.

An Article 1904 Panel, usually triggered by a private party, revises final AD/CVDs imposed by one of the three NAFTA Parties. It is a substitute for domestic legal procedures challenging those final AD/CVDs. A given Article 1904 Panel may remand or affirm the final determination subject to review. There may be several remands with respect to the same final determination, and there may be several 1904 Panels reviewing different final determinations within the same AD/CVD order. Data on these cases is a good means of measuring the power of lobbies. The main legal remedies in an Article 1904 Panel – to uphold or to remand the final determination – are 'property rules'. But if a NAFTA Party considers that an Article 1904 Panel has been undermined, it can trigger the Special Committee. This procedure may lead to the suspension of NAFTA benefits or the suspension of Article 1904 procedures – 'liability rules'.

II. THE CASES

Mexico has used the multilateral forum (thirty-three cases under GATT/WTO) significantly more than the regional country versus country forums (four cases under NAFTA/other PTAs). Exporters have several times used the procedures under Article 1904 of NAFTA (sixteen AD/CVD orders with several 1904 Panels).

This study classifies cases into three categories: abandoned, implemented and pending. The factors used to evaluate Mexico's conduct of its international trade disputes are: subject matter; identity of the Parties involved; products; adjudicators; procedural stage at which the litigation stopped or was pending at the cut-off date; number of findings won/lost by Mexico; implementation (*ex ante* and *ex post*); and legal remedies used.

III. THE GATT

Even though Mexico won most of the claims in its three cases under the GATT (50% of the findings in two cases and 100% in the third case), it did not manage to secure implementation – only one case was adopted and implemented, and this one was initiated by Mexico, Canada and the EC, not by Mexico alone. Mexico could have been a free rider in this single adopted case, by not participating as complainant, since implementation was on a most-favoured-nation (MFN) basis. This MFN implementation also benefited non-parties to the dispute. The other reports remain unadopted and are hence of limited legal value.

IV. THE WTO PROCEDURAL STAGES

Mexico litigated its WTO cases beyond the original Panel/Appellate Body (Panel/AB) stage only against the US/EC: to the retaliation stage, one case as complainant;

to the Article 21.5 Panel/AB stage, two cases as complainant and one case as defendant; and to the reasonable period of time under Article 21.3 of the DSU (which could be in practice determined by agreement or by binding arbitration), or RPT, stage, three cases as complainant. Cases against Parties which were not Members of the Organisation for Economic Co-operation and Development were implemented, abandoned or pending at an earlier stage.

V. THE WTO FINDINGS WON

As complainant, Mexico won the highest number of Panel/AB findings when it cooperated with other complainants. In *US – Offset Act* (217/234) the co-complainants won 71% of the Panel findings and 64% of the AB findings, whereas in *EC – Bananas III* (27) the co-complainants won 100% of the Panel findings and 82% of the AB findings. As a single litigant before the AB, Mexico did not win any finding in two cases as complainant. As defendant, it did not win any finding in two cases and won 13% of the AB findings in another case.

Mexico as a single complainant won a higher number of findings when the defendant was not an OECD Member – 95% of the Panel findings against Guatemala in one case, and 75% of the Panel findings, though subsequently revoked by the AB, against Guatemala in another case. It won fewer findings when the defendant was the US/EC – 20% at Panel stage and none before the AB. As defendant, the only cases that Mexico litigated within the period of observation were initiated by the US/EC, and Mexico won very few findings.

Administrative capacity may have contributed to the low number of findings won by Mexico.

VI. THE WTO IMPLEMENTATION

As defendant, Mexico implemented more cases initiated by the US/EC (four out of nine total) than the US/EC did in cases initiated by Mexico (two of ten). For cases with non-Members of OECD, the rate of implementation is more balanced: four of six total as complainant and three of five as defendant. The defendant's bargaining power seems to have a strong influence on whether a case is implemented. But Mexico is more disposed to agree to comply *ex ante* when the complainant is a non-Member of OECD.

When Mexico does not have bargaining power as complainant to press for legal remedies it litigates to an advanced stage in sensitive cases, such as those against US/EC (three cases). It seems to seek to use loss of reputation as a lever against defendants with stronger bargaining power. But as defendant, it also litigates to an Article 21.5 Panel/AB stage against US/EC on sensitive issues (one case on sweeteners) and holds off until the end of the RPT before implementing (three cases initiated by the US).

Within the period of observation, when the complainant was more powerful than the defendant[4] (one case of Mexico as complainant and four cases as defendant), successful litigation was always followed by implementation. When the US/EC defended against Mexico, successful litigation was not followed by implementation by the US/EC in three cases. These are the only cases where Mexico as complainant won findings against the US/EC. No cases involving Mexico as defendant against non-Members of OECD were litigated, and Mexico complied *ex ante* in three cases but did not in two cases (one abandoned by Brazil and the other pending by Guatemala). This shows that bargaining power matters for implementation, regardless of the results of the Panel/AB findings. But Mexico did not use it when defending against weaker Members and used it only to a limited extent when defending against US/EC.

VII. THE POWER OF LOBBYING

When cement and steel exports have faced antidumping (AD) measures, the respective industries have used their lobbying power. Mexico initiated as complainant one of three cases in the GATT era and five of sixteen cases under the WTO to address illegalities obstructing its exports of cement. From 1990 to 2006, exports of cement from Mexico did not represent more than 0.3% of its total exports per year. The cement lobby, however, remains a very powerful lobby in the domestic setting. Turning to cases on steel products, Mexico initiated five of sixteen cases to defend the export interests of its steel producers. Between 1995 and 1997, its exports of steel products represented 1% of total exports, and from 1998 to 2006 less than 0.8%. In sum, Mexico initiated as complainant eleven of nineteen GATT/WTO cases (from 1986 to 2006) relating to products that represented less than 2% of its yearly exports, demonstrating that the cement and steel products industries have strong lobbying power and have used that power in support of their export interests.

The Mexican sugar industry has not achieved substantive results when Mexico has acted as complainant. The opposite is true when Mexico was defending its domestic market. From 1997 to 2006 there was a significant decrease in Mexico's sugar exports at the same time as imports and production of high fructose corn syrup – a sugar substitute – appeared on the domestic market. The sugar industry is highly sensitive/labour intensive, even if it does not contribute significantly to gross domestic product (GDP). Agriculture, sugar included, represented less than 6.3% of Mexico's GDP per year from 1995 to 2007. The government responded to this situation with two measures: first, an administrative AD measure which was challenged twice in the WTO and once under Article 1904 of NAFTA; and second, a measure involving a discriminatory 20% tax on high fructose corn syrup which was challenged through the WTO and the investor-State dispute settlement mechanism under NAFTA.

4. Two combinations appear in Mexico's data: (a) US/EC vs Mexico and (b) Mexico vs non-Members of the OECD.