

January 2000

The Mexican View on the Operation of NAFTA for the Resolution of Canada-U.S.-Mexico Disputes

Guillermo Aguilar Alvarez

Follow this and additional works at: <https://scholarlycommons.law.case.edu/cuslj>

Recommended Citation

Guillermo Aguilar Alvarez, *The Mexican View on the Operation of NAFTA for the Resolution of Canada-U.S.-Mexico Disputes*, 26 Can.-U.S. L.J. 219 (2000)

Available at: <https://scholarlycommons.law.case.edu/cuslj/vol26/iss/37>

This Speech is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Canada-United States Law Journal by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

THE MEXICAN VIEW ON THE OPERATION OF NAFTA FOR THE RESOLUTION OF CANADA-U.S.-MEXICO DISPUTES

*Guillermo Aguilar Alvarez**

I am very glad to be here, and I am very grateful for being allowed to intrude in what would have otherwise been a very bilateral meeting. I have been asked to address the operation of the NAFTA from the Mexican perspective. To do that, I would like to avoid merely speaking of the institutional framework in dispute settlement. For Mexico, the importance of NAFTA cannot be understood unless you take a look at its economic impact.

NAFTA has been the engine for growth in Mexico from the date of its implementation. If you look at 1995, which was a year of economic crisis and recession during that period, Mexican exports to the NAFTA region grew considerably. If you look at the figures after 1996, and you compare total Gross Domestic Product (GDP) and the contribution of exports to that growth, you will realize the growth of the Mexican economy depends heavily on exports. In 1998, almost ninety-four percent of Mexican exports were to the NAFTA region: 87.5% to the United States and 6.3% to Canada.

If you look at the rate of growth of Mexican regional exports, Mexico has experienced double digit growth since the NAFTA was implemented and in some of the years prior. One relevant year was 1986, because that is the year Mexico started implementing its trade-liberalizing measures. Bilateral Mexico-U.S. trade was 120 billion dollars a year in 1998. It will probably be something like 130 to 140 billion dollars for 1999. That figure, even from that considerable base, has continued to grow at two digits in the first quarter of 2000.

So when you think of Mexico-U.S. disputes, you have to think of them in the context of a 140 billion dollar relationship. Increase in total trade is 122.3% since the NAFTA was implemented and Mexican exports to the United States have increased 140% since the implementation of the NAFTA. Mexican imports from the United States have also grown at the considerable rate of 105.5%. Peaks in trade in the case of Mexico and Canada as compared to the rest of the world can be explained primarily as a result of the NAFTA. If you look at trade figures after 1994, and you look at Mexico's shares in total U.S. purchases, it is a direct result of the NAFTA. If you compare Mexico's exports to the United States with the exports of all of

* Alvarez bio.

Latin America, the figures are quite impressive. The trade figure for all of Latin America put together, including Brazil, whose economy is four times larger than Mexico's, their trade figure is 53.7 billion dollars. If you look at Mexico alone, it was 100.2 billion dollars in 1998. As I said, it will probably be 120 to 130 billion dollars in 1999 and 2000.

If you look at exports to the United States by selected country groups and you compare pre-NAFTA and post-NAFTA data, pre-NAFTA Mexico was in last place, except for Latin America. It still exported more than the rest of Latin America, but all of the other country groups exported more to the United States than Mexico in 1993. If you look at figures for 1997, 1998, and 1999, Mexico ranked second, and in 1999 it ranked first, exporting more to the United States than China and Singapore combined, more than Korea, Taiwan, and Hong Kong, more than the United Kingdom and France, and almost twice as much as the rest of Latin America. If you look at the Mexico-Canada figures, the increases in total trade, although from a lower base, have also been pretty impressive. There was an 83.2% increase in total trade.

If you look at the composition of exports to the United States, the figures exceed any expectation. Manufactured goods are 88.6%, 6% in agricultural goods (still protected, even under the NAFTA). Oil is only 5.4%. If you look at figures for 1985, or for 1986, for 70% of Mexican exports to the U.S. were accounted for by oil. That situation has since been reversed. If you look at Canada, the composition of our exports are very similar, primarily manufactured goods.

There is a lot of talk about low wages being an unfair competitive advantage for some exporting countries. The truth is that more than half of the 1.7 million jobs that have been created in Mexico since August 1995 have been export related. Firms that exported 80% or more of their product paid wages that were 44% higher than the rest of the economy. If you look at compensation during the third quarter, the Maquiladora industry paid wages that were significantly higher than the rest of the economy.

Clearly, the enactment of the NAFTA has had a tremendous impact on Mexico's ability to capture foreign direct investment. Prior to the NAFTA, the highest yearly figure was less than five billion dollars. Immediately after enactment of the NAFTA, that number doubled to ten billion. In 1997, the figure was almost fourteen billion dollars, and it was almost eleven billion dollars for both 1998 and 1999. This is something that you have to bear in mind when we have these heated discussions about Chapter 11 of the NAFTA and how it protects investment. It makes a great topic for law review articles, but when you look at the impact of that protection on the investor's level of comfort, I would submit that the cost benefit analysis is clearly favorable.

Between 1994 and 1998, Mexico received 57.2 billion dollars of FDI. Almost 60% of that came from the United States and 4.2% came from Canada. Over 60% of foreign direct investment went to the manufacturing sector. By April 1998, one of every five workers registered in the Social Security system had a job with a company that had foreign direct investment in Mexico. Moreover, companies with foreign direct investment paid wages that were almost 50% higher than the rest of the economy. Foreign direct investment is a limited pool. Capital exporting countries only have so many resources to invest in countries different than their own. China has been by far the most successful country in capturing foreign direct investment, primarily as a result of the size of its economy. Mexico is in second place with 32.2 billion dollars. Other countries, Malaysia, for example, have half of the dollars that Mexico captured in the 1994 to 1996 period.

Where did foreign direct investment go in the Mexican economy 62% went to the manufacturing sector; 1% went to the construction industry; other industries received 1.1%; services received 6.9% and the growing transportation and telecommunications industries received 6.6%. That figure would certainly be larger if we did not have the foreign investment restrictions in the telecommunications industry that we still have in place. The banking industry got 10%, and commerce got 12%.

Between 1993 and 1997, Mexico's automotive exports increased 134%. In 1997, sales of automotive goods represented 19% of Mexico's total exports, and 22% of our exports of manufactured goods. That is a figure of over twenty billion dollars. Mexico is the tenth most important exporter in the world of automobiles and automobile parts. Mexico is the third largest U.S. provider, and its second largest market for automotive goods. U.S. exports to Mexico account for 16% of its foreign sales. Trade in automotive goods grew by 15% between 1993 and 1997 after the entry into force of NAFTA. Job creation has increased 3%. Labor productivity has also increased. The industry has accumulated a significant amount of foreign currency – 9.9 billion dollars during that same period.

The trade balance is still favorable to the United States in the agricultural and agro-industry in bilateral trade. But this is still a sector where tariffs are yet to be eliminated. Mexican exports to the United States increased 67%, which is at a significantly lower rate than the rest of the economy's exports to the United States. Imports from the United States increased 60%. If you look at Mexico-Canada agriculture and the agro-industry trade balance, Mexico's trade balance is in a deficit almost from the outset. But rates of growth are more important. Mexican exports to Canada have increased 102%, and imports from Canada have increased 82%. That is more in line with the general statistics for growth in trade between the two countries.

Mexico is the second largest provider of agricultural goods to the United States after Canada. In five years, Mexico went from sixth place to third place as the U.S. provider of agro-industrial goods, after Canada and France. Mexican exports of fruits and vegetables are expected to grow as tariff protection is eliminated.

Textiles are another success story for Mexico. Exports of Mexican apparel to the United States grew 167%. That is almost three times the growth of agricultural exports. Mexican apparel exports to Canada grew 133%. U.S. sales of apparel to Mexico increased almost 140%, and to Canada, 70%. If you look at the post-NAFTA trade balance for textile goods, there was a surplus for Mexico of almost two billion dollars in 1997. 80,000 new jobs were created after the NAFTA went into effect. Mexico became the sixth most important exporter of textiles and apparel in the world, and it became the largest exporter of apparel to the United States, more important than China.

So when you talk about dispute settlement, you have to bear these figures in mind. You have to realize that every expectation that Mexico had when it decided to negotiate with the United States and Canada has been realized with the entry into force of the NAFTA. We also expected the number of trade and investment disputes to increase and that is why we have dispute settlement mechanisms. But even if you look at the statistics for the use of the dispute settlement systems in the NAFTA, there has been considerable restraint and interest in managing rather than prolonging disputes.

There have been sixteen cases under Chapter 20 disputes. There have been eleven cases between Mexico and the United States, nine where Mexico was the claimant and two where the United States was the claimant. There has been one case between Mexico and Canada against the United States: the Helms-Burton case. I think Canada was the claimant in that one. There have been four cases between Canada and the United States, three where Canada was the claimant, and one where the United States was the claimant. By and large, the largest category in this pie is disputes between Mexico and the United States.

How have those disputes progressed in the Chapter 20 stages of the procedure? Chapter 20, as you know, has three stages. The first stage is consultations. Then, the Free Trade Commission is convened. If the Free Trade Commission cannot resolve the dispute, a panel is appointed. So you start out with sixteen disputes that made it to consultations. Many more disputes were discussed between the parties even before the consultations stage in the different committees and working groups that are created under the NAFTA, serving as a buffer for disputes that do not necessarily have to percolate to the consultations stage. Out of sixteen disputes that reached the

stage, six were settled and two were suspended. So only half of the disputes that entered the Chapter 20 procedure actually proceeded to the commission stage, where two were settled, two were suspended, and two remain unsettled but did not go to a panel. Four of the sixteen that were initiated under Chapter 20 eventually got to the panel stage. Two of them were settled and two remain in effect, with a decision expected.

After five years we may have two NAFTA disputes that actually will result in a panel decision. If you compare this with the bilateral Free Trade Agreement (FTA) between the United States and Canada, there has been a lot more restraint here. You had decisions in the *Salmon's Herring* case,¹ for example, in the bilateral FTA before the five-year deadline.

If you look at Chapter 19, as soon as you have private party involvement in the dispute settlement process, the numbers tend to grow. But still, fifty-two cases are reasonable when compared to the volume of trade. The pattern under the bilateral U.S.-Canada FTA, I would say, is repeated here in terms of the defending investigating authority. In 54% of the cases, it was the U.S. Department of Commerce. In 17% of the cases, it was the Mexican Ministry of Foreign Trade. In 29% of the cases, it was the Deputy Minister of National Revenue or the Canadian International Trade Tribunal.

If you look at Chapter 11, you have a total of fourteen cases. Damages sought by private parties average 211 million dollars. So parties tend to use Chapter 11 only for very significant cases. We have had clients at the firm that had very clear textbook examples of Chapter 11 violations by the Mexican government and decided not to sue because they value a good ongoing relationship with the administration. As you can see, the amounts in dispute here are quite significant: 750 million dollars in the *Loewen* case,² 900 million dollars in one of the other cases. But, in general, they average out to 211 million dollars.

There were two ways to write Chapter XI. By including a precise definition of every concept and situation that is likely to jeopardize an investor's rights, or by including broad terms and principles, leaving the case by case application to the ebb and flow of arbitral wisdom. It was this second model that was adopted. It will be up to arbitrators to decide on a case-by-case basis.

What are the major challenges in the years to come? For Mexico, certainly a sustained flow of foreign direct investments, and that would mean

¹ Canada – Measures Affecting Exports of Unprocessed Herring and Salmon, (1998) 35S B.I.S.D. 98 (Panel Report adopted Mar. 22, 1998).

² See *Loewen Group, Inc. v. United States*, Notice of Claim, Oct. 31, 1998. See also Harmonization Project, Briefing Paper, *Loewen Group, Inc. v. United States* (visited July 28, 2000) <<http://www.harmonizationalert.org/NAFTA/loewen.htm>>.

opening up sectors that remained closed under the NAFTA. There are significant opportunities in the energy, telecommunications and financial sectors.

There is a need for transparency in Mexico. There are still instances where the processes for developing regulations is not as transparent as it should be; a chance for private industry to have some input into the way regulations are designed and put in place. There are efficiency gains that are to be captured if NAFTA firms use the market-making capability of the Internet to source materials and to export finished goods within the region. There is a discussion, at least in academia, as to whether a free trade market should evolve into a common market.

For the time being, it does not seem like the NAFTA can evolve into a common market, but there are at least some common institutions. Competition will be one of the tough topics that the three countries will have to tackle in the years to come.