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THE LAW OF AMPARO: A CRITICAL ANALYSIS OF THE FUNCTION AND USES OF THE AMPARO PROCESS IN INTERNATIONAL TRADE LAW MATTERS

ADRIAN VAZQUEZ B.*

I. INTRODUCTION

The amparo process in Mexico has been defined and discussed by many authors. Their discussion focuses on the nature of this system and its extraordinary challenges. Some categorize the amparo process as a form of judicial review; however, most authors consider it a unique appellate institution. Ultimately, every author agrees that the amparo process exerts constitutional control in Mexico.¹

This article explores whether amparo law defines the scope of the amparo process by limiting the use of legal recourse in every dispute. In practice, a great number of litigants seek amparo protection. These claims commonly assert the existence of a constitutional violation, therefore, an amparo judge is asked to analyze whether a violation has really occurred.² When a constitutional violation is legally supported by facts, a judge could grant amparo protection to the plaintiff.³

This article is not intended to be an amparo treaty. Rather, this article will address the main characteristics of the amparo process, its principles, and types of resolutions. This paper will illustrate the function of the amparo process by employing a critical approach to the functions of international trade law.

A. *The Nature of the Amparo Concept*

It is difficult to define when and to whom we owe the amparo process utilized in the Mexican judicial system. However, this legal institution finds its origins in Mexico during the late first half of the nineteenth century. Articles 101 and 102 in the Federal Constitution of 1857 defined and applied the amparo process.⁴ Currently, this regulatory law is found in Articles 103 and 107.⁵ A general accepted definition of the amparo process is:

a way and means of constitutional control, exercised by jurisdictional organs, under action, whose object is the constitutional protection of the plaintiff or affected party, in the cases set forth in Constitutional Article 103. Thus, the Constitutional protection tends to restore the damage that the party suffered in

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1. CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS [hereinafter MEX. CONST.], Feb. 5, 1917, as amended, arts. 103, 107.

2. MEX. CONST., *supra* note 1, art. 103 (I).

3. *Id.* at art. 103(I).

4. CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS [Mexican Constitution], 1857, arts. 101, 102.

5. MEX. CONST., *supra* note 1, at arts. 103, 107.

the exercise of the particular individual right demonstrated to be violated by the authorities.⁶

The objective of the amparo process is to solve existing controversies. Those controversies include laws or acts of authorities violating individual rights, laws or acts of federal authorities restraining the States sovereignty, laws or acts of states invading federal authority, and decisions or sentences made by lower courts.⁷

The amparo process is the last available opportunity to overcome a final resolution in a dispute. For example, during an ordinary judicial or administrative dispute, parties would like to obtain a resolution in their favor from an administrative authority. If the determination is negative and there is legal foundation to file an amparo suit, the judge or the administrative authority will occupy the role of the defendant. Simply, the administrative authority is the responsible authority of the alleged violation.⁸ The original opposing party will be a third interested party. The role of the parties could change because an original respondent could be the plaintiff in the amparo process, or viceversa.

In the amparo process, only the individual party affected by the law, international treaty, regulations, or act may pursue an amparo trial.⁹ If a violation is found, there could be a revocation of the act that gave rise to a legal remedy.¹⁰ Violations typically stem from the erroneous conduct of a judge or administrative authority or from a lack of observation and erroneous interpretation of constitutional provisions.¹¹ The legal remedy for amparo is different from other damages or losses. A legal damage must effect the legal interest of an individual rather than a sole economic or commercial interest.

B. Principles of the Amparo Process

Numerous authors study amparo by reviewing Constitutional articles 103 and 107.¹² Some authors believe that more than nine amparo principles exist. However, almost every author agrees to six main principles:

- *Principle of affected ex-parte action*-The amparo protection may not be started *ex-officio* and may only be used by an effected interested party;
- *Principle of judicial prosecution*-This defines the way the formalities of the amparo must be followed;
- *Principle of relativity* -Amparo sentences must not have *erga-omnes* [general effects], rather, constitutional protection is limited to the amparo petitioner;
- *Principle of definitivity*-Ordinary judicial remedies must be exhausted, except in those cases where the law orders otherwise;

6. Hector Fix Zamudio, A Brief Introduction to the Mexican Writ of Amparo, 9 CAL. W. INT'L L.J. 331 (1979).

7. Helen L. Clagett, The Mexican Suit of Amparo, 33 GEO. L. J. 418, 420 (1945).

8. MEX. CONST., supra note 1, at art. 103.

9. Carlos del Rio Rodríguez, Origins of Mexico's Supreme Court and its Interpretation of Judicial Review up to the Middle of the Nineteenth Century, 20 CAL. W. INT'L L.J. 10, 14 (1989-1990).

10. LEY DE AMPARO [hereinafter AMPARO LAW] ch. 3, art. 11.

11. Id. at ch. 3, art. 11. Responsible authority is the one that issues, promulgates, publishes, orders, executes, or tries to execute the law or the act being challenged (claimed act).

12. MEX. CONST., supra note 1, at arts. 103, 107.

- *Principle of strict legal right*-The judicial authority must only decide on those violations argued by the plaintiff and must not substitute them in its favor. There are some exceptions to this principle; and,
- *Principle of proceeding*-Amparo decisions made by district judges and circuit courts may be reviewed by the Supreme Court.

C. Types of Amparo

This section attempts to briefly describe the main characteristics and procedural elements of the different amparo processes. The following types of constitutional amparo originate from an alleged violation.

1. Indirect

Indirect amparo is applied when an authority issues a provision of general character considered unconstitutional by individuals.¹³ A district judge oversees this type of amparo trial.¹⁴ Ordinarily, judicial remedies must not have been previously exhausted. Therefore, an indirect amparo trial may be requested.¹⁵

- When federal or local laws, international treaties, federal or local executive regulations, any other administrative regulations, decrees, or agreements effect and cause damage to an individual by their mere existence or by virtue of its first application;
- Against acts not issued by judicial, administrative, or labor tribunals;
- Against acts of judicial, administrative, or labor tribunals executed outside trial or after having been concluded;
- Against acts in trial where an executive order over persons or properties are of impossible reparation;
- Against acts executed in or outside trial that effect third persons, provided the law does not grant such individuals any ordinary legal remedy; and,
- Against acts or laws of the federal or local authorities in cases of sovereignty restraint or competence invasion.

Generally, amparo writs must be filed within fifteen days following the notification of the first act effecting the individual. For example, in the case where sole expedition causes damages to individuals, amparo protection may be requested within thirty days of the law being enforced.

Indirect amparo protection may be subject to an ulterior review. Since the nature of indirect amparo protection is extraordinary, the decisions made through indirect amparo may be reviewed by more than one authority. Simply, indirect amparo protection is the exception to the general rule stating all remedies must be exhausted. Therefore, if an individual challenges the unconstitutionality of a certain legal provision, the Supreme Court reviews the sentence or resolution issued by the district judge. Moreover, if a plaintiff requests a district judge to review the legal defects of

13. Id. at art. 107(IX).

14. Id. at art. 107(XV).

15. Id. at art. 107.

the alleged violation, another appellate court can review the district judge's determination if an amparo review recourse is filed.

2. Direct

On the other hand, direct amparo may be utilized when ordinary legal remedies cannot be used to overcome or modify final sentences or resolutions.¹⁶ Indeed, once ordinary legal remedies are exhausted, resulting in a negative decision, the only way to get judicial protection is through the amparo process. Generally, direct amparo decisions are only reviewed by one authority and is at the exclusive control of circuit courts.¹⁷

As a general rule, direct amparo parties may not challenge the constitutionality of laws or regulations. It is understood that a constitutional violation has occurred during judicial review of the original procedure. That is, the violation effects the individual's defense and disturbs the final outcome. Violations to individual rights made in the sentence or resolution itself are also effected. Any of these errors give individuals the right to pursue amparo protection and obtain the restoration of the violated individual right.

D. Amparo Inadmissibility and Dismissal

The amparo process is complicated and time consuming. Litigants should analyze whether the action by judicial or administrative authorities deserves to be studied further. A large number of cases filed before amparo judges are inadmissible and most are rejected on procedural grounds.

1. Inadmissibility

The Federal Constitution declares that amparo will not operate when it is constitutionally, legally, or jurisprudentially inadmissible.¹⁸ Legal reasons for its inadmissibility may only be declared in amparo law and not in any other legal framework, such as international treaties or regulations.¹⁹ Amparo law declares the following events as inadmissible:²⁰

- Acts of the Supreme Court;
- Resolutions issued in the amparo trials or in execution of them;
- Laws or acts decided in another amparo process brought by the same plaintiff against the same authorities for the same claimed act;
- Acts that do not effect the legal interests of the plaintiff;
- Laws, treaties, and regulations effecting a plaintiff's damages because an ulterior act of application is necessary;
- Resolutions of electoral authorities;
- Consumed acts impossible to repair;

16. Hector Fix Zamudio, *A Brief Introduction to the Mexican Writ of Amparo*, 9 CAL. W. INT'L L.J., 306, 331 (1979).

17. These constitutional procedures are called one-instance amparos because review recourse is not permitted.

18. MEX. CONST., *supra* note 1, at art. 103.

19. For example, NAFTA's Chapter XIX may be declared unconstitutional, given that it denies parties access to domestic judicial remedies that may overturn panel orders.

20. AMPARO LAW, *supra* note 10, at ch. 8, art. 73.

- Consented acts, expressly or tacitly;
- Judicial, administrative, or labor tribunal resolutions not timely challenged in an ordinary legal remedy;
- An ordinary legal remedy which is in a process that could eventually modify, revoke, or nullify the claimed act;
- Acts of authorities different from judicial, administrative, or labor tribunals subject to challenges that could eventually modify, revoke, or nullify such determinations;
- Cases where the effects of the claimed act have ceased; and,
- Cases where the claimed acts have not ceased, but its legal effects may not operate because the object or matter no longer exists.

At the presentation of the amparo writ, courts must evaluate whether the amparo is admissible. If the court considers the amparo inadmissible, relevant reasons for the rejection must be stated. If the court finds no evident cause of inadmissibility, it must order a continuance of the procedure.

2. Dismissal

A dismissal occurs during the course of the amparo process. In the event of a dismissal, the judge or tribunal does not make a declaration towards the challenged constitutional issues. Dismissal occurs in the following situations:²¹

- When the plaintiff terminates their action;
- When the plaintiff dies during the course of the process;
- When causes of inadmissibility occur during the process;
- When the record does not evidence the existence of the claimed act; and,
- Procedural inactivity for a period longer than 300 days.

Dismissal occurs in a great number of cases. This is due to various reasons, including the failure to exhaust ordinary legal remedies and the lack of legal interest.²² Moreover, jurisprudence plays a big role in dismissal because constitutional and legal interpretation may give courts the foundation to dismiss cases in events that were not necessarily foreseen by the plaintiff. The final sentence or resolution declaring whether a case is admissible is subject to legal recourse.

E. The Sentence

An amparo sentence must only address the amparo petitioner.²³ This limits protection to the plaintiff's claimed act without making any general reference to the law or act that originated the amparo.²⁴

A sentence includes several elements. First, a clear and precise definition of the claimed acts with supporting evidence is required.²⁵ Second, the legal foundation

21. *Id.* at ch. 9, art. 74.

22. In the case of direct amparos.

23. Zamudio *supra* note 16 at 309-310.

24. MEX CONST., *supra* note 1, at art. 107, ch. 5, sec. c.

25. *Id.* at art. 107, ch. 6.

that supports the court's decision to dismiss or declare the constitutionality or unconstitutionality of the claimed act is needed.²⁶ Lastly, the court must state clearly why the amparo is dismissed, conceded, or denied constitutional protection.²⁷

The amparo sentence recognizes that the benefit of the violated individual right must be restored, thereby re-establishing the status quo by obligating the responsible authority to act in one way and respect the individual's right.²⁸ Under certain conditions, the court may temporarily suspend the effects of the claimed act until a final sentence or resolution.²⁹ The purpose for this is to avoid irreparable damage to the plaintiff during the course of the amparo process.³⁰

There are two kinds of positive amparo sentences. First, sentences could be of full and final effects. Second, they could be for remand to the responsible authority ordering compliance. After the sentence is issued and once it is final, meaning that it cannot be modified or nullified by a legal recourse, the responsible authority must comply with the constitutional order.³¹

Testimony of an executive sentence must be sent to the responsible authority for its immediate compliance. The responsible authority is, of course, subject to fines and sanctions if it does not comply in full terms and in satisfaction of the grantor of the amparo. There is a special provision in amparo law ordering that an amparo may not be closed and filed until the responsible authority complies with the sentence that has granted the plaintiff constitutional protection.

F. Legal Recourses

Amparo permits three legal recourses: (1) review recourse, (2) complaint recourse, and (3) reclamation on recourse.

1. Review Recourse

Sentences issued by district judges in direct amparo utilize review recourse. Sentences issued by direct amparo cannot be reviewed by judicial mechanisms.³² Review recourse is permitted in indirect amparos which:³³

- Reject or have an amparo writ that has not been filed;
- Grant or deny provisional suspension of the claimed act;
- Dismiss the amparo process; and,
- Issue a sentence after the constitutional hearing.

Direct amparo sentences issued by the circuit courts may be subject to review under certain circumstances. Specifically, sentences containing a declaration about the constitutionality or unconstitutionality of federal and local laws, international treaties, or federal and local regulations may be reviewed. In other words, recourse

26. *Id.* at art. 107, ch. 6.

27. *Id.* at art. 107, ch. 6.

28. del Rio Rodríguez, *supra* note 9, at 14.

29. *Id.* at 14.

30. A provisional suspense resolution must not be identified with an amparo protection order.

31. Execution of the amparo sentence is a complicated issue and will not be treated thoroughly in this article.

32. Non-revisable sentences of the Supreme Court are called "executable".

33. MEX. CONST., *supra* note 1, at art. 107, ch. 12.

review of indirect amparo sentences is limited to the constitutionality issue and does not reach legal defects of the authorities' act.³⁴

In any case where a district judge or circuit court sentence establishes a rule in respect to the constitutionality of a legal provision, the Supreme Court shall hear review recourse filed by the effected party. Therefore, the effected party could be the plaintiff of the amparo process, the third interested party, or even the responsible authority. However, the Supreme Court will not rule on the legal issues that may be the defect of the act. For these reasons, the circuit court could hear a review recourse with respect to legal defects only after the Supreme Court determines the constitutionality of the law or legal provision.

2. Complaint Recourse

Complaint recourse does not address the factual basis of the amparo sentence, but rather the amparo process itself and the acts relating to the amparo protection.³⁵ For example, complaint recourse is applicable when resolutions accepted for amparo protection are notoriously inadmissible amparo writs. It is also applicable against determinations suspending the claimed act and against authorities for defects or excessive enforcement.³⁶

3. Reclamation Recourse

Reclamation recourse is only applicable against procedural orders issued by the President of the Supreme Court, the President of any other branch, or those issued by the circuit courts.³⁷

G. The Uses of Amparo in International Trade Related Matters

Until Mexico entered the General Agreement on Tariffs and Trade (GATT) in 1986, foreign trade was nearly unknown to Mexican lawyers and judges. Although many Mexican customs lawyers had taxation law experience, they were unaware of the changes which GATT and later the North American Free Trade Agreement (NAFTA) would bring to Mexican law practice. Simply, the practice of international trade law is not related only to customs matters. Rather, international trade law is a new legal universe requiring study and practice.

Incorporating amparo into international trade matters has not been easy for district judges, circuit courts, or private practitioners. Private practitioners must be clever enough to explain disputes in simple technical terms, tying the controversy to a particular constitutional violation. Similarly, amparo courts must thoroughly study unfamiliar international laws and treaties. As such, it is normal for courts to give deference to more experienced administrative authorities. However, amparo courts must nevertheless review administrative determinations involving international issues.

It is of utmost importance to decide the type of amparo that will be used to challenge the international issue. Ordinary violations address the unconstitutionality

34. Id. at art. 133.

35. Zamudio *supra* note 16 at 309-310.

36. MEX. CONST., *supra* note 1, at art. 107, ch. 13.

37. Id. at art. 107, ch. 13.

of the law or international treaty, lack of legal foundation and motivation, and lack of competence of the administrative authority. Going through direct amparo must include the exhaustion of ordinary legal remedies. However, once the remedies are exhausted, it is important to remember that the amparo process is not subject to review. On the contrary, going through indirect amparo obligates the petitioner to find clear unconstitutional issues with the law, regulations, or international treaties. Moreover, the indirect amparo in administrative matters may be subjected to review by the Supreme Court or the circuit courts. However, a district judge could consider the amparo as inadmissible, giving the plaintiff few possibilities of success.

H. Antidumping and Countervailing Law

Recently, amparo law has been used more often in antidumping and countervailing duty cases. During the first years of the Mexican antidumping system few companies brought amparo challenges because trade law did not give national producers an ordinary legal remedy. The Supreme Court held that national producers did not act as parties but as assistants of the investigating authority. Thus, they did not have legal interest in amparo until the new Foreign Trade Law of 1993.

Foreign exporters faced this same problem when they started challenging the determinations of the investigating authorities. According to the decisions of several district judges, and one from a circuit court in amparo review, foreign exporters lacked legal interest because they did not pay duties. Only importers had the legal interest to challenge negative determinations before the courts. Fortunately, this problem was solved by a recent decision issued by the Supreme Court where foreign exporters and importers were given the right to pursue amparo in antidumping and countervailing duty cases.

Amparos in unfair international trade disputes are more common following the Foreign Trade Law. However, not every case has been decided as plaintiffs would wish because it is too soon for courts to correctly interpret unfair trade provisions. Other cases have brought good results for importers and foreign respondents. However, these rulings may be a temporary effect, as a remand of the judicial sentence allowing the investigating authority to correct a flaw or omission committed during the investigation is possible. If this were the case, the authority would make such corrections and, in the long run, would conform to the original duty. Therefore, it is important to present an amparo case before the court that would not be remanded. Plaintiffs should try to obtain full constitutional protection by presenting only foreseeable allegations.

I. Amparo Processes vs. Binational Panel Reviews

Binational panel reviews are only for parties whose merchandise is from countries that have signed free trade agreements with Mexico. Foreign respondents from other countries do not have the opportunity to challenge negative determinations in a binational panel review. As such, their only options are an indirect amparo, ordinary legal remedies (including direct amparo), or World Trade Organization (WTO) mechanisms. Of course, parties with access to binational panel review may utilize these options as well.

Several questions should be answered before choosing one of those options:

- Did the investigating authority consider misleading facts or make a false interpretation of the case based on the standard of review;
- Did the investigating authority erroneously interpret a GATT provision;
- Will the reviewing court understand the procedural defects;
- Are unconstitutional laws supporting the investigating authority's position;
- Are amparo processes expeditious;
- Are other legal remedies mechanisms faster than an amparo process;
- Will the judicial court understand my legal arguments correctly; and,
- Is foreign trade law really unconstitutional?

The answers to these questions would assist a claimant deciding which option to pursue when seeking amparo protection against a negative determination.

II. CONCLUSION

Judges, magistrates, and ministers must continue to see into a new era of law where globalization of economy has brought globalization of legal systems. Mexico must not remain passive towards this inevitable change. Mexican jurists must demand judicial bodies to become part of this change by presenting new amparo cases. Courts must avoid inappropriately dismissing these challenges and should solve amparos expeditiously in accordance with constitutional orders. Finally, democracy and the judicial power's independence from the executive branch must play a big role in this transformation. Perhaps unconstitutional declarations of transcendental legal provisions in the national economy will, more often, give individuals greater legal certainty and confidence in the judicial system. Therefore, the legislative and the executive powers will have to better adjust to federal constitutional orders.

