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Enforcement of labor, environmental and anticorruption provisions in the USMCA

Aplicación de las disposiciones laborales, medioambientales y anticorrupción del T-MEC

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Abstract

The lack of enforcement in the United States–Mexico–Canada Agreement (USMCA) based on the regression of international legal adjudication has a direct impact on the inapplicability of the non-investment provisions included on the treaty (such as labor, environmental and anticorruption provisions). Therefore, the attempt to advance in these matters by submitting them to State-to-State dispute settlement is truncated.

Keywords: United States–Mexico–Canada Agreement (USMCA); Labor; Environment; Anticorruption; Dispute settlement

Resumen

La falta de aplicación forzada del Tratado entre México, Estados Unidos y Canadá (T-MEC) debido a la debilidad de su sistema de solución de controversias tiene un impacto directo en la inaplicabilidad de las disposiciones no relacionadas con la inversión incluidas en el tratado (como las disposiciones laborales, medioambientales y anticorrupción). Por lo tanto, se trunca el intento de avanzar en estas materias y someterla a la solución de controversias interestatal.

Palabras clave: Tratado entre México, Estados Unidos y Canadá (T-MEC); Laboral; Medio ambiente; Anticorrupción; Solución de controversias

1 Introduction

This work is an intent to determine the effects that USMCA Chapter 31 (Dispute Settlement) may have, especially on matters related to environmental, labor and anticorruption issues. Both NAFTA and the USMCA have several provisions that are not traditionally considered as investment matters that should be regulated on an agreement of this nature (Baker and Keiser 21). I am referring to provisions related to environment, labor and anticorruption. The two agreements include State-to-State dispute settlement and make it applicable to those provisions.

As a matter of example, pursuant to Article 27.8.1 USMCA (Anticorruption):

> Chapter 31 (Dispute Settlement), as modified by this Article, applies to disputes relating to a matter arising under this Chapter

Article 27.8.2 continues:

> A Party may only have recourse to the procedures set out in this Article and Chapter 31 (Dispute Settlement) if it considers that a measure of another Party is inconsistent with an obligation under this Chapter, or that another Party has otherwise failed to carry out an obligation under this Chapter, in a manner affecting trade or investment between Parties.

Thus, even if, as a general rule, dispute settlement may be applicable, Article 27.8.3 provides:

> No Party shall have recourse to dispute settlement under this Article or Chapter 31 (Dispute Settlement) for a matter arising under Article 27.6 (Application and Enforcement of Anticorruption Laws) or Article 27.9 (Cooperation)

Therefore, it excludes application and enforcement of anticorruption laws and cooperation from dispute settlement. Corruption has "come to be seen as distorting investment and other economic activity, siphoning resources from public needs and retarding growth; undercutting the rule of law, democracy, government legitimacy, and political stability" (Abbot). Thus, corruption has an evident effect on investment, so it might be an indicator that through Article 27.8.2, the USMCA dispute settlement mechanism may address corruption.

In regard to environmental and labor provisions, USMCA Articles 24.4.1 and 23.5.1 assume that a violation of labor and environmental provisions may affect trade or investments. That means that the necessity to provide evidence for the complaining party is not that high, and that is a main difference with other free trade agreements.

Considering that the USMCA includes a dispute settlement mechanism applicable not only to economic issues, but also to non-investment related matters, this work tries to determine if those provisions are stronger than NAFTA or if, considering the whole agreement, they are just purely symbolic provisions that lack the enforcement required to make them applicable.

2 Analyzing dispute settlement

Pursuant to Beyer, twelve NAFTA cases have been initiated, and that only three cases culminated in panel reports:

1. Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products – Final Report, 2 December 1996, Doc. CDA-95-2008-01.
2. Safeguard Action Taken on Broom-Corn Brooms from Mexico – Final Report, 30 January 1998, Doc. USA-97-2008-01.
3. Cross-Border Trucking Services – Final Report, 6 February 2001, Doc. USA-MEX-98-2008-01.

Even though that forty-five cases between NAFTA parties were initiated, only fourteen could have been taken to NATFTA's dispute resolution mechanism. Beyer argues that The World Trade Report said that "WTO members that are partners in a PTA continue to have frequent recourse to the WTO dispute settlement system to resolve trade disputes", but that statement falls short because it doesn't consider that there are PTAs that don't provide for adjudication, and the ones that do, may not impose substantial obligations similar to the obligations found under WTO, or they might exempt some obligations to adjudication. As in both NAFTA and USMCA anti-dumping and countervailing duties can't be subject to adjudication, in regard to those cases there wasn't a choice in the first place, and so the comparison falls short. So the generally held belief that NAFTA parties have a preference for WTO proceedings is not convincing, and that's why Beyer indicates that that dominance might not be as pronounced as it is often assumed.

Beyer also reflects that in the twenty-five years since the WTO was created, only 2% of bilateral relations have been subject to dispute settlement. That author wonders why the existence of more adjudicatory dispute settlement mechanisms should, without any other intervening factor, suddenly lead to an increase in the number of disputes. 46 cases have been initiated under fifteen different PTAs. According to Beyer, the only thing that number shows is that the vast majority of provisions in regional and bilateral trade agreements are never subject of any dispute settlement proceedings, even when a right to invoke proceedings exists.

Puig's article has a broader scope than just State-to-State dispute settlement mechanisms, so I am focusing in those aspects of his article that are relevant to my hypothesis. According to him, the USMCA State-to-State dispute settlement mechanism is really hard to implement. He believes that the roaster of 30 individuals who are willing to serve as panelists (Article 31.8) is going to be a difficult commitment for the parties, considering what happened with NAFTA panelists. He argues that USMCA didn't thrust forward even though NAFTA's major shortcoming was its incomplete State-to-State dispute settlement mechanism (Puig 57). That is why nothing ensures that the parties will follow through with the obligation to consent on the panel arbitrators in order to be able to establish the dispute settlement mechanism.

Puig also indicates that by the time the agreement is implemented, the WTO dispute settlement mechanism will no longer be functioning, so that alternative dispute settlement mechanism won't be available for the parties. Puig is very pessimistic regarding how enforceable USMCA is going to be. If may link the previous concern with Beyer's article that shows that fourteen cases that were initiated in the WTO could have been settled through NAFTA's State-to-State dispute settlement panel. Despite USMCA, Canada, Mexico and the United States still consider the WTO a better forum for solving their disputes. Although Puig rates some provisions as progressive, like anticorruption, environmental standards, indigenous and labor rights, he argues that they are not justiciable or enforceable (Puig 58). He claims that the treaty scaled back the role of investor-State dispute settlement mechanism: for example, exhaustion of local remedies is almost always required. Puig concludes that it is unlikely that a governmental decision to unfairly block foreign investments will be ever reviewed by USMCA arbitrators (Puig 58).

As an overall conclusion, Puig believes that the big losers regarding the USMCA are international legal adjudication and the rule of law, since the use of raw economic power is gaining preponderance. In his opinion, the United States seems to be insulating decisions from international adjudication (Puig 60).

While Puig writes viscerally and has a more political point of view regarding international relations from an economic perspective, VanDuzer is more technical and refers to facts and data. VanDuzer seeks to identify the differences between NAFTA and USMCA State-to-State dispute settlement mechanisms. Unlike Puig, he takes into consideration the USMCA Protocol of Amendment of 2019. According to that author, one of the prime objectives of the USMCA concerning Chapter 31 was to prevent a State party from blocking the formation of State-to-State dispute settlement panels. Even maintaining the status quo was a win because of the intention of the American government to weaken dispute settlement.

Considering that VanDuzer uses the USMCA 2019 Protocol as a starting point, he disagrees with Puig in regard to the roaster appreciation. He believes that "the roster will only fail if no party designates anyone" (VanDuzer 10), and that seems quite unlikely. In fact, the Protocol states that "each party is to designate 10 roster members and, if there is no consensus within one month of the entry into force of the USMCA, the roaster is composed of the designated individuals". This way recalcitrant parties will not be able to prevent the formation of a panel.

VanDuzer also mentions the side deals on labor and environment. Unlike NAFTA, the USMCA obligations related to labor and environment can

be subject to dispute settlement, which he qualifies as a mayor innovation. When compared to the WTO, USMCA provisions cover a much broader range of economic activity and contain a number of distinct provisions which can only be brought to adjudication under USMCA, making the UMSCA State-to-State dispute settlement mechanism the only forum in which environmental or labor claims can be made. Another highlight of USMCA is that Canada, US and Mexico have agreed to more transparent proceedings; this commitment and the possibility that NGOS and other third parties participate on the proceedings, are breakthroughs.

He agrees with Puig in regard to the lack of enforcement. In his opinion, one of the key problems of the NAFTA process was the limited role of authoritative adjudication by panels in facilitating compliance. VanDuzer believes that USMCA even waters down the role of panel decisions compared to NAFTA, because under USMCA a panel is no longer to provide recommendations regarding how non-compliance should be resolved, unless requested by both parties.

VanDuzer concurs with Puig in his view that USMCA is not going to be properly applied. He is skeptical on how member States will use the dispute settlement mechanism. His overall conclusions are similar to Puig's, as USMCA "diminishes the role of authoritative, independent adjudication as a way to encouraging states to comply with their obligations" (VanDuzer 21).

3 Conclusions

In recent years, international economic law and economic integration treaties have been including provisions related to general international public law. Provisions on tech, environmental issues, transparency, anti-corruption and humanitarian law have been addressed by this branch of international law, trying, by this means, to make them enforceable.

Nonetheless, there are strong arguments to maintain that, although the USMCA has some novelties, they are far from seriously advancing the enforcement of non-investment related provisions. We have reviewed different arguments on why the USMCA dispute settlement mechanism is going to have little application. Mainly, it is the lack of enforcement that this State-to-State dispute settlement mechanism has. Even though some Chapters and provisions in the USCMA might seem as a novelty, there's no real progress if parties are not compelled to adhere or even to take a step further in regard to these subjects. As was foreseen by Baker and Keiser, it seems that the United Sates accomplished its objective of hindering the access to international dispute settlement, and impeding that this type of decisions is taken to international panels or organs (Baker and Keiser 53).

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Bibliography

Abbot, Kenneth W. "Fight against corruption." Wolfrum, Rüdiger. *Max Planck Encyclopedia of Public International Law*. 2009.

Baker, John S. and Lindsey Keiser. "NAFTA/USMCA Dispute Settlement Mechanisms and the Constitution." *University of Miami Interamerican Law Review* (2019): 1-57. https://repository.law.miami.edu/umialr/vol50/iss1/3.

Beyer, Vincent. "Dispute Settlement in Preferential Trade Agreements and the WTO: A Network Analysis of Idleness and Choice of Forum." *The European Journal of International Law* 32.12 (2021): 433-456. https://doi.org/10.1093/ejil/chab011.

Hart, Nina M. "USMCA: Legal Enforcement of the Labor and Environment Provisions." *Congressional Research Service* (2021). https://crsreports.congress.gov.

Puig, Sergio. "The United States-Mexico-Canada Agreement: A Glimpse into the Geoeconomic World Order." *American Journal of International Law* 113 (2019): 56-60. https://doi.org/10.1017/aju.2019.6.

VanDuzer, J. Anthony. "State to State Dispute Settlement under the USMCA: Better than NAFTA." *SSRN* (2020). https://ssrn.com/abstract=3341662.