

Mexico v. Smith & Wesson: Cross-Border Implications

Introduction

U.S. citizens enjoy a robust constitutional right to gun ownership. There are an estimated 52,799 gun stores in the United States, and 9,923 dealers in the border states of Arizona, California, New Mexico, and Texas alone. But there is only one gun store in all of Mexico.¹

In August 2021, Mexico filed suit against multiple gun-industry defendants, blaming U.S., Austrian, and Italian entities for their role in the killing and maiming of children, judges, journalists, police, and ordinary citizens throughout the country. Most of these defendants sell their guns, via a Boston-area wholesaler, for resale to gun dealers throughout the U.S.² On this basis, Mexico filed its complaint in Boston's Federal District Court, which will soon rule on the defendants' Motion to Dismiss. This *Insight* summarizes key aspects of the litigation to date, including the Mexican Government's complaint and the forthcoming motion. It also considers whether the U.N. Arms Trade Treaty—as yet not pleaded by Mexico—might provide an additional claim, in the event Mexico is allowed to amend its complaint. Given the interim *Remington* settlement discussed below, the *Smith & Wesson* litigation has the potential for inviting lawsuits from other countries.

Mexico's Complaint and the Gun Culture Divide

After allowing its assault weapons ban to expire in 2004, Congress enacted the 2005 federal Protection of Lawful Commerce in Arms Act (PLCAA). Pursuant to its key provision: "Businesses ... that are engaged in ... sale to the public of firearms or ammunition products ... are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products...." The PLCAA further cautions that,

“the possibility of imposing liability on an entire industry for harm that is solely caused by others is an abuse of the legal system ... and constitutes an unreasonable burden on interstate and foreign commerce of the United States.” Thus, “[t]he possible sustaining of these actions by a maverick judicial officer or petit jury would expand civil liability in a manner never contemplated by the framers of the Constitution, by Congress, or by the legislatures of the several States.”³

The U.S. gun industry has since increased its production, distribution, and marketing of military-grade weapons. Mexican gun homicides have also dramatically increased: from 25 percent in 2004, to 69 percent as of 2018. Mexico was deluged with a horrific torrent of guns and ammunition, in a downstream “Iron River” flowing from the U.S. into Mexico. A 2006-2011 clandestine U.S. operation sent some 2,000 supposedly tracked guns into Mexico. As the government’s resulting investigation concluded:

The scale of firearms trafficking from the United States to Mexico is well established. ... A large number of the weapons used by these organizations originated in the United States, and the types of weapons sought were increasingly powerful and lethal. The situation continues to pose a national security challenge for Mexico and a significant organized crime challenge for the United States.⁴

Consistent with this conclusion, Mexico’s complaint alleges that more than 500,000 guns are trafficked each year.⁵

In response to these harrowing statistics, Mexico’s key allegations are that the defendants facilitated a common objective to design, market and distribute guns that routinely arm the Mexican cartels; used corrupt downstream U.S. gun dealers to achieve that objective; designed guns to be easily modified to fire automatically; ignored “blazing red flags” indicating that downstream gun dealers were conspiring with straw purchasers; and were “willfully blind, [evinced by] standardless distribution practices [that] aid and abet the killing and maiming of children, judges, journalists, police, and ordinary citizens throughout Mexico.”⁶ It thus seeks injunctive relief and billions of dollars in compensatory and punitive damages.

Case Evolution

The Joint Motion to Dismiss principally seized upon the conspicuous theme that the defendants’ products properly function as designed, as well as lack of proximate cause. Their supporting judicial precedent includes that “a manufacturer of ammunition could not be held liable for a design defect where someone used that ammunition in a mass

shooting, because the ‘very purpose of the Black Talon bullet is to kill or cause severe wounding.’”⁷ The defense further asserts that “all of the Mexican’s [sic] government’s asserted injuries stem from violence committed by third-party criminals in Mexico ... which they obtain through a long and attenuated chain of other independent criminal actors.”⁸

In opposing the dismissal motion, Mexico focused on Smith & Wesson’s 2000 agreement with several cities and the federal government. The manufacturer therein agreed “not to market any gun in a way that would make the gun particularly appealing to criminals.” A developed discovery record, the government argues, will allegedly prove that the *Smith & Wesson* defendants have “massively and systematically marketed their weapons exactly as what the cartels want—military-style weapons capable of killing police and military.”⁹

In February 2022, thirteen U.S. states and the District of Columbia filed an amicus brief in support of the Mexican government. Their brief primarily asserts that federal statutes like the PLCAA may not displace traditional areas of state regulatory authority. The *Smith & Wesson* federal diversity jurisdiction suit alleges various state law claims—including various state consumer protection and unfair trade practice statutes. The Attorney Generals thus proffered the “presumption [that] instructs courts to ‘insist on a clear indication’ from Congress before construing a federal statute to intrude on an area of traditional state authority.”¹⁰ Put another way, states’ rights should not be trumped by the PLCAA’s federal interference.

But the court may embrace a competing principle: under the Supremacy Clause of the U.S. Constitution, certain matters are of such a national character that federal law generally takes precedence over state law. Congress has thus spoken via its PLCAA ban on such civil suits. As urged in the defendants’ Joint Motion to Dismiss: “By seeking to bankrupt U.S. gun makers, this gambit not only threatens America’s constitutional freedoms, but also the careful balance of firearms regulations set by Congress....”¹¹ As a practical matter, then, Mexico’s prevailing might invite similar suits, since guns legally manufactured and privately owned in the U.S. are trafficked to other countries as well.¹²

An additional factor that is likely to play a prominent role in Mexico’s oral arguments is the February 15, 2022, Remington-Sandy Hook settlement, following the 2012 mass shooting at Sandy Hook Elementary School. That settlement, while unique in PLCAA history, did not reveal any details. It suspended all litigation deadlines. The Sandy Hook families had alleged that Remington never should have sold the AR-15 assault rifle used in that mass shooting to the public. The *Smith & Wesson* families await the trove of discovery documents that last month’s *Remington* settlement requires. But those documents might

not surface in time for the hearing in this case. The *Smith & Wesson* families may nevertheless use the fact of last month's *Remington* settlement to seek a delay in resolving the dismissal motion.¹³

International Legal Regime

Four months after Mexico filed its complaint, the U.N. Security Council adopted a resolution concerning the role peace operations could play in helping states to stem the flow of illicit weapons. As it thus resolved:

Gravely concerned that the illicit transfer, destabilizing accumulation and misuse of small arms and light weapons in many regions of the world continue to pose threats to international peace and security ...

Recognizing the importance of ... gather[ing] information on all aspects of networks that use false documentation to evade inspections ... including information on suspected traffickers and trafficking routes ...

Encourages Member States to ensure adequate marking and record keeping measures are in place to trace arms, including small arms and light weapons....¹⁴

This resolution provides a backdrop for an international treaty that Mexico could have invoked in the *Smith & Wesson* litigation and might consider in the event the court grants Mexico the opportunity to amend its complaint: the United Nations Arms Trade Treaty. The U.N. Arms Trade Treaty has been ratified by 110 states, including Mexico, and signed by another 31 states, including the United States. The relevant provision acknowledges: the need to prevent, combat and eradicate the illicit trade of conventional arms and to prevent their diversion to illegal and unauthorized end use, such as terrorism and organized crime ... [and] preventing combating and eradicating the illicit trade in small arms and light weapons in all its aspects, as well as the ... illicit manufacturing of and trafficking in Firearms, their parts and components and ammunition....¹⁵

Mexico could allege (in an amended complaint) that the U.S. is intimately familiar with the number of guns flowing into Mexico.¹⁶ It might thus claim that the above statutory liability immunity fails to comply with U.S. obligations under the Arms Trade Treaty.

The Vienna Convention on the Law of Treaties provides: "A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when ... it has signed the treaty...."¹⁷ As a signatory to this (or any) treaty, the U.S. thus has a good faith obligation

to refrain from conduct (or omissions) calculated to frustrate the object of the treaty's small arms provisions. This general responsibility has also been confirmed in U.S. case law citing the Restatement of Foreign Relations Law.¹⁸

Mexico's lawyers perhaps decided that a U.S. court would not consider the treaty as a full-throated basis for stating a claim against private entities, absent Senate ratification and the creation of a private cause of action. But Mexico's pleading the treaty (in a presumptive amended complaint) could render its amended claim more "plausible."¹⁹

Conclusion

As oral argument on the defendants' motion to dismiss approaches, Mexico faces an uphill battle. As discussed, Congress conferred immunity from liability on the U.S. gun industry via the PLCAA. This will be a difficult challenge for Mexico to overcome.

In the event the case is dismissed, there are other options to consider, including the International Court of Justice (ICJ). The U.S. withdrew its acceptance of compulsory ICJ jurisdiction in 2005, but that does not preclude a last-ditch diplomatic attempt by Mexico to seek U.S. consent to participate on this case-by-case basis.

The other option is diplomacy. That avenue has presumably not borne fruit—which would explain Mexico's resorting to the U.S. judicial branch in *Smith & Wesson*. However, as of 2021, a Bicentennial Framework for Security, Public Health, and Safe Communities has refocused the 2009 Mérida Initiative, a security cooperation agreement among the United States, Mexico, and Central American countries. Its declared objective is to combat drug trafficking, transnational organized crime, and money laundering. Under the Bicentennial Framework, U.S. President Joseph Biden and Mexican President Andrés Manuel López Obrador have pledged to, *inter alia*: "Prevent transborder crime by reducing arms trafficking, [and] targeting illicit supply chains...." Mexican officials might thus consider seeking a more robust U.S. financial contribution to such initiatives and, alternatively, more joint attention to stopping the flow of arms into their country.²⁰ At present, though Mexico may lose this legal battle, the broader impact of this case cannot be overstated.

About the Author:

Bill Slomanson is Professor Emeritus, Thomas Jefferson School of Law. He was Chair of ASIL's United Nations Section from 1995-2006. He has been a Corresponding Editor for *International Legal Materials* since 2007. He was the author of six editions of his international law textbook. Other authors will soon publish the 7th edition, entitled

Slomanson's Fundamental Perspectives on International Law (Cambridge University Press, 2022).

¹ *Culture Clash*: Joint Memorandum of Law in Support of Defendants' Motion to Dismiss, Introduction, p. 3 [hereinafter Joint Motion]. *Gun stores* (2020): <https://www.statista.com/statistics/215666/number-of-federal-firearms-dealers-in-the-us>. *Border stores* (2019): Complaint, p. 96-97 ¶ 391. *Lone Mexican store*: Complaint, p. 2 ¶ 4.

² *Estados Unidos Mexicanos v. Smith & Wesson Brands*, Case No. 1:21-cv-11269-FDS (2021) [hereinafter *Smith & Wesson*].

³ *Assault Ban expiration*: Vivian S. Chu, *Federal Assault Weapons Ban: Legal Issues*, CONG. RES. SERV. 7-5700 (2013). *PLCAA provision*: 15 U.S. Code § 7901(a)(5). *Caution*: 15 U.S. Code § 7901(a)(6). *Maverick expansion*: 15 U.S. Code § 7901(a)(7).

⁴ Dep't of Justice Office of the Inspector General Oversight and Review Division, *Review of ATF's Operation Fast and Furious and Related Matters* (Sept. 2012, reissued Nov. 2012), p. 21 [hereinafter *Fast and Furious Review*].

⁵ *Homicide increase*: Complaint, p. 109-110 ¶ 443. *Annual traffic*: Complaint, p. 108 ¶ 437.

⁶ Complaint, pp. 1-2, 5 ¶¶ 1, 3, 7 and 15.

⁷ *Joint Motion*, *supra* note 1, p. 13, at C.1. *Intended purpose*: *Id.*, p. 34, citing *McCarthy v. Olin Corp.*, 119 F.3d 148, 155 (2d Cir. 1997).

⁸ *Joint Motion*, *supra* note 1, p. 1. Notably, the defense did not address the court's *jurisdictional* problems: these include the apparent lack of subject matter jurisdiction over two foreign defendants, and the overall lack of personal jurisdiction. As stated by the Supreme Court: "diversity jurisdiction is not sufficiently broad to support a grant of jurisdiction over actions by foreign plaintiffs [against foreign defendants]." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 492 (1983). Personal jurisdiction could surface later in this litigation, in the event the court grants Mexico's motion to amend its complaint. All of the harm occurred in Mexico.

⁹ *Mexico's Opposition*, p. 4 ¶ 2. *Agreement elements*: Complaint, pp. 89-91 ¶ 369 and Historic Agreement with Smith & Wesson (Mar. 17, 2000), https://clintonwhitehouse4.archives.gov/textonly/WH/New/html/20000317_2.html. *Discovery objective*: Mexico's Opposition, p. 12.

¹⁰ Brief of Amici States in Support of Plaintiff's Opposition to Defendants' Motion to Dismiss, p. 2.

¹¹ *Joint Motion*, *supra* note 1, p. 3.

¹² See, e.g., David Gacs, et al., *Explainer: Gun Laws in Latin America's Largest Economies* (Aug. 26, 2021), <https://www.as-coa.org/articles/explainer-gun-laws-latin-americas-largest-economies#:~:text=AS%2FCOA%20Online%20looks%20at%20gun-related%20legislation%20in%20Latin,for%20civilians%2C%20though%20restrictions%20tend%20to%20be%20stringent>.

¹³ Remington is now bankrupt. The \$73,000,000 settlement will be paid by four insurers. The agreement appears at <https://www.usatoday.com/story/news/nation/2022/02/15/sandy-hook-families-reach-settlement-remington-arms/6797030001/>.

¹⁴ S.C. Res. 2616, p. 1/4 ¶¶ 1, 3 and p. 3/4 ¶ 6 (Dec. 22, 2021).

¹⁵ *Treaty*: <https://thearmstradetreaty.org/treaty-text.html>. *Parties*: <https://thearmstradetreaty.org>. *Quote*: Preamble.

¹⁶ See text accompanying *Fast and Furious Review*, *supra* note 4.

¹⁷ Vienna Convention, art. 18, https://www.gc.noaa.gov/documents/012780-vienna_treaty.pdf.

¹⁸ *U.S. v. Davila-a-Reyes*, 23 F.4th 153, 181 n. 43 (1st Cir. 2022), citing Restatement (Third) § 312(3) (1987).

¹⁹ The trial court could grant the Motion to Dismiss for failure to state a claim—a disfavored motion in federal procedure. That may be followed by the plaintiff’s seeking an amended complaint—a favored request. In any event: “The plausibility standard ... asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of ‘entitlement to relief.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

²⁰ *Merida*: U.S. Dep’t of State, Diplomacy in Action, <https://2009-2017.state.gov/j/inl/merida/index.htm>. *Bicentennial Framework*: Cong. Res. Service, *Mexico: Evolution of the Mérida Initiative, FY2008-FY2022* (Nov. 1, 2021), <https://crsreports.congress.gov>.