

Can the U.S. gun industry be held liable for arming Mexican drug cartels?

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Title: L'industria bellica americana può essere ritenuta responsabile di armare i cartelli della droga messicani?

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1. – On 22 January 2024, the U.S. Court of Appeals for the First Circuit has ruled in the case *Estados Unidos Mexicanos v. Smith & Wesson Brands Inc. et al.* concerning a civil lawsuit brought by the Mexican government against eight U.S.-based gun companies that allegedly facilitate the illegal trafficking of their products to Mexico, thereby fuelling the widespread gun-related violence in the country which causes massive injury to the Mexican government.

The Court of Appeals (the Court) has reversed the district court's decision to dismiss the case on the basis of the Protection of Lawful Commerce in Arms Act (PLCAA), a U.S. statute which prohibits civil liability actions against guns' manufacturers and sellers for the harm caused by the misuse of their products by third parties. The Court has held that, although the PLCAA applies to the case, Mexico's lawsuit falls within one of the statutory exceptions, specifically the so-called predicate exception, which exempts from the general prohibition those actions where the plaintiff alleges (i) that the defendant "*knowingly violated statutes applicable to the sale or marketing of firearms*", and (ii) that such violation was a "*proximate cause*" of the injury for which relief is sought. Accordingly, the Court has concluded that the PLCAA does not bar the lawsuit brought by the Mexican government and remanded the case back to the lower court for further proceedings on the merits of the claims.

The case under examination draws attention to a persistent issue in the U.S.: the accountability of the gun industry for damages resulting from the distribution of firearms in manners that facilitate the proliferation of gun violence. In fact, U.S. courts are familiar with tort claims filed by U.S. citizens (typically relatives of victims of mass shootings) or municipalities (concerned about the escalation of armed violence in their communities) against gun companies deemed responsible for harms resulting from their negligent business practices (on this type of litigation, which has recently undergone important developments in the sense of limiting the immunity granted by the PLCAA, see L. S. Mullenix, *Outgunned No More?: Reviving a Firearms Industry Mass Tort Litigation*, in *U of Texas Law, Legal Studies Research Paper No. 589*, 390 (2020); and, more recently, L. Hallas, *Mass Shootings and Mass Torts: New Directions in Gun Manufacturer Liability*, in 41 *Yale*

Journal on Regulation 384 (2024)). In this regard, it is worth mentioning the lawsuit filed in 2022 by the New York General Attorney against a number of gun distributors accused of fuelling the gun violence in the State by selling - without proper background checks - disassembled components of firearms that were then converted into untraceable handguns and assault-style weapons (known as “ghost guns”) in violation of several laws, including New York’s licensing laws (in February 2024 the district court rejected the challenges raised by the defendants allowing the case to move forward: see the post authored by E. Leonard, *New York Attorney General’s ‘Ghost Gun’ Lawsuit Marches Forward*, in *Syracuse Law Review* 1 (2024)).

The lawsuit brought by the Mexican government is of particular interest as it represents the first case in which a foreign government aims to hold U.S. gun companies accountable before a U.S. court for harms occurred abroad. While the main question addressed so far in the proceedings has concerned the applicability of the PLCAA, the case raises other legal issues that deserve to be addressed in this contribution. In particular, in the upcoming trial on the merits the lower court will be called, among others, to assess the relevant standards of care that gun companies are expected to observe in the distribution of their products and, most importantly, under what conditions they can be held liable for harms resulting from their failure to exercise proper due diligence over their downstream supply chain.

2. – The case at hand originated from a complaint filed on 4 August 2021 with the district court of Massachusetts through which the Mexican government sued for damages, and asked injunctive relief against, seven gun manufacturers (Smith & Wesson, Beretta, Century Arms, Colt, Glock, Ruger, and Barrett) and one distributor (Interstate Arms). The plaintiff’s broad argument is that the defendant companies deliberately design, market and distribute their products in ways that encourage and actively facilitate the illegal trafficking to drug cartels and other criminals in Mexico.

The complaint alleges that the defendants produce more than 68 % of the around half a million guns that are annually are trafficked from the U.S. into Mexico, where they are then used for criminal purposes: indeed, between 70 to 90 % of firearms recovered at crime scenes in Mexico allegedly originate from the United States. The Mexican government details how such flow is alimented by U.S. gun dealers who supply Mexican criminals through several unlawful sales practices, including straw sales, large-volume sales and sales at gun shows without background checks on final end-users. Importantly, the plaintiff claims that the defendant companies are fully aware to supply dealers that are involved in such illegal sales practices, having been repeatedly informed by media and even by governmental reports. However, according to the complaint, the defendants have been unwilling to implement any public-safety measure aimed at monitoring and regulating their downstream supply chain: on the contrary, it is alleged that they deliberately encourage such illegal market, for instance by advertising their products as military style weapons (which are particularly sought after drug cartels) and by designing their guns to have easily removable serial numbers (which make them especially attractive for criminals). By doing so, Mexico argues, the defendants aid and abet gun dealers’ violations of several U.S. federal statutes regulating gun exports, gun licensing and possession and other gun-sales practices, as well as Mexican laws regulating arms import. According to the complaint, such negligent and unlawful business practices have as a predictable and proximate result the injury that the Mexican government suffer due to endemic gun-violence in the country, including in the form of increased healthcare and security costs. Therefore, through its civil action the Mexican government demanded compensation for such economic damages and asked for an injunction ordering the

defendants to take all necessary actions to abate the current and future harm, including by implementing standards to reasonably monitor and discipline their distribution systems.

On their side, the defendant companies denied any responsibility and asked the court to dismiss Mexico's claims on the basis of several defensive arguments, among which two have proved to be particular relevant. First, the defendants argued that the Mexican government had no legal standing to bring its claim, on the basis that it failed to allege facts showing that the plaintiff's injuries are "*fairly traceable*" to defendants' alleged conducts. Second, and most importantly, they claimed that Mexico's lawsuit was barred by the PLCAA, which provides broad immunity to U.S. gun industry by prohibiting to bring in any U.S. federal or state court a qualified civil liability action, meaning "*a civil action or proceeding (...) brought by any person against a manufacturer or seller of a qualified product (...) for damages, punitive damages, injunctive or declaratory relief (...) resulting from the criminal or unlawful misuse of a qualified product by the person or a third party*" (for an analysis on the PLCAA's purposes, main provisions and related case-law see V. S. Chu, *The Protection of Lawful Commerce in Arms Act: An Overview of Limiting Tort Liability of Gun Manufacturers*, in *Congressional Research Service*, 2 (2012)).

3. – On 30 September 2022, the district court has dismissed the case stating that, although Mexico had legal standing to bring its claim, the PLCAA barred its action. So, interestingly, the court rejected the first defensive argument according to which Mexico lacked legal standing, finding instead that the complaint had sufficiently alleged that the injuries for which compensation is sought are fairly traceable to the defendants' conduct. After having highlighted the complexity of the causal relation between the alleged defendants' conduct and the harm allegedly suffered by the plaintiff – which indeed depended upon conducts of multiple independent parties beside the defendants, such as gun dealers and ultimately individuals that criminally deploy the defendants' products – the district court held that for standing purposes the causation requirement is "*no more than de facto causality*" (referring to U.S. Supreme Court's decision in *Bennett v. Spear* (1997)) which in its opinion was satisfied in the case at hand.

As for the second issue raised by the defendants, concerning their immunity from legal actions relating to the criminal misuse of their products, the district court concluded that the PLCAA applied to the action brought by Mexico and that such action did not fit within any of the statutory exceptions. First, the court rejected the argument put forward by Mexico according to which, being the case governed by Mexican tort law (as the injury occurred in Mexico), the PLCAA would not apply, arguing that no-choice of law was needed being the PLCAA a jurisdictional statute which precludes any analysis concerning the law applicable to the cases it bars. Then, the court considered whether the application of the PLCAA to the lawsuit at hand – brought by a foreign government for harms primarily occurred abroad – would be in breach of the presumption against extraterritoriality (for an analysis on the issue of PLCAA's extraterritorial application in the case see S. Wisniewski, *The Consequences of Extraterritoriality: The Gun Industry, Gun Trafficking, and Mexico*, in *Seton Hall Legislative Journal* 243 (2021)). Under such principle, U.S. laws and statutes only have domestic territorial scope and therefore, unless otherwise expressly stated in the text, they cannot be applied to events and circumstances abroad. As stated by the U.S. Supreme Court in the case *RJR Nabisco, Inc. v. European Community* (2016), in order to assess whether the application of a domestic statute is extraterritorial or not, it is necessary to examine the focus of the relevant statutory provisions: if the conduct relevant to that focus occurred abroad, then the case involves an impermissible extraterritorial application

regardless of any other conduct that occurred in U.S. territory. In this light, the court concluded that the PLCAA's focus are the civil actions that it seeks to regulate and the commercial activity it seeks to protect: as the relevant conducts to such focus (bringing a civil action and manufacturing guns) occurred within the U.S., the court held that the case involved a permissible domestic application of the PLCAA and, therefore, that the presumption against extraterritoriality was overcome.

Finally, the court analysed whether Mexico's lawsuit amounted to any of the exceptions provided by that statute, three of which were potentially applicable: the predicate exception, the negligence *per se* exception and the design-defect exception. The court rejected the negligence *per se* and the design-defect exceptions, finding them inapplicable given Mexico's claims, but it left open the possibility that the predicate exception applied, according to which the PLCAA does not bar actions where it is alleged that the defendants knowingly violated a statute applicable to the sale or marketing of guns. However, the court concluded that such exception only concerns statutory claims and not common-law claims, being the formers lawsuits where the right of action on the basis of which the plaintiff sues arise under the gun-related statute allegedly violated by the defendant. Given that the complaint filed by Mexico asserts claims for negligence and other causes of action arising under common law, rather than under the statutes allegedly violated by the defendant companies, the district court concluded that the exception does not apply in the case. The Mexican government timely appealed the decision, challenging it on two main grounds. First, that the application of PLCAA to bar its claims was impermissibly extraterritorial and that the district court erred in considering the statute's focus for the purposes of the extraterritorial analysis. Second, that the predicate exception applies to the case as there are no reasons for excluding from its scope common law claims and, therefore, that the district court's interpretation is inconsistent with PLCAA's purpose and precedent case-law.

4. – In its opinion dated 22 January 2024 the Court of Appeals dismissed Mexico's first argument but granted the second one by holding that, while the PLCAA applies to the case, the lawsuit at hand fits within the predicate exemption. Therefore, it concluded that the action was not barred under the PLCAA and reversed the district court's dismissal decision.

In first place, the Court confirmed that applying the PLCAA to the case does not infringe the presumption against extraterritoriality, amounting instead to a permissible domestic application of the statute. The Court found that the lower court had correctly assessed that the focus of the PLCAA is regulating the types of claims that can be asserted against firearm manufacturers and sellers, as well as to protect the interests of the U.S. firearms industry and the rights of gun owners. It thus disagreed with the contrasting argument advanced by Mexico, that claimed that the focus is instead "*gun misuse and the resulting injury*". To sustain this, in its appeal the plaintiff had argued that the district court erred by looking only at the PLCAA's operative provision - which prohibits "*qualified civil liability actions*" - and not its definitions section where such actions are defined as civil actions for harm "*resulting from the criminal or unlawful misuse of a qualified product by the person or a third party*"; however, the Court found that such interpretation had too little connection to the PLCAA's purpose. Having determined the PLCAA's focus, the Court stated that the relevant conducts - the filing of the lawsuit and the manufacturing of guns - occurred entirely within the U.S. and, accordingly, it concluded that the presumption of extraterritoriality does not preclude the application of the PLCAA to this case.

Secondly, the Court addressed Mexico's argument that the district court wrongfully considered not applicable the PLCAA's predicate exception, which

allows to bring “*an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought*”. Notably, the Court reversed the lower court’s conclusion that such exception only applies to statutory claims and not to common law claims by affirming that it applies to lawsuits based on common law causes of actions as long as the plaintiff alleges a violation of a gun-related statute that proximately causes the harm. On this, it granted Mexico’s argument according to which while other PLCAA exceptions exempt lawsuits “*for*” specific causes of action, the predicate exception more broadly exempts actions “*in which*” the manufacturer or seller violated a statute.

Having found that the predicate exception applies to Mexico’s claims, the Court had then to establish whether the conditions required by such exception were met, namely that the plaintiff “*knowingly violated a predicate statute*” and that such violation was the “*proximate cause*” of the harm suffered. According to the Court, both issues were sufficiently alleged by Mexico. First, it held that Mexico’s complaint adequately alleged that defendants have been aiding and abetting the unlawful sale of firearms by dealers in knowing violation of relevant state and federal laws indicated by the plaintiff. Such conclusion was largely grounded on the Supreme Court’s decision in *Direct Sales Co. v. United States* (1943), concerning a case in which the defendant company was deemed liable for distributing medical products to a doctor who was illegally reselling them. In that case the Supreme Court pointed to evidence that the doctor was ordering the product in large volumes incompatible with lawful use by legitimate patients, that the defendant facilitated this behaviour through mass advertising and offering discounts: from this evidence, the Supreme Court concluded, there was a reasonable doubt that the defendant supplier “*not only kn[ew] and acquiesce[d]*” in the illegal enterprise, but also “*join[ed] both mind and hand (...) to make its accomplishment possible*”. The Court of Appeals concluded that, similarly, Mexico’s complaint alleged that defendants have failed to take measures that would make it more difficult for their guns to fall into the Mexican cartels’ hands (despite warnings from the U.S. government) and concluded that it was “*not implausible*” that the defendants engaged in the alleged conducts “*in order to maintain the unlawful market in Mexico, and not merely in spite of it*”. Finally, the Court ruled that also the proximate cause requirement of the predicate exception was met, rejecting the defendants’ argument that the injury for which Mexico seeks compensation could not be considered a direct consequence of their conducts (manufacturing and distribution of guns), being instead the result of dealers’ unlawful sales practices and, on a more proximate level, of the criminal misuse of their products by Mexican criminals. Relying on the Supreme Court’s decision in *Abramski v. United States* (2014) – where it was rejected an interpretation of a gun-control statute that “*would render the statute all but useless*” – the Court held that a third party’s criminal act does not necessarily interrupt the causal chain, especially in the context of the PLCAA which precludes claims resulting from the misuse of guns by others than the defendant: according to the Court, the predicate exception would have no meaning if the proximate cause requirement would be undercut by a third party’s unlawful act.

5. - From the above it emerges that the Court of Appeals has reached two fundamental conclusions for affirming that Mexico’s action falls within the predicate exception and, therefore, it is not barred by the PLCAA. First, that the defendant companies through their business practices plausibly aid and abet the unlawful trafficking of guns to Mexican criminals; second, that such conducts allegedly amount to the proximate cause of the damages suffered by the plaintiff.

At the same time, the Court has made clear that such findings are exclusively based on the allegations contained in the complaint, which is of course construed favourably to Mexico; in other words, the Mexican government will have to prove its claims with further evidence in the upcoming trial.

Moreover, the Court expressly recognized that it did not consider certain issues which are crucial for to the solution of the case – and that will have to be addressed in the continuing of the proceedings – including “*which jurisdiction’s law governs Mexico’s tort claims and whether defendants owe a duty to Mexico under whichever tort law does apply*”. Hence, the lower court to which the case was remanded will have to assess (i) if U.S. or Mexican law governs the case, (ii) if, under applicable law, the defendants own a duty of care to the Government, and (iii) if, and to what extent, such duty requires the defendants to exercise due diligence on their distribution systems so as to prevent the illegal trafficking of their products into criminal hands. The latter question is of paramount importance as only by establishing what is the conduct that gun distributors are expected to observe, it will be possible to ascertain whether the defendants’ alleged misbehaviours give rise to liability for negligence (on the concept of due diligence in the gun industry and different legal avenues – both civil and criminal – for responding the failure to respect it see M. Kanetake and C. Ryngaert, *Due diligence and corporate liability of the defence industry: Arms exports, end use and corporate responsibility*, Report by the Flemish Peace Institute (2023)). Clearly, in the case at hand, the court will address the issue in order to establish whether the defendants might be considered civilly liable; more broadly, however, the failure to properly conduct due diligence may also lead to corporate officers’ criminal liability for complicity in international crimes, both before domestic courts and the International Criminal Court (ICC). While national criminal proceedings against gun companies’ managers are rare, in 2018 a Dutch court of appeals confirmed the indictment of a Dutch businessman – Kouwenhoven – for complicity in war crimes for illegally providing weapons to the President of Liberia, Charles Taylor, during the civil war in Sierra Leone. The Dutch court found that Kouwenhoven deliberately provided an essential contribution to the commission of war crimes and crimes against humanity because, through the supply of weapons and ammunition, he enabled the regime to engage in armed attacks on civilians (on this and another similar case in the Netherlands, see G.K. Sluiter, S. Yau, *Aiding and Abetting and Causation in the Commission of International Crimes: The Cases of Dutch Businessmen van Anraat and Kouwenhoven*, in N. Jørgensen (Ed.), *The International Criminal Responsibility of War’s Funders and Profiteers*, Cambridge, 2020, 304). With regard to international criminal liability before the ICC, it has been argued that business conducts facilitating commission of war crimes might entail criminal liability under Article 25(3)(c) of the Rome Statute, according to which a person shall be criminally responsible if “*for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission*” (on this see L. Bryk, M. Saage-Maaß, *Individual Criminal Liability for Arms Exports under the ICC Statute: A Case Study of Arms Exports from Europe to Saudi-led Coalition Members Used in the War in Yemen*, in 17 *Journal of International Criminal Justice* 117 (2019)).

6. – To conclude, it must be highlighted the Mexican government’s choice to not rely in any way on international law arguments to support its claims, in contrast with the global trend that sees victims of corporate-related abuses seeking to hold multinational companies civilly liable by invoking the violation of international human rights norms and standards (for an overview on human rights transnational litigation see C. Ryerson, D. Pinkert, A. Kelly, *Seeking Justice: The State of Transnational Corporate Accountability*, in *The Yale Law Journal Forum* 1 (2023)).

Particularly relevant under such framework are the UN Guiding Principles on Business and Human Rights (UNGPs): adopted by the UN Human Rights Council in 2011, the UNGPs are a soft-law instrument which do not pose direct obligations for companies, but provide the most authoritative guidance on expected human rights due diligence that companies are expected to observe in order to identify, prevent and address the possible adverse human rights impact of their activities. Notably, an increasing number of states, as well as the European Union, are considering to enact pieces of legislation providing mandatory human rights due diligence obligations for companies and related enforcement mechanisms, including forms of civil liability (some states, such as France and Germany, have already adopted mandatory due diligence laws; for an overview of such legislative initiatives in Europe see S. Deva, *Mandatory human rights due diligence laws in Europe: A mirage for rightsholders?*, in 36 *Leiden Journal of International Law* 389 (2023)). At the same time, regardless of the adoption of specific legislation, courts of different jurisdictions are increasingly referring to international law and standards for assessing whether companies owe a duty of care to those affected by their activities. In a landmark decision held in 2021, a Dutch civil court ordered the oil company Shell to reduce its CO₂ emissions finding that the it had infringed its responsibilities as outlined by the UNGPs (among other international instruments), which were considered a suitable guideline for interpreting the company's unwritten standard of care (for an analysis of the case see C. Macchi, *Business and human rights implications of climate change litigation: Milieudefensie et al. v Royal Dutch Shell*, in 30 *Review of European, Comparative and International Environmental Law* 1 (2021)). Previously, other national courts had reached similar conclusions although without directly mentioning the UNGPs. In 2019, the UK High Court ruled in the case *Lungowe v. Vedanta Resources plc* that a UK mining company had the responsibility to ensure its Zambian subsidiary's compliance with the human rights and environmental standards to which it (the UK mother company) had expressly committed, thus assuming a duty of care towards Zambian communities affected by the operations of the subsidiary (see L. Green and D. Hamer, *Corporate Responsibility for Human Rights Violations: UK Supreme Court Allows Zambian Communities to Pursue Civil Suit Against UK Domiciled Parent Company*, in *EJIL:Talk!* (2019)). In a similar vein, in 2020 the Supreme Court of Canada in the case *Nevsun Resources Ltd. v. Araya* – in which Eritrean plaintiffs claimed damages against a Canadian mining company – held that norms of customary international human rights law may be the basis of a tort claim under Canadian law, thus expressly recognising the possibility of corporate civil liability for violations of such human rights norms (see J.H. Jennet and M. Parcasio, *Corporate civil liability for breaches of customary international law: Supreme Court of Canada opens door to common law claims in Nevsun v Araya*, in *EJIL:Talk!* (2020)).

In the case at hand Mexico alleges that the defendants, by aiding and abetting the illegal trafficking of guns, directly contribute to the violation of Mexican citizens' fundamental rights to life and physical integrity; therefore, the complaint could have drawn on international law and standard (such as the UNGPs) to argue the defendants' failure to carry out their businesses with proper care. While so far the Mexican government has exclusively relied on domestic tort law, it might decide to raise international law arguments in the continuing on the proceeding, also considering the recent submission by the Mexican government of a request for an advisory opinion from the Inter-American Court of Human Rights concerning “the responsibility of private entities engaged in the manufacture, distribution, and sale of firearms, in relation to violations of the protection of the rights to life and humane treatment arising from their negligence when developing their commercial activities”. An approach to the case from an international human rights law perspective opens numerous scenarios, the analysis of which is beyond the scope of this contribution. However,

it is worth mentioning that a lawsuit against a U.S. company for the harm caused abroad by its business activities grounded on international law would not represent a novelty for the U.S. judiciary system, as there is a rich case-law of lawsuits brought against U.S. corporations on the basis of the Alien Tort Statute (ATS), which provides “*the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States*”. Especially since the 1980s such statute has been used by foreign nationals for claiming damages for harms caused by the overseas operations of U.S. companies, but over the last years the U.S. Supreme Court has placed a number of constraints upon the ATS’s scope thereby significantly reducing the potential for such type of litigation (in *Kiobel v. Royal Dutch Petroleum Co.*, 2013, the Supreme Court held that the ATS only applies to cases where the harm occurred abroad “*touch and concern the territory of the United States (...) with sufficient force*”; for an analysis of the decision and its implication see K. Anderson, *Kiobel v. Royal Dutch Petroleum: The Alien Tort Statute’s Jurisdictional Universalism in Retreat*, in 24 *Cato Supreme Court Review* 149 (2013)). Given that in the case at hand the defendants’ conducts that allegedly resulted in a harm occurred in Mexico took place in the U.S., it could be argued that the requisite set in *Kiobel* is met. Moreover, despite the fact that so far this avenue for accountability has not been explored in the context of the gun industry’s activities, it has been argued that right holders suffering fundamental rights violations due to the negligent business conduct of gun companies might consider to do so (see in this regard E. Beavers, *War Crimes, Inc.: The ATS Case against the U.S. Weapons Industry for Aiding and Abetting Atrocities in Yemen*, in 31 *Florida Journal of International Law* 179 (2013)).

In this light, the case discussed above deserves to be closely followed as the upcoming trial on the merits of Mexico’s claims might lead to important findings concerning the due diligence obligations of gun companies with regard to their downstream supply chain and, accordingly, it could provide guidance on the conditions under which gun manufacturers and distributors might be held liable for the harms caused by the illegal trafficking of their products. And this, as said, is not only crucial for the solution of the civil lawsuit brought by Mexico, but could only entail important consequences with regard to future legal actions against gun companies on the basis of international human rights law and international criminal law.

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