



MEXICO UPDATE



ABA • SECTION OF INTERNATIONAL LAW • MEXICO COMMITTEE

Message from the Co-Chairs

Happy New Year to all! We hope this first 2023 edition of the *Mexico Update* finds you and your loved ones happy and healthy. We are thrilled to report that the *Mexico Update*, which you have all helped be so successful, won the ABA Section of International Law's 2022 **Best Newsletter Award**. This wonderful honor is shared by the *Mexico Update* team and the Mexico Committee, as well as the students and faculty of the Universidad Panamericana. And so, with a deep feeling of accomplishment and of gratitude, we are proud to present this latest edition of the *Update*. With the New Year, we gain the opportunity for new beginnings, and also the chance to continue the successes of the past. We are excited to work with all of you to continue our shared cross-border scholarship, cooperation, and community into 2023 and beyond.

—Eduardo Díaz Gavito, John Walsh, Andrés Nieto, co-chairs



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Message from the Editors

This issue of MEXICO UPDATE addresses a sampling of key issues of Mexican law. We welcome contributions from our readers for the next issue. Although we publish in English, contributions may be submitted in Spanish or English. Our editorial team works to assure that everything is published in well-polished legal English. Happy reading!

— Karla Ruiz, Andrés Nieto, Kelsey Quigley, editors



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About the Mexico Committee

Anchored by coordinators in cities in Mexico and the United States, the Mexico Committee has a diverse membership through attraction, rather than promotion. Among the committee’s signature activities are: active sponsorship of programs on legal developments in Mexico, the U.S. and other jurisdictions. It includes arbitration, antitrust law, criminal procedure reform, data privacy, environmental law, legal education, secured lending, and trade law. The Committee contributes to the annual *Year In Review* publication. Through a partnership with a leading Mexican law faculty (Universidad Panamericana) this Committee develops its newsletter, and actively organizes programs at the spring and fall meetings in the Section of International Law.

The Mexico Committee’s membership is its most important asset. We encourage all Committee members to be involved in Committee activities and to communicate freely their suggestions and ideas.

Do you know?

An international lawyer (not licensed by a US bar) can join the ABA for US\$150, plus the Section of International Law for US\$65, for a total of US\$ 215? The application is available at:

Order Summary	
MEMBERSHIP TYPE	
Affiliated Professional <small>At \$150.00/yr</small>	\$150.00
MEMBER GROUP(S)	
International Law <small>At \$65.00/yr</small>	\$65.00
ABA FUND FOR JUSTICE AND EDUCATION ⓘ	
\$35.00	ADD
Tax	\$0.00
Total	\$215.00

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ELECTIONS AND RULE OF LAW.

Hannon, Elias



The two bodies in charge of overseeing Mexico's political and electoral process—the National Electoral Institute (NEI) (the policy and regulatory authority) and the Electoral Tribunal of the Federal Judiciary Power (ETFJP) (the dispute resolution authority)—are on the cusp of potential massive change.

President Andrés Manuel López Obrador has proposed three substantial electoral reforms. First, he aims to change the name of the NEI to the National Institute of Elections and Consultations. Second, he wants to alter the composition of the newly named body: instead of 11 NEI Councilors proposed and ratified by the Chamber of Deputies, there would be only seven Councilors, all chosen by popular election. And third, he has proposed that the Magistrates of the ETFJP be elected popular vote.

What would these potential reforms mean for Mexico? What do they mean for rule of law in the country?

Background

For as long as I can remember, elections in Mexico have been organized and overseen by the NEI, a body independent from Mexico's other three branches of power. Indeed, my first memory of the electoral process comes from 2006, when my father filled out his ballot for the presidential election by hand. Only six years prior, in 2000, president Vicente Fox Quezada achieved a great victory for Mexican democracy: he was elected president, as a member of a party other than the *Partido Revolucionario Institucional* (PRI). Before President Fox's victory, a PRI politician held Mexico's highest political office for *seventy years*. And after President Fox's administration, Mexico continued to have peaceful transitions of presidential power, even amongst different parties—all organized, supervised, and facilitated by the NEI (or a precursor thereto).

The path to these functioning democratic presidential transitions was not an easy one, and democratic successes were achieved largely due to pressure exerted by Mexican civil society. Before the NEI, and during most of the 20th Century, elections were organized by the Executive Power itself. And, as a result, presidency was held by the same party from 1930 until 2000.

It was not until 1987 and 1990, respectively, that the Electoral Disputes Tribunal (today the ETFJP) and the Federal Electoral Institute (today the NEI) were created through a series of constitutional reforms. The ETFJP forms part of Mexico's Judicial Power and is tasked with settling electoral controversies and protecting electoral rights.

The NEI executes, supervises, and facilitates electoral processes, ensuring that elections comply with applicable regulations; the NEI is also responsible for ensuring that none of Mexico's Executive, Legislative, or Judicial powers interfere with free and open elections.

Today: Electoral Reform and Rule of Law

Today, Mexico is facing hotly debated reforms to these electoral mechanisms, which will inevitably impact rule of law in the country. The electoral reforms proposed by President Andrés Manuel López Obrador establish, among others, three substantial changes to the current electoral system. First, his administration seeks to change the name of the NEI to the National Institute of Elections and Consultations. Second, his administration seeks to change the composition of the NEI. The 11 Councilors proposed and ratified by the Chamber of Deputies would be reduced to seven Councilors, who would be elected by popular vote; in addition, the Councilors' terms would be reduced from nine to six years.¹ (Notably, this contradicts Article 41, section V, paragraph "A" of the Mexican Constitution). Finally, the Magistrates of the Electoral Tribunal of the Judicial Power would be elected by popular vote.

Dr. Elías Díaz defines rule of law: as a state whose power and activity are regulated and controlled by the law, law that is itself a reflection of the general will.²

¹ Gaceta parlamentaria, Cámara de Diputados, <http://gaceta.diputados.gob.mx/PDF/65/2022/abr/20220428-XI.pdf>, November 25, 2022.

² Ramírez García Hugo Saúl et al. Pallares Yabur, Pedro de Jesús, *Derechos Humanos. Promoción y defensa de la dignidad*, Tirant Lo Blanch, México; 2021, p.42

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And as Pallares Yabur and Ramírez García describe, rule of law is closely related to fundamental aspects of a functioning society, including the legality and legitimacy of government.³ Legality addresses the empowering authority of a government to execute a governing act. Legitimacy centers on how citizens perceive the law and honor their duty to comply with the law. The electoral reforms should be analyzed for their impact on both legality (that they accord with current legal order) and legitimacy (that they reflect the will of the population, such that people will be encouraged to comply).

Legality

The explanatory memorandum, accompanying the proposed reforms, highlights the NEI's significant expense, as well as the expense of the country's political parties. (Unlike the U.S., the Mexican federal government uses tax money to cover the expenses of political parties.) These significant expenses, the memorandum claims, justify the reduction of resources to the NEI, to political parties, and to the electoral process more generally.

President López Obrador has also emphasized that the NEI and the ETFJP suffer from institutionalized corruption, and he invokes this corruption as an additional reason for the proposed reforms. During a recent morning press conference, President López Obrador went so far as to state that he wants a “reliable” NEI and ETFJP that (1) do not operate in service of conservatism, and (2) do not execute electoral frauds supported by corrupt and anti-democratic Councilors and Magistrates.⁴

Of course, in accordance with the legality facet of rule of law, the president faces legal obstacles to carry out these proposed reforms. Because the reforms require constitutional amendments, a qualified majority (two-thirds of the legislators present) will need to vote in favor of the changes, in accordance with Article 135 of the Constitution.

From a political point of view, this seems unlikely. The President's party (*MORENA*) and its allies (*PT* and *PV*) only have a simple majority in Congress, so opposition members (from *PAN*, *PRI*, *PRD*, and *MC*) would need to vote in favor of proposed reforms. The current political winds in congress do not favor this outcome.

Given these political challenges, President López Obrador has suggested that he might achieve the same electoral policy changes within the framework of current election law.⁵

Because the election law is a general law, changes require just a simple majority (over half)- But under this framework, none of the new legal provisions could contradict the Mexican Constitution on electoral matters (e.g., the reform could not legally change the number of Councilors).

Legitimacy

The implications that these proposed reforms could have on the legitimacy arm of the rule of law may prove complex. Recent weeks have been significant demonstrations of hundreds of thousands of people in Mexico's major cities—Mexico City, Guadalajara, and Monterrey—all against the proposed reforms.

The protests reflect the polarization sweeping Mexico in light of these proposed reforms. The NEI conducted a survey showing that most people supported, in order, budget cuts to the federally funded political parties, direct election of Councilors and Magistrates, and a decrease in the NEI budget. And a simple majority of people polled (52%) favored the name-change for the NEI.⁶ But, that support is, of course, not universal.

Conclusion.

These electoral reforms, and the considerations they present, invite us to reflect on the importance of the rule of law, including implications for legality and legitimacy.

⁵ Youtube.com, <https://youtu.be/yrXLTgTsb4M>, November 24, 2022.

⁶ El país, <https://elpais.com/mexico/2022-11-02/una-encuesta-del-propio-ine-muestra-que-la-mayoria-de-mexicanos-respalda-la-reforma-electoral-de-lopez-obrador.html>, November 26, 2022.

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³ *Id.*

⁴ Youtube.com, <https://youtu.be/nCIoSWs-928>, November 24, 2022.



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MEXICO COMMITTEE SHINES IN MADRID FOR ABA FALL MEETING

Quigley, Kelsey

WILMERHALE® 



In September 2022, members of the ABA Mexico Committee traveled to Madrid, Spain for a week of wine, tapas, learning, and networking—all at the American Bar Association’s Section of International Law Fall Conference.

Thanks to coordinated prep work by a diverse set of Committee members, the Mexico Committee had an incredibly strong showing at the Conference, which was also attended by His Majesty (and fellow lawyer), King Felipe VI.

To kick off the first full day of the conference, the Mexico Committee sponsored a panel entitled “Investor Legal and Political Risk and Response to Doing Business in Latin America.” Mexico Committee member Judith Wilson moderated the panel, which elicited fascinating discussion amongst the Latin America expert panelists.

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Later in the conference, I moderated a panel on environmental litigation and ESG. And Co-Chair Andres Nieto spoke on a panel about FinTech. For my part, it was an honor to facilitate rousing discussion with esteemed cross-border panelists. And it was a special treat to engage in cross-border comparative legal analysis (a major facet of this Newsletter) that makes all of our work stronger.



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But perhaps the biggest thrill for the Mexico Committee attendees came from the wonderful sense of community that developed during the conference. It was great to see old and new friends and spend time discussing law, politics, life, and everything else, over *tapas* and *sangria*. The conference included a night of hosted dinner events, in which Section members local to Madrid hosted Committee members for a dinner event. It also included hosted receptions, featuring food, wine, and even live acrobatic performances!

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Special thanks to everyone on this Committee who made the event memorable. We look forward to more wonderful times in 2023 (and beyond). See you in New York!

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INTERVIEW ON NEW US TRADE REPRESENTATIVE'S

Mexico Committee Vice Chair Les Glick Interviewed on New US Trade Representative's Commonet Period on the Extension or Termination of Section 301 Tariffs.

Mexico Committee Vice Chair for Programs, Les Glick, of the Butzel law firm in Washington was recently interviewed by GlobalAutomotiveIndustry.com, a leading website oriented towards the automotive industry. The interview relates to section 301 of the Trade Act of 1974 and a current open period for comment on the extension or termination of tariffs under this section. The revised rules would affect Mexican and U.S. companies selling products that contain Chinese content. Due to the integration of the U.S. and Mexican auto industries, GlobalAutomotiveIndustry.com works together with several Mexican publications and websites that have carried the interview, which you can find on any of the links below. **Congratulations, Les, on the fascinating and timely interview!**

In the 15-minute Audio Interview, Mr. Glick discusses these questions:

- What is section 301 and why is it the news?
- When did section 301 Tariffs on China begin and when do they end?
- What is the impact on the automotive industry of section 301 duties?
- What is the US trade Representative and what are they doing now in regard to China section 301 duties?
- What can importers and consumers of products from China do to stop these Tariffs and what is the time period to do this?
- What are the arguments in favor and against these China tariffs, and what role is Congress playing in this dispute?

MexicoNow:

<https://acortar.link/uC5LIY>

BorderNow:

<https://acortar.link/NieB1E>

HorsePower:(in Spanish)

<https://acortar.link/ihGbkG>



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USMCA, AUTOMOTIVE PANEL RULES IN FAVOR OF CANADA AND MEXICO. *Grajales, Eduardo*



Abstract

On January 11, 2023, an independent panel published a final report on the rules of origin applicable to the automotive sector under the USMCA. The panel, established at the request of Canada and Mexico, aimed to address a disagreement with the United States regarding the interpretation of said rules.

The disagreement centered on the U.S.'s method of calculating the requisite Regional Value Content (RVC) for automobiles and light trucks to be considered as "originating in North America" under the USMCA. The panel concluded, in its final report, that the U.S.'s interpretation is contrary to the commitments agreed upon trilaterally in the Treaty.

Background

The minimum threshold for vehicles and light trucks to be considered as "originating in North America" has been a hot button issue since negotiations for the USMCA began back in 2017. This is, in part, because tariff and administrative benefits afforded to vehicles and light trucks that "originate in North America" are substantial. The reduced tariff and administrative barriers allow for reduced prices, which is a significant competitive benefit in an increasingly Chinese-influenced market.

To receive these "originating" benefits, the precursor to the USMCA, the North American Free Trade Agreement (NAFTA), required an automotive vehicle to have 62.5% of content originating in North America. The USMCA established a higher percentage that has only increased over the years. In 2020, when the USMCA entered into force, the minimum threshold was 66% of content originating in North America. This increased to 69% in 2021, 72% in 2022, and finally, to 75% applicable in 2023 and beyond.

Beginning of the Dispute

On August 20, 2021, Mexico requested the formal initiation of a consultation procedure under the USMCA, challenging the United States' interpretation of the automotive rules of origin. According to Mexico, the U.S.'s incorrect interpretation had led to the imposition of multiple requirements that were incompatible with the USMCA and its Uniform Regulations. Canada soon thereafter joined as a fellow complainant.

Specifically, Mexico and Canada complained that Chapter 4 of the USMCA, which covers rules of origin, permitted the use of "cumulation" methodologies." Cumulation allows partially-North-American components to acquire 100% North American origin designation by fulfilling certain criteria. Thereafter, when these materials are incorporated into vehicles as finished products, it is much easier to attain the "originating in North America" designation.

The United States, on the other hand, claimed that the USMCA did not allow this sort of "cumulation" calculation, instead insisting that Canada and Mexico strictly limit the use of foreign content in the automotive supply chain.

The parties failed to find a mutually acceptable solution through ministerial dialogue during the consultation period. So, in January

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2022, the Mexican and Canadian governments requested the creation of an independent panel to rule on the matter and determine whether or not the U.S.'s interpretation contradicted the USMCA. The panel was constituted in March 2022.

Final Report

After several months of deliberations, the independent panel published its final report on January 11, 2023. The report repudiated the United States' interpretation, siding with Canada and Mexico. The panel noted that the USMCA specifically provided for “cumulation” for parts considered essential to automotive vehicles (e.g., engine, axles, suspension, etc.). In other words, as soon as the essential parts comply with the 75% regional content requirement under the USMCA, they shall be considered 100% North American when incorporated into a car or light truck. In addition, notably, the panel identified that certain evidence suggested that, at the time of the USMCA negotiations, U.S. representatives indicated that they acceded to “cumulation” calculations, and only after the signing changed the interpretation.

An example will likely prove helpful. Say a car engine is composed of 80% materials from North America and 20% materials from Asia. Because the engine itself complies with the USMCA's 75% requirement, once that engine becomes a component of a finished vehicle, when calculating the RVC of said vehicle, the engine will be counted as 100% from North America—not 80%. As a result, the cumulation method relaxes automotive rules of origin requirements significantly.

Next Steps

Following the panel's report and in accordance with Chapter 31 of the USMCA, the governments of the three countries must resume dialogue and find a mutually satisfactory solution within forty-five days. This resolution could include compensation for the damage caused to Canada and Mexico (and their industries) by the U.S.'s measures.

If there is no resolution within forty-five days, Mexico and Canada will be able to impose tariffs on products originating in the United States at an amount equivalent to the injury caused, either in the automotive sector or in any other sector covered by the USMCA.

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CALL FOR NOMINATIONS: ABOGADX DEL NEWSLETTER, IN HONOR OF PATRICK DEL DUCA.

For each edition of the Newsletter, the Mexico Committee will feature one Abogadx del Newsletter, In Honor of Patrick Del Duca. The award will spotlight a lawyer in Mexico or the U.S. who is working to establish strong cross-border legal scholarship, cooperation, and community. The recipient of the award will have a half-article in the Newsletter to discuss their personal background, legal career, and tips for cross-border practice. Have someone in mind who you think would be an ideal honoree? Please reach out to Karla Ruiz (klruiz@up.edu.mx) and Kelsey Quigley (kelsey.quigley@wilmerhale.com).



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American Bar Association Section of International Law

The Mexico Committee continuously seeks qualified professionals prepared to contribute their time and talents to continue developing a more active Committee. This is a prime opportunity to become involved with a community of lawyers that share an interest in Mexico and Mexican law, who are fellow American Bar Association members.

The Mexico Committee welcomes any suggestions, ideas or contributions to enhance this periodic publication.

If you are interested in participating actively with the Committee and in joining its steering group, please contact any member of the Committee leadership.

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