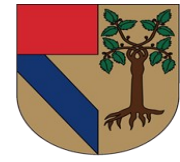




# MEXICO UPDATE



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## *Message from the Co-Chairs*

In the midst of the challenges facing both Mexico and the United States in the unprecedented year of 2020, the Mexico Committee is proud to present this edition of its Newsletter in honor of a great lawyer, human being and friend of Mexico, Patrick Del Duca. A former Mexico Committee Co-Chair, Patrick was a driving force behind this Newsletter and all the publications of the Committee—many of the images and ideas that will continue to be featured in the Newsletter we owe to our beloved colleague. With Patrick's untimely passing in 2020, the Mexico Committee has lost a dear friend and committed leader. His memory inspires us all to continue our work to fulfill the Committee's mission of bringing our two countries – and their legal systems – closer together.

We dedicate this edition, Issue 58, to Patrick and his work. And never has the Committee's mission and Patrick's example been more important. As the pandemic continues to rage across both Mexico and the United States, so too does intense debate regarding efforts to respond, and about the legal and economic implications of the virus and response efforts. Amidst this backdrop, the U.S. has concluded a highly anticipated presidential election. The consequences of the pandemic and the presidential transition for U.S.-Mexico relations will undoubtedly interest our Committee members, and we are honored to offer this Newsletter as a snapshot of commentary at this important juncture.

## *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. We can also suggest topics focused on specific judicial decisions or legislative and regulatory developments. Happy reading!

Karla Ruíz, Andres 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 this Committee develops its newsletter, it also maintains a website, 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:

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Mexico Committee Members can access back issues of MEXICO UPDATE from inception through the Mexico Committee webpage library within ABA Connect.



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Immediate Past Co-Chairs:

Perez-Delgado, Luis

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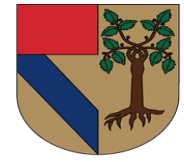
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Juarez Segura, Melina

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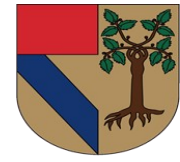


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## DRAFT OF MEDICAL USE RULES PUBLISHED

*Luis Armendariz*

On July 27, 2020, a draft of secondary rules for medical cannabis in Mexico was submitted by the Secretary of Health (SSA) to the National Commission for Regulatory Improvement (CONAMER) for mandatory public consultation and regulatory impact assessment. The Rules for the Sanitary Control of the Production, Research and Use of Medical Cannabis and its Pharmacological Derivate (*Reglamento en Materia de Control Sanitario para la Producción, Investigación y Uso Medicinal de la Cannabis y sus Derivados Farmacológicos*, “the Rules”) should have been issued 180 days after 2017 amendments that legalized the use of medical marijuana. However, the Rules—which only govern medical use and research—now come after more than a 3-year wait.

**General Provisions.** The stated purpose of the Rules is to establish the “...regulation, control, promotion and sanitary oversight of raw material, molecular compounds, pharmacological derivate and medications with production, scientific, industrial and medical purposes.”

The contemplated scientific research activities only include those for pharmacological and agronomic purposes. The industrial activities refer to the production of molecular compounds, pharmacological derivatives and medications. However, this contradicts the definition set in the general cannabis legalization bill previously approved by Senate committees.

Generally speaking, the Rules insert the use of cannabis into the existing Mexican healthcare and sanitary legal framework, even overlapping with other health regulations. Each of the existing government agencies mentioned herein are assigned responsibilities that will now cover the stages of production, processing, preparation, importation or exportation, sale and prescription for the allowed uses. In other words, no new agencies are created for now—as opposed to the general Cannabis Legalization Bill, which contemplates the creation of the *Instituto Mexicano del Cannabis* (Mexican Cannabis Institute).

For purposes of this summary and consistent with the terminology used in the Rules, a cannabis “establishment” is any

of the commercial establishments that are mentioned by Mexico’s General Health Law, the Medical Supply Regulations (*Reglamento de Insumos para la Salud*) or the Rules for Healthcare Research (*Reglamento de la Ley General de Salud en Materia de Investigación para la Salud*). These include medication production facilities or laboratories, pharmacies, drugstores, storage facilities, clinics and hospitals.

### Agencies Responsible for Implementation

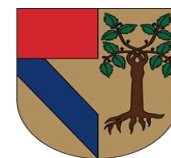
In addition to the SSA, the following government agencies will be involved in the application and enforcement of the Rules:

- Federal Commission against the Protection of Sanitary Risks (COFEPRIS): conduct sanitary oversight and control of cannabis use in accordance with federal law; COFEPRIS will implement and manage a system of traceability for the cannabis products; this might seem surprising, as one might expect that the Secretary of Agriculture (or the tax revenue service, for that matter) would be more suited to manage this responsibility;
- National Service for Agro-food Sanitation, Innocuity and Quality (SENASICA): oversee and promote cannabis sanitation, as well as manage systems to prevent or reduce contamination at the primary production stage in accordance with the Mexican Law of Vegetable Sanitation;
- National Service for Seed Inspection and Qualification (SNICS): regulate the production of certified cannabis seeds, qualification of seeds and sale of seeds in accordance with the Federal Law for Seed Production, Certification and Commerce;
- Secretary of Agriculture (SADER): review permits for importation of seeds, through various agencies that are under its jurisdictional and operative umbrella;
- Mexican Tax Revenue Service (SAT): verify





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compliance with applicable tax provisions, including but not limited to taxes and customs procedures, in accordance with federal law;

- Secretary of Economy (SE): intervene in the determination of tariffs that shall be applied to the import and export of cannabis.

**Production, Scientific, Industrial and Medical Purposes.** As stated above, the Rules apply to the use of cannabis for “production, scientific, industrial and medical purposes.”

## Production.

- A permit shall be obtained from SENASICA for cultivation with either research or medication production purposes. SENASICA will keep a National Registry of Cultivation Permits (*Registro Nacional de Permisos de Siembra*).
- Cultivation permits may be granted for (a) cultivation, grow and harvest; (b) health and research; (c) production of molecular compounds, pharmacological derivatives and medication; or (d) production of SNICS-certified seed.
- Cultivation activities shall be carried out within “physical barriers” that limit contact with “people and environment”.
- The registration of production of qualified cannabis seeds may be requested for inclusion in the National Catalogue of Vegetable Varietals (*Catálogo Nacional de Variedades Vegetales*), provided the requirements set forth in the Rules are met. Expert opinions may be sought in order to verify the varietal’s distinctiveness, homogeneity and stability.
- A varietal may be registered into a National Program for the Production of Certified Seeds (*Programa Nacional de Producción de Semillas Calificadas*) by the SNICS.

## Scientific.

- A research protocol shall be authorized by COFEPRIS for those parties intending to carry out cannabis research. In addition to the Rules, secondary rules for healthcare research remain applicable, which for example, set forth the requirements and credentials that research professionals must meet.
- Research done on human beings shall follow applicable laws and regulations, along with “good clinical practices” adopted internationally, which are not clearly defined or

identified.

- The SSA, through COFEPRIS, will lead coordination efforts to maintain a national cannabis research inventory.

## Medical Use.

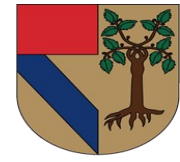
- Medical cannabis can only be prescribed by licensed medical, homeopathic and dentist professionals. Their prescriptions must carry a bar code to be obtained by COFEPRIS and the prescription books will be subject to strict control and patient information recording practices.
- International travelers (Mexican nationals or foreigners) who require cannabis medication shall carry and present a special bar code-bearing prescription signed by a medical professional, or in the case of foreigners, the permit or authorization by the foreign nation’s authority.
- Pharmacies, drug stores and establishments that provide diagnosis and treatment services will be subject to strict compliance requirements, starting with those set forth by the existing sanitary control and health care regulations.

## Industrial.

- Cannabis raw material is defined as “...cannabis seeds, seedlings, propagative vegetative material, stem, leaves or inflorescences, necessary for the production of molecular compounds, pharmacological derivatives or medication”.
- Establishments that process, import, export or use raw material shall keep control books authorized by COFEPRIS, along with a Custody and Safeguard Security System.
- Production facilities, processing laboratories or storage organizations that handle cannabis as raw material, molecular compounds or medication can only sell the raw material to establishments that hold the corresponding sanitary licenses, such as hospitals, pharmacies and distributors.
- Cannabis as a homeopathic medication will only be



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- allowed if presented diluted and dynamited.
- Cannabis (natural or synthetic) is not allowed in herbal remedies.

## Import and Export of Raw Material and Medication

- Raw material, molecular compounds, pharmacological derivatives and medications can be imported. Establishments seeking to import cannabis as raw material shall prove to COFEPRIS that such material is legally allowed in the country of origin.
- On the other hand, only pharmacological derivatives and medications can be exported.
- In order to obtain a permit for seed import with research and industrial purposes under the Rules, SADER will publish the mandatory phytosanitary requirements.
- The Rules provide detailed requirements and logistics that will apply to the importation process of molecular compounds, pharmacological derivatives and medications. The process includes prior notices to the port of entry customs office, sampling, import documents to be delivered, and storage facility requirements.
- For the importation of medication intended for personal use, COFEPRIS will be the agency with authority to issue the corresponding permit. Applicants will submit the current medical prescription that includes the medical professional's license number and details the product and quantity.

## Import Authorizations.

- SENASICA will issue the phytosanitary import certificates for botanic seed for cultivation, seedlings for cultivation and vegetative propagative material. Such certificates will be issued under guidelines aimed at preventing entry of plagues or other similar hazards.
- Once raw material enters the country, it shall be transported to facilities where confined cultivation is allowed under strict custody and control responsibilities.

## Establishments for Medical Attention.

- Medical care services that result in the supply or

prescription of cannabis must meet the corresponding requirements for operation.

- Each such establishment shall have a responsible individual who will be in charge of maintaining compliance with a list of reporting, safety, control and record keeping obligations.
- Licenses granted by COFEPRIS for these establishments shall have a duration of 2 years.

## Advertisement and Sale.

- The General Health Law provides for two types of advertisement: for healthcare professionals and for the public in general. Cannabis medications can only be advertised to healthcare professionals and not to the public, pursuant to guidelines approved by the SSA.
- Establishments that sell pharmacological derivatives in cannabis medications shall meet sanitary requirements and qualifications before COFEPRIS.

After SSA replied to CONAMER's opinion with suggested changes and adjustments, CONAMER issued its final positive opinion moving the Rules to be run through the President's Counsel Official Gazette.

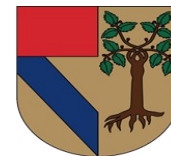
It's worth reminding that this deadline for medical cannabis use is separate and parallel to the deadline set also by the nation's highest court for December 15 to legalize recreational use.

As of the date of submission, no such ruling had come down.

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## Mexico's New Amnesty Act

*Romina Guarneros Galaz*

On September 2019, Andrés Manuel López Obrador, Mexico's president, issued a decree to the Chamber of Deputies proposing a bill of law regarding a new Amnesty Act. After several months of studies and debate in both the Chamber of Deputies and the Senate, the bill was sent back to the Executive for enactment and publication in the Official Journal of the Federation (*Diario Oficial de la Federación*).

An amnesty act, in a general sense, eliminates criminal liability for certain crimes committed in a time given period and territory. According to subsection XXII of article 73 of the Mexican Constitution, amnesty can be issued by the federal Congress or by local Congresses and can only be granted by law by the Legislative Branch.

Section 1 of the Amnesty Act states that amnesty is granted to persons against whom criminal proceedings have been initiated or who have been prosecuted or sentenced in federal courts, before the Act's entry into force, provided that they are not repeat offenders of the offence for which they have been charged. The Act applies to the following types of crimes:<sup>1</sup>

I. Abortion, in any of its form, provided for in the Federal Criminal Code, when

- A. The mother is charged with the interruption of the product of the pregnancy;
- B. Doctors, surgeons, midwives or other authorized health service personnel are charged with assisting in the termination of the pregnancy, provided that the criminal conduct was carried out without violence and with the consent of the mother of the product of the interrupted pregnancy;
- C. The relatives of the mother of the product are charged with assisting the termination of the pregnancy.

II. Parricide, when the victim is the product of conception at any time during the pregnancy;

III. Crimes against health referred to in articles 194, section I and II, 195, 195 Bis and 198 of the Federal Criminal Code, provided that they fall within federal jurisdiction, in terms of article 474 of the General Health Act, when:

- A. The offender is in a situation of poverty, or is extremely vulnerable because of his or her condition of exclusion and discrimination, or because of his or her condition of exclusion and discrimination, or because he or she has a permanent disability, or when the crime was committed at the instigation of his or her spouse or concubine, partner, blood relative or by affinity in any degree, or because of well-founded fear, as well as in the case of pressure to commit the crime by organized criminal groups;
- B. The offender belongs to an indigenous or Afro-Mexican community, in terms of article 2 of the Mexican Constitution, and is in one of the vulnerable categories mentioned above;
- C. The offender is a consumer who has possessed narcotics in quantities of up to two times the maximum dose for personal and immediate consumption, as referred to in article 479 of the General Health Act, provided that it is not for distribution or sale;

IV. Any crime committed by persons belonging to indigenous communities who, during their proceedings, have not had full opportunities to present their case, because the right to have interpreters or defenders who have knowledge of their language and culture has not been guaranteed;

V. Simple and non-violent robbery, provided that it does not carry a penalty of more than four years' imprisonment, and

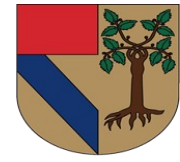
VI. Sedition, or because the offender invited, instigated or incited the crime by forming political groups with the aim of altering institutional life, provided that it does not involve terrorism and that there has been no deprivation of life, serious injury to another person or the use of firearms.<sup>2</sup>

<sup>1</sup> Poder Legislativo Federal, *Minutes of the Draft Decree Issuing the Amnesty Act*, available at: [https://www.senado.gob.mx/64/gaceta\\_del\\_senado/documento/103237](https://www.senado.gob.mx/64/gaceta_del_senado/documento/103237).

<sup>2</sup> Poder Legislativo Federal, *Minutes of the Draft Decree Issuing the Amnesty Act*, available at: [https://www.senado.gob.mx/64/gaceta\\_del\\_senado/documento/103237](https://www.senado.gob.mx/64/gaceta_del_senado/documento/103237)



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The recent coronavirus outbreak has created the perfect environment to justify the enactment of this kind of law. Even the United Nations has praised the Act as a measure to decongest prisons, urging authorities to implement the new measure to prevent infection in the country's prisons. The Mexico Office of the United Nations Office on Drugs and Crime (UNODC) and the High Commissioner for Human Rights welcomed the Act as an effective measure against the spread of the virus, and praised the Act for continuing to advance the transformation of the justice system in the country.<sup>3</sup>

Nevertheless, the Amnesty Act has generated some criticism. For example, Jesús Peña, High Commissioner for Human Rights, expressed that “an amnesty act like the one approved yesterday will be an insufficient measure if it is not accompanied by actions to support reintegration and changes in criminal policies that among other aspects avoid the criminalization of poverty”.<sup>4</sup>

Other organizations, such as the Mexican Bar Association (BMA), have also criticized the Act. The BMA has argued that the Amnesty Act violates the rule of law and the human rights of the victims, as the victims will not be able to reach justice or obtain a comprehensive reparation of the damage.<sup>5</sup>

Indeed, the notion that the primary purpose of the Act is to reduce prison population, due to health concerns regarding the COVID-19, strains logic for two main reasons. First, the Act creates a special commission to coordinate and oversee application of the law. Before releasing anyone, the commission must request an opinion from the Ministry of the Interior, a process that is allowed to take four months. If the main concern is to ameliorate the sanitary risk within prisons, this required procedural delay suggests otherwise.

Second, the bill was first presented to the Congress in September 2019. The first COVID-19 case was reported to the World Health Organization by the Chinese government on December 8, 2019<sup>6</sup> and the first case in Mexico was confirmed at the end of February 2020<sup>7</sup>. Therefore, the Amnesty Act had been on the agenda long before the current health crisis.

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<sup>3</sup> Aristegui, Carmen, ONU aplaude Ley de Amnistía Mexicana; aplicarla rápidamente evitaría contagios en cárceles” *Aristegui Noticias*, available at <https://aristeginoticias.com/2104/mexico/onu-aplaude-ley-de-amnistia-mexicana-aplicarla-rapidamente-evitaria-contagios-en-carceles/>

<sup>4</sup> García, Itzel, “¿Qué es y en qué consiste la Ley de Amnistía aprobada en lo general por el Senado?”, *Grupo Fórmula*, April 20, 2020, available at <https://www.radioformula.com.mx/noticias/20200420/que-es-ley-de-amnistia-en-que-consiste-definicion-mexico-2020/>

<sup>5</sup> <https://www.24-horas-mx/2020/04/19/bma-rechaza-liberacion-de-reos-por-covid-19-y-ley-de-amistia-docto/>

<sup>6</sup> Davidson, Helen, “First Covid-19 Case Happened in November, China Government Records Show Report”, *The Guardian*, available at <https://www.theguardian.com/world/2020/mar/13/first-covid-19-case-happened-in-november-china-government-records-show-report>.

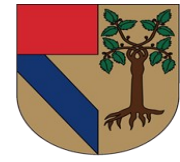
<sup>7</sup> BBC News Mundo, “Coronavirus en México: confirman los primeros casos de covid-19 en el país”, *BBC News*, available at <https://www.bbc.com/mundo/noticias-america-latina-51677751>.

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## Restriction to Acquire Agricultural Lands in Mexico

Marcela Enrigue

Foreign investment in Mexico is limited in a number of respects. One of them, perhaps most analyzed by lawyers and scholars, is the restriction on foreign acquisition of real estate in the *restricted zone*, which comprises 100 kilometers along the Mexico border and 50 kilometers along country's coastline. However, there are other limitations that are relevant for considering investment in Mexico.

One of the fastest growing businesses in North America in the past few years has been the production of berries and other agricultural foods. In just the last six years in Mexico, it has exploded from a 1 billion dollar industry to a roughly 2.3 billion dollar industry, exporting 364 thousand tons of fruit worldwide. And berries are the third most exported agricultural product out of Mexico, only after beer and avocados.<sup>1</sup> This growth has piqued the interest of many foreign investors in Mexican fields, mainly due to low costs, high production potential and soil fertility.

Starting an agricultural business in Mexico—or relocating an existing business to the country—requires the acquisition of seeds, plants, croplands and water. This implicates several Mexican legal requirements, which affect both Mexican and foreign investors.

For example, water rights in Mexico are subject to cumbersome regulation, which is exacerbated by the current drought. Delving into water rights in Mexico would involve analysis beyond the scope of this article, so this article only addresses the acquisition of agricultural lands under three Mexican legal sources: the Mexican Constitution, the Foreign Investment Act and the Agrarian Act.

### Mexican Constitution

In order to protect indigenous and agricultural communities (*Ejidotes*), and their heritage and economic stability, the Mexican Constitution provides for certain restrictions regarding agricultural land acquisitions for individuals.

The constitutional provisions limit Mexican and foreigner ability to acquire agricultural lands of an area greater than the limits of small farmland holdings (*pequeña propiedad*).

To understand the surface area of a “small farmland holding,” one must consult the Agrarian Act. The Act describes a “small farmland holding” as a “surface area that does not exceed 150 hectares for cotton crops, 300 hectares for banana crops, sugarcane, coffee, henequen, rubber, palm, vine, olive, quinoa, vanilla, cocoa, agave, nopal or fruit trees, and 100 hectares for different crops”.<sup>2</sup>

The term “small farmland holding” is also used to define the limits on commercial entities to acquire agricultural lands. That restriction is twenty-five times the limit of an individual small farmland holding. But in addition to the Mexican Constitution, Mexican legislative law provides for additional legal requirements on commercial owners of agricultural lands, and specifically, for those commercial entities with foreign equity.

### The Agrarian Act and the Foreign Investment Act

The Agrarian Act applies to commercial and civil entities that own agricultural land. The Agrarian Act provides for certain partnership and land ownership rules, and the Act limits the purpose of entities owning agricultural land to the production, transformation or marketing of agricultural, livestock or forestry products.

Under the Agrarian Law, commercial and civil entities must denote equity contributed to lands destined for these activities with special series of shares, identified with the letter “T”.<sup>3</sup>

<sup>2</sup> Agrarian Act section 117

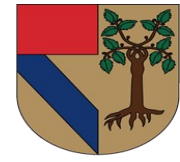
<sup>3</sup> *Ibidem*, section 126

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<sup>1</sup> RIZO, Erandy, August 7, 2019, “¿Cuál es el futuro de la industria de berries?” <https://www.inforural.com.mx/cual-es-el-futuro-de-la-industria-de-berries/>, consultation date: February 24, 2020.



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Moreover, this law states that neither individuals nor entities may have more shares of the “T” series than those that correspond to their small farmland holdings limits, regardless of whether the shares are issued by different legal entities.<sup>4</sup> This is where the Foreign Investment Act plays a critical role, as it establishes certain limitations for foreign investors regarding the legal entities partaking in these kinds of activities, and the entities that issue series “T” shares.

Section 7 of the Foreign Investment Act provides that foreign investors may own interests in legal entities that own agricultural, livestock and/or forest land, with only a maximum of 49% of the series “T” shares. This percentage interest does not include participation made through a Mexican legal entity, as long as the Mexican legal entity is not controlled by foreign investment.<sup>5</sup>

To track compliance with these requirements, the Agrarian Act and the Foreign Investment Act both require commercial legal entities that issue series “T” shares to register with the National Agrarian Registry and the National Registry of Foreign Investment.

## These Laws In Practice

Many consider that, together, these laws prohibit foreign control over legal entities that own agricultural, livestock or forestry lands. However, the limitations described above apply only to equity percentage ownership of the land (the “T” series shares), and therefore do not prevent foreign investment in shareholding control. This is illustrated in the following table:

STRAWBERRY PRODUCERS, S. DE R.L. DE C.V.								
Shareholders	Shares A		Shares B		Shares T		Total interest	
	\$	%	\$	%	\$	%	\$	%
US legal entity	99	99%	99	99%	57	49%	255	73%
Mexican individual	1	1%	1	1%	60	51%	62	27%
Total:	100	100%	100	100%	117	100%	317	100%

In other words, even though foreign companies can acquire 99% control of certain shares of a Mexican agricultural company, they must always have the participation of Mexican capital in 51% of the “T” shares.

Notwithstanding the foregoing, there is no legal limitation that prevents commercial legal entities, whose purpose is the production of agricultural food or similar products, from acquiring indirect ownership of Mexican lands through trusts or otherwise, or to enjoy the use of lands through other legal mechanisms—leaving direct ownership of private property aside. However, in these instances, it will be important to analyze the legal and financial viability of these types of business.

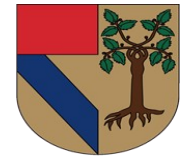
<sup>4</sup> *Ibidem*, section 129

<sup>5</sup> Foreign Investment Act section 4.

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## Self Defense Groups, the Failure of the Rule of Law

*Oliver Buenrostro*

“What happens when the State is unable to contain violent actions and renounces to impart justice and coercion against those who violate the primordial rights of another, in their most basic and fundamental sense, such as life, liberty and property?”<sup>1</sup> Jean-Jacques Rousseau, in his book “The Social Contract”, tells us that the only way that a society can be formed is by a pact, or a social contract, by which individuals give up part of their freedoms and submit to laws of the community. The State is the entity tasked with enforcing this social contract. Securing the rights of the citizens under this contract is the highest obligation for any government.

In Mexico, government authorities have failed to uphold this obligation. For example, in Tepalcatepec Michoacán—a town north of the state of Michoacán and south of the state of Jalisco—drug cartels have colluded with local police, which has presented serious security risks. This represented an obvious failure of the Mexican State to uphold its obligation under the social contract.

In the face of this insecurity, and the failure of the Mexican State, individual citizens turned to self-defense. According to *El Universal* a well-known newspaper in Mexico, there are 50 self-defense groups distributed across 6 Mexican states.

The first group arose in the state of Michoacán, in an area of that state named “Tierra Caliente.” There, the Cartel of the Caballeros Templarios harassed and intimidated local farmers and ranchers, extorting them by with threats of death and other violence to extract money.

According to a founding member of the self-defense force, the Cartel members charged local citizens a “tax” for every economic activity. This member—who I had the opportunity to interview—explained that the Cartel charged one peso for each kilogram of meat sold, one peso for each kilogram of tortillas sold; and if you sold cattle or a crop, they collected a percentage of your earnings. Otherwise, they threatened death and violence against you or your family.

You might wonder why these instances were not reported to authorities. The authorities, upon receiving such reports, would either ignore the claimants or tell Cartel leaders. Rule of Law did not exist in this “Narco State”.

Under these circumstances, Tierra Caliente’s locals decided to create a self-defense group and to fight to eject the Cartel. The defense group was officially formed on February 24, 2013, Mexico’s flag day. These groups were armed with machetes, knives and pistols to protect themselves against the well-armed Cartel. No authorities helped in the effort. On the contrary, state and federal politicians condemned the groups—accusing them of organized crime.

Even today, these groups are still protecting their towns, working to prevent new cartels from entering. And there remains no support from local, state or federal government. Inside these towns, crime rates are low and drugs are banned from the area.

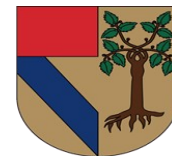
According to World Justice Project, an international civil society organization with the stated mission of “working to advance the Rule of Law around the world”, Mexico

<sup>1</sup> A. (2016, 8 febrero). *Autodefensas, entre el estado de derecho y el estado de necesidad*. Desinformémonos.  
<https://desinformemonos.org/autodefensas-entre-el-estado-de-derecho-y-el-estado-de-necesidad/>

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faces great institutional challenges, especially at the state and municipal level. The second edition of the index of Rule of Law in Mexico, shows that each of the 32 states in Mexico have serious problems with Rule of Law.

Across Mexico, the Rule of Law is almost non-existent, due to corruption of public institutions and the power of drug cartels. However, the problem is not only the Mexican authorities' fault. It is in part the fault of the United States of America, the biggest drug market in the world, and the country's poor control over the illegal drug market. In addition, poor gun regulation in the United States has facilitated drug cartels' access to weapons.

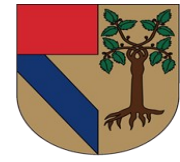
To strengthen the Rule of Law in Mexico, Mexican authorities must concentrate their efforts on generating functional institutions, eradicating corruption and generating trust in the population.

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## The Mexican *Fideicomiso*. Similarities and Differences with the Trust of Anglo-Saxon Tradition.

*Bernardo Espinosa Aranda*

With the enactment of the General Law of Negotiable Instruments and Credit Transactions, in 1932, Mexico instituted the current scheme of the *fideicomiso*.

The scheme has pillars similar to those of a common law trust. However, unlike a traditional trust, which is used primarily for estate planning, the Mexican *fideicomiso* can be targeted to a variety of different uses: management and source of payment *fideicomisos* (typical in real estate transactions); restricted zone *fideicomisos* (designed to allow foreigners to acquire real estate on Mexico's beaches and borders); inheritance, pension and stock market *fideicomisos* (such as *FIBRAs*—Mexican REITs); and public or government *fideicomisos* (key vehicles for large infrastructure projects, as well as for projects aimed for urban, social and cultural development).

Although the principles and objectives of the common law trust and the Mexican *fideicomiso* are very similar, key differences lie in their creation and operation.

The involved parties are largely the same: (i) the settlor, or *fideicomitente*, is the person that incorporates the trust; (ii) the trustee, or *fiduciario*, is the titleholder (and legal owner) of the assets and rights transmitted by the settlor or *fideicomitente*; and (iii) the beneficiary, or *fideicomisario* (formerly known as *Cetui que trust*) is the person who benefits from the trust.

In a common law trust, the settlor and the trustee might be the same person. However, in the Mexican *fideicomiso* there must be a clear division between those parties. In a common law trust, the trustee can be almost any person, while in Mexico, the *fiduciario* (trustee) has to be an authorized legal entity. In such sense, Article 385 of the General Law of Negotiable Instruments and Credit Transactions states the following: “Only those expressly authorized institutions may act as trustees”; and Article 395 of the same Law lists the types of companies that may act as *fiduciaries* in guarantee trusts:

*Article 395.— As provided in this Second Section, only the following institutions and corporations may act as trustees of trusts which purpose is to guarantee the beneficiaries the compliance of an obligation and its preference in the payment:*

- I. Credit institutions;*
  - II. Insurance institutions;*
  - III. Bonding institutions;*
  - IV. Brokerage houses;*
  - V. Multiple Purpose Financial Companies that have a valid registration with the National Commission for the Protection and Defense of Financial Services Users;*
  - VI. General deposit warehouses;*
  - VII. Credit Unions; and*
  - VIII. Companies operating investment funds that comply with the requirements of the Investment Funds Law.*
- [...]

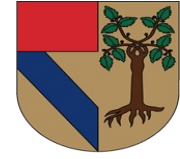
Now, Mexican law contemplates the possibility that the *fiduciario* (trustee) is also a *fideicomitente* (beneficiary), but only in the case of guarantee *fideicomisos*, provided that the terms for settling potential conflicts of interests are agreed in advance. In other words, in Mexico, the trustee could also be a beneficiary in one specific type of *fideicomiso*. This situation, however, could also occur in a traditional common law trust, without having the same limitation that it be a guarantee *fideicomiso*.

In addition, in Mexico, the *fideicomiso* is considered a contract and requires that its creation be expressly stated in writing. The written *fideicomiso* agreement requires a set of clauses detailing the purposes of the trust and the processes to reach them, adhering to formalities required in analogous transactions.

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For example, the transfer of real property to a management and source of payment *fideicomiso* requires that the agreement be executed before a notary public, be in a public deed and be registered in the corresponding section of the Public Registry of Property with the location of the asset. This puts the *fideicomiso* agreement in compliance with applicable civil laws regarding transfers of real estate.

As for its operation, a Mexican *fideicomiso* has to follow the instructions that the *fideicomitentes* (settlers) or the *fideicomisarios* (beneficiaries) give to the *fiduciario* (trustee). Unlike a common law trust, letters of instruction must be observed.

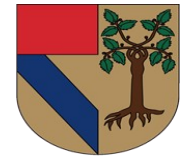
In addition to the letter of instruction, in a *fideicomiso*, it is necessary to grant powers of attorney to individuals acting on behalf of the *fiduciario* (trustee). Notwithstanding this, in certain *fideicomisos*, such as those for management and source of payment, it is common to establish a Technical Committee that, in addition to having powers of attorney, will make operational decisions and be held accountable for the actions of the *fideicomiso*.

Regardless of their differences, it is clear that a common law trust and the *fideicomiso* are both safe and efficient vehicles to achieve lawful business purposes.

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**USMCA - The Modernized NAFTA. Universidad Panamericana– Campus Guadalajara– Symposium organized jointly by the Barra Mexicana– Colegio de Abogados; the Bar of Montreal International Relations Subcommittee and the American Bar Association– Section of International Law.**

*Les Glick*

I am summarizing this important conference, although held a while ago, for several reasons. First, it was held at the Universidad Panamericana the venue of the Mexico Committee Newsletter and its staff; second, several of our members were speakers; and last but not least because of its excellent content much of which proved prophetic when the USMCA was finalized in July 2020. Also one of the hallmark features of the conference was the high level participation from all three countries with both government officials, USMCA negotiators and distinguished private practitioners.

The meeting began with comments by Héctor Herrera Ordoñez, PhD, President of the Barra Mexicana Colegio de Abogados with some prophetic remarks that the USMCA actually was a step back from the encouragement of U.S. investment in Mexico that occurred under NAFTA and that this gap could well be filled by Russia and China, even in the defense procurement field where the U.S. previously had 100% of the market.

The keynote speaker, on the topic of **The Fate of the USMCA and its Implementation** was

Salvador Behar Lavalle, Legal Director, Mexican Sugar and Alcohol Chamber and Former Deputy Chief USMCA Negotiator). I have known Salvador for many years when he was the Legal Counsel for International Trade at the Mexican Embassy in Washington and he is highly knowledgeable and respected. Behar also touched on the theme of China's interconnection with USMCA. He pointed out the value of USMCA to the U.S. insofar as it would result in the USA, having two large partners governed by a trade agreement and the rule of law is important since 40% of all Mexican exports contains some USA content compared to China which is only 4%. He pointed out from the Mexican viewpoint, USMCA was largely the

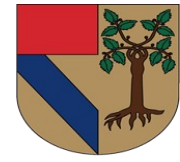
idea of President Trump and Mexico was concerned with trying to preserve as much of NAFTA as possible

The Luncheon speaker on the first day was another distinguished Mexican, **Luncheon Keynote: The Negotiations**, presented by **Guillermo Malpica**, Former Head of Mexican Trade and NAFTA Office in Washington, then Executive Director American Chamber of Commerce of Mexico, Monterrey Chapter, and currently Secretary of Industry and Trade for the State of Puebla. I worked with Guillermo when he was in at the Mexican Embassy and we have been panelists together at a Practising Law Institute program on USMCA. Malpica shared some insights as someone who was part of Mexico's negotiating team. He discussed how Mexico and Canada actually worked together on strategy. For example, some points that they felt would be resisted by the United States were purposely left to the end until after the U.S. had enough victories on other points in their favor that they would be unlikely to abandon the negotiations. Malpica went through a detailed analysis of the important chapters in USMCA and a comparison of USMCA to NAFTA. I would be glad to make copies of both his PowerPoints available to Mexico Committee members on request

The first day ended with a panel on **Non-trade issues in the context of the USMCA**. Moderated by : **Bianca Lampron Brault**, of the Canadian Bar, Montréal International Law Section. The lead off speaker was former Mexico Committee co-chair **Ernesto Velarde Danache** who is President, of the Ernesto Velarde Danache Inc law firm. Velarde noted that from his viewpoint it would have been easier to just modernize NAFTA than to try to negotiate an entirely new agreement, which became much more than an update, with considerations of changed needs for intellectual property, the need to protect the environment, and worker's rights issued. Velarde expressed surprise for how long the negotiations has been taking and the discussed the effect this uncertainty has had on investment in Mexico. As a prominent labor lawyer, Velarde went into detail on the new labor reforms in



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Mexico. He discussed how the U.S. was concerned with the possible inability of Mexico to enforce these new labor laws and pointed to the fact that the budget of the Mexican department of labor had been cut by over 35.8% in 2020. I can make available a copy of Ernesto Velarde's complete PowerPoint on request.

Another prominent speaker on this panel was **Patrick Goudreau** | Président du Comité sur le rayonnement International du Barreau de Montréal who noted that Canada was ready to ratify the USMCA quickly, but would likely delay to see the USA ratify first, and if the section 232 duties on the steel and aluminum tariffs would be lifted.

The next panel in which I had the honor to participate was entitled

## **Trade Remedies, Rules of Origin and Government Procurement**

Moderated by two prominent Mexican attorneys: **Edmundo Elias-Fernandez** and **Edna Ramirez-Robles** who is a professor of law at the Universidad Panamericana and Consultant to the World Trade Organization. Below is a brief summary of the presentations:

**Turena Ramirez Ortiz** | Partner, Sánchez Devanny LLP (Mexico):

Mexico has 75 FTAs and it was essential to Mexico to have the USMCA if NAFTA ends.

Mexico is likely to experience a great deal of progress from requirements to adopt measures to combat fraud, bribery and money laundering, which is being pushed by both Mexico and the U.S. Mexico will also see new developments from requirement to adopt whistleblower legislation.

USMCA provision requirement to coordinate for improving the region's competitiveness also holds the promise of unprecedented approaches to regulation of business and trade, and transportation.

**Leslie Alan Glick** | Shareholder, Co-chair of the International Trade and Customs Specialty Team, Butzel

Long (Washington D.C. and Michigan). This PowerPoint is also available on request.

### Rules of Origin on Automotive Products- Regional Value Content (RVC)

The RVC requirement for passenger vehicles and light trucks is: (a) 66% under the net cost method from July 1, 2020 to June 30, 2021; (b) 69% under the net cost method from July 1, 2021 to June 30, 2022; (c) 72% under the net cost method from July 1, 2022 to June 30, 2023; and (d) 75% under the net cost method, from July 1, 2023, onwards.

### Auto Parts: Parts for automobiles and light trucks.

Parts for autos and light trucks will have to meet different percentages of North American value according to their type: Core – 75% - includes engines, transmissions, body chassis axle, suspension, steering (3-year phase-in), advanced batteries (5-year phase-in) Principal – 70% - tires, glass, pumps & compressors, A/C, bearings, bearing housings, brakes. Complementary – 65% - pipes, valves, small electric motors, distributors, windshield wipers, radios, headlamps

### Parts for heavy-duty trucks:

Heavy-duty trucks – 75%; Principal – 70%; Complementary – 60%

**Labor Value Content (LVC):** New trade rules of origin require that 40% of passenger vehicles, 45% of light trucks and heavy trucks content be made by workers earning at least \$16 U.S. dollars per hour (hourly wage earners, including temps). Applies to vehicle Original Equipment Manufacturers (OEM's); Up to 10% can be R&D Phased in starting 2020 Can be their own plants or supplier plants

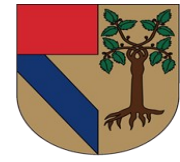
### **Quotas**

Quotas had to be set in for automobiles from Mexico and Canada to escape the section 232 tariffs on automobiles that may be imposed.. However the quotas, in the form of side letters are high enough above ex-





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isting export levels to have little short term impact on Mexico.

As for any new section 232 tariffs on automobiles, The USA agreed to 60-day grace period, and that Canada and Mexico can challenge them at WTO. Commerce's affirmative finding concerning the section 232 national security investigation on autos has not been released (note: as of the date of this article no section 232 duties on automobiles have been imposed)

Maintains original North American Free Trade Agreement (NAFTA) transaction value and net cost method of calculating regional value control (RVC). Maintains NAFTA rules on accumulation fungible goods and intermediate and indirect materials. De Minimis exception raised from 7% to 10%: Thus one can maintain NAFTA origin even with 10% non-NAFTA content!

**Vincent Routhier | Partner, DS Lawyers Canada LLP (Montreal)**

Discretionary application of proxy markets for costing is making US (Canada as well) more and more protectionist.

USMCA Chapter 10 even subjects legislative changes to obligatory examination by binational panel for Declaratory Opinions. USMCA Chapter 10 maintains countries' rights to impose safeguard measures, and even requires Mexico and Canada to assist in the enforcement of safeguard measures and antidumping findings.

Luncheon Keynote speaker: **Ricardo Ramirez-Hernandez**, Former Chairman of the WTO Appellate Body, now at Derecho Comercial Internacional in Mexico City.

Trade War is a path to mutual destruction.

It appears that the tariff war will remain, even if it is frozen,

Did Trump negotiate himself into a corner? Claiming victory means having to explain the victory. Will any deal with China meet MFN obligations due to nearly all other countries? That may be affected.

## WTO Dispute Settlement

Half of disputes are settled at Consultations Stage.

Of 7 seats on Appellate Body, 3 judges sit at a time, chosen randomly. Korean member resigned to enter cabinet in Korea. USA refused to participate in naming successor, as did with other departures including that of Ricardo Ramirez of Mexico...

Only 3 left now (China, USA, India). Two of those have terms coming to end December 10, leaving just one, the Chinese. The USA has been open about complaints with Appellate Body. USA sees some rulings as going beyond agreed texts.

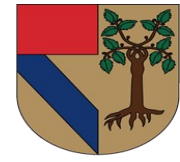
The USA says discussions on point can only begin on the basis of prior agreement that Appellate Body has indeed failed to follow rules and texts and the "role assigned to it by the Members" (Statement from US Mission to WTO). The USA does not say what it wants as remedy its cure or path for future.

The USA also takes objection to appellate body members extending their work on pending cases beyond their term under Rule 15, for ending existing disputes. American Member Tom Graham says he has not decided whether to continue, but would keep an eye on "developments". Two previous American members support the idea that the departing members be allowed to finish pending cases....

Countries will wonder about going to dispute settlement at all in current scenario when there is no certainty about having an appeal. Their promise to go to a parallel arbitration is a process-related promise and therefore the promises are not bound to offer arbitration also to other MFN trading partners.



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The concluding panel was entitled **General Conclusions on CPATPP, CETA, Regional Trade Agreements, WTO, the future of international trade agreements and of the rules-based international trading system** Moderated by Robert L. Brown, PhD | Past-Chair of the American Bar Association – Section of International Law

The opening speaker was Professor **Edna Ramirez-Robles**, PhD | Professor University of Guadalajara and International Consultant )

Professor Robles discussed emerging features on global scale including the Revival of managed trade, the Greater fragmentation of trade rules and the weakening of global trade governance. She discussed the need for more Flexible approaches that requires reminding the stronger countries how they have benefited from the WTO system and a Multi-stakeholder approach and Pro-compliance approach. This will help to maintain the rules-based system and keep the players on it, and improve the way in which that system works. Professor Robles summarized International trade and investment policy scenarios today as having: Open international rules, competing coalitions. Technological disruption, making borders irrelevant with each country putting its sovereignty first.

This session was concluded with the highly prophetic presentation of distinguished Canadian attorney, **Simon Potter**, of McCarthy Tetrault. These were his major points:

There are reasons also to fear that "free trade agreements" will cease to be free trade agreements at all, but will become, ironically, mechanisms of protectionism. The Investor State Dispute Settlements NAFTA Chapter 11 is scaled back significantly. Chapter 11 encouraged cross-border direct investment by ensuring that the rights of those investors would be protected, and that those investors would have access to impartial, binding arbitration. Investor-state dispute mechanisms remain in place in the USMCA but only as between Mexico and the U.S., only in respect of limited sectors, including telecommunications, energy and transportation, only with plaintiff duty to seek to exhaust domestic remedies.

Canada saw Chapter 14 not only as a serious backward step from the NAFTA chapter 11 but as worse than nothing at all, a threat to the other ISDS agreements around the world, and refused to sign onto Chapter 14, and is excluded from it.

Nevertheless, Chapter 14 shows where the current USA administration wants to go and provides a precedent for other governments to use in order to avoid scrutiny over their protectionist decisions even if they are harmful to cross-border investment.

Canadians are also left unprotected except at the ballot box against stupid measures imposed from time to time by their provincial governments.

Canada will maintain an ISDS recourse in relation to investments to or from Mexico, thanks to both countries being parties to the TPP.

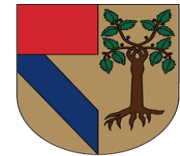
Historically the U.S. has been seen as the prime "beneficiary" of Chapter 11, as no investor that sued the U.S. under Chapter 11 has been successful, but American investors have a reasonable track record of success against Canada and Mexico. Losing ISDS in the Canadian relationship with the USA is not a "win", though. One of the principal values of Chapter 11 was to assure investors that their investments would be treated fairly and protected, and that discriminatory impulses would be avoided by legislators and regulators. Investors may want to consider whether there are subsidiary or affiliated entities through which their investments can be made so as to continue to benefit from binding investor/state arbitration.

A copy of this presentation is available on request.

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## Patrick Del Duca Appreciation

It is with profound sadness that we announce the passing of our dear friend and colleague Dr. Patrick Del Duca. We would like to honor his memory with some anecdotes and pictures.

“Patrick was a mentor, leader, scholar, crusader for the rule of law, and, most importantly, a friend. Countless times Patrick moved me and others to act for the betterment of the ABA Section of International Law. One of Patrick’s true gifts was his ability to not only lead but also to cultivate and build *new* leaders. Patrick had a knack and uncanny ability for bestowing upon fledgling committee leaders and our youngest members “certain innate powers” (as he would put it) that enabled us to be doers rather than followers. From naming city coordinators across borders, co-editors of the *Mexico Update* newsletter or the Year in Review, to encouraging, coaching and shepherding approval of diverse, enlightening, and cutting edge program proposals, to fostering the rule of law both within the Section and through his leadership and volunteer work at ROLI, Patrick was always coming up with new ways to empower our membership, make our Section stronger and build a better world” - **Ben Rosen**

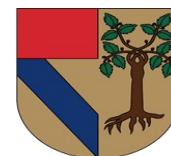


“The professional identity of lawyers is in constant development in different ways. Education during law school is one of them. The contact with other professionals working in specific projects or assignments plays an important role to acquire specific competencies. Patrick made an extraordinary contribution to developing professionalism in our students who participate in the editorial committee of the newsletter “Mexico Update”. Through my contact with Patrick during the time, which I participated as a member of the editorial committee of our newsletter, I had the opportunity to discover in Patrick a professional sharing his knowledge and expertise with patience. He worked very hard every issue. In addition, when he visited the Universidad Panamericana to talk with a group of students about the newsletter, he encouraged them to work hard and pursue international careers. Afterward, he invited us to write a book about the Mexican Legal System. That was an opportunity for me to learn more about his hard work. He understood perfectly the Mexican culture and part of that culture includes labor practices. He always was a bridge between people, countries, and efforts. It was a great honor for me to have learned of his wisdom” - **Yurixhi Gallardo**





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## Patrick Del Duca Appreciation



“I met Patrick back in 2007 at his office in Los Angeles when he was a Partner at Manatt, Phelps & Phillips, right after sitting for the New York Bar Exam and a few days before coming back to my home country from my LLM at UCLA. A couple of weeks later, while already in Bogota, I got an offer that required a big change in my life: moving to LA with who’s now my wife, taking the California Bar, and working between LA and NYC (which luckily ended up being mostly in wonderful and sunny LA).”

Patrick was one of the most brilliant lawyers I have ever met. There is no question about it. But he was also a truly exceptional human being. He was always kind and respectful, and irradiated calm to those of us who worked with him. Patrick was a man of very few words and a particularly reserved person so that he was not the “beer mate” you would go to to discuss about feelings or emotions. However, he was full of kind details and always made sure his friends knew they could count on him. And we actually always did. Patrick, truly, very much loved LATAM where he traveled recurrently.



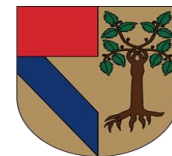
He used to go to Mexico quite often where he had good friends and colleagues. As to Colombia, just to mention a couple of countries in the region, he first came back in 2009 for our wedding, and never stopped coming back thereafter, for business and academic purposes, which brings me to another of his passions: teaching, writing and giving conferences. And that was a main point of contact between us.

We both shared the passion for the “academic field” and I really admired him in that regard. He also had great love, admiration and respect for his father, Louis F. Del Duca, Penn State University professor emeritus of law, who was a true scholar. Since I happen to have the same sentiment for my father Sergio Rodríguez Azuero, who is also a well-respected lawyer and scholar, we always found common grounds for discussions there. Actually, perhaps the most personal thoughts that we ever shared, were related to our fathers.





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## Patrick Del Duca Appreciation

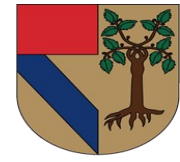
In that field, he and I had the chance to speak together at a couple of ABA conferences in NYC and Miami and some other conferences in LA which was always a great honor to me. I also had the honor of sharing, for three or four years, a summer course we thought and taught together at Los Andes University in Bogota, Colombia, where we were about to start our first virtual class in the midst of the pandemic when he passed away (it would have started on June 8<sup>th</sup> of 2020). That gave me the chance to share more personal time with him and his adorable wife Maria-Grazia Ascenzi who would come with him to his business/academic trips to Colombia. The last time they came to Colombia, summer of 2019, we came together to our family country house in Villa de Leyva, a wonderful little city a couple of hours away from Bogota, where my wife, kids and I had the pleasure to spend a weekend with Patrick and Maria Grazia. And it is from that same house in Villa de Leyva, where my wife, kids and I have been living for the last three months to weather the COVID19 crisis, where I got the sad news of Patrick's death and I am writing this short story full of otherwise insignificant anecdotes. I will miss him a lot and will always remember him as a great friend, boss, mentor and colleague"

*- Daniel Rodriguez*





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## Patrick Del Duca Appreciation

“It is with heavy hearts that we move toward closing one ABA year and starting another without our friend and mentor by our side. Patrick Del Duca was a humble and ever-present force for positive change within the ABA. His commitment to mentoring young lawyers, particularly via production of quality committee publications was unparalleled. Patrick always made time to lend an ear or a helping hand and always had a creative suggestion for resolution – no matter the problem. Patrick Del Duca: a great leader, a wonderful friend, and an impressive mentor. You will be missed. Rest in peace”. - *Susan Burns*



“Patrick Del Duca embodied the spirit of the ABA Mexico Committee. He cared deeply and passionately about Mexico, the United States and the relationship between the two. He was a legal scholar and lover of the law who held himself and others to the highest standards. And he was a kind, generous soul who worked to strengthen the U.S.-Mexico relationship, both culturally and legally, by bringing lawyers from both countries together to build their mutual knowledge, affection and respect. From the beginning of my time working with the Committee, Patrick was a constant, supportive presence, encouraging us all to do our best and never to lose sight of the great project of forging stronger ties between our two countries. Patrick had a timeless quality – he was both an “old-school” traditional lawyer and scholar, and yet lived very much in the 21<sup>st</sup> Century. Patrick and the guiding light that he brought to the Mexico Committee will be deeply missed” – *John Walsh*



ABA • Section of International Law • Mexico Committee



# MEXICO UPDATE

## 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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