



ABA • SECTION OF INTERNATIONAL LAW • MEXICO COMMITTEE

# MEXICO UPDATE

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## *Message from the Co-Chairs*

This is a very special issue for our Newsletter. It is special—and bittersweet—because it is the last message the three of us together will write in our capacity as the current Co-Chairs of this ABA Section of International Law Mexico Committee. As you may know, two of the three of us—Enrique and Laura—are concluding our three-year Co-Chair terms this Summer 2022.

For Enrique and Laura, it has truly been an honor and privilege to serve as Co-Chairs of this amazing Committee. We still vividly remember the first monthly call and asking ourselves at the end if we had reached our goals and if we had kept the call interesting and engaging for our members. Thankfully, after a few months of holding the monthly meetings, they became very manageable. We got into the swing of efficiently preparing the agenda and then chairing each monthly call. Then came the COVID Pandemic—and the calls became video conference Zoom calls. We worked hard to make meetings even more interesting. The meetings were, for many of us, a much-needed break in long days of working alone from home. At each meeting, we included a time for the attendees to comment and share their personal thoughts on the impact the pandemic was having on each of us. We also organized several Committee virtual happy hours, with games and activities to integrate new Committee members.

Although these three years have been shadowed by the challenging reality of the COVID pandemic, there have been many silver linings. The Mexico Committee is, if anything, stronger today than even before. Even though we were dealing with the pandemic, we continued with our committee's newsletter. We submitted panel

proposals for the ABA International Law Section conferences—some of which were postponed or cancelled, and some even converted to virtual conferences. We were active in the first post-pandemic in person Cannabis Industry conference in Denver in November 2021, which John and Enrique attended and many other Mexico Committee members were also able to attend. We strongly supported the Committee's Rule of Law team, working closely with the ILS Rule of Law committee, proposing and sponsoring an initiative for the ABA to express concern regarding the Mexican federal administration's treatment of the federal judiciary. This initiative ultimately resulted in a letter directly from the president of the ABA to the Mexican President Manuel Andres Lopez Obrador, which we are proud and gratified had significant impact on the public debate in Mexico on the issue.

And most recently, at the ABA ILS Section annual meeting in Washington, DC in April 2022, we ensured that the Mexico Committee and its members participated in and moderated several outstanding panels to packed rooms. The Mexico Committee sponsored a reception at the Washington, DC office of Laura's law firm which was well attended by members from many different ABA ILS committees. And of course, we had the wonderful Committee dinner that same night celebrating our return to in person meetings.

We now transfer our leadership positions to Eduardo Diaz Gavito, current Vice Chair of Rule of Law and Andres Nieto, current Vice Chair of programs. As Co-Chairs with John Walsh, the three of them will make an amazing team. Our Mexico Committee is in the best of hands to continue to work effortlessly to accomplish its goals.

Best Regards and Thank you.



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Andrés Nieto, John Walsh, Laura Nava, Eduardo Díaz Gavito and Enrique García

## Issue 61 July 2022

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

— Karla Ruiz, 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:

<https://www.americanbar.org/auth/register/?authSuccessRedirect=%2Fjoin%2F>

Mexico Committee Members can access back issues of MEXICO UPDATE from inception



## Mexico Committee Leadership 2020-2021

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García, Enrique  
Walsh, John

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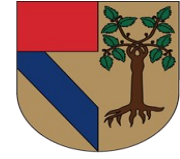
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## FEMINISM IN THE MEXICAN SUPREME COURT.

*Andrade, Juan Pablo*

*The latest decisions out of the Supreme Court of Mexico embrace a radical feminist agenda. These new interpretive standards offer methods for improving the conditions of women in Mexico, but also come with risks.*

Recent years have seen significant change in judicial interpretation of women's rights in Mexico. The Mexican Supreme Court (the Court) has developed a "gender perspective" standards when deciding cases that involve women or other vulnerable groups. This gender perspective as defined by the Court in the *Amparo Directo* 12/2012 and in the *Amparo Directo en revision* 2655/2013, requires state authorities (including judges) to avoid any gender-based discrimination, and therefore obliges these authorities to use novel analytical and interpretative tools to identify and correct discrimination that might be implicit in traditional institutional practices and in legislation.

The Court has interpreted this gender perspective to apply to all judges and government officials in all cases relating to women or other vulnerable groups. This means that it is not necessary for parties to invoke the use of gender perspective; judges might, by their own means, be supposed to adopt this gender perspective.<sup>1</sup> In practice, using this gender perspective means that if a judge identifies that a statute, judicial precedent, or other law reinforces or implicitly relies on traditional gender roles or gender stereotypes, the judge is not bound to enforce this law—as it is presumptively discriminatory.<sup>2</sup> Such practice is grounded in the Court's obligation to refuse to apply any law that is contrary to the human rights recognized in the Mexican Constitution or international treaties to which Mexico is a party.<sup>3</sup>

The gender perspective jurisprudence is a legal expression of feminist theories, and it embraces some of these basic language and concepts. And notably, the Court has held that gender is a concept that should not be limited by biology or genital data, but rather relies on the internal experience and convictions of individuals.

The Court has used this gender perspective standard to decide a number of important cases of divorce law<sup>4</sup>, marriage law<sup>5</sup>, last names of children<sup>6</sup>, abortion<sup>7</sup>, transgenderism<sup>8</sup>, and criminal cases in which the accused are women that have suffered domestic violence<sup>9</sup>. In all of those cases, the Court has considered traditional laws and institutions to be unconstitutional because the laws were based on traditional gender roles and stereotypes.

<sup>4</sup> In the *Amparo directo en revision* 3419/2020, the First Chamber of the SCJN declared that a Civil Statute that required women to demonstrate that their primarily work was a homemade in order to ask for a compensation should be interpreted with gender perspective in the burden of proof, because the Court should consider the social reality that women tend to work at home more than men and there is an historical inequality in society.

<sup>5</sup> In the *amparo en revision* 581/2012 and others the Court ruled that heterosexual marriage was based on gender stereotypes and was therefore discriminatory toward homosexual couples.

<sup>6</sup> In the *Amparo en revision* 653/2018, the Court decided that the fact that birth certificates in Mexico orders the last name of the father first and secondly of the mother was based on a gender stereotype and was therefore discriminatory.

<sup>7</sup> In the *Acciones de Inconstitucionalidad* 41/2019 and 42/2019 the Court ruled that State Constitutions that protects life since conception was discriminatory because it's effects would have a disproportionate effect on women based on gender stereotypes that force women to be mothers and stigmatize women who perform abortions.

<sup>8</sup> In the *Amparo directo* 6/2008, the Court ruled that trans people have a right to change their gender on birth certificates and that the sexual assignment made on birth certificates that is grounded on genital data is a discriminatory reproduction of gender stereotypes.

<sup>9</sup> The *Amparo Directo en revision* 1667/2021 derived from a criminal case in which a couple was accused of organized crime and the women argued that she had a subordinate role and suffered domestic violence, therefore she should not be held responsible for the crimes. The Court ruled that when a woman argues domestic violence or subordination, even if they don't present evidence, tribunals have the duty to judge with gender perspective and search for evidence.

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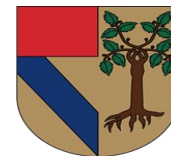
<sup>1</sup> The Court first ruled this in the *Amparo directo en revision* 5490/2016, in order to calculate the reparation of damages caused to a woman victim of domestic violence. This understanding of gender perspective was developed in latter cases that quoted this first case as precedent.

<sup>2</sup> The Court affirmed this explicitly in the *Amparo directo en revision* 2655/2013, in which a woman was deprived of her paternal authority because of abandonment, but she argued that she could not see her children because she suffered violence from her husband. The Court decided that Judges must be sensible to discriminatory social practices such as domestic violence and their judgments must attend explicitly to this reality.

<sup>3</sup> This obligation was affirmed in the *Varios* 912/2010 case, related with the judgment of the Inter-American Court of Human Rights in the *Radilla Pacheco* case, in which the Court for the first time obliges tribunals to apply diffuse control of constitutionality *ex officio*.



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The Court has also decided seemingly non-gendered questions, using this gender perspective. In an employment case involving a pregnant woman, for example, the Court considered social practices and traditions that have historically affected women, to hold that the pregnant woman's signed resignation letter was not sufficient evidence that she left her job voluntarily, noting that it is a common practice for pregnant women to be forced to quit their jobs. As a result, the employer was required to provide additional evidence demonstrating the authenticity of the resignation.<sup>10</sup>

Although gender perspective is an interesting tool that might be useful for identifying and correcting structural injustice for adapting general rules to concrete situations, it also entails some risks if it is not applied carefully. The gender perspective often exists in tensions with other fundamental legal principles, such as equality of the parties and judicial impartiality. It may also be very hard for a lawyer or party to predict if a long-established law might be overruled by a judge through the use of gender perspective; this breeds uncertainty and lack of confidence in the justice system. For example, using the case above, if a pregnant woman actually resigns, and a statute has provided that a resignation letter is sufficient proof of departure, a judge's sudden interpretation against the statute risks shifting the legal landscape, without any notice to the employer.

Some critics of this gender perspective jurisprudence argue that it represents radical judicial activism that has no constitutional or legal basis—and without any checks or balances. Judges, based on their own understanding of gender and discrimination (an understanding that is hotly debated in academia and in society), would have the ultimate word on not just interpretation of the law (the source of their training), but also on the interpretation of human nature, psychology, medicine, ethics and philosophy. In this way, then, gender perspective—as developed by the judicial branch—might ultimately undermine its own legitimacy, if it does not recognize its limits.

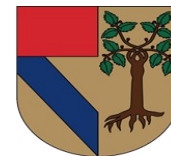
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<sup>10</sup>*Contradicción de Tesis* 318/2018, Second Chamber of the SCJN.

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## THE GENEVA PACKAGE: THE TWELFTH WORLD TRADE ORGANIZATION MINISTERIAL CONFERENCE AND ATTEMPTS TO STRENGTHEN MULTILATERALISM

*Díaz, Eduardo; Islas, Paulina and Grajales, Eduardo*

### Abstract:

Between June 12 and 17, 2022, the Members of the World Trade Organization (WTO) held their Twelfth Ministerial Conference (the Conference) at the organization's headquarters in Geneva, Switzerland—the first such conference in five years.

The Conference culminated in the “Geneva Package” (the Package), a series of declarations, decisions, and agreements on key topics including fisheries, e-commerce, vaccination, and preparedness for future pandemics. Several facets of the Package achieved resolutions to issues that had stalled in the WTO for more than two decades. The adoption of the Geneva Package, including on these formerly entrenched issues, reflects the WTO's focus on recovering the strength of global trade multilateralism, particularly in the face of several simultaneous global crises—the COVID19 pandemic and the war in Ukraine chief among them.

This article aims to provide comments on the outcome of the Conference, placing special emphasis on the resulting implications, challenges, and opportunities for international trade.

### Background

The Marrakesh Agreement, which established the WTO, provides that the Ministerial Conference is the organization's highest decision-making body, composed of representatives from all member states. Generally, the Conference must meet every two years to fulfill its mandate.<sup>1</sup>

Before June 2022, the Conference was last held in Argentina in December 2017, during which no major negotiations were concluded. Since then, the WTO has faced one of its greatest crises since it was formally established in 1995. The crisis has been, in part, due to a rising trend of protectionist policies from member states, as well as the alarming paralysis of the WTO's Dispute Settlement Body, resulting from blocked attempts to appoint new members to the Appellate Body.

In addition to this context, the COVID19 pandemic, the United States' change in administration, and the 2021 appointment of Dr. Ngozi Okonjo-Iweala as WTO Director General, along with other global economic and political developments, all galvanized some of the groundbreaking agreements reached at the Conference.

### Emergency Response Package

In the face of global inflationary pressures—caused, at least in part, by the consequence of the COVID 19 pandemic and the ongoing war between Russia and Ukraine—the WTO conclude a package of two declarations and two decisions to strengthen international food security and to establish resilience and preparedness in the event of future global health emergencies.

Through the Geneva Package, the WTO recognized that prices for food remain volatile, and in some cases have reached record highs. This, the WTO warned, may particularly affect developing and least developed countries, putting the food security of their population at risk. Upon this finding, the Conference made a commitment to facilitate trade and cooperation measures to increase the availability of food products, specifically agreeing that member states should not impose restrictions on food exports, as long as the products are purchased for humanitarian purposes by the World Food Programme.

The WTO also used the Conference to address trade measure to support global response to the ongoing COVID19 pandemic. Within the framework of the TRIPS Agreement (Trade-Related Aspects of Intellectual Property Rights), the WTO agreed that, over the next five years, developing countries may use patents for COVID19 vaccines without the consent of the patent holders, in an attempt to boost the supply of vaccines in countries with low immunization rates. However, the decision does not apply to patents for treatments against the disease, supplies, or diagnostic equipment, which raises questions about whether the Geneva Package was only adopted more than two years after the World Health Organization declared COVID19 a global pandemic, back in March 2020, and eighteen months after the United States Food and Drug Administration approved the first vaccine against the disease.

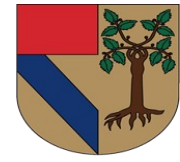
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<sup>1</sup> Marrakesh Agreement Establishing the World Trade Organization (April 15, 1994), [https://www.wto.org/english/docs\\_e/legal\\_e/04-wto\\_e.htm](https://www.wto.org/english/docs_e/legal_e/04-wto_e.htm).



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## Electronic Transmissions

Since 1998, with the WTO's adoption of the Declaration on Global Electronic Commerce, WTO member states have declined to impose customs duties on electronic transmissions.<sup>2</sup> This practice was again reaffirmed by the Conference, until at least March 31, 2024. although there is no specific definition of "electronic transmission", it is generally understood to refer to the cross-border flow of digital data including software, information, communications, and audiovisual content, among others.

The non-imposition of tariffs on international trade in electronic transmissions has allowed the exponential growth of various industries. However, some countries, such as India, have recently expressed interest in exploring the possibility of setting tariffs on these products. Of course, doing so would increase tariff revenues for exporting countries significantly, especially for developing and least developed countries. According to studies by the United Nations Conference on Trade and Development (UNCTAD), as of 2019, the countries facing the greatest losses in the tariffs on electronic transmissions are Mexico, Thailand, Nigeria, India, China, and Pakistan, in roughly that order<sup>3</sup>.

Interestingly, in the Geneva Package, the Conference also expressed interest in intensifying discussions on potential tariffs for electronic transmissions, ordering integral evaluations of the economic and commercial implications. The 2024 Ministerial Conference will likely see intense discussion around this topic.

## Fisheries Subsidies

Perhaps the Conference's greatest success was the agreement concluded on fisheries. After more than twenty years without resolution, the negotiations launched at the 2011 Doha Ministerial Conference regarding fishery subsidies, finally came to a successful conclusion. The negotiations culminated in the Geneva Package's adoption of an unprecedented multilateral agreement with sustainability as its fundamental premise.

The package's Agreement on Fisheries Subsidies is a response to an escalating environmental crisis, and it prohibits member states from granting subsidies to vessels or operators engaged in: (i) illegal, unreported, and unregulated fishing, (ii) fishing of overexploited stocks, (iii) unregulated high seas fishing, and (iv) any activity related thereto.

The Agreement stipulates that this prohibition shall apply immediately to develop countries and establishes a two-year transition period for developing counterparts.

To enforce the application of these restrictions, the Agreement on Fisheries Subsidies requires member states to submit periodic information regarding the subsidies granted to fisheries, as well as reports on the vessels and operators that have been detected carrying out such activities. The Agreement also establishes a Committee on Fisheries Subsidies, composed of representatives from each of the member states, which must meet at least twice a year to monitor and evaluate the application and function of the Agreement.

Undoubtedly, concluding an instrument of this nature and relevance among all the members of the WTO is the greatest achievement of this Conference. It is only the second multilateral trade agreement concluded since the creation of the WTO (only after the Trade Facilitation Agreement in 2015), and it is the most ambitious agreement to be reached in years.

## Strengthening Trade Multilateralism

The 2022 Conference was not only one of the most productive in recent times, but also a clear triumph for an organization that seemed to have been losing strength in the face of criticism and waning influence. In this regard, it will be essential to closely monitor how the Geneva Package is implemented in the domestic legislation of countries, ensuring that, in words of Dr. Ngozi Okonjo-Iweala, the agreements reached at this Ministerial Conference make a difference in the lives of people.

Of course, the WTO can be improved, and the Geneva Package is only a small step towards much-needed global action. Most urgently, the WTO should focus on structural reform, especially in its Dispute Settlement Body. Nonetheless, the Geneva Package illustrates the continued value of patient and unwavering multilateralism to promote communication, negotiation, and shared purpose.

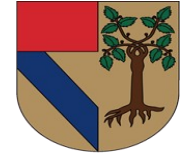
<sup>2</sup>Declaration on Global Electronic Commerce (May 1998), [https://www.wto.org/english/tratop\\_e/ecom\\_e.htm#:~:text=The%20Declaration%20on%20Global%20Electronic,relating%20to%20global%20e%2Dcommerce](https://www.wto.org/english/tratop_e/ecom_e.htm#:~:text=The%20Declaration%20on%20Global%20Electronic,relating%20to%20global%20e%2Dcommerce)

<sup>3</sup>UNCTAD (2019), "Growing Trade in Electronic Transmissions: Implications for the South", UNCTAD Research Paper N°29





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## THE 2022 INITIATIVE FOR MEXICO'S ELECTORAL REFORM

*De la Torre, José Eduardo*

Today any proposal for electoral reform in Mexico is controversial. But on April 28, 2022, President Andrés Manuel López Obrador proposed amendments to the Mexican Constitution that would provide for electoral reform. This article will cover what will happen if these reforms pass through the Mexican Congress and become law.

### Funding for Political Parties

According to the article 41, section II of the Constitution, the Mexican federal government is in charge of financing the country's political parties<sup>1</sup>. The proposed reforms would eliminate this provision, and political parties would no longer receive government funding.

At first blush, this seems to be a good idea. It might tend to reduce the massive amounts of public money currently going to political parties. But doing so will create at least one more problem: it will allow powerful and wealthy private enterprises (including even illicit organizations linked to drug cartels) to buy political parties and their candidates, permitting these powerful actors undue influence in national politics.

But perhaps there is a middle ground. Rather than eliminating all public funds for political parties, Mexico could consider reducing public funding for parties by up to 50%. Thereafter, the country could subsidize private citizens' support of political parties, for example by allowing them to deduct 10% of their taxes for political donations. This would allow political parties to receive necessary funding, with a balance between public and private financial influence.

### Restructuring of the Electoral Authority

The second key potential reform would unify existing federal, state, and municipal electoral authorities into a single national electoral authority called the Instituto Nacional de Elecciones y Consultas "INEC." Proponents of this reform note that doing so would save the Mexican government 2.2 billion USD<sup>2</sup>.

However, what proponents do not admit is that doing so would violate some of Mexico's founding principles. Article 40 of the Constitution specifically provides for federalism in Mexico. The Constitution does not envision Mexico with a centralist foundation.

In addition, despite the President's claims, unifying all electoral organizations will not necessarily save money because the new centralized authority will need to hire more people to cover the work of existing decentralized authorities.

And this does not account for the extreme controversy that would be inherent in the creation, administration, and composition of the new centralized authority. According to the current proposal, candidates for the primary electoral decision-making board would be nominated by the House of Representatives, the Senate, the Supreme Court of Justice, and the President. And citizens would elect board members from this slate of candidates by popular vote. Members of a specialized electoral court would be selected in a similar manner. Making these board members and judges political actors, beholden to power brokers who nominate them and voters who elect them, risks the impartiality of the electoral system.

### Legislative Restructuring

Also on the table are reforms that change the structure of the Mexican legislatures at both the federal and local level.

Today, the House of Representatives has 500 representatives, and the Senate has 128 senators. The proposed initiative contemplates changing this to 300 representatives and 96 senators—primarily by eliminating plurinominal legislators. The plurinominal legislators are chosen by their party—not through direct elections—based on the percentage of votes that party received in an election.

Instituting this reform would likely lead to single-party-rule, especially in the short term. Indeed, if plurinominalies did not exist, the Partido de Regeneración Nacional (MORENA)<sup>3</sup> would have control of the legislature and would have likely already made groundbreaking reforms in Mexico.

<sup>3</sup> MORENA is the political party of current President Andres Manuel Lopez Obrador

<sup>1</sup> Constitución Política de los Estados Unidos Mexicanos, Artículo 41, Fr. II

<sup>2</sup> Gabriel Moreno Zepeda, "El costo presupuestario de la democracia electoral en México" *Elecciones, justicia y democracia en México* (May 19, 2002), <https://integralia.com.mx/web/wp-content/uploads/2021/09/Tema4-Sub1.pdf>.

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The reforms would also change the makeup of local councils. Council membership would no longer be fixed, but rather be based on population<sup>4</sup>.

For example, in Zapopan County in Jalisco, the initiative would result in a reduction of the number of council members from 19 to nine, including the mayor<sup>5</sup>. This is a direct attack on local governance.

## Conclusion

Mexico does need electoral reform, but not at the expense of fundamental principles of federalism, rule of law, and balanced government—and not without considering the political realities in Mexico and practical consequences of the proposed reforms.

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<sup>4</sup> Código Electoral del Estado de Jalisco, Art. 29

<sup>5</sup> Código Electoral del Estado de Jalisco, Art 29, fr. IV

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## FINTECH PANEL

*Garcia, Enrique*

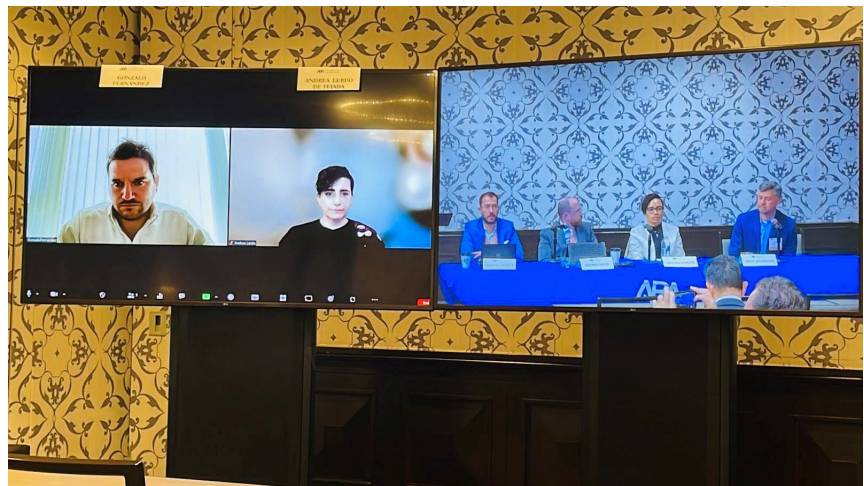
The 2022 ABA International Section Annual Meeting in Washington DC was a great experience. The conference featured fantastic programs and speaker lineups on a wide range of hot international legal matters.

Among the Mexico Committee's many contributions to the event (including the attendance of many of you!) was its participation in the panel entitled "Innovation 2.0: FinTech: Lessons learned, changes, and new challenges".

FinTech is no longer a "new" topic, as it has infiltrated the daily life of millions of people. But it continues to push the boundaries of the heavily regulated financial services industry. Therefore, unsurprisingly, one of the most important challenges for the industry has been the way in which different countries have updated their laws to regulate the industry. Indeed, participants in this industry looking to utilize these technical innovations should be tuned into the complex and rapidly changing legal and regulatory landscape.

In addition to being sponsored by the Mexico Committee, the FinTech panel was moderated by two Committee members—Co-Chair Enrique García and Vice-Chair of Programs Andrés Nieto. Five world-class specialists offered various perspectives, including that of regulators, external and in-house counsel and industry experts. They discussed current issues, driving forces, and key players within the ever-changing world of FinTech, including as the technology is deployed across borders and into new jurisdictions. This provided attendees with forward-thinking knowledge and insight into how to best manage technological development, compliance, and customer satisfaction.

And of course, as always, networking and receptions at the meeting in Washington DC were exceptional, having the opportunity to share with friends and colleagues from around the world, especially after the COVID19 pandemic.



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## VACCINATION STATUS AND PRIVACY

*Espinosa Aranda, Bernardo; Palazuelos Domínguez, Elvia; Soto Antón, Regina*

The Global COVID-19 pandemic brought an unforeseen digital revolution to the workplace. The Mexican legal system, including courts and regulators, have faced an unprecedented need (and now apparent preference) for digital solutions. As a result, questions have arisen in new situations—like virtual terminations and e-signatures on union contracts—such that all facets of employment law are confronting a steady readaptation to this new digital era. This article focuses on workplace vaccination requirements in this new age, with an eye towards compliance with Mexican data privacy law.

### Background on Mexican Data Privacy

The foundations of Mexican data privacy are laid out in the Federal Law for the Protection of Personal Data in Possession of Private Parties (*Ley Federal de Protección de Datos Personales en Posesión de Particulares*) and its supplementary regulations. These laws divide personal data into three main categories: general, financial and sensitive. Each information collector—defined as any natural or legal persona that processes personal data—owes a certain level of protection to the data owner. The required level of protection depends on its category, as do fines for violation of these requirements. For example, when collecting general data (e.g., name, contact information, CV, etc.), the collector must provide a privacy notice to the data owner, with information on how the data is going to be used and disposed. The data owner does not need to expressly accept these terms. By contrast, subject to certain exceptions (like in medical emergencies), to collect and use financial or sensitive data<sup>1</sup>, the collector must obtain the data owner's express prior consent to the privacy notice.

Mexican data privacy regulations also make clear that data collection cannot take place unless there is a specific purpose for doing so (*i.e.*, marketing, furthering a business relationship, analyzing financial capabilities, accessing medical care, among many others).

### Vaccination Status as Personal Data and Challenges to Employers

Mexican law does not explicitly provide for whether employer collection of COVID19 vaccination status is a valid purpose. Some assert that this information is necessary to make workplaces as safe as possible. However, even if validly collected, vaccine status likely falls into the sensitive data category (as it is comparable to a medical record).

Mexico has not issued any laws that require vaccination against COVID19. Therefore, because every individual is free to decide whether to receive the vaccine, employers may not discriminate against unvaccinated employees—whether in relation to labor conditions, growth opportunities, hirings or firings. Employers may, however, use vaccination status to organize working schedules, determine home-office schemes, and otherwise foster safe working spaces. Any other disparate treatment that affects an employee's salary, benefits, or professional growth could be considered discrimination, and therefore a violation of Mexican labor regulations.

### Tips for Companies with Employees in Mexico

Even in the face of these legal risks, there is an undeniable need for companies to prevent the spread of COVID19, which resultingly requires them to understand the vaccination status of their workforce. Therefore, companies should consider the following in their collection and treatment of sensitive vaccination status data:

*1. Treatment:* Treatment of all personal data must comply with the following key principles, among others:

- Data must be used in accordance with the terms of the privacy notice (as mentioned above and discussed in more detail below);
- Data must be kept confidential, in the context of both external and internal disclosures<sup>2</sup>
- Data must not be transferred, unless to companies within the same corporate group or if indicated in the privacy notice; and
- Data may be accessed, eliminated, cancelled, or its use challenged, at the data owner's request, and must be disposed when no longer in use.

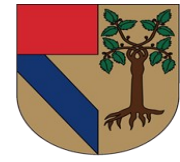
<sup>2</sup> Internal disclosures could include granting access to people (even other employees) who do not strictly need the information to carry out their functions.

<sup>1</sup> Financial and sensitive data are those that relate to the most intimate sphere of the data owner, such that their improper use might result in discrimination or present a risk to the owner's integrity. Specific examples of these data could be the following: racial or ethnic origin, present and future health status, genetic information, religious, philosophical, and moral beliefs, union membership, political opinions, and sexual preference.





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## 2. Privacy Notice.

- The collection of sensitive data (like vaccination status) must be accompanied by a privacy notice. Privacy notices must indicate, in general terms, the following: what information is being collected, why the information is being collected, how the information is being processed, when the information will be eliminated, where the information will be stored, and who will have access to the information. Unlike privacy notices for general data, before collecting sensitive data, the data owner must provide express consent to the privacy notice.
- Of course, because there is no law requiring the vaccine, individuals may refuse to disclose their vaccination status to their employers. Employers may not discriminate against or impose distinct treatment on those who refuse to provide this information.

## 3. Other Workplace Measures

- If a vaccine information is obtained, companies in Mexico must take precise and strategic actions to avoid labor shortages and health emergencies. In addition to rules imposed by the government (i.e. maximum workers per square meter and the required use of a facemask), companies may require temperature controls, periodic COVID19 testing (if covered by the company), the placement of hand sanitizers throughout the workplace, special employee insurance policies, and in some cases reorganizing work schedules to reduce risk exposure.
- However, importantly, all actions that company takes must apply equally to all employees—and never targeted specifically against unvaccinated employees.

## **Conclusion**

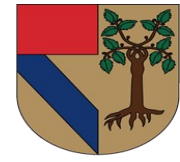
Although the landscape may seem unclear for now, COVID19 has accelerated many legal processes and procedures in Mexico—including analysis of vaccination status under domestic data protection laws.

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## ORGANIZATION OF AMERICAN STATES: A TOUR OF THE AMERICAS FROM D.C.

*Quigley, Kelsey*

On Tuesday, April 26, during its Annual Conference, the American Bar Association Section of International Law hosted an event at the Organization of American States (OAS). The OAS is the world's oldest regional organization, with roots dating back to the late nineteenth century, that today serves to achieve "an order of peace and justice, to promote [member stat's] solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence"<sup>1</sup> Today, the OAS is headquartered in Washington, DC, with several offices just steps from the White House.

The event was held at the OAS's General Secretariat Building, at the corner of 19th Street and F street. The Section owes special thanks to Rule of Law Chair Max Trujillo for his leadership in imagining and creating the special event— which featured new insights for those completely unfamiliar with the OAS, for those who appear before the OAS, and even for those already working within the OAS! To further share this insight, and in the interest of cross-border rule of law in the Americas, I write with two brief highlights from the event: the Inter-American Commission on Human Rights and the Inter-American Commission on Women.

### Inter-American Commission on Human Rights

Before the event, I knew a fair amount of the Commission. WilmerHale has an active practice before the Inter-American Commission of Human Rights (the Commission). Most recently, this practice has included representation of environmental defender— and former Secretary of the Environment and Sustainable Development— Romina Picolotti (For those interested, the case has been featured on WilmerHale's podcast, *In the Public Interest*, [here](#)).

### Responsibilities

The Commission is a quasi-judicial organ of the OAS, which aims to promote and protect human rights in the Americas. The Commission is made up of seven independent members (Commissioners). Interestingly, the Commission currently has four Commissioners who are women; only 17 women have been Commissioners in the organ's history— meaning that nearly one-fourth of all women Commissioners are actively serving!

The Commission has three pillars of responsibility: (1) monitoring human rights situations in member states (e.g., publishing country reports, etc.); (2) focusing on specific human rights themes (e.g., protecting the environment, preventing violence against journalists, ensuring human rights of detained persons, etc.); and (3) deciding on petitions of individuals who seek the protection of the Commission in the face of alleged human rights violations (e.g., the case of Romina Picolotti against Argentina)— with the ability to refer petitions to the OAS's judicial body, the Inter-American Court of Human Rights.<sup>2</sup>



### Priority: Addressing Petition Backlog

Perhaps unsurprisingly, given this broad mandate, the Commission often finds itself under-resourced. And yet, the Commission's lawyers and experts press on. For example, the Commission currently has an impressive backlog of individual petitions: during 2020 alone, the Commission received 2,448 petitions alleging violations of human rights by member states.<sup>3</sup> It was therefore quite welcome when Mario Lopez, a senior adviser at the Commission, announced at the event that the Commission is keenly focused on clearing this backlog as quickly as possible. How this will be done remains to be seen— especially as governments in the Americas only appear to be intensifying threats to rule of law and human rights.

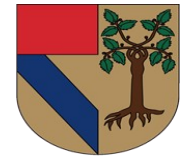
<sup>3</sup> Inter-American Commission on Human Rights, *Statistics by Country*, <https://www.oas.org/en/iachr/multimedia/statistics/statistics.htm>

<sup>1</sup> Organization of American States, *Who We Are*, [https://www.oas.org/en/about/who\\_we\\_are.asp](https://www.oas.org/en/about/who_we_are.asp).

<sup>2</sup> Inter-American Commission on Human Rights, *What is the IACHR?* <https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/mandate/what.asp>.



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But the Commission is at a key inflection point, as it is currently accepting comments to its 2022-2026 Strategic Plan.<sup>4</sup>

## Priority Universalization

Universalization is another key priority of the Commission, which will likely continue under the new Strategic Plan. Universalization refers to all OAS member states ratifying OAS treaties, so that the protections are universal across OAS member states.

One example of the importance of universalization may be especially salient for the Mexico Committee. Mexico has ratified the American Convention on Human Rights (American Convention); the United States has not. Therefore, OAS protection differ—even between San Diego and Tijuana, separated by just a few hundred feet.

Say, for example, a man is Tased to death by police, even though he is unarmed, has not committed a crime, and begs for mercy. (This example is based on the case of Anastasio Hernandez-Rojas, an unarmed migrant who was killed by US border police in May 2010, more information is available [here](#)).

If this death occurred in Mexico, the family members of the deceased could bring an individual petition against Mexico. If successful, this case would ultimately be heard before the Inter American Court on Human Rights (the Court).

This is because, by ratifying the American Convention, Mexico specifically recognized the jurisdiction of the Court. And as compared to the Commission, the Court had additional judgment and enforcement mechanisms against member states—like Mexico.

However, because this case actually occurred in the United States, at the hands of US border agents, it will never be heard by the Court. The United States has never ratified the American Convention and has never submitted to the jurisdiction of the Court.<sup>5</sup> Nonetheless, the United States does answer individual petitions before the Commission, as it has done in this ongoing case.

## **Inter-American Commission on Women**

During the event, I also learned about a new Commission: the Inter-American Commission on Women (CIM for *Comision Inter-Americana de Mujeres*).

The CIM was founded in 1928, as the world's first inter-governmental agency established to ensure recognition of women's human rights.<sup>6</sup>

Senior Gender Specialist, Hilary Anderson, joined the event as a representative from the CIM. She explained that the CIM is a body within the OAS that focuses on gender equality and women's rights. The CIM is comprised of one "principle delegate" from each member state, usually the highest-level authority responsible for gender equality and women's issues in the given country. (The only country that does not have equivalent of a Minister for Women: the United States; instead, the United States' representative is Jessica Marcella, Deputy Assistant Secretary for Population Affairs.)<sup>7</sup>

The CIM's operations include working through human rights legal instruments—like the American Convention, mentioned above—and through Strategic Plans announced in conjunction with the OAS. However, Anderson was careful to mention that the CIM does not envision its mission through the lens of one type of woman, instead using gender as one of many intersectional identities.

Using this intersectional approach, the CIM has had several recent successes—for women from across identities. For example, the CIM has drafted and published a Model Law on Preventing Violence Against Women in Politics<sup>8</sup>, which has been incorporated into the national law of Argentina, for example<sup>9</sup>. In addition, the CIM has published a Model Law in Caregiving<sup>10</sup>, which will likely prove quite relevant as countries consider how to value and protect caregiving—traditionally a space dominated by women—amidst the COVID19 pandemic.

<sup>6</sup> ORGANIZATION OF AMERICAN STATES, *CIM Mission and Mandate*, <https://www.oas.org/en/cim/members.asp#:~:text=The%20Inter%2DAmerican%20Commission%20of,equality%20and%20women's%20rights%20issues>.

<sup>7</sup> ORGANIZATION OF AMERICAN STATES, *Inter-American Commission of Women*, <https://www.oas.org/en/cim/members.asp#:~:text=The%20Inter%2DAmerican%20Commission%20of,equality%20and%20women's%20rights%20issues..>

<sup>8</sup> ORGANIZATION OF AMERICAN STATES, *Inter-American Model Law On the Prevention, Punishment and Eradication of Violence Against Women in Political Life*, <https://www.oas.org/en/mesecvi/docs/LeyModeloViolenciaPolitica-EN.pdf>.

<sup>9</sup> LIBRARY OF CONGRESS, *Argentina: Law on Protection of Women Amended to Include Provisions on Political Violence* (Feb. 26, 2020), <https://www.loc.gov/item/global-legal-monitor/2020-02-26/argentina-law-on-protection-of-women-amended-to-include-provisions-on-political-violence/>.

<sup>10</sup> ORGANIZATION OF AMERICAN STATES, *Ley Modelo Interamericana de Cuidados*, <https://www.oas.org/es/cim/docs/LeyModeloCuidados-ES.pdf>.

<sup>4</sup> Inter-American Commission on Human Rights, *Strategic Plan*, <https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/mandate/strategicplan/2022/default.asp>.

<sup>5</sup> Nor does the United States seem poised to ratify the American Convention. Treaty ratification would require a currently unattainable vote in the US Senate. In addition, member states wishing to ratify the American Convention must freeze the application of the death penalty on the date of ratification, an additional political flashpoint in the United States.





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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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