MEXICO UPDATE

ABA • SECTION OF INTERNATIONAL LAW • MEXICO COMMITTEE

Message from the Co-Chairs

The Mexico Committee proudly presents another edition of the Mexico Update. This edition features fantastic articles from members, including leaders on the Mexico Committee, along with new and emerging leaders in cross-border law. And this edition also highlights the July 2023 Rule of Law letter from ABA President Deborah Enix-Ross to President Andrés Manuel López Obrador, which urged Pres. López Obrador to cease his administration's harassment of the independent judiciary, defend democracy, and uphold the rule of law in Mexico. The Mexico Committee played a central role in this effort to underscore the ABA's concern, and we are pleased that the letter has been met with acclaim among lawyers and media outlets in Mexico.

The Mexico Committee is also especially thrilled that this edition documents the important (and fun!) flurry of in-person seminars, conferences, and meetings that our members have spearheaded in recent months. These included in-person meetings uniting the Mexico Committee and the Mexican bar associations, seminars on critical cross-border issues, and conferences connecting old friends and new friends. Thanks, all, for the work on this Mexico Update and the rule of law letter, and for all of these wonderful experiences—here's to more editions, impact, and memories!

Message from the Editors

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

— Karla Ruíz, Nicole Castillo, Eduardo González, editors

Issue 63
September 2023

Nearshoring and Friend-Shoring Panel.	3
What Skills and Competencies will Legal Education Deliver to the Legal Market in the Era of AI.	4-5
The Relaunching of the Mexico City International City Chapter of the International Law Section ("ILS") of the American Bar Association ("ABA").	6
Strengthening Bilateral Ties: Mexican Legal Leadership makes an Impact at the ABA International Law Section Annual Meeting with Panel Entitled "LEGAL PRACTICE, RULE OF LAW, AND CIVILITY—WHAT CAN LAWYERS DO?"	7
The Mexican Advantage.	8
Mexico's Supreme Court Rules on Patent Compensatory time due to Administrative Delays, and Holds that the Effective term of a Patent may not be less than seventeen years– Part II.	9-10
Summary about the Rule of Law	11
ABA Law Section International Annual Conference.	12-13

MEXICO UPDATE

About the Mexico Committee

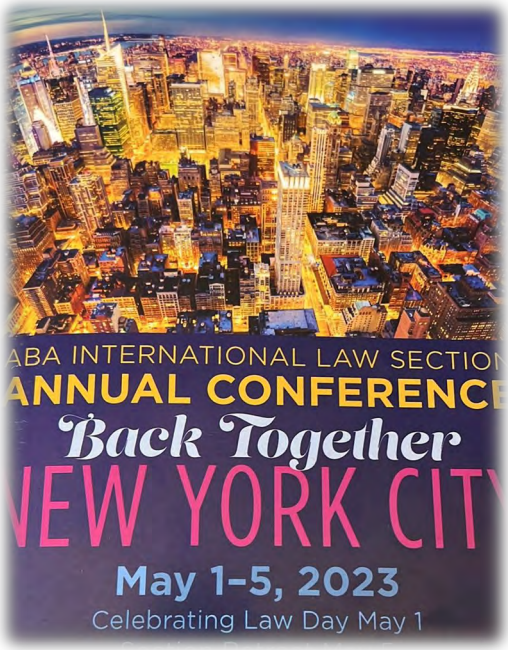
Anchored by coordinators in cities in Mexico and the United States, the Mexico Committee has a diverse membership through attraction, rather than promotion. Among the committee's signature activities are: active sponsorship of programs on legal developments in Mexico, the U.S. and other jurisdictions.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

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

Do you know?

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

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



Mexico Committee Leadership 2023-2024

Co-Chairs:
Díaz Gavito, Eduardo
Quigley, Kelsey

Vice-Chairs:
Staines, Alejandro
Glick, Les
Schlossberg, Betina
Gutierrez, Patricio
Flores Campbell, Natalie
Castillo, Nicole
González, Eduardo
Ruiz, Karla

Steering Group Members:
Perez-Delgado, Luis
Burns, Susan
Alva, Rene
Velazquez-de-Leon, Carlos
Rosen, Ben
Velarde, Ernesto
Juarez, Melina
Piana, Mario

Newsletter Committe members:
Ruiz, Karla
Castillo, Nicole
González, Eduardo

MEXICO UPDATE

NEARSHORING AND FRIEND-SHORING PANEL

Díaz Gavito, Eduardo

On April 21, 2023, Mexico Committee co-chairs John Walsh and Eduardo Díaz Gavito participated in a panel on nearshoring during a trinational seminar organized by ANADE in Mexico City. The panel discussion aimed to analyze the concepts of nearshoring and friend-shoring as they are understood in Canada, the United States, and Mexico. The panel was formed by Jessica Horwitz from Canada, Suzanne Kane from the United States, and Eduardo Diaz Gavito from Mexico, under the moderation of John Walsh. Each panelist presented their views on the concept of nearshoring and made recommendations to the audience on how entities interested in relocating their operations to North America should take into consideration from a legal standpoint. This rich discussion allowed the audience of approximately 50 lawyers to have a clear understanding of this very recent phenomenon and some tools to assist their clients with their relocation projects. We would like to thank ANADE and its president, Ms. Nuhad Ponce, for her invitation to participate in this panel.

MEXICO UPDATE

WHAT SKILLS AND COMPETENCIES WILL LEGAL EDUCATION DELIVER TO THE LEGAL MAKET IN THE ERA OF AI?

Guillen, Denise — VP Legal and Integrity Leader for LATAM at NielsenIQ

On may 3, 2023, Eugenia Castrillon, Vice Dean of the IE Law School Madrid, moderated a panel of experts at the 2023 ILS Annual Conference comprised by Toni Jaegar-Fine, Senior Counselor Fordham University School of Law, Margarita Oliva Sainz de Aja, Partner at DLA Piper, and Denise Guillen Lara, Vice President and General Counsel of NielsenIQ for Latin America.

Invaluable sights were shared by the three panelists, each of whom offered different perspectives on the use of Artificial Intelligence. A special focus was placed on the skills and competencies that AI will contribute to the legal market as well as the impact and consequences of its use in the short, medium and long term.

As we all know, "AI systems work by ingesting large amounts of labeled training data, analyzing the data for correlations and patterns, and using these patterns to make predictions about future states. In this way, a chatbot that is fed examples of text can learn to generate lifelike exchanges with people, or an image recognition tool can learn to identify and describe objects in images by reviewing millions of examples. New, rapidly improving generative AI techniques can create realistic text, images, music and other media"[1]

AI programming focuses on four cognitive skills: "(i) Learning. This aspect of AI programming focuses on acquiring data and creating rules for how to turn it into actionable information. The rules, which are called *algorithms*, provide computing devices with step-by-step instructions for how to complete a specific task; (ii) Reasoning. This aspect of AI programming focuses on choosing the right algorithm to reach a desired outcome; (iii) Self-correction. This aspect of AI programming is designed to continually fine-tune algorithms and ensure they provide the most accurate result possible and; (iv) Creativity. This aspect of AI uses neural networks, rules-based systems, statistical methods and other AI techniques to generate new images, new text, new music and new ideas".[2]

The use of new technologies—including now AI systems—have been a concern within the legal profession for many years. In the case of AI, some speculate about whether the legal profession will disappear altogether. The event's panelists agreed that the legal profession will not disappear, but will transform and evolve. The panelists analyzed the pros and cons of utilizing AI in the legal field and concluded that this technology shot not be forbidden or banned.

However, AI should only supplement—not replace—existing frameworks and resources. The panelists also recognized the importance and value of the use of AI in repetitive tasks where humans add no value. Indeed, in certain situations using AI might improve quality and speed and decrease costs. This means that certain positions or activities will likely be replaced by AI. However, for more complex problem-solving, the panelists opined that AI will not replace lawyers.

AI is not yet equipped to handle all legal problem-solving. For example, AI might use inaccurate or outdated datasets to solve a problem— or not recognize its own biases or errors. As such, the panelists believe that the legal profession should use AI only as a supplementary tool or resource and emphasized that AI's input should not be considered as the "only truth" to solve a problem. Indeed, legal experts believe that "gone are the days when law education used to be all about rote learning and theoretical knowledge… Despite the high investment that technology demands, we need to embrace it and use it to our advantage by implementing the required legislations to safeguard the interests of the users".[3]

All of the panelists cautioned about the ethics in AI processes, agreeing that AI does not exercise "ethical behavior" because ethics are inherently human. Moreover, given that concepts such as "good" and "bad" have varying definitions in different countries, cultures and religions, AI will analyze any given dataset with different and conflicting points of view on that is "right". As such, any AI inputs, calculations and results may ultimately be biased and unethical. In addition, while lawyers consider context in their analyses, AI does not, not to mention the singularity, originality, uniqueness and individuality of given circumstances or background. AI cannot replace the contributions that lawyers make through these human traits.

[1] Ed Burns, *A Guide to Artificial Intelligence in the Enterprise,* TECHTARTGET (Mar.2023), https://www.techtarget.com/searchenterpriseai/definition/AI-Artificial-Intelligence.

[2] *Id.*

[3] Sukhyinder Singh Dari, *Impact of AI and Machine Learning on Legal Education,* EDUCATIONWORLD, https://www.educationworld.in/impact-of-ai-and-machine-learning-on-legal-education//

MEXICO UPDATE

None of the panelists believe that AI will cause the legal profession to disappear completely; however, they agree that repetitive legal tasks will be replaced by technology. As such, lawyers must identify those activities that are closely related to human traits that cannot be replaced by technology or AI. Some examples include empathy, caring for others, compassion, ethical standards, networking, strategic thinking, emotional intelligence, personal human interactions, warmth, human touch, judgment with context, wisdom gained from experience, deeper knowledge, personal engagement and motivation, thought leadership, innovation, futurist thought, personal connections with key players, integrity, diversity of gender, diversity of culture, diversity of thought, self-awareness, jokes, negotiation skills, business acumen, political acumen, and so many other human traits that only human lawyers possess. It is these traits that make human lawyers "hungry" to seek justice, make a difference, transcend adversity, change the lives of others, and succeed, all of which are not goals that technology and AI can pursue (for now). Lawyers should immediately start looking at the legal activities that involve human traits and start "redesigning" them as AI moves rapidly in the direction of eliminating unnecessary positions in the profession.

The panelists also invited lawyers to take advantage of AI and other technological tools to make tasks faster, more accurate, and cost effective. Some of examples include systems dedicated to document creation and automation, electronic signature, budget management, contract management, integrity and compliance trainings, record retention, e-discovery, due diligence related activities, background checks, legal research, litigation management, among others. The panelists shared insights from authors such as Professor Mari Sako, who co-led the research into the impact of AI on law firm business models. Professor Sako explained: "We're starting to see a clear division of expertise between lawyers who are involved in the development of AI lawtech as producers, and those who mainly use the technology as consumers. As more lawyers develop their technology-related skills, it will be interesting to see what impact these changes have on the wider legal profession. It is possible, that in future, lawyers with these skills stop regarding themselves as being traditional lawyers, and instead regard themselves as being part of an emerging profession of legal technologists.[4] Other experts in the field such as Bo Ma and Yuhuan Hou have added that__"[a]rtificial intelligence has brought new impetus for legal education from three dimensions: providing new technologies, establishing new models, and shaping new paradigms".[5]

As such, "legal education must also upgrade the concept of cultivating professionals, make full use of the support of big data, artificial intelligence, and other new technologies, clarify the goal of cultivating versatile professionals who 'have the ability of legal thinking + can use artificial intelligence technology', bolster the ranks of teachers who not only 'understand the technology' but also can 'foster a new generation of people with sound values and ethics'".[6]

Finally, the panelists shared an article by Dorie Clark and Tomas Chamorro– Premuzic in which the authors proposed that all legal professionals should be questioning how we can use these tools to improve ourselves and make our skills stand out.[7] Clark and Chamorro-Premuzic suggested five strategies we can use to generate "unique value", including investing time and energy into real-world relationships and developing recognized industry expertise.[8] Generating your "unique value" allows you to become "relevant" and involved in activities that are predictable and repeatable, and that only lawyers can complete because they involve human traits that cannot be replicated by tech tools. In order to reinforce your "unique value" in this post-pandemic world, consider avoiding virtual participations. Consider pursuing experiences that foster empathy, understanding, and personal connection—even with opponents. Matters are often solved because the lead counsel knew who to contact.

All of the thoughts shared by the panelists invited lawyers to redesign their "professional legal brand", position themselves as experts in the field, and recognize that the value they bring is original, unique and up to high quality and ethical standards. These human traits cannot be replicated by AI.

[4] John Armour & Mari Sako, *New Research Finds That AI Is Improving the Way the Legal Sector Operates,* UNIV. OXFORD (Dec. 9,2021), https//www.law.ox.ac.uk/news/New%20research%20finds%20that%20AI%20is%20improving%the%20way%20the%20legal%20sector%operates.

[5] Bo Ma & Yuhuan Hou, *Artificial Intelligence Empowers the Integrated Development of Legal Education: Challenges and Responses,* 16 FUTURE HUM. Image 43, 43, (2021).

[6] *Id.* At 43, 53-54.

[7] Dorie Clark & Thomas Chamorro-Prezumic, *5 Ways to Future-Proof Your Career in the Age of AI,* HARV. BUS. REV. (Apr 25, 2023), https://hnr.org/2023/04/5-ways-to-future-proof-your-career-in-the-age-of-ai.

[8] *Id.*

MEXICO UPDATE

THE RELAUNCHING OF THE MEXICO CITY INTERNATIONAL CITY CHAPTER OF THE INTERNATIONAL LAW SECTION ("ILS) OF THE AMERICAN BAR ASSOCIATION ("ABA").

García, Enrique & Nava, Laura

The Mexico Committee of the ILS of the ABA is very proud to have established contact at the beginning of 2022 with the three prestigious Mexican bars organizations, Barra Mexicana, Colegio de Abogados, A.C. ("BMA"); Asociación Nacional de Abogados de Empresa, Colegio de Abogados, A.C. ("ANADE"); Ilustre y Nacional Colegio de Abogados de México ("INCAM"); and the Consejo General de la Abogacía Mexicana ("CGAM") to discuss the relaunching of the Mexico City International City Chapter of the International Law Section of the American Bar Association.

The efforts started with a virtual meeting on May 2, 2022. That kicked off a series of correspondence and calls that paved the way for the initial in-person meeting on August 30, 2022. At that fist in-person meeting, representatives from each organization described their current activities, their operations, and opportunities to collaborate to enhance rule of law, the legal practice, and other critical topics. The agenda also included the discussion of the ABA Rule of Law Initiative ("ROLI") for the Criminal and Labor Programs and these programs' accomplishments. Furthermore, the attendees discussed the history behind prior collaboration efforts and the need to reactivate the Mexico City International City Chapter that was originally approved by the ABA ILS in July 21, 2011. The first meeting was very well attended and successful, allowing all participants and organizations to be actively involved and knowledgeable of the goals set forth going forward.

Thereafter, the representatives continued to collaborate. The representatives started to hold periodic in-person and online meetings geared towards organizing the relaunching of the Mexico City International City Chapter and related activities.

The efforts culminated on February 28,2023, when the General Annual Meeting of the ABA ILS Charter of the Mexico City International chapter was held. The meeting took place at the Mexico City– Club de Industriales, Meeting Room "Jose Carral" in the Marriot Hotel Polanco. The attendees included representatives from the following bars: ABA, ANADE, BMA, CGAM, and INCAM. The meeting included a video presentation with a message from Marcos Rios, the current President of the ILS. Mr. Rios' message congratulated the efforts and encouraged the accomplishments of the organizations. Gerardo Nieto, President of the CGAM also expressed his thoughts and recognized all the time and energy devoted to this relaunching.

The meeting also approved the appointment of the member of the High Counsel, the Chairs, and Vice Chairs of the Mexico City International City Chapter. The members include the following for each of the bars present at the meeting; for the BMA: Victor Olea, Ana Maria Kudisch, Diego Sierra, Jorge Sepulveda and Jorge Ojeda; for the ANADE: Nuhad Ponce Kuri, Jose Angle Santiago Abrego, Jose Juan Mendez Cortes, Shadia Ponce Kuri, and Manuel Sainz Orantes; for the INCAM: Arturo Pueblita, Isabel Davara, Christian Zinser, Carlos Ferran, and Denise Guillen; for the CGAM Gerardo Nieto and Alfonso Perez Cuellar, for the ABA ILS Mexico Committee: Laura Nava, Enrique Garcia, Andres Nieto, Eduardo Diaz Gavito, John Walsh, Natalie Flores, Melina Juarez, Ana Velazquez, Juan Manuel Olvera, Carlos Mena Labarthe, and Emilio Aarun.

Finally, a report was presented regarding the ABA ROLI Mexico initiatives, including i) the initiative in criminal litigation and mediation for law students and ii) the legal reform fund ("LRF"). The former initiative aims to enhance the ability of Mexican law students to operate in the Mexican criminal justice system through increased capacity at Mexican law schools to train students in oral litigation and alternative resolution mechanisms, improving teaching techniques for the adversarial system, and seeking opportunities as public servants in the criminal justice system. The latter initiative is aimed at addressing the obstacles that prevent the full and effective participation of women in the economic sphere. The LRF approaches women's economic empowerment in an intersectional manner, linking other impediments with gender equality and closing gaps in national legal frameworks through policy and regulatory reforms as well as through the support of the implementation of the jure systems so that they are translated into de facto experiences. In Mexico, the program focuses on two thematic areas: removing barriers to employment and access to credit.

Finally, the members discussed the breakfast event that took place at the ABA International Law Section's Annual Conference in New York City on Thursday, May 4.

Thereafter, the meeting was adjourned and the minutes executed by the member present.

The first annual meeting was very successful and the members are committed to insuring that the Mexico City International City Chapter continues to work consistently ensure the goals of the organization are reached.

MEXICO UPDATE

STRENGTHENING BILATERAL TIES: MEXICAN LEGAL LEADERSHIP MAKES AN IMPACT AT THE ABA INTERNATIONAL LAW SECTION ANNUAL MEETING WITH PANEL ENTITLED "LEGAL PRACTICE, RULE OF LAW, AND CIVILITY—WHAT CAN LAWYERS DO?"

García, Enrique

In early May, the American Bar Association International Law Section ("ABA ILS") held its Annual Meeting in New York City. The conference drew a remarkable group of legal professionals from various countries, including Mexico. Leaders from the various Mexican bar associations attended, showcasing the Mexican legal profession's breadth of experience and dedication at the highest level. Representatives from (1) the Consejo General de la Abogacía Mexicana ("CGAM"), (2) the Asociación Nacional de Abogados de Empresa, Colegio de Abogados, A.C. ("ANADE"), (3) the Barra Mexicana, Colegio de Abogados A.C., and (4) the Ilustre y Nacional Colegio de Abogados de México, A.C. were all in attendance.

First and foremost, we would like to express our sincerest gratitude to Gerardo Nieto, Nuhad Ponce, Arturo Pueblita Fernández, Ana Maria Kudisch Castello, Diego Sierra, Gustavo Santillana, Denise Guillen Lara, Shadia Ponce Kuri, and all of the other members of the Mexico City— International City Chapter who dedicated their time, efforts, and skills to planning and attending the ABA ILS Annual Meeting. Their participation exemplified the spirit of collaboration and knowledge sharing between the ABA and the Mexican Bars.

The Mexico City—International City Chapter sponsored a panel discussion entitled "Legal Practice, Rule of Law, and Civility—What can Lawyers Do?" The panel proved to be a thought-provoking session, enriched by the diversity of perspectives and insights shared by Mrs. Deborah Enix-Ross, President of the American Bar Association ("ABA"), Mr. Gerardo Nieto, President of the CGAM, and Mrs. Ana Buitrago, Member, General Council of the Ilustre Colegio de Abogacía de Madrid ("ICAM"). The panel was moderated by Mrs. Nuhad Ponce Kuri, President of ANADE. We would also like to recognize ABA ILS Section chair Marco Ríos Larrain for hosting this remarkable event. By providing a platform for bar leaders from the United States, Mexico, and Spain to come together, the ABA demonstrated its commitment to fostering meaningful connections and promoting dialogue across borders.

As a co-chair of the Mexico City– International City Chapter and senior advisor of the Mexico Committee, I am confident that these discussions will significantly contribute to strengthening the relationship between the ABA and Mexican Bars by addressing critical issues in Mexico such as the Rule of Law and Judicial Independence, and the meeting has paved the way for future collaboration and cooperation.

A heartfelt thank you also goes out to all the members of the Mexico Committee for their exceptional organization and coordination of the highly successful panel "Legal Practice, Rule of Law, and Civility—What can Lawyers Do?". Their dedication and hard work were vital to the panel's success, and created an impactful platform for insightful discussions.

The Mexico Committee's invaluable contributions to the ABA ILS Annual Meeting underscore its role as a driving force in promoting legal excellence and as a platform for advocating for important issues in Mexico and the U.S. The Committee´s efforts have undoubtedly enhanced the understanding and collaboration between legal professionals from both countries.

As always, the ABA International Law Section Annual Meeting provided a unique chance for the attendees to reconnect with old friends and forge new relationships. The bonds created within the legal profession are invaluable, and events like this serve as a meeting ground for legal professionals to share their experience and discover new ways to collaborate with one another. Lastly, the conference's networking opportunities provide an avenue for fostering meaningful connections and lasting friendships among legal practitioners.

MEXICO UPDATE

THE MEXICAN ADVANTAGE

Schlossberg, Betina

When speaking U.S. immigration, the first thought that comes to mind is that being born in Mexico is a disadvantage. In the immigrant categories, both through family and through employment, Mexican born applicants suffer long periods waiting for their priority dates to be current in order to be able to file for their "green card" applications.

Such disadvantage reverts to an advantage when discussing non-immigrant status, in particular professionals. Mexico is on of the largest suppliers of engineers to the United States, who are now in high demand. The traditional approach to employing foreign professionals in the U.S. is for the American employer ("Petitioner") to petition U.S. Citizenship and Immigration Services ("USCIS") for a *"specialty occupation*" classification for the prospective employee ("Beneficiary"). The employee then applies for a visa at a U.S. Consulate abroad, if necessary. This is commonly referred as the *H-1B classification.*

The H-1B classification was created for professionals in specialty occupations. According to INA § 214(i)(1) a *"specialty occupation"* is defined as an occupation that requires "*theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States".*

H-1Bs are highly regulated. The Immigration Act of 1990 sets a maximum of 85,000 new H-1B "visas" each year, which is referred to as the "quota". 65,00 of these are to be assigned to individuals with Bachelor's degrees, while the remaining 20,000 are reserved for those who have obtained their Master's degrees in the U.S. Every year in April, there is a registration period for prospective Beneficiaries to participate in a lottery in which USCIS selects enough registrations to cover the quota for the following fiscal year. That the availability for theses "visas" is too low for the market's demands is clear. For fiscal year 2023 (April 2022), USCIS received over 483,000 registrations for the 85,000 quota. For fiscal year 2024, the situation worsened as the April 2023 registration period saw over 780,000 registrations. In short, only about one in ten registrations authorized the employer to file an H-1B petition for a foreign professional employee. Those few who get selected, if approved, get a 3-year authorized stay, renewable up to a maximum of 6 years.

Here is where Mexicans have advantages. The United States—Mexico—Canada Agreement ("USMCA", formerly NAFTA) allows for easy movement of certain professionals within the three party countries—with conditions, of course. The corresponding classification is commonly known as *TN.* 8 C.F.R. § 214.6 codifies the classification and Appendix 1603.D.1 to Annex 1603 of the NAFTA lists the professions and requirements for each. Professions are divided into Business, Medical, Scientific, and Teaching occupations. Not all professions are listed, still, the USMCA benefits most Mexican professionals.

Although for Mexicans getting a TN "visa" or classification[1] is more cumbersome than for Canadians, who can request the classification at the border, TNs are still far easier to obtain and cheaper to process than H-1Bs. In addition, TNs can be renewed for as long as the individual has employment in the United States. One Caveat is that the TN allows for employment with a specific employer (Petitioner), therefore a new TN is required for a change of employer or concurrent employment different from that with the original Petitioner.

There are two processing alternatives for Mexicans seeking to obtain TNs. If abroad, a Mexican citizen must present a visa application an corresponding documentation at a U.S. consulate –preferably in Mexico– in order to obtain the visa stamp that will allow for admission and employment upon entering the United States. If the individual is already present in the United States either under a TN or another non-immigrant classification, a new or extended TN can be filed with USCIS to extend the stay. In this case, a paper visa will still be necessary for reentry after departure.

In both cases, the Petitioner, in addition to the pertinent forms, needs to present a letter explaining the need and the nature of duties the Mexican national will carry out in the United States, together with proof of its operations and taxes and/or other financials to prove its ability to pay the Beneficiary's wages for the entirety of the authorized stay. In addition, the Beneficiary will need to present proof of his/her degree and professional license (*cédula professional*), resume and other proof of experience and education, or other documentation required for the particular profession as listed on Appendix C.

As mentioned above, the classification has some limitations: Not all professions are covered; spouses are not eligible for employment authorization; and after many renewing periods, Customs & Border Patrol ("CBP") may start questioning the "non-immigrant intent" of the visa holder. Also worth considering is the fact that, while the Beneficiary's children are under 21 years of age, they cannot work and are considered "out of state" for college tuition; and once they turn 21, they need their own visas.

Finally, I want to dispel the myth that the re is no path to Legal Permanent Residence status ("a green card") for TN-holders. There is, there are just some issues to consider before starting the process.

As with every aspect of immigration law, the devil is in the details. Each Petitioner is different and so is every Beneficiary; therefore, an immigration lawyer is an essential partner to help foresee issues and minimize risks. Keep his/her card handy.

[1] I refer to "visas" as the "paper stamp" on a foreign national's passport at a U.S. Consulate—required for entry. I refer to "classification" when the foreign national gets an I-94 (through Extension of Stay or Change of Status) in the United States.

MEXICO UPDATE

MEXICO´S SUPREME COURT RULES ON PATENT COMPENSATORY TIME DUE TO ADMINISTRATIVE DELAYS, AND HOLDS THAT THE EFFECTIVE TERM OF A PATENT MAY NOT BE LESS THAN SEVENTEEN YEARS– PART II

Athié-Cervantes Adolfo

For a long time, it was common practice to assume that a patent would be valid for 20 years from the filing date of the patent application ("20-year filing date rule"). Although some Mexican statutes that govern this issue include the 20-year filing date rule, no one seems to have ever questioned whether this rule was fair or in compliance with the federal Constitution. Instead, it was generally accepted that if a regulation included the 20-year filing date rule, then compliance with the law was unequivocally required. But it is right to accept this unfair rule as normal? Can it be legally challenged? We argue that not everything provided for by a statute is necessarily constitutional. When a rule appears to conflict with common sense, there may be an unconstitutionality issue to contend with.

In the past, it was common for the effective term of a patent to differ from one patent to another based on how much time an examiner required to study the application. Because a patent could be granted at any time after the filing—ranging from two to seventeen years, or sometimes even more—there were some cases where the patentee would enjoy only a single year of protection. Or, even more extreme, the patent would be born dead—an illogical, unfair, unpredictable, and this unconstitutional result. Contrary to this system's supports, a pending patent application is not the same as a patent that has already been granted. For example, a pending patent application is not entitled to take legal action against an infringer or to benefit from no-bid governmental contracts for the supply of pharmaceutical drugs.

Recognizing this problem, the Second Chamber of Mexico's Supreme Court sought a legal solution based on a new interpretation of the law. The Court moved away from the unconstitutionality issue of Article 23 of Industrial Property Law ("IPL") and found a way to overturn the unfair patent validity system by interpreting other sources of law, like NAFTA and an internal agreement of the Mexican Patent Office. In doing so, the Court established a historic and transcendental new theory that removed extensions for the effective term of a patent, establishing the principle that compensatory time is not to extend the validity of the patent , but rather to give to the patentee a period of effective protection.

Furthermore, Article 126 of Federal Law for the Protection of Industrial Property ("FLPIP") introduced a so called "supplementary certificate" ("*certificado complementario*") pursuant to the November 30, 2018 United States, Mexico and Canada Agreement ("USMCA"). The supplementary certificate provides compensatory time to offset delays of more than five years between the filing date in Mexico and the granting of the patent has been granted. However, the following ambiguities arise: what qualifies as a "notification" under the FLPIP? Is it a notice attaching the patent certificate or a notice to pay the required fee for the issuance of the certificate? Moreover, the new statute contains an unfair formula that compensates the patentee with only one extra day for every two days of delay.

The Bayer Case

On January 12, 2000, Bayer Corporation (later Bayer Healthcare LLC) applied for an oncological substance invention patent via the international Patent Cooperation Treaty application ("PCT application"). The patent, "Ω-Carboxyaryl Substitutes Diphenyl Ureas as Raf Kinase Inhibitors," was granted on July 26, 2006.

The Mexican Institute of Industrial Property ("IMPI" for Spanish acronym) took six years and six months to grant the patent, and an additional eight months to provide the invention certificate under patent number 238942. It should be noted that both in Mexico and internationally, the average time to grant a patent is three yeas; however, in this case, IMPI took twice as long. Thus, the validity of the patent was cut short three years and six months.

Article 1709 (12) of the North American Free Trade Agreement ("NAFTA"), to which Mexico was a party, recognized this type of delay was possible and allowed for the patentee to obtain compensatory time to reclaim time taken in the patent approval process, effectively protecting the patentee. Both of our trading partners, the United States and Canada, have a much more suitable patent protection system than Mexico. In Canada, patents are protected for 17 years from the date that the patent is granted, providing legal certainty to patent holder. In the United States, like Mexico, the protective period last 20 years from the filing of the patent application, but differs from the Mexican system by adding compensatory time for the red tape delays to cover time lost due to the administrative process. Unfortunately, in Mexico we are faced with an unfavorable system prone to legal uncertainty because the patentee neither knows how long it will take for the patent to be granted by IMPI nor whether the time the protection sought will be effective. This situation places Mexico at a disadvantage in patent rights when compared to its trading partners.

As mentioned above, Article 126 of FLPIP now regulates the issuance of a limited and unfair supplementary certificate, arbitrarily providing for compensatory time to offset time lost in the patent process. But what is the logic behind the rule that a patentee may receive one day of compensatory time for every two days of delay? Would it not have been better to provide one day of compensatory time for every day of delay? When a statutory rule does not have a rational logic, it is likely to be considered unfair.

Bayer should have been entitled to three years and six months of additional exclusive exploitation of its patent based on the benefits contemplated under NAFTA and applicable federal laws (including Article 1 of Mexico's federal Constitution and IPL). Patent protection is a civil right that should be given the broadest interpretation for the benefit of private parties. However, in Bayer's case, the government improperly interpreted the rule to the detriment of the patentee and refused to grant compensatory time for the validity of the patent, without analyzing the benefits provided by NAFTA, which is an international treaty that hierarchically outranks IP law.

Under NAFTA, member countries are required to establish a protection period of at least seventeen years from the granting of the patent or, alternatively, twenty years from the filing application date. When the NAFTA parties negotiated and agreed on this wording, they intended to establish a protection period of not less than seventeen years. The NAFTA parties were aware that the study and administrative process of an application normally takes three years before the patent is finally granted, thus providing roughly seventeen years of protection to patents filed in jurisdictions that start the clock on the filing application date. Furthermore, the NAFTA parties recognized that there may be situations that require additional time to grant a patent and, in those cases, compensatory time could be used to offset the excess time.

MEXICO UPDATE

It is unfair and unreasonable that some patentees are granted an exclusive right to exploit the patent for seventeen years, whereas others are granted only fourteen years or less, based solely on administrative and red tape issues. The effective term of a patent is of paramount importance to the patentee because inventions require expensive research and development. The exclusive protection bestowed by a patent is a right recognized under both international treaties and by Article 28 of the federal Constitution. It follows that the ideal protection should be seventeen years, after subtracting the customary three-year processing time by the respective Patent Office.

Analysis of the Court's Opinion.

On October 14, 2020, the Second Chamber of Mexico's Supreme Court, on the amparo action under review 257/2020 and based on the draft opinion authored by Justice Yeasmín Esquivel-Mossa, adopted a systematic interpretation of Article 23 of IPL and Article 1709 (12) of NAFTA, and reaffirmed that **in all cases the effective term of a patent may not be less than seventeen years from the granting date of the patent.** On page 76 of the opinion, the following wording appears:

> *We find that, regardless of the [maximum] terms set under the Administrative Rulings [issued by IMPI], and as mentioned above, the* ***interpretation of Article 23 of the Industrial Property Law read in conjunction with the applicable provisions of Article 1709 (12) of the North American Free Trade Agreement, allows us to conclude that the effective term of patents cannot be less than*** *either twenty years from the filing date or* ***seventeen [years] if the granting date is considered*** *(emphasis added); consequently, if it is proven that there was a delay in the administrative approval process, the protection must be extended in order to offset such delay, thereby preserving the effective term of the patent which, we insist, cannot be less than seventeen years. […]"*

The Second Chamber of Mexico's Supreme Court opted for a new, systematic interpretation of the legal provisions under review, instead of either (i) directly holding that Article 23 of IPL was unconstitutional for failing to provide a uniform effective term for all patents or (ii) applying the notion of compensatory time contemplated by Article 1709 (12) of NAFTA. As a result of the legislature's failure to enact a statutory rule on a minimum term for the validity of all patents or a maximum term for a delay in the granting of a patent, the Supreme Court has now corrected the problem by interpreting the law to require seventeen years from the granting date for all patents.

This recent Supreme Court opinion is more favorable for patent holders than the provisions of the new FLPIP because it mandates a minimum effective term of seventeen years from the granting date, and does away with the preposterous rule of granting one day of compensatory time for every two days of delay. But the question remains: Why not provide one-day of compensatory time per one day of delay?

Court Opinion

On January 8, 2021, the Supreme Court published the following summary of Bayer:

Digital registration: 2022603

Court: Second Chamber

Tenth period

Subject(s): Administrative

Precedent: 2nd. LV/202 (10a.)

Source: Federal Weekly Judicial Gazette. Book 82, January 2021, Volume I, page 662

Type: Single Opinion

PATENTS. WHEN DELAYS IN THE APPROVAL PROCESS ARE ATTRIBUTABLE TO THE ADMINISTRATIVE AGENCY, THE EFFECTIVE TERM OF A PATENT MAY NOT BE LESS THAN SEVENTEEN YEARS FROM THE GRANTING DATE (SYSTEMATIC INTERPRETATION OF ARTICLE 23 OF THE NOW REPLACED INDUSTRIAL PROPERTY LAW). (…)

The *ratio decidendi* of this court opinion is that there are two systems: one of the twenty years from the filing application date, and the other of seventeen years from the patent granting date, with the proviso that in the event of any administrative delays, patents must have a minimum effective term of seventeen years from the granting date, and not twenty years from the filing patent application date.

The above interpretation directly impacts those patents that took more than three years to be granted. This Supreme Court opinion corrects the flawed patent system that for many years had prevailed in Mexico under Article 23 of IPL and prior statutes and that, unfortunately, have caused severe damage to those who sought an effective protection for their inventions, but were completely unaware of the unfair shortening of the effective term of patents due to unreasonable delays by the government. In our opinion, the interpretation embraced by the Supreme Court fully upholds the constant and perpetual desire to put into practice the principle of justice, without declaring that Article 23 of IPL was unconstitutional.

It is important to note that the recent opinion of the Supreme Court is only applicable to patent applications filed prior to July 1, 2020, while NAFTA was in effect. However, any patent applications filed between July 1 and November 4, 2020, before the new FLPIP came into effect, may fall into an interpretation limbo. On one hand, those patents are subject to UMSCA, but, on the other hand, the former IPL continued in full force and effect, which was the legal grounds taken by the Supreme Court to issue its opinion. It would be interesting to see how federal courts would react when deciding this time factor in a conflict of laws situation.

MEXICO UPDATE

SUMMARY ABOUT THE RULE OF LAW

On July 25, 2023, the President of the American Bar Association ("ABA"), Deborah Enix-Ross, addressed a letter to Mexican President Andrés Manuel López Obrador, urging him to uphold the rule of law and judicial independence in Mexico. The ABA specifically expressed concerns about the López Obrador Administration's comments against members of the federal judiciary who have criticized or ruled against the President's actions. As laid out in the letter, the Administration's comments, made during press conferences and in social media posts, have created a hostile environment that undermines fundamental democratic principles, such as the separation of powers and judicial independence. The ABA emphasized in the letter that maintaining Mexico's democratic tradition and safeguarding the rule of law relies on respecting the independence and legitimacy of the judiciary. The ABA also reminded President López Obrador that protecting judicial independence is enshrined in the Mexican Constitution and several international treaties to which Mexico is a party. While acknowledging President López Obrador's pursuit of legal reforms, the ABA warned against compromising the rule of law in the process and urged adherence to the country's constitutional and international obligations. The ABA's letter aligns with concerns raised by the president of Mexico's Supreme Court and other esteemed judicial institutions, including the International Bar Association and the New York State Bar Association. The letter received coverage from several renowned media outlets, including *Reforma* (https://www.reforma.com/piden-abogados-de-eu-a-amlo-frenar-ataques-a-poder-judicial/ar2648994?v=5) and *El Universal* (https://www.eluniversal.com.mx/mundo/barra-de-abogados-de-eu-critica-hostigamiento-de-amlo-sobre-el-poder-judicial/).

MEXICO UPDATE

ABA INTERNATIONAL LAW SECTION ANNUAL CONFERENCE

BACK TOGETHER

NEW YORK CITY

MAY 1-5, 2023

Mexico Update

Karla Ruíz & Kelsey Quigley,
editors

ABA Section of International Law
Your Gateway to International Practice

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.

Mexico Committee Email Address:
americanbar-intmexicanlaw@ConnectedCommunity.org