

## CLIENT UPDATE

# BRACING FOR ATTACK (PART 2) - ON MEXICAN JUDICIARY INDEPENDENCE

### Background

On February 5, 2024, the Mexican president, Andrés Manuel López Obrador (“Amlo”), introduced a bill proposing amendments to the Constitution (the “Bill”).

This is the second post in our two-part Berdeja Update covering the Bill. In Part 1 [here](#), we addressed the coverage of the proposed amendments to the Constitution, including a fundamental change in the structure of the Judiciary that would make it subservient to the Executive, would lower its professional standing and would make it prone to the gaining of influence by threat groups in Mexico.

In this Berdeja Update, we review the Bill’s conflict with the constitutional separation of powers in Mexico, as well as potential violations to the framework of international organizations in which Mexico is a member.

As we have previously discussed, the Judiciary faces unique issues related to the Bill. There are several ways in which the Executive and threat groups (drug cartels, money laundering rings, groups causing depletion of natural resources, etc.) can use the Bill if enacted, to enhance attacks against and gain influence on the Supreme Court and federal courts.

In sum, the Bill proposes that justices of the Supreme Court, be elected by popular vote instead of being appointed. Qualifications to be elected would no longer require that justices be experienced in the judiciary or the legal profession, but simply make it something desirable. The proposed system would grant the president *de facto* control of the nominating process, since it would be entitled to nominate two thirds of candidates, acting both directly and indirectly through a controlled Congress. The president would be likely to control federal funds to support campaigns of the candidates ultimately nominated by him. The Bill contemplates the possibility of subjecting justices to a “political trial” from which suspension and civil responsibility may ensue. Such action would be initiated by a court supervisory entity and would be conducted before Congress. The Bill does not propose clear elements to subject a justice to a “political trial”. The Constitution contains a nebulous basis consisting of action or inaction that “harms fundamental public interest”. A decision that would protect citizens from president-mandated measures, would subject justices to the risk of such a nebulous “political trial”, by unilateral decision of a president-controlled Congress.

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The Mexican Constitution provides that Mexico has three separate powers: Congress, the Executive and the Judiciary. It expressly prohibits that two of these powers be exercised by one institution or natural person. It vests the Judiciary power in the Supreme Court and the federal courts.

Control of the Executive and of the Judiciary (through a president-controlled Congress) by the president, consequent to an enactment of the Bill, would violate the Constitution.

The General Agreement on Trade in Services (GATS) is one of the World Trade Organization (WTO) agreements. The GATS is the first multilateral agreement to cover trade in services and aims to create a reliable system of international rules for this type of trade. It also aims to treat all signatories equally when accessing foreign markets. Mexico is a member of WTO.

GATS provides that each Member shall maintain judicial tribunals or procedures which provide, at the request of an affected service supplier, for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services. Where such procedures are not independent of the agency entrusted with the administrative decision concerned, the Member shall ensure that the procedures provide for an impartial review.

Such requirement as well as other established in respect to courts including expertise, adequate financial resources and freedom from political or economic pressure imbued in GATS would be violated by an enactment of the Bill.

The UN Basic Principles on the Independence of the Judiciary, provide that the independence of the judiciary shall be guaranteed by each State and enshrined in the Constitution of the country, that the judiciary shall decide matters without any pressures, threats or interferences, and that judicial decisions by the courts shall not be subject to revision. Although such principles do not have the force of law in Mexico, they are indicative of what trading partners expect to see in their legal systems as well as in that of Mexico.

Congress should carefully consider when voting on the Bill, that its approval would contradict the Mexican Constitution and GATS. NGO's, State legislatures and other related institutions, should consider preparation for action before the Supreme Court based upon a violation of the Constitution, as well as notification to international bodies based upon a breach of GATS, should the Bill be passed and the need to challenge it arise.

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We are closely monitoring developments related to the Bill. Please do not hesitate to reach out to our firm with any questions.

Berdeja Abogados, S.C.

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