

CLIENT UPDATE

QUESTIONABLE APPROVAL OF JUDICIAL REFORM

Background

As mentioned in our previous Client Update [here](#), two federal judges based in Queretaro and Chiapas issued definitive orders to stay the proceedings to vote the bill containing the judicial reform (the “Bill”) in the Chamber of Deputies, the Senate, the state legislatures and the legislature of Mexico City. A federal Circuit Court based in Colima subsequently affirmed the prior decisions and ordered the president to refrain from publishing the judicial reform in the Official Daily of the Federation (*Queja 909/2024, Tribunal Colegiado Trigésimo Segundo Circuito, Colima*, September 11, 2024).

Notwithstanding such orders the Morena-controlled Chamber of Deputies 80% of whose members were sworn in for the first time on September 1st, after a perfunctory discussion, voted to approve the Bill on September 3 and sent the same to the Senate. After Morena exerted duress on an opposition senator to cast the pending vote required for approval, the Senate voted within one day of its receipt to approve the Bill. The Morena-controlled local legislatures ratified the judicial reform approved by Congress within two days, without complying in several instances with the steps required by their local constitutions. An immediate publication by the president in the Official Daily of the Federation ensued.

Such approval lacks essential elements of validity including those arising from a breach of the above-mentioned court orders and should be contested.

As stated by the two federal judges and reaffirmed by the federal circuit court, the Bill violates fundamental provisions which provide that Judicial independence and separation of powers are essential elements of the Constitution. A system of judicial competence is proposed to be replaced by a popular vote, without any requirement to qualify as a candidate for judicial positions.

In addition to such violations of the Constitution, the Bill has serious implications under the United States-Mexico-Canada Agreement, other international treaties to which Mexico is a party and the United Nations Basic Principles on the Independence of the Judiciary.

The United States-Mexico-Canada Agreement (the “USMCA”) entered into force on July 1, 2020, replacing the North American Free Trade Agreement (“NAFTA”). Under the USMCA, most investors are required to resort to local courts and only a limited number can access the Dispute Settlement System of the USMCA. A lack of independent, professional courts that

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would result from the judicial reform, raises the questions of a potential gross miscarriage of justice affecting Mexican persons and a denial of justice for foreign investors.

Under the USMCA, investor-State arbitration is limited to the United States and Mexico. Access to ISDS (USMCA's Investor-State Dispute Settlement ("ISDS") provisions for disputes between Canadian or Mexican investors and Mexico or Canada, respectively, is possible under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (the "CPTPP"), which entered into force on December 30, 2018.

Under the USMCA a priority regime applies to foreign investors that are "party to a covered government contract" and belong to five "covered sectors": (i) oil and gas; (ii) power generation; (iii) telecommunications; (iv) transportation; and (v) infrastructure. Investors under this priority regime can enforce substantially the same investment protections available under NAFTA through the USMCA's ISDS procedures.

A less favorable regime applies to all other foreign investors under the USMCA. The main limitations applicable to nonpriority disputes are the following:

- Limited Access to Investor-State Arbitration. Nonpriority investors can only access the USMCA's ISDS system to pursue claims for (i) direct expropriation and (ii) national treatment and most favored nation treatment (principle of nondiscrimination).
- National Courts. As a general rule nonpriority investors must submit other claims with national courts.

The Bill would demolish the judiciary as a fundamental power to exercise the checks and balances reflected in the Constitution. It would terminate with the Supreme Court as a stalwart check for presidential authority, as evidenced for example in the fact that the court blocked certain changes to Mexico's electricity law at the center of an ongoing trade dispute with the U.S., among other actions.

Federal judiciary labor organizations, NGO's, independent State legislatures and other related institutions, should initiate actions before the Supreme Court based upon the above-mentioned violations of the Constitution, and should notify international bodies of breaches of the USMCA, CPTPP and GATS arising from the illegal passage of the Bill.

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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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