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JUDICIAL REFORM IN MEXICO: A GUIDE FOR COMPANIES ON IMPLICATIONS AND RISKS

BACKGROUND

Mexico's Judicial Reform Decree, published on September 15, 2024, in the Federal Official Gazette, fundamentally altered the operation of the federal judiciary, which serves as the ultimate guarantor of legality in the country. While the reform also impacts state-level justice systems, most state constitutions still await corresponding amendments. The potential effects of this reform are unpredictable, as it was implemented without prior assessment. The reform has raised concerns and uncertainties about its possible impact on an investment environment already shaken by recent global events, particularly due to the risk of diminished legal certainty stemming from a complete overhaul of the justice delivery system.

The complete replacement of all federal and local judges set to take place in 2025 and 2027, along with the structural modification to the composition of all judiciaries nationwide, eliminates the experience of judges who have accumulated years of technical knowledge in their fields, procedural law, and the precedents built over time, replacing them with individuals who lack judicial experience in the subject matter they will handle.

This guide concisely analyzes the primary risks and considerations for companies seeking to understand potential impacts of the new reform on their operations. It is not intended to be an exhaustive or definitive study of all economic dimensions and implications of the judicial reform. Rather, it is an initial guide that outlines some relevant points for consideration.[1]

[1] For further information on Mexico's Federal Judicial System, the *Cyrus R. Vance Center for International Justice* has prepared a Judicial Independence Assessment, available at: https://bit.ly/VCDJFLAM.

WHAT CHANGED WITH THE JUDICIAL REFORM?

- The reform fundamentally altered the appointment process for judges and magistrates nationwide, at both the federal and state levels. At the federal level (and in some state judiciaries, at least for lower court judges), the previous system was based on a professional career service track implemented through technical exams and professional merits. The reform replaced this system with one based on a popular vote from a list of candidates approved by the three branches of government (executive, legislative, and judicial). This change in the selection model entails a mass removal of federal and local judges in two phases, scheduled for 2025 and 2027.
- These changes were implemented without first developing the electoral authorities' institutional, technical, and operational capacities and without considering the high costs of conducting such a complex election in such a short timeframe.
- Initially, this dismissal will impact the composition of all judicial institutions, summarized in the following bodies listed by hierarchy:

    a. The Supreme Court of Justice of the Nation (SCJN) will be reduced to 9 members (from 11).
    b. The Federal Judiciary Council (CJF) will now be divided into a Judicial Discipline Tribunal and a Judicial Administration Body, each composed of 5 members.
    c. The Superior Chamber of the Electoral Tribunal of the Federal Judiciary (TEPJF) will comprise 7 members.
    d. The Regional Chambers of the TEPJF, each composed of 3 members.
    e. All District Courts, Collegiate Tribunals, Criminal Justice Centers, and Labor Courts, totaling approximately 1,580 judges.
    f. The Judiciary Councils of the States: there is no definitive estimate of the total number of members.
    g. Courts and Chambers of the State Judicial Branches, totaling more than 4,398 judges.

- The judicial discipline and administration model has been substantially modified with the creation of a Judicial Discipline Tribunal, which will oversee and sanction judges who commit acts or omissions contrary to the law, the administration of justice, or the principles of objectivity, impartiality, independence, professionalism, or excellence, as well as any other matters determined by law. This oversight and review model is atypical; under the previous system, the review of rulings issued by judges was carried out through legal appeals resolved in a second instance. In cases of irregularities or complaints, the Federal Judiciary Council—a separate governing body—addressed these issues independently from judicial activity. Concerns have arisen about the potential threat this Tribunal poses to judicial independence, particularly given the offenses it deems punishable.

Furthermore, under Article 182 of the Organic Law of the Federal Judiciary, the Judicial Discipline Tribunal is granted investigative, procedural, and adjudicative powers over administrative liability proceedings, meaning it can simultaneously act as both prosecutor and judge of the judges.

With rather broad provisions, Article 184 of the approved legislation ultimately establishes that judges can be subject to discipline based on the content of their rulings and their evidentiary reasoning. Such ambiguous regulations can have a chilling effect, leading judges to adopt conservative or literal stances (as seen in subsections II and VI, for example) and avoid complex or controversial cases, thereby compromising the judiciary's role as a counterbalance to other branches of government. In summary, this increases the risk of abuse by these terminal bodies.

Furthermore, the broad powers of the Judicial Discipline Tribunal violate the jurisdictional guarantees established in the Constitution, international treaties, and the jurisprudential doctrine of the Supreme Court of Justice (SCJN) on this matter. Respect for these guarantees is essential to ensure that judges have the necessary conditions—such as security, benefits, and a dignified retirement—to perform their duties independently and impartially.

WHAT IS THE NEW SELECTION PROCESS?

As we previously noted, Mexico provides a popular vote election mechanism for candidates pre-selected by each branch of government (executive, legislative, and judicial).

The election process introduced by the judicial reform involves several phases that increase its complexity and raise multiple questions. As will be explained in more detail, under this new process: (i) the Evaluation Committees of each branch of government determine the legitimacy and suitability of the candidates at their discretion; (ii) the list of selected candidates is narrowed down through a public drawing (lottery) to adjust it to the number of nominations; (iii) the resulting candidates are submitted for approval by each branch; and (iv) finally, the Senate consolidates the lists from the three branches and sends the final list to the National Electoral Institute (INE).

The Senate issued the first general call on October 15, 2024. This call provided general guidelines and instructions for each branch of government to begin the candidate selection process. The first step was to appoint an Evaluation Committee for each branch, consisting of five individuals responsible for receiving and evaluating applications from recognized individuals.

These Committees compiled a list of the best-evaluated individuals for each position. From this list, the Committee will narrow it down to the number of nominations through a public drawing (lottery). Subsequently, each Committee will send a final list to the authority representing each branch of government for approval and submission to the Senate.

The election will take place on June 1, 2025, and the votes will determine the winners for each position. Finally, the National Electoral Institute (INE) will assign the positions based on votes received and the required specializations, alternating between women and men to ensure gender parity. Certificates of majority will be issued once any potential challenges have been resolved.

Some concerns include the fact that the electoral legislation was passed in a fast-track manner without sufficient consideration in the legislature. Additionally, questions have been raised about the credentials of the individuals serving on the Evaluation Committees and the criteria they will use to select hundreds of suitable candidates. It is important to note that 881 positions will be filled, and each branch of government will select the best-evaluated candidates for judges and magistrates based on the type of court, circuit, specialization, and candidate's gender. The timeframe and speed with which the candidate selection process has been conducted raises doubts about the depth of analysis in choosing the most suitable profiles.

The citizen vote in this election will be the most complex in Mexico's history. For instance, in Mexico City, 168 positions for federal judges and magistrates will be contested. Each branch of government (legislative, executive, and judicial) will nominate two candidates per position, resulting in a total of 1,008 candidacies. This means that citizens will need to carefully evaluate this large number of options before casting their votes in 2025.

All of this is without considering the profiles of the SCJN, the TEPJF, the Discipline Tribunal, or the much larger state judiciary. Therefore, voters will need to spend a significant amount of time at the voting booth and, of course, take the time to consciously decide which candidate to select, especially in circuits with a large number of courts and tribunals.

HOW DOES THE REFORM IMPACT LEGAL CERTAINTY?

The lack of predictability in future judicial decisions threatens legal certainty. Some of the most significant risks highlighted by various sectors are the following:

1. **Judicial independence:** The election of judges through popular vote could politicize the judicial process, as candidates might be influenced by political or economic interests to secure their election or re-election. This risks creating political commitments, undermining the impartiality of judicial decisions and, consequently, public trust in the justice system.

2. **Investor insecurity:** Legal certainty is essential for attracting and maintaining investment. Changes that impact the stability and predictability of the legal system may discourage national and international investors who seek a reliable environment for their operations.

3. **Risk of external interference:** The possibility of external actors, such as organized crime, influencing judicial elections is a latent and real concern. This could further erode public trust in the judicial system and the rule of law.

4. **Uncertainty in implementation:** The creation of new bodies and the restructuring of the judiciary may lead to confusion and delays in the administration of justice, affecting the system's efficiency and effectiveness.

WILL THE GENERAL REPLACEMENT OF JUDGES AFFECT ESTABLISHED PRECEDENTS?

Given the minimal requirements, there is no guarantee that new judicial candidates will possess basic technical legal knowledge, let alone an understanding of jurisprudence and precedents in Mexico. The reform makes no effort to ensure that the new judges are better prepared than their predecessors.

Although the judicial reform does not explicitly mandate the repeal of existing precedents, a newly appointed judge may decide to modify the jurisprudence established by their court. This happens in individual cases, so the mass replacement creates more opportunities for it to occur at scale.

Under the previous appointment system, the years of training required to become a judge fostered an awareness and understanding of precedents. Without this training, elected judges may choose to deviate from precedents if they are not aligned with popular demands or the interests of their voters, thereby undermining legal certainty and the legitimacy of judicial decisions.

This aspect is critical for maintaining a healthy investment environment, so we will examine its potential implications. The mass replacement of judges brought on by the judicial reform in Mexico poses significant challenges in key sectors, such as energy. The following section analyzes a specific example.

Energy

During the last administration, the energy sector faced legal disputes related to the reform of the Electricity Industry Law (LIE) approved in 2021, which contradicted the 2013 constitutional reform. The 2021 changes to the LIE primarily prioritized the Federal Electricity Commission (CFE) over private generators, which was interpreted as an indirect expropriation of foreign investments and discouraged clean energy projects. This led to tensions with trade partners such as the United States and Canada and the threat of Mexico facing dispute resolution panels under the USMCA, which were initiated by the United States in 2022.

In response to this legislative reform, more than 250 amparo lawsuits were filed, suspended, and later reactivated following a Supreme Court (SCJN) decision that left the law's constitutionality in the hands of lower courts due to an incomplete vote for an unconstitutionality action. Subsequently, the SCJN's Second Chamber ruled that, per the Constitution and its 2013 reform, the order of priority for

electricity dispatch regulated by the 2021 Electricity Industry Law violated the principles of competition and free market access. This was because, instead of adhering to an efficiency criterion outlined in the Constitution, the legislation prioritized those able to enter into contracts with physical delivery commitments—namely, state generators (CFE) or their associated plants—thereby distorting the electricity market.

The Chamber further clarified that the alleged strengthening of state-owned enterprises is not a valid reason to disregard the constitutional framework for electricity. It emphasized that in certain activities, such as electricity generation, the CFE is merely another market competitor. Moreover, the constitutional reform ordered the creation of a structure enabling the CFE to compete on equal terms, meaning secondary legislation could not introduce a design that hampers free competition and market access.

Some public opinion outlets claimed that this ruling by the Second Chamber saved Mexico from facing dispute resolution panels under the USMCA.

WHAT IS THE SCOPE OF ARBITRATION IN THIS UNCERTAIN ENVIRONMENT?

Some observers have suggested national or international arbitration as the avenue through which the private sector might address the uncertainty generated by the judicial reform.

It is important to note that Mexico continues to regulate international arbitration through the Commercial Code, which is based on the UNCITRAL Model Law, and is a party to treaties such as the USMCA and ICSID. The reform did not affect the substantive provisions of this legislation. However, in 2023, Mexico faced multiple arbitration cases related to investments, particularly in mining and renewable energy, with disputes arising from legislative changes impacting investors' rights.

Arbitration, while it may be a reasonable solution in light of the reform, also has its limitations:

1. **Cost and Accessibility:** International arbitration proceedings can be expensive, limiting their use to large companies with sufficient resources to afford these proceedings. Additionally, not all companies include arbitration clauses in their initial contracts, which could be an obstacle to using this mechanism for dispute resolution.

2. **Judicial Intervention in Arbitration:** Although Article 1421 of the Commercial Code recognizes the general principle of non-judicial intervention in arbitration, there are circumstances in which such intervention is necessary, including (i) recognition, enforcement, and annulment of arbitral awards; (ii) precautionary measures; (iii) assistance in the taking of evidence; (iv) referral of parties to arbitration; (v) assistance in the constitution of the arbitral Tribunal; (vi) judicial resolution on the Tribunal's jurisdiction; and (vii) consultation on the Tribunal's fees.

The judicial reform raises concerns about these limited scenarios of judicial intervention in arbitration, as they require a judiciary inclined to support arbitration procedures. The following areas of judicial intervention in arbitration are particularly worrisome due to the judicial reform:

I. **Recognition and Enforcement of Arbitral Awards:** Arbitral awards in Mexico are private; however, their enforcement requires a judicial act issued by a judge. Article 1461 of the current Commercial Code states that an arbitral award, regardless of the country in which it was issued, will be recognized as binding and, upon submission of a written request to the judge, will be enforced following the provisions of the law. However, Article 1462 also grants the judge the authority to deny recognition or enforcement of an arbitral award in the following cases:

A. If the party against whom the award is invoked proves before the competent judge of the country where recognition or enforcement is sought that:
   a. One of the parties to the arbitration agreement was under some incapacity, or the agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereof, under the law of the country where the award was made;
   b. They were not duly notified of the appointment of an arbitrator or the arbitral proceedings or were otherwise unable to assert their rights;
   c. The award deals with a dispute not contemplated by the arbitration agreement or contains decisions on matters beyond the scope of the arbitration agreement. However, if the provisions of the award that relate to matters submitted to arbitration can be separated from those that are not, recognition and enforcement may be granted for the former;
   d. The composition of the arbitral Tribunal or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
   e. The award has not yet become binding on the parties or has been set aside or suspended by a judge of the country in which, or under the law of which, the award was made.
B. If the judge finds that, under Mexican law, the subject matter of the dispute is not arbitrable or that the recognition or enforcement of the award is contrary to public policy.

This second scenario constitutes an open-ended clause requiring interpretation by the judge. The vague notion of "public policy" poses a significant challenge in the context of Mexico's recent judicial reform. This creates an environment in which

"public policy," defined as a set of principles, can be subject to broad and inconsistent interpretation, particularly under the influence of a politicized judiciary.

II. **Nullity of Arbitral Awards:** Article 1462 of the Commercial Code grants judges the authority to annul an arbitral award in the same circumstances under which they may deny its recognition and enforcement, with the exception that the award is not yet binding on the parties or has been annulled or suspended by the court of the country where it was issued. Since the grounds for denying recognition and enforcement of arbitral awards are very similar to those that justify their annulment, concerns related to recognition and enforcement also apply to the issue of nullity, particularly in the context of the reform.

III. **Provisional Measures:** Article 1425 of the Commercial Code allows parties in arbitration to request provisional measures from a judge, either before initiating the arbitration process or during its course. Judicial intervention in granting these measures is essential to preserve the subject matter of the arbitral dispute, as failing to adopt them could irreversibly affect the arbitration's subject matter, thereby compromising the effectiveness of a potential award. Therefore, it is crucial that judges exercise this authority responsibly, considering they have full discretion to grant such provisional measures.

In summary, concerns in this area arising from the judicial reform stem from the fact that judicial intervention in arbitration, though limited, is critically important for the proper development of arbitral proceedings. Thus, it is imperative to have a judiciary willing to assist arbitration, acting responsibly, in accordance with the law, and, above all, limiting its intervention to the scenarios provided by law.

PERMITS, LICENSES, AND CONCESSIONS: WILL DECISIONS BE IMPARTIAL?

Issues such as permits, licenses, and concessions will be more exposed to the influence of the Executive Branch's economic policies, as the energy sector is a central part of the current government's political agenda. Furthermore, changes in this area, stemming from reactions to the 2021 Energy Reform, have caused dissatisfaction in the private sector, leading to numerous lawsuits handled by the Judiciary.

In this context, the judicial reform significantly impacts the energy sector and jeopardizes the impartiality of judicial decisions in such disputes, as elected judges may be inclined to rule in alignment with government directives or popular demands rather than strictly adhering to the rule of law.

The popular election of judges and the increasing politicization of the judicial system could lead to a scenario where decisions regarding permits, licenses, and concessions are viewed as tools to support the economic policies of the government in power. For example:

- Suppose the Executive Branch decides to prioritize fossil fuel sources over renewables. In that case, judges might interpret denying permits to renewable energy companies as justified under criteria such as "energy sovereignty" or "protection of national interest."
- In the case of energy infrastructure concessions, such as pipelines or power plants, judges could refuse to review arbitrary decisions made by administrative authorities, arguing that these align with the State's economic policy, even if they violate legal principles or international commitments.

Possible Scenarios in the Energy Sector:

1. **Concessions for Renewable Energy:** A foreign company applies for a concession to operate a wind farm, but the administrative authority rejects the request, claiming it interferes with the Federal Electricity Commission's (CFE) electricity generation plans. Under the judicial reform, a judge influenced by the Executive's political discourse on "energy sovereignty" will likely uphold this decision without adequately analyzing its legality.
2. **Permits for Natural Gas Imports:** If the government adopts an energy self-sufficiency policy, judges might support administrative decisions to deny permits for importing natural gas, even if such decisions harm the competitiveness of key industries like manufacturing or electricity generation.
3. **Review of Energy Concession Contracts:** If an international company holds a contract to operate a hydroelectric plant and the government seeks to rescind it for political reasons, there is little likelihood of a judge intervening impartially to review the legality of the decision—particularly if the judge fears political retaliation or aims to maintain public favor.

Risks and Uncertainties in These Scenarios:

- **Lack of Specialization:** The judge may lack experience in administrative matters and/or the legal framework applicable to concessions and licenses in the energy sector. This could result in decisions that fail to consider important technical and legal aspects of the case.
- **Political Criteria:** Instead of relying on legal principles, the judge might prioritize political considerations, such as aligning with narratives favoring state control over the energy industry or discouraging the participation of international actors.
- **Lack of Independence:** Popular elections could influence judges to avoid unpopular decisions or ruling against government policies, even if such decisions are legally correct. This could lead to judges upholding administrative denials simply to avoid political or social conflicts.

This scenario directly impacts investors' confidence in the Mexican legal system. If judges cannot guarantee impartial and law-based rulings, companies will hesitate to invest in the

country, particularly in strategic sectors like energy. Furthermore, this lack of legal certainty limits the courts' ability to correct arbitrary decisions by administrative authorities, solidifying a legal environment marked by insecurity that hinders the country's economic and social development.

WHAT DOES THE USMCA SAY ABOUT ALL THIS?

Article 14.6 of the USMCA establishes the minimum standard of treatment that States must grant to foreign investments covered by the treaty based on customary international law. This standard includes two key concepts: fair and equitable treatment and full protection and security. Fair and equitable treatment ensures that justice is not denied in judicial proceedings and that due process is upheld following globally accepted legal principles. On the other hand, full protection and security require the State to provide the police protection demanded by international law.

This standard does not obligate States to provide treatment more favorable than that stipulated under customary international law, nor does it create additional rights for investors. Additionally, a breach of other provisions of the USMCA or other international treaties does not automatically constitute a violation of this article. Moreover, failure to meet investors' expectations, even if it results in losses, is not considered a violation.

The judicial reform in Mexico adds another risk factor to a potential review of the USMCA, supported by some public officials in Canada and the United States, regarding Mexico's continued participation in the treaty due to the benefits Mexico is deriving from it.

KEY POINTS FOR COMPANIES AND INVESTORS TO CONSIDER:

1. The mass replacement of judges increases unpredictability in judicial decisions, impacting the legal stability essential for investments.
2. The lack of legal certainty necessitates documenting business operations in contracts with clear clauses, leaving minimal room for interpretation that could give rise to judicial disputes.
3. Decisions related to licenses and concessions may align with government policies rather than legal principles, affecting sectors such as energy, mining, and trade.
4. There is significant risk of judges coordinating with political actors, posing a threat to private investments, with additional risks of expropriations without fair compensation and no impartial judicial authority to ensure a just payment.
5. Arbitration will likely become increasingly relevant as a viable tool for resolving disputes. However, beyond additional costs, it may face implementation challenges in Mexico due to various judicial intervention scenarios, especially under interpretations of "public order."

6. Monitoring secondary legislative developments and the implementation process will be crucial to adjust legal and business strategies in response to potential regulatory changes.
7. The private sector has previously observed instances where the local judiciary lacked integrity and independence in resolving disputes. With the judicial reform, the guarantee of constitutional relief (resolved by the Federal Judiciary) as an effective remedy handled by independent and well-trained federal judges is now uncertain.
8. Developing a strategic legal plan to address potential changes in judicial criteria aligned with executive policies will be essential.
9. Corporate lawyers must act with a serious and ethical approach, elevating the quality of legal arguments presented to judges and compelling them to conduct thorough study and reflection.