

President's Bill in administrative matters seeks broad reform affecting contracts with government entities, permits and concessions

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I. Introduction

On March 24, 2023, the President of Mexico, Andrés Manuel López Obrador, introduced a bill on administrative matters to the House of Representatives, which seeks relevant changes to various federal administrative laws (the "Bill").

In broad terms, the Bill aims to strengthen the State's stewardship on the economy and the scope of action of the entities of the Federal Government, both in relation to public expenditure, as in relation to the participation of the private sector in various economic activities. The foregoing, through a model with greater State intervention in the provision of public services and the execution of infrastructure works, providing the Federal Government with broader powers and more discretion, which may affect future and ongoing projects and their financing by generating lack of legal certainty and security for investors in Mexico.

The Bill proposes to amend 23 Federal laws¹ under three large subjects: "reversion of corruption", "prevention of actions that are harmful to the public interest or that may cause damages to the treasury", and "strengthening of the Public Federal Administration". It is intended to amend provisions related to the use of the federal budget, contracting of works, revocation of permits and concessions, termination of contracts, tender processes, indemnifications by the State, sectorization of government entities, among many others.

The Bill is yet to be passed by the House of Representatives, which in this case acts as chamber of origin. If approved, it must be turned over to the Senate (chamber of review) for its discussion and if applicable, its approval. In both cases, a simple majority is required for either the passing or rejection of the Bill.

1. The list of laws to be modified includes the Organic Law of the Federal Public Administration, the Federal Law of Government Entities, the Regulatory Law of the Railroad Service, the Law of Acquisitions, Leasing and Services of the Public Sector, the Law of Public Works and Related Services, the Federal Law of State Property Liability, the Expropriation Law, the General Law of National Assets, the Law of General Means of Communication, the Federal Law of Administrative Procedure and the Federal Law of Administrative Contentious Procedure, among others.

Once the amendments are enacted, such modifications may be challenged through an amparo lawsuit (constitutional review), as mentioned in Section III of this alert.

Following is an analysis of the Bill and of the legal provisions that it seeks to amend.

II. Analysis of the Bill

a. Proceeding initiated by an authority against a favorable resolution (*juicio de lesividad*)

The "*juicio de lesividad*" is an administrative proceeding that allows the government to revoke favorable specific acts of authority, such as permits or authorizations, when they have been issued in contravention of the applicable law.

The Bill proposes that in addition to being applicable against favorable administrative resolutions, that the "*juicio de lesividad*" may also be initiated by authorities against administrative actions resulting from a deemed acceptance by inaction of authorities, or actions that cause harm to the Federal Public Administration or that violate public policy.

Similarly, the Bill proposes that, in the case of environmental and health matters, judgments resulting from the "*juicio de lesividad*" have retroactive unfavorable effects on the individual, all the way down to the original issuance of the action in question. Currently, retroactive unfavorable effects for the individual in all matters are limited to the five years prior to the filing of the corresponding lawsuit.

b. Annulment proceeding

The Bill proposes that administrative actions may be declared null and void ex officio or at the request of an interested party. Currently, the annulment procedure may only be initiated at the request of an interested party.

Additionally, the Bill proposes that when an action that has been annulled has been consummated or its effects cannot be reversed, administrative, civil, and criminal liability proceedings shall be initiated as appropriate. Currently, in these cases, administrative liability is only incurred by the public servant who issued or ordered the act.

c. Revocation of permits and concessions

It is proposed to amend the Federal Law of Administrative Procedure to establish as grounds for the revocation of concessions, permits, authorizations or licenses, supervening events that affect the public, general or social interest, or cause some type of economic, social, environmental or any other type of imbalance.

Likewise, it is proposed that, prior the revocation ruling, the concession, permit, authorization, or license act may be modified to establish the new conditions to be complied with by the holder thereof.

It must be noted that the Federal Law of Administrative Procedure is as a general rule, of supplementary application to federal laws of administrative nature. As a result, this amendment could have a great impact on the highway, energy, railroad, mining and other sectors that involve infrastructure projects and depend on concessions, permits, licenses or authorizations, since it would significantly increase the discretion granted to the Federal Executive, with arbitrary decisions relating to events subsequent to the granting of the concession, permit, license or authorization in question, such as changes in public or economic policies.

d. Exorbitant clause

The Bill proposes the mandatory inclusion of the "exorbitant clause" in new contracts regarding the procurement of goods, supplies, services and public works entered into by agencies and entities of the Federal Government. The "exorbitant clause" is a provision that may be found in administrative contracts (as those awarded in public tenders) that empowers government entities to unilaterally terminate an administrative contract in advance and for reasons of public interest. The "exorbitant clause" entails the payment of compensation equivalent to the unrecoverable, reasonable and duly documented expenditures, directly related to the performance of the contract in question.

In order to implement the foregoing, the Bill proposes to amend the Public Sector Procurement, Leasing and Services Law and the Public Works and Related Services Law, penalizing officers who do not include the "exorbitant clause" in contracts subject to these laws.

It must be noted that contracts awarded by the Federal Commission of Electricity ("CFE"), and PEMEX and their respective subsidiary entities, as well as contracts or licenses awarded by the National Hydrocarbons Commission ("CNH") or the National Center of Energy Control ("CENACE"), would not be affected, as they are not subject to the above-mentioned laws.

e. Indemnifications

To limit the indemnifications payable by the Mexican Government to private individuals in the context of international arbitrations, the Bill proposes the following measures:

- The Federal Law of Administrative Procedure would be amended to establish that indemnification for damages or losses does not apply in the following cases: (i) when contractors or similar parties fail to comply with their obligations, (ii) when the revocation or early termination is motivated by public interest, (iii) when no action has been taken to comply with the main purpose of the legal instrument, and (iv) when operations have started and the investment has been recovered.

This rule would not apply to permits or contracts issued under special laws to which the Federal Administrative Procedure Law does not apply, such as contracts or licenses awarded as a result of oil rounds conducted by CNH, auctions conducted by CENACE and legacy PPAs awarded by CFE to independent power producers.

- The Bill proposes to remove the language in the Expropriation Law stating that the application of this law is subject to the provisions of the international treaties of which Mexico is a signatory.

Notwithstanding this elimination, under Mexico's Constitution, the international treaties to which Mexico is a signatory rank in principle in the same level as Federal laws. In this sense, the deletion of this language in the Expropriation Law does not entail that international treaties cease to be of application to expropriations.

f. Government austerity

The Bill proposes to amend several legal provisions, among them, the General Law of Administrative Responsibilities, the Law of Remuneration of Public Servants and nine other laws that regulate the Judicial Branch, to limit public officers, upon leaving office, from working for, and providing services to, private parties they previously supervised or regulated or with whom they entered into administrative contracts, until a certain period of time has elapsed. The waiting period will be based on the position held by the public official, starting at four years, and with up to 10 years for Mexico's President.

Moreover, the Bill seeks to cap the compensation of officers from certain institutions such as the National Human Rights Commission, the National Institute of Transparency, Access to Information and Protection of Personal Data, the Federal Attorney General's Office, the Federal Judiciary and the Federal Economic Competition Commission. It should be noted that during the current administration, most of the aforementioned institutions have acted as a counterweight to the Federal Government.

g. Recovery of properties through administrative proceedings

The administrative recovery of real estate is a procedure used by the State to regain possession of public domain land that is being exploited without a concession or permit or by the holder of a concession or permit that has defaulted its obligations under said concession or permit.

The Bill proposes a new and faster procedure for the administrative recovery of real estate, which includes an administrative recovery order specifying a deadline for surrendering the property that cannot exceed 72 hours.

The Bill proposes that the administrative recovery order shall not be subject to injunctions in case of a legal challenge.

h. Administrative trust

The Bill proposes to incorporate the "principle of trust" in the public sector. It is argued that the public interest must prevail over formality and that the State cannot be subject to the same formalities as private parties, since they pursue different purposes. To this end, it is proposed to amend the Law of Public Works and Related Services to allow public infrastructure projects to begin before the obtainment of the necessary permits, in extremely urgent cases or when the "economic development of the country, the defense of sovereignty or national security" is involved.

i. Transitory provisions and entry into force

The decree would enter into force the day after its publication in the Federal Official Gazette of the Federation.

Administrative actions that are in process upon the entry into force of the decree will continue to be processed in accordance with the legal provisions that were in force at the commencement of such administrative actions.

III. Means of defense

There are reasonable elements to sustain that the Bill is contrary to various fundamental rights, such as free competition, freedom of work, right to a healthy environment, legal security and legality. Therefore, if enacted, the Bill could be challenged through an amparo proceeding.

The deadlines for the commencement of an amparo proceeding depend on the analysis of the situation of each specific case.

Given the significance of the Bill, we suggest analyzing each specific case to determine if the Mexican State has breached any of its obligations contained in international treaties.

In case of questions or comments, do not hesitate to contact our expert team.

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