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**Investor-State Claims against Mexico:
Recent Developments in the Energy
and Mining Sectors**

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In recent months, it has become clear that Mexican President Andres Manuel Lopez Obrador (AMLO) is continuing his protectionist agenda in both the energy and mining sectors. As an update to our [August 2021 client alert](#), this client alert provides an overview of the most recent regulatory developments in the energy and mining sectors and their potential effect on foreign investments in Mexico.

RECENT DEVELOPMENTS IN THE ENERGY AND MINING SECTORS

I. Mexico's Supreme Court of Justice rejects constitutional challenge to AMLO's legislative reforms in the electricity sector

On 9 March 2022, Mexico's Supreme Court of Justice (SCJ) rejected a constitutional action put forward by some members of the Senate to challenge the bill which AMLO had introduced last year seeking to amend Mexico's Electric Power Industry Law (EPIL).

On 1 February 2021, AMLO had introduced a bill to Congress seeking to amend the EPIL. By amending the EPIL, AMLO sought to overturn the energy reform package enacted by former President Enrique Peña Nieto in 2013 and to reshape the Mexican electricity sector. AMLO's reforms intended to strengthen the role of Mexico's state-owned utility company, the Federal Electricity Commission (*Comisión Federal de Electricidad*) (CFE), and to limit the role of private companies, including foreign-owned companies, in the renewable energy sector. Congress approved the bill on 2 March 2021 and the amended EPIL entered into force on 9 March 2021 (although its application has been provisionally suspended by virtue of numerous *amparo* actions (a form of judicial review) before the Mexican courts until all these proceedings have been decided).

There have, however, been various challenges to the amended EPIL since it was passed in March 2021. As well as more than two hundred *amparo* proceedings (discussed below), on 8 April 2021, a group of senators initiated court proceedings before the SCJ seeking to challenge the constitutionality of the amended EPIL. It was this action which the SCJ decided on 9 March 2022.

Whilst the SCJ's decision dismissed the senators' challenge, it did not definitively decide whether the amended EPIL was either unconstitutional or constitutional. Under Mexican law, for the amended EPIL to be declared unconstitutional, a supermajority vote of eight out of eleven justices would have been required. Since only seven justices held the amended EPIL to be unconstitutional, the amended EPIL has not been declared unconstitutional, and will therefore continue to apply (subject to the current suspension).

Thus, whilst the SCJ's decision ends the senators' constitutional challenge, there still remains a large number of *amparo* proceedings pending before the district courts. Although these district courts are not bound by the SCJ's recent decision, and could therefore find the amended EPIL to be unconstitutional, many of these *amparo* actions are likely to go before appeal tribunals or could even reach the SCJ, if it decides to use its judicial powers to "attract" and hear the case.

It remains to be seen how the appeal tribunals will deal with any such *amparo* actions. It is possible that the appeal tribunals may follow the reasoning of the seven justices of the SCJ who considered the EPIL to be unconstitutional on 9 March 2022, and rule that the amended EPIL is unconstitutional. Otherwise, the appeal tribunals will dismiss the *amparos* with the effect of lifting the suspension such that the EPIL takes effect.

II. Mexican Congress rejects AMLO's constitutional reform in the energy sector

On 17 April 2022, the House of Representatives of Congress (*Camara de Diputados*) voted against AMLO's constitutional reform package in the energy sector (**Constitutional Reform**), particularly in the electric and mining sectors, which required a two-thirds majority to be passed. The President's attempt to amend the Constitution therefore failed.

Following the many challenges to his amended EPIL, AMLO had sought to achieve the same objectives by way of amendments to Mexico's Constitution. On 30 September 2021, he submitted a bill seeking to amend Articles 25, 27 and 28 of the Mexican Constitution. His proposed constitutional reform would have granted dominance to CFE and ensured that at least 54% of electricity in Mexico would have been generated by CFE. His Constitutional Reform was rejected with 275 votes against the reform and 233 in favour.

III. AMLO introduces new mining reforms in the lithium sector

On 17 April 2022, the same day on which Congress rejected the President's Constitutional Reform, AMLO signed a bill to amend Mexico's mining law (**Mining Law**), seeking to nationalise the lithium reserves of Mexico and thereby to fulfil an objective already contemplated in his earlier constitutional reform package. Although under the Mexican Constitution all natural resources are owned by the State, the private sector is permitted to participate in the exploration and exploitation of such resources by way of concessions – and it is for this reason that the amended Mining Law seeks to restrict the grant of such concessions.

The bill was approved by the House of Representatives of the Congress on an expedited basis and then submitted to and approved by the Senate. The amended Mining Law entered into force on 21 April 2022.

The key amendments to the Mining Law are:

- the establishment of a new public agency to handle and administer all lithium-related activities (exploration, exploitation, benefit and use of lithium), including economic value chains;
- a prohibition on private sector participation in the exploration and exploitation of lithium (i.e. no concessions or other forms of authorisation will be granted, as lithium-related activities are declared to be of “*public interest*”); and
- a potential future prohibition on private sector participation in the exploration and exploitation of “*other minerals declared strategic by the government*”.

In contrast to the President's rejected Constitutional Reform, which expressly would not have applied to companies already exploring lithium, the amended Mining Law is potentially more far-reaching in its consequences. The amended Mining Law is silent as to its effect on current concessions, which have already been granted to domestic and foreign companies for the exploration and exploitation of lithium. Arguably, this does not bode well for such concessions, given AMLO's public pronouncements that he intends to review these concessions.

IMPLICATIONS FOR FOREIGN INVESTORS AND INVESTMENTS

Foreign investors in the Mexican energy and mining sectors will likely have been on high alert as to the risks posed by AMLO's reform agenda for some time now. Whilst Congress' rejection of the President's Constitutional Reform package will have been welcomed by foreign investors, the refusal by the SCJ to conclude that the amended EPIL is unconstitutional and Congress' expedited approval of the amended Mining Law both show that the risks to foreign investors and their investments have far from disappeared.

Whilst the protection offered by the Mexican courts' provisional suspension of the amended EPIL in the context of *amparo* proceedings offers some comfort to foreign investors, it remains to be seen how the appeal tribunals or the SCJ will view the amended EPIL when the issue inevitably comes before them on appeal.

As a result, it is important for foreign investors with significant investments in energy and mining projects to begin to consider how they can protect their investments not only under domestic law, but also under international law.

Mexico is party to investment treaties and free trade agreements (with investment chapters) with around 45 states. In addition to the North American Free Trade Agreement (**NAFTA**), the new United States-Mexico-Canada Agreement (**USMCA**) and other FTAs with investment chapters, Mexico has entered into approximately 31 bilateral investment treaties, including treaties with a number of European States. Notably, Mexico has bilateral investment treaties with Spain (2008) and Italy (2002).

Where foreign investors' investments are protected by an applicable investment treaty, and, if AMLO's reforms damage such investments, international investment law and investment arbitration should be carefully considered as a remedy. Investment arbitration would offer a foreign investor an international forum in which to seek relief, including monetary compensation for loss caused to the investor's investments.

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