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# Mexico's Supreme Court Weighs-In on AMLO's Reform to Power Sector Law

## Background

Last year King & Spalding issued an informative **note** regarding a new bill (“**LIE Bill**”) in the power sector introduced by Mexico’s President Andrés Manuel López Obrador (“**AMLO**”) that, after a fast-track congressional vote, came into effect in March 2021. Among multiple amendments, the LIE Bill effectively revoked several important rights previously granted to private companies during Mexico’s historic 2012-2013 energy reform, while also seeking to secure the dominant position of Mexico’s national utility: Comisión Federal de Electricidad (typically referred to as “CFE”). In summary, the LIE Bill:

- changes grid dispatch rules in order to prioritize electricity generated by Mexico’s State-owned utility CFE, despite its higher cost and higher polluting emissions compared to other sources;
- grants clean-energy certificates to CFE’s power plants, even though they did not originally qualify to receive such certificates, diluting the value of certificates that were granted to clean energy generators to incentivize investment;
- reviews or revokes existing self-supply permits, in reaction to AMLO’s allegation that such arrangements were secured by fraud and are detrimental to CFE; and
- prompts a review of long-term power purchase agreements executed with investors, among other changes. These amendments put the economic viability of privately-owned energy projects at serious risk and significantly modify the previous regime upon which investors relied to invest in Mexico’s electricity sector.

Following its entry into force, several parties challenged the LIE Bill on different fronts. Many private companies in the power sector filed constitutional challenges (known in Mexico as *amparos*) against the bill. At the same time, an opposition legislative group, a Mexican federal state, and Mexico’s Antitrust Agency (**COFECE**), filed their own legal challenges



arguing *inter alia* that the LIE Bill contravened competition and environmental principles enshrined in the constitution.

The AMLO administration vigorously resisted these legal challenges to the LIE Bill. During 2021, however, approximately 200 companies affected by the LIE Bill obtained stays of general effect in these constitutional challenges from different district courts. Consequently, the AMLO administration was prevented from enforcing the disputed provisions of the LIE Bill, and as a practical matter, the LIE Bill has had little to no effect in the power sector to date.

Amid this contentious backdrop, last week Mexico's Supreme Court heard the first constitutional challenge to the LIE Bill in a much-anticipated session.

### **The Supreme Court's Vote**

On April 7, 2022, the Supreme Court ruled on the constitutionality challenge filed by the legislative group. Under Mexican law, a supermajority vote of eight out of eleven justices was required in order for the Supreme Court to declare the LIE Bill unconstitutional. After a long session, only seven justices ruled that the LIE Bill was unconstitutional, while the remaining four justices voted to uphold the central amendments contained in the LIE Bill.

Notably, the Supreme Court's decision is not binding on the district courts presiding over the *amparo* actions, meaning that these courts may still find the LIE Bill unconstitutional. Irrespective of district courts' decisions, the *amparo* actions brought by private companies are expected to ultimately reach the Supreme Court. Those appeals, however, would be heard by specific chambers of the Supreme Court, and would not be subject to the requirement of a supermajority vote in order to enjoin application of the law as unconstitutional. As a result of these different rules governing private and public challenges to the constitutionality of the LIE Bill, it is expected that the Supreme Court will enjoin application of the LIE Bill as unconstitutional in many of the private *amparo* actions, even though the entire Supreme Court declined to declare the LIE Bill unconstitutional on its face as a result of the supermajority requirement.

Notwithstanding that the majority of justices sided with the unconstitutionality position, and that other constitutional challenges (including *amparos*) are still pending, AMLO took the Court's recent decision as a political victory and announced that the LIE Bill would enter into effect immediately, starting with the revocation of self-supply permits and the review of long-term power purchase agreements executed with investors.

### **The Constitutional Reform Lingers**

Partly in reaction to earlier court decisions declaring the LIE Bill to be unconstitutional, the AMLO administration initiated a separate legislative project to amend certain constitutional provisions affecting the energy industry (the "**Constitutional Reform**"), which is currently being discussed in Mexico's Congress. In summary, the Constitutional Reform seeks to revoke power generating permits and green-energy incentives, limit the power generation by private energy companies to a 46%, and nationalize Mexico's lithium ores. Although both the LIE Bill and the Constitutional Reform overlap in their goal to favor CFE over private companies setting forth a new legal regime, the Constitutional Reform is stand-alone legislation that, if enacted, would not be subject to challenge as unconstitutional through *amparo* or other proceedings brought before the Mexican judiciary.

The lower chamber of Congress will vote on the Constitutional Reform during the coming week. Afterwards, the reform will transition to the Senate for an additional voting session. To pass, AMLO and his party, MORENA, need a two thirds majority in both chambers which they do not have by default. The fate of the Constitutional Reform ultimately lies with the opposition parties who have sent mixed signals. We will follow closely the Congress' vote and continue to provide updates.

### **Conclusions**

To date, the Mexican judiciary has effectively blocked the AMLO administration's ambitions to modify the regime for private energy investment that Mexico introduced in 2012-13, but the Supreme Court's recent decision on the



constitutionality of the LIE Bill and the upcoming vote on the Constitutional Reform call into question whether the Mexican judiciary can preclude those regulatory changes from taking effect in the long run.

If the AMLO administration succeeds in overcoming judicial opposition to the regulatory changes or decides to implement them in defiance of amparo injunctions issued in particular actions, investors who are harmed by the measures may have no further recourse before the Mexican judiciary. However, foreign investors may continue to have recourse under international investment treaties. Mexico has investment treaties and trade agreements with approximately 45 countries. These treaties and agreements protect foreign investors from, among other things, discriminatory, arbitrary, and unfair and inequitable treatment by the Mexican Government, as well as from direct and indirect expropriation of their investments. Like other countries that amended their energy regulatory frameworks in a way that detrimentally affected investments made in reliance on the prior regime, Mexico could see a number of investment treaty arbitrations being launched by foreign investors.

Importantly, however, some of these investment treaties contain prescription periods or provisions aimed at curbing “forum shopping,” which might complicate investors’ ability to seek redress for treaty violations before an independent arbitral tribunal. We therefore strongly advise that any investors considering filing or resuming domestic actions before the Mexican courts, like amparos, consider their potential remedies under applicable investment treaties in parallel, as part of a comprehensive legal strategy.

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King & Spalding’s international arbitration team has significant experience in energy disputes across Latin America and worldwide. Ranked the no. 1 international arbitration practice in the world, King & Spalding currently represents investors from across the globe in at least 20 treaty arbitrations against different countries challenging changes to their renewable energy regulations that detrimentally affected prior investments.

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