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Court Suspends Amendment To Mexico's Energy Industry Law

By **Caroline Simson**

Law360 (March 11, 2021, 7:59 PM EST) -- A Mexican court has temporarily suspended a controversial amendment to the country's electrical industry law that would prioritize energy from the national power company over the private sector, a regulatory change that experts warn could trigger an avalanche of investor-state claims.

The federal court's order on Thursday puts a temporary hold on the amendment, which came into force on Wednesday after being published in the country's official gazette the day before, according to Von Wobeser y Sierra SC founding partner Claus von Wobeser, who is also president of the Mexican chapter of the International Chamber of Commerce.

The amendment, put forward by the government of Mexican president Andrés Manuel López Obrador, aims to strengthen the Mexican state-owned utility Comisión Federal de Electricidad, or CFE, and to weaken reform made in favor of renewable energy and the private sector by the previous administration of Enrique Peña Nieto.

It prioritizes power provided for the country's electrical grid by the CFE over cheaper power provided by private investors, many of which built renewable energy facilities utilizing wind and solar power under incentives provided under the energy reform.

The amendment eliminates the bidding process CFE previously had to undertake when purchasing power. It would also allow the government to revoke so-called self-supply power generation permits under the law, under which generators could produce power for their own use.

If the amendment remains in effect, it would create an extremely uncertain situation for foreign investors in the power generation sector — both those who are considering investing in the country and those who already have, many of whom relied on the regulatory changes enacted by the Peña Nieto administration, according to Vera de Gyarfas, a partner in Mayer Brown's Houston office.

"It's a situation where you really don't want a country to be, especially Mexico, which was so successful in attracting foreign investment as a result of its energy reform," she said.

Since the CFE generally relies on less environmentally friendly forms of power generation, including oil and hydroelectricity, critics of the amendment argue that it wrongly eliminates competition favoring green energy, according to von Wobeser. Moreover, the legislation may also violate Mexico's obligations under a litany of investment treaties and free trade agreements signed with other countries to treat foreign investors fairly and not deprive them of the value of their investment, he said.

"Obviously, all these changes would hurt foreign companies that are invested heavily in that sector ... It's a retroactive application of the law. Suddenly, they are creating new rules, different from those that were in place when [the investments] were carried out," von Wobeser said.

He added that the matter is likely to go to Mexico's Supreme Court, which will ultimately decide whether or not the amendment violates the Mexican Constitution.

If the court rules in favor of the government, he said that foreign investors in the country's electricity sector could file potentially "hundreds" of investor-state cases against the government.

"It's a big deal because there's a lot of investment in this area," he said.

Among the treaties signed by Mexico is the U.S.-Mexico-Canada Agreement, which replaced the North American Free Trade Agreement last summer. Although the USMCA generally offers a more scaled-back version of investor-state arbitration than NAFTA, the power generation sector is among those included in a carveout where foreign investors get more protection.

Although Canada opted out of investor-state arbitration in the USMCA, Canadian investors in Mexico will have access to investment arbitration under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, which was not signed by the U.S.

Officials from the Mexican government could not immediately be reached for comment on Thursday.

--Editing by Jay Jackson Jr.