ENVIRONMENTAL AND SOCIAL IMPACT

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On September 30, 2024, a reform of Article 2 of the Political Constitution of the United Mexican States regarding the rights of indigenous and Afro-Mexican peoples and communities (the "Reform"), was published in the Official Gazette of the Federation, which Reform entered into force on October 1st, 2024. The Reform was approved by the Mexican Congress with no votes against, which reflects its broad consensus.

The Reform contains multiple amendments that clarify, adjust and broaden the scope of Article 2 of the Mexican Constitution, in which, thanks to a transcendental reform adopted in 2001, the rights of indigenous peoples were recognized at the constitutional level for the first time. It is noteworthy that the Reform maintains the provision according to which all communities comparable to indigenous peoples and communities shall enjoy the same rights recognized in their favor.

The new provision of the Reform regarding free, prior and informed consultation is of great relevance for the development of projects that may significantly affect or impact indigenous peoples and communities, such as wind farms, gas pipelines, infrastructure works, tourism and extractive projects, among others. The Reform introduces Subsection XIII to Section A of Article 2 of the Constitution, elevating to constitutional rank the right of the peoples and communities to be consulted, as follows:

A. This Constitution recognizes and guarantees the right of indigenous peoples and communities to self-determination and, consequently, to autonomy to:

XIII. Be consulted on legislative or administrative measures that are intended to be adopted, when these may cause significant affectations or impacts on their life or environment, with the purpose of obtaining their consent or, as the case may be, to reach an agreement on such measures.

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The indigenous consultations shall be carried out in accordance with principles and rules that guarantee the respect and effective exercise of the substantive rights of the indigenous peoples recognized in this Constitution.

When the administrative measure to be adopted is intended to benefit a private individual, the cost of the consultation must be covered by the latter.

The individual or legal entity that obtains a profit from the administrative measures subject to consultation must grant the indigenous peoples and communities a fair and equitable benefit, in the terms established by the applicable laws.

The indigenous peoples and communities are the only ones entitled to challenge, through the established jurisdictional channels, the non-compliance with the right recognized in this section. The, conditions and procedures to carry out the challenge shall be regulated by applicable law.

Consistent with the provisions of ILO Convention 169, in force in Mexico since 1991, a key point of the Reform is the inclusion of the phrase "for the purpose of obtaining their consent or, as the case may be, reaching an agreement on such measures". This implies that the purpose of initiating the consultation process is to obtain consent or reach an agreement, however, it does not grant peoples and communities a veto right when the substantive rights of the communities are respected, and these rights are effectively exercised.

The Reform does not specify the cases in which free, prior and informed consent is required, such as the transfer and relocation of these peoples or the use of their lands to deposit toxic substances, as established in Convention 169, the United Nations Declaration on the Rights of Indigenous Peoples and the jurisprudence of the Inter-American Court of Human Rights.

As an essential point, the Reform incorporates the obligation of the individuals or legal entities that obtain a profit from the administrative measures that are the object of the consultation, to grant the peoples and communities a fair and equitable benefit. Regulating this concept in the secondary legislation will be an important legislative challenge, and the requirements that the legislation establishes in this respect could have an impact on the viability of certain projects.

The last paragraph of the Reform is innovative, as it limits the legal standing to challenge breaches of the right to prior consultation exclusively to indigenous communities, thus excluding Non-Governmental Organizations and individual members of such communities. This will force the communities to act through their representative bodies to be able to claim the referred non-compliance.

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The Reform did not make any changes in the delicate issue of land tenure for the indigenous communities that certain organizations sought to introduce. The forms and modalities of ownership and tenure established in the general legal framework continue to be applied. Regarding the natural resources of the places inhabited and occupied by the communities, they have the preferential use and enjoyment of such resources, except for those corresponding to the strategic areas listed in Article 28 of the Constitution, such as petroleum.

Before the Reform, the rules for the recognition of indigenous peoples and communities as entities of public interest corresponded to each state of the Republic. This provision was eliminated, and now it is the Constitution that directly acknowledges these rights as follows: "Indigenous peoples and communities are recognized as subjects of public law with juridical personality and their own patrimony". The absence of a system of qualification and public registration of the communities, their normative systems, governing bodies, location, occupied lands, and patrimony, to be considered as indigenous communities in the terms of Article 2 of the Constitution and to be holders of constitutional rights (as exists in Colombia), continues to generate legal insecurity with respect to the identification of indigenous communities. In addition, the Reform elevates self-ascription to constitutional rank as one of the criteria to be considered for the recognition of indigenous peoples and communities, which may give rise to misuses.

The Reform grants legislative powers to the Congress of the Union that it did not have before, but it also obliges the states to adapt their constitutions and laws to ensure the effective observance of the Reform in their respective spheres of competence. This creates a confusing situation in terms of competencies. It is likely that the states will wait for the federal legislator to act before making their own reforms.

The Congress of the Union has until March 30, 2025 to issue the general law with the norms and mechanisms that ensure the respect and implementation of the constitutional rights of indigenous and Afro-Mexican peoples and communities, and to harmonize the applicable legal framework, such as the Electricity Industry Law, the Hydrocarbons Law, and their respective Regulations. The general law should be applicable to projects of all sectors of the economy that cause significant affectations or impacts on the life or environment of indigenous communities.

The implementation of the Reform in laws and secondary regulations as described above may impact new projects and those under development. At Ritch Mueller we have specialized teams to provide legal advice on all aspects derived from the Reform that may affect the development, execution and financing of energy, infrastructure, industrial and tourism projects.