美國於 USMCA 爭端解決機制下控訴墨西哥能源政策案簡析

一、背景

墨西哥政府於 2019 年起進行能源法規改革，修法重點包括優先使用國有企業電力及天然氣，內容略以：

(一)電力工業法(Electric Power Industry Law)規定國家能源管控中心(Centro Nacional de Control de Energía, CENACE)營運的電力輸配系統，優先輸送墨西哥聯邦電力委員會(Comisión Federal de Electricidad, CFE，相當於墨國營電力公司)生產的電力。

(二)墨西哥能源規範委員會 Comision Reguladora de Energía, CRE)同意墨西哥國營石油公司(PEMEX)延後 5 年使用含硫量較低的石油 (註：此舉讓 PEMEX 得以延後添購煉製低硫石油的新設備，損害美國低硫石油在墨西哥的銷量及美國煉製低硫石油的設備在墨西哥的商機) 。

(三)墨西哥能源部要求 CRE 及國家天然氣管控中心(Centro Nacional de Control de Gas Natural, CENAGAS)提供能源供應商優先採購 CFE 及 PEMEX 天然氣的獎勵，並限制美國天然氣進口。

二、墨能源改革措施爭議

美國主張前述墨國措施不符合 USMCA 第 2.3 條(國民待遇)、GATT1994 第 3 條(國民待遇)、USMCA 第 14.4 條(與投資有關的國民待遇)、USMCA 第 2.11 條(進出口限制)、USMCA 第 22.5.2 條(國營企業與授權獨佔事業的管轄與管理機關)、USMCA 第 29.3 條(與執行 USMCA 規範有關的行政程序)。

三、當事國主張及第三方意見

(一)控訴方(美國)

1、 墨西哥政府規定輸電系統優先輸送墨國營企業生產的電，對美國電力造成歧視、造成美國在墨西哥能源投資業者的投資

條件低於墨本土業者。

2、 墨西哥政府延長 PEMEX 使用含硫量較高的石油，變相允許該公司持續以現有設備生產石油，免去設備升級及使用美國含硫量較低石油的需求，對美國石油及設備造成歧視待遇。

3、 墨西哥政府要求優先採購墨國營企業生產的天然氣，對美國天然氣造成歧視，也對在墨能源領域投資的美企造成歧視待遇，依據美方統計，美在墨能源領域投資金額超過 300 億美元。

4、 墨西哥政府對美商申請的再生能源投資案延遲回復或不作為，阻礙及限制美國在墨西哥的再生能源(太陽能及風力)發電設施運作、進出口電力及石油、電力儲存或轉移、石油配送等營運活動。在法規面及內地銷售與轉運等措施歧視美國電力；對美國投資者構成歧視待遇；對美國電力或美國在墨西哥生產的電力構成貿易限制；墨西哥國營事業監管機關沒有行使職權，公正客觀地監管國營事業；墨西哥政府沒有公正、客觀、合理地執行法規。

(二)共同控訴方(加拿大)

加拿大認為墨西哥前述措施損害外商在墨投資潔淨能源的權益，且不符合 USMCA 規範。

(三)被告方(墨西哥)

墨西哥羅培茲(AMLO)總統捍衛其所推動的能源改革政策，強調墨西哥不會再延續過往對美國所採取的順從政策，更遑論墨政府新能源政策並無違反 USMCA 相關規範。

四、最新發展

(一)目前仍處於爭端解決諮商階段：依據 USMCA 爭端解決規定，雙方自美國通知後，應於 75 天內進行諮商，倘無法逾期內取得共識，美國可要求成立小組。由於美國於 2022 年 7 月 20 日向

墨西哥提出諮商，目前已逾該期限，惟雙方仍試圖尋求共識，因此美國尚未提出成立小組的要求。

(二)USMCA 墨經濟部諮商談判團隊多數已請辭或被辭職：墨前任經長 Claudia Clouthier 於 2022 年 10 月 6 日以個人因素為由請辭，據悉請辭原因之一係伊在本案諮商階段與羅培茲(AMLO)總統立場分歧。隨後 AMLO 任命素有鐵娘子之稱的墨賦稅總署(SAT)署長 Raquel Buenrostro 擔任經長，伊隨後任命前 USMCA 勞工章主談人 Alejandro Encinas Nájera 為外貿次長，並要求隨同 Clouthier 前經長離職之墨經濟部外貿次長 Luz María de la Mara 任命之多位曾參與 USMCA 談判之總司長及司長層級高層主管主動請辭。

(三)美、墨雙邊諮商遲未能獲共識之緣由：根據墨重要財經平面媒體金融時報(El Financiero)及經濟學人報(El Economista) 2022 年 11 月 9 日引述 Buenrostro 經長 11 月 8 日在墨聯邦參議院備詢發言略以，墨與美、加兩國在本案雙邊諮商之所以未能於規定 75 天內達成共識，主要癥結在於墨經濟部前談判團隊未就美加兩國向墨所提出之第一份及第二份問卷予以完整填復，且態度傲慢，不僅未與墨能源業者充份溝通，在墨行政部門亦未與包括墨能源部在內相關單位協調問卷填復內容，因此本爭端案的諮商階段才會超過 75 天期限還未能達成共識。

(四)墨 AMLO 總統在 2022 年 10 月 14 日表示，美墨雙方均有不讓本爭端案往成立小組的方向進行之期待。

(五)美國有迅速解決本爭端的需求：墨經濟觀察家 José de la Cruz 認為，美國視協助能源產業為基本且必須的產業，因此無論是為了 2022 年 11 月 8 日期中選舉或 2024 總統選舉，美政府都有盡速解決本爭端的需求。

(六)美 USTR 戴琪與墨經長 Raquel Buenrostro 於 2022 年 11 月 3 日

視訊會議情形：戴琪祝賀 Buenrostro 經長就任新職，並傳達美墨經濟關係及雙方持續執行 USMCA 的重要性，希望本案能有迅速的進展(expeditious progress)。Buenrostro 經長及 Encinas Najera 外貿次長會中重申墨國在攸關國家重大利益之自主權。

(七)墨國各界看法：墨前能源次長 César Hernández 及墨 USMCA 前主談人 Kenneth Smith 均認為，墨國在本爭端案恐難以獲勝，屆時墨政府將無法堅持其能源政策。

五、倘成立爭端解決小組，且墨在本爭端案敗訴對經濟可能之影響

(一)USMCA 爭端解決機制提供控訴方權益損失的彌補機制

依據 USMCA 第 31-A.10，控訴方得適當地對貨品或服務暫停優惠關稅待遇或實施懲罰作為補償，且雙方應就補償方式持續諮商直至彌補控訴方減損的權益。

(二)綜上，倘小組裁定墨國能源政策不符合 USMCA 規範，且墨國無意願修正，美國可能對墨國若干產品或服務課徵懲罰關稅。對此，墨國 Base 銀行(Banco Base)經濟分析處處長 Gabriela Sillelr 就美對墨課徵不同程度的懲罰性關稅對墨產生之影響，預估下列三種可能情境：

1、 倘美國對墨西哥特定產品或服務課徵 5 至 10%關稅，墨幣(peso)恐將貶值至 1 美元兌換 22 墨幣(註：相當於貶值 5-10%)，以彌補被加徵的關稅。

2、 倘美國對墨特定產品或服務課徵 15%關稅，考量墨西哥主要產業包括汽車及電子產品組裝等，其出口與進口息息相關，一旦美國對墨主要產品祭出暫停適用優惠關稅或課徵懲罰性關稅，屆時墨國對外貿易赤字可能會上升惡化。

3、 倘美對墨特定產品或服務課徵 15%以上關稅，墨西哥 GDP 可能會減少 1.5%，墨政府只能放手讓墨幣貶值至 1 美元兌換 23.5 墨幣來彌補被加徵關稅的傷害。

(三)墨新任經長對墨西哥與美加達成協議表示樂觀：Buenrostro 經長在前述參議院備詢中強調，在墨經濟部前經貿談判團隊要員陸續離任後，墨政府與產業界及行政部門間溝通及合作將更為順暢，將可更快速回復美加兩國第三份問卷，另在全球產業供應鏈日趨區域化及近來近岸生產(Nearshoring)似已蔚為風尚之際，美墨兩國均盼儘速就雙方在能源方面歧見達成解決方案，俾利目前有至少 400 家企業規劃從亞洲轉移至鄰近美國的墨西哥，以供應北美市場需求。

六、本組觀察

(一)墨對美貿易依賴甚深：以 2021 年為例，墨對美出口 3,988 億美元，占墨全球出口之 80.69%，自美進口 1,678 億美元，占墨總進口之 43.70%，另在僑匯及觀光收入方面亦十分仰賴美國，每年為墨西哥創造數百億美元之收入，還有美墨邊境超過 3,000 公墨邊境所引發之非法移民及販毒等有組織犯罪問題，爰如何妥善處理對美關係，是歷任墨西哥總統重中之重的第一優先要務。

(二)鑒於美中貿易戰及全球新冠肺炎疫情所造成之產業供應鏈斷鏈等問題，全球企業尤其是亞洲及北美廠商，已將過往全球化基於生產效率極大化的降低成本考量，將工廠設在中國及東南亞等勞力成本較低的國家，調整為近岸生產，以確保供應鏈安全的模式，而墨國鄰近美國地理位置及 USMCA 提供外商在以規則為基礎的投資法規穩定性與透明度，加上具競爭力的勞動力，已成為包括台商在內的各國廠商，在北美設立生產據點的首選。

(三)綜上，墨政府應該會在尋求能源自主的國家利益及不違反 USMCA 相關規範情形下，儘速與美國達成協議，避免本案往成立爭端解決小組方向前進，進而影響墨西哥在促進出口及吸引外資方面的努力。

附件：與本爭端案相關的 USMCA 條文

Article 2.3: National Treatment

1. Each Party shall accord national treatment to the goods of another Party in accordance with Article III of the GATT 1994, including its interpretative notes, and to this end, Article III of the GATT 1994 and its interpretative notes are incorporated into and made part of this Agreement, mutatis mutandis.

2. The treatment to be accorded by a Party under paragraph 1 means, with respect to a regional level of government, treatment no less favorable than the most favorable treatment that regional level of government accords to any like, directly competitive, or substitutable goods, as the case may be, of the Party of which it forms a part.

Article 14.4: National Treatment

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a government other than at the central level, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that government to investors, and to investments of

investors, of the Party of which it forms a part.

4. For greater certainty, whether treatment is accorded in “like circumstances” under this Article depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.

Article 2.11: Import and Export Restrictions

1. Except as otherwise provided in this Agreement, no Party shall adopt or maintain any prohibition or restriction on the importation of any good of another Party or on the exportation or sale for export of any good destined for the territory of another Party, except in accordance with Article XI of the GATT 1994, including its interpretative notes, and to this end Article XI of the GATT 1994 and its interpretative notes are incorporated into and made a part of this Agreement, mutatis mutandis.

2. The Parties understand that GATT 1994 rights and obligations incorporated by paragraph 1 prohibit, in any circumstances in which any other form of restriction is prohibited, a Party from adopting or maintaining:

(a) an export or import price requirement, except as permitted in enforcement of antidumping and countervailing duty orders or price undertakings;

(b) import licensing conditioned on the fulfilment of a performance requirement; or

(c) a voluntary export restraint inconsistent with Article VI of the GATT 1994, as implemented under Article 18 of the SCM Agreement and Article 8.1 of the AD Agreement.

3. If a Party adopts or maintains a prohibition or restriction on the importation from or exportation to a non-Party of a good, nothing in this Agreement shall be construed to prevent that Party from:

(a) limiting or prohibiting the importation of the good of that non-Party from the territory of another Party; or

(b) requiring, as a condition for exporting the good of the Party to the territory of another Party, that the good not be re-exported to the non-Party, directly or indirectly, without being consumed in the territory of the other Party.

4. If a Party adopts or maintains a prohibition or restriction on the importation of a good from a non-Party, the Parties, on the request of a Party, shall consult with a view to avoiding undue interference with or distortion of pricing, marketing, or distribution arrangements in another Party.

5. No Party shall as a condition for engaging in importation generally, or for the importation of a particular good, require a person of another Party to establish or maintain a contractual or other relationship with a distributor in its territory.

6. For greater certainty, paragraph 5 does not prevent a Party from requiring

that a person referred to in that paragraph designate a point of contact for the purpose of facilitating communications between its regulatory authorities and that person.

7. Paragraphs 1 through 6 do not apply to the measures set out in Annex 2-A (Exceptions to Article 2.3 (National Treatment) and Article 2.11 (Import and Export Restrictions)).

8. For greater certainty, paragraph 1 applies to the importation of any good implementing or incorporating cryptography, if the good is not designed or modified specifically for government use and is sold or otherwise made available to the public.

9. For greater certainty, no Party shall adopt or maintain a prohibition or restriction on the importation of originating used vehicles from the territory of another Party. This Article does not prevent a Party from applying motor vehicle safety or emissions measures, or vehicle registration requirements, of general application to originating used vehicles in a manner consistent with this Agreement.

Article 22.5: Courts and Administrative Bodies

1. Each Party shall provide its courts with jurisdiction over civil claims against an enterprise owned or controlled through ownership interests by a foreign government based on a commercial activity carried on in its territory.12 This shall not be construed to require a Party to provide

jurisdiction over those claims if it does not provide jurisdiction over similar claims against enterprises that are not owned or controlled through ownership interests by a foreign government.

2. Each Party shall ensure that any administrative body that the Party establishes or maintains that regulates a state-owned enterprise exercises its regulatory discretion in an impartial manner with respect to enterprises that it regulates, including enterprises that are not state-owned enterprises.

Article 29.3: Administrative Proceedings

With a view to administering all measures of general application with respect to any matter covered by this Agreement in a consistent, impartial, and reasonable manner, each Party shall ensure in its administrative proceedings2 applying measures referred to in Article 29.2.1 (Publication) to

a particular person, good, or service of another Party in specific cases that:

(a) a person of another Party that is directly affected by a proceeding is provided, whenever possible and, in accordance with domestic procedures, with reasonable notice of the initiation of a proceeding, including a description of the nature of the proceeding, a statement of the legal authority under which the proceeding is initiated and a general description of the issue in question;

(b) a person of another Party that is directly affected by a proceeding is afforded a reasonable opportunity to present facts and arguments in support of that person's position prior to any final administrative action, when time, the nature of the proceeding, and the public interest permit; and

(c) the procedures are in accordance with its law.

Article 31-A.10: Remedies

1. Once the conditions precedent to the imposition of remedies have been met, the complainant Party may impose remedies that are the most appropriate to remedy the Denial of Rights. The complainant Party shall select a remedy pursuant to paragraph 2 that is proportional to the severity of the Denial of Rights and shall take the panel's views on the severity of the Denial of Rights into account when selecting such remedies.

2. Remedies may include suspension of preferential tariff treatment for goods manufactured at the Covered Facility or the imposition of penalties on goods manufactured at or services provided by the Covered Facility.

3. In cases where a Covered Facility or a Covered Facility owned or controlled by the same person producing the same or related goods or providing the same or related services has received a prior Denial of Rights determination, remedies may include suspension of preferential tariff treatment for such goods; or the imposition of penalties on such goods or services.

4. In cases where a Covered Facility or a Covered Facility owned or controlled by the same person producing the same or related goods or providing the same or related services has received a prior Denial of Rights determination on at least two occasions, remedies may include suspension of preferential tariff treatment for such goods; the imposition of penalties on such goods or services; or the denial of entry of such goods.

5. After the imposition of remedies, the Parties shall continue to consult on an ongoing basis in order to ensure the prompt remediation of the Denial of Rights and the removal of remedies.

6. If, as a result of those ongoing consultations, the Parties reach agreement that the Denial of Rights has been remediated, the complainant Party shall remove all remedies immediately. If the Parties are in disagreement as to whether the Denial of Rights has been remediated, the respondent Party may request an opportunity to demonstrate to the panel that it has taken action to remediate the Denial of Rights. The panel shall make a new determination within 30 days after receipt of the respondent Party's request, consistent with the procedures set out in Article 31-A.8. The complainant Party may request a new verification consistent with the procedures set out in Article 31-A.7.

7. If the panel determines that the Denial of Rights has not been remediated, the respondent Party may not request another determination for 180 days, and any remedies shall remain in place until the Parties agree that remediation has occurred or a panel determines that the Denial of Rights has been remediated.