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Change of Clean Energy Rules in Mexico: Potential Impact for Investors

Fernando Pérez-Lozada (CMS) · Monday, January 13th, 2020

In 2013 Mexico embarked on a major energy reform by [amending its Constitution](#), thereby allowing the participation of private investors in the exploration and extraction of oil & gas and the generation of electricity, particularly from clean and low-cost energy sources.

Subsequently, Certificates of Clean Energy (“[CELs](#)“) were introduced on [31 October 2014](#) to promote new “private” investments for the generation and use of clean energy in accordance with Mexico’s [national development plan 2013-2018](#). CELs are granted to companies generating electricity only from renewable sources,¹⁾ which can be sold to suppliers, qualified users and other obliged participants to meet their consumption requirements. Furthermore, pursuant to Mexico’s international commitments (*i.e.* [Paris Agreement](#) ratified on 21 September 2016) and the [national strategy](#) adopted as a result, Mexico committed to generate **30%** of its energy from clean sources by 2021 (from a base of 20.3% in 2015), to reach **35%** by 2024 (as established in its [Climate Change Law](#)), **37.7%** by 2030 and **50%** by 2050. Mexico’s national strategy of clean energy was inspired by model economies such as Germany ([Energiewende](#)), France ([Act on energy transition for green growth](#)) and the State of California in the U.S. ([Senate’s Bill No. 350](#)).

Under the 2014 original regime, CELs could only be granted for a period of 20 years to “**Clean Power Plants**” (*Centrales Eléctricas Límpias*) established after 11 August 2014, to be sold in the free market under certain criteria established by SENER. Notably, the plants owned by the State (under the Federal Electricity Commission “[CFE](#)“) built before August 2014 –known as “**Legacy Power Plants**” (*Centrales Eléctricas Legadas*)– were not eligible to acquire CELs, unless they invested capital to increase their production of clean energy (*i.e.* by replacing power plants with new ones) and only to the extent of the additional clean energy generated.

This policy was intended to promote new investments on clean energy plants through a series of public auctions. As a result, private investors have committed [US \\$8.6 billion](#) in clean energy projects in the last 5 years under the 2014 CELs regime. There are 44 companies registered as “Clean Generators” (as of 7 November 2019), involving local and foreign investors from, *inter alia*, North America, Europe and Asia. In 2017 Mexico was ranked the **9th** most attractive country to invest in renewable energy (out of the top 40 economies) and the **2nd** in Latin America (behind Chile) according to the [Renewable Energy Country Attractiveness Index \(RECAI 2017\)](#). In the same year, 36% of the total investment in clean energy in Latin America was placed in [Mexico](#). However, in November 2019 Mexico lost 15 positions in the attractiveness index, and ranked in

the 24th position (RECAI 2019).

However, on 28 October 2019 the Secretariat of Energy of Mexico (“SENER”) published an accord modifying the previous 2014 *Guidelines that established the criterion for the issuance of Clean Energy Certificates* (the “New Guidelines”). Under the New Guidelines, the state-owned Legacy Power Plants can now acquire CELs –without the previous condition of making an investment to increase their clean energy generation. Furthermore, the State can acquire CELs with respect to all the clean energy generated. Notably, the CFE generated 65.7% of the clean energy in Mexico in 2018.

The left-wing administration currently in power does not consider that this change will have a negative impact on the market of CELs, as it will not reduce the number of clean generators, but considers the favorable outcomes to be the following: (i) favor competition between public and private generators of clean energy; (ii) increase productivity; and (iii) favor better prices for the final consumer, thus avoiding the speculation and the increase of prices. This was indicated in the New Guidelines.

However, this view is not shared by business and energy associations who have expressed their concern on the adverse impact of the regulatory change. One business association in Mexico (*Consejo Coordinador Empresarial*) has claimed that this modification “*alters the equitable treatment between participants in the electricity sector, generates uncertainty and violates the execution of investments.*” Furthermore, SENER modified the guidelines without carrying out a Regulatory Impact Analysis –employed in OECD countries to assess the positive and negative effects of a regulatory change– which includes public consultations.

It has been reported that power generators and companies have filed legal *injunctions* and *Amparos* (constitutional appeals) to contest the constitutionality (legality and due process) of the modification, which may involve investors from the UK, France and Italy. In a *joint communication* the wind and solar associations in Mexico (AMDEE and ASOLMEX) reported the main arguments put forward before *Amparo* courts, namely: (i) violation of environmental rights; (ii) destruction of the value of power plants in operation; and (iii) reduction of the investors’ confidence in Mexico. As a result, on 12 December 2019 the District Judge(s) hearing the case granted the “definitive suspension” (yet provisional in nature) of the application of the New Guidelines, while the merits of the *Amparos* in question are resolved. Although the suspension maintains the *status quo* pending the analysis of the merits, it is uncertain what the outcome and duration of the *Amparos* would be. Foreign investors have other mechanisms of negotiation and Investor-State arbitration under the various Bilateral Investment Treaties signed by Mexico (29 in force) and other treaties with investment provisions (*i.e.* NAFTA, CPTPP), under which a number of *arbitration proceedings can be triggered against Mexico*, given the high stakes at hand.

Potential impacts of the regulatory change

It has been suggested that this change may have a potential effect in the prices of CELs, which under specific circumstances may affect the investor’s economic interests and/or the value of their investments. On the other hand, Mexico’s ability to achieve its clean energy goals seems uncertain and therefore it is unclear how Mexico will deal with its commitments in the near future.

The following potential impacts have been indicated by experts, local media and renewable energy associations, as a result of the change of the rules governing CELs in Mexico:

1. Saturation of CELs in the market;
2. Decrease of the price of clean energy (*i.e.* CELs);
3. Devaluation of clean energy plants in operation after August 2014;
4. Uncertainty on the viability of current and/or new clean energy projects; and
5. Discouragement of foreign investment in the clean energy sector.

Potential violation of foreign investor's rights

The most common protections afforded under the investment treaties signed by Mexico are related to, *inter alia*, expropriation, national treatment, fair and equitable treatment and full protection and security. In some cases, the legitimate expectations standard has been analyzed by investment tribunals considering both the investors' economic interest and the State's right to regulate. In the case at hand, arbitral tribunals would have to decide those issues depending on the particular circumstances of the case and their interpretative approach of the BIT's language.

At this point, it is uncertain for how long foreign investors would continue to litigate in Mexican courts before resorting to treaty-based arbitration against Mexico, if necessary. This would depend on many factors, including the likelihood of success of domestic proceedings on the one hand, and on the other, on the exhaustion of local remedies requirements, cooling periods and/or statute of limitation periods set out in the applicable BIT.

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References

?1 Receiving 1 CEL for each MW/h generated.

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