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For more information,
contact:

Ken Fleuriet
+ 33 1 7300 3910 (Paris)
+ 1 202 626 8970 (D.C.)
kfleuriet@kslaw.com

Reggie Smith
+1 713 751 3226
rsmith@kslaw.com

Roberto Aguirre Luzi
+1 713 276 7412
raguirreluzi@kslaw.com

Harry Burnett
+1 212 556 2201
hburnett@kslaw.com

Amy Roebuck Frey
+ 33 1 7300 3914
afrey@kslaw.com

Kevin Mohr
+1 713 276 7428
kmohr@kslaw.com

Fernando Rodriguez-
Cortina
+1 713 276 7380
frdriguez-cortina@kslaw.com

Isabel San Martin
+33 1 7300 3973
isanmartin@kslaw.com

Arturo Oropeza
+1 713 276 7365
aoropeza@kslaw.com

Mexico Restricts Entry-Into- Operation of New Solar and Wind Plants

On April 29, 2020, CENACE —the Mexican Electricity Grid Operator— issued an administrative **Decision** ordering the suspension of all preoperative tests for wind and solar PV plants for an indefinite period of time to allegedly “protect the efficiency, quality and security of the National Electric System” amid the COVID-19 pandemic.¹ The Decision impacts new renewable energy projects currently conducting preoperative tests, as well as plants under construction.

In the Decision, CENACE stated that the COVID-19 health emergency poses a major challenge to the national grid due to a significant decrease in energy consumption. In this context, CENACE underscored its responsibility to guarantee the reliability of electricity supply and its ability to undertake all necessary actions to strengthen the system in accordance with the principles of “energy sovereignty and security.” In a Technical Annex to the Decision, CENACE listed a series of recent, temporary electrical failures that took place in relation to certain solar photovoltaic (“PV”) plants and wind farms, concluding that due to their intermittent supply, these renewable energy sources “affect the reliability of the national electric system and the quality and continuity of electricity supply.” It further noted that wind and solar PV plants “do not contribute with physical inertia to the stability” of the electricity system. Based on these statements, CENACE ordered the suspension, as of May 3, 2020, of all preoperative tests for wind and solar PV plants for an indefinite period of time.

The Decision directly impacts new renewable energy projects that were in the process of conducting preoperative tests as well as plants under construction. Most of the affected companies won competitive bids in the third national auction in 2017 and will now see their projects indefinitely suspended as they will not be able to start operating until CENACE lifts the suspension. It is unclear whether the suspension will last only for the duration of the State of Emergency declared by Mexico due to the COVID-19 pandemic – currently set until May 30, 2020 – or whether it will depend on other factors, such as an increase in energy consumption.



King & Spalding

Paris
12 Cours Albert 1er
Paris 75008

Houston
1100 Louisiana Street
Suite 4000
Houston, Texas 77002-5213

CENACE's Decision has received a series of criticisms from the private sector (including the Business Coordinating Council), and from State entities. On May 6, 2020, COFECE—the Mexican antitrust agency—issued an official **Opinion** concluding that CENACE's Decision is contrary to competition regulations.² COFECE stated that excluding the most efficient producers for an indefinite period of time gave an unfair advantage to CFE (*Comisión Federal de Electricidad*), the state-owned utility. Notably, COFECE found the Decision's connection to COVID-19 unclear, as it does not explain the relationship between the decrease in energy consumption and the instability in the electricity system. COFECE also observed that the electric failures mentioned in the Decision occurred before COVID-19. It also expressed concern that CENACE's measure indefinitely suspends all new renewable energy projects, and it underscored the importance of providing certainty to the market, in particular to planned and future investments in renewable energy projects.

As expected, the wind and solar energy associations are very concerned and estimate that the Decision will impact more than 40 projects, representing over 5,000 MW in installed capacity. These projects represent approximately 50% of the projects that were scheduled to enter into operation in 2020, accounting to more than U.S. \$6, billion in investment.

TAKEAWAY

This is the most recent episode of a continuing saga in the Mexican renewable energy sector. Clean-energy players have been navigating regulatory uncertainty since President Andrés Manuel López Obrador took office at the end of 2018. In November 2019, CRE—the Energy Regulatory Commission—modified the eligibility requirements for obtaining “clean energy certificates” or “CELs,” which are financial incentives aimed at developing Mexico's renewable energy market. With that measure, old projects developed by the State utility CFE became eligible to obtain CELs, distorting the market and negatively impacting renewable energy investors. In response to this measure, most renewable energy companies filed challenges before domestic courts (*amparo* proceedings), claiming that the modification violated constitutional rights and environmental laws. Last December, Mexican federal courts stayed the measures until the *amparo* challenges are conclusively decided.

After CENACE's most recent Decision, a new wave of *amparo* challenges is expected. In parallel, companies under foreign ownership should consider assessing their international remedies under bilateral and multilateral investment treaties. Mexico has investment treaties with over 35 countries including the U.S., Canada, Spain, the U.K., and others.

King & Spalding's International Arbitration team has significant experience in energy disputes across Latin America and is currently representing investors from across the globe in at least 20 renewable energy arbitrations against different European countries due to changes to their renewable energy regulations.³



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¹ CENACE, Acuerdo para garantizar la eficiencia, Calidad, Confiabilidad, Continuidad y seguridad del Sistema Eléctrico Nacional, con motive del reconocimiento de la epidemia de enfermedad por el COVID -19: <https://www.cenace.gob.mx/Docs/MarcoRegulatorio/AcuerdosCENACE/Acuerdo%20para%20garantizar%20la%20eficiencia.%20Calidad.%20Confiabilidad.%20Continuidad%20y%20seguridad%20del%20SEN%202020%2005%2001.pdf>.

² Opinión del Pleno de la COFECE, OPN-006-2020: <https://www.cofece.mx/CFCResoluciones/docs/Opiniones/132/28/5125826.pdf>.

³ See, e.g., K&S Clients Prevail In ECT Arbitration Against Spain: <https://www.kslaw.com/news-and-insights/ks-clients-prevail-in-ect-arbitration-against-spain>.