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CLIENT ALERT

Mexican COVID-19 Measures Imperil Foreign Investments in Renewable Energy Projects – Are International Arbitration Claims Imminent?

May.19.2020

Mexico's electric system operator, the National Energy Control Center (CENACE), imposed new constraints on renewable energy projects this month in a move which has drawn rebukes from Canadian and European officials. The new measures may jeopardize billions of dollars of foreign investment into Mexico's energy industry and lead to multiple international arbitration claims by aggrieved foreign investors.

The Mexican government reformed its energy system in 2013 and 2014, adopting measures that liberalized the purchase and sale of electricity and which promoted the development of clean energy. As part of those reforms, the country established auctions for clean energy projects; required off-takers in the wholesale electricity market, including the state-owned electric utility *Comisión Federal de Electricidad* (CFE), to acquire clean energy certificates; and moved to an economic dispatch model, whereby efficient plants with lower costs are dispatched before older, less economic projects.

Despite the apparent success of the Mexican government's reforms, CENACE this month issued a resolution temporarily suspending all pre-operation tests for wind and solar project, and provided that certain thermal projects will be designated as "must-run", in violation of Mexico's dispatch rules. CENACE claims the measures are necessary in light of the current COVID-19 pandemic, but foreign officials are skeptical about the justification, and have expressed concern that the government is undermining investments by renewable energy developers who responded to the government's reforms by constructing tens of projects, worth billions of dollars, over the last few years.

These concerns are exacerbated by other recent energy market reforms that have undermined the value of renewable energy investments in the country. The government cancelled a planned electricity auction, which would have increased renewable participation in the energy market; changed the eligibility criteria to allow older projects developed by CFE to obtain clean energy certificates; and reduced the value of the certificates, a change which has since been challenged in the courts.

This recent measure by CENACE, and its negative impact on renewable energy projects, may well implicate Mexico's obligations under dozens of Bilateral Investment Treaties (BITs) and Investment Chapters of Free Trade Agreements (FTAs) it has signed with countries such as the United States and Canada (through NAFTA—soon to be USMCA, and CP-TPP), the UK, France, Spain and Switzerland, among others. Depending on how companies have structured their investments into Mexico, they may be able to invoke these BITs and FTAs to pursue binding international arbitration for any damages that may be caused by Mexico's expropriatory, arbitrary or otherwise discriminatory measures. Furthermore, Mexico recently became a party to the ICSID Convention, which allows foreign investors to enforce favorable arbitral awards in the courts of more than 150 ICSID treaty parties, as if the awards were final judgments of their highest court.

Crowell & Moring has extensive experience helping companies resolve international disputes with governments and representing them in investor-State arbitrations under international investment agreements. It has represented some of the world's largest renewable energy developers in both litigation and arbitration, and has assisted clients and worked with local

counsel across Latin America and the Caribbean. The firm's international dispute resolution and energy experts are closely monitoring how governments in the area are responding to COVID-19 and how commercial relationships are impacted by the global pandemic.

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