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The Land of the Setting Sun: Mexico's Disregard for the Law in Renewable Energy Policy

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INTRODUCTION

A report published by the Center for the United States and Mexico on June 5, 2020,¹ examines the precarious state of renewable energy projects in Mexico. The report analyzes relevant evidence to argue that renewable energy projects are facing adversarial action from the government of Andrés Manuel López Obrador in Mexico.² However, at that time, no concrete policy steps had yet been taken toward the elimination of wind and solar projects. There were only rhetorical statements against such projects, made especially by Manuel Bartlett, the CEO of Mexico's national utility company (*Comisión Federal de Electricidad* or CFE). In various public declarations, against all evidence, he spoke about the "adverse effects" of renewable energy generation.³ He claimed that the prices of solar and wind plants are, comparatively speaking, much higher than those using hydrocarbon sources⁴ and that the "intermittent" nature of sun- and wind-generated electricity made the supply unreliable and thus inappropriate for public electric service. He further claimed that the transmission rates charged by the owner of the grid (CFE) were too low, to the point of cheating the country of revenue, and that private and foreign companies were getting what he repeatedly called the "lion's share"⁵ of the contracts awarded by prior submissive and corrupt governments. These public statements were a sign of the growing aversion of the López

Obrador administration toward renewable energy. And, as the head of the CFE, Bartlett's statements were not taken lightly by investors. Indeed, Bartlett's declarations turned out to be a harbinger of a recent series of legal and policy actions aimed at the elimination of solar and wind power generation through the crafting of technical and financial barriers.

To explore this turn of events, this brief examines the decrees⁶ issued by the National Center for the Control of Energy (CENACE) on April 29, 2020⁷ and those issued by the Department of Energy (SENER) on May 15, 2020.⁸ These decrees are specifically intended to hinder renewable energy companies from initiating the start-up tests to connect to the transmission grid.⁹ The explanation given to justify these actions is the presumed intermittent nature of power generated through wind and sun, which, due to the Covid-19 crisis, could bring about an unacceptable interruption in the public utility service.¹⁰ To be sure, the risks of intermittency are subject to debate,¹¹ but the real problem is that these policy documents were not issued in accordance to current law, and they cannot abrogate the rights and obligations contained therein. Predictably, several lawsuits have followed the publication of these decrees. Constitutional challenges (*amparos*) have been filed by dozens of affected companies and two non-governmental organizations (NGOs), and a petition for a constitutional



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injunction was even presented before the Supreme Court by Mexico's antitrust commission against these decrees, arguing that they are really intended to restore the monopolistic market power of the CFE.¹²

In the next section, the decrees by CENACE and SENER issued on April 29, 2020, and May 15, 2020, are examined in form and content. In it, a review of their adherence to the administrative procedures, by which previous decrees have been issued and published, is carried out. Here, the central question is whether due process was followed in issuing the decrees. The following section takes up a more complex issue, the economic and technical considerations behind the decrees. Finally, the essay concludes with an update on the state of current litigation against the decrees. In this regard, the judicial branch has so far sided with the challengers of the decrees, including both companies and NGOs.¹³

THE CENACE DECREE: NO TRANSMISSION ALLOWED

Some background on CENACE can provide more context for the anomalies behind this decree. CENACE was historically linked to the CFE as its exclusive transmission operator. That is, because the CFE was a vertically integrated¹⁴ legal monopoly, in charge of the provision of all electricity, CENACE's transmission services were practically for its exclusive use.¹⁵ In other words, the role of CENACE was to coordinate the electricity dispatch for the CFE.¹⁶ As mentioned in the Baker Institute report *Earth, Wind, and Sun: Will Renewable Energy Prevail in Mexico?*,¹⁷ transmission plays a fundamental role in the electricity value chain, as there is no point in generating electricity without the means of conveying it to the user. That report also shows that, even in the case of the private generators engaged by the CFE, there was evidence of discriminatory behavior by the utility company. The CFE, for example, would grant access to the grid to preferred generators without any transparent criteria as to why some generators were given

access while others were not. The 2013–2014 energy reform separated CENACE from the CFE, turning CENACE into an autonomous transmission company agency, with the ability to grant generators access to the grid based on technical criteria, e.g., their efficiency.¹⁸

After the reform, when electricity bids took place, CENACE—and no longer the CFE—awarded the contracts for access to the transmission grid. This was done by design and to avoid discriminatory action from the utility company. Under the López Obrador administration, however, CENACE and the CFE have reverted to their close relationship. The recent decree issued by CENACE is again void of impartial criteria and is discriminatory by principle. The decree is under the guise of preventing supply unreliability (intermittency) in order to justify excluding some renewable generators. Moreover, part of the justification for the denial of grid access to some generators is that the global health crisis of Covid-19 requires reliability in the supply. In effect, the first paragraphs of the decree set forth a “sanitary basis” as the main reason why “intermittent sources” should not be allowed to connect to transmission lines.¹⁹ They list a number of facilities that have experienced power generation interruptions without proving that intermittency is the true cause of these service disruptions. Finally, CENACE ruled that no connection to the grid will be allowed for the excluded generators if the public health crisis continues. Technically speaking, the decree does not provide sufficient evidence that renewable projects are the cause of the current unreliability in electric power service.²⁰ Moreover, renewable power generation accounts for only 11% of the total capacity installed,²¹ suggesting that, although intermittency may be a problem, interruptions stemming from renewable generators cannot have a substantive impact on the system as a whole. In sum, the technical reasoning of the decree appears unsound and does not justify the denial of connectivity to the grid.

THE SENER DECREE: POLICY OUTSIDE THE LAW

On May 15, 2020, the Energy Ministry (SENER) issued its own decree. The “Reliability, Continuity, and Quality Policy for the Power Sector” (*Política de Confiabilidad, Continuidad y Calidad del Sector Eléctrico*) is a lengthy and intricate document by which, on the basis of Article 33, Section I, of the Federal Public Administration Act (*Ley Orgánica de la Administración Pública Federal*), SENER stated that it intends to set new rules to guarantee the proper operation of the transmission grid, particularly during the Covid-19 crisis.

The power of SENER in crafting energy policy is in fact established in the cited law. SENER’s ability to craft energy policy is therefore not questioned here. Instead, it is argued that the content of its decree runs against current law. Indeed, SENER does have the legal power to issue any type of policy document, but its policy cannot contravene the constitutional, legal, and regulatory framework as approved by Congress or any competent authority. And that is exactly what has happened. According to the Mexican Bar Association, the decree by SENER eschews the rules and principles of its legal framework.²² Here is how.

It violates the principles outlined by the Mexican Constitution in Article 25, paragraphs 1–7, which clearly state that the Mexican economy (including the energy sector) shall be environmentally and socially sustainable, competitive, and open to the participation of the public, private, and social sectors, with no limitations except for those contained in the law itself.²³ Yet, the decree, as it is written, violates the environmental sustainability principle, as it imposes entry barriers for renewable energy projects on the basis that they hinder the reliability, safety, quality, and continuity of electric service. It contradicts the evidence that renewable power plants have zero greenhouse gas emissions and are less polluting than hydrocarbon-based power generation facilities.²⁴ The decree also runs contrary to the principle of social sustainability, because, in

addition to being environmentally friendly, renewable energy plants also have the potential to create many jobs and aid in the technological development of the country. This is evidenced by Mexico’s solar irradiation, which is one of the largest in the world.²⁵ Mexico also has one of Latin America’s largest wind farms. The decree is regrettable because, despite its declining hydrocarbon reserves, Mexico could secure its power supply by using resources that are plentiful and, more importantly, inexhaustible. Another socially desirable aspect of renewable projects is that they do not suffer the price volatility found in hydrocarbon-generated energy. Finally, the technology has reached a state of maturity that could result in highly competitive generation prices.²⁶

In their decrees, both CENACE and SENER seem to have disregarded the advantages of renewable projects, alleging concern that wind and solar power are intermittent and therefore threaten the reliability, continuity, safety, and quality of the electric service.²⁷ This goes against most of the evidence, suggesting that they have other intentions. For example, as already mentioned, renewable energy accounts for 11% of power generation in Mexico, and most of it goes to self-use projects.²⁸ So, even if intermittency is an issue, it should mainly affect the industries that generate power for their own use. Additionally, the major power outages registered in the country were caused by a shortage of natural gas in the Baja California and Yucatan peninsulas, not by intermittency caused by renewable power sources. In both cases, the failure was found in the methane transportation infrastructure. Interestingly, at the time of these power outages, the CFE’s CEO Manuel Bartlett had just stopped a major submarine-transborder pipeline—built and owned by TransCanada—to begin natural gas import operations from the southern United States to Tuxpan, Veracruz,²⁹ which was destined, in part, for the Yucatan peninsula. Further pointing to the real motivations behind this policy is the fact that, as in the case of renewables, Bartlett claimed that private companies were getting the “lion’s share” of the CFE’s financial resources in natural gas contracts.³⁰ This further suggests

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that, when it comes to hydrocarbon-powered energy projects, the government is willing to risk the “reliability, safety, quality and continuity” of public electricity service by obstructing pipeline operations. However, when it comes to renewable projects, the government finds the alleged intermittency unacceptable. In sum, it appears that the government is committed to finding reasons to divest the private sector of conventional or renewable energy sources. Its actions are beginning to look like a de facto reversal of the Peña Nieto energy reform.

Finally, the SENER decree also violates Article 28 of the Constitution, which sets forth that economic activities, within the limits of the law, may be performed by the public, private, and social sectors.³¹ Thus, there is no legal restriction preventing private companies from partaking in either natural gas transportation or renewable energy generation. Instead, they are being excluded through regulatory action. This matches the discourse of president López Obrador and the CFE’s CEO Bartlett, who have long rejected private sector participation in energy generation. It also fits their tacit objective to restore Mexico’s state-owned energy monopolies.³² In doing so, however, they appear to be willing to resort to various justifications and even act in contravention of existing law.

FIGHTING BACK: COMPANIES, NGOS, AND THE ANTITRUST COMMISSION LITIGATE

The CENACE and SENER decrees set of a series of legal challenges. Shortly after their publication, nearly 20 constitutional challenges were filed before the federal courts, resulting in important injunctions against the government’s actions.³³ At the time this brief was written, nearly 200 companies had already received protection from the Federal Judiciary and can now connect to the grid. Of these lawsuits, three disputes deserve special attention, as they have the potential to establish a new trend in Mexican judiciary activism.

Two of these legal actions are constitutional-level injunctions (*amparos*) filed by Greenpeace and Defensa Colectiva A.C. in federal courts.³⁴ The third is a constitutional-level case (*Controversia Constitucional*) initiated by the antitrust regulatory commission of the Mexican government. The first two challenges are noteworthy because they were filed on behalf of the public interest. That is, neither of the two NGOs represent companies, but instead claim to be acting on behalf of the “legitimate interest” of the Mexican people. According to these NGOs, the Mexican people possess a right to social and environmental sustainability through a competitive electric industry that provides opportunities for the public, private, and social sectors to engage. The key difference between an injunction granted to a private affected party is that a ruling against the decrees benefits only the interests of that private party,³⁵ while a ruling on the *public* interest has a broad effect on the laws and regulations of the government. In the latter case, the initial suspension of the decree completely freezes it until the final ruling is issued.³⁶ Interestingly, the first general injunction was granted as a result of the *Defensa Colectiva A.C.* action, while the second favored Greenpeace’s lawsuit. More notable still is the third legal action pursued by Mexico’s independent antitrust commission, the Mexican Federal Competition Commission (*Comisión Federal de Competencia Económica*).³⁸ The Supreme Court has accepted the case for review, and, as this is the highest tribunal in Mexico, there is no appeal process after that. If eight of the 11 justices favor the injunction, it voids the government decrees; it is as if they never existed.³⁹ More importantly, it becomes a powerful precedent for barring future acts of the current or future government, done in contravention of current law.

FINAL WORDS

The decrees examined in this brief are more a symptom than a malady in themselves. The López Obrador administration has so far acted with palpable disregard for the law. This modus operandi may be explained,

not justified, because its functionaries are unfamiliar with the legal framework and sometimes even bereft of all legal knowledge. However, that is certainly not the case with Bartlett, who not only is a lawyer, but has also written a treatise on constitutional law and happens to be the son of a late Supreme Court justice. The president has called Bartlett a “great lawyer,” whose opinion is to be greatly respected.⁴⁰

Moreover, in the president’s morning press conference on May 29, shortly after the SENER decree was published, Bartlett clearly stated that it was time to set a new regime for renewable energy “without changing a period or a comma” in the legal framework. This implied that he intended to change the policy without changing the law. This message was significant for two reasons. First, it served as an admission that the decrees were his idea. Second, he should have known that legislative, and even constitutional changes, are necessary to bar renewable generators from Mexico, but he designed a strategy to avoid having to go through the legislative process. So far, this has only resulted in myriad legal actions against the government, with over 142 injunctions granted so far. Clearly, it may be impossible to change current policy on renewable energy generation without changing a “period or a comma” in the law. Unfortunately, so far, the court battles have only stopped the effects of the decrees, but Mexico’s reputation as a safe and credible place for investment has been damaged,⁴¹ perhaps beyond repair, as long as López Obrador is in office.

ENDNOTES

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