

# LEGAL ANALYSIS ON THE REGULATION OF CLIMATE CHANGE PROTECTION, CONCERNING THE AGREEMENT:

*Agreement issuing the Policy of Reliability, Safety,  
Continuity and Quality in the National Electric System*

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## **I. INTRODUCTION**

The purpose of this legal analysis has its origin in the publication of the "Agreement issuing the Policy of Reliability, Safety, Continuity and Quality in the National Electric System" (hereinafter the "SENER Agreement"), published in the Official Gazette of the Federation on May 15, 2020, by the Ministry of Energy. Said agreement generates various constitutional and investment treaties violations and to the detriment of investors and developers/operators of renewable energy projects, for which there are various legal protection mechanisms such as Amparo trials or investment arbitrations. However, the purpose of this legal analysis has a different approach, which is to determine if the SENER Agreement violates the international regime related to the protection of Climate Change, and if so, the available defense mechanisms. In the first section of this document, the context and provisions set forth in the SENER Agreement will be analyzed. Subsequently, the international legal framework related to the protection of Climate Change will be studied, particularly analyzing the commitments assumed by Mexico in relation to the promotion of clean energy and the reduction of greenhouse gas emissions. Consecutively, it will be determined if the SENER Agreement represents a violation of the commitments assumed by Mexico, and in such a case, the legal or political mechanisms that could be initiated will be analysed.

## **II. CONTEXT**

The SENER Agreement abrogated the prior reliability policy, published in the Official Gazette of the Federation on February 29, 2017, the foregoing on the grounds that the values and indicators of said policy were insufficient to provide dispatch security and technical requirements. In particular, the SENER Agreement provides, among others, the following provisions regarding the generation of intermittent clean energy (wind or photovoltaic):

- 1) The Power Plants with an interconnection contract prior to the issue date of the SENER Agreement will be maintained in the integration of Installed Capacity in the National Electric System.<sup>1</sup>

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<sup>1</sup> Article 10.1, Ministry of Energy, (May 15, 2020). Agreement issuing the Policy of Reliability, Safety, Continuity and Quality in the National Electric System.

- 2) In the event that the interconnection agreement or generation permit of a power plant is cancelled, the National Center for Energy Control (CENACE) will have the power to evaluate the applications to determine the viability of the continuation of the project.<sup>2</sup>
- 3) CENACE will have the power to reject future interconnection applications on the grounds of congestion or reliability risks.<sup>3</sup>
- 4) The power plants with intermittent clean energies which are interconnected to the Mexican Electric System should permanently guarantee the voltage control.<sup>4</sup>
- 5) In particular, the SENER Agreement interprets article 27, section III, of the Energy Transition Law, considering that the contents of said provision imply that the Ministry can define when it is economically feasible to reduce the use of fossil fuels, considered all the costs of using clean energy.

The aforementioned elements are relevant, since from its reading it appears that the current energy policy will consist of only giving preference to the use of clean energy when it is economically and technically feasible, which in few cases could be true since currently, only the fossil fuels can provide the guarantees of economic viability and non-intermittency that the current administration seeks.

### **III. CLIMATE CHANGE | INTERNATIONAL LEGAL FRAMEWORK**

The provisions of the SENER Agreement have significant implications in the international legal framework to combat climate change since the energy sector represents two-thirds of the anthropogenic emissions that have generated climate change. This, since the economy of the sector, relies mainly on the use of fossil fuels, which produce the greatest amount of CO<sub>2</sub>, which is the main greenhouse gas in the atmosphere. For this reason, the international

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<sup>2</sup> idem

<sup>3</sup> Article. 10.2 Ministry of Energy, (May 15, 2020). Agreement issuing the Policy of Reliability, Safety, Continuity and Quality in the National Electric System

<sup>4</sup> Article 10. 4.10 Ministry of Energy, (May 15, 2020). Agreement issuing the Policy of Reliability, Safety, Continuity and Quality in the National Electric System

climate protection regime is continuously promoting the development and use of renewable energy.<sup>5</sup>

In this regard, it is relevant to note that the legal framework applicable to the promotion of renewable energy is generally provided for in international treaties and agreements related to the fight against climate change. Below is a diagram that develops the main instruments that regulate the fight against climate change - which in turn indirectly regulates the promotion of renewable energy:-

#### UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, 1992

**Objective:** To stabilise the concentration of greenhouse gas emissions in the atmosphere at a level that can prevent anthropogenic interference with the climate system.

**Obligations:** the creation of issuance of inventories and differentiation of goals between countries.

#### KYOTO PROTOCOL, 1997

**Objective:** Compliance with the objective of the Convention.

**Main obligations:** Implementation of policies related to energy efficiency, transportation, sustainable agriculture.

**Binding obligations in emissions reduction for developed countries.**

#### PARIS AGREEMENT, 2015

**Objective:** Holding the increase in the global average temperature to well below 2°C above pre-industrial levels.

**Main obligations:** Every five years, Nationally Determined Contributions must be submitted.

**Seek local mitigation measures in order to meet contributions..**

### 3.1 UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE

The United Nations Framework Convention on Climate Change (hereinafter the "Convention") is a binding agreement, the main objective of which is to stabilize concentrations of greenhouse gases in the atmosphere at a level that prevents dangerous anthropogenic interference in the

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<sup>5</sup> International Energy Agency, *Energy and Climate Change: World Energy Outlook Special Report (Paris: International Energy Agency, 2015)* 20

climate system.<sup>6</sup> Among the general objectives and commitments of the Convention are mitigation, adaptation, technology transfer and financing. The principle of the Convention is that the parties have common but differentiated responsibilities according to their capacities.

In addition, the Convention has created a regime that indirectly promotes the use of renewable energy as one of the most important means of mitigating greenhouse gas concentrations. This, indirectly when setting targets related to the reduction of gas emissions, which are generated with the use of fossil fuels, and directly by providing incentives in the development of renewable energy projects.

On the other hand, it is relevant to note that the Convention establishes a subsidiary executing body to assist the Conference of the Parties in evaluating and examining effective compliance with the Convention.<sup>7</sup>

### **3.2 KYOTO PROTOCOL**

The Kyoto Protocol (hereinafter the "Protocol") is part of the Convention and introduced specific mitigation obligations for the countries listed in its Annex I (developed countries). Likewise, it created three aid mechanisms for the parties: i) Clean Development Mechanism<sup>8</sup>, ii) Emission Rights Trading<sup>9</sup>, iii) Mechanism for Joint Implementation. Currently, the Protocol is in its second period, which was extended until December 31, 2020, by the Parties through the Doha Amendment<sup>10</sup>.

### **3.3 PARÍS AGREEMENT**

The main objective of the 2015 Paris Agreement is to reinforce the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, and to do so, keep the increase in global average temperature below 2 ° C from pre-industrial levels, and continue efforts to limit this temperature rise to 1.5 ° C from pre-industrial levels.<sup>11</sup>

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<sup>6</sup> Article 2, *United Nations Framework Convention on Climate Change*.

<sup>7</sup> Article 10, *United Nations Framework Convention on Climate Change*.

<sup>8</sup> Article 12, *Kyoto Protocol*

<sup>9</sup> Article 17, *Kyoto Protocol*

<sup>10</sup> [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXVII-7-c&chapter=27&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-c&chapter=27&clang=_en) (accessed May 30, 2020)

<sup>11</sup> Article 2, *Paris Agreement*

The main contribution of this agreement is the creation of the Nationally Determined Contributions concept (hereinafter the “NDC”). The NDCs imply that each signatory party must prepare, communicate and maintain the successive nationally determined contributions that it plans to make. Subsequently, the parties should seek to adopt the internal mitigation measures necessary to achieve their NDCs. Thus, each party must communicate their NDCs every five years, which must be higher than the one previously presented.

#### **IV. MEXICO’S OBLIGATIONS IN RELATION TO THE INTERNATIONAL CLIMATE CHANGE REGIME**

Mexico is a signatory to the Convention, as well as to the Protocol and the Paris Agreement, for which it has committed to comply with the obligations set forth in said international norms. Particularly, in the context of the Paris Agreement, Mexico presented its NDCs on March 27, 2015, before the Secretary-General of the United Nations, in which it carried out an analysis of its global position as a pollutant, determining which areas were that they had to be attended as priorities, as well as the obligations regarding emission reductions to which it would commit.

##### **4.1 CONTAMINATING SITUATION OF MEXICO IN ELECTRICITY GENERATION**

In the case study, it is relevant to highlight that Mexico determined in its NDC that its carbon dioxide emissions (CO<sub>2</sub>), derived from the use and burning of fossil fuels, represented in 2012 1.37% of global emissions, which placed it in the thirteenth place of the countries with the highest volumes of emissions of this gas derived from said burning.<sup>12</sup> Likewise, according to the National Inventory of Emissions of Gases and Greenhouse Compounds 2013 (INEGEI), direct emissions of greenhouse gases (GHG) in the country amounted to 665 megatons of CO<sub>2</sub> equivalent, of which the greatest contribution must be the transportation sector (26%), followed by the electric power generation sector (19%).<sup>13</sup>

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<sup>12</sup> International Energy Agency. *CO<sub>2</sub> Emissions from Fuel Combustion*. 2014

<sup>13</sup> [https://www.gob.mx/cms/uploads/attachment/file/39248/2015\\_indc\\_esp.pdf](https://www.gob.mx/cms/uploads/attachment/file/39248/2015_indc_esp.pdf) (accessed May 30, 2020)

#### 4.2 MÉXICO'S COMMITMENTS

Mexico's NDC were presented, taking into consideration conditional and unconditional mitigation measures. The first are those that the country can carry out with its own resources and legal regime, and the unconditional ones are those that will depend on international development and additional resources that the country may obtain. Thus, the following table shows the mitigation measures proposed by Mexico:

<b>UNCONDITIONAL REDUCTION</b>	Mexico committed to unconditionally reduce 25% of its greenhouse gas emissions by 2030. The established goal contemplates a reduction of 22% of greenhouse gases and 51% of black carbon.
<b>CONDITIONED REDUCTION</b>	25% of unconditional reductions could be increased to 40% conditioned to international agreements regarding the price of coal, technical cooperation, access to low-cost financing and technology transfer. Under these conditions, GHG reductions could increase to 36% and black carbon reductions to 70% in 2030. <sup>14</sup>
<b>ELECTRIC POWER GENERATION</b>	To reduce the volume of emissions from the energy sector, four measures were defined that seek to mitigate 31% per cent of GHG and 33% black carbon (BC) of the entire sector by 2030. The referred measures are: <ol style="list-style-type: none"> <li>1. Achieve 35% of clean energy in 2024 and 43% by 2030.</li> <li>2. Modernize the generation plant.</li> <li>3. Reduce technical losses in the electrical grid.</li> </ol>

<sup>14</sup><https://www4.unfccc.int/sites/submissions/INDC/Published%20Documents/Mexico/1/MEXICO%20INDC%2003.30.2015.pdf> (accessed May 30, 2020)

	<p>4. Substitute heavy fuels for natural gas.</p> <p>Likewise, it is highlighted that Mexico calculated that the estimated investment, necessary to implement the four unconditional mitigation measures of the sector, is around 67.8 billion dollars for the period 2014-2030.<sup>15</sup></p> <p>Note: It can be noted that the four measures are related to the reduction of the use of fossil fuels.</p>
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Now, inattention to and in harmony with the commitments assumed by Mexico, within the national legislation goals were established that would help fulfil the country's NDC. Generically, the Constitutional Energy Reform of December 2013, does not mention the concept of renewable energy. However, in the Seventeenth transitory article it was established: *"In terms of electricity, the law will establish **clean** energy obligations for the participants of the electric industry and reduction of polluting emissions"*.

Particularly, in the Energy Transition Law in the third transitory article, the following was established:

*"Third.- The Ministry of Energy will set as a minimum goal participation of clean energies in the generation of electrical energy of 25 per cent for 2018, 30 per cent for 2021 and 35 per cent for 2024."*

<sup>15</sup>[https://www.gob.mx/cms/uploads/attachment/file/330857/Costos\\_de\\_las\\_contribuciones\\_nacionalm ente\\_determinadas\\_de\\_M\\_xico\\_dobles\\_p\\_ginas\\_.pdf](https://www.gob.mx/cms/uploads/attachment/file/330857/Costos_de_las_contribuciones_nacionalm ente_determinadas_de_M_xico_dobles_p_ginas_.pdf) (accessed May 30, 2020)



Thus, it is evident that Mexico has made various international commitments to protect Climate Change, which have been transferred to local legislation. Likewise, it is highlighted that the development of renewable energy projects is essential for Mexico to meet the established goals.

**V. THE SENER AGREEMENT, DOES IT REPRESENT A BREACH WITH THE OBLIGATIONS ASSUMED BY MEXICO?**

In principle, it is evident that the SENER Agreement could involve migrating again to the use of fossil fuels to generate electricity, this in accordance with an efficiency principle. However, it is also clear that said agreement gives the CRE and CENACE powers to give priority to electricity made with fossil fuels, which must be done in accordance with the guidelines to be issued by said organizations at the time, and it is expected to be in cases of emergency. The foregoing, regarding International Climate Change Law, implies that currently, with the mere issuance of the SENER Agreement, the commitments assumed by Mexico are not violated, since the number of renewable energy projects has not been reduced, nor have been increased greenhouse gas emissions.

Now, in the event that the SENER Agreement and the guidelines issued by the regulator, materialize the scenario of giving priority in all cases to the use of fossil fuels to generate electricity, the following violations by the Mexican State would materialize, among others.

**1) Violation of the provisions of Article 4 of the Convention that establishes the following:**

*"(...)*

*1. All Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, shall:*

*(...)*

*f) Take climate change considerations into account, to the extent feasible, in their relevant social, economic and environmental policies and actions, and employ appropriate methods, for example, impact assessments, formulated and determined nationally, with a view to minimising adverse effects on the economy, on public health and on the quality of the environment, of projects or measures undertaken by them to mitigate or adapt to climate change;*

*(...) "*

**2) Violation of the provision of Article 4 of the Paris Agreement:**

"(...)

*3. Each Party's successive nationally determined contribution will represent a progression beyond the Party's current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.*

*4. Developed country Parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets. Developing country Parties should continue enhancing their mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances.*

(...) "

**3) Breach to the NDC submitted by Mexico on the following aspects:**

- i) There will not be a reduction of carbon dioxide emissions, since even with renewable sources in the electric system, this was the second sector in Mexico with the highest emissions of carbon dioxide, which would be increased in case of giving preference to fossil fuels for the generation of electricity.
- ii) Mexico would not be able to achieve the goal of 35% of clean energy by 2024 and 43% by 2030.

**VI. MECHANISMS TO CHALLENGE MEXICO'S POTENTIAL VIOLATION OF THE CLIMATE CHANGE REGIME**

The most significant criticism that the international climate change regime has received is that it does not foresee legal mechanisms to compel a country to fulfil the goals it has committed to. In particular, regarding the protection and promotion of renewable energies, since there are no direct references to their need to comply with the objectives of the Convention, it has been considered that this sector is regulated by measures considered *soft law*<sup>16</sup>. As mentioned, neither the Convention nor the Paris Agreement provide for a legal mechanism through which a country can be compelled to fulfil its commitments. However, the following proposals are made, although they are not a legally binding process, indirectly, in an international political

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<sup>16</sup> Rafael Leal-Arcas and Stephen Minas, *Mapping the International and European Governance of Renewable Energy*, *Yearbook of European Law*, Vol. 35, No. 1 (2016), pp. 621–666

scenario, they could exert pressure on the current administration to reconsider the shift of the energy policy.

**1) Submit a Communication before the United Nations General Secretariat notifying the potential violations to the NDC.** - Since the Secretariat, is the in charge of receiving and forwarding the reports submitted by the countries to the Committee of Experts, it could analyse this communication, and pay considerable attention. The foregoing, considering that the term of the Kyoto Protocol is about to end (December 31, 2020), and this will lead to an analysis of the goals achieved by the countries and the new goals in the context of the Paris Agreement. If it were determined that Mexico does not intend to meet the goals it assumed, although it could not be compelled to meet it, it would lose the benefits provided for in the Convention, such as financing in renewable energy projects, and would be unable to continue participating in the carbon emissions market.

**2) Support from the International Renewable Energy Agency.** - This Agency is considered a turning point for the development of renewable energies since before 2009; there was no international body whose objective was to promote and support the development of renewable energies. In accordance with the statute of creation of the Agency, it is empowered under its Article IV to the following:

“(…)

*a) The Agency shall analyse, monitor and, without obligations on Members’ policies, systematise current renewable energy practices, including policy instruments, incentives, investment mechanisms, best practices, available technologies, integrated systems and equipment, and success-failure factor*

*b) initiate discussion and ensure interaction with other governmental and non-governmental organisations and networks in this and other relevant fields;*

*c.) provide relevant policy advice and assistance to its Members upon their request, taking into account their respective needs, and stimulate international discussions on renewable energy policy and its framework conditions;*

(…)”

In this regard, it is relevant to highlight that Mexico is a member of the Agency. Therefore, although the Agency does not have the power to compel a State to promote renewable energy, it can serve as an expert body that provides information and serves as a mediator in a debate between the current administration and the agencies affected by the policy that may generate derived from the SENER Agreement. Furthermore, the Agency is empowered to issue recommendations to member states if so requested.<sup>17</sup>

## **VII. CONCLUSION**

As it has been analysed in this document, it can be concluded that the SENER Agreement opens the way to a new energy policy in which preference will be given to sources that provide greater efficiency to the National Electric System and which could imply a disregard for the sources from renewable generation. However, if an administrative decision entitles the authorities to discretionary give preference to fossil fuels rather than renewable, it is clear that the Mexican government would be in breach of the international agreements to which it committed itself. The preceding considering that the Mexican State would be failing to comply with the commitment to reduce carbon dioxide emissions and with the goal of renewable energy in the electricity sector. As has been stated, there would be no legal mechanism to compel the government to comply with its international commitments regarding the protection of Climate Change, however, in the context of a termination of the validity of the Kyoto Protocol, a potential review of the actions taken by the states parties will be performed, and the criticism and international political pressure that the Mexican State would receive would be relevant. Therefore, having an approach at this time with the United Nations Secretariat or with the International Renewable Energy Agency could represent a mediation mechanism in which an objective dialogue and debate can take place, to determine whether the new energy policies undertaken by the Mexican government are in line with the international commitments that Mexico has signed in recent years.

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<sup>17</sup> Article 9, *Statute of the International Renewable Energy Agency (IRENA)*