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Post-Election Impact on U.S. and Mexico Energy and Environmental Matters

January 2021

Introduction

On November 3, 2020, Presidential Elections were carried out in the United States, from which, former Vice President Joe Biden was elected representing the Democratic Party. He was inaugurated on January 20, 2021.

Amongst others, during his presidential campaign he proposed the following environmental and energy policies:

- The centerpiece of Biden's energy and climate proposals is a call for investing US$1.7 trillion over 10 years to promote a portfolio of clean energy technologies. It would support advancing electric vehicles, building a national vehicle charging network, accelerating the smart grid and battery storage, scaling up tax credits for renewable technologies and nurturing next-generation energy sources like hydrogen and advanced nuclear power plants.

Introduction

- Rejoining the Paris Agreement, and net zero economy by 2050
- Zero-carbon electricity generation by 2035
- Efficiency upgrades and retrofits for buildings
- Ensuring a 'just transition' for fossil-fuel workers
- Reversing environmental deregulation. Work with Congress to enact in 2021, legislation that, by the end of his first term, puts the U.S. on an irreversible path to achieve economy-wide net-zero emissions no later than 2050.
- Make a historic investment in clean energy and innovation. Biden will invest $400 billion over ten years, as one part of a broad mobilization of public investment, in clean energy and innovation.

Introduction

- Accelerate the deployment of clean technology throughout the economy
- Make environmental justice a priority across all federal agencies
- Hold polluters accountable
- Create 10 million good-paying, middle-class, union jobs. Every federal dollar spent on rebuilding infrastructure during the Biden Administration will be used to prevent, reduce, and withstand the impacts of climate.
- Fulfill on obligation to the communities and workers that have risked their lives to produce fossil fuels.

Biden’s Team

He has nominated Jennifer Granholm as Energy Secretary, Michael Regan in charge of the EPA and John Kerry as NSC / Special Envoy for Climate.

Jennifer Granholm: Granholm, who served two terms as Michigan's governor, is experienced in dealing with the auto industry – a potentially big advantage as the new president seeks to speed the rollout of electric vehicles and the network of charging stations. Granholm's support of the auto industry may help Biden's team strengthen its appeal to blue-collar workers and the manufacturing sector. And it would be a marked change of course from President Donald Trump's first Energy secretary, former Texas Gov. Rick Perry, who used the position to promote natural gas exports and push regulators to prop up coal as a power source.

Granholm will help the U.S. to compete with China on the electric vehicles sector and also will play a key role in reducing emissions from the nation’s buildings another target of Biden’s climate plan.

Granholm’s Michigan connections to the auto industry and her ability to win support for a transition to electrified transportation will be central to Biden’s vision for the U.S. economy and for the nation’s climate change puzzle. Transportation is the largest greenhouse gas emitting sector in the U.S., so Biden’s quest to achieve net-zero greenhouse gas emissions by 2050 requires large-scale adoption of electric cars, trucks, buses, trains and planes.

Biden’s Team

Michael S. Regan: North Carolina’s top environmental regulator. He is credited with reaching the largest coal-ash cleanup settlement in the country and for ordering the chemical company Chemours, a former DuPont subsidy, to take fresh steps to clean up the toxic substances known as PFAS from the Cape Fear River. Mr. Regan also has been a key figure in helping Governor Roy Cooper, a Democrat, carry out his pledge to achieve carbon neutrality in North Carolina by 2050. He also oversees the state’s climate change interagency council, a working group of state agencies set up to meet that goal. In 2018 he created an environmental justice and equity board at the state’s environmental agency.

Mr. Regan also has faced criticism – some have accused him of not sufficiently standing up to fossil fuel and agricultural interests. Under Mr. Regan, the state agency granted a water quality certification to the Atlantic Coast Pipeline, which would have carried natural gas across the Appalachian Trail. This year, Duke Energy and Dominion Energy announced they had canceled plans for the project in the face of environmental opposition.

He will be on the front lines of the Biden administration’s effort to unravel a half-century of pollution and climate regulations, and the diminishment of the science that underpinned them. But no agency will be more fundamental to the politically sensitive work of actually reducing United States planet-warming emissions than the E.P.A.

Mr. Biden also chose Representative Deb Haaland of New Mexico to lead the Department of Interior. She would be the first Native American to lead the department and is expected to curtail the oil and gas leasing on federal lands that Mr. Trump has overseen. Brenda Mallory, an experienced former federal lawyer, will lead the Council on Environmental Quality.

Biden's Team

John Kerry: President Barack Obama's secretary of state, will be a Cabinet-level official in Biden's administration and will sit on the National Security Council. This marks the first time that the NSC will include an official dedicated to climate change, reflecting the president-elect's commitment to addressing climate change as an urgent national security issue.

Kerry has long worked on climate issues. As a former Secretary of State, he played a key role in negotiating the Paris Agreement. In 2019, Kerry co-founded a bipartisan initiative of world leaders and celebrities to combat the climate crisis called World War Zero.

Kerry served alongside Biden in the Senate for decades. He was first elected to the Senate to represent Massachusetts in 1984 after serving as lieutenant governor of the state under Gov. Michael Dukakis. In 2004, Kerry won the Democratic nomination for president before losing the general election to incumbent President George W. Bush. In 2009, when Biden became vice president, Kerry took over his role as chairman of the Senate Foreign Relations Committee.

In addition to Kerry, there is a possibility that Biden will have a White House climate director working on domestic issues who will be on equal footing with Kerry.

U.S. and Mexico Relationship

USMCA-TMEC

Environmental:

The recent United States - Mexico - Canada Agreement (USMCA), which replaces the North American Free Trade Agreement (NAFTA), intends to modernize and reinforce obligations regarding environmental matters that were previously covered in NAFTA and by the Commission for Environmental Cooperation (CEC).

When NAFTA came into effect in 1994, it linked the trade with the environment through the CEC. In this sense, the USMCA renews and reinforces agreements related to environmental matters in Chapter 24, including, among others, the following obligations and commitments:

- Procedural matters
- Protection of the Ozone Layer
- Protection of the marine environment and prevention of pollution caused by boats
- Air quality
- Marine waste
- Corporate social responsibility
- Trade and biodiversity
- Invasive exotic species
- Marine life conservation and sustainable management of fisheries
- Eliminate subsidies for *Illegal, Unreported and Unregulated fishing ("IUU")* vessels and operators
- Combat IUU
- Conservation of flora and fauna in harmony with trade
- Sustainable forest management in communion with trade
- Environmental goods and services

- It is important to highlight that compliance with the obligations under Chapter 24 will be monitored by an environmental committee established under the USMCA.
- If the parties fail to resolve a matter through dialogue, consultation, or exchange of information, they must resort to the provisions of Chapter 31 of the USMCA for dispute settlement.

U.S. and Mexico Relationship

USMCA-TMEC

Energy:

The USMCA largely does away with the investor-state dispute settlement mechanism (“ISDS”) that was a central feature of NAFTA, a similar ISDS system is preserved for certain U.S. investments in Mexico’s energy sector.

USMCA

NAFTA conferred upon foreign investors the right to bring arbitration claims for mistreatment of their investments against the host country directly, without needing to go to domestic court or have their own government advance the claims. Chapter 14 of the USMCA largely eliminates automatic ISDS as a general principle, but preserves a form of automatic ISDS as between the U.S. and Mexico with respect to investments involving government contracts in five “covered sectors”: (i) oil and natural gas, (ii) power generation, (iii) telecommunications, (iv) transportation, and (v) infrastructure.

Investors with investments existing prior to the USMCA’s entry into force can still bring claims under NAFTA until July 1, 2023. Canada will not be part of ISDS under the USMCA, but has an ISDS mechanism with Mexico via the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (“CPTPP”) that went into force in 2018.

ISDS

Four general grounds for ISDS claims are: (i) expropriation, either (a) direct (a taking) or (b) indirect (short of a taking, but with an equivalent effect); (ii) national treatment (discriminatory treatment as compared to domestic investors); (iii) most favored nation treatment (discriminatory treatment as compared to other foreign investors); and (iv) fair and equitable treatment (failure to provide a minimum standard of treatment or full protection and security).

Under the USMCA, U.S. investors may bring ISDS claims against Mexico both immediately and under all those grounds only if (i) they have investments in the covered sectors and (ii) they (or enterprises they own or control) are parties to certain contracts with parties exercising central governmental authority. If these two criteria are not satisfied, ISDS is still available, but in this case the investor (i) first must adjudicate the claims in Mexican courts for 30 months and (ii) even thereafter, may not bring claims for “indirect” expropriation, or for fair and equitable treatment.

Claims no longer covered by ISDS may still be advanced by the investor’s home country through the USMCA’s state-to-state dispute settlement mechanism.

Most Favored Nation Treatment

“Mexico has the direct, inalienable, and imprescriptible ownership of all hydrocarbons in the subsoil of the national territory.” That statement could give investors pause as to the staying power of the 2013 energy reforms. However, the USMCA provides that Mexico will not take measures with respect to Chapter 14 that are more restrictive than “parallel obligations in other trade and investment agreements that Mexico has ratified” prior to the USMCA. This is instructive because Mexico’s Annex 1 to the CPTPP incorporates the 2013 energy reforms, meaning that under the USMCA Mexico has taken on a most favored nation obligation to treat U.S. investors at least the same as investors from CPTPP countries. Thus, Mexico would not be able to repeal the 2013 energy reforms without risking breaching its treaty obligations under both the USMCA and the CPTPP.

Under the USMCA, investments at the intersection of oil and gas and government should be eligible to benefit from ISDS under the USMCA without a requirement to first adjudicate the claims in Mexican court and without being limited by the types of claims that can be made.

U.S. and Mexico Relationship

USMCA-TMEC

Energy:

Expropriation and Fair and Equitable Treatment

It is not clear if expropriation claims could be advanced under the USMCA's ISDS. Under Annex 14-E, for power generation services to qualify as a covered sector it is specifically required that the services be provided "to the public" on behalf of a governmental authority of the host country.

Also, even if those claims were made, the USMCA may provide a defense. Chapter 14 of the USMCA provides that non-discriminatory government regulatory actions "designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment," generally will not constitute indirect expropriations. These objectives could be used to justify the actions indicated as having been undertaken in light of the COVID-19 pandemic and the stated rationale of providing grid security.

If such claims are not eligible for ISDS under the USMCA, they could be brought under NAFTA's ISDS before it is phased out.

In conclusion, the USMCA contains less protective ISDS provisions for U.S. energy investors in Mexico relative to NAFTA. U.S. investors in Mexico's oil and gas sector with contracts awarded by CNH may find that fundamentally they can still rely on traditional ISDS to protect their investments. U.S. investors in the solar and wind sector instead may want to consider whether they can advance their claims under other investment treaties with Mexico, or under NAFTA while there is still time.

U.S. and Mexico Relationship

PARIS AGREEMENT

Under the Agreement, countries are responsible for taking action on both mitigation and adaptation. Countries officially submitted their own nationally determined climate actions. They have an obligation to implement these plans, and if they do, it will bend the curve downward in the projected global temperature rise.

Mexico

The Mexican legislative power approves the reforms to the General Law on Climate Change (LGCC), which harmonize the law with the objectives established in the 2nd Article of the Paris Agreement. This action proves Mexico´s compromise to contribute to the global target of stabilizing the greenhouse gas emissions concentration in the planet. In an effort to update and harmonize the national legal framework with the commitments established in the Paris Agreement, related to global goals that seek to reduce GHG emissions to keep the rise in global temperature below 2 °C, through the Nationally Determined Contributions (NDCs). The amendments to the LGCC expand the scope of the Law, adjust and include new definitions, while adapting and modifying faculties of the national government. The reform establishes the principle of progressivity (Article 26) and respect for Human Rights, gender equality and intergenerational equity, with the aim of harmonizing the precepts of the Paris Agreement with the national legal framework. However, with the new policies for restricting renewable energies and with the infrastructure projects of the government creating relevant environmental impacts with no mitigation measures, specialists consider that Mexico will not achieve their commitments under NDCs.

United States

President Trump withdrew the nation from the Paris Agreement — insisting that following through with the nonbinding pledges of the Obama era could economically disadvantage the country. President Biden has rejoined the Paris Agreement "on day one" and intends to restore the United States as a world leader in climate action.

U.S. and Mexico Protection Regulations

NON COMPLIANCE USMCA

USMCA includes new environmental and regulatory improvements chapters as well as for the protection of investments. Likewise, it also includes the environmental cooperation agreement or Acuerdo de Cooperación Ambiental (ACA), that México could breach with it's new policies.

Regulations against private energy generation, especially renewables, go against USMCA, could result in sanctions and not comply with clean energy and climate change goals.

Due to the energy impass in Mexico, U.S and international companies have reached out to the World Resources Institute (WRI México) complaining that their investments are in risk.

Several of these companies have goals on renewable energy or emissions reductions, not only local but international, as well as obligations for buying clean energy; hence all the regulatory changes that Mexico has published are affecting their interests.

U.S. and Mexico Protection Regulations

NON COMPLIANCE WITH PARIS AGREEMENT

The Mexican government committed to reduce 22% of GHG emissions by 2030. In order to achieve the goal it needs to annually reduce 211 millions of tons of CO2, however with the new policies of AMLO, this goal seems to not be achieavable.

Experts pointed out that it is necessary to increase up to 40% of clean energy and to rehabilitate all oil refineries since they are very contaminating. In addition, the Mexican government must invest in improving the public transport for using more hybrid and electric vehicles.

In accordance with the WRI Mexico, the emisions information that México presented in its new National Determined Contribution (NDC), and published in the last version of the COP convention does not line up with the trayectory of emissions in accordance with the objectives of the Paris Agreement.

WRI México also pointed out that the level of commitment of Mexico for reducing GHG (as the twelvth world economy and fifteenth in energy production) is below smaller economies such as Perú, Chile, Argentina, Costa Rica, Panama and Colombia.

Mexico’s New Energy and Environmental Regulations

- Several dispositions and regulations for restricting or reducing renewable energy
- Restrictions to import and export hydrocarbons and hydrocarbon products
- Cancellation of public bids for investing in energy and hydrocarbon projects
- Disappearance of the energy regulators
- Greater powers to Pemex and CFE against the other private players in order to inhibit free commerce
- Cancellation of environmental programs due to the austerity policies of this new government
- The priorization of the infrastructure projects of the government that do take into account the compliance of environmental obligations

Possible Conflicts Between U.S. and Mexico

Companies already operating or developing wind and solar farms in the country have lost confidence in the system. “Policy changes introduced by the Ministry of Energy in 2020, and since suspended, sought to reverse a core achievement of prior reforms: a competitive, cost-based power market,” said the Climatescope 2020 report about Mexico. “AMLO has challenged energy reform and sought to block the growth of renewables with the aim of supporting the CFE.”

The Mexican energy sector closed 2020 with a negative impact for the private sector, since Federal policies have been enacted to try to rescue the governmental companies Pemex and CFE, by shuting the private participation. Experts said that these actions will affect 14% of the gross domestic product, affecting an estimate of 44,000 million dollars in investments. Despite for the temporary measures taken by private companies before the courts, the conflict will continue this year since AMLO has warned of a posible initiative for amending the energy reform that took place on 2013, which will open the enegy sector to private investment.

The decision to favor fossil fuel generation over renewable energy now puts Mexico on a path that is even more inconsistent with the steps it needs to take to achieve the Paris Agreement's 1.5°C limit,” said the non-profit institute Climate Action Tracker in a report about Mexico published in September 2020. “The Mexican government’s recent decisions also bring into question whether it will achieve its clean energy targets under its Energy Transition Law and General Climate Change Law.”

Experts share the same view, pointing out that Mexico’s recent actions are a setback to reaching its goal to generate 35% of its energy by clean sources by 2024, 37.7% in 2030, and 50% in 2050.

Nevertheless, AMLO’s officials said they are going to meet the goals for 2024 or 2030 as established by law. The Energy Ministry has said that, as of last year, about 30% of the country's electricity generation came from clean sources — not only solar and wind but also nuclear, hydroelectric, and geothermal. But the law requires that this share of generation be measured as an average through the whole year and not on a particular day, said Paul Alejandro Sanchez, an independent energy analyst. He added that clean power production actually hit a peak of 41% in the first eleven months of 2020, but its average was 24%.

Renewable players around the world must see Mexico as a big disappointment. And who could blame them, with the government using regulation as a cudgel against wind and solar farms while encouraging the CFE to bring its old, pollution-belching plants back online.

Regulatory and Policy Environment

Year	Regulatory / Policy Change
2018	Suspension / Cancellation of Clean Energy Auction
	Replacement of 6 of 7 Commissioners at Energy Regulatory Commission
2019	Adjustments to CFE separation rules
	PRODESEN with reduced transmission expansion
	Cancellation of pending Market features (FTRs, Medium Term Auctions)
	Clean Energy Certificates for pre-reform plants
2020	Cancellation of testing at Renewable plants
	“Reliability Policy”, including: - Ancillary service requirements for renewable generators - Limits on renewable energy participation - New interconnection requirements; priority for “Strategic” projects - Liberalization of out-of-merit dispatch
	Higher wheeling rates for legacy plants – especially clean generators
	Declaration of freeze on new permits
	Modification of Legacy Contracts for Basic Supply

Relevant Problems Between U.S. and Mexico

POSSIBLE SOLUTIONS

January 11, 2021

The Honorable Lic. Marcelo Ebrard Casaubón
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Secretaries Ebrard, Nahle, and Clouthier:

We send our warmest regards to you and the people of Mexico during these extraordinary times. We value the cooperation between our countries as we seek to overcome together the health and economic challenges we face.

Both of our governments seek to maximize our economic relationship, especially with the introduction of USMCA, for the prosperity of both our nations. However, as we have discussed with you previously, recent regulatory actions by the Mexican government have created significant uncertainty about Mexico's regulatory processes, especially regarding the energy sector, and have damaged Mexico's overall investment climate. Most recently, we have been concerned by reports of a July 22 memo, followed by a September 22 meeting with regulators who were allegedly instructed to block permits for private sector energy projects and to exercise their regulatory authority to favor state-owned energy companies. If true, this would be deeply troubling and raise concerns regarding Mexico's commitments under the USMCA.

In addition to harming several U.S.-backed private sector projects across the energy sector, these measures could adversely affect hundreds of millions of dollars of U.S. government public energy investments in Mexico made through the U.S. International Development Finance Corporation, the Export-Import Bank of the United States, and U.S. and Mexican public investments via the North American Development Bank. While we respect Mexico's sovereign right to determine its own energy policies, we are obligated to insist that Mexico lives up to its USMCA obligations, in defense of our national interests, which include investments funded by the U.S. taxpayer.

Mexico will still need to analyze the energy policy that Biden will take. AMLO continues to try to change regulations and laws but he must be very careful since Mexico has obligations under USMCA, Paris Agreement and other International treaties, by which investments of American companies in Mexico are protected. Investors are expecting that the new government of Biden will help pressure the Mexican government to comply with their environmental and energy obligations under the USMCA and also once U.S. is reinserted in the Paris Agreement, to pressure Latin American countries to comply with their obligations of GHG reductions.

Mexico already received pressure letters from the governments of China and Canada and this month received a letter from the U.S. trying to pressure the Mexican government to help U.S. investors on the energy sector.

Multilateral Efforts

Trump's prioritization of U.S. interests led to a move away from several international efforts, including his decisions to leave the Paris Agreement on climate, cut funding to the World Health Organization over its handling of the Coronavirus, and to pull out of the Trans-Pacific Partnership trade deal. Biden supported both the Paris Agreement and the TPP during his time as Vice President and seeks to rejoin them, while also restoring the WHO funding.

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Thank You

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