

COLOMBIAN DRAFT DECREE LIMITING THE AMOUNT OF RENEWABLE ENERGY POWER GENERATORS CAN ALLOCATE TO SPOT CONTRACTS RAISES CONCERNS OF VIOLATIONS OF INTERNATIONAL OBLIGATIONS

The Colombian Mines and Energy Ministry recently issued for public commentary a draft Decree proposing that renewable energy power plants' owners can sell no more than 5% of such energy in the wholesale market for immediate or near term delivery ("**Draft Decree**"). If enacted the Draft Decree could imply the violation of local and international obligations.

COLOMBIA AIMS TO IMPOSE LIMITS TO THE TRANSACTIONS OF THE RENEWABLE ENERGY WHOLESALE MARKET

Following President Gustavo Petro's intention to reform the energy system, the Draft Decree seems to aim at reducing the price that Colombian population pays for electricity. Currently, power generators have two ways to sell electricity: (i) through bilateral long-term contracts where the price is already fixed in the contracts or (ii) through immediate or near-term transactions in the wholesale market, at a price determined in the moment of the purchase. The Draft Decree aims to limit the amount of energy generators can sell in the wholesale market by imposing a cap of no more than 5% of generators' energy to be sold in the wholesale market, with the intention that generators allocate more energy to long-term contracts with a fixed price. Despite of describing this limit as "ideal" the Draft Decree has not specified how did it arrive to such number, nor it presented any calculation to determine the 5% limit as "ideal."

Despite of seemingly recognizing that it is the CREG the entity with the powers to regulate the wholesale market, the Mines and Energy Ministry already proposed a specific cap. Currently, it's uncertain whether the cap will be implemented directly by the Ministry or whether the CREG will issue separate regulation on this regard.

CONCERNS BY STAKEHOLDERS

Stakeholders in Colombia such as the President of the Colombian Association of Electric Power Generators among others, have stated that despite of the alleged good intention behind the Draft Decree, it would not only be prejudicial for the market but also would imply the violation of local and international obligations of

Key issues

- Colombian Mines and Energy Ministry has introduced a Draft Decree to limit the amount of renewable energy that power generators can allocate to spot contracts in the wholesale market.
- The Draft Decree proposes to impose a cap of no more than 5% of generators' energy to be sold in the wholesale market, with the intention that generators allocate more energy to long-term contracts with a fixed price.
- The Draft Decree has not specified how the 5% percentage was decided.

the Government of Colombia. Experts have expressed that the lack of long-term contracts is not due to the lack of regulation, but due to the lack of energy. In that scenario, the wholesale market exchange is a mechanism that allows to meet demand during peak consumption periods.

For that reason, the proposed limitation in the wholesale market and the distortion of the signals would end up reducing efficiency of the market and increasing the probability of energy shortages. This could lead to situations where supply does not cover demand and increasing the volatility of the prices paid by users. Ultimately, this would lead to higher prices in the long-term contracts due to the uncertainty created by the Draft Decree's proposed limitation.

Different companies have previously invested in the power market in Colombia due to the freedom of contract that regulation and prior governments announced. Particularly, articles 7 and 42 of Law 143 of 1994 (which established the regime for the generation of electricity in Colombia) granted power generators "freedom to develop their functions in a context of free competition", so that their transactions in the energy market are "free and ... remunerated by the prices agreed upon by the parties." For this reason, the limitation proposed by the Draft Decree could amount to an expropriation of economic rights and the violation of other international obligations assumed by Colombia in different international treaties to which it is a signatory party.

PROTECTIONS POTENTIALLY AVAILABLE UNDER BILATERAL INVESTMENT TREATIES AND FREE TRADE AGREEMENTS

These developments should serve as a timely reminder to investors in the power market in Colombia of the protections potentially available to them and their investments under Colombia's network of bilateral investment treaties ("**BITs**") and free trade agreements ("**FTAs**"). BITs and FTAs typically afford foreign investors with protections against nationalization and other measures that otherwise affect or deprive investors of the economic use of their investment.

Colombia has more than a dozen BITs and FTAs in force with third States throughout the world, granting enhanced protections to the investments made in Colombia by nationals of the contracting States. Therefore, many investors currently benefit from protection under these instruments.

To determine if an investment is protected under one of the BITs or FTAs currently in force in Colombia, it is crucial that investors engage qualified international counsel to perform a legal analysis of the investment treaty protections available to their investments in the country and of the potential implications of the recent proposed energy reforms.

Our team of legal experts, which combines substantive expertise with bilingual capabilities and cultural fluency, is ready to help you navigate these uncertain times and provide you with the best legal advice to protect your investments in Colombia.

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