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Briefing, analysis, opinion and insight of legal affairs in Mexico. Digital publication by Abogados Sierra



“DILIGITE JUSTITIAM QUI JUDICATIS TERRAM.” “Ye who judge the earth, give diligent love to justice”



**Mexico: back to the 1940's**  
**An electric reform back to the mid XXth**  
**century in violation of treaty obligations.**  
By Miguel Ruelas

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## Mexico: back to the 1940's

### An electric reform back to the mid XXth century in violation of treaty obligations.

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There are wounds that scar every nation deep. Wounds so embedded in their history, that centuries may pass, and the debate never grows cold. Energy production, its sale, distribution, and control—is such a topic for Mexico. Immediately after the Mexican revolution, in the early 1930's the Federal government underwent its first formal reform on the subject matter. Known as the “Oil Expropriation”, the Mexican government decided that a country whose economy is so dependent on oil could not have foreigners even touch it. Energy production in all its forms –electric, coal and others—faired the same policy.

It took more than 80 years for the paternalistic views on energy production to understand the world and the fair market. In 2013, Mexico approved the energy reform that would allow private investors, domestic and foreign alike to compete in the production and storage of energy. The government would buy it from these approved private companies at a “fair price” through biddings and fair market competition and pricing. Private energy producing companies, both with “old school” energy production methods like coal and gas, and modern environmentally-friendly companies invested and created alternatives to produce energy in Mexico. Then, eight years after the breakthrough.... It all went south.

The current Federal administration has set it's priorities and those of Mexico back to the 1940's, where the Federal government must control e-v-e-r-y-t-h-i-n-g that would fair better in the free market, where the Mexican state-owned companies would not stand a chance against efficient cost-production competitors. So, on 9th March 2021, Mexican Congress, approved the Executive's proposal to reform the Federal Law of the Electric Industry<sup>1</sup>. The Reform was approved in utter disregard of Mexico's International obligations before the United States–Mexico–Canada Agreement (“T-MEC”)<sup>2</sup>.

*“Now, the Federal Commission of Energy is not obliged to buy energy through public tenders and offerings, it now has authority to buy at-will, and more importantly, prioritizing the state-owned and paralegal energy and electric producing companies.”*

In the previous edition of TERRUM, a broad overview of the reform was given. In this edition: first, a slight introduction of the concrete reform will be made, then it will focus on the breaches of international obligations that this reform produces, and finally it will explain the disregard of the Mexican authorities before their international obligations.

1.- Decree in the Mexican Official Gazette by which there are reforms and additions to the Federal Law of the Electric Industry: DOF 9 March 2021 [https://www.dof.gob.mx/nota\\_detalle.php?codigo=5613245&fecha=09%2F03%2F2021](https://www.dof.gob.mx/nota_detalle.php?codigo=5613245&fecha=09%2F03%2F2021).

2.- Decree in the Mexican Official Gazette by which the T-MEC treaty replaces NAFTA and is re-incorporated in the Mexican Legal Regime: DOF. 29 June 2020. [http://dof.gob.mx/2020/SRE/T\\_MEC\\_290620.pdf](http://dof.gob.mx/2020/SRE/T_MEC_290620.pdf)

## The energetic reform 1-0-1

As with any new law, there are infinite possibilities of criticism, risks, and wrong-doings—the electric reform of 2021 is no exception. However, for purposes of this publication we will restrain them to two:

- First, the mechanism under which electric energy is to be bought by the government from private companies; and
- Second, the disregard to renewable energies, and prioritizing of “combustion-produced” electric energy.

As mentioned above, the 2013 energy reform allowed private and state-owned companies to produce and store electric energy. Before the reform, the Federal Law of Electric Energy provided that the Federal Commission of Electricity (the government independent commission bestowed with the power to distribute the energy), was “obliged” to buy the energy from these companies in public tenders and biddings. These offers were forced to be bought following the order of best-price and most efficient process.

*“Ironically-- not that there would be a choice, as it has been the President’s agenda to reject renewable energies in favor of coal and gas burning.”*

The new law, scratches it all out and denies the private sector’s rights to sell the energy they produce. Now, the Federal Commission of Energy is not obliged to buy energy through public tenders and offerings, it now has authority to buy at-will, and more importantly, prioritizing the state-owned energy and electric producing companies.

So basically, private investors are not guaranteed a fair price, as the government will now prioritize, state-produced energy at whatever cost, and at whatever inefficiencies. Fair-market is now a mirage. The justification—a paternalistic discourse: “Biddings are a perverse mechanism created with the sole purpose of guaranteeing the the profitability of the investors of private [energy] generators, in detriment of the Federal Commission of Electricity”<sup>3</sup>.

As if the above was not pulling enough Mexico’s progress 50 years back, the reform not only prioritizes state-owned energy generators, but ironically also prioritizes the use of combustion-produced energy over renewable sources. In the legislative bill before Congress the reform calls for what they quote as “more traditional and more effective”<sup>4</sup> energy sources—quite the statement---. Not that there would be a choice, because no state-owned company produces electricity from renewable sources. Furthermore, the President has been overconfident and blunt on his agenda to reject renewable energies in favor of coal and gas burning.

3.- Text contained in the proposed bill submitted before congress for the 2021 Electric Reform, directly quoting President Andres Manuel Lopez Obrador. Text translated by the author. [http://archivos.diputados.gob.mx/portalHCD/archivo/INICIATIVA\\_PREFERENTE\\_01FEB21.pdf](http://archivos.diputados.gob.mx/portalHCD/archivo/INICIATIVA_PREFERENTE_01FEB21.pdf)

4.- Text contained in the proposed bill submitted before congress for the 2021 Electric Reform. Text translated by the author. [http://archivos.diputados.gob.mx/portalHCD/archivo/INICIATIVA\\_PREFERENTE\\_01FEB21.pdf](http://archivos.diputados.gob.mx/portalHCD/archivo/INICIATIVA_PREFERENTE_01FEB21.pdf)

## The violations to T-MEC

The trend clearly has been the reinstatement of a paternalistic regime of an almighty federal government. So powerful, that even strict violations to international treaties—which under Mexican law trump federal regulations—have gone unattended. The T-MEC agreement has a specific chapter on foreign investments and one on foreign investments, and you guess right—the Treaty obliges for equal national treatment.

*“Article 14.4.- Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory”<sup>5</sup>.*

Nonetheless the reformed law, boldly uses the word “prioritize” state-producing/energy generators, and applies the same prioritizing principles to “non-renewable energies”. American and Canadian investors are clearly in disadvantage, against all that purported in the free-trade agreement. Concerns were expressed by the U.S Senate, the Canadian Prime Minister, private investors, and the Mexican political opposition. Mr. Kenneth Smith, head of the T-MEC negotiations back in 2013, expressed that the reform is “alarming, and it is possible that Canada and the United States open a panel of dispute resolution and that would allow to apply commercial retaliations against Mexico, which may damage high-level sectors”<sup>6</sup>.

Chapter 31 of T-MEC describes the process for dispute resolutions, and before the creation of a panel, good-faith negotiations are to be taken. It is a matter of time, before Washington calls Mexico to the table. In the meantime, a myriad of “amparos”—the constitutional defense legal mechanism in Mexican law—have been put forth before the courts, well-alleging domestic and international treaty violations.

The amparo as the constitutional defense mechanisms against a newly approved law is Mexico’s ex-post constitutional review mechanism. Parties affected by this law, both domestic and foreign, have expressed their legal concern against a law that clearly violates constitutional and international treaty rights. As the amparos flooded the courts, the Judicial Power in its rightful capacity and understanding of the legal system granted the affected parties a moratorium on the application of the law. Should the court confirm its unconstitutional status, then the law will never come into force—a decision most likely to reach the Mexican Supreme Court—. Nevertheless, the rightful decision of imposing a moratorium was not taken lightly by the president. The title of this article is no hyperbole. The president personally attacked the judge that provided the moratorium in a preoccupying and direct attack against judicial independence. The president mocked the judge’s rightful decision-making with classist remarks and ignoring the actual application of the law. As if these attacks were not enough, Mexico’s president—stubbornly announced before the media that if the constitution needs to be changed for the entering into force of the reform he will make it happen. What is at play is the safe-guard of Mexico’s rule of law. The Mexican judicial power is now under severe stress to hold the Mexican institutions and the checks and balances system in place. May the courts hold... may the laws be applied... and ... may judicial barricades stand against a foreshadowing...tyranny.

5.- <https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/14-Investment.pdf>

6.- <https://www.elfinanciero.com.mx/economia/eu-y-canada-aplicaran-represalias-si-se-aprueba-reforma-electrica-kenneth-smith>

**If the electric reform is unconstitutional, we will change the Constitution: AMLO.**

Mexico's President Andrés Manuel López Obrador assured that the reform to the Electricity Industry Law will be applied despite the appeals that have been granted against it, and if it is declared unconstitutional, his government will seek to modify the Constitution. In addition to the above, last Thursday, a federal judge granted a first provisional suspension for the application of the law, while on Tuesday, another judge joined the decision and between them they have granted close to twenty measures in favor of companies, considering that the reform recently approved by the Congress violates the constitutional rights to a clean environment and health. [www.forbes.com.mx/reforma-electrica-inconstitucional-cambiamos-constitucion-amlo/](http://www.forbes.com.mx/reforma-electrica-inconstitucional-cambiamos-constitucion-amlo/) 17/03/2021.

**One million Sinovac vaccines arrive in Mexico.**

A new shipment of one million Covid-19 vaccines from the Chinese company Sinovac arrived in Mexico on Thursday to continue with the immunization of the elder people. This is the fourth shipment from this Chinese company, bringing the total number of antidotes that the federal government has received from Sinovac to three million. Furthermore, this vaccine was authorized last February 9th, by the Federal Commission for the Protection of Health Risks (COFEPRIS), for emergency use in Mexico. [www.jornada.com.mx/notas/2021/03/18/politica/llega-a-mexico-un-millon-de-vacunas-de-sinovac/](http://www.jornada.com.mx/notas/2021/03/18/politica/llega-a-mexico-un-millon-de-vacunas-de-sinovac/) 18/03/2021.

**AMLO and governors sign agreement not to interfere in elections.**

President Andrés Manuel López Obrador signed this Tuesday an agreement with the 32 governors so that the authorities refrain from interfering in the mid-term elections on June 6, considered the largest in the country's history. López Obrador took advantage of the agreement to denounce once again that "the 2006 presidential election was stolen", when Felipe Calderón (2006-2012) became president to the detriment of the current president. The elections considered to be the largest in Mexico's history will take place next June 6th, where 94 million voters will elect 500 Federal Deputies, 15 Governors of a total of 32 States, 30 State Congresses and 1,900 City Councils. [www.forbes.com.mx/amlo-gobernadores-acuerdo-no-interferir-elecciones/](http://www.forbes.com.mx/amlo-gobernadores-acuerdo-no-interferir-elecciones/) 23/03/2021.

**For the second consecutive year, Mexico leaves the ranking of the most attractive countries for foreign investment.**

For the second consecutive year, Mexico was left out of the list of the 25 most attractive countries for Foreign Direct Investment (IED), according to A. T. Kearney's Foreign Direct Investment Confidence Index. This is due to factors of regulatory transparency and governance with the signals sent with the reforms to the Electricity Industry Law and outsourcing in the labor market. This is the third time that Mexico has dropped out of the index since its launch in 1998; it did so for the first time in 2011 and, as in the last year, the regulatory issue in the energy sector pushed it out of the list of the 25 most attractive countries for directing foreign direct investment. [www.elfinanciero.com.mx/economia/por-segundo-ano-consecutivo-mexico-sale-de-ranking-de-paises-con-mas-atractivo-para-inversion-extranjera/](http://www.elfinanciero.com.mx/economia/por-segundo-ano-consecutivo-mexico-sale-de-ranking-de-paises-con-mas-atractivo-para-inversion-extranjera/) 24/03/2021.

**Reform to the Hydrocarbons Law violates the Constitution and intends to expropriate: IMCO.**

On March 26, President Andrés Manuel López Obrador sent to the Chamber of Deputies an Initiative with a Draft Decree reforming and adding various provisions of the Hydrocarbons Law, which intends to give a wide margin of discretion to the Ministry of Energy and the Energy Regulatory Commission. With it, it grants powers to these agencies to expropriate the facilities of the permit holder companies for the benefit of the state companies. The Mexican Institute for Competitiveness (IMCO) demanded the deputies not to approve the presidential initiative since it violates the Mexican Constitution and international treaties. As with the electricity reform, this reform proposal would threaten present and future investments, affecting Mexico's competitiveness. [www.eleconomista.com.mx/empresas/Reforma-a-Ley-de-Hidrocarburos-viola-la-Constitucion-y-pretende-expropiar-Imco-20210329-0088.html](http://www.eleconomista.com.mx/empresas/Reforma-a-Ley-de-Hidrocarburos-viola-la-Constitucion-y-pretende-expropiar-Imco-20210329-0088.html) 29/03/2021.

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## MIGUEL RUELAS

Attorney at Law. Mr. Miguel Ruelas Rosas of Mexican nationality obtained his law degree at Instituto Tecnológico Autónomo de México (ITAM). Miguel has participated in the legal structuring and counseling of cross-border transactions, financing and leasing of aircraft and mobile assets in Mexico. Mr. Ruelas Rosas is on a full-time secondment to the Aviation Working Group, assisting the secretariat on all AWG projects.

He holds an LLM on Global Business Law from the University of Washington, where he was a designated global-business-fellow for 2019-2020. Euromoney legal media nominated Mr. Ruelas Rosas as 'Rising Star' in the category 'Best in Aviation' in 2019.

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