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A commentary article
reprinted from the
April 2022 issue of
Mealey's International
Arbitration Report



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Commentary

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[Editor's Note: After several years as arbitration and litigation counsel, including her role as partner of the arbitration practice at leading international and local firms, Cecilia Flores Rueda established FloresRueda Abogados in 2015, a dispute resolution boutique. She acts in arbitration as both party representative and as arbitrator, and focuses her practice on issues related to energy, infrastructure projects, construction, trust, joint ventures, transportation and logistics, and insurance and reinsurance, as well as in cases involving governmental entities, amongst many others. She graduated, with honours, from Universidad Panamericana, where she also completed postgraduate studies on international commercial law. She obtained her master's degree, with honours, at the Instituto Tecnológico de Estudios Superiores de Monterrey and a Diploma in Energy by the Instituto de Investigaciones Jurídicas de la Universidad Nacional Autónoma de México. She has been professor of arbitration for more than 20 years at the Business Mater of LaSalle University and in the Diploma Course on Arbitration offered by the ICC and Escuela Libre de Derecho. She can be reached at cecilia@floresrueda.com. This should be considered as a non-exhaustive summary of some of the legal actions implemented or being implemented by Mexico. It should also not be considered as an opinion of FloresRueda Abogados or any of its lawyers with respect to the actions described. For specific advice, please contact the FloresRueda Abogados team directly. Any commentary or opinions do not reflect the opinions of FloresRueda Abogados or LexisNexis®, Mealey Publications™. Copyright © 2022 Cecilia Flores Rueda. Responses are welcome.]

In December 2013, a constitutional legal reform known as the "Energy Reform" (*Reforma Energética*)

was implemented in Mexico, which entailed an opening of the oil & gas, and electric power sectors.

The Mexican Energy Reform formally saw the light on December 20, 2013, when the "Decree reforming Articles 25, 27 and 28 of the Political Constitution of the United Mexican States"¹ was published in the Official Gazette of the Federation (*Diario Oficial de la Federación*) ("Gazette"), including 21 transitory articles with guidelines for the elaboration of secondary laws that would allow the proper implementation and execution of the new provisions.

For its implementation, the Mexican President sent to the Congress nine initiatives, and on August 11, 2014, the secondary legislation of the energy reform was published, consisting of twelve reformed laws and nine completely new laws.

As a consequence, a competitive power market was opened to private investment in almost all energy areas; particularly, in generation and commercialization of electricity. These reforms were the most important change to the Mexican electricity market in over 40 years. In fact, it was reported in a publication made by the Wilson Center that, at that time, potential investors and industry observers considered the reforms as successful.² Even, the renowned International Energy Agency ("IEA") considered, in its World Energy Investment 2018 report, Mexico's 2013 energy reforms as a model for the world to follow.³

However, as of 2018, a new group of political power took over the direction of the country. This group is leaded by Andrés Manuel López Obrador ("AMLO"),

who in 2014 founded a political party, MORENA. Due to, what some consider a crisis of credibility suffered by the earlier administrations and traditional political parties,⁴ in 2018 MORENA achieved absolute majority in the Lower House with 256⁵ seats out of 500. This meant that such party would occupy the Presidency of the Chamber in the following three years.

In June 2018, it was announced that AMLO won the Mexican elections for the Presidency. He won with at least 53% of the votes, being the first presidential candidate to receive more than 50% of the vote in more than three decades.⁶

During his administration, AMLO has continuously declared his interest in profiting State companies *Petróleos Mexicanos* ("PEMEX") and the Federal Electricity Commission ("CFE") over private companies. One example of such is the following declaration given by the current Mexican president on October 24, 2020.⁷

"We are going, according to the legal framework, to give preference to both the Federal Electricity Commission and PEMEX, as clear as that, which are state-owned companies."⁸

Since 2018 until now, the Mexican government has taken different actions and has issued a number of legal reforms that some consider benefit CFE and PEMEX over private companies. The following are some examples:

- In December 2018, by instructions of AMLO, the fourth renewable energy public bid was suspended, just to be cancelled later, on January 31, 2019. This bid was considered as a major opportunity to attract investment in wind and solar power generation plants. In three previous bids, Mexico allocated more than 4.8 GW of solar generation capacity. According to James Ellis, analyst at Bloomberg New Energy Finance, it was a major blow to the prospects for private investment in what was, until then, the most attractive renewable energy market in Latin America.⁹
- On March 2019, AMLO announced a bid for the construction in three years of a new refinery in Mexico for about 8 billion USD. Since that very early stage of his administration,

some foresaw that AMLO would have preference over the oil & gas industry rather than renewables.¹⁰ The bid was canceled when the bidders failed to meet the ambitious three-year timeline and were supposed to keep within the 8 billion budget. Thus, the project was handed to PEMEX, with an outrageous indebtedness.¹¹

- On June 13, 2019, the public bid for granting contracts for the exploration and exploitation of hydrocarbons was cancelled. Previously, as a result of the 2013 Energy Reform, more than 100 contracts of that kind were entered into. In exchange, AMLO's administration opted for tenders for oil drilling service contracts.¹² According to the National Association of Oil & Gas Enterprises (*Asociación Nacional de Empresas de Hidrocarburos – AMEXHI*), the cancellation of the auctions would deprive Mexico of receiving 160 thousand million USD.¹³
- On June 1, 2019, CFE filed seven requests to arbitration concerning gas pipelines' contracts. AMLO then argued that the earlier administration had included aggressive clauses contrary to the public interest. The Business Coordinating Council in Mexico (*Consejo Coordinador Empresarial*) declared that the arbitration proceedings had few chances to be resolved in favor of CFE.¹⁴ At the end, the contracts were negotiated, and the claims were withdrawn.
- On October 28, 2019, the Secretary of Energy ("SENER") published on the Gazette a resolution to change the requirements for granting Clean Energy Certificates ("CEL's"). Prior to it, power plants received CEL's only if they had started its generation after 2014. With the new resolution, the power plants that existed before 2014 would receive also CEL's. CFE was spotted as the most benefited player of this resolution since its 60 hydroelectric, one wind farm, some geothermal, and a nuclear power plant would be now receiving CEL's.¹⁵

Several energy-related associations, such as the Mexican Association of Wind Energy (*Asociación Mexicana de Energía Eólica*), and the Mexican Academy of Energy Law (*Academia Mexicana de Derecho Energético*), declared that the modification was a violation of basic investment protection principles enshrined not only in the Mexican constitution, but also in investment treaties.¹⁶

- On April 29, 2020, the National Electric Power Control Center (*Centro Nacional de Control de Energía*) ("CENACE") issued a Resolution to Guarantee the Efficiency, Quality, Reliability, Continuity and Stability of the National Electrical Grid of Mexico during the COVID-19 Pandemic.¹⁷ It consisted, *inter alia*, in the temporary suspension of pre-operative commissioning tests for wind and solar power plants, while pandemic-related contingent measures remained in effect in Mexico. Some players of the energy market, shared their concerns about the fact that this measure could be indefinitely in force, since it did not specify an end date for its restrictions.¹⁸

According to the Mexican Association of Wind Energy (*Asociación Mexicana de Energía Eólica*), the resolution would affect potentially all the private projects in the electricity sector. This is, 260 generating projects, 56 projects in testing stage, and 81,500 jobs.¹⁹

This resolution was challenged by some companies through judicial *amparo* claims (which is a form of constitutional challenge under Mexican law).

On May 7, 2020, the Mexican anti-trust regulator, the Federal Economic Competition Commission (*Comisión Federal de Competencia Económica*) ("COFECE"), published an opinion declaring that the resolution could mean potential restrictions on economic competition and the free market for electricity in Mexico.²⁰ It also stated that some measures could allow CENACE to favor conventional power plants, which are mostly owned by CFE, over wind and solar power plants. However, such opinion was not binding on CENACE.

Industry stakeholders reacted by filing claims to enjoin CENACE's resolution. Some obtained provisional injunctions against it.

- On May 15, 2020, SENER published in the Gazette the Resolution for issuance of the Policy on Reliability, Stability, Continuity and Quality in the National Electric Grid.²¹

The Resolution states that one of its primary goals is to guarantee electricity supply under the principle of reliability, and to do so according to national goals,

including, *inter alia*: management of demand and consumption; achievement of a sovereign-led energy transition and the orderly incorporation of clean energy and distributed generation. It makes references to concepts such as: reliability, stability, continuity, and quality. However, those concepts were criticized since they are not technically defined, leaving them open to potentially discretionary interpretation and application. According to some private stakeholders, the resolution is contrary to the legality, legal certainty, and free economic competition principles.²²

Regarding the resolution, Jean-Pierre Bou, the Chairman of the European Union Commission on Business, sent a letter to the Mexican Secretary of Energy to share Europe's concern about this Resolution. According to him, such measures would prevent investment in Mexico. Likewise did the Canadian Ambassador in Mexico, Graeme C. Clark, he particularly declared that such measures impact 450 million USD made by Canadian investors.²³

On June 4, 2020, the SENER resolution was provisionally enjoined in a ruling in favor of *Greenpeace México* that is of general application nationwide, and which also enjoins the CENACE resolution nationwide. The ruling judge noted that the SENER resolution put at risk the environment, the health of the Mexican people and Mexico's international treaty commitments to reduce its fossil fuel consumption.²⁴

On June 10, 2020, another non-governmental entity, *Asociación Civil Defensa Colectiva*, was successful in obtaining a definitive *amparo* injunction against the same resolution, which also applies nationwide to all affected generating companies.²⁵

On June 22, 2020, COFECE announced that it filed a constitutional claim before the Supreme Court of Mexico against the SENER resolution, alleging that it: (a) violates the fundamental principle of free competition, and (b) constitutes an attempt by SENER to exceed its constitutional mandate.²⁶

In early July 2020, the Supreme Court of Mexico provisionally suspended the SENER resolution and its effects in response to COFECE's claim.

- On May 28, 2020, the Energy Regulatory Commission (*Comisión Reguladora de Energía*)

(CRE) approved two resolutions amending transmission charges for legacy renewable, cogeneration, and conventional power plants that, prior to the regulatory reforms of 2013–2014, signed legacy interconnection contracts with CFE. Some business leaders in the country opposed the new rule, as it would increase their cost.²⁷ However, this resolution was provisionally suspended via an *amparo* injunction in early July 2020.²⁸

- On October 23, 2020, a Federal Judge issued a final ruling on the *amparo* claim filed by two private companies against the CENACE Resolution. The ruling nullified the CENACE Resolution not only with respect to the companies that filed the *amparo*, but also on a general basis, and it required CENACE to notify market participants that its resolution was no longer in force.²⁹
- On October 30, 2020, the same Federal Judge issued a similar ruling on the *amparo* claim filed against the SENER resolution, nullifying it nationwide and requiring SENER to notify market participants that its resolution had no longer effects. In this regard it is known that energy companies had filed 170 *amparo* lawsuits, which alleged that the measures affected 44,000 million USD.³⁰
- On January 11, 2021, the US. Secretaries of State, Energy, and Commerce sent a letter to Mexico's Secretaries of Foreign Affairs, Energy, and Economy, sharing their concern regarding "recent regulatory actions by the Mexican government." The following statement is particularly remarkable:

"as we have discussed with you previously, recent regulatory actions by the Mexican government have created significant uncertainty about 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."³¹

- On February 3, 2021, the Mexican Supreme Court issued a final ruling on the constitutional claim filed by COFECE against the SENER resolution; striking down most of its provisions. The Supreme Court ruled that though SENER has legal authority to make energy policy, those policies may not contradict or override the existing constitutional principles; it also added that it gave an unduly advantage to CFE.³²

The foras hoped that this ruling could send a clear message to AMLO regarding that the implementation of the energy policy must be done in accordance with the applicable laws, and not merely on political ideology.³³

- On February 1, 2021, the Mexican President submitted an Energy Bill to the Mexican Congress ("Energy Bill") to amend the Electricity Industry Law (*Ley de la Industria Eléctrica*) ("LIE") to, *inter alia*: (i) modify the dispatch order of power plants to favor CFE; (ii) allow legacy power plants (i.e., those operating before the Energy Reform) to receive clean energy certificates for power generated; (iii) allow CFE to purchase power directly from market participants and not exclusively from public energy bids; (iv) allow CRE to terminate certain existing legacy self-supply permits; and (v) allow CFE to renegotiate or terminate existing power purchase agreements executed with independent power producers for certain legacy projects.³⁴

Some considered that this Reform implied for Mexico to go in the opposite direction in comparison to the rest of the world, since the reform created disincentives to clean generators due to CFE's advantages. It was also noted that Mexico allocated 70 billion pesos in 2021 to subsidize electricity rates, an amount that would increase if the reform were approved; as a consequence, they argued that the reform would imply subsidizing fossil fuels.³⁵

The Mexican Chapter of the International Chamber of Commerce declared that this Reform gave preference to CFE over private companies. It also mentioned that this Reform included the changes previously intended by AMLO's administration, but were stopped by the judiciary. It added that the reform was unconstitutional and unconventional.³⁶

On February 23, 2021, the House of Representatives discussed and approved the AMLO Energy Bill.³⁷

On March 2, 2021, the Senate Chamber approved the Energy Bill. The Revolutionary Institutional Party (“PRI”) alleged that MORENA did not allow for a discussion of congressmen nor of the players of the electricity market.³⁸

On March 9, 2021, the Energy Bill was published on the Gazette.³⁹ Congressmen from the opposing parties (PRI, PAN and PRD) declared that they would contest it before the Mexican Supreme Court.⁴⁰

On April 8, 2021, a group of legislators opposed to the Energy Bill published. They asserted an unconstitutionality action against it. According to them, the Energy Bill violates the Paris Agreement, the United States – Mexico – Canada Agreement, Constitutional principles of legality, legal security, and non-retroactivity.⁴¹

On April 22, 2021, COFECE filed a constitutional controversy against the Energy Bill published. According to it, it prevented COFECE from safeguarding competition and free concurrence in the sector.⁴² The constitutional controversy was admitted by the Mexican Supreme Court of Justice on May 11, 2021, although, without granting the suspension of the application of said reform requested by COFECE.⁴³

However, the Energy Bill published was later indefinitely suspended due to the multiple *amparo* review actions filed against it by various companies.⁴⁴

- In June 2021, some mid-term elections took place for the Lower House, governorships, and boroughs of Mexico City. In the Lower House, Morena's seats were reduced from 256 to 197, which made it reliant on its allies. In Mexico City, which was ruled by AMLO from 2000 to 2005, Morena won 9 out of 16 boroughs. However, MORENA won 11 of the 15 governorship elections.⁴⁵

Previously, Morena forged alliances that allowed it to have qualified majority in the lower house, and have its reforms approved easily. After the mid-term elections it has no longer such a strong majority. According to some analysts, this change would make it

more difficult for AMLO to approve a constitutional reform about energy.⁴⁶

- On September 30, 2021, the Mexican President sent to Congress a Constitutional Reform proposal, consisting on modifications to Articles 25, 27 and 28 of the Mexican Constitution, along with several transitory articles.⁴⁷ Some consider that the proposal is a significant change of direction from the legal framework established in 2013.⁴⁸

This proposal stipulates that CFE would be responsible for generating 54% of all electricity, while the private sector would be allowed to generate up to the remaining 46%.

Furthermore, it is established that the electricity generated by private companies would be purchased exclusively by CFE, based on economic dispatch and contractual arrangements to be determined by CFE. Currently, private companies can sell electricity directly to other private companies.

The aforementioned provisions are accompanied by the stipulation to cancel all existing power generation permits and the private contracts for the sale of electricity, effective, as of the day of enactment. Some have considered that, though there is not an expropriation decree as such, the proposed reform could have its effects.⁴⁹ It has even been said that Mexico could soon face a wave of investment arbitration claims similar as the one faced by Spain.⁵⁰

Besides, in the proposal it is also considered the disappearance (i) of the Mexican energy regulators: CRE, and the National Hydrocarbons Commission (*Comisión Nacional de Hidrocarburos*); which powers would be assumed by SENER; (ii) of CENACE, which would be absorbed by CFE; and (iii) of all of CFE's subsidiaries and affiliates (apart from *CFE Telecomunicaciones e Internet para Todos*, *CFE Energía*, *CFE Internacional* and *CFE Capital*).

The Mexican private sector generally opposed the Reform. It argued that, for families to pay less for their gasoline, gas and, in this case, electricity, there must be more competitors and greater supply. They considered that this initiative closes the door to competition and that, if approved, in the short term, it would gen-

erate shortages, blackouts and increasingly expensive rates for Mexican families. This was pointed out, for example, by the *Confederación Patronal de la República Mexicana* ("COPARMEX").⁵¹

- On October 2021, about 20 Texas congressmen and senators sent a letter to U.S. Ambassador in Mexico, Ken Salzar, criticizing the changes proposed by AMLO. According to the media, the reform would cancel contracts under which 34 private plants sell power into the national grid, and declare "illegal" another 239 private plants that sell energy directly to corporate clients in Mexico.⁵²
- On October 17, 2021, the Chairman of the Energy Commission of the Chamber of Deputies, Manuel Rodríguez González, stated that the legislators will listen in Open Parliament to civil organizations, institutions, specialists, professionals and businessmen who wish to contribute. He pointed out that, based on these contributions, the legislators will analyze, debate, and prepare the opinion to be submitted for consultation in the commissions.⁵³

Mr. Manuel Rodriguez has received different criticisms from the forum. One of them is that the proposed Constitutional Energy Reform would be a violation of ratchet clauses which prevent States from eliminating a benefit previously granted in a trade agreement. Another strong one is that it would harm investors and investments; this argument has been mentioned by different newspapers.

- On November 3, 2021, a group of US congressmen sent a letter to Katherine Tai, U.S. Trade Representative, and Secretaries Blinken (Department of State), Raimondo (Department of Commerce), and Granholm (Department of Energy).⁵⁴ They wrote to express their "grave" concern about reports of escalating effort by the Government of Mexico to exclude private companies from its energy sector in contravention to its international commitments, including the United States-Mexico-Canada Agreement (USMCA). They added that Mexico is blocking U.S. private sector participation in Mexico's fuels markets. They also alleged that, according to the media:

- The Mexican government suspended the permits of several US-owned fuel storage terminals, while using the National Guard to force the closure of 23 fuel-related facilities, such as storage sites, and partial closures of 17 others.⁵⁵
- In June, Mexico's tax authority changed the General Rules for External Trade, banning companies from obtaining or renewing the three-year permits that are required for fuel terminals to serve as points of entry and exit for hydrocarbons.⁵⁶
- Mexico's tax authority suspended 82 companies in July from trading fuels over alleged fiscal violations.⁵⁷
- Between December 20, 2020, to July 15 alone, Mexico's Secretariat of Energy canceled 1,866 permits for the import and export of gasoline, diesel, LP gas, jet fuel, fuel oil and crude.⁵⁸
- As of September 20, just 97 of 1,954 permits issued to private companies were active in Mexico.
- On November 22, 2021, the CFE published a press release in which it criticized a note of a relevant newspaper in Mexico "*El Financiero*". The criticized note stated that the constitutional energy reform would harm 22 million USD. CFE stated that such note was unfounded and shared no data supporting the claim. CFE also added that there have been different events organized in which it was proved that the proposed energy reform does not violates any Mexican regulation nor any international agreement. The following is an extract of such note:⁵⁹

"... we would like to remind both Bloomberg and *El Financiero* that forums have already been held where it has been demonstrated that President Andrés Manuel López Obrador's reform initiative does not violate any Mexican legal statute or contravene any international trade agreement: it is within the framework of both the Constitution and the T-MEC."⁶⁰

It is worth to notice that, to the date of issuance of this note, the latest information about this constitutional energy reform is that some congressmen declared that it might be discussed until April 2022. However, the Chairman of the Energy Commission of the Lower

House replied that the discussion would start before December 15, 2021, and that it is the legislative process the one ending in April 2022.⁶¹ Nevertheless, the process did not start on December 2021.

On December 31, 2021, the CRE published on the DOF the Ruling No. A/037/2021 (Criteria B).⁶² This ruling amends the Ruling No. A/049/2017 (Criteria A). Both rulings set a criteria for the concept “own needs”, which is provided in article 22 of the LIE. Such article states as following:

“Article 22.- Isolated supply is understood as the generation or import of electric energy for the satisfaction of own needs or for export, without transmitting such energy through the National Transmission Network or through the General Distribution Networks. [...]”⁶³

The Criteria B amends different items regulated by Criteria A, such as the following: (i) the definition of “Economic Interest Group”; (ii) establishes a limit to the installed capacity of the Power Plant operating under the isolated supply regime based on the demand of the Load Points served by such Power Plants; (iii) eliminates the “local generation” scheme; (iv) amends the conditions applicable for the injection and sale of surplus; (vi) prohibits the Power Plants and/or Load Points operating under the isolated supply scheme, with or without interconnection to the national Electric System grid to coexist with Power Plants included in Grandfathered Interconnection Agreements; and (vi) eliminates the examples of business schemes for isolated supply set forth in the Criteria A.

The Criteria B was criticized for being a new setback for the industry in Mexico since, it was alleged, isolated supply schemes and local generation had become alternatives to reduce the energy costs of some major users and their exposure to regulatory risks.⁶⁴

Endnotes

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MEALEY'S: INTERNATIONAL ARBITRATION REPORT

edited by Samuel Newhouse

The Report is produced monthly by



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Telephone: (215)564-1788 1-800-MEALEYS (1-800-632-5397)
Email: mealeyinfo@lexisnexis.com
Web site: <http://www.lexisnexis.com/mealeys>
ISSN 1089-2397