

# Mexican President Announces Significant Constitutional Reforms Affecting Energy Sector

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Following prior attempts to preclude private investor participation in the energy sector through Congressional legislation (i.e. Electric Industry Law and Hydrocarbons Law), President Andrés Manuel López Obrador, submitted to the Mexican Congress a Bill to amend Articles 25, 27 and 28 of the Mexican Constitution related to energy matters (the “Bill”). As stated in the Bill’s legislative intent, the same seeks to undo the Constitutional changes that opened the market for private investment and intend to limit/preclude private sector participation. The Bill also affects the hydrocarbons and the mining industries.

Key changes of the Bill include the following:

## A. Private Sector – Cancellation of Prerogatives

1. **Cancellation of all power generation permits and power purchase agreements entered into with the private sector.**
2. Cancellation of all Clean Energy Certificates.
3. Power generation originating from (i) Self-Supply Generation Permits granted under the former Electric Energy Public Service Law (*Ley del Servicio Público de Energía Eléctrica*), also known as the “old regime”, will be allowed only to the extent that the Federal Electricity Commission (*Comisión Federal de Electricidad*, or CFE) deems the operation of such permits as “authentic”<sup>1</sup>; and (ii) the excess power generation from Independent Power Producers (IPPs) **shall not be recognized nor purchased by CFE** under the new regime.
4. Private sector participation would be limited to a maximum of 46% of total power market generation (IPPs and “authentic” self-supply regimes are included within this percentage). Currently, the Bill acknowledges that the private sector generates 62% of all available power. The Bill is unclear on the parameters to measure private sector power generation (e.g.,

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month, peak hours, etc.).

5. The 46% of the power generation capacity required to satisfy Mexico's demands will be produced by the following entities:
  1. IPPs (without the surpluses);
  2. generators awarded production contracts through auctions held by the National Center for Energy Control (*Centro Nacional de Control de Energía*, or CENACE) under the Energy Reform of 2013;
  3. power projects developed under the Electricity Industry Law; and
  4. "authentic" self-supply power stations (defined as those that do not sell electricity to third parties).
6. CFE will define the new contract models for the purchase of capacity and electricity from the private sector, which will be awarded under a special regime different to the one regulated by Article 134 of the Mexican Constitution (the Mexican government procurement principles – "level playing field rules").

## **B. Strengthening of CFE**

1. CFE will again be integrated vertically and horizontally. Current CFE subsidiary companies (*CFE Generación*, *CFE Transmisión*, *CFE Distribución*, *CFE Suministrador de Servicios Básicos* and *CFE Calificados*) will merge into one vertical and horizontal entity. CFE will control the generation, transmission, distribution and supply of electricity.
2. CFE will be in charge of the planning and control of the National Electric System.
3. The National Center for the Control of Energy (*Centro Nacional de Control de Energía*, or CENACE) as the independent system operator will be reintegrated into CFE. Moving forward, the dispatch of power stations will be controlled by CFE, as well as the wheeling rates for the use of the transmission and distribution lines and electricity rates.
4. CFE will also be in charge of the energy transition, considered as a State's priority.

## **C. Dissolution of Regulators**

The Energy Regulatory Commission (*Comisión Reguladora de Energía*, or CRE) and the National Hydrocarbons Commission (*Comisión Nacional de Hidrocarburos*, or CNH) will be dissolved. Their authority and structure will now be integrated into the Ministry of Energy. This means that there will be no independent and autonomous regulator for the electricity and the hydrocarbons industries.

## **D. Lithium**

The Bill intends to nationalize lithium deposits by disallowing further concessions to explore and mine

this mineral by private parties. Concessions granted and exploited prior to the Bill will not be affected. The Bill also opens the door to block “Other Strategic Minerals” from being mined by private parties.

For approval to occur, the Bill requires a two-thirds majority of both houses of Congress and the majority of the State Congresses (32 Mexican states). Currently, the President does not have the necessary support to reach the required majority, making approval of the Bill uncertain.

If approved, private investors will need to determine which legal remedy provides the most expeditious defense to protect their investment. A party can opt to file a claim with the Mexican federal courts, or initiate international arbitration proceedings as afforded within the provisions of the USMCA, the CPTPP and other bilateral investment treaties signed by the Mexican government, as the Bill is a direct breach to these provisions. In the event of a dispute, the legal method for resolution will need to be analyzed on a case-by-case basis considering the nature of the investment.

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<sup>1</sup> The Mexican government has made public its position that the supply of power by the generation entity to its self-supply partners should be deemed as fraudulent. This is because the original self-supply scheme was developed in order for a company to build its own power generation facility and not to supply power to third parties different to this original company.

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