The Mexican Petroleum License of 2013: A Step to the Past to Bring Mexico into the Present and the Grounds for an Uncertain Future

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Petroleum in Mexico is not only a resource that has been used and abused by the State to finance its operations; petroleum runs in the veins of its national identity—oil rigs, barrels, and the State-owned company’s eagle are present in monuments across the nation and featured on coins and circulation bills. Official history books tell the story of how the Mexican revolution was fought partly to regain control of the hydrocarbons sector, which in 1910 was dominated by international oil companies. Consequently, to understand the legal nature of the Mexican petroleum license, one needs to review the history of the constitutional treatment of hydrocarbons in Mexico. The regulation of the sector is in constant tension between a deep-rooted policy of government control over the resource motivated by nationalism, and the need to attract and maintain foreign investment to keep production flowing. The rivalry between these goals has not always been resolved successfully, and at times, two legal structures exist in parallel with each other. On one hand, according to the Constitution, the State cannot grant concessions nor transfer the property of the resources to private parties because they belong to the nation. Only the State is empowered to extract and develop hydrocarbons in Mexico. On the other hand, secondary legislation creates a contractual structure that focuses on the maximization of the recovery and allows the government to transfer the hydrocarbons to private parties at the wellhead. In the middle of this contradiction lies the ammunition for politicians that lobby for a government-controlled energy sector to amend the law and renegotiate contracts with private parties.

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The First Parallel Regime: Property of the Nation Developed by Private Parties Through Concessions

In the dawn of the nineteen century, the Mexican State gave extensive concessions to American and British investors to mine and extract hydrocarbons. For instance, the British-controlled Mexican Eagle Oil Company received a concession to develop almost all federal lands located around the Gulf of Mexico. In practice the old concessions included a right to mineral development over extensive acreage, over long periods of time, and giving vast control of the development program to the private company. The old concession had close similarities to the mineral rights awarded during the Spanish colonial times: individuals were granted usufruct rights to the exploitation of veins and deposits. The crown reserved the right to royalties and to receive the property back after the mining development was over. The holder of the concession “had full property rights, jus utendi, fruendi and abutendi, and the State retained the high dominium, that is the right to reacquire the full dominium after a condition was met, either because there were no regular works or because they failed to pay taxes.”

It is no surprise then that people identified oil development in Mexico with foreign companies and their private property. The presence of foreign companies was also accompanied by a sense of foreign intervention in domestic affairs. This perception was sparked in part by the occupation of American forces in the ports of Tampico and Veracruz to protect U.S. oil companies from raids and attacks by the revolutionaries in 1914.

By 1917, the fervent nationalism against foreigners was at its height, and the revolutionary congress adopted Article 27 of the new Constitution declaring all the “subsoil” and its underground resources

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3 ibid.
4 ibid.
6 ibid.
7 ibid 205.
as “inalienable” and “imprescriptible” property of the Mexican people.\textsuperscript{9} The revolutionary congress wanted to make sure that “as a basic, solid and unalterable principle under Mexican law, individual rights to property are to be subordinated to the superior rights of society as represented by the State.”\textsuperscript{10} For the revolutionaries, the absolute property of the State over minerals and substances underground was a clear example of this subordination.\textsuperscript{11} In their minds, the regime established in 1884 had ceded the rights of the nation to develop the national treasures to landowners and private companies, violating the sovereign control over the resources that dated back to early days of the republic.\textsuperscript{12} The new text of the Constitution ended this practice and specified that the resources belonged to the nation and the State could not transfer the “direct dominium” of the resources to private parties.\textsuperscript{13} According to Article 27, paragraph 6, oil and all hydrocarbons were inalienable and not subject to limitations.\textsuperscript{14} In a way, the Constitution recognized that even if the government in power represented the State, the nation or the people of Mexico are the “original” owners of the resources, and the government as such is precluded from ceding them to private parties.\textsuperscript{15} When it came to national minerals, the government was a type of trustee administering the resources for the benefit of the Mexican people.\textsuperscript{16}

However, the new Constitution did recognize the need to use private companies for the exploitation of mineral resources.\textsuperscript{17} Article 27 stated that only through federal concessions could the State allow the exploitation of the subsoil by private actors, but the underground minerals would always remain the property of the nation.\textsuperscript{18} The reforms presented a clear challenge to already existing concessions that, in

\begin{itemize}
  \item \textsuperscript{9} ibid 254–255.
  \item ibid 172.
  \item ibid.
  \item ibid 177–178.
  \item Favela (n 12) 174.
  \item ibid.
  \item ibid 177–178.
  \item ibid 174.
\end{itemize}
practice, had transferred full ownership of the resources subject to taxation and relinquishment of the acreage after exploitation.  

The British and American companies maintained that their contractual rights granted them full property rights over any hydrocarbons located in the acreage and complained against the retroactive effect of the new Constitution. The revolutionary government instead insisted that the State never gave up the ownership of the subsoil. It was an essential right of sovereign nations. Any concession, in their view, had not granted property rights in the underground resources and should not bind the newly elected government.

After the approval of the Constitution of 1917, the revolutionary war entered a new violent stage, and as a consequence, the government decided not to implement the new constitutional framework. By the time the war was over, in the late 1920s, the post-revolutionary government allowed the companies to operate under the previous regime, but it sustained its claims over the subsoil ownership. The government could not afford to lose the oil produced by foreign investors at a time when the country was in dire need of resources for post-war reconstruction. In a way, a dual legal regime existed: one where the concessions, in practice, granted full ownership to the producers, subject only to taxation; and one where the resources belonged exclusively to the State, as drafted in the 1917 Constitution.

In 1927, under President Plutarco Elias Calles, the government seemed to be willing to implement Article 27, raising tensions to the point of ordering General Lazaro Cardenas, the military commander in the oil zone, to prepare to set the oil fields on fire if the American troops threatened to invade the ports in defense of the companies. The government resisted the temptation of forced renegotiation, but the industry reacted by halting new investment in the fields. In other words, since the threat was still present and taxes continued to increase, the companies suspended all new investment in the fields and stopped

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19 Yergin (n 10) 254–255.
20 ibid 255.
21 Favela (n 12) 172.
22 Yergin (n 10) 255.
23 ibid.
24 ibid.
25 ibid.
26 Favela (n 12) 174.
27 Yergin (n 10) 255.
exploring new areas.\textsuperscript{28} The risk and production costs in Mexico were too high.

As a consequence, in the following years, Mexico ceased to be the second largest oil producer in the world and began losing its global market share to nearby competitors.\textsuperscript{29} In just ten years, Mexico’s production fell by 80%, and by the mid-1930s, Venezuelan oil was being refined in Mexico because it was cheaper than oil produced in the Tampico wells.\textsuperscript{30} The government blamed the loss of production and the increase in costs on the foreign-controlled companies. By the late 1930s, two foreign companies produced 95% of Mexico’s total production: 65% by the British owned, but Dutch/Shell managed, Mexican Eagle, and 35% by the American companies Standard Oil of New Jersey, Sinclair, Cities Services, and Gulf.\textsuperscript{31}

In 1934, General Lazaro Cardenas was elected president of Mexico. He favored land reform, syndicalist trade unions, and extensive public intervention in the economy.\textsuperscript{32} The General was a leftist-oriented revolutionary hero who was ready to enforce the unfulfilled promises made to the Mexican people during the revolution.\textsuperscript{33} The control of the oil industry was at the center of his agenda, and the decline of production and the rising costs of oil gave him the political ammunition to move forward with his plans.\textsuperscript{34} By 1938, the conditions in Mexico had become inhospitable to foreign investment.\textsuperscript{35}

\textit{The 1938 Expropriation: The End of the Old Concession and the Birth of the Contractual Simulation}

In the late 1930s the world was dramatically changing. Nazi Germany had invaded Poland, and Japan was expanding its military grip in the Pacific islands, triggering the start of World War II. The belligerent parties need to secure energy sources for their global war efforts.\textsuperscript{36} In the Americas, through the New Deal, President Roosevelt had successfully implemented policies that disfavored the oil barons

\textsuperscript{28} ibid.
\textsuperscript{29} ibid.
\textsuperscript{30} ibid.
\textsuperscript{31} ibid.
\textsuperscript{32} ibid 256.
\textsuperscript{33} ibid.
\textsuperscript{34} ibid.
\textsuperscript{35} ibid.
\textsuperscript{36} ibid 258–260.
and redefined the United States’ role in Latin America as a “good neighbor.” Roosevelt pledged to never intervene again in domestic affairs of democratically elected governments. President Cardenas read the new global environment as an opportunity to advance his social agenda in Mexico. What he needed was a political opening in the domestic sphere to implement the energy policies envisioned in Article 27 of the Constitution.

In 1937, the oil workers union went on strike for higher salaries and better working conditions. President Cardenas, who had dealt with international oil companies in the past, set up a commission to review the companies’ books and business practices. The report argued that the companies “contributed nothing to the country’s broader development.” The governments of the past had allowed the companies to abuse their production plans, business models, and mistreat the oil workers. The report laid out a series of recommendations which would avoid the wrongdoing of oil companies—it would keep them from extracting the national treasures without paying appropriate taxes, and would ensure they developed the fields at adequate rates and invested in exploration activities. As negotiations with the union collapsed, President Cardenas used the report and a Supreme Court decision favoring the union as a pretext to nationalize the oil companies. The oil barons tried to convince the British government, embedded in the European warfront, and President Roosevelt to intervene on their behalf. The Mexican expropriation of 1938 was the first one of its kind around the world, and the companies feared that it would set a precedent for other leftist-oriented nations, but their hands were tied when World War II began in September 1939. The response was clear: the allies could not risk blockading Mexican oil or the Cardenas administration. A blockade on Mexico could push Cardenas to partner with Japan and Germany.

37 ibid 258.
38 ibid.
39 ibid 257–258.
40 ibid 257.
41 ibid.
42 ibid.
43 ibid 257–258.
44 ibid 258–259.
45 ibid 259–260.
46 ibid 260–261.
47 ibid 259–260.
would have to settle for just compensation. The allied governments were not willing to fight for their property’s restitution.48

Now, Cardenas faced a significant technical challenge. Taking over operations meant that Mexico would need to train petroleum workers, build an administrative body for the development of the oil sector, finance its operations, and arrange the efficient exploration and development of the new fields.49 The expropriation decree not only included the assets of the companies destined to the exploitation of the concessions, but also the property connected to refining, storage, transportation, and distribution activities.50 It was a nationalization of the entire industry value chain.51 The solution was the creation of a national oil company, PEMEX, that would take over the nationalized companies’ operations. With a state-owned company with enough resources, human capital, and infrastructure, the government, in theory, would finally be free from the need to use private actors to develop its national resources.52 Consistent with this view, President Cardenas submitted a constitutional amendment to Article 27 to prohibit all concessions in the hydrocarbons industry. In the words of the text adopted by Congress, “when it comes to petroleum and hydrocarbons, there will be no concession and the law [secondary regulation] will determine the manner in which the nation will exploit the resources.”53 Foreign companies would lose the full mineral rights granted by the only concessions and the State would become the only player empowered to exploit them. The 1940’s reform consolidated “the construction of a State petroleum sector through assigning the entirety of the goods and services necessary for its exploitation to the government.”54

Notwithstanding Cardenas’ vision of a national industry free of private foreign influence, his secondary regulation recognized the need to maintain some contractual relationship with private parties. As such, in the law that regulated the amended Article 27, President Cardenas allowed for the State to contract with private parties for “exploration and exploitation works, on behalf of the federal government.”55

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48 ibid.
49 ibid 258.
50 Favela (n 12) 179.
51 ibid.
52 ibid 182.
53 ibid.
54 Cossio Díaz and Cossío Barragan (n 16) 7.
55 ‘La Amnesia de Lorenzo Meyer’ (La Razón, 7 July 2013)
these contracts, private companies could be paid “in cash or an equivalent percentage of the extracted production.” In other words, the resources belonged to the nation and the State could not grant concessions for their development, but it could contract private parties to extract them on the government’s behalf. The private parties could receive in exchange the produced oil. In essence, the private companies continued extracting the national resources but now under an administrative contract on behalf of the nation and could be paid with the produced hydrocarbons.

Cardenas’ successor, President Manuel Avila Camacho (1940-1946), went even further with the reinstatement of a “simulation” of state independence from private companies. Less than six months after being sworn in, President Avila Camacho amended the law that regulated Article 27 to allow the State to “contract” with private parties at all stages of the hydrocarbons industry value chain. As such, the State would retain control over the sector, but it could choose between instructing the state-owned entities or contracting with private companies to complete the exploitation, exploration, transportation, storage, and distribution of hydrocarbons. The textual constitutional restriction on concessions remained, and the contracts were considered to be consistent with the wording of Article 27 because they were a “way” to exploit those resources. These contracts were not the old type of concessions, but they did allow the participation of private companies in the Mexican hydrocarbons development. Essentially, the State could grant private companies contractual rights to participate in the mineral development, but not full property rights over the underground resources. Moreover, the Law, materially, did not give a full monopoly over the industry to PEMEX, but instead, conceded a right to directly exploit the resources, with the State maintaining some regulatory and police powers over the operations. Both presidents recognized that private parties were needed for the development of the industry because the State entities lacked the capacity to do it on their own. What the new

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56 ibid.
57 Favela (n 12) 186.
58 ibid.
regime required was tighter State control and a subordination of the industry to the national interests that included broader social and economic development through the extraction of its national resources.\(^60\)

*The PEMEX Monopoly (1958–2013)*

It was not until twenty years after the nationalization of the oil industry that the government finally closed its door to private companies.\(^61\) In 1958, President Adolfo Ruiz Cortines submitted to Congress an amendment to the secondary legislation of Article 27 to give PEMEX a monopoly over the industry. In his proposal, President Ruiz Cortines clearly expressed that the nation required “that the activities of such a vital industry, should not be only controlled by the government, but also *monopolized* by the State.”\(^62\) Consistent with this vision, Article 27 was amended again in 1959 to clarify that “no concessions or contracts shall be granted, nor those in existence shall be valid and only the nation will be in charge of the exploitation of those resources.”\(^63\) In the words of President Ruiz Cortines, “the nation has opted, as such, that the only way of exploiting petroleum is through the works of Petroleos Mexicanos [PEMEX].”\(^64\) Finally, the secondary legislation was entirely consistent with the Mexican constitutional text and spirit.\(^65\) The resources belonged to the nation, the State developed the resources on the nation’s behalf, and to achieve that goal, a State entity held a monopoly over the entire value chain.

Notwithstanding the intention to leave without effect the existing contracts, the then Director of PEMEX, Jesus Reyes Heroles, did not phase out the existing contracts until February 27, 1970.\(^66\) Three years later, the Constitution was again amended to include in Article 38 a statement about the areas and activities in the national economy under which “the State has exclusive control.”\(^67\) As such, “petroleum and other hydrocarbons” and “basic petrochemical activities” fell under the

\(^{60}\) Yergin (n 10) 260–261; ‘La Amnesia de Lorenzo Meyer’ (n 57).
\(^{61}\) Cossio Díaz and Cossio Barragan (n 16) 7–8.
\(^{62}\) ‘La Amnesia de Lorenzo Meyer’ (n 57).
\(^{63}\) Favela (n 12) 187.
\(^{64}\) ‘La Amnesia de Lorenzo Meyer’ (n 57).
\(^{65}\) Favela (n 12) 184–185.
\(^{66}\) ibid 187–188.
\(^{67}\) ibid 188.
exclusive and strategic State control.\textsuperscript{68}

Coincidentally, PEMEX’s full monopoly over the industry value chain coincides with a period in the industry’s history where Mexico dropped from the list of great exporters.\textsuperscript{69} After the 1938 nationalization, PEMEX’s production devoted itself to supplying the domestic energy demand of a booming economy.\textsuperscript{70} It is also during this period when PEMEX’s corporate governance took the company down a road of inefficient and corrupt relationships—first with its workers and later with its suppliers.\textsuperscript{71} The 1938 expropriation of foreign assets was unsuccessful in improving the workers’ relations with the industry. Although the union was central to the nationalization process, in the early decades of the new system, the State failed to reciprocate with an adequate increase in benefits.\textsuperscript{72} Fundamentally, the company faced increasing pressure both from the government to keep energy prices down, and from the worker’s union to increase benefits.\textsuperscript{73} The result was a policy of awarding contracts to the worker’s union, mainly for midstream activities such as transportation and storage, and a reduction on exploration activities.\textsuperscript{74} The reduced capacity of PEMEX to access finance led to development programs “guided by a conservationist ethic based on the conviction that resources should be husbanded for future generations.”\textsuperscript{75} The byproduct of such a policy was PEMEX’s inability to expand its reserves at the necessary rate to maintain production in the long run. While the output of existing fields kept increasing, by not amplifying its proven reserves, the company was unable to keep up with the internal demands of Mexico’s economic miracle.\textsuperscript{76} By the late 1960s, Mexico was, in fact, a minor oil importer of Venezuelan crude.\textsuperscript{77} The political consequences of such a reality were clear; a once major oil producer was unable to keep in business. At that point, the company launched a deep-drilling exploration plan in Tabasco and Campeche—a program that would save the monopoly of PEMEX.\textsuperscript{78}

\textsuperscript{68} ibid.
\textsuperscript{69} Yergin (n 10) 648.
\textsuperscript{70} ibid.
\textsuperscript{71} ibid.
\textsuperscript{72} ibid.
\textsuperscript{73} ibid.
\textsuperscript{74} ibid.
\textsuperscript{75} ibid.
\textsuperscript{76} ibid.
\textsuperscript{77} ibid.
\textsuperscript{78} ibid.
In early 1970s, PEMEX discovered Cantarell, a field that in its golden year produced 2.136 million barrels per day (“mbd”).\textsuperscript{79} Located in shallow waters, Cantarell allowed PEMEX to focus most of its production and investment in one field, to the point of accounting for more than 60% of Mexico’s oil production.\textsuperscript{80} President Lopez Portillo (1976–1982), who had inherited a deep economic crisis from President Luis Echeverria, capitalized on the discovery and converted PEMEX’s output into the primary source of foreign earnings.\textsuperscript{81} The oil produced by Cantarell became “the engine of renewed growth.”\textsuperscript{82} Most of the investment in Cantarell came from international borrowing using production as collateral.\textsuperscript{83} Output in Mexico moved at an impressive pace: from 500,000 barrels in 1972 to 830,000 barrels in 1976, reaching 1.9 million barrels in 1980.\textsuperscript{84} With these production results and the price shock of OPEC’s oil embargo of 1973, borrowing from abroad became the primary source of finance for State projects, not only to PEMEX but to the central government and other State-owned companies in Mexico.\textsuperscript{85} By 1982, oil as a share of exports peaked at 77%.\textsuperscript{86} Mexico had become a petro-dependent state.\textsuperscript{87}

For more than twenty-five years, PEMEX, mostly through Cantarell, generated around 40% of the Mexican government’s revenue.\textsuperscript{88} With such an abundant field, the State did not have any need to partner with private parties, fix the corruption in the worker’s union, develop new technologies, deal with the difficulties of attracting international investment to other fields, nor redress managerial and

\textsuperscript{79} Wood and Martin (n 2) 20.
\textsuperscript{81} Vergin (n 10) 649.
\textsuperscript{82} ibid.
\textsuperscript{83} ibid.
\textsuperscript{84} ibid.
\textsuperscript{85} ibid.
\textsuperscript{86} Wood and Martin (n 2) 21.
fiscal inefficiencies in PEMEX.\textsuperscript{89} When help from the outside was needed, the law allowed PEMEX, not the State, as in the past, to contract services with private parties. In exchange, companies were to be paid in cash, never with a percentage of production.\textsuperscript{90}

The new oil-based economy of Mexico implemented by Lopez Portillo reached its limits in 1996 when the Cantarell Field began to decline. Once more, Mexico had not invested the boom of production into expanding the reserve base, and in a desperate effort to increase production, PEMEX began to inject nitrogen into Cantarell.\textsuperscript{91} The short-term solution allowed Cantarell to continue producing until 2003, when production in Mexico peaked to 3.4 mbd.\textsuperscript{92} Just five years later, in 2009, Cantarell’s output had dropped to 560,000 mbd. To put it bluntly, due to Cantarell’s decline, Mexico lost 1.7 million bpd from its total production in just nine years.\textsuperscript{93} At that point, “PEMEX was mired in debt, faced enormous labor and pensions liabilities and a fiscal regime that seemed to be critically weakening the company to the point of no return.”\textsuperscript{94} The end of the “goose that laid the golden egg” was near, and Mexico needed to do something about it.\textsuperscript{95}

To expand the reserve base and production, an attempt was made in 2007 to bolster PEMEX’s capacity to partner with international companies.\textsuperscript{96} President Felipe Calderon (2006-2012), who had served as Minister of Energy in 2004 when production peaked, presented a bill to Congress that would have allowed the State-owned company to sign joint ventures with international companies for exploration and production projects.\textsuperscript{97} Moreover, the bill proposed to open the midstream and downstream sectors to private participation.\textsuperscript{98} Calderon wanted PEMEX to focus on upstream activities and slowly allow private companies to invest in refineries, pipelines, and storage

\textsuperscript{89} Yergin (n 10) 648; Wood and Martin (n 2) 21.
\textsuperscript{90} Wood and Martin (n 2) 21; Romo (n 82).
\textsuperscript{91} Romo (n 82).
\textsuperscript{93} Wood and Martin (n 2) 20.
\textsuperscript{94} Wood (n 94) 2.
\textsuperscript{95} ibid 1.
\textsuperscript{96} Wood and Martin (n 2) 24.
\textsuperscript{97} ibid.
\textsuperscript{98} ibid.
facilities. What came back from Congress was a watered-down version of the proposal.

Instead of allowing PEMEX to partner with international oil companies, the reform allowed PEMEX to sign incentivized service agreements for upstream activities. Under the new incentivized model, PEMEX would design the contracts and the bidding system, and the companies would be paid a bonus linked to the number of barrels and a price formula if production was commercially successful. The reform also modified the corporate structure of PEMEX and allowed the federal government to select independent members from industry experts to its board. An agency entirely independent from the Ministry of Energy, the National Hydrocarbons Commission (“CNH”), was created to increase the oversight of the State-owned company’s activities. However, the central tenet of the system remained. Only the State—through PEMEX—could develop hydrocarbon resources. PEMEX, in exchange, could sign service or incentivized service agreements to achieve the goals specified in the Constitution. The new incentivized model was not attractive to the major international oil companies. Only a few incentivized contracts for mature onshore fields—Magallanes, Santuario, and Carranza—were signed, but not enough to overcome the years of lack of investment in new acreage. In sum, the 2008 reform fell short in halting the production decline and in dismantling the restrictions of a monopolistic oil sector.

The 2013 Energy Reform: Old Concession Wine in a New License Bottle

As mentioned above, in 2004 Mexico’s oil production began to plunge dramatically. In that year, Cantarell accounted for 63% of Mexico’s 3.4 mbd, dropping to 400,000 mbd in 2013. Cantarell was phasing out, and PEMEX had not invested enough in new

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99 ibid 25.
100 ibid 24.
101 ibid.
102 ibid 25.
103 ibid.
104 ibid.
105 ibid.
106 Krauss and Malkin (n 90).
exploration.\textsuperscript{108} Production was in decline and, at the existing rate, Mexico’s crude oil production would fall below two mbd by 2017.\textsuperscript{109} The alternative was clear: If Mexico wanted to increase output to continue financing most of the social programs supported by oil revenues, the government needed to access finance and partner with international actors fast to bring new fields into production. Once again, a reform of the existing model was necessary to keep public finances afloat.\textsuperscript{110}

In 2012, Enrique Peña Nieto was elected president of Mexico, and within his ranks, he had a group of technocrats who believed in liberalized markets and the need to open the energy sector.\textsuperscript{111} The result was the Energy Reform of 2013 that focused on allowing private parties to compete with PEMEX over the contracts that the government was constitutionally authorized to sign. According to the Peña Nieto Administration, Mexico could, with the help of private partners, stop the decline in production. By their assessment, the reform would allow Mexico to uptick its oil output to an additional 500,000 bpd by the end of the Peña Nieto Administration in 2018.\textsuperscript{112}

Now, for the government of Peña Nieto to pass legislation allowing for private parties to develop the resources, Peña Nieto’s advisors needed to convince the population that the reform would not be giving away the national treasures to private parties, and that the average Mexican would benefit from the new energy model. Since the memory of Lazaro Cardenas was regularly invoked by the opposition to exclude private participation in the sector, President Peña Nieto decided to use the text of the Constitution as amended by Lazaro Cardenas back in 1938.\textsuperscript{113} It was a political maneuver to silence the left-leaning opposition. If Cardenas was the example to follow, then the reform would “copy/paste” the constitutional amendment implemented by Cardenas.\textsuperscript{114} But the devil is in the details.

As explained above, the Cardenas reform textually prohibited the government from signing “concessions” with private parties, but it

\begin{itemize}
\item \textsuperscript{108} ibid.
\item \textsuperscript{109} ibid.
\item \textsuperscript{110} ibid 606.
\item \textsuperscript{111} Wood and Martin (n 2) 25–26.
\item \textsuperscript{112} ibid 20.
\item \textsuperscript{113} Constitutional Reform (n 85).
\item \textsuperscript{114} Guillermo Jose Garcia Sanchez, ‘The Fine Print of the Mexican Energy Reform’, \textit{Mexico’s New Energy Model} (Woodrow Wilson International Center for Scholars 2018) 37.
\end{itemize}
left open the possibility for the State to develop its resources by “contracting” companies. As such, it was constitutionally permissible to exploit the national treasures through private parties, as long as the term “concession” was not employed in the process. It is not without irony that the President who promised to bring the energy sector into the twenty-first century had to put to use the wording of a nationalist post-revolutionary reform of the early twentieth century. It took a step to the past to bring Mexico’s oil production into the future.

In order to be consistent with the Cardenas’ text, the government did not include in the amendment the type of contracts that could be signed by the State with private parties. Instead, different contractual arrangements were specified in the transitory articles of the reform. Article 4 Transitory determined that the contracts to extract hydrocarbons on behalf of the nation “should be, among others: service agreements, profit or production sharing, or licenses.” The transitory articles also regulated the government considerations of these contracts: “I) cash for the service contracts; II) a percentage of the profit, for the profit-sharing agreements; III) a percentage of the production, for the production-sharing agreements; IV) with the onerous transfer of hydrocarbons after being extracted from the underground, in the case of licenses, or V) any combination of the above.” The use of transitory articles to specify the contracts was not without risk.

Under the Mexican legal system, the transitory articles serve as guidelines to help the constitutional norm to transition. That is, they set the timeline for the new rules to take effect, and specify the steps that Congress must take to execute the new constitutional arrangement. Thus, they are temporary in nature and are supposed to

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116 Garcia Sanchez (n 116) 37.


118 ibid.


120 Sergio Nudelstejer, ‘Artículo Transitorio’, Enciclopedia Legal
expire after the specified timeline, or when Congress enacts the secondary legislation that gives life to the reform.\textsuperscript{121} None of these characteristics are fully respected in the case of the 2013 Energy Reform.

The transitory articles of the Energy Reform, far from being temporary norms that should expire at some point in time, serve instead as atypical secondary legislation of the Constitution. They set up the rules that the secondary legislation should follow, but also awarded rights to private parties, such as the right to book the reserves, and specified the types of contracts that the government could sign with private actors for exploration and production (“E&P”) activities.\textsuperscript{122} Hence, these “transitory” articles can be interpreted as hierarchically and normatively below the Constitution, but above the federal legislation that regulates Article 27.\textsuperscript{123} They serve as “endnotes” or the “fine print” of the constitutional reform.\textsuperscript{124} They were used to “mislead and conceal” the actual intention of the amendment.\textsuperscript{125}

If federal law contradicts the transitory articles, these, in theory, would be upheld. The trickier question is whether the transitory law contradicts the text of the Constitution. According to the Supreme Court of Justice of Mexico’s jurisprudence, these temporary articles are part of the reform and cannot be interpreted as challenging constitutional text. They are jurisprudentially an appendix of the Constitution.\textsuperscript{126} However, the existing Supreme Court’s jurisprudence dealt with cases of traditional transitory articles involving timelines, steps, and different legislative stages to appoint judges and regulators or enact secondary

\textsuperscript{121} Nudelstejer (n 122); Huerta Ochoa (n 121).
\textsuperscript{122} Constitutional Reform, Transitory Articles (n 112).
\textsuperscript{124} García Sanchez (n 116).
\textsuperscript{125} Diego Valadés, “La Constitución desfigurada” [The disfigured constitution], Reforma, December 12, 2013.
\textsuperscript{126} Amparo en Revisión 1106/2015, resuelto 02/03/2016, Segunda Sala de la Suprema Corte de Justicia de la Nacional; see also Acción de Inconstitucionalidad 99/2016 y acumulada 104/2016 (regarding electoral judges); Acción de Inconstitucionalidad 58/2016 (anticorruption law in Chihuahua); Acción de Inconstitucionalidad 56/2006 (anticorruption law in Veracruz).
regulation; not the granting of rights to private parties.\textsuperscript{127}

The open possibility of a contradiction between the transitory articles and the Constitution leaves the Energy Reform in a weak position.\textsuperscript{128} The spirit of not granting any concessions to private parties could be interpreted as hindered by the transitory articles that allow the State to sign “licenses” or “production sharing agreements,” paid with the hydrocarbons extracted from the underground.\textsuperscript{129} The only difference between these contractual arrangements and a traditional concession from the late nineteen century is the granting of a property right to the underground minerals, in large extensions of land and without a relinquishment formula—a type of contract that is rarely available in any jurisdiction around the world.\textsuperscript{130} Today, around the globe the terms “concession,” “permit,” “license,” and “E&P agreements” are used to refer to the same type of contractual arrangement where private parties extract the resource at their own risk and expense, and in exchange, pay royalties, bonuses, and different tax arrangements.\textsuperscript{131} Depending on the jurisdiction, this type of contract has different levels of government control, terms of operation, minimum work requirements, and terms for the relinquishment of the area.\textsuperscript{132} But

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\textsuperscript{127} Ron Snipeliski Nischli calls the transitory articles “a new modality” of the constitutional legislator to “detail certain aspects of the constitutional text” in the “transitory” articles “which are not transitory at all, because they share the same nature and characteristics of other constitutional provisions” Ron Snipeliski Nischli, “Artículo 27,” Constitución Política de los Estados Unidos Mexicanos Comentada, Vol. 1, edited by Jose Ramón Cossio Días (Mexico: Tirant lo Blanch, 2017), 558
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\textsuperscript{128} See comments from José Antonio Prado of Holland and Knight in Alejandra López, “Confunden términos licencia y concesión” [They confuse the terms license and concession], Reforma, June 8, 2015, www.reforma.com/aplicacioneslibre/articulo/default.aspx?id=560100&md5=8651197a2972748724fca21ebf63411&ta=0dfdbae11765226904c16cb9ad1b2efe&po=4; and Alejandro Guzmán Rodríguez, “¿Contratos o Concesiones?” [Contracts or concessions?], Energía a Debate, n.d., www.energiaadebate.com/¿contratos-o-concesiones/.
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\textsuperscript{129} ibid.
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\textsuperscript{130} Smith and others (n 3) 443.
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the spirit remains—the State owns the resource in the subsoil and the property of the mineral is transferred to the private parties at the wellhead. As explained above, if the spirit of Article 27 of the Constitution and the 1938 nationalization was to prevent private parties from extracting the national treasures and handing them a full property right at the moment they are extracted, then both the secondary legislation in 1938 and the Energy Reform of 2013 violate that spirit.

Now, if the government decides that the best option for a particular field is for PEMEX to develop it, then the Ministry of Energy can “assign” the field directly to the State-owned company. In this way, the block is omitted from the public bidding process of the rest of the contracts. The Ministry of Energy only needs to justify its decision “as the most adequate mechanism for the interest of the State in terms of production and that guarantees the supply of hydrocarbons and that the recipient of the assignment had the technical, financial and execution capacity to extract the hydrocarbons in the most efficient and competitive way.”

Regarding the existing fields operated by PEMEX and that were deemed as appropriate for its operation, the State-owned company is authorized to sign farm-outs with private companies. However, the farm-out process requires PEMEX to receive approval from the Ministry of Energy and to conduct an open bidding process designed and supervised by the National Hydrocarbons Commission. In other words, PEMEX can only set up the requirements, but CNH chooses the partner.

New “Independent” Authorities and the New Auction Process

[References]

133 ibid.
134 Decreto por el que se expide la Ley de Hidrocarburos y se reforman diversas disposiciones de la Ley de Inversión Extranjera, Ley Minera, y Ley de Asociaciones Público Privadas), DOF: 11/08/2014 (hereafter, Hydrocarbons Law), Article 6.
135 ibid
136 ibid.
137 Adrián Lajous, Mexican Oil Reform: The First Two Bidding Rounds, Farmouts and Contractual Conversions in a Lower Oil Price Environment (New York: Center on Global Energy Policy, School of Public and International Affairs, Columbia University, October 2015), http://energypolicy.columbia.edu/sites/default/files/Mexian%20Oil%20Reform_October%202015.pdf.
The Energy Reform of 2013 also had the goal of decentralizing the decision-making process of the energy policies in Mexico. To achieve decentralization, the reform gave additional powers and levels of independence to the energy regulatory agencies: the National Hydrocarbons Commission for upstream activities, and the Energy Regulatory Commission (“CRE”) for the remaining value chain (midstream and upstream). As opposed to administrative agencies wholly dependent on the Ministry of Energy, the reform transformed them into “coordinated regulatory agencies” with budgetary autonomy and with a two-thirds Senate majority approval process to select their members. The reform, however, was unable to abandon the old ways of Mexican presidential centralism entirely.

Just as before the reform, the Constitution recognized that the Ministry of Energy sits at the head of the national industry. Transitory Article 10 states that the Minister of Energy, who is solely appointed by the President, will “establish, conduct and coordinate the energy policy.” The constitutional reform also emphasized the fact that all hydrocarbons activities and the distribution of power are “strategic” activities “of social interest and public order, and as a consequence will have preference over any other activity that benefits from the development of the surface or underground.” Consistent with its central role, the Minister of Energy is the authority who decides which areas of the national territory will be developed by the State, and most importantly, whether the State will do so by contracting private parties or assigning them to State production entities, such as PEMEX. The Ministry of Energy is also in charge of designing and drafting the terms of the contracts to be signed with the private parties if the government decides to use any of the E&P authorized contracts. The only elements of the agreement that cannot be designed by the Ministry are the economic and fiscal terms, which are delegated to the Ministry of

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140 Garcia Sanchez (n 116) 48–49; Grunstein (n 141) 1.
141 Garcia Sanchez (n 116) 42.
142 Constitutional Reform, Transitory Article 10 (n 112).
143 Constitutional Reform, Transitory Article 18 (n. 112).
144 Hydrocarbons Law, Article 29 (n 129).
145 ibid.
Finance.\textsuperscript{146} According to Transitory Article 10, the Minister of Finance will establish the economic conditions for the bids and contracts in connection with the fiscal regime that will allow the nation to obtain, in time, the profits that will contribute to long-term development.\textsuperscript{147} These include determining the standard royalties, corporate tax and costs deduction, and adjustable rates for windfall profits.\textsuperscript{148} Consistent with this view, the Hydrocarbons Income Law sets up a sliding-scale royalty adjustable by the Minister of Finance with varying rates depending on the fields, production rates, and the global price of the hydrocarbons.\textsuperscript{149} Thus, for projects with narrower profits, the Ministry can authorize a royalty discount.\textsuperscript{150}

In the process of selecting which areas will be open to development, the independent upstream agency, CNH, has an advisory role.\textsuperscript{151} The CNH can only provide an “opinion” to the selected areas by the Ministry of Energy and comment on the terms of the contracts.\textsuperscript{152} Ultimately, however, it is up to the Minister of Energy to decide whether the most attractive fields will be exploited with the help of private parties or through the State-owned company.\textsuperscript{153} It is also up to the Minister to decide whether a license, a production sharing agreement, a profit-sharing agreement, or a service contract will be employed to develop the fields with private parties. Once the decision is made, the CNH cannot modify the government’s choice.

The real CNH independence only kicks in once the Ministry selects the field and the type of contracts.\textsuperscript{154} At that point, the CNH must design, supervise, and execute the auction process.\textsuperscript{155} It is then when the CNH is at its full independent powers. The Ministry cannot intervene nor can it select a winner of the auction.\textsuperscript{156}

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\item[146] 8/22/19 12:10:00 PMConstitutional Reform, Transitory Article 10 (n 112).
\item[147] ibid; Hydrocarbons Law, Article 30 (n 129).
\item[148] Garcia Sanchez (n 116) 44–45.; Hydrocarbons Law, Article 30 (n 129).
\item[149] Decreto por el que se expide la Ley de Ingresos sobre Hidrocarburos, se reforman, adicionan y derogan diversas disposiciones de la Ley Federal de Derechos y de la Ley de Coordinación Fiscal y se expide la Ley del Fondo Mexicano del Petróleo para la Estabilización y el Desarrollo, DOF:11/08/2014. (Hereafter, Hydrocarbons Income Law.)
\item[150] ibid.
\item[151] Hydrocarbons Law, Article 6 and 29 (n 129).
\item[152] Hydrocarbons Law, Article 31 (n 129).
\item[153] Hydrocarbons Law, Article 6 and 29 (n 129).
\item[154] Constitutional Reform, Transitory Article 10.b (n 112).
\item[155] Hydrocarbons Law, Article 23 (n 129).
\item[156] ibid.
\end{footnotes}
The CNH also has the responsibility of processing all the hydrocarbons information that PEMEX used to monopolize the industry and establishing the National Center of Hydrocarbon Information so that the competing companies can prepare their bids.\textsuperscript{157} There is a preselection stage in which the CNH filters those companies that have the capacity and technical expertise for the particular fields, but everything else is done at an opening ceremony live-streamed with the representatives of the companies present.\textsuperscript{158} The pre-classification rules and bidding processes are set to maximize transparency and ensure that the State collects the most revenue out of the bids.\textsuperscript{159} It is an economically-driven process where the winner is the party that bids a higher added economic benefit to the State. In the case of licenses, the companies can include in their bid a signing bonus, additional initial investment contributions, and an additional royalty percentage to the State. In the case of production and profit-sharing agreements, the companies can include in their bid an additional signing bonus and a higher additional percentage of production or profit to be awarded to the State. In all of the cases, the Ministry of Finance establishes a minimum signing bonus, royalty rate, and exploratory phase fees. In other words, under the Energy Reform, the predominant principle for selecting the winner is to maximize the nation’s revenue.\textsuperscript{160}

Once the winner of the block is announced, the CNH continues exercising its independence by transforming into the supervisory entity of the company’s activities and must ensure that the projects maximize recovery. As such, the contracts in the energy reform are not only contracts for extraction, but imbue a constitutional requirement to maximize recovery for the benefit of the State. The CNH is the body in charge of rescinding the contract in case the company or PEMEX does not follow the agreed terms.\textsuperscript{161} Moreover, it is this independent agency that would have to defend the agreement before tribunals if a private party were to challenge its terms or the decision from the CNH to rescind it.\textsuperscript{162} The CNH is also tasked with promoting reserve restitution, using suitable technology in the upstream activities of the companies,
and issuing regulations in matters respective to its authority.\textsuperscript{163}

\textit{In 2018, Another Jump to the Past: Making PEMEX Great Again and the Grounds for the Rescission of Existing Contracts with Private Parties}

In the summer of 2018, by a margin of 53\%, the Mexican people elected Andres Manuel Lopez Obrador as their fifty-eighth president.\textsuperscript{164} Lopez Obrador is a social justice fighter who started his political career in the 1990s by running as governor against the establishment and by leading a protest against PEMEX’s drilling plans in indigenous lands in his home state of Tabasco. He has always expressed admiration for President Cardenas and his vision of relying on State oil production to boost Mexico’s development. Once again, the old tension between nationalism and the need to increase output emerges. With production in Mexico at 1.763 mbd in 2018, the continuing decline was blamed on the 2013 Energy Reform and on private companies.\textsuperscript{165} The reality is that most of the 107 contracts signed with private parties as part of the 2013 Energy Reform are not even close to reaching full production.\textsuperscript{166} The first bidding round took place in July 2015, and out of the fourteen blocks that involved production sharing agreements with the State, only two received offers.\textsuperscript{167} Although the E&P contracts represent a total future investment value of more than $160 billion, the defenders of the reform have little to offer in terms of overall output to defend the claims of Lopez Obrador.\textsuperscript{168} To his base, the Energy Reform has not delivered

\textsuperscript{163} Grunstein (n 141) 3.
\textsuperscript{168} Wood (n 94) 2.
Peña Nieto’s promises of a massive increase in production.\textsuperscript{169}

It is no surprise then that one of the first things Lopez Obrador announced as president was the halting of any new bidding rounds with private parties until 2021.\textsuperscript{170} His administration’s goal is to “make PEMEX great again.”\textsuperscript{171} In Lopez Obrador’s view, the previous administrations “surrendered some of the [S]tate’s functions to private national and foreign interests.”\textsuperscript{172} Consequently, they are exercising the powers awarded to the Ministry of Energy to rely on assignments to PEMEX, strengthening its finances, and ensuring that the significant midstream and downstream projects in Mexico, including building a new refinery, benefit the State-owned company first.

The question then becomes: Will Lopez Obrador force a renegotiation of the 107 contracts signed with private parties as part of the energy reform? He already canceled, against all advice, a $13 billion project for Mexico City’s new airport using similar nationalist views against foreign investors and arguing the abuse of former government officials.\textsuperscript{173} Lopez Obrador has proved to be consistent when it comes to fulfilling promises that affect foreign investors, even if the State has to pay billions of dollars in compensation, like the $6.6 billion cost of the new airport’s cancellation.\textsuperscript{174} When it comes to the 107 upstream contracts, so far, Lopez Obrador has pledged to “review” them but not cancel them unless his administration finds signs of corruption.\textsuperscript{175} If Lopez Obrador finds reasons to renegotiate the contracts, he will have to face the fact that only CNH can cancel the agreements on behalf of the government. As mentioned above CNH is the signing authority of

\begin{itemize}
\item \textsuperscript{169} ibid.
\item \textsuperscript{170} ‘Mexico’s AMLO Takes Office With Attack on Energy Overhaul’ (n 166).
\item \textsuperscript{172} ‘Vowing to Transform Mexico, AMLO Takes Aim at Energy Reform in Inaugural Speech’ (n 167).
\item \textsuperscript{173} ‘AMLO’s Mexico City Airport Plan Baffles Airlines Seeking Answers - Bloomberg’ accessed 22 March 2019.
\item \textsuperscript{174} ‘Cancelling New Mexico Airport Would Cost $6.6 Billion: Company CEO | Reuters’ accessed 22 March 2019.
\item \textsuperscript{175} Blackmon (n 168).
\end{itemize}
each E&P contract on behalf of the Mexican State. The grounds to cancel the contract are set by the Hydrocarbons Law.\footnote{\textsuperscript{176}Garcia Sanchez (n 116) 43.}

According to Article 6, CNH can rescind a contract if the company does not start operations under the pre-established timeline; if it discontinues activities for no just cause; if it fails to comply with the approved exploration or extraction development plan; if it neglects to comply with a final judicial resolution; if it declines to invest the agreed amounts in the contract; if it transfers interests without authorization; if the operator has an accident due to negligence or fraudulent conduct; if the companies are unsuccessful in reporting adequate information and data on production rates and costs to the CNH; and finally, if the companies fail to produce payment in accordance with the terms of the law or the contract.\footnote{\textsuperscript{177}Hydrocarbons Law, Article 20 (n 129)} The Hydrocarbons Law is textually explicit in that these are the only ("únicamente") grounds for which the CNH can rescind a contract.\footnote{\textsuperscript{178}ibid.} If the CNH cancels the contract, then the area is relinquished "without any charge, payment, or compensation."\footnote{\textsuperscript{179}ibid.} There is nothing in the law or the existing E&P contracts that would allow the new government to legally rescind the contract for suspicion of corruption or because the government decides that PEMEX is in a better position to develop the field as opposed to the winning private consortium. In other words, “making PEMEX great again” is not a legally recognized ground to rescind the contract.\footnote{\textsuperscript{180}ibid.} The rescission of the agreement is subject to judicial review under the federal administrative tribunals in Mexico.\footnote{\textsuperscript{181}Garcia Sanchez (n 116) 45–46.} The private party cannot bring an international claim if the government decides to cancel the contract under the terms established by the law.\footnote{\textsuperscript{182}ibid.} However, if the company wins the case in federal administrative tribunals, and the rescission is found to have been groundless, the investor can bring a claim to international arbitral tribunals for the quantification of compensatory damages and loss of profit.\footnote{\textsuperscript{183}ibid.}

If the government decides to relinquish the area under different grounds not preestablished in the Hydrocarbons Law, then the private party can bring a claim under any of the international treaties that award
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rights to private investors in Mexico. These include twenty-nine Bilateral Investment Treaties and sixteen Trade Agreements with Investment Protection Provisions in force with arbitration provisions that provide jurisdiction to international tribunals. The E&P contracts include a clause specifying that, notwithstanding the domestic administrative remedial proceedings, the companies “will enjoy all of the rights recognized in international treaties signed by the State.” Classic examples of claims that might arise out of violations of investment treaties include: a forced renegotiation of the contract terms; a modification of the tax regime that affects the profitability of the project; the repeal of the hydrocarbons law that affects the structure of the project; the discrimination of foreign companies in terms of policy and contractual changes; and the nationalization of the assets without just, prompt and adequate compensation.

Conclusion: What Lies Ahead for the Mexican Contracts

The arrival to Los Pinos of a new leftist-oriented government reignites the old discussion in Mexico of whether the secondary laws violate the spirit of the Constitution. As the first subsections in this chapter explained, this debate is as old as the 1917 revolutionary constitutional convention. The old concession regime inherited from colonial times awarded a usufruct on the mineral rights to the producers only subject to taxation and relinquishment by the state once the extraction was over. The 1917 revolutionaries wanted to create a system where the nation was the primary owner of the resources in the subsoil, and the State had to develop them in the way that maximized the benefits to the Mexican people. The Constitution affirmed the sovereignty of the resource by making them inalienable and imprescriptible. However, they recognized that in order to extract the resource the government could award concessions to private parties to

184 Garcia Sanchez (n 116) 46.
187 Garcia Sanchez (n 89).
exploit it on behalf of the nation. Hence, from a usufruct, the regime moved to an administrative contract awarded by the State. Lazaro Cardenas, who nationalized the industry in 1938, believed that State-owned companies were the dominant vehicle to achieve the constitutional mandate, even if for particular projects the government could contract private actors and pay them with the produced hydrocarbon. Hence, in essence the Cardenas regime created a system of partnership with private parties to extract the resource. Under Cardenas, even if the constitutional mandate recognized that the hydrocarbons in the subsoil belonged to the State, once they were extracted, they could be transferred to the private operator as payment. It wasn’t until the 1970s when the government decided to close the door to the possibility of associating with private companies to develop the nation’s resources. At that point the State could only develop the resources through PEMEX, but the state-owned company could sign service contracts with private companies and pay them in cash.

The Energy Reform of 2013 brought back private participation as an instrument for the State to achieve its constitutional mandate. As explained above, the 2013 Energy Reform reinstated the power of contracting with private parties to arguably maximize recovery. The reform allows the government to sign licenses, production and profit-sharing agreements, and service contracts. The new production and profit-sharing contracts are nothing more than a revival of a contractual association between the State and private parties to jointly develop the resources. Moreover, the 2013 Mexican license looks, in essence, similar to the old concessions of the early twentieth century, in that it gives erga omnes rights to the private parties operating “on behalf of the nation” to exploit the riches of the national underground. Under the Mexican license the moment the resources are extracted, they now entirely belong to the private party, who in exchange, pays a royalty fee and additional fiscal contributions. And just like in 1940, the State only reserves the right to regulate activities, police, and sanction the companies, but the resources at the wellhead belong to the licensee. The main difference between the two legal figures is that the 2013 license limits the period of extraction, establishes minimum working requirements, and constraints the operations to smaller blocks.

In this modern version of the State associations, PEMEX is

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188 Garcia Sanchez (n 116).
189 Cardenas Garcia (n 61) 4.
190 ibid.
treated as another competing party. As a state-owned entity it can associate with private parties to present bids, it can farm-out its existing fields, and it can hire private parties for services related to its acreage. But it no longer remains the single operators with a monopoly over the industry. The Peña Nieto Administration could have amended the Constitution and clarified how public-private partnerships are not contradictory with the principle of maximizing the government’s revenues. However, they decided to use the text of Lazaro Cardenas to bypass the opposition and left open a flank for future litigation.

The transmission of property to private parties is even consistent with the transitory articles. They allow the companies to book the reserves for purposes of accessing international financing.\textsuperscript{191} The booking of reserves is permitted under the Energy Reform as long as a statement is added specifying that the hydrocarbons contained in the subsoil belong to the State, even if at the wellhead the property is transferred to the companies.\textsuperscript{192}

It is clear that Lopez Obrador will not continue with the implementation of the 2013 Energy Reform as designed by the previous administration. He is already taking significant steps to recentralize the government’s energy policies. His new Minister of Energy announced that the goal of the administration will be to strengthen PEMEX’s participation in the sector and that they do not expect to sign any new contracts with private parties for upstream activities in the short run. Moreover, during the transition period, they forced the Peña Nieto Administration to negotiate the inclusion in the United States-Mexico-Canada Agreement (“USMCA”) of a new chapter entitled “Recognition of the Mexican State’s Direct, Inalienable, and Imprescriptible Ownership of Hydrocarbons.”\textsuperscript{193} Chapter 8 states that Canada and the U.S. recognize and fully respect the sovereignty of Mexico’s right to regulate the development of hydrocarbon resources.\textsuperscript{194} Moreover, they

\textsuperscript{191} Constitutional Reform, Transitory Article 5 (n 112); Hydrocarbons Law, Article 45 (n 129)
\textsuperscript{194} ibid.
recognize that Mexico reserves the right to modify its Constitution and laws to reflect the fact that “the Mexican State has the direct, inalienable and imprescriptible ownership of all hydrocarbons in the subsoil of the national territory.”

The USMCA was negotiated to outplace the 1994 North American Free Trade Agreement (“NAFTA”). One of the leading expectations of the USMCA negotiators was to “modernize” the old trade agreement that did not contemplate changes in technology, the services market, new global trade adversaries—such as China—and the new realities in Mexico’s energy and telecommunication sectors. In other words, one of the goals was to finally bring into agreement the energy sector that was left out of the 1994 deal, since back then the State-owned companies held a monopoly over the industry. Lopez Obrador’s request to modify the negotiated text shows clear signs that the new administration does not want to signal Mexico’s openness to private investment, but rather reinforce the idea that the State and its companies will remain at the helm of development in the sector. As opposed to bringing the trade deal into modernity, the agreement, when it comes to the energy sector in Mexico, is a reinforcement of the 1938 nationalistic views of Lazaro Cardenas and the revolutionaries. Canada and the U.S. signed side letters addressing the integration of the energy markets by facilitating the flow of products and commodities. However, under Lopez Obrador’s instructions, Mexico did not participate in those letters.

Will the contracts with private parties of the energy reform, and particularly the license model, survive the political change in Mexico? It will all depend on whether PEMEX can overturn the continuous depletion of its reserves and a push for rapid increase in existing production. The government does not need to modify the law or the Constitution again to assign all new fields to PEMEX. They could easily ignore the sections that allow participation of private parties and focus

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195 ibid.
198 ‘Agreement between the United States of America, the United Mexican States, and Canada Text’ (n 195).
on the powers that the reform left to the government to centralize the activities of State-owned companies. Regarding the 107 signed contracts, from a political standpoint, Lopez Obrador would need to offer an alternative before forcing a renegotiation. Perhaps it is better for his administration to wait for the fields to start producing before compelling any changes in legislation that could affect the contracts and bring international litigation. From a legal standpoint, there are reasons to believe that they could fight off in courts the contradiction between the transitory articles and the constitutional text. As explained above, there are solid arguments that the spirit of the 1938 nationalization could be disregarded by the contractual models offered by the 2013 Energy Reform.

The ball is up in the air, and one more time, Mexico must debate whether nationalism will prevail over efficiency and production. The Mexican political class must decide whether they believe in making PEMEX great again, or in a practical approach that allows the government to keep the property of the resource but use private or State entities to develop the resource on behalf of the nation. The choice between State monopolies and private participation for the development of oil is not a new debate; and just as in the days of the revolution, it sparks heated deliberations over sovereignty, foreign intervention, and the use of resources for government programs in a country desperate for solutions to reduce massive poverty and inequality. The unparalleled overexploitation of Cantarell was insufficient to bring Mexico into modernity. Will new governments learn the lesson or will they fall into the trap of the petro-dependent curse? Will they try to maximize short-term goals but sacrifice the future of generations to come?