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THE RULE OF LAW AND MEXICO'S ENERGY REFORM

Security, the Rule of Law, and Energy Reform in Mexico

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“Security, the Rule of Law, and Energy Reform in Mexico”

Abstract

Mexico has taken a major step to further liberalize its economy. In a historical move, the country opened its energy sector to private and foreign investment in 2013—after more than seven decades of a tightly controlled oil industry. This major structural reform contains the promise of furthering Mexico’s development. There are, however, important issues that need to be resolved before this promise can be fulfilled. One of those challenges has to do with the rule of law. This essay explores three major issues with Mexico’s weak rule of law that threaten to foil the successful implementation of the new reforms and cut short the promise of development. The first consists of the effects violence and organized crime. The second issue is the increasing corruption that prevails in the country. And the third involves the potential for social conflict in the face of contradictory priorities when it comes to natural resource allocation. This essay argues that Mexico must anticipate potential problems in these three areas and resolve them before it can call energy reform a success and reap its benefits.

Introduction

The 2013-2014 energy sector structural reforms in Mexico were greeted with great enthusiasm inside and outside the country. After the initial euphoria for this historic opening, however, a new set of more serious questions on the conditions and probability of success arose. Some of these questions were related to the shifting geopolitical conditions of oil and gas—the role of Iran in energy markets, Russia’s weakened position in the gas sector, China’s economic slowdown, the U.S.-Saudi Arabia oil price war, etc. Other questions had to do with the country’s ability to successfully implement this historic change in the face of numerous domestic challenges. Chief among these concerns were issues related to *the rule of law*—specifically, the capacity of the Mexican state to protect energy projects from the onslaught of organized crime; the capability to offer guarantees against the web of corruption that currently envelops the country; and the ability to prevent and deal with social conflicts related to natural resource allocation, such as land and water.

At numerous fora, concerns related to the rule of law were raised multiple times by private and international investors. Their questions included: Will the Mexican government be able to guarantee the safety of personnel and physical infrastructure of the energy sector? Will Mexico be able to offer guarantees against activity by criminal organizations, such as acts of fuel theft, extortion, kidnapping, threats, etc.? Will Mexico adhere to its commitments to fight corruption by public officials and punish those who would demand payoffs? Can Mexico successfully deal with social conflict arising from land and water allocation issues in a way that is fair to both investors and citizens? Will the Mexican judicial system be fully capable of dealing with crime, punishing corruption, and adjudicating disputes among different actors operating in the energy space?

Without diminishing the considerable efforts that the Mexican government, particularly the National Hydrocarbons Commission (CNH), has made to keep the energy sector opening process transparent and responsive to investors' concerns, these are valid questions with regard to the probabilities of energy reform success. Moreover, these questions are directly related to well-known data about Mexico today, including dramatic increases in violent crime over the last decade (Heinle, Molzahn and Shirk 2015), an evident rise in corruption in the country (Transparency International 2013), and the increased risk for social conflict derived from a new socioeconomic regime and structural reforms (Institute for Economics and Peace 2015). This analysis seeks to examine these three lines of concern—organized crime, corruption, and social conflict—and their potential effect on the implementation of energy reform and, ultimately, on the success of Mexico's energy sector.

Why Mexico is a Difficult Case

Energy markets are global, with producers, distributors, and consumers increasingly tied in a complex network from the upstream to the downstream of the energy chain. Given this market interdependence and the wildly varying economic, political, and social conditions under which energy companies operate, these corporations learned to function in complex environments with multiple challenges. Some work in spaces where states have failed or are failing—Iraq, Syria, Libya, or Sudan; others work in places where business and political conditions are compartmentalized—Venezuela, Russia, or Nigeria. Other markets are relatively peaceful and stable—Canada, Norway, and Chile. The Mexican case is different. While Mexico does not enjoy the low levels of violence, corruption, and social stability found in developed democracies, it is not a failed state either (Correa-Cabrera, Keck, and Nava 2015). And it will not be easy for companies to isolate the business environment from the social or political risk the country presents, given the Mexican government's plans to actively engage the energy sector as producer, distributor, and consumer while it simultaneously serves as regulator, legislator, and adjudicator of disputes.

Moreover, Mexico in fact has relatively well-established and experienced economic, political, and social institutions, along with a strong economy, in spite of significant income and wealth inequality. But it has a weak judiciary and levels of corruption among the highest in the world. Mexico is also not monolithic in its challenges. Some regions have crime levels comparable to those of Canada or Switzerland—such as the Yucatán Peninsula or Baja California Sur—while other regions (or Mexican states) are mired in criminal activity that matches that of the Northern Triangle of Central America, Jamaica, or South Africa—such as Guerrero, Michoacán, Tamaulipas, or Chihuahua. Thus, the limitations to Mexico's implementation of energy reform in regard to the rule of law are much more nuanced and will require appropriate corporate strategies and direct and clear lines of communication with governmental, economic, and social actors. Differently stated, Mexico's diverse condition poses a serious challenge to development and growth, and ultimately to energy reform. But to understand the challenges that the energy sector will face during implementation of the reform, it is crucial to employ adequate analytical tools that match the Mexican reality. The advancement of Mexico's energy sector can be a

powerful engine for growth and economic development, but a prerequisite for such progress is to resolve the most important rule of law issues facing the country.

The Rule of Law: A Definition

The three major areas of concern addressed in this analysis—organized crime, corruption, and social conflict—and the potential threat they pose to the successful implementation of energy reform in Mexico are ultimately closely related to Mexico’s structural issues with the rule of law. This merits a short discussion on this concept.

The rule of law is a broad concept (O’Donnell 2004; Tamanaha 2004; Bingham 2011) that refers to the relationships among three main elements: 1) rules and procedures that link individuals and institutions through behavioral expectations; 2) individuals and institutions that employ these rules and procedures to relate to each other; and 3) a centralized actor charged with ensuring compliance with rules and procedures by individuals and organizations—normally the state and its bureaucratic apparatus. Thus, the rule of law involves at least six crucial principles by which we can judge the relationship among the three elements outlined above:¹

1. Clarity of rules and procedures that guide interactions among individuals and institutions.
2. Specified rights and behavioral obligations of all actors, all of whom have access to recourses to assert their rights and demand the obligations of others.
3. Sufficient and effective state capacity to ensure compliance with rules and procedures.
4. A monopoly of the legitimate use of force by the state.
5. Limits to the exercise of power by the state.
6. Enforcement actions and outcomes that are ethical, independent, fair, and timely.

Each of these principles of the rule of law deserves explanation, given that our discussion will focus on how the rule of law in Mexico falls short—meaning that it is not entirely present nor entirely absent—on most of these points. Such a situation gives rise to higher levels of insecurity, greater corruption, and potential social conflict, all of which could constitute a threat to the successful implementation of energy reform in the coming years. The next section explains them briefly, as a deeper exploration of each of these principles goes beyond the scope of this project.

Elements of the Rule of Law: A Brief Discussion²

Clarity of rules and procedures involves an open government in which the general public has access to the information produced and used by the elected authorities and bureaucratic agencies in their decision-making processes. At the same time, access to all information about administrative procedures and outcomes must be expeditious and

timely, so that citizens can play a crucial and active role in the decision-making process itself. In general, laws and regulations must be publicized and relatively stable, and any change in the rules must be open, participatory, and publicized. Any information not readily available must be made so upon request.

Part of the rule of law also consists of the existence of effective mechanisms that hold officials and agents accountable under the law. Governments cannot enjoy an unlimited exercise of powers but instead are subject to restraints and are limited by the rights of citizens, which the government cannot abrogate. To ensure this, constitutional and institutional checks and balances are crucial, including a distribution of authority such that no single entity of government can make all decisions unchecked.

Limits on government are necessary because the rule of law implies a monopoly of the use of force. According to Max Weber in his 1919 lecture *Politics as a Vocation*, the state “claims the monopoly of the legitimate use of physical force within a given territory.” What is more, “the right to use physical force is ascribed to other institutions or to individuals only to the extent to which the state permits it.” Under this perspective, “the state is considered the sole source of the ‘right’ to use violence.” Weber referred to the possession of the legitimate use of physical force, but he confined this to recognized and legitimate entities. This model implies that individuals and organizations, other than the recognized and legitimate authorities, cannot be purveyors of physical force.

Following the idea that the authorities must be both recognized and legitimate in the use of force, they also must possess sufficient capacities to ensure compliance with the law. These institutional capacities, however, must be balanced in their use of force, which must be used to protect the weaker and sufficiently enforce the rules against the stronger. The use of force must also be efficient in reference to the proportionality of the use of force. Its use must be proportionate to and effective against the challenge the state faces in ensuring compliance with the law.

At the same time, there must be clear limits on the use of force. These limits include a scrupulous observation of the rights of individuals and organizations as they interact with each other or come in contact with the state. These individuals and organizations must enjoy the certainty that any use of force will not exceed the limits of their clearly defined rights, which must be duly understood by each party. In order to assert these rights, procedures for the use of force must also be clear to the agents of the state, and, when state agents fail to respect these rights, individuals and organizations can resort to a different entity within the state to seek redress.

This point leads to the realm of the substantive limits of enforcement and the outcomes of any action taken against agents of the state in charge of utilizing force. When seeking redress, all actions must be ethical, independent, fair, and timely. The proceedings should be public and the victim of wrongdoing, and society in general, must ultimately feel that justice has been done. The same applies for conflicts and disputes between private parties, be it individuals or organizations.

Transition to Democracy and the Rule of Law in Mexico

Although Mexico did not truly meet most of the previous conditions—at least not perfectly during the 20th century—its political system did create relatively stable rules and regulations that were understood by nearly all individual and institutional actors. It also created expectations and guided behavior in a way that it provided governability to the country. It was short of democratic governability—some called it authoritarian—but it was a relatively stable political and economic system (Middlebrook 1995).

The country's transition to democracy changed that. The rule of law challenges that Mexico faces today, which constitute the major threat to the implementation of energy reform, cannot be understood outside the country's economic and political transformation over the last three decades and particularly since 2000 (Camp 2006). Up until the 1980s, Mexico's stable governance stemmed not from the empire of the law, but from what could be described as a large national pact founded on a single-party state. It was a *sui generis* case, but the relationship between the “official” political party—the Institutional Revolutionary Party (PRI)—and the state enabled a solid understanding of the roles and relationships of all societal actors, both within the state and between the state and the rest of society (Middlebrook 1995). The rule of law, *per se*, was not a priority; but the regime did ensure order and stability.

By the 1980s, Mexico was undergoing a double transition. The country turned away from an import substitution industrialization development model toward so-called neoliberalism. The economy was dismantled and privatized. This tore the strongest link between society and the state—employment in the parastatal economy—which brought about substantial defections from the PRI. At the same time, political pressure mounted (Levy and Bruhn 2006). Mexico's democratization process changed the structure of power that had been institutionalized by the PRI. These defections continued apace throughout the 1990s, with the National Action Party (PAN) and the Party of the Democratic Revolution (PRD) gaining electoral ground. Finally, the ensuing political dissonance brought on the triumph of the PAN in the 2000 presidential elections—after more than 70 years of PRI dominance (Camp 2006). The government itself underwent internal factionalization that resulted in many political actors independently exercising power in the absence of a grand national pact.

The result was a state whose economic scope had shrunk considerably and a final PRI-led regime collapse by 2000. These twin phenomena deeply affected the Mexican government's ability to keep the lid on criminal organizations, which facilitated the work of drug syndicates (Aguayo 2010; Astorga 2009; Escalante 2009). Moreover, the state's contraction provided more opportunities for widespread corruption, as mayors, governors, and bureaucrats felt no loyalty to a new PAN-led central government (Flores 2009). And social groups that previously had been kept under control mobilized in pursuit of their interests, creating greater social instability.

The political and economic transformation examined above was a deviation from “an authoritarian regime, capable of subordinating every existing social actor to the dispositions emanating from the highest ranks of political authority: fundamentally, the president as well as the political party that backed him up, in this case, the PRI” (Flores 2009, 137). The subsequent disintegration of the control apparatus that had been forged under the PRI allowed for the unrestricted exponential growth of organized crime, increasing levels of corruption, and further manifestations of social unrest.

Moreover, the justice system—police, investigators, prosecutors, courts, etc.—were unprepared to combat crime and punish law breakers, given that their institutional robustness was never a priority for the Mexican government. The justice system during the 20th century was largely a political instrument, not an independent and impartial instrument of the rule of law. Thus, the law itself was not the mechanism by which all actors engaged each other under new conditions of economic liberalization and political pluralism. The country experienced increased social and political mobilization coupled with diminished state capacity to deal with the emerging chaos. As Steinberg states, “by and large, the PRI turned a blind eye to the illicit trade, so long as the cartels gave government officials a cut of the profits and prevented the violence from spilling into the traditional plaza” (2011, 28). As long as peace was maintained, political partnerships allowed for the continuation of the illicit drug trade. Once political control broke down, crime was ready to take off. What is more, corruption was exacerbated because “local power brokers were suddenly free to negotiate their own arrangements, whether by forcing new deals with rival groups or by taking a more aggressive line on enforcement” (Steinberg 2011, 28). The sudden disintegration of the decades-old political system that bound drug trafficking organizations to the domineering political party in Mexico allowed for an unprecedented expansion in their operations and brought with it a host of unforeseen changes that altered the drug industry and organized crime in general.

The problems generated by Mexico’s “democratic” transition and the government’s inability to control organized crime were accompanied by “factionalism” and a “patrimonial conception of political power.” Such a situation, according to Flores (2009), maintained sectarian divisions between political parties and prevented the creation of effective agreements between them that could have furthered the professionalization of the country’s security and public safety services, as well as the needed cooperation between key actors to stop the growing power of transnational criminal organizations (325). It had been claimed that “Mexico’s ill-conceived patronage system laid the foundation for the present wave of violence that afflicts the country in various regions today. Democracy simply freed potential challengers to break off from state dominance when it was at its weakest and most disoriented stage to pursue their interests by breaking the law” (Correa-Cabrera, Keck, and Nava 2015, 80).

Understanding this double transition in Mexico is important because it enables any observer to contextualize the three issues examined in this work: 1) the rise and fragmentation of organized crime; 2) the increase in corruption, given the emergence of both new outside-the-law relationships between officials and bureaucrats and organized

criminals, which led many officials and bureaucrats to implement the law arbitrarily for financial gain; and 3) the potential for social conflict based on contradictory priorities among social actors, who have to engage each other and resolve their own conflicts in the face of a state that has lost coercive capacity and possesses a weak justice system.

Methodology

This study uses historical and textual analysis to examine the three major issues of the rule of law in Mexico as outlined above and the challenge they pose to a successful implementation of energy reform. It zooms in on current state capacity to deal with each of these important challenges by examining the enabling energy legislation and studying its provisions under the light of the concept of the rule of law. At the same time, the historical analysis of Mexico's economic, social, and political transition is crucial to anticipate where potential conflicts might emerge as the government attempts to implement energy reform.

Three Challenges to Public Safety and Security and the Future of the Energy Sector

In this section, the three main challenges to the rule of law in relation to energy reform are examined. The first section addresses the rise of organized crime and the threat it poses to new energy investment. The second section deals with the problem of corruption and the possibility that public officials force private and foreign investors to participate in corrupt activities that may include bribes, shady business dealings, etc. The third section deals with the potential for social conflict based on disputes over resource allocation, including land and water.

The Rule of Law, Organized Crime and Energy Reform

One of the biggest challenges to Mexico's energy reform today comes from organized crime activity and the extreme violence that accompanies it—an issue worsened by the Mexican government's inability to resolve this problem. For decades, organized crime has had a strong presence in Mexico, but most of these criminal groups were largely dedicated to cultivating illicit drugs, and transporting and smuggling them into the United States (Valdés 2013). At the same time, the Mexican government held these groups accountable to its own political rules and established the parameters of their work, mostly implicitly, but sometimes through connections that wove in and out of government (Flores 2013b). Beginning in the early 2000s, in the face of political fragmentation and the contraction of the Mexican state, as already explained above, these organizations expanded their criminal activities to include drug distribution at the retail level, kidnapping, human trafficking, migrant smuggling, extortion, and theft of oil and fuels, among others. These groups diversified their criminal activities and simultaneously expanded their areas of operations to become veritable transnational criminal organizations (TCOs) in key regions of the country.

By the end of 2006, the Mexican government viewed the exponential growth of TCOs as a threat to the survival of the Mexican state itself. Then-President Felipe Calderón (2006-2012) implemented a security strategy to fight organized crime, which drew in not only the federal police, but the Mexican army and navy as well. Organized crime groups responded violently to the government's initiative, increasing the use of barbaric, terror-inflicting methods such as decapitation, dismemberment, car bombs, mass kidnappings, grenade attacks, blockades, and the widespread execution of public officials. Calderón's strategy is often viewed as a mistake, one that would cause levels of violence to skyrocket, resulting in the deaths of more than 100,000 residents and the disappearance of 25,000 additional people.³ Countless other citizens also became internal refugees, displaced within Mexico or forced to move abroad (Correa-Cabrera, Keck, and Nava 2015).

Worse, criminal organizations continued to diversify their operations to lucrative new businesses. Besides kidnapping, extortion, human trafficking and smuggling, etc., they added weapons smuggling and video and music piracy, and pressed on with trafficking crude oil, natural gas, and gasoline stolen from Mexico's state petroleum company. These activities were made possible by a new relationship between organized crime groups and a new set of state actors. New corruption networks were built between criminal organizations, local police and law enforcement agencies, politicians at all levels, and federal authorities. Even formal businesses, including transnational companies (e.g., financial firms, U.S. oil companies, private security firms, weapons distributors, and gambling companies) did business with organized criminals.

More directly to the core subject of this analysis is the threat these groups pose to the new energy industry. Organized crime has been involved in the energy sector in different ways, and this will certainly have an impact on future and potential investments in the hydrocarbons and electricity sectors after the passage of energy reform and enabling legislation. The involvement of organized crime in Mexico's energy sector has been extensive in recent times (Pérez 2011; Alvi 2014a, 2014b, 2014c). Criminal actors clearly have been infiltrating the once state-run oil industry, *Petróleos Mexicanos* (PEMEX) and other private businesses related to the energy sector—iron ore and coal, for example—in order to diversify their revenue sources in several key states of the Mexican Republic, such as Tamaulipas, Coahuila, Michoacán, Guerrero, and Veracruz. For example, the General Attorney's Office (PGR) attributes a large part of the hydrocarbons' black market that is extracted from the part of the Burgos Basin located in Tamaulipas to the Zetas organization (Pérez 2011). "More than \$300 million in stolen natural gas condensate from the Burgos basin was smuggled across the U.S. border by drug cartels from 2006 to 2010, according to a lawsuit filed by Pemex in a Houston federal court in 2010" (Cattan and Williams 2014).

In 2014, gasoline theft represented more than \$1.13 billion (17,000 million pesos) in losses to Pemex. Apart from the economic losses and the theft of around 27,000 barrels of hydrocarbons per day, the security of those who lived near the pipelines subjected to bunkering also was at risk (González 2015).⁴ Today, gasoline theft from Pemex generates very high incomes to criminal groups, who not only sell this product along the highways,

but have also started to take control of a number of gas stations. The Mexican Association of Gas Dispensers (AMEGAS) estimates that at least 20 percent of the fuel market is controlled by organized crime, highlighting the fact that prices in the black market are substantially lower than those in the formal market (González 2015).

With regards to natural gas condensates, a complex network has been established through which millions of liters of this hydrocarbon is stolen and smuggled into the United States. Among the businesses that have benefited from purchasing gas from criminal groups are important U.S. transnational energy companies, such as the chemical giant BASF, Shell Global's Shell Chemical division, and ConocoPhillips, among others. Pemex has filed lawsuits against more than 20 U.S. energy and chemical companies, alleging they bought more than \$300 million of stolen natural gas condensate from Mexican organized crime groups (Cruz 2011, 20). It is also worth mentioning that, according to some investigations, organized crime groups steal up to 40 percent of the condensed natural gas extracted from Mexico's northern border region and sell it in the U.S. black market (Perez 2011).

According to some reports, more than 97 Pemex workers and 10 contractors have been linked to fuel theft in the first decade of the present century (Alvi 2014b). Overall, this whole situation, and particularly the presence and growing power of organized crime in the country, shows serious limitations of the rule of law in Mexico. These limitations affect public security in Mexico and have had, at the same time, very negative consequences for the energy sector in the past few years. If nothing is done in this regard, potential investments planned to further the development of this strategic sector after the passage of energy reform will stall and prevent the arrival of projected investments that would allegedly generate jobs and economic growth.

The negative impacts of organized crime on the energy sector are not hypothetical. They have already occurred, and if the Mexican state does not put together a strategy to deal with such a situation, they may become a scourge on the new energy sector players (Payan and Correa Cabrera 2014b).

The Monopoly of the Use of Force

The most worrisome aspect of organized crime—and one that energy investors have to consider carefully as they venture into Mexico—is that criminal groups seem to have undermined the Mexican government's monopoly of the use of force in some regions of the country. The government has effectively lost its monopoly on the legal instruments of violence in states like Guerrero, Michoacán, and Tamaulipas (but also parts of Coahuila, Chihuahua, Durango, Veracruz, Mexico State, Sinaloa, and other states). Through a constant barrage of terror practices, threats, and bribes, criminal non-state actors have muscled their way into both the institutional and social fabric of society. They have created fiefdoms where the power of the state is shared, if not supplanted. In these regions, the government is either too weak, absent, or completely absorbed by criminal organizations (Centro de Investigación para el Desarrollo A.C. 2015).

What this means for energy investors in Mexico is that, once their investments turn into projects on the ground, they will have to deploy equipment and personnel on or through territory largely controlled by criminal groups. The discussions on public safety and security will be intense and may involve not only the corporation and the government, but also criminal groups with the ability to obstruct or seriously damage the profitability of these projects—and certainly with the ability to attempt to extract resources from companies operating in what they consider their territories. This is particularly true of unconventional energy projects because many of them will be located in states where organized crime holds vast swaths of territory—such as Tamaulipas, Coahuila, Chihuahua, and Veracruz.

The Rule of Law, Corruption and Energy Reform

Corruption is an endemic problem in Mexico. Transparency International places Mexico 103 out of 175 countries worldwide in public corruption, with a score of 35/100 in 2014 (Transparency International 2014). Much of it has its origins in the rapport between political and criminal actors in the 20th century. During the PRI regime, the government-organized crime nexus was strong and, in the end, assured stability because it afforded the Mexican government the ability to manage criminal activity (Escalante 2009; Flores 2009). In those days, the Mexican state negotiated drug trafficking routes with criminal groups and implicitly distributed the pathways among major drug cartels. The Federal Security Directorate (DFS) was presumably the conduit for these negotiations and was the *de facto* bureaucracy by which Mexico kept a lid on criminal activity and managed criminal organizations (Donnelly and Shirk 2010).

As Mexico became more democratic and its political power fragmented, however, the ability of the Mexican government to control crime weakened. The number of actors in the field grew both on the political and the criminal sides of the table, and opportunities for corruption multiplied. This was particularly true after 2000 and more so in those states that were not governed by the PAN, which held the presidency from 2000 to 2012. In addition, the Vicente Fox administration dismantled much of the Mexican government's security and police apparatus in early 2000, further weakening the ability of the Mexican state to fight criminal organizations. Slowly, after 2000, organized crime became more aggressive, diversified its activities, grew more paramilitarized, and fragmented further after the Calderón administration decided to fight criminal groups frontally with militarized force and help from the United States. Much of the success of organized crime depended now on their ruthlessness and on their corrupting links with state and local law enforcement authorities—many of which were completely or partially coopted or penetrated by organized crime. This situation reached nearly all levels of Mexico's justice system (Correa-Cabrera 2014).

Power at the state and local levels is now distributed between the three main parties—PRI, PAN, and PRD—and each party supports or tolerates TCOs in different ways. This has generated serious conflicts among the main criminal syndicates for the control of the territory and drug trafficking routes in the country as well as and other illegal markets. At the same time, the federal government has its own dynamics and agendas that are not

always in line with those of the governors. Thus, the decentralization of power in Mexico—which has brought with it higher levels of corruption—seems to have generated greater conflict and violence among the different players: federal forces, local authorities, and organized crime groups (Correa-Cabrera 2014, 2013). In the past few years, drug violence in Mexico has been motivated by a decline in the state-organized crime nexus, which has visibly fueled corruption, particularly in those states that are not governed by the party in power at the federal level (i.e., the PAN from 2000 to 2012).

More importantly, the system of internal accountability of the Mexican state was fragmented. The hierarchical structure of Mexican political power broke down. Different parties governed different regions and politicians, particularly at the state and local levels, no longer felt accountable to a central authority, practicing instead a curious mixture of federalism and regional or local autonomy. With this new distribution of power in Mexico, local and state actors became unable to fight organized crime, and many succumbed to bribery, threats, and even outright participation in criminal activities. Governors and mayors engaged public resources at their discretion with few or no mechanisms for accountability—embezzlement of public funds; payoffs to politicians that have involved companies such as Wal-Mart, Citibank, Bank of America and HSBC Commercial Banking (Voreacos and Dudley 2014; Case and Bain 2014; Schneider 2012; Flannery 2012); discretionary and unaccountable use of governmental budgets for political campaigns; sharing in the spoils of organized crime, money laundering; and other similar activities all became common in many parts of the country. Political corruption in Mexico is also at an all-time high (Morris 2009).

The implications of Mexico's public corruption levels for energy reform implementation are important, given that the corrupt practices of many state and local governments will tempt many of the companies to engage in corrupt acts once they decide to invest in regional projects and may need the help of state and local politicians. It is probable that Mexican politicians will engage in various types of corruption: legislative, judicial, regulatory or administrative, contractual, and law enforcement. They may, for example, demand payoffs in exchange for legislative or regulatory changes favorable to the companies, construction permits, right of way licenses, or administrative adjudication in favor of a particular business action. Or they may engage in influence peddling, seeking private goods or services contracts for their own businesses or employment for friends and relatives in exchange for favors or for government contracts. They also may demand bribes for the use of public force to demobilize local opponents of energy projects or to fend off local gangs who may want to extract resources, etc. All of these activities are common among the current Mexican political and bureaucratic classes. There is little to no understanding in Mexico that public corruption poses a threat to economic development or to the country's ability to deepen its democracy. What is more, Mexico has no solid record of fighting corruption—neither the right institutions to do so nor the political will to prosecute it (Tuckman 2012).

What energy companies have to keep in mind, as they deploy their investment—physical assets as well as personnel into Mexico—is that in increasingly integrated trade markets,

corruption is becoming subject to prosecution by any country that can claim jurisdiction under various principles, including territory, nationality, protective principles, passive personality, or even universal jurisdiction (Carter, Trimble, and Weiner 2007, 657-741). Moreover, in the United States, corruption abroad is gaining additional attention under the Foreign Corrupt Practices Act of 1977.⁵

The Rule of Law, Social Conflict and Energy Reform

During the 20th century, Mexico was considered an authoritarian country. Authoritarian regimes are not necessarily repressive. In fact, people living under authoritarian regimes often enjoy varying degrees of personal, economic, and social freedoms. What characterizes authoritarian governments is the concentration of political power in a centralized authority that admits few or no challenges. Unlike totalitarian regimes, where the government mobilizes people politically in support of the regime, or democratic governments in which people are left to aggregate and mobilize around their own political interests, authoritarian regimes are interested in political demobilization. In the case of Mexico, the regime discouraged independent political mobilization and actively aggregated interests around large economic sectors (farmers, blue collar workers, professionals, etc.). This instead created large unions with membership in a single political party, the PRI, which would periodically mobilize these unions in favor of the regime, particularly during electoral seasons. The result of this approach was a weakened civil society, with no tradition of autonomous organization and no democratic mechanisms to channel their interests peacefully. Even the neoliberal reforms implemented since the 1980s—and certainly the most recent reforms under President Enrique Peña Nieto—have been the product of authoritarian designs, without consultation with civil society or national debates (Otero 2005; Shefner 2008).

Public policy priorities were thus the domain of Mexican officials, exclusive of the people, who rarely participated in governmental deliberations. The president made most public policy decisions, in fact, while Congress rubber-stamped them and the bureaucracy then proceeded to implement them. Although key sectors were represented within the PRI, other sectors like indigenous peoples and the Catholic Church were excluded. The entrepreneurial class in certain economic sectors was also excluded by virtue of the nature of the state-led development model of the mid-20th century. Under this culture of political demobilization, Mexicans grew unaccustomed to organizing autonomously. The result is a weak civil society with no autonomous understanding of political mobilization in pursuit of their interests through well-established and pacific means.⁶ Bailey (2014) summarizes these security traps as a state characterized by 1) a missing social contract; 2) a disconnect between politics and the aspirations of Mexicans; 3) a lack of trust and compliance with the law; and 4) an inability to reform Mexico's justice system.

Yet, beginning in the late 1960s, Mexicans began to demand more nongovernment-led spaces for political and public policy participation. Crucial events included the student mobilization of 1968, armed rebellions in Guerrero in the early 1970s, the democratization movement in Chihuahua in the 1980s, citizen mobilization after the 1985 Mexico City earthquake, and the Zapatista rebellion in 1994. Although occurring at different times, for

different reasons, and with different levels of intensity, these events represented attempts by the Mexican people to open autonomous civil society spaces. Nevertheless, although civil society in Mexico has flourished in the areas of indigenous rights, women's rights, public safety concerns, and other social causes, most Mexicans still lack the tradition, skills, and freedom to aggregate their interests and mobilize around them. There have been, for example, instances of social mobilizations that have appealed to violence as a means of protest—the latest being the armed militias in Michoacán, Guerrero, and other places (Conn 2014; Mohar 2014). On some occasions, civil society has responded with high levels of frustration and engaged in lynchings (Vilas 2001), violent protests, mass mobilizations that end in confrontations with the police (CNN 2013), and other such manifestations. But, what does this all mean for the energy sector?

First of all, the Peña administration made the decision to open the energy sector without consulting with the Mexican citizens and without a national debate that inquired into residents' visions and aspirations for the sector or the country. In the old fashion of public policy decision-making, the government changed the constitution and passed the legislation without considering all potential or perceived impacts of the new law on various sectors of the Mexican society. In that sense, it follows Mexico's recent tradition of pursuing major public policies initiatives with little or no public debate. In addition, President Peña was elected with just over one-third of the total vote—that is, with the opposition of nearly two-thirds of Mexican voters—mostly divided into five different political parties. Given the corruption scandals that have enveloped the Peña administration, the president's approval numbers have sunk to the mid-30s and his approval among the economic elites is no more than 15 percent, according to a *Reforma* poll.⁷ And there is an increasing perception that the Peña administration is a failure in regard to security and public safety and the fight against corruption (Cuddington and Wike 2015). These conditions are ripe for the loss of support during the implementation phase of energy reform. In addition, they can also further the emergence of eventual protests at certain points during the implementation process.

Diffused opposition and protests, however, will be plausibly different than individual or community protests once the bidding rounds take place and the time comes to implement energy projects that will infringe on land use and water rights—something which is likely to affect landowners and users and clash with other priorities for the use of water and other resources. Actually, there are several contradictions between the new energy law and other legislation on land and water, and between energy development and other major initiatives as national priorities. These contradictions could fuel social conflict. In regard to land access, for example, the new energy law is clear: energy projects have priority and access to the land must be granted within 180 days or the government will intervene to grant access, in the face of opposition.⁸ It would seem simple that energy sector activities and the development of Mexico's hydrocarbon resources have priority, but this does not mean that there will be no challenges, which could range from peaceful local protests to potentially violent social unrest associated with the displacement of farmers, ranchers, and other land users, including indigenous peoples. But this would trample on already weak property

rights in Mexico and may conflict with indigenous rights laws. Furthermore, it clashes with the Mexican constitution's established water-as-a-human-right clause (Article 4).

As previously stated, the law is clear that energy projects take precedence over any other uses of the land and land owners and users will have 180 days to negotiate a contract with the company or the government will assign a negotiator for them. This has the potential to affect indigenous communities, none of which was consulted in the implementation of the energy law. It also has the potential to create a conflict with the *ejido*⁹ communities. And these communities cannot say no. In fact, the law obliges them to say yes to energy projects, either willingly or if forced by the government to do so. Even though the government calls it mediation, it is really the imposition of a mediator to ensure that land owners and users surrender their land. To truly be a consultation process, the owners and users of the land should have the option to say no to energy projects or to draw the contracts themselves as a third party in the negotiations with companies and the government.

A variety of civil society groups have already pointed out their concerns with energy reform, especially its impact on small and "social" landowners, which include *ejidatarios* and indigenous communities. Several associations of landowners, environmental groups, human rights activists, union members, and left-wing movements—including some members of political parties, such as the National Regeneration Movement (MORENA) and PRD—already have begun to protest the new energy legislation as it relates to land use and rights of way. They are speaking out against the effects of the energy reform on land ownership and use. The controversial right to water—that would allegedly favor economic activities over human consumption—has yet to play out as Mexico pursues water-related legislation in the next few years. Protests and mobilizations have not materialized because no projects affecting these groups have come on line thus far.¹⁰

Some of the most radical groups have even been open about their intention to reverse the recently passed energy reform and are calling for a nonbinding initiative at the ballot box. Resistance movements, protests, social unrest, and even individual and communal standoffs against energy projects could arise in the near future. Potential social instability might undermine the expeditious implementation of the reform, delay construction of much-needed energy sector infrastructure, and deter foreign investment (Payan and Correa-Cabrera 2014a).¹¹ Moreover, some of the cases related to land disputes could end up in court, where the powerful *amparo* (injunction), a unique judicial remedy, may pose a threat to energy reform. In an *amparo*, an affected party can request an injunction on the implementation of a law, project, or governmental administrative action until the constitutional nature of the action is determined by a court of law. There likely will be some such challenges to at least a few energy projects. The government, anticipating this problem, has made it clear that a) injunctions would either not be allowed or b) their resolution would be expedited in the interest of energy development. However, these injunctions are not up to the executive branch. Instead, they must be decided by the judiciary, a separate branch of government—even if the lines are sometimes blurred in Mexico (Payan and Correa-Cabrera 2014a, 4).

Hipólito Rodríguez, member of the organization *La Vida: Veracruz Assembly for Environmental Defense*, stated in an interview with *Contralínea* that the implementation of mega-projects related to energy reform presents a worrying scenario for social organizations “because what the government has just done with energy reform is to legalize a set of processes that go against pre-established agreements that go back to the 1930s in the country” (Ramírez 2015). On the one hand, he said, they are allowing damaging initiatives, such as fracking, water damming, or hydroelectric plants, all of which are said to have priority over other uses of land. That is the first worrisome scenario (Ramírez 2014). He added,

“Acaban de darle carta legal a una serie de procedimientos que son de naturaleza expropiatoria, vienen a despojar a las organizaciones campesinas e indígenas de un suelo que habían conquistado con la reforma agraria. Con esto expulsan los últimos bolsones de suelo en manos de organizaciones campesinas. Expulsar a estas poblaciones y generar una nueva ola de empobrecimiento es echar la moneda al aire, y está por verse que la población se deje.” [“They have given a legal carte blanche to a series of processes which are expropriating by nature; they come to take from farmers and indigenous peoples the lands that they had earned the rights to through land reform. With this, the last lands in the hands of indigenous groups will be taken away. To expel these peoples from their land and to generate new impoverished groups is like throwing a coin up in the air, but we will see if the people will let them do it”] (Ramírez 2014).

Evidently, new legislation on land ownership and use under Mexico’s energy reform creates an environment for potential land- and water-related conflicts. In the same article, Romina Martínez of the Mexican Institute for Community Development (IMDEC, for its acronym in Spanish) stated,

“Con ello podemos ver que en estos estados habrá más conflictos sociales, tensiones, resistencia, movilizaciones, también criminalización de la protesta social y de la defensoría de los territorios. Esto nos lleva a que no se vea un panorama positivo para las luchas sociales.” [“With all this we can see that in those states there will be more social conflicts, resistance, mobilizations, and also criminalization of social protest and efforts to defend the land. This will not lead us to a positive state for social struggles”] (Ramírez 2014).

These statements are but two examples of activists anticipating potential conflicts associated with social unrest that may arise from the implementation of energy projects. To be sure, however, this is not to say that the government did not consider these potential conflicts. The enabling legislation attempts to be somewhat clear. Social impact statements will have to be conducted and public consultations will have to take place. But at the same time, the law does not provide for the right balance in the decision-making process. For example, Article 119 of the enabling legislation states that the Interior Ministry and the Energy Ministry will have to carry out social impact studies prior to issuing contracts to energy companies. But at the same time, the Energy Ministry is largely responsible for

these contracts. Having the same agency conduct the social impact studies and share power over assigning contracts and concessions for energy projects leaves no impartial judge for land owners and users to appeal a decision. This clearly implies that the government maintains the right to push through social impact statements with little or no real consultation with those affected by energy projects—or that the consultation is not likely to change a project if appealed before the very government responsible for the study. Moreover, the government is also not obliged to make public the social impact studies nor the contracts with companies that obtained permits to explore and extract subsoil resources on account of “national security,” even if they could be obtained by petition before the National Institute of Transparency, Access to Information, and Protection of Personal Data (INAI).

Conclusion: The Rule of Law and the Three Main Challenges

Mexico’s rule of law issues are wide and deep. They are fundamentally related to the political history of the 20th century—a centralized authoritarian system, a weak civil society, a feeble democracy with largely absent channels for citizen representation and interest aggregation, and justice institutions that are unable to implement the law evenly for all. Furthermore, Mexico’s long democratic transition has not allowed for the development of a national pact agreed upon by both the political class and political institutions with clear governance rules leading to a strong, rather than a stunted, democratic rule.

Similarly, most structural reforms have been implemented within a system that has evolved to contain many different and contradictory rules derived from a slow economic and political opening. It can be said that Mexico has evolved gradually, preserving key components of an old Mexico while attempting to introduce modern processes, all of which exacerbates the ability to understand exactly what the law is and where the national priorities lie. In other words, even the economic opening of the last 30 years has been carried out largely by authoritarian means while attempting to preserve old frameworks of clientelism and corporatism that directly contrast with the image the country attempts to project abroad.

This situation has essentially resulted in a system where organized crime has occupied vacuums that the government has left untended, where corruption has flourished, and where many areas of public life are ripe for social conflict. The implementation of energy reform is caught between “the old” and “the new” Mexico, and it could be undermined by the three major issues outlined in this work.

Moreover, Mexico has attempted to bring about the rule of law, but it has failed to do so. Most of its security operations have, in fact, increased the level of violence, further exhibited the weakness of the state, and angered civil society. A first effort must begin with fighting corruption. It costs the country billions of dollars a year, weakens its institutions, enables government officials to participate in criminal activities, and sows despair in the Mexican public. Unfortunately, there is no agreement among the political parties on what

type of anticorruption system must be put in place, but it is better to begin with a weak system than not have any at all. Second, all of the administration of justice institutions must be reformed well beyond the scope of the 2008 judicial reform, which as of yet has not been implemented. Mexico's justice system requires a major overhaul, especially one that guarantees its independence from an interfering executive power. Third, Congress should make a major effort to clarify Mexico's laws where they contradict with national priorities. Energy projects and water allocation, for example, cannot be both highest and equal in their priority. The laws are clearly contradictory and must be clarified.

Without considering the damage organized crime, corruption, and the potential for social conflict can do to the successful implementation of energy reform, Mexico's transition to a new economy and a deeper democracy will continue to fall short of the aspirations of the Mexican people. It will also prevent many private and foreign investors from participating in the Mexican economy with results that are fair to both them and Mexico's citizens.

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Endnotes

¹ Elements of the rule of law can be found at *World Justice Project* at <http://worldjusticeproject.org/what-rule-law>.

² See also World Justice Project, at <http://worldjusticeproject.org/what-rule-law>.

³ Numbers found in the website of the National Registry of Data on Abducted or Disappeared Persons (RNPED). See <https://rnped.segob.gob.mx/>.

⁴ At the end of 2014, PEMEX recorded 3,674 illegal cases of tampering with its pipeline system. Tamaulipas is the state with the largest numbers in 2014 with 699 cases or 19 percent of the total incidents in the country (See González 2015).

⁵ See U.S. Justice Department, at <http://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act>.

⁶ Understanding Mexican politics is a complex task. In many ways, Mexico's political system differed from that of most of Latin America. To gain a quick understanding of the country's political system, see Roderic Ai Camp's *Politics in Mexico: Democratic Transition or Decline?*, Sixth Edition (Oxford, England: Oxford University Press, 2013); and Emily Edmonds-Poli and David A. Shirk's *Contemporary Mexican Politics*, Second Edition (Lanham, MD: Rowman & Littlefield Publishers, Inc., 2012).

⁷ See <http://gruporeforma-blogs.com/encuestas/?cat=38>.

⁸ For an explanation of these land-related provisions see Chapter VIII, Articles 71-89 of the enabling legislation at http://www.energia.gob.mx/webSener/leyes_Secundarias/_doc/leyes/3.%20Ley%20de%20la%20Industria%20Electrica_Decreto.PDF.

⁹ *Ejido* refers to a community of ranchers, farmers, or fishers who, under Mexico's 20th century land reform legislation, were granted communal ownership of the land. Even though the *ejido* law was reformed in the 1990s and now allows privatization of communal lands, many of these communities remain intact and dot the country.

¹⁰ It is also worthwhile noting that to date, these efforts have not been quite successful to stopping major investments in strategic sectors (mining, for example). Mexico's government has been able to neutralize, coopt, and negotiate with social movement leaders on most occasions. The capacity of these movements to "resist" or block massive investments or mega-projects is low. In Mexico's most recent history, only one protest movement has impeded the progress of a strategic investment project—the construction of an international airport in Texcoco, State of Mexico (2001-2002).

¹¹ For further exploration of these kinds of water- and environmental-related issues, see Posada and Buono's examination in this collection.