

COMMENTS ON THE REFORMS TO THE MEXICAN ENERGY LAWS OF 2008

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I. INTRODUCTION

A strong discussion has taken place in Mexico since the beginning of this millennium concerning the legal reform of the energy sector, particularly the Mexican government's oil company, *Petróleos Mexicanos* (Pemex). This reform differs from others not only because of its content, but because it caused differences of opinion that frequently poured onto the streets in the form of protests both in favor and against it.¹ Popular opinion on President Calderón's reform project was that the intent behind such project was to privatize Pemex.² In my opinion, this continues to be the current popular perception.

Notwithstanding my personal stance, the perception that the reason behind the Energy Reform was to privatize Pemex was fostered by several national political actors, including left wing political parties, particularly the Party of the

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1. See, e.g., *Participan 30,000 en mitin de AMLO*, CNNEXPANSION.com, Apr. 27, 2008, available at <http://www.cnnexpansion.com/actualidad/2008/04/27/participan-30-000-en-mitin-de-amlo> (last visited Mar. 21, 2009).

2. *Id.* (Where, for example, it is reported that a former engineer from the Mexican Oil Institute protests that "Calderón's reform is a reform geared towards privatization and which will rob us of the most valuable resource Mexicans have.").

Democratic Revolution (*Partido de la Revolución Democrática*, PRD),³ which is one of the three main political parties in Mexico. Unfortunately, this perception was not ameliorated by the frequent and unfortunate expressions of then President Vicente Fox, who in a forum before industry leaders held in New York in 2003, affirmed that without an Energy Reform “Pemex would leave Mexico.”⁴

Mexican hydrocarbon reserves have declined perceptively in these past years and this was one of the reasons that pushed President Calderón to sponsor the Energy Reform bill. Pemex itself has recognized that production in its current oilfields has slowed down and that production in the Cantarell Field, once the most important offshore oilfields in the world, is far from ideal.⁵

It is prudent to note that even though this reform is referred to as an “Energy Reform,” it is far from being a reform of the energy sector as such. The discussion surrounding such reform and the legislation approved by the Mexican Congress focused on Pemex, leaving aside not only an opportunity to adopt a truly comprehensive reform concerning energy in Mexico, but also an opportunity to adopt an energy policy geared towards the future—a comprehensive policy including all available energy sources and fostering investment on research, development and exploitation of renewable energy sources. It seems, from a simple reading of the reform, that Mexico remains without a coherent energy policy and without any serious intent of exploiting the renewable energy sources which will become more necessary as Mexico’s hydrocarbon reserves continue to decline.⁶

3. For example, the PRD’s Parliamentary Bloc in the Senate has even created a website “Special site dedicated to Pemex: PRD Senators in Defense of Mexican Oil,” <http://www.prd.senado.gob.mx/sitopemex/pemex.html> (last visited Mar. 21, 2009). Other political parties also participated in these protests, including the Worker’s Party (*Partido del Trabajo*, PT). See *Protesta del PT en el Congreso de Veracruz [Protest of PT at Veracruz Congress]*, LA JORNADA, Apr. 22, 2008, available at <http://www.jornada.unam.mx/2008/04/22/index.php?section=politica&article=009n2pol> (last visited Mar. 21, 2009).

4. José Luis Ruiz, *Urge Vicente Fox abrir Pemex al capital privado*, EL UNIVERSAL, Sept. 26, 2003, available at http://www2.eluniversal.com.mx/pls/impreso/noticia.html?id_nota=102444&tabla=nacion (last visited Mar. 21, 2009).

5. Diagnóstico: Situación de Pemex (SENER), p. 14, available at <http://www.pemex.com/files/content/situacionpemex.pdf> (last visited Mar. 21, 2009) [hereinafter Diagnostic Pemex]. In official documents, Pemex has even affirmed that:

[T]he reduction of reserves has to be an issue for grave concern since the energy safety policy of the country is placed at risk. Given the reduction in production of the main fields, one of the great challenges shall be to raise the restitution rate of our proven reserves if we want to guarantee production at levels similar to those of 2007.

Id. This document also makes constant reference to Pemex’s need to secure additional resources for guaranteeing Mexico’s energy independence. *Id.*

6. *Id.* at 15 (“During 2007 Pemex replaced only 50% of its proven reserves . . . a level which is far inferior to the world average . . .”); *id.* at 7 (“[C]rude production has continually diminished since 2005

This commentary intends to present a general overview of the modifications to the legal framework for foreign investment in the Mexican energy sector after the Energy Reform of 2008. This commentary will not compare the current legal framework with the framework which existed prior to this reform, nor will it delve in detail into the mechanisms and procedures through which foreign investors may participate in this sector. However, due to the fact that the Energy Reform of 2008 focused on Pemex and in the oil industry, the main part of this article also refers to those topics. First, we shall briefly present the legal status of hydrocarbons in Mexico. Second, we will refer generally to the legal framework for foreign investment relevant for purposes of these comments, as well as to the draft reform proposed by President Calderón and the Energy Reform of 2008 as adopted by the Mexican Congress. Third, we will analyze the changes to the legal framework applicable to foreign investment in connection with Pemex.

II. HYDROCARBONS IN MEXICO

The Mexican Constitution of 1917, which was adopted after the Mexican Revolution, establishes that hydrocarbons are the property of the Mexican nation and that, therefore, they are inalienable, unattachable and may not be acquired through the passage of time.⁷ The Mexican state reserves to itself the authority to legislate and regulate this area, as well as activities related to the oil industry.⁸ The Energy Reform of 2008 does not modify these constitutional

and while gas production has increased, it is insufficient to compensate for the fall in oil production in either value or oil revenue.”).

7. Mexican Constitution, art. 28, *as amended*, Diario Oficial de la Federación [D.O.] [Official Journal of the Federation], Feb. 5, 1917 (Mex.) [Const.] [hereinafter Mexican Constitution]. (“The activities performed exclusively by the State in the following strategic areas shall not constitute a monopoly: . . . oil and other hydrocarbons, basic petrochemicals; radioactive minerals and generation of nuclear energy; electricity and the activities expressly set forth in the laws issued by Congress . . .”). See also Ley Reglamentaria del Artículo 27 Constitucional en el Ramo del Petróleo [L.R.R.P. 27] [Law Regulating Article 27 of the Constitution concerning Oil], art. 1, *as amended*, Diario Oficial de la Federación [D.O.] [Official Journal of the Federation], Nov. 28, 2008 (Mex.), available at <http://www.sener.gob.mx/webSener/hj/res/LRA27CRP.%201941/PO.%20T.%20LRA27CRP.%2018-06-1941.pdf> (last visited Mar. 21, 2009) [hereinafter L.R.R.P. 27].

The nation shall have the direct, inalienable and unattachable ownership of all hydrocarbons found within national territory, including the continental shelf and the exclusive economic zone situated outside the territorial sea and contiguous to it, in mantles or fields, irrespective of its physical state, including intermediate states and which form crude mineral oil, accompany such oil or are derived from such oil.

Id.

8. L.R.R.P. 27, *supra* note 7, art. 2 (“Pursuant to the provisions of paragraphs four of article 25 and six of Article 27 of the Mexican Constitution, only the nation shall be entitled to carry out the exploitation of hydrocarbons which constitute the oil industry in conformity with the provisions of the

principles; therefore, Mexico retains ownership of any hydrocarbons that may be found within Mexican territory.

Nevertheless, it is necessary to clarify that this situation is different in respect to transborder fields. Transborder fields are those hydrocarbon fields that extend from the territory of one state to another; that is, fields shared between two or more states. For purposes of Mexican law, transborder fields are defined as “those found within national jurisdiction and which physically continue outside of it,”⁹ as well as “those fields outside of national jurisdiction, shared with other states pursuant to treaties to which Mexico is a party or to the United Nations Convention on Law of the Sea.”¹⁰

Exploitation of this type of field is regulated through a special regime established in the Law Regulating Article 27 of the Constitution concerning Oil (*Ley Reglamentaria del Artículo 27 Constitucional en el Ramo del Petróleo*). This law establishes that transborder fields shall be exploited pursuant to the agreements reached between Mexico and the other state or states sharing such fields.¹¹ As of this date, the exploitation of the transborder oil fields shared with the United States and Cuba is considered viable by Pemex, but Pemex recognizes that this is one of its mayor challenges¹² Notwithstanding the large number of treaties celebrated between Mexico and the United States, Mexico has not entered into any international agreement with the United States or Cuba regulating the exploitation of these fields¹³ and the only agreement formalized

following article.”). *See also* Mexican Const. art. 28 (“The State shall have the organisms and entities it requires for the efficient administration of the strategic areas and the high-priority activities where, according to the laws, it participates by itself or through social and private sectors.”); *id.* art. 25 (“[T]he State shall plan, conduct, coordinate and orient national economic activity and shall enact regulation and foster activities that are required by the general interest within the framework of liberties granted by this Constitution . . .”).

9. L.R.R.P. 27, *supra* note 7, art. 1, ¶ 2.

10. *Id.* art. 2, ¶ 3.

11. *Id.* art. 2, ¶ 3 (“The transborder fields referred to in the foregoing article may be exploited pursuant to the provisions of the treaties to which Mexico is a party to, celebrated by the President of the Republic and approved by the Senate.”).

12. Diagnostic Pemex, *supra* note 5, at 72–74.

13. Among the treaties celebrated by Mexico and the United States in connection with this issue we can find the Treaty on Maritime Boundaries signed in Mexico City on May 4, 1978, entry into force on November 13, 1997, after the United States took twenty years to ratify this treaty. In Mexico it was published in the Official Journal of the Federation on January 28, 1998. This treaty does not resolve the issue of the transborder fields since it limits itself to establishing the maritime borders between Mexico and the United States, but it fails to mention transborder fields. *See generally* Tratado sobre Límites Marítimos entre los Estados Unidos Mexicanos y los Estados Unidos de América [Treaty on Maritime Boundaries], Diario Oficial de la Federación [D.O.] [Official Journal of the Federation], Jan. 28, 1998 (Mex.). The other relevant treaty celebrated between Mexico and the United States concerning this issue is the Treaty on the Delimitation of the Continental Shelf in the Western Gulf of Mexico beyond 200 Nautical Miles, signed in Washington, D.C., on June 9, 2000, entry into force on January 17, 2001. In Mexico it was published in the Official Journal of

in a treaty between Mexico and the United States is the obligation to cooperate concerning the “efficient and fair exploitation of such transborder fields”.¹⁴

Therefore, there is no special exploitation regime under the Law Regulating Article 27 of the Constitution concerning Oil since Mexico has not entered into any treaties regulating the manner in which transborder fields will be exploited. It would be necessary to wait in order to determine what will be the practical interpretation of such provisions.

III. THE ENERGY REFORM OF 2008

Foreign investment in Mexico has increased through the years since the adoption of the Foreign Investment Law in 1993.¹⁵ Foreign investment is one of the factors that have driven the growth of the Mexican economy.¹⁶

In general, foreign investment in Mexico is regulated by the Mexican Constitution and the Foreign Investment Law and its regulations. The Mexican Constitution establishes the legal basis for regulating foreign investment in Mexico and imposes certain limits on the participation of foreigners in certain sectors and activities¹⁷ such as, land ownership by foreigners.¹⁸ For purposes of these comments, the most important limitation established in the Mexican

the Federation on March 22, 2001. *See generally* Tratado entre el Gobierno de los Estados Unidos Mexicanos y el Gobierno de los Estados Unidos de América sobre la Delimitación de la Plataforma Continental en la Región Occidental del Golfo de México [Treaty between the Government of the United Mexican States and the Government of the United States of America on the Delimitation of the Continental Shelf in the Western Gulf of Mexico], Diario Oficial de la Federación [D.O.] [Official Journal of the Federation], Mar. 22, 2001 (Mex.) [hereinafter Treaty on the Delimitation of the Continental Shelf].

14. Treaty on the Delimitation of the Continental Shelf, *supra* note 13, art. V(1)(b).

15. Ley de Inversión Extranjera [L.I.E.] [Foreign Investment Act], *as amended*, Diario Oficial de la Federación [D.O.] [Official Journal of the Federation], Dec. 27, 1993 (Mex.) [hereinafter L.I.E.].

16. For a quantitative analysis of foreign investment in Mexico during the nineties, *see* ENRIQUE DUSSEL PETERS, LA INVERSIÓN EXTRANJERA EN MEXICO [FOREIGN INVESTMENT IN MEXICO] (2000).

17. As such, the Mexican Constitution does not expressly prohibit foreigners from directly participating, but it does establish that certain activities and acts are reserved for Mexicans. *See, e.g.*, Mexican Const. art. 27(1).

Only Mexicans . . . have the right to acquire ownership of lands, water . . . or concessions for the exploitation of mines or water. The State may grant the same right to foreigners, provided they agree to be considered as Mexican and to waive the protection of their governments concerning the foregoing before the Ministry of Foreign Relations, under penalty of losing the goods acquired thereunder in benefit of the Mexican State . . .

Id.

18. This limitation to foreigners’ rights in Mexico is one of the most known and every year it affect a significant number of foreigners that have the intention of settling down in Mexican coasts for their retirements. Mexican Const. art. 27(I) (“[F]oreigners may not acquire direct ownership of lands and water within a boundary of one hundred kilometers along the border and fifty along the beach . . .”).

Constitution for foreigners is, in fact, a general limitation which also limits the rights of Mexican nationals: the possibility of exploiting hydrocarbons found in Mexican territory.¹⁹

The Foreign Investment Law, the Regulations of the Foreign Investment Law and the National Registry for Foreign Investment²⁰ are the general framework for foreign investment in Mexico that establish the procedures through which foreign investors may participate in Mexican markets. Foreign investors are barred from participating in “strategic areas” which include oil and other hydrocarbons, basic petrochemicals, electricity and nuclear energy, among others.²¹ Foreign investors are also barred from participating in the distribution of gasoline and liquid oil gas.²² Notwithstanding the foregoing prohibitions, it is possible for foreign investors to participate in the construction of pipelines for the transportation of oil and its products and in the drilling of oil and gas,²³ subject to the prior approval of the National Commission for Foreign Investment (*Comisión Nacional de Inversiones Extranjeras*).²⁴

In this sense, in order for a foreign company to participate within the field of these restricted activities, it is necessary for such company to first obtain the approval of the National Commission for Foreign Investment to carry out the corresponding activities in Mexico. This authorization is necessary in order for a foreign company to participate in a public bid process. Once the foreign company has obtained such approval, such company may carry out the authorized activities and may thus enter into a contract with the Mexican government or any of its entities, for example, with Pemex.

19. As we have previously mentioned, the Mexican Constitution provides that the Mexican State shall be their owner and that it shall be entitled to regulate their use and exploitation. Mexican Const. art. 28.

20. Published in the Official Journal of the Federation on September 8, 1998, as amended from time to time. L.I.E., *supra* note 15.

21. *Id.* art. 5.

22. *Id.* art. 6.

23. *Id.* art. 8 (X, XI).

24. This commission is required to “issue the policy guidelines for foreign investment and to design mechanisms to promote investment in Mexico.” *Id.* art. 26(I) (the commission also has additional powers in connection with foreign investment, nevertheless, all its functions are subordinate to this main task). The authorization to which we make reference shall be necessary every time that a company’s corporate capital exceeds the thresholds established by the commission for foreign investment every year. In 2008, the commission set the threshold at 2,549,872,000 Mexican pesos. Resolución General Número 9, que Determina el Monto Actualizado del Valor Total de los Activos a que hace referencia el Artículo 9 de la Ley de Inversión Extranjera [R.G. 9] [General Resolution No. 9, that determines the Current Total Value of Actives which is referenced in the Foreign Investment Law], *as amended*, Diario Oficial de la Federación [D.O.] [Official Journal of the Federation], July 4, 2008 (Mex.) [hereinafter R.G. 9].

A. President Calderón's Project for Reform

Towards the end of 2007, an analysis was carried out with respect to the real situation in Pemex. The result of such analysis was a report entitled "*Diagnóstico: Situación de Pemex*" (Diagnostics: Pemex's Situation), which was presented by Pemex's General Director, Jesus Reyes Heróles and the Minister for Energy, Dr. Georgina Kessel Martínez, on March 30, 2008.²⁵ This report provided additional elements for public discourse. The main conclusion of the report is that a reform of the applicable legal framework was necessary in order to strengthen Pemex.²⁶

The analysis into Pemex concluded that there was a need for investment into exploration and refinery due to the fact that Pemex's oil reserves were beginning to decline.²⁷ The analysis included a series of short and long term proposals, including the discovery of new fields, generating production of new fields in the short term, developing proven reserves and improving production costs, discovery and development.²⁸ The report affirms that it is fundamental for Pemex to develop the deep sea oil fields found in the Gulf of Mexico in order to secure production for the coming years,²⁹ but it also notes that Pemex lacks the necessary experience and funds in order to explore these fields and seemingly concludes that Pemex will have to partner with large international corporations, which is prohibited under the Mexican Constitution.³⁰

President Calderón presented his reform bill to the Mexican Congress on April 9, 2008. The purpose of his reform was to restructure the Mexican oil

25. An executive summary of this report was also prepared and is also available online. See generally *Diagnostic Pemex*, *supra* note 5.

26. *Id.* at 126 ("The purpose is to have a strong Pemex [t]o achieve the foregoing, it is necessary to review the legal framework of the oil industry").

27. *Id.* at 35 ("Hydrocarbon reserves have diminished since the mid eighties. During 2002–2007, the only period for which a homogeneous methodology exists, the hydrocarbon reserves diminished gradually as a result of the low level of incorporation of new reserves."). In 1982, Pemex estimated its total reserves in 72.0 billion barrels of crude oil. In 2007, Pemex calculates its reserves in 44.5 billion barrels, of which only 14.7 billion barrels are classified as probable reserves. *Id.*

28. *Id.* at 43–46.

29. *Id.* at 54.

If the maturation time of deep sea projects is taken into account, Pemex would have to begin developing this region shortly in order to maintain production during the medium term . . . for 2018, ten years away, we would have a deficit of 400 thousand barrels per day. Therefore, beginning the development of deep sea fields as quickly as possible is fundamental.

Id. The report emphasizes that "this region presents characteristics which are different to the other areas where Pemex has carried out exploration and production activities" since the columns of water exceed 500 meters and we can find a series of complex geological structures. *Id.* at 59.

30. *Id.* at 69.

industry and to allow the incursion of private investment into activities which were previously reserved for Pemex. This reform was ambitiously called an “Energy Reform,” but unfortunately, the project presented by President Calderón and the laws adopted by Congress are little more than a reform of the oil sector—it was never intended to be anything more.³¹ The purpose behind President Calderón’s draft was to grant Pemex greater administrative autonomy, to improve the usage of its resources and to multiply its operating capacity. In fact, this was set forth in the documents sent to Congress for their review and approval.³²

President Calderón’s draft was amply criticized by the media, political parties and by the general public.³³ In Congress, political forces divided themselves into three large groups. The National Action Party (*Partido Acción*

31. The reform approved by Congress focuses mainly on the issue of oil and merely refers to energy policy as such. See generally *infra* notes 37–46. The other substantial reform which is relevant for investment purposes is the generation of electricity from renewable energy sources. This reform, however, does not modify the distribution of electrical power in Mexico. That is, private persons may participate in the generation of renewable energy, but they may not supply power to the final consumer. The government has the exclusive authority to sell energy to consumers. Ley del Servicio Público de Energía Eléctrica [L.S.P.E.E.] [Electrical Power Law], as amended, Diario Oficial de la Federación [D.O.] [Official Journal of the Federation], Dec. 22, 1975 (Mex.), available at <http://www.cddhcu.gob.mx/LeyesBiblio/pdf/99.pdf> (last visited Mar. 21, 2009) [hereinafter L.S.P.E.E.] (“The Nation has the exclusive authority to generate, conduct, transform, distribute and supply electrical power as part of a public service pursuant to article 27 of the Constitution. Private persons may not be granted concessions . . .”). In this sense, a private party that generates electrical power from renewable energy sources with commercial purposes shall sell such power to the government entities dedicated to the supply of electrical power through long term contracts. Ley para el Aprovechamiento de Energías Renovables y el Financiamiento de la Transición Energética [L.A.E.R.F.T.E.] [Law for the Use of Renewable Energy and Financing of the Energetic Transition], art 16, as amended, Diario Oficial de la Federación [D.O.] [Official Journal of the Federation], Nov. 28, 2008 (Mex.), available at <http://www.cddhcu.gob.mx/LeyesBiblio/doc/LAERFTE.doc> (last visited Mar. 21, 2009) [hereinafter L.A.E.R.F.T.E.] (“Suppliers shall enter into long term agreements with the Generators that use renewable energy sources and that have a permit from the Commission, pursuant to the guidelines issued by such Commission.”).

32. Draft reform presented by President Calderón to Congress, available at <http://www.presidencia.gob.mx/> (last visited Mar. 21, 2009). See also Ciro Acosta, Calderón Propone Abrir Pemex a la Iniciativa Privado, available at http://puntopunto.com/principal/clderon_propone_abrir_pemex_a.php (last visited Mar. 21, 2009).

33. See, e.g., Enrique Méndez & Alma E. Muñoz, *Se Desligan los Chuchos de Movilizaciones Pacíficas del FAP en Defensa de Pemex* [The Chuchos (leftist activists) Step Down from the FAP’s Pacific Demonstrations to Defend Pemex], LA JORNADA, Apr. 7, 2008, available at <http://www.jornada.unam.mx/2008/04/07/index.php?section=politica&article=005n1pol> (last visited Jan. 3, 2009); Gardenia Mendoza Aguilar, *En contra de la reforma energética* [In Opposition of the Energy Reform], LA OPINIÓN, Apr. 14, 2008, available at <http://www.laopinion.com/primerapagina/?rkey=000000000000003655730> (last visited Mar. 21, 2009); see also Gardenia Mendoza Aguilar, *Aprueban en México la reforma energética*, available at <http://www.impre.com/laopinion/noticias/latinoamerica/2008/10/24/aprueban-en-mexico-la-reforma-89039-1.html> (last visited Mar. 21, 2009), among others.

Nacional or PAN), President Calderón's party, supported his proposal almost without reservation.³⁴ The Institutional Revolutionary Party (*Partido Revolucionario Institucional* or PRI) defended the principle of national ownership over hydrocarbons, a principle which is enshrined in the Mexican Constitution, arguing that it is necessary for Mexico to retain ownership over hydrocarbons in order to have an integral State policy. The PRI, however, recognized that Pemex had to have administrative and financial autonomy with operative flexibility, and so the PRI supported this part of the draft.³⁵ Finally, the Broad Progressive Front (*Frente Amplio Progresista* or FAP), composed by the PRD and several other smaller parties, vehemently objected to any change to Pemex's legal framework.³⁶

B. The Package Approved by Congress

On October 20, 2008, after an ample discussion over the Energy Reform, the Mexican Congress approved a package composed of four new laws and reforms to six existing laws. The four newly enacted laws are: the Mexican Oil Law (*Ley de Petróleos Mexicanos*),³⁷ the National Commission on Hydrocarbons Law (*Ley de la Comisión Nacional de Hidrocarburos*),³⁸ the Law

34. See generally Grupo Parlamentario del PAN, *Debates Reforma energética* [Parliamentary Group of PAN, *Energy Reform Debates*], <http://www.pan.senado.gob.mx/reformaenergetica.php?PHPSESSID=2982f70da8bfbf0305ecbca479ecfe46> (last visited Mar. 21, 2009).

35. Information to this effect can be found in the official website of the PRI. Grupo Parlamentario del PRD, *Posicionamiento en Materia de Reforma Energética de la Presidenta del PRI, Beatriz Paredes en la Sesión del Consejo Político Nacional del 5 de Abril* [Position as to the Energy Reform by the PRI's President, Beatriz Paredes, at the Meeting of the National Political Council], available at http://www.fundacioncolosio.org/index.php?option=com_content&task=view&id=135&Itemid=1 (last visited Mar. 21, 2009). The PRI is printing a book on the documents concerning the energy reform and the PRI's position, however, as of the date of this article, such book is currently in press.

36. Grupo Parlamentario del PRD, *Sitio especial dedicado a Pemex: los Senadores del PRD en la Defensa de Petróleos Mexicanos* [Special site dedicated to Pemex: the Senators of PRD in Defense of Mexican Oils], available at <http://www.prd.senado.gob.mx/sitopemex/pemex.html> (last visited Mar. 21, 2009).

37. This law reorganizes Pemex and abrogates the old Organic Law of Mexican Oil and Subsidiary Companies which regulated Pemex. We will make further reference to this law below. *Ley de Petróleos Mexicanos* [L.P.M.] [Organic Law of Mexican Oil], art. transitorio 2, *as amended*, Diario Oficial de la Federación [D.O.] [Official Journal of the Federation], Nov. 28, 2008 (Mex.), available at <http://www.cddhcu.gob.mx/LeyesBiblio/pdf/LPM.pdf> (last visited Mar. 21, 2009) [hereinafter L.P.M.].

38. *Ley de la Comisión Nacional de Hidrocarburos* [L.C.N.H.] [National Commission on Hydrocarbons Law], art. 1, *as amended*, Diario Oficial de la Federación [D.O.] [Official Journal of the Federation], Nov. 28, 2008 (Mex.), available at <http://www.cddhcu.gob.mx/LeyesBiblio/pdf/LCNH.pdf> (last visited Mar. 21, 2009) [hereinafter L.C.N.H.]. This law creates the National Commission for Hydrocarbons (L.C.N.H., art. 1), which is in charge of providing technical assistance to the Ministry of Energy for purposes of its planning and regulation, as well as for supervising Pemex's exploration and exploitation activities (L.C.N.H., art. 2). This commission is independent from the Ministry of Energy and, among others, will

for Sustainable Energy Use (*Ley para el Aprovechamiento Sustentable de la Energía*)³⁹ and the Law for the Use of Renewable Energy and Financing of the Energetic Transition (*Ley para el Aprovechamiento de Energías Renovables y el Financiamiento de la Transición Energética*).⁴⁰ The six laws that underwent reforms are: the Law Public Works and Services related to such Works (*Ley de Obras Públicas y Servicios Relacionados con las Mismas*),⁴¹ the Law of Public Sector Acquisitions, Leases and Services (*Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público*),⁴² the Federal Law of Parastatal

regulate and supervise the exploration and exploitation of hydrocarbons; issue the technical rules concerning exploration and exploitation of hydrocarbons, the design and execution of the exploration and extraction projects; evaluation mechanisms for operating efficiency, supervising, verifying and certifying the compliance with such provisions; issuing opinions concerning the assignment and cancellation of the areas for exploration and exploitation of oil and licenses for the superficial recognition and exploration for investigating the possibilities of oil fields. *Id.* art. 4.

39. The purpose of this law is to promote the use of renewable non-polluting energy sources, the efficient use of electricity and to reduce both its use and the pollution related to its production. *Ley para el Aprovechamiento Sustentable de la Energía* [L.A.S.E.] [Law for Sustainable Energy Use], art. 1, *as amended*, Diario Oficial de la Federación [D.O.] [Official Journal of the Federation], Nov. 28, 2008 (Mex.), available at <http://www.diputados.gob.mx/LeyesBiblio/pdf/LASE.pdf> (last visited Mar. 21, 2009) [hereinafter L.A.S.E.]. This law also creates the National Commission for Efficient Energy Use, which is empowered to issue regulations concerning this issue. *Id.* Arts. 10, 11.

40. The purpose of this law is to “regulate the use of renewable energy sources and clean technologies for the generation of electrical power for purposes other than electrical public service, as well as establishing the national strategy and the financial instruments for the energetic transition.” L.A.E.R.F.T.E., *supra* note 31, art. 1.

41. This law regulates “actions concerning the planning, programming, budgeting, procurement, expenses, execution and control of public works, as well as services related to such works” carried out by the Mexican government. *Ley de Obras Públicas y Servicios Relacionados con las Mismas* [L.O.P.S.R.M.] [Law of Public Works and Related Services], art. 1, *as amended*, Diario Oficial de la Federación [D.O.] [Official Journal of the Federation], Jan. 4, 2000 (Mex.), available at <http://www.diputados.gob.mx/LeyesBiblio/pdf/56.pdf> (last visited Mar. 21, 2009) [hereinafter L.O.P.S.R.M.]. The reform to Article 1 was limited to creating a special procurement regime for Pemex and activities related to the oil industry. *Id.*

Public works and related services related to productive activities mentioned in articles 3 and 4 of the Law Regulating Article 27 of the Constitution concerning Oil which are carried out by Pemex and its subsidiaries are excluded from the application of this law and shall therefore be regulated by the provisions of its Law, except as such Law expressly remits to this law.

Id.

42. This law regulates “actions concerning the planning, programming, budgeting, procurement, expenses and control of acquisitions and leases of goods and the provision of services of any nature” carried out by the Mexican government. *Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público* [L.A.A.S.S.P.] [Law of Public Sector Acquisitions, Leases and Services], art. 1, *as amended*, Diario Oficial de la Federación [D.O.] [Official Journal of the Federation], Jan. 4, 2000 (Mex.), available at <http://www.diputados.gob.mx/LeyesBiblio/pdf/14.pdf> (last visited Mar. 21, 2009) [hereinafter L.A.A.S.S.P.]. The reform to Article 1 was limited to creating a special procurement regime for Pemex and activities related to the oil industry. *Id.*

Entities (*Ley Federal de Entidades Paraestatales*),⁴³ the Law Regulating Article 27 of the Constitution concerning Oil (*Ley Reglamentaria del Artículo 27 Constitucional en el Ramo del Petróleo*),⁴⁴ the Law of the Commission for the Regulation of Energy (*Ley de la Comisión Reguladora de Energía*)⁴⁵ and the Organic Law of the Federal Public Administration (*Ley Orgánica de la Administración Pública Federal*).⁴⁶

Acquisitions, leases and services related to productive activities mentioned in articles 3 and 4 of the Law Regulating Article 27 of the Constitution concerning Oil which are carried out by Pemex and its subsidiaries are excluded from the application of this law and shall therefore be regulated by the provisions of its Law, except as such Law expressly remits to this law.

Id.

43. This law regulates parastatal entities created by the Mexican government. The reform to this law is limited to creating an exception for Pemex and its subsidiaries establishing that “Pemex and its subsidiaries, created by law or Presidential decree, shall be governed by their laws or decrees, irrespective of the legal structure adopted. This law shall also apply only insofar as it does not contradict the provision of such laws or decrees.” *Ley Federal de las Entidades Paraestatales* [L.F.E.P.] [Federal Law of Parastatal Entities], art. 2–3, *as amended*, *Diario Oficial de la Federación* [D.O.] [Official Journal of the Federation], May 14, 1986 (Mex.), available at <http://www.salud.gob.mx/unidades/cdi/nom/compi/1140586.html> (last visited Mar. 21, 2009) [hereinafter L.F.E.P.].

44. We consider that the most relevant reform to this law is found in Article 6, where it provides that in contracts entered into by Pemex with other parties, including private persons, for public works or other services which are necessary for Pemex to meet its goals, the contract price will always be in cash, excluding concessions, shared exploitation or participation agreements. *See* L.R.R.P. 27, *supra* note 7, art. 6.

Pemex and its subsidiaries may enter into public works and service agreements with private individuals or companies. The prices agreed under such contract shall always be in cash and in no case shall they provide for ownership over hydrocarbons, nor can Pemex enter into any joint production agreement or any other contract which grants a percentage of the production or the value of the sale from hydrocarbons or its derivatives, nor from Pemex’s profits.

Id.

45. This law creates the Commission for the Regulation of Energy, which is a “separate organ of the Ministry of Energy, [with] technical, operative and administrative autonomy” *Ley de la Comisión Reguladora de Energía* [L.C.R.E.] [Law of the Commission for the Regulation of Energy], art. 1(i-vii), 3, *as amended*, *Diario Oficial de la Federación* [D.O.] [Official Journal of the Federation], Oct. 31, 1995 (Mex.), available at www.diputados.gob.mx/LeyesBiblio/doc/48.doc (last visited Mar. 21, 2009) [hereinafter L.C.R.E.]. This commission is entrusted with promoting the efficient development of activities concerning the energy sector, including, among others, the supply and sale of electrical power, the sale of energy by individuals, gas sales, oil fuel and basic petrochemicals, gas and biofuel transportation and distribution, etc. *Id.* art. 2. The most relevant reform to this law for purposes of the participation of private parties in the energy sector refers to the fact that now the Commission for the Regulation of Energy is empowered to fix the price and other terms and conditions which are relevant for the sale of renewable energy by private investors, as well as to issue the model contracts for regulated activities. *Id.* art. 3.

46. This law “establishes the organizational basis for the Federal Public Administration, both centralized and parastatal.” *Ley Orgánica de la Administración Pública Federal* [L.O.A.P.F.] [Organic Law of the Federal Public Administration], art. 1, *as amended*, *Diario Oficial de la Federación* [D.O.] [Official

Five of the laws adopted by Congress as part of the Energy Reform package restructure the oil industry, as well as restructure the administration and operation of Pemex, while two others promote and regulate the usage of renewable, non-polluting energy sources⁴⁷ as well as greater energy efficiency.

The reform package adopted by Congress is far from a truly integral reform and in reality is nothing more than a reform of the oil sector.⁴⁸ Nevertheless, the reform adopted by Congress is much more limited than the President's draft reform in that, among other things, it does not allow for private investment into certain expected sectors such as the execution of association contracts, participation or risk, or the generation and distribution of energy directly to the final consumer.

The principal objective of the Energy Reform law was to grant Pemex greater flexibility in its ability to contract for goods, leases, services and public works.⁴⁹ It is important to highlight that the Energy Reform is not a constitutional reform and, therefore, the principles of state ownership of hydrocarbons and the right to exploit the oil industry were not modified. The foregoing means that Mexico continues to be the sole owner of all hydrocarbons found within Mexican territory.

IV. THE ENERGY REFORM AND PEMEX

As we have previously mentioned, pursuant to the Mexican Constitution, the Mexican State is the owner of all hydrocarbons in Mexico.⁵⁰ Pemex was created by decree on June 7, 1938 as the parastatal entity in charge of the

Journal of the Federation], Dec. 29, 1976 (Mex.), available at <http://www.cddhcu.gob.mx/LeyesBiblio/pdf/153.pdf> (last visited Mar. 21, 2009) [hereinafter L.O.A.P.F.]. The reform to this law was limited to Article 33, increasing the authority of the Ministry for Energy concerning energy planning and hydrocarbons. See generally *id.* art. 33.

47. For purposes of Mexican law, a renewable energy source is that "whose source lies in natural phenomena, processes or materials which may be transformed into usable energy by humanity, which are naturally regenerated and which are available continuously or periodically." L.A.E.R.F.T.E., *supra* note 31, art. 3(2)(a-g). The law lists as renewable energy sources solar energy, aeolic energy, energy derived from the movement of water, oceans, geothermal fields, biofuels, or any other source classified as such by the Ministry of Energy. *Id.*

48. It is important to note, however, that due to the Law for the Use of Renewable Energy and Financing of the Energetic Transition, private persons are entitled to sell electrical power generated from renewable energy sources; however, we will make reference to this situation later on. See generally L.A.E.R.F.T.E., *supra* note 31.

49. These activities include the exploration, exploitation, refining, transportation, storing and distribution of crude oil, gas, refined oil and basic petrochemicals, as well as the first sale of such products as well as all activities necessary to implement the international treaties celebrated by Mexico with other States for the exploration and development of transborder oil fields. L.R.R.P. 27, *supra* note 7, arts. 3, 4.

50. *Id.* art. 1.

administration and exploitation of the oil industry in Mexico.⁵¹ Pemex was the central focus in the discussion on the Energy Reform, as well as the most affected entity. The new Mexican Oil Law approved by Congress abrogated the old Organic Law of Mexican Oil and Subsidiary Companies, which was the law that regulated Pemex prior to the reform.⁵²

A couple of issues under the Energy Reform should be noted. It provides financial and budgetary autonomy to Pemex since it grants Pemex the authority to use excess cash that may be available after satisfying its yearly financial goals. However, Pemex is limited in that it cannot increase the amounts it originally earmarked for the payment of personal services to increase its investment or for maintenance and operating costs. With regard to its financial goals, Pemex must also respect the general guidelines of the Treasury Department (*Secretaría de Hacienda y Crédito Público*), as well as the general limits imposed on its yearly budget which is approved annually by Congress.⁵³ Further, it is important to mention that all debt acquired by Pemex after the date of entry into force of this reform on November 29, 2008, shall no longer be guaranteed by the Mexican State.⁵⁴

In order to comply with its mandate, Pemex currently has four subsidiary companies: Pemex Exploration and Production (*Pemex Exploración y*

51. *Id.* art. 4 (“The State shall carry out the exploration and exploitation of oil and other activities mentioned in article 3 and which are considered strategic activities pursuant to the fourth paragraph of article 28 of the Mexican Constitution through Pemex and its subsidiary organs.”). L.P.M., *supra* note 37, art. 2 (“The State shall carry out the activities which are within its exclusive jurisdiction concerning the strategic oil sector and other hydrocarbons and basic petrochemicals through Pemex and its subsidiary organs.”). Decreto que Crea Petróleo Mexicanos [D.P.M.] [Decree that Creates Mexican Oil], Arts. 1–2, Diario Oficial de la Federación [D.O.] [Official Journal of the Federation], July 20, 1938 (Mex.), available at http://www.biblioteca.tv/artman2/publish/1938_227/Decreto_que_crea_Petr_los_Mexicanos_printer.shtml (last visited Mar. 21, 2009) [hereinafter D.P.M.] (“A public institution is created and shall be called Mexican Oil [Pemex]”); *id.* (Pemex’s purpose shall be to handle the administration of the goods [expropriated from] several oil companies). See also the law abrogated by the reform, Ley Orgánica de Petróleos Mexicanos y Organismos Subsidiarios [L.O.P.M.O.S.] [Organic Law of Mexican Oil and Subsidiary Companies], art. 1, as amended, Diario Oficial de la Federación [D.O.] [Official Journal of the Federation], Nov. 29, 1958, (Mex.), available at http://www.pemex.com/files/dca/LEYES/LEY_ORGANICA_PEMEX_Y_OS.pdf (last visited Mar. 21, 2009) [hereinafter L.O.P.M.O.S.].

52. This later law governed Pemex and its subsidiaries and established the budgetary controls modified in the new law. See generally L.O.P.M.O.S., *supra* note 51.

53. At first, Pemex could use as much as thirty-five percent of its profits or 11,000 millions, whichever is greater. This percentage will increase as provided for in such article. L.P.M., *supra* note 37, transitory Arts. 8, 9.

54. *Id.* art. 44 (“Obligations which give rise to Pemex public debt do not constitute obligations guaranteed by the Mexican State.”). See generally Andrea Beceril, *Hoy Entre en Vigor Nueva Legislación Petrolera [Today the New Oil Legislation will go into force]*, LA JORNADA, NOV. 29, 2008, available at <http://www.jornada.unam.mx/2008/11/29/index.php?section=politica&article=015n3pol> (last visited Mar. 21, 2009).

Producción), Pemex Refining (*Pemex Refinación*), Pemex Gas and Basic Petrochemicals (*Pemex Gas y Petroquímica Básica*) and Pemex Petrochemicals (*Pemex Petroquímica*).⁵⁵ The new Mexican Oil Law, however, is intended to grant greater flexibility as it authorizes the President to create any subsidiary that the President considers necessary, pursuant to a proposal by Pemex's Board of Administration. Any such subsidiary will have a separate legal personality and patrimony.⁵⁶

Individuals and companies may participate in the oil industry and may, in principle, enter into any type of contract with Pemex or any of its subsidiaries, be it a public works or service contract⁵⁷ and may include the transportation, storage and distribution of gas, and the building and operation of gas pipelines⁵⁸

A. Pemex's New Structure

The Mexican Oil Law establishes a new corporate governance structure for Pemex similar to other modern companies. This structure is expected to

55. It is worth noting that Pemex has an additional subsidiary not included in the old Pemex Law, PMI Comercio Internacional, S.A. de C.V. (PMI). PMI is a company incorporated on May 24, 1989, by Pemex and the National Bank for Foreign Commerce (*Banco Nacional de Comercio Exterior*, Bancomext), among others, in order to act as Pemex's commercial front in the international market. See PMI's documents of incorporation, available at <http://www.pmi.com.mx/Contenido/docsPortal/Transparencia/pmicim.pdf> (last visited Mar. 21, 2009); see also PMI's bylaws currently in force, available at <http://www.pmi.com.mx/Contenido/docsPortal/Transparencia/estatutosPMICIM.pdf> (last visited Mar. 21, 2009). This corporate structure shall remain unchanged "until the President issues the corresponding reorganization decrees." L.P.M., *supra* note 37, transitory art. 3.

56. L.P.M., *supra* note 37, art. 3 ("[P]emex may have as many subsidiary and decentralized entities as necessary to carry out the activities part of the oil industry"); *id.* art. 6.

[P]emex subsidiary entities created by the President, at the proposal of the Board of Administration, shall have the nature of decentralized entities with productive purposes, with technical, industrial and commercial character, and their own legal personality and patrimony in order to carry out the activities part of the strategic areas of the state oil industry

Id.

57. L.R.R.P. 27, *supra* note 7, art. 6 ("Pemex and its subsidiary companies may enter into any public work and service agreements with individuals or companies which are required to best comply with their purpose.").

58. *Id.* art. 4.

[E]xcept as provided under article 3, with prior permission, gas transportation, storage and distribution may be carried out by social and private sectors who shall be entitled to construct, operate and own pipelines, installations and equipment pursuant to the provisions of the applicable technical and regulatory rules. Transportation, storage and distribution of methane gas falls within the scope of activities and regime mentioned in the foregoing paragraph. Gas associated with the carbon fields will be subject to applicable laws concerning gas transportation, storage and distribution.

Id.

make Pemex more capable of responding to the daily challenges it faces as one of the largest oil companies in the world.⁵⁹ Generally speaking, Pemex is authorized to adopt a new corporate governance structure which better serves its interests, subject to the authority of the Board of Administration which is authorized to create as many committees as it considers necessary. However, Pemex must have, at a minimum, the following committees: Audit and Performance Evaluation Committee (*Comité de Auditoría y Evaluación del Desempeño*),⁶⁰ Strategy and Investment Committee (*Comité de Estrategia e Inversiones*),⁶¹ Compensations Committee (*Comité de Remuneraciones*),⁶² Acquisitions, Leases and Public Works Committee (*Comité de Adquisiciones, Arrendamientos y Obras y Servicios*),⁶³ Environmental and Sustainable Development Committee (*Comité de Medio Ambiente y Desarrollo Sustentable*),⁶⁴ Transparency and Accountability Committee (*Comité de Transparencia y Rendición de Cuentas*),⁶⁵ and the Development and Research Committee (*Comité de Desarrollo e Investigación Tecnológica*).⁶⁶

Pemex's Board of Administration will be composed of fifteen members: six State representatives, five Union (*Sindicato de Trabajadores Petroleros de la República Mexicana*) representatives, all of whom should be full time workers at Pemex, and four "professional members."⁶⁷ The

59. Exposición de Motivos [Motives Exposition], Apr. 10, 2008, available at <http://www2.scjn.gob.mx/leyes/UnProcLeg.asp?nIdLey=64079&nIdRef=1&nIdPL=1&cTitulo=LEY%20DE%20PETROLEOS%20MEXICANOS&cFechaPub=28/11/2008&cCateg=LEY&cDescPL=EXPOSICION%20DE%20MOTIVOS> (last visited Mar. 21, 2009).

60. Formed by three professional members. This committee shall have the functions of any audit committee and shall be authorized to analyze all issues concerning hydrocarbon reserves. L.P.M., *supra* note 37, art. 23.

61. Presided by a professional member. This committee shall analyze Pemex's business plan and investment portfolio. *Id.* art. 24.

62. Presided by a professional member. It shall propose the payment mechanism for Pemex's CEO and other high officers. *Id.* art. 25.

63. Presided by a professional member. This committee shall propose the guidelines that shall be approved by the Board of Administration in connection with the acquisition of goods and services for productive activities, interpret such guidelines, issue opinions, etc. *Id.* art. 26.

64. Formed by three professional members. Its purpose is to "assist Pemex with the compliance of environmental preservation policies and sustainable development." *Id.* art. 28.

65. Presided by a professional member. This committee shall propose the criteria used to determine what is considered relevant information, as well as the guidelines for its publication, supervision of the compliance with such guidelines, proposing accountability mechanisms, access to information and publication, among others. L.P.M., *supra* note 37, art. 29.

66. This committee is in charge of proposing research and development activities in areas concerning the oil industry. *Id.* art. 30.

67. *Id.* art. 8. Out of the total number of professional members, two shall be full-time members and shall be considered public servants. Reforma Energética: Ley Orgánica de Petróleos Mexicanos, Cámara de

professional members were created in response to criticism that Pemex's Board of Administration lacked independence and impartiality since its members were either government representatives or representatives of Pemex's workers who adopted a number of decisions which may not necessarily benefit Pemex.⁶⁸ Among others, the Board of Administration shall have regulatory authority in the sense that it may issue regulations that shall apply to the procurement of works and services as well as issue the criteria governing extraordinary payments.⁶⁹

Diputados Congreso de la Unión [Energy Reform: Organic Law of Mexican Oil], Centro de Estudios de las Finanzas Públicas, Abril de 2008. Further, these two members shall be independent.

68. The new Mexican Oil Law provides that in order for a resolution to be adopted by the Board of Administration, it shall be necessary to have the affirmative vote of at least two of the professional members. L.O.P.M.O.S., *supra* note 51, art. 15. Nevertheless, this requirement shall only apply the first time the resolution is submitted to a vote: if the resolution is resubmitted to a vote before the Board of Administration, such resolution may be approved through a simple majority *Id.* Likewise, in certain cases, the reason for certain votes shall be required under the law, a situation which could foster greater care and study before voting one sense or another. *Id.*

The Board of Administration . . . shall deliberate as an organ and shall decide any matters through majority vote of the members present in the sessions. In the case majority is not reached with at least the vote of two professional members, members opposing the corresponding motion may issue the reasons for their votes within twenty working days. The issue shall be decided through simple majority vote of the members present in the following session after the conclusion of the foregoing term. The regulations of this Law shall regulate the publication of the agreements and, if applicable, of the individual votes of the members of the Board of Administration The votes of the members [representing the State] shall be in the affirmative or negative. If they cast a negative vote, such vote shall be reasoned in fact and law and such reasoning shall be set forth in an individual vote.

Id.

69. *Id.* art. 19(I)(b); 19(IV)(g)(h)(j); 19(XIX); 19(XIV).

The Board of Administration shall have the following authority: I Central and strategic direction of Pemex and its subsidiaries, for purposes of which: b) It shall issue the guidelines regulating the operations between Pemex and its subsidiaries, or among the subsidiaries, concerning financial, credit, fiscal, budgetary, accounting, safety and all other issues. . . . IV. To approve, with the prior favorable opinion of the corresponding committee: g) The guidelines that establish the method through which requests for information referred to in article 20 of this Law shall be carried out, as well as the scope of such requests. h) The guidelines concerning the control, internal auditing and safety of Pemex and its subsidiaries. . . . j) The applicable rules for Pemex and its subsidiaries to contract public works and services related to such works as well as acquisitions, leases and services, pursuant to the provisions of article 51 of this Law. . . . XIX. Establish the rules, basis and procedures for the acquisition, lease and sale of real estate required by Pemex and its subsidiaries in order to carry out their mission

Id.

The fact that Pemex itself issues the guidelines necessary to attain its goals and develop its projects and strategic activities should allow for more specialized and flexible guidelines as opposed to the guidelines in force prior to the reform. Other important powers of the Board of Administration include the authority to approve Pemex's business plan and investment programs.⁷⁰

B. Pemex's New Hiring Regime

A new legal framework for the procurement of acquisitions, leases, public works and services related to oil industry activities was created with the Energy Reform.⁷¹ This special contractual regime for the oil industry ensures that the oil industry will no longer be regulated by rules applicable to all other government activities, which will continue to be regulated by the general laws governing public administration.⁷²

As a general rule, all contracts must be awarded through public bidding procedures.⁷³ Such public bidding procedures are substantially the same as the

70. L.P.M., *supra* note 37, art. 19(III) ("The Board of Administration shall have the following authority: . . . III. To approve, on a yearly basis and pursuant to national energy policy, Pemex's and its subsidiaries' business plan; such plan shall be prepared with a projection for five years."). *Id.*

71. The term "oil industry" is defined as the "substantive activities with a productive nature." L.P.M., *supra* note 37, art. 26.

Article 3. The oil industry includes: I. The exploration, exploitation, refining, transportation, storage, distribution and first sale of oil and the products derived from its refining; II. The exploration, exploitation, preparation and first sale of gas, as well as any transport and storage which are indispensable and necessary for the connection of its exploitation and preparation, . . . Gas related to carbon fields is exempt from the foregoing and the Mining Law shall regulate its recovery and usage, and III. The preparation, transport, storage, distribution and first sale of oil and gas derivatives which are susceptible of functioning as basic industrial raw materials and which constitute basic petrochemicals listed below: 1. Ethane; 2. Propane; 3. Butane; 4. Pentane; 5. Hexane; 6. Heptane; 7. Raw material for lampblack; 8. Naphtas; and 9. Methane, when it is derived from hydrocarbons, obtained from fields located in Mexican territory and used as raw materials for petrochemical processes.

L.R.R.P. 27, *supra* note 7, art. 3, 4.

72. Applicable law for these cases is included primarily in two laws: *Ley de Adquisiciones, Arrendamientos y Servicios del Sector Publico* [L.A.A.S.S.P.] [Law of Acquisitions, Leases and Services of the Public Sector], *as amended*, *Diario Oficial de la Federación* [D.O.] [Official Journal of the Federation], Jan. 4, 2000 (Mex.), available at <http://www.diputados.gob.mx/LeyesBiblio/pdf/14.pdf> (last visited Mar. 21, 2009) [hereinafter L.A.A.S.S.P.]; see *Ley de Obras Publicas y Servicios Relacionados con las mismas* [Law of Public Works and Related Services], *as amended*, *Diario Oficial de la Federación* [D.O.] [Official Journal of the Federation], Jan. 4, 2000 (Mex.), available at <http://beop.funcionpublica.gob.mx/bitacora/ayuda/procedimientos/normatividad/lpsrm.pdf> (last visited Mar. 21, 2009).

73. L.P.M., *supra* note 37, art. 54 ("Acquisitions, leases and related services shall be carried out, as a general rule, through public bids . . ."). *Id.*

public bid procedure which has existed in Mexico for years.⁷⁴ First, the call to a public bid is published in the Official Journal of the Federation (*Diario Oficial de la Federación*) and should include all requirements concerning the experience and financial capacity of the contractors based on the complexity and size of the project a general description of the goods, works or services, the place where they shall be delivered or performed, the rules concerning subcontracting and information concerning the price or compensation.⁷⁵ It is worth noting that if two bidders meet the requirements set forth in the public bid, preference will be given to offers with greater national content.⁷⁶

There are two exceptions to the procurement through public bids rule: direct adjudication and invitation of at least three suppliers.⁷⁷ These exceptions can only take place in very limited and clear cases which are set forth in the law, but in any case, it shall always be necessary to have the prior approval from the Acquisitions, Leases and Public Works Committee.⁷⁸

A contract may be awarded through direct adjudication in any of the following three cases: 1) accidents concerning leaks, emission of toxic or dangerous gases, irregular hydrocarbon spills or of any other substance which may present a danger to Pemex employees, the general population, the environment or Pemex facilities or its subsidiaries;⁷⁹ 2) when it is necessary to contract conservation, maintenance and reconstruction services and it is

74. For a discussion on public bids outside of the context of the oil industry, *see, e.g.*, JOSÉ PEDRO LÓPEZ-ELÍAS, ASPECTOS JURÍDICOS DE LA LICITACIÓN PÚBLICA EN MÉXICO [JUDICIAL ASPECTS OF PUBLIC BIDDING IN MEXICO] (Universidad Nacional Autónoma de México 1999); DANIEL RAMOS TORRES, LICITACIÓN PÚBLICA EN EL MARCO DE LA DOCTRINA DE LOS CONTRATOS ADMINISTRATIVOS, SU LEGISLACIÓN VIGENTE Y LA JURISPRUDENCIA [PUBLIC BIDDING WITHIN THE FRAMEWORK OF THE DOCTRINE OF ADMINISTRATIVE CONTRACTS] (Escuela Nacional de Administración Pública, S.C. 2004).

75. L.P.M., *supra* note 37, art. 55.

76. *Id.* art. 53(X) ("In order to participate in procurement procedures, Pemex and its subsidiaries shall require minimum national content percentages, as well as establish preferences for grading and selecting offers employing human resources, goods or services of national origin, pursuant to the guidelines issued by the Board of Administration."). *Id.*

77. *Id.* art. 54, 57 ("[A]s an exception, when public bids are not ideal to insure the best conditions as mentioned in the paragraph above, procurement may be carried out through restricted invitations or direct award."). *Id.*

78. *Id.* art. 57.

Pemex and its subsidiaries, under their responsibility and prior opinion of the Acquisitions, Leases and Public Works Committee justifying that the public bidding process does not satisfy the best conditions for price, quality, financing, opportunity and other important circumstances, may opt to award the corresponding contracts through an invitation of at least three persons or through direct award and not through a public bidding process

Id.

79. *Id.* art. 57(A)(I).

convenient that such services be performed by the original equipment manufacturer in order to comply with the terms of such equipment's guarantee⁸⁰ and 3) to contract public notaries and legal counsel for judicial or administrative proceedings.⁸¹

Contracts may be awarded through restricted invitation in two cases: whenever such contract is for the development of technological innovation⁸² and whenever it is necessary to contract engineering, consultancy, research and training services.⁸³

One of the limitations which is relevant for foreign investors is the fact that contracts entered into with Pemex are governed and construed pursuant to Mexican law and in cases when arbitration is provided for, the place of the arbitration shall be inside Mexican territory.⁸⁴

C. Compensation

With regard to compensation, one should remember that the Energy Reform was not a constitutional reform and therefore, the principles concerning ownership of hydrocarbons were not modified. The Mexican State continues to be the sole owner of hydrocarbons in Mexico.⁸⁵ Consequently, it is impossible to pay with reserves and all contracts will only be works or service and not concessions or shared production. In this new legal framework, it is also prohibited to grant preference rights for the acquisition of oil to contractors which provide exploration services in case they do, in fact, find oil.⁸⁶

Pemex's new legal framework for procurement establishes that the prices set forth in the corresponding work or service agreements shall be agreed upon in cash, without such prices depending on the production or sales generated as

80. L.P.M., *supra* note 37, art. 57(A)(III).

81. *Id.* art. 57(A)(II).

82. *Id.* art. 57(B)(I).

83. *Id.* art. 57(B)(II). Notwithstanding the foregoing, additional exceptions could be established for public bidding procedures in other applicable laws, the Law of Acquisitions, Leases and Services of the Public Sector and the Law of Public Works and related Services. *Id.* art. 57.

84. L.R.R.P. 27, *supra* note 7, art. 6.

[P]emex shall not submit, under any circumstances, to foreign jurisdiction in connection with controversies related to public works and services which take place in national territory and in the areas where Mexico exercises sovereignty or jurisdiction. The agreements may provide for arbitration pursuant to Mexican laws and the international treaties to which Mexico is a party to.

Id.

85. *Id.* art. 1.

86. L.P.M., *supra* note 37, art. 60(V) ("No preferential rights of any kind will be granted for the acquisition of oil or its derivatives or to influence the sale to third parties."). *Id.*

a consequence of such agreement.⁸⁷ Price adjustments may only be included in Pemex contracts pursuant to the cost and price adjustment mechanism approved by Pemex's Board of Administration as payment for technological developments, for fluctuations in the price of materials and equipment used in the works, and for any other case which may improve the efficiency of the project.⁸⁸ Of course, any price adjustment mechanism has to be expressly included in the corresponding contract.⁸⁹

The new procurement framework attempts to foster investment in activities related to the oil industry by private capital, both national and foreign, through the possibility of including "additional compensation." However, the new laws establish strict prohibitions which we could hardly consider an incentive to foreign investment. Additional compensation clauses have to be expressly included in the contracts and may only be included 1) when Pemex or its subsidiaries obtain an economic benefit derived from the early termination of the works, that is, when the works are concluded prior to the contract date; 2) when Pemex or its subsidiaries appropriates or benefits from new technologies supplied by contractors; and 3) when, for circumstances imputable to the contractor, Pemex or its subsidiaries obtain a greater profit or improved results from the works or services provided by contractor.⁹⁰

The new rules have made participation in the oil sector more attractive since it allows private actors to enter into contracts which may include conditions that improve the economic benefit derived from such contracts and which provide additional benefits to Pemex. This is different from the old inflexible framework which did not allow for incentives. It would be necessary to question, however, whether these rules effectively work as predicted. The hesitation to include joint participation or shared risk agreements or preference rights for contractors could have promoted investment and could have acted as

87. *Id.* art. 61(I) ("They shall always be in cash, reasonable pursuant to the standards or usages of the industry and shall be included in the Budget authorized by Pemex and its corresponding subsidiaries"); *id.* art. 61(II) ("They shall be established pursuant to fixed tariffs or predetermined formulas which result in a determined price, pursuant to civil law."). *Id.*

88. However, these may only be agreed upon in contracts with a term of over one year. *Id.* art. 61(III).

Multiple year contract may include revisions for the incorporation of technological advances or the variation of the market price of goods or equipment used in the corresponding works, or others that contribute to improve the efficiency of the project based on mechanisms for cost adjustments and price determination authorized by the Board of Administration.

Id. This provides greater security, particularly for public work contractors who face complex situations, such as, for example, in the case of the Cantarell Project, which was greatly delayed.

89. *Id.* art. 61(IV) ("They shall be included from the signature of the contract."). *Id.*

90. *Id.* art. 61(VI).

an actual, real incentive for the large investments which are necessary in this industry; particularly for the new deep sea fields. It could be that this new framework for compensation is insufficient to secure the resources which are necessary for the exploration and exploitation of transborder fields.⁹¹

D. Citizen Bonds

The Energy Reform entitled Pemex to issue “citizen bonds” (*bonos ciudadanos*). These bonds are negotiable instruments issued by Pemex to finance productive projects in strategic areas and that grant the bearer interest over the capital of such bonds.⁹² Resources raised by Pemex through citizen bonds may only be destined for investment into productive activities.⁹³ As it is to be expected, these bonds do not grant their bearers any right over Pemex’s patrimony.⁹⁴

These bonds, however, may only be acquired by Mexican nationals or by certain Mexican legal entities.⁹⁵ In this sense, I believe that the Energy Reform is discriminatory towards foreigners as it prohibits their acquisition of such bonds.⁹⁶ Notwithstanding, it seems possible for foreign nationals or entities to acquire such bonds through a Mexican institutional investor.

V. FINAL COMMENTS

The Energy Reform of 2008 will not greatly foster investment in the energy sector in Mexico since it retains the old legal framework concerning national property of hydrocarbons and it impedes Pemex from entering into association, joint participation or risk agreements, or to at least enter into public works or service agreements with preferential access to any hydrocarbons discovered as a result of such agreements. In this sense, the reform will disappoint the foreign investor who may intend to invest in the Mexican energy

91. See Noé Cruz Serrano, *Petróleo del Golfo, en Peligro [Gulf Oil in Danger]*, EL UNIVERSAL, Jan. 9, 2009, available at <http://www.eluniversal.com.mx/nacion/164979.html> (last visited Mar. 21, 2009) (reporting that the federal government has decided to delay exploration and exploitation of transborder fields in the Gulf of Mexico).

92. L.P.M., *supra* note 37, art. 47.

93. *Id.* art. 44(II)(b).

94. *Id.* art. 44(VI) (“The obligations resulting from public debt shall never, and under no circumstances, grant ownership or control rights to the bearers over Pemex, or over the ownership or exploitation of the Mexican oil industry.”).

95. These are investment societies specialized in retirement funds, pension funds, investment funds and other financial intermediaries. *Id.* art. 47.

96. It could be the case that Mexico, as party to the American Convention on Human Rights may be involved in a case before the Inter-American Court of Human Rights as a result of discrimination of unequal treatment of foreigners trying to buy such bonds.

sector. Nevertheless, the Energy Reform implements certain changes and formalizes several tendencies that were actually occurring in reality and which sometimes fell under gray areas of the law.

The fact that oil bonds may only be acquired by Mexicans or Mexican institutional investors could be considered discriminatory pursuant to international instruments concerning the protection of human rights which are celebrated by Mexico. It would be necessary to permit some passage of time in order to observe how these bonds are implemented.

The Energy Reform grants Pemex a specialized legal framework that allows Pemex to carry out its activities more efficiently, and to follow international practice by modifying its corporate governance scheme and permitting the Mexican government to retain control while also granting Pemex greater flexibility and autonomy. Pemex's new hiring regime is certainly more flexible, but it could be that the incentives under the new energy laws turn out to be insufficient to carry out exploration and exploitation of deep sea oil fields.

The Energy Reform sets forth a number of interesting opportunities concerning the use of renewable energy sources and energy efficiency. However, in the end, we can affirm that the Energy Reform is nothing more than a restructuring of Pemex and a modification of the legal framework concerning public works and the hiring of services by Pemex. This reform has failed to properly address the use and development of renewable energy sources.

In conclusion, except as concerns Pemex, the Energy Reform is not an innovation. It is necessary to wait for the passage of time in order to properly analyze the impact of the Energy Reform; particularly since a number of the mechanisms under the reform require months, even years, before they enter into force.