

FOREWORD

Daniel Yergin recently wrote a book titled “The new map, energy, climate, and the clash of nations”, but in my mind the title was immediately rephrased as: “the new map, energy, climate, and the clash of visions”. This is exactly what you will find in this book, a clash of visions between energy governance frameworks. On the one hand, a technical-investor vision, on the other hand, a political-social vision, both well represented and explained as lessons in energy law in Mexico.

You will also find several lessons to be learned. One that I found powerful and interesting was governance instability and its correlation with the rule of law as a cornerstone.

The unifying thread is the Energy Reform that took place on December 20, 2013, when the General Constitution was amended as a result of the controversial [Pacto por Mexico], let’s say a new social contract risen at a constitutional level aimed to foster market liberalization under competition standards. Then the secondary legislation was issued in a record time as acknowledged by the IEA, for instance, the Hydrocarbon Law, the Law of the Electricity Industry, the Energy Transition Law, among others, as well as the administrative and technical regulations based on international best practices.

Energy regulatory agencies were also empowered to regulate market participants and to encourage sustainable long-term investments by providing legal certainty and income maximization in favor of the Nation. Balance is not easy to achieve.

The implementation of the Energy Reform was successful in terms of the law. Oil contracts were awarded, permits were issued, power auctions were carried out, investments flowed, and environmental and social impacts were addressed, at least by regulation.

The action plan went well as an ordinary business, except that State-owned enterprises were probably unprepared to compete at this level of sophistication. Moreover, tangible energy benefits for ordinary citizens did not arrive soon enough, on the contrary, people got upset when the gasoline subsidy was cut off abruptly.

Which is why the pendulum rapidly swung to the political left. In 2018, President Andrés Manuel López Obrador took office and began to fulfill his political promises. The lens of the energy policy switched overnight into a gray concept: energy sovereignty —with an angle to help poor people—, perhaps taking advantage of the still immature Energy Reform despite its empirical success. Indeed, President López Obrador interfered and decided to keep on going with the USMCA (T-MEC), if Chapter 8 placed his vision of energy sovereignty exactly as stated in the text of the General Constitution, which was accepted, but not as a means of implicit reversion of the Energy Reform nor to affect investment rights. This political behavior has been called by academics the Energy Counter Reform.

At that time, the degree of hard or soft applicability upon the energy sovereignty vision was unknown, however it was unveiled quickly. The energy sovereignty vision was spread throughout the main energy policies, such as the National Development Plan, the Ministry of Energy Sectorial Plan, the Business Plans of PEMEX and CFE —giving them preferential treatment—, daily discourses, and administrative decrees. Regulators, with new *ad-hoc* appointed officials, were compelled to follow these instructions, partly because the General Constitution states in its transitory framework that regulation cannot contravene the current energy policy. As such, this provision became a loophole that enabled a rewriting of the regulation.

Since then, oil contracts have not been awarded, permits have been delayed, power auctions have been cancelled, investments have been quietly folded and inspections leading to close private facilities strengthened.

It didn't stop there. President López Obrador introduced two bills to Congress to amend critical secondary legislation, the Hydrocarbon Law and the Law of the Electricity Industry. Both bills were fast-track approved by the majority of the political party in power.

These actions were obviously not welcomed by the investors who trusted the Energy Reform, arguing that President López Obrador's policies and new regulations were unconstitutional and affected their accrued rights. Additionally, these could be considered discriminatory and uncompetitive measures leading to an unlevelled playing field.

Thus, a litigation battle started to the point that a presidential bill to amend the General Constitution was introduced to Congress in order to place the energy sovereign vision at all costs. This time, the bill was rejected by a newly instated political opposition, deepening the ideological polarization.

In any case, most of the arguments against the Hydrocarbon Law amendments have not been fruitful yet and might not be soon either. These

amendments do not affect the upstream sector, only the midstream and downstream sectors; nevertheless, a standoff in the value chain continues.

However, in the case of the Law of the Electricity Industry, specialized Judges on competition affairs took jurisdiction. They started ruling in favor of the investors and granted temporary injunctions against the government. At the same time, the aforesaid amendments were challenged by the lawmakers and other public entities by filing an unconstitutional action before the Supreme Court of Justice. The Court decided that the amendments were generally constitutional but recognized the jurisdiction of lower courts to rule upon individual cases. Specialized Judges on competition keep ruling in favor of the investors, arguing environmental damages, lack of competition, and discriminatory treatment.

It is likely that, once again, the Supreme Court of Justice will rule some concrete cases derived from the Law of the Electricity Industry. However, the criteria of Supreme Court Justices and their individual votes might be hard to be change, so they might defer in favor of the energy sovereignty vision.

At the international level, the United States and Canada have initiated consultations in accordance with the USMCA, arguing Mexico's breach of treatment standards. If unsuccessful, an arbitral tribunal will proceed to decide the scope and effects of the energy sovereignty vision among trade partners. Retaliatory measures, as tariffs, might hinder the Mexican economy if a settlement is not reached.

Current polls suggest that Mexicans would prefer energy sovereignty over investments protected by the T-MEC (USMCA), but those may be biased, since costs of indemnifications are not being considered into the discussion yet.

David Yergin anticipates struggles over climate, more tensions, and a fragmenting global order as drivers of the clash of nations, but it can also be called the clash of visions, or even better, the clash of notions, or why not, the clash of ideologies, as opposed to the agreement of visions, the concurrence of notions, or the assent of ideologies. In one word, reconciliation, needed to accomplish the greater good of the Mexican people and future generations.

I am grateful for the opportunity to preface this book, which will be of great benefit to the academic community. I am honored.

Miguel Ángel MARMOLEJO CERVANTES
Summer, 2022