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Land Ownership and Use Under Mexico's Energy Reform

Tony Payan, Ph.D., Françoise and Edward Djerejian Fellow for Mexico Studies, Rice University's Baker Institute
Guadalupe Correa-Cabrera, Ph.D., Associate Professor and Chair, Government Department, University of Texas at Brownsville

INTRODUCTION

Mexico's energy sector is now open to private and foreign investment in offshore and onshore projects for the first time since 1938. The Mexican government expects tens of billions of dollars in investment, a reversal of oil production declines, a shale gas boom, a steady creation of jobs, and ultimately a substantial increase in Mexico's GDP growth. The reception of Mexico's energy sector opening has been enthusiastic abroad, even as the Mexican public is ambivalent about it.

Although there are enormous potential benefits for Mexico in the future, there are also important challenges the country must overcome to fully realize its energy potential. One of them has to do with the land ownership and land use regime in Mexico. As the legislative debate on the new *Ley de Petróleos* and the *Ley de la Comisión Federal de Electricidad* (Petroleum Act and Federal Electric Utility Act)¹ proceeded in the summer of 2014, the Mexican Congress anticipated potential land-related conflicts associated with exploration and production activities related to hydrocarbons and new energy-related infrastructure projects. These potential conflicts stem from the fact that all of these projects will necessarily require the right of way to access and work on the resources in the subsoil of privately owned as well as on so-called "socially owned" lands in regions targeted for energy

development. Thus, the Mexican Congress sought to avoid land-related conflicts by including language related to land ownership and use in the new energy legislation. The legislation, however, may not be able to prevent such conflicts. This issue brief will explain why.

CONSTITUTIONAL UNDERPINNINGS OF MEXICO'S LAND OWNERSHIP AND USE

Land ownership and use in Mexico is framed by Article 27 of the Constitution. It states that "ownership of the lands and waters within the boundaries of the national territory is vested originally in the Nation, which has had, and has, the right to transmit title thereof to private persons." It also states that "The Nation shall at all times have the right to impose on private property such limitations as the public interest may demand." The article adds that "In the Nation is vested the direct ownership of all natural resources of the continental shelf...all minerals or substances...deposits of precious stones...solid mineral fuels; petroleum and all solid, liquid, and gaseous hydrocarbons..."² Essentially, Mexican citizens who are landowners are entitled to the use of the surface of the land, but not to any subsoil natural resources.



Under the new legislation, energy development projects are a matter of public and national interest. They take priority over any other use of the land.

THE SOCIAL LAND REGIME IN MEXICO

Article 27 further frames the land tenure regime by recognizing three types of land ownership: private, public, and social. Private land ownership in Mexico is, as already stated, limited to the use of the surface of the land with no rights over subsoil resources. Mexican law refers to public property as the land or assets whose use is in the hands of governmental agencies. Social land ownership, however, is more complicated. It includes communal lands, generally associated with indigenous communities, and a uniquely Mexican form of collective ownership known as the *ejido*. *Ejido* lands were distributed among communities (mostly consisting of peasants) after the federal government expropriated land from private owners as a result of the Mexican Revolution.³ Initially, members of the *ejidos*, known as *ejidatarios*, were entitled to use and work these lands to their benefit, but could not sell or use them for collateral. A reform of land tenure rules in February 1992 gave *ejidatarios* “formal title to their land, enabling them to lease or sell their plots if a majority of members of their *ejido* agreed. No further land would be distributed, and joint ventures with private capital were legalized and encouraged.”⁴ Thus, in 1993, the Mexican government began to “privatize” *ejidos* by allowing the division of land among members and the issuance of titles “to individual land parcels to *ejido* members, enabling individuals to sell or convey ownership in their parcels.”⁵ The intention was to initiate a major effort to privatize land ownership, but only a small fraction of all land was actually subdivided and sold as intended. Most formerly *ejido* land remains *ejido* land.

LAND OWNERSHIP AND LAND USE IN MEXICO TODAY

Land and land distribution has been a major area of social contention in Mexico’s history.⁶ The agrarian reform initiated after the Mexican Revolution and formalized in the 1920s reflects the importance of the

land to most Mexicans and its significance to the effective operation of the political system. Indeed, land reform was pivotal in settling social conflict in Mexico, but resulted in the creation of vast swaths of “social” lands. In Mexico, such social lands comprise 100.3 million hectares or 51 percent of the total national territory.⁷ Moreover, there are 31,514 “social land properties” in Mexico.⁸ A total of 5,653,637 individuals live and work on these properties.

In addition to the potential conflicts with private property owners, there are 12 states⁹ where social land ownership and use in Mexico could become a cauldron of conflict. All of these states contain large swaths of social lands and major areas targeted for energy development projects because of their rich hydrocarbon deposits. Figure 1 shows these 12 states and the areas likely to be developed first for energy production.

THE 2014 ENERGY LEGISLATION AND LAND OWNERSHIP AND USE

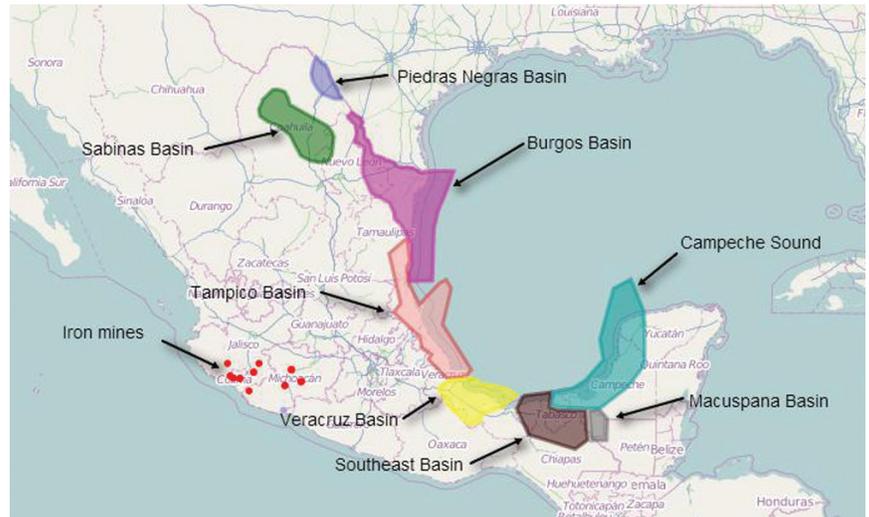
Under the new legislation, energy development projects are a matter of public and national interest. They take priority over any other use of the land. In order to enforce this priority, the lawmakers address the issue of land ownership and land use in Chapter IV, Articles 100 to 117 of the Petroleum Act as it relates to energy development projects.¹⁰ These articles establish that all landowners and users, whether of private or social lands, are obligated to sell their property or to negotiate one of several types of agreements with the energy corporation that was granted the contract to carry out energy projects on the property. In other words, landowners and users are to permanently or temporarily cede their property for energy projects.¹¹ Landowners and users do not have the right of refusal. This combination of development priorities and the land ownership and land use regime that developed in 20th century Mexico creates an environment for potential land-related conflicts.

LAND OWNERSHIP AND LAND USE TRANSFER UNDER THE 2014 ENERGY LEGISLATION

The enabling energy legislation establishes that:

1. Energy companies must inform landowners of their intentions to use their land and the nature of the project they wish to undertake.
2. The energy company must notify the Secretariat of Energy of its intention to initiate negotiations over a specific property.
3. The landowner can rent, lease, and yield the land's temporary use, or sell or exchange the land.
4. All payments must reflect the commercial market value of the property.
5. All payments to landowners should include the amount negotiated for the sale or use of the land, plus environmental remediation compensation and the royalty fees agreed to by the parties.
6. Energy companies will pay property owners royalty fees of between 0.5 and 3.0 percent in the case of gas developments and of 0.5 to 2.0 percent in the case of other energy projects, after the corresponding fees to the Mexican Sovereign Oil Fund¹² have been paid.
7. Energy companies may offer other types of compensation to landowners, including resources for community development projects and exclusive contracts assigned to landowners for the purchase of goods and services from them as compensation. In no case can energy companies pay landowners in kind, whether with oil or gas.
8. In their negotiations, communal landowners can utilize the legal counsel of the Ministry of Agriculture, Livestock, Rural Development, Fisheries, and Food. They can also use a third party to negotiate, receive, and distribute royalty payments.

FIGURE 1 — MAJOR ENERGY DEVELOPMENT PROJECTS AND MEXICAN STATES INVOLVED



SOURCE Mario Hernández, using the *ikiMap* platform and imagery from ©OpenStreetMap contributors.

The implementation of energy reform necessarily means that landowners and users will be affected by energy projects agreed upon by the government and the private and foreign companies bidding for specific investment projects.

The legislation does not use the word “expropriation,” and the Mexican government has gone out of its way to expunge the word from the law. Energy Secretary Pedro Joaquín Coldwell has been categorical in saying that outright expropriation of lands is out of the question, but that all landowners and users would be encouraged to negotiate with energy companies.¹³ However, the law itself appears to undermine Coldwell’s assurances. Under the legislation, if landowners and users and energy companies do not achieve a negotiated agreement within 180 days, companies have the ability to ask a federal judge to force the cession of land use or to ask the Ministry of Agriculture to initiate compulsory mediation on how the land will be ceded. In other words, the law precludes the landowner’s ability to say no and halt operations by denying access to the property.

The development of Mexico’s hydrocarbon resources will face challenges ranging from peaceful local protests to potentially violent social unrest associated with the displacement of farmers, ranchers, and other land users, including indigenous peoples.

Without such equity and respect for current landholders, the energy reform faces considerable hindrances despite the government's efforts to foster a more vibrant energy sector.

POTENTIAL SOCIAL CONFLICTS

Given the law's prioritization of land use for energy sector activities, the development of Mexico's hydrocarbon resources will face challenges ranging from peaceful local protests to potentially violent social unrest associated with the displacement of farmers, ranchers, and other land users, including indigenous peoples. At present, a variety of civil society groups have already pointed out their concerns with energy and land reform, especially its impact on both small landowners and "social" owners, which include ejidatarios and indigenous communities. 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 the Party of the Democratic Revolution (PRD)—have already begun to protest the new energy legislation. They are speaking out against the effects of the energy reform on land ownership and use. Recent protests and mobilizations, albeit still isolated, have already taken place in Ciudad Juárez and Puebla. 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 to begin with. 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.

LAND REFORM AND JUDICIAL REMEDIES AGAINST ENERGY PROJECTS

Moreover, some of the cases related to land disputes could end up in court, where the powerful *amparo*, 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 will likely be some such challenges to at least a few energy projects. The government, anticipating this problem, has made it clear that a) *amparos* would either not be allowed or b) their resolution would be expedited in the interest of energy development. However, these *amparo* resolutions 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.

ENERGY REFORM'S PAYMENT FOR LAND STRUCTURE

The Mexican government has made it clear that landowners and energy companies can arrive at any of a broad number of agreements that surrender their lands for energy projects. The legislation is relatively fair in that regard, even if refusal is not an option. The question, however, is whether this will be enough to stave off potential resistance from landowners. In other words, even generous compensation may not solve all potential problems, given the large symbolic nature of land tenure in Mexico's convoluted history. Some communities, particularly indigenous ones, may not appreciate the concept of land cession at market value, as they bestow a much deeper, nonmonetary value to the land.¹⁴

CONCLUSION

Mexico is positioning itself to reverse its decline in energy production. However, important challenges, including potential land conflicts, still confront the successful implementation of the country's recent energy reforms. The government must move to anticipate these disputes and resolve them in advance by establishing a whole new regime on land ownership and use that deepens property rights and puts landowners and users on an equal footing with companies developing energy projects. Legislating that energy projects have priority and that there is no right of refusal is a sure way to invite social conflict rather

than resolve it, particularly when it comes to social lands. Without such equity and respect for current landholders, the energy reform faces considerable hindrances despite the government's efforts to foster a more vibrant energy sector.

ENDNOTES

1. For the full text of the new Petroleum Act and the new Federal Electric Utility Act see http://www.dof.gob.mx/nota_detalle.php?codigo=5355990&fecha=11/08/2014.

2. See http://www.oas.org/juridico/mla/en/mex/en_mex-int-text-const.pdf, particularly pages 8–14.

3. Gabriela Sánchez Luna, “Algunas notas en relación con la tenencia de la tierra en México,” *Boletín Mexicano de Derecho Comparado* 84 (1995): 1139–54.

4. US Library of Congress, “Land Tenure,” in *Mexico: A Country Study* (Washington, DC: GPO for the Library of Congress, 1996), accessed October 4, 2014, <http://countrystudies.us/mexico/70.htm>.

5. Social Security Administration (SSA), “SI DAL01140.100 Foreign Property — Ejidos in Mexico,” March 1, 2013, <http://policy.ssa.gov/poms.nsf/lnx/0501140100DAL>.

6. See, for example, Neil Harvey, *The Chiapas Rebellion: The Struggle for Land and Democracy* (Durham, NC: Duke University Press, 1998).

7. See <http://www.sedatu.gob.mx/sraweb/noticias/noticias-2012/abril-2012/12166/>.

8. See <http://www3.inegi.org.mx/sistemas/tabuladosbasicos/default.aspx?c=15687&s=est>.

9. Those states are Chihuahua, Coahuila, Nuevo León, Tamaulipas, San Luis Potosí, Veracruz, Hidalgo, Puebla, Oaxaca, Tabasco, Chiapas, and Campeche.

10. Government of Mexico, “DECRETO por el que se expide la Ley de Hidrocarburos y se reforman diversas disposiciones de la Ley de Inversión Extranjera; Ley Minera, y Ley de Asociaciones Público Privadas,” August 11, 2014, http://www.dof.gob.mx/nota_detalle.php?codigo=5355989&fecha=11/08/2014.

11. Presidency of Mexico, “Uso de Tierras e Impacto Social.” See <http://presidencia.gob.mx/reformaenergetica/-!leyes-secundarias>.

12. The Mexican National Sovereign Oil Fund is a new institution created by the 2014 legislation. This fund, designed after a similar fund in Norway, will bankroll future development projects.

13. Ministry of Energy, “La Reforma Energética Establece Condiciones de Equidad para el Uso y Ocupación de la Tierra: Pedro Joaquín Coldwell” (press release, August 27, 2014). See http://www.sener.gob.mx/portal/Default_blt.aspx?id=2948.

14. See Ethelia Ruiz Medrano, *Mexico's Indigenous Communities: Their Lands and Their Histories, 1500–2010* (Boulder, CO: University Press of Colorado, 2011).

AUTHORS

Tony Payan, Ph.D., is the Françoise and Edward Djerejian Fellow for Mexico Studies and director of the [Mexico Center](#) at the Baker Institute. [Payan's](#) research focuses primarily on border studies, particularly the US–Mexico border. His work theorizes on various topics regarding international borders, including border governance, immigration, border security, organized crime, and the manifestation of US foreign policy at its borders. He received his doctorate degree in international relations from Georgetown University.

Guadalupe Correa–Cabrera, Ph.D., is an associate professor and chair of the government department of the University of Texas at Brownsville. Her areas of expertise are US–Mexico border relations, immigration, and organized crime. She is the author of *Democracy in “Two Mexicos”: Political Institutions in Oaxaca and Nuevo León* (Palgrave Macmillan, 2013), and her current research analyzes the sources of violence and organized crime in the Texas–Mexico border region.

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