
The Biden Administration: What to Expect From a Changing US-Mexico Relationship

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With President Donald Trump's departure from office and the inauguration of President Joe Biden comes the prospect of major shifts in the relationship between the United States and Mexico. President Biden has taken immediate steps to reverse policies of the prior administration in areas that may have a substantial impact on those doing business in Mexico and along the border between the two countries. These changes come at a time when Mexico itself is in a state of flux under the presidency of Andrés Manuel López Obrador, who took office in December 2018.

How these shifts develop in the Biden Administration remains to be seen. The US-Mexico relationship is strong, but also faces new hurdles, including López Obrador's continued populist agenda, new migration challenges, a global pandemic with profound impact in both countries and cross-border criminal justice controversies. Awareness and understanding of these shifts, and of the key players and policies at work, will be critical as businesses position themselves in the initial months of the Biden Administration.

Rule of Law

Presidents Trump and López Obrador shared a close personal relationship that surprised many, given Trump's frequent negative comments about Mexico and its citizens. Their amicable relationship may have been based, in part, on their personal and political similarities. Like Trump, López Obrador offered campaign promises of radical transformation in Mexico and attacked perceived political corruption.

Since taking office, López Obrador has made controversial moves to effectuate the "Fourth Transformation," his preferred name for his administration. In October 2020, the Editorial Board of the *Financial Times* opined that López Obrador "is revealing himself as an authoritarian populist" through his attacks on Mexico's independent electoral authority, targeting of journalists and winning

the supreme court's approval of his proposed referendum on whether to allow the prosecutions of his political predecessors.¹

López Obrador also initially refused to recognize President Biden's electoral victory, delaying his acknowledgment of the president-elect until mid-December 2020.² The Mexican president later criticized companies such as Facebook and Twitter for denying Trump a platform in the wake of the January 6, 2021, insurrection at the Capitol.³

López Obrador has also criticized attorneys whose practice conflicts with his administration's goals. On October 20, 2020, the American Bar Association published an open letter to López Obrador expressing concerns about the rule of law under his administration.⁴ It objected to federal efforts to delegitimize attorneys practicing tax law and to discourage individuals under tax investigation from consulting attorneys, impinging upon the right to legal counsel.⁵ Just a few months later, on February 22, 2021, López Obrador commented that it was a "disgrace" that Mexican lawyers work for foreign companies he claimed want to take advantage of Mexico. He stated that, although these lawyers are free to practice, he hoped that they realize they are committing "treason against their nation." Several Mexican professional lawyers' associations expressed strong disapproval of López Obrador's comments and defended the role of attorneys in guaranteeing access to justice.⁶

Immigration

On January 23, 2021, Biden and López Obrador conducted their first presidential phone call, during which they covered immigration, the COVID-19 pandemic and investment in Latin America. López Obrador reported that Biden promised the United States would spend \$4 billion to further develop Honduras, El Salvador and Guatemala in the hope that this investment would address the root

¹ "López Obrador becomes Latin America's new strongman," *Financial Times*, Oct. 4, 2020, <https://www.ft.com/content/ae1f61d8-d421-4b70-97a1-891a5e9d34b1>.

² Joe Walsh, "Mexico and Brazil's Presidents Finally Acknowledge Biden's Win," *Forbes*, Dec. 15, 2020, <https://www.forbes.com/sites/joewalsh/2020/12/15/mexico-and-brazils-presidents-finally-acknowledge-bidens-win-after-weeks-of-waiting/?sh=3893d3fd7e7f>; "Mexico's president again declines to recognize Biden win," Reuters, Nov. 25, 2020, <https://www.reuters.com/article/usa-election-mexico/mexicos-president-again-declines-to-recognize-biden-win-idUSKBN285294>.

³ "Mexico Leader Condemns Twitter, Facebook for Blocking Trump," *U.S. News*, Jan. 7, 2021, <https://www.usnews.com/news/us/articles/2021-01-07/mexico-leader-condemns-twitter-facebook-for-blocking-trump>.

⁴ Patricia Lee Refo, ABA President, Letter to President López Obrador regarding "Respect for the Rule of Law and the right to legal representation," Oct. 20, 2020, https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/Rule-of-Law%20letter-Mexico-10-20-20.pdf?logActivity=true; <https://www.msn.com/en-us/news/world/mexico-denies-threatening-criminal-charges-to-boost-tax-take/ar-BB1alaQi>.

⁵ These federal efforts occurred in the context of López Obrador's professed goal of increasing tax enforcement; Mexico has the lowest tax intake of the 37 countries that are members of the Organization for Economic Co-operation and Development. Daina Beth Solomon, "Mexican tax campaign threatens rule of law, international attorneys say," Reuters, Sep. 19, 2020, <https://www.reuters.com/article/mexico-taxes-idINKBN26A0B6>.

⁶ José Luis Álvarez, "Asociaciones de abogados responden a AMLO: el Estado de derecho no es traición a la patria," *el Contribuyente*, Feb. 24, 2021, <https://www.elcontribuyente.mx/2021/02/asociaciones-de-abogados-responden-a-amlo-el-estado-de-derecho-no-es-traicion-a-la-patria/>.

causes of unlawful migration to the United States.⁷ During the phone call, Biden rejected the previous administration's approach to immigration from Mexico and Central America and declared his plans to revise those policies.

Biden's promises have been put to the test by migrant caravans of thousands of Central Americans hoping to pass through Mexico and into the United States.⁸ López Obrador previously made several major concessions to Trump, including by deploying the Mexican National Guard to patrol for undocumented immigrants attempting to enter the United States and by requiring asylum seekers to remain in Mexico during the pendency of their US asylum cases.⁹

On March 1, 2021, the two leaders met by video to discuss migration, COVID-19, trade and climate change. They also exchanged invitations for in-person visits, without any specific dates.¹⁰ At this meeting, Biden and López Obrador expressed their shared "commit[ment] to immigration policies that recognize the dignity of migrants and the imperative of orderly, safe, and regular migration."¹¹ Biden has attempted to make good on that commitment throughout the month of March, despite an average of over 550 unaccompanied minors crossing into the United States per day. A record-setting 17,000 minors will likely enter by the end of the month.¹² Biden has flatly refused to expel such minors, instead working to increase capacity in shelters and to place children with family members within the United States.¹³

US-Mexico Trade

During the Trump Administration, the United States and Mexico negotiated and signed the United States-Mexico-Canada Agreement (USMCA). The USMCA went into effect in summer 2020, and among other things, replaced the prior North American Free Trade Agreement's investor-state dispute settlement provisions and increased some labor and intellectual property protections.

⁷ Mark Stevenson, Rob Gillies and Aamer Madhani, "Mexican leader says Biden offers \$4B for Central America," Associated Press, Jan. 23, 2021, <https://apnews.com/article/joe-biden-north-america-mexico-justin-trudeau-coronavirus-pandemic-070159520dd892ad0f4233cfec7e2827>.

⁸ "Migrant caravan: Mexico presses US to reform immigration policies," *BBC News*, Jan. 19, 2021, <https://www.bbc.com/news/world-latin-america-55714865>.

⁹ "Mexican president defends restrictive immigration policies," *AP News*, Dec. 17, 2020, <https://apnews.com/article/international-news-mexico-coronavirus-pandemic-immigration-central-america-bfc07e78d2c5ca2b1fe2a72e0d37cf34>.

¹⁰ Tal Axelrod, "Biden to hold virtual bilateral meeting with Mexican president," *The Hill*, Feb. 26, 2021, <https://thehill.com/homenews/administration/540803-biden-to-hold-virtual-bilateral-meeting-with-mexican-president>; U.S.-Mexico Joint Declaration, The White House Briefing Room, Mar. 1, 2021, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/01/u-s-mexico-joint-declaration/>.

¹¹ US-Mexico Joint Declaration, The White House Briefing Room, Mar. 1, 2021, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/01/u-s-mexico-joint-declaration/>.

¹² Nick Miroff and Maria Sacchetti, "Migrant teens and children have challenged three administrations, but Biden faces rush with no precedent," *Washington Post*, Mar. 22, 2021, <https://www.washingtonpost.com/nation/2021/03/22/unaccompanied-minors-immigration-obama-trump-biden/>.

¹³ Claire Hansen, "Biden Defends Administration on Immigration, Promises to Improve System," *U.S. News*, Mar. 25, 2021, <https://www.usnews.com/news/national-news/articles/2021-03-25/biden-defends-administration-on-immigration-promises-to-improve-system>.

International trade with Mexico under the Biden Administration will be an important area to watch. Notably, Biden supported the signing of the USMCA, particularly following House Democrats' largely successful efforts to shore up its labor protections.¹⁴ Where the Biden Administration ultimately lands on policies related to energy, trade, labor and the environment will be important and may diverge from the approach of the Trump Administration. For example, on January 25, 2021, Biden signed an executive order increasing requirements that the federal government buy American.¹⁵ At the signing of the executive order, Biden announced that the federal government has plans to eventually replace its fleet of vehicles with electric cars made in the US.¹⁶ Biden also explained that supply shortages during the COVID-19 pandemic have highlighted the importance of American manufacturing. These new developments in the US could considerably impact international companies' strategies with respect to cross-border trade and operations.

López Obrador's policies and demonstrated hostility to private enterprise in the energy sector are also generating controversy, along with litigation in the Mexican courts. He has attempted to return Mexico to reliance on state-run oil and power conglomerates, *Petróleos Mexicanos* (PEMEX) and *Comisión Federal de Electricidad* (CFE), respectively. On March 10, 2021, new legislation backed by López Obrador's administration that favors CFE over private energy suppliers went into effect.¹⁷ Several interested companies promptly challenged this new Electricity Industry Law as unconstitutional, and Mexican courts have enjoined application of the law for at least the course of the litigation.¹⁸ Soon after Judge Juan Pablo Gómez Fierro instituted the initial temporary injunction in the case challenging the law, López Obrador responded by drawing into question the judge's integrity and publicly asked Arturo Zaldívar, Mexico's Minister of the Supreme Court and the Federal Judiciary Council, to launch an investigation into Gómez Fierro.¹⁹ Zaldívar responded that the Federal Judiciary Council would consider whether there was cause to open an investigation into Gómez Fierro but also reminded López Obrador of long-respected judicial autonomy principles. López Obrador later threatened to amend Mexico's constitution to permit the implementation of the Electricity Industry Law should the courts conclude that the law contravenes the current Mexican

¹⁴ Vice President Kamala Harris, however, voted against the USMCA in her former capacity as a US Senator. NAFTA/USMCA, *Politico*, Jan. 21, 2020, <https://www.politico.com/2020-election/candidates-views-on-the-issues/trade/nafta-usmca/>.

¹⁵ David Lynch, Jeff Stein and Ashley Parker, "Biden signs order pushing federal government to buy more American-made products," *Washington Post*, Jan. 25, 2021, <https://www.washingtonpost.com/us-policy/2021/01/25/biden-buy-american-rules/>.

¹⁶ Allan Smith, "Biden signs 'Buy American' executive order," *NBC News*, Jan. 25, 2021, <https://www.nbcnews.com/politics/white-house/biden-sign-buy-american-executive-order-monday-n1255487>.

¹⁷ Anthony Harrup and Juan Montes, "Mexican Lawmakers Pass Bill to Favor State Power Utility," *Wall Street Journal*, Feb. 23, 2021, <https://www.wsj.com/articles/mexicos-lower-house-of-congress-passes-bill-that-favors-state-electric-company-11614125696>.

¹⁸ "Juez suspende indefinidamente reforma eléctrica en México," *DW*, Mar. 19, 2021, <https://www.dw.com/es/juez-suspende-indefinidamente-reforma-el%C3%A9ctrica-en-m%C3%A9xico/a-56935935>.

¹⁹ Francesco Manetto, "López Obrador desafía al Poder Judicial y pide investigar al juez que frenó la reforma eléctrica," *El País*, Mar. 15, 2021, <https://elpais.com/mexico/2021-03-15/lopez-obrador-desafia-al-poder-judicial-y-pide-investigar-al-juez-que-freno-la-reforma-electrica.html>.

constitution.²⁰ On March 21, however, the Secretariat of Energy struck a slightly more conciliatory tone and announced that it would suspend the Electricity Industry Law's implementation while the injunction is in effect.²¹ The environmental organization Greenpeace Mexico subsequently secured a judicial order suspending the implementation of the Electricity Industry Law; the Mexican judge accepted Greenpeace's argument that the reforms "delay interminably the decarbonization of electricity production and the fulfillment of international commitments in matters of climate change," making it the first injunction granted on environmental grounds.²²

If the new Electricity Industry Law does go into effect—either as a result of action by Mexican courts or constitutional amendment—the energy reform will likely lead to high-stakes investor-state disputes, which will test the dispute resolution provisions under the new USMCA. See [Three Tips for Investors in Mexico's Energy Sector Regarding Potential USMCA Claims](#). On February 3, 2021, Roberto Velasco Álvarez, a representative from Mexico's Secretariat of Foreign Relations, commented that the USMCA's commitments allow companies injured by the Electricity Industry Law to use the USMCA's arbitration channels.²³ After the comment, Velasco Álvarez promptly issued a statement backpedaling and explaining that Mexico hoped to negotiate solutions to any conflicts before arbitration.²⁴

López Obrador's administration's efforts to favor state-owned energy companies, paired with difficulties in securing required government permits in the midst of the pandemic, have led several private energy companies, including some focusing on renewable energy, to reconsider their investments in Mexico.²⁵ The administration's March 26, 2021 proposal of an additional energy reform bill to support the state-owned oil and gas giant PEMEX only adds to the private sector's concerns regarding Mexico's policy direction with respect to the energy industry.²⁶ The outcome of

²⁰ "Si reforma eléctrica es inconstitucional, cambiamos la Constitución: AMLO," *Forbes Mexico*, Mar. 17, 2021, <https://www.forbes.com.mx/reforma-electrica-inconstitucional-cambiamos-constitucion-amlo/>.

²¹ Karol García, "Secretaría de Energía cumple con suspensiones a la reforma eléctrica de AMLO," *El Economista*, Mar. 21, 2021, <https://www.economista.com.mx/empresas/Secretaria-de-Energia-se-echa-para-atras-en-reforma-electrica-20210321-0013.html>.

²² "Otorga juzgado federal suspensión provisional a Greenpeace México respecto a la Ley de la Industria Eléctrica," Greenpeace México, Mar. 23, 2021, <https://www.greenpeace.org/mexico/noticia/9775/otorga-juzgado-federal-suspension-provisional-a-greenpeace-mexico-respecto-a-la-ley-de-la-industria-electrica/>; "Obtiene Greenpeace suspensión definitiva por amparos contra Ley de la Industria Eléctrica y Programa de Desarrollo del Sistema Eléctrico Nacional (PRODESEN)," Greenpeace México, Mar. 26, 2021, <https://www.greenpeace.org/mexico/noticia/9842/greenpeace-suspension-definitiva-por-amparos-contra-lic-prodesen/>.

²³ "Empresas perjudicadas por reforma eléctrica podrán recurrir al T-MEC: SRE," *LatinUS*, Feb. 2, 2021, <https://latinus.us/2021/02/03/empresas-perjudicadas-reforma-ley-industria-electrica-recurrir-tmec/>.

²⁴ Roberto Velasco Álvarez, Letter to Juan Pardini, General Director of Diario Reforma, Feb. 4, 2021.

²⁵ Isabella Cota, "Fuga de empresas ante la incertidumbre que plantea política de López Obrador a los inversores," *El País*, Feb. 6, 2021, <https://elpais.com/mexico/2021-02-06/la-incertidumbre-con-los-inversionistas-aumenta-en-mexico-y-fuerza-a-muchas-empresas-a-dejar-el-pais.html>.

²⁶ "López Obrador presenta una reforma petrolera para fortalecer a Pemex y facilitar la suspensión de permisos," *El País*, Mar. 26, 2021, <https://elpais.com/mexico/2021-03-27/lopez-obrador-presenta-una-reforma-petrolera-para-fortalecer-a-pemex-y-facilitar-la-suspension-de-permisos.html>.

Mexico's impending June 6, 2021 midterm legislative elections may impact the feasibility of López Obrador's agenda, including whether he has the legislative numbers to amend the constitution.

COVID-19

The US administration change will also impact Mexico's and the United States' efforts to address COVID-19. Thus far, Mexico has reported around 200,000 COVID-19 deaths; observers have suggested that this count likely dramatically understates the true number of COVID-19 deaths in Mexico.²⁷ López Obrador, who has at times denied the significance of COVID-19 and occasionally has refused to don a mask, contracted COVID-19 while in office in late January 2021, just as Trump had done only months before.²⁸

Biden's insistence on strong measures to fight the pandemic, paired with López Obrador's illness, may lead Mexico to increase its vaccination efforts to combat the spread of the virus. Mexico has administered more than 640,000 doses of the Pfizer-BioNTech vaccine to date, but in January Pfizer announced delays in delivering second doses of the vaccine to the country.²⁹ López Obrador responded to the setback by authorizing private companies to purchase available vaccines directly if they can find them. Mexico also made plans to acquire 24 million doses of Russia's Sputnik V vaccine over the subsequent two months, following in Argentina's footsteps.³⁰ During his March 1 virtual meeting with Biden, López Obrador asked whether the US would "loan" vaccine supplies to Mexico. The Biden Administration initially replied by announcing that it was not considering sharing vaccines with Mexico, instead focusing on making vaccines available to Americans.³¹ However, on March 18, 2021, the White House announced that it planned to provide Mexico 2.5 million doses of the AstraZeneca vaccine.³²

Cienfuegos Investigation

Biden replaces Trump at a tense moment for US-Mexico law enforcement relations. Some of this tension stems from the October 2020 arrest of Mexican General Salvador Cienfuegos Zepeda in

²⁷ Natalie Kitroeff, Maria Ali-Habib, Zolan Kanno-Youngs, and Jim Tankersley, "U.S. to Send Millions of Vaccine Doses to Mexico and Canada," *The New York Times*, Mar. 18, 2021, <https://www.nytimes.com/2021/03/18/world/americas/usa-mexico-vaccine-coronavirus.html>; Azam Ahmed, "Hidden Toll: Mexico Ignores Wave of Coronavirus Deaths in Capital," *The New York Times*, Dec. 22, 2020, <https://www.nytimes.com/2020/05/08/world/americas/mexico-coronavirus-count.html>.

²⁸ Maria Abi-Habib and Oscar Lopez, "Mexicans Worry That Even Getting Covid Won't Make Their Leader Take It Seriously," *The New York Times*, Jan. 25, 2021, <https://www.nytimes.com/2021/01/25/world/americas/amlo-mexico-covid.html>.

²⁹ "Mexico may delay second doses of COVID-19 vaccine, allows private orders," Reuters, Jan. 22, 2021, <https://www.reuters.com/article/health-coronavirus-mexico-vaccine/update-1-mexico-may-delay-second-pfizer-vaccine-doses-allows-private-orders-idUSL1N2JX157>.

³⁰ "Russia to supply Mexico with 24 million COVID-19 vaccines, president says," Reuters, Jan. 25, 2021, <https://www.reuters.com/article/health-coronavirus-mexico-russia/update-1-mexicos-president-thanks-putin-for-vaccine-shipments-idUSL1N2K01CU>.

³¹ "Lopez Obrador to virtually meet Biden, ask for vaccine 'loan,'" Al Jazeera, Mar. 1, 2021, <https://www.aljazeera.com/news/2021/3/1/lopez-obrador-to-virtually-meet-biden-ask-for-vaccine-loan>.

³² Natalie Kitroeff, Maria Ali-Habib, Zolan Kanno-Youngs, and Jim Tankersley, "U.S. to Send Millions of Vaccine Doses to Mexico and Canada," *The New York Times*, Mar. 18, 2021, <https://www.nytimes.com/2021/03/18/world/americas/usa-mexico-vaccine-coronavirus.html>.

Los Angeles on drug trafficking charges. US federal authorities alleged that Cienfuegos, a former Mexican defense minister, had conspired with Mexican drug cartels and had taken bribes in exchange for protecting cartel leaders. Apparently frustrated by the United States' failure to give advance notice of the arrest, Mexico responded to Cienfuegos's arrest by threatening to expel US federal drug agents stationed in Mexico, which would disrupt long-standing cross-border cooperation in combating narcotics trafficking. The Trump Administration ultimately instructed US prosecutors to drop the charges against Cienfuegos, to return him to Mexico and to provide the evidence against him to Mexican authorities for a full investigation in Mexico. Mexico's attorney general subsequently announced his decision not to charge Cienfuegos; López Obrador accused the US Drug Enforcement Agency of fabricating the charges against Cienfuegos and published the evidence provided by the United States. Thus far, the US Justice Department has not indicated plans to reinstate its investigation or prosecution of Cienfuegos following Mexico's refusal to prosecute.³³

The Cienfuegos controversy may or may not mark a significant inflection point in law enforcement relations for two countries with a long history of investigatory and prosecutorial cooperation, particularly concerning narco-trafficking. For example, in December 2020, Mexico's federal legislature imposed new requirements and restrictions on foreign government agents on Mexican soil. The legislation requires that such agents make additional disclosures to Mexican authorities and strips them of diplomatic immunity for crimes committed in Mexico.³⁴ These developments threaten to disincentivize US law enforcement involvement in Mexico. The controversy may also have ongoing impacts on the tenor of cross-border investigations between the two countries, including corruption investigations involving the Foreign Corrupt Practices Act and anti-money-laundering statutes. For an in-depth discussion on conducting cross-border investigations during a pandemic, see [COVID-19: Investigations in the Time of Coronavirus: Conducting FCPA Investigations in Latin America During the Pandemic](#).

Strategic Preparation in the Face of a Changing US-Mexico Relationship

Prepare for rapid changes

Given López Obrador's commitment to favoring state-owned companies over private enterprise and foreign investment, as well as the evolving nature of US policies and priorities concerning Mexico, companies should work with engaged stakeholders and counsel to monitor for new political and policy developments. Biden has issued a flurry of executive orders during his first months in office

³³ Taylor Barnes, Natalie Gallon and Florencia Trucco, "Mexican president defends decision not to press charges against ex-minister who was arrested on drug charges in US," CNN, Jan. 15, 2021, <https://www.cnn.com/2021/01/15/americas/mexican-president-defends-dismissal-of-probe/index.html>.

³⁴ "Mexican lawmakers vote to restrict foreign agents despite U.S. pressure," Reuters, Dec. 15, 2020, <https://www.reuters.com/article/us-mexico-usa/mexican-lawmakers-vote-to-restrict-foreign-agents-despite-u-s-pressure-idUSKBN28P2O6>.

because of the relative ease with which the orders can be implemented (as opposed to legislation). Such executive orders can have considerable impact on political and business climates and should be closely monitored and analyzed along with any parallel Mexican governmental action.

Expect lingering cross-border political uncertainty

The potential for shifts in the US-Mexico relationship in the wake of the administration change is high due to a range of factors, including new waves of Central American migrants moving north through Mexico to the US border, ongoing energy reform measures in Mexico, the Cienfuegos case controversy and the continuing efforts of both countries to address the COVID-19 pandemic. Given the ongoing uncertainty and new developments, companies should work with counsel to consider how to frame their approaches to ongoing business efforts and to potential cross-border investigations.

Anticipate increased US involvement in the region

Biden's pledge to invest economically in Latin America and his efforts to form relationships with regional leaders carry the promise of increased oversight of and attention on the region. Furthermore, COVID-19 vaccinations and Biden's stance on immigration may lead to rapidly changing and loosening border restrictions in the next few months, allowing for the easier passage of people and goods between the two nations, although the recent historic influx of asylum seekers and unaccompanied minors has already complicated the situation at the border. Companies should make the most of opportunities that may arise from the changing conditions.

WilmerHale attorneys are monitoring the evolving US-Mexico relationship in the wake of the presidential transition and analyzing its potential implications on companies doing business in Mexico, in consultation with Mexican law firms with which the firm has long-standing relationships. We are available to provide guidance to aid clients to position themselves in this rapidly developing political environment.

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