Biden administration targets Mexican energy policies that hurt U.S. investors

By Doug Palmer

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The Biden administration is escalating a dispute with Mexico over energy policies that it says hurt U.S. investors and jeopardize Mexico's own climate goals.

The U.S. government on Wednesday initiated a process that could lead to trade sanctions on its southern neighbor if the two sides cannot resolve the issue through talks or litigation.

"Mexico's protectionist energy policies are a one-two punch against economic and environmental progress," Senate Finance Chair Ron Wyden (D-Ore.) said in a statement welcoming the move. "Mexico is flouting its USMCA obligations by shutting American renewable energy providers out of the market and giving unfair advantages to less reliable, fossil fuel-based state-owned enterprises."

U.S. Trade Representative Katherine Tai's decision to ask for formal consultations regarding concerns about Mexico's state-owned electricity utility and dominant power company, the Comisión Federal de Electricidad, has been building for over a year.

Interesting timing: But it comes just a week after President Joe Biden hosted Mexican President Andrés Manuel López Obrador at the White House.

The two leaders wrapped up their meeting with a joint statement reaffirming their commitment to the "full implementation" of the U.S.-Mexico-Canada Agreement, which was negotiated by the Trump administration to replace NAFTA.

The action also comes less than three weeks after the second anniversary of the USMCA entering into force. U.S. business groups, including the National Association of Manufacturers and a broader coalition called the Alliance for Trade Enforcement, marked that occasion by calling for tougher enforcement of Mexico's obligations under the trade agreement.

"Mexico's failure to adhere to its USMCA commitments harms the nearly five million U.S. jobs that depend on trade with our southern neighbor," Brian Pomper, executive director of the trade enforcement alliance, said in a statement. "It's time for the Biden-Harris administration to take action and fully enforce the USMCA in Mexico."

In her request for consultations, Tai also accused Mexico of failing to honor the terms of the pact and putting billions of dollars of U.S. energy investment at risk.

“We have repeatedly expressed serious concerns about a series of changes in Mexico’s energy policies and their consistency with Mexico’s commitments under the USMCA,” Tai said in a statement. “We have tried to work constructively with the Mexican government to address these concerns, but, unfortunately, U.S. companies continue to face unfair treatment in Mexico.”

Among other things, the United States is challenging policies that prioritize Mexico’s state-owned utility, which Tai argued negatively impact American economic interests in multiple sectors and disincentivize investment by clean-energy suppliers and by companies that seek to purchase clean, reliable energy.

The United States still hopes to resolve its concerns with Mexico through consultations, rather than take the next step of requesting a USMCA dispute settlement panel to rule on the issue, she added.

Although the Biden administration has used USMCA dispute settlement procedures to resolve four complaints about labor practices at manufacturing facilities in Mexico, this is the first case it has filed to address concerns raised by the U.S. business community.

Still, Tai warned as far back as March that she could bring a USMCA case against Mexico’s energy policy in a letter she sent to Mexican Economy Minister Tatiana Clouthier.

“Unfortunately, while we have tried to be constructive with the Mexican government in addressing these concerns, there has been no change in policy in Mexico,” Tai wrote. “U.S. companies continue to face arbitrary treatment and over $10 billion in U.S. investment in Mexico, much in renewable energy installations, is now more at risk than ever.”

A senior administration official said they were confident bringing the case would not sour the overall relationship with Mexico, despite the sensitivity of the energy concerns.

“The US and Mexico are neighbors and close allies, and we're close trading partners,” the senior official said. “We work together on a range of important issues and this is one issue that we're going to engage on. But our relationship broadly is not going to be impacted at all.”

The main source of friction: Much of the friction can be traced to legislation passed by the Mexican Congress in 2021 that sought to strengthen the CFE’s power over the private sector, said Jay Truesdale, CEO of Veracity Worldwide, a global political risk consultancy.

Foreign investors, including many from North America and Asia, complain that legislation favored Mexico's "state-owned power generation plants over private-sector renewable energy investments, including many that are foreign owned," Truesdale said.

USTR mentions that concern in its statement, saying amendments to Mexico's electricity law have prioritized the distribution of CFE-generated power over cleaner sources of energy provided by private sector suppliers, such as wind and solar.

"Mexico's policies have largely cut off U.S. and other investment in the country's clean energy infrastructure, including significant steps to roll back reforms Mexico previously made to meet its climate goals under the Paris Agreement," USTR said

Specifically, the United States is challenging:

– a 2021 amendment to Mexico's Electric Power Industry Law that prioritizes CFE-produced electricity over electricity generated by all private competitors;

– Mexico's inaction, delays, denials and revocations of private companies' abilities to operate in Mexico's energy sector;

– a December 2019 regulation granting only PEMEX an extension to comply with the maximum sulfur content requirements under Mexico's applicable automotive diesel fuel standard;

– a June 2022 action that advantages PEMEX, CFE, and their products in the use of Mexico's natural gas transportation network.

"These measures appear to be inconsistent with several of Mexico's USMCA obligations, including under the Market Access, Investment, and State-Owned Enterprises chapters," USTR said.

What's next: Under USMCA dispute settlement procedures, the two sides have 30 days to begin consultations once a request is made and 75 days to conclude those talks once they start. If those talks fail, the United States can request a dispute settlement panel to hear the case.

Once a panel is formed, it could take from six months to a year to issue a ruling. If the United States wins and Mexico fails to change its policies to comply with the ruling, U.S. officials could seek permission to retaliate against Mexican goods by raising tariffs. U.S. officials said it was too early to speculate about the level of retaliation they could seek.

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