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Administrative Litigation Update

SCJN declares valid the Amendment to the Hydrocarbons Law - unconstitutionality challenge 91/2021

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On the Plenary Session of the Mexican Supreme Court ("SCJN"), dated April 29, 2024, the Court decided the unconstitutionality challenge 91/2021, recognizing the legality of the following provisions: (i) article 51, section III, (ii) article 53, second paragraph, (iii) article 57 and (iv) article 59 Bis of the Hydrocarbons Law ("LH"), amended and published on the Official Gazette on May 4, 2021, as well as the fourth and sixth transitory articles of said decree. Thus, the SCJN recognized the legality of the amendment, based on the following reasoning:

1. In relation to the **sixth transitory article**, which provides that the permits will be revoked when the authority verifies that the permit holders do not comply with the requirements indicated in the law or that they violate its provisions, the Plenary of the SCJN, decided that the article does not violate the **principle of legal certainty**, considering that before the amendment, the LH already provided a procedure to revoke permits when any provision is violated.

   Moreover, the Court resolved that the article does not violate **the principle of legality**, since the sanction on permit holders who do not comply with the provisions, will be precisely the revocation, hence there are no new cases of revocation.

   Finally, the Plenary of the SCJN considered that the **principles of due process of law and proportionality** of sanctions are not violated by this article, since the revocation is a legal act that renders a permit void for non-compliance with the requirements established. And the non-compliance or violation of the provisions will be verified by the Ministry of Energy ("SENER") or the Energy Regulatory Commission ("CRE"), prior to the procedure that concludes with the resolution of revocation. In other words, the revocation is not automatic, rather it complies with the provisions of the LH and the Federal Law of Administrative Procedure.

2. **Article 51, section III** and **fourth transitory article** of the amended LH, establish the requirement to complying with the storage capacity determined by SENER, the Plenary of the SCJN considered that, the articles do not violate the **principle of non-retroactivity**, because the obligation to comply with the storage capacity already existed; according to article 80, section II of the prior LH, the SENER had to issue general provisions that established the measures to be met by permit holders, regarding minimum storage levels.

   So much so, that on December 12, 2017, the "Public Policy for Minimum Storage of Petroleum Products" was published.

   For this reason, what was established in the LH does not constitute an acquired right in favor of individuals, since the State has always retained the possibility to amend the law when considered necessary.

   On the other hand, the Plenary of the SCJN specified that, in relation to the fourth transitory article, which establishes as follows: "in accordance with the applicable legal provisions", it refers to those provisions that are precisely applicable, in case of not complying with the corresponding storage capacity.

3. Finally, the Plenary of the SCJN analyzed **articles 51, section III, 53, second paragraph, 57, 59 BIS, fourth and sixth transitory articles**, in connection to the amendment that modified the way in which *Petróleos Mexicanos* ("PEMEX") participates in the oil market, and concluded that the **principle of free competition** is not violated, since:

   - **Article 51, section III, and fourth transitory article**, do not violate article 28 of the Constitution, as these provisions do not establish entry barriers for new participants, since they do not generate a visible and forceful adverse effect for the market, considering that the interested parties have conditions of certainty regarding the compliance with requirements to participate in the market; nor is anyone unjustifiably excluded, since before the LH was amended, there were rules issued by SENER, regarding storage capacity, in addition to the fact that the arguments made by the Senate do not indicate, in which way it could prevent the attendance of other participants.

     Furthermore, the Court points out that the *afirmativa ficta* cannot be considered an unmodifiable prerogative in this matter, since it can be modified in accordance with the public interest. The fact that the previous legislation provided it, this does

not mean that it constitutes an immovable acquired right, but rather that it is a mere expectation for those that were given during its validity.

The above, considering that the legislator has the power to modify the regulation of the permit transfer procedure, when he considers it most beneficial for the hydrocarbon sector.

- Regarding **articles 57** and **59 Bis**, which provide the temporary occupation, intervention and suspension of permits, for cases of imminent danger to national security, public security, or for the national economy, the Plenary of the SCJN pointed out that these articles **do not have a confiscatory nature**, since, contrary to what is argued, the permit suspension does not have such characteristics that imply the appropriation of the assets of the permit holders, it is simply a procedure for the authority to temporarily and legally revoke a previously granted permit.

  Nor do they violate the **principle of legal certainty or lack of certainty**, since the need to effectively regulate the legal acts that are related to the operation of this matter, implies not only the opening of the sector but rather a broader regulation, given its relevance and the nature of its activities, allowing third parties to participate in certain activities other than exploration and extraction, such as the storage, transportation, distribution of some of the hydrocarbons and petroleum products, therefore the authorizations must be subject to the public supervisory powers in charge of the SENER and the CRE.

  Thus, the incorporation of the permit suspension allows, at a certain moment, to paralyze the operation when it involves an imminent danger to national security, public security or to the national economy, until a final decision is reached; therefore, it is not considered any violation of legal certainty to the extent that, every case will always be motivated to be legal. In any case, if there is a violation of the principles of legality, that could provide merits to defend that particular case, but it is not considered that these conditions are generated by the law itself.

- Now, regarding the **second paragraph of article 57**, which eliminated the possibility for the authority to hire third parties to take charge in cases in which it intervenes, occupies, or suspends, the activities of the permit holders, the SCJN concluded that there is **no unequal treatment**, since it is a different case for specific situations, which does not violate the **principle of free competition**.

In general terms, 8 of the 11 members of the Plenary of the SCJN voted in favor of the proposal to recognize the validity of the amendment of the LH, except in relation to articles 57 and 59 BIS, in which there was a majority of 7 votes.

In this sense, although anyone may file an *amparo* appeal, once the authority applies each article individually, the truth is that, derived from what was resolved by the Plenary of the SCJN, it is expected that protection will be denied to the companies.

Thus, it will be necessary to analyze in each case, whether instead of fighting the constitutionality of the provisions that are the subject of the unconstitutionality challenge at hand, we could claim the illegality of a specific act of authority.

Finally, regarding the amendment to the **thirteenth transitory article** (**asymmetric regulation**), through which the regulation had been eliminated, considering that a mature market in oil and hydrocarbons had already been reached, in a prior *amparo* appeal, the article was declared unconstitutional with general effects, even the CRE left without effect the agreement A/015/2021, while upholding the agreement A/029/2023, so this asymmetric regulation remains in force.

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