May 19, 2021

Definitive suspensions granted by Mexican Federal Courts against the amendments to the Hydrocarbons Law

The following is a summary of a relevant ruling rendered by a Mexican federal court against the amendments introduced by the Mexican Congress to the Hydrocarbons Law (*Ley de Hidrocarburos*) originally published on August 11, 2014, following the Constitutional amendments to the Mexican Constitution to allow the participation of domestic and foreign private investment in Mexico's energy sector. For context about this amendment to the Hydrocarbons Law, we encourage you to visit the following link.

I. Introduction; Background.

On May 14, 2021, the First District Court on Administrative Matters Specialized in Economic Competition, Telecommunications and Radio, with seat in Mexico City and National Jurisdiction (the "**First District Court**" or "**1DC**") held the so-called in incidental hearing to rule on the definitive nature of the suspension granted on May 7, 2021, under the amparo action (*juicio de amparo*) with docket number 935/2021, against the Decree amending and adding multiple provisions of the Hydrocarbons Law (*Decreto por el que se reforman y adicionan diversas disposiciones de la Ley de Hidrocarburos*), published in the Federal Register (*Diario Oficial de la Federación*) on May 4, 2021 (the "**Challenged Law**" or "**Decree**").

II. Effects of the Ruling.

Based on the reasons discussed in Section III *infra*, the definitive suspension granted against the Challenged Law has general (*erga omnes*) effects which means that even companies that did not challenge or filed an amparo claim are benefited by these effects.[1] This suspension is limited to the following provisions of the Hydrocarbons Law that were amended or added by the Decree:[2]

[1] Unlike the Second District Court on Administrative Matters Specialized in Economic Competition, Telecommunications and Radio, with seat in Mexico City and National Jurisdiction, the 1DC did not order the Ministry of Energy to make a publication about the effects of this suspension in the Federal Register. However, even without this publication, all governmental agencies are prevented from enforcing the provisions of the Challenged Law subject to the suspension.

[2] In (parenthesis) a short summary on what the amendment or addition consists of.

(i) Article 51 (adding a new requirement of storage capacity determined by SENER for all permits);

(ii) Article 57 (contemplating suspension and limiting the operator role of occupied, suspended or intervened facilities to Pemex);

(iii) Article 59 Bis (establishing the suspension of permits due to an imminent danger to the national security, energy security or the national economy), and

(iv) Fourth and Sixth Transitory Provisions (ordering the revocation of permits for non-compliance with minimum storage requirements and any other infringements to the Hydrocarbons Law).

Through this ruling, the Ministry of Energy (*Secretaría de Energía*) ("**SENER**") and the Energy Regulatory Commission (*Comisión Reguladora de Energía*) ("**CRE**") as the governmental authorities/agencies mainly responsible for enforcing the Challenged Law, are prevented from enforcing the aforementioned provisions until the merits of the *amparo* action are resolved or the definitive suspension is overturned. Therefore, while the main trial is resolved, these agencies (and all other Mexican governmental authorities) are required to enforce the Hydrocarbons Law as if those amendments and additions had not taken place.

Of note, the 1DC also mentions that no permits may be revoked on grounds that a permit holder failed to comply with the minimum storage requirement until the trial is resolved. In our opinion, this only limits SENER and CRE's ability to revoke a permit based on the new section III of Article 51 of the Hydrocarbons Law, but it would not necessarily forbid or prevent the governmental authorities to commence a revocation process for a failure to meet the obligations on minimum storage provided in the relevant permits and regulation issued by SENER prior to the Decree.[3]

III. Summary (Key Takeaways) of the Ruling.

As part of the analysis, the First District Court concluded that the claimant did not evidence a legal or lawful interest to challenge the amendments to Article 53, sections XII [sic][4] and

[3] Among these regulations is the Public Policy on Minimum Storage of Refined Products (*Política Pública de Almacenamiento Mininmo de Petrolíferos*) published in the Federal Register on December 12, 2017, as amended.

[4] The public version of the resolution incorrectly mentions section XII twice, when the Decree amended section XI and added a new section XII to Article 56 of the Hydrocarbons Law.

55 4166 9040 | contacto@campaymendoza.com | Av. Volcán 150 Piso 4, Lomas de Chapultepec, CDMX, 11910
www.campaymendoza.com

XII of Article 56 and the last paragraph in section II of Article 86 of the Hydrocarbons Law.[5] The 1DC argues that *prima facie*, these provisions are not applicable to all permit holders of the activities regulated in matters of hydrocarbons, "*but rather only to those that through their own actions or subsequent actions by the administrative authority, suffer the effects of the law in their legal sphere*."

On the other hand, the First District Court concluded that the claimant evidenced a legal interest (*interés jurídico*) to challenge the amendments to Articles, 51, 57, 59 Bis and the transitory provisions of the Decree.

Interestingly, as part of the argumentation used to, *prima facie*, conclude that the claimant will be affected by these amended and added provisions is the affectation to the business plan prepared or carried out as a result of the commercialization permit granted to the claimant. We find this portion to be interesting since, as part of the requirements to apply for permits, the CRE required the applicants to submit a business plan or potential customers or suppliers and other information from which a business plan could be inferred from. Thus, the existence of this information in the permit application file may prove to be of relevance in the decision to grant or not *the amparo*.

The 1DC also concludes that the mere entry into force of the amended Article 53 and the Fourth Transitory Provision (*Cuarto Transitorio*) of the Decree authorizes the relevant governmental authority to revoke the permits of those who do not comply with "the new minimum storage requirement". The First District Court also concludes that the "statutory system" formed by Article 57, 59 Bis and the Fourth and Sixth Transitory Provisions also empower the governmental authority to suspend permits by the mere entry into force of the Decree when, in its discretion, it determines that an imminent danger to national security, energy security or the national economy occurs.

IV. <u>Analysis by the 1DC</u>.

To conclude that, *prima facie*, the claimant successfully argues a case to grant a suspension against the Challenged Law, the 1DC bases its decision on two main apparent violations to the Mexican Constitution:

[5] These provisions deal with new cases for revocation of permits (smuggling of hydrocarbons, refined products and petrochemicals, as well as the addition of repeat offenses to certain conducts under the Hydrocarbons Law), and the deemed denial provision on the applications for assignment of permits.

55 4166 9040 | contacto@campaymendoza.com | Av. Volcán 150 Piso 4, Lomas de Chapultepec, CDMX, 11910
www.campaymendoza.com

1. Barriers to Free Markets and Economic Competition.[6] The First District Court agrees with the claimant that there is a possibility that it may successfully argue that: (**i**) the suspension of permits may be used to exclude current market participants to empower State productive enterprises (*i.e.*, Pemex) and the fact that only Pemex may be appointed to operate facilities/permits subject to a temporary occupation, intervention or suspension may be enforced by the governmental authorities (*i.e.*, CRE and SENER) as a "*(…)* ***political end, activate or strengthen the presence*** *of a State productive enterprise* ***(PEMEX) in the hydrocarbons market***"; and (**ii**) there is an intent to infringe upon the rights of permit holders to displace them from the market and achieve the political objective of strengthening the State productive enterprises.

2. Affectation to Basic Rights to Legal Certainty, Property and Non-Retroactive Application of the Law. The First District Court agrees with the claimant that: (**i**) there is a possibility that it may successfully argue that the Energy Reform of 2013 was envisioned as a long-term reform and therefore it created a state of "legitimate trust" in the market that fostered and prompted investors to invest in the market under the expectation that asymmetric regulation will be maintained until conditions to compete on a "leveled floor" existed;[7] (**ii**) the Challenged Law constitutes an "unforeseeable and untimely change" that breaks the long-term nature of the Energy Reform therefore affecting legal certainty of these companies; (**iii**) a loss of investment may occur based on the investment made based on that legitimate trust; and (**iv**) there is a retroactive application of the Decree by establishing the potential immediate revocation of a permit based on new causes for revocation.

Furthermore, the First District Court believes that the momentum of the Energy Reform outweighs any valid merits that the Challenged Law may have because: (**i**) the granting of the suspension seems "less serious" than the effects and ramifications that the execution of these acts (*i.e.*, under the Decree) may generate; and (**ii**) there is a public interest on the participation of the private sector in oil and gas activities.

[6] In page 54 of the resolution the First District Court cites the use of "asymmetric regulation" as an action by the State in exercise of its regulatory role of the country's economy to level the balance between competitors of a market, when such balance is unduly tilted by a monopoly or the presence of a competitor with substantial power or preponderance in the market. This portion of the analysis is relevant given that the publication of other amendments to the Hydrocarbons Law on matters of asymmetric regulation in the oil and gas mater is imminent; thus, it can be expected that the 1DC and other federal courts will review the Constitutionality of such second amendment to the Hydrocarbons Law. Visit this link to learn more about that amendment.

[7] *See* previous footnote.

55 4166 9040 | contacto@campaymendoza.com | Av. Volcán 150 Piso 4, Lomas de Chapultepec, CDMX, 11910
www.campaymendoza.com

Campa y Mendoza, S.C.
contacto@campaymendoza.com

* * * * *

If you have any questions or comments on the matter, please contact us.
This document does not constitute legal advice.