

LIMITS ON THE IMPLEMENTATION OF THE PRINCIPLE OF LEGITIMATE EXPECTATIONS IN THE FIELD OF HYDROCARBONS

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I. INTRODUCTION

In the exercise of its duties, the Mexican Congress established that the Political Constitution of the United Mexican States and Transitory Article 13 of the Hydrocarbons Law would act as the regulatory framework for the Energy Regulatory Commission to issue a ruling that would set the methodology to determine the maximum prices of natural gas object of first-hand sale,¹ and which was published on February 15, 2016, and made effective on the first day of the month following its publication. Therefore, the regulations issued in the exercise of said authority is applicable to the facts and acts carried out

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¹ “This is understood as the first transfer in national territory undertaken by Petróleos Mexicanos, its subsidiaries and any other State productive enterprise, or legal entity, on behalf of and by order of the State. Such sales are to take place upon leaving the processing plants, refineries, injection points of imported product, domestic pipelines, or injection points of hydrocarbons coming indirectly from production fields”. *Cfr.* RES/998/2015. <https://core.ac.uk/download/pdf/230558638.pdf>.

as of its entry into force, as in the case of RES/998/2015. All this is aimed at attaining a greater participation of economic agents in the natural gas market and arguing that this way first-hand sales of this hydrocarbon would reflect the conditions of an international competitive market and where the product would be sold, thus avoiding price arbitrage between different parts of the country while promoting the national production of gas.

However, the promoter company LEO, S.A. de C.V. filed an indirect *amparo* lawsuit for violations to Articles 14 and 16 of the Constitution, arguing that, as a sub-guarantee of the principle of legal security, legitimate expectations were violated because the new methodology for establishing the maximum prices of natural gas, object of first-hand sales, was substantially modified without any transition rules. Therefore, it had a negative impact on the cost projection the company had made since they had reasonably well-founded expectations on which the authorities should act.

Thus, the question that arises is whether contractors have a legally protected right to the immovability of the regulations applicable to them, inherent to the principle of legitimate expectation. In the light of this approach, we argue that were it intended to establish that the authority is obliged not to alter the regulatory conditions to protect a sector, in this case hydrocarbons contractors, then it would harm the collective and would not respond to the social reality because the regulation would then be set in stone.

Therefore, we will begin by discussing the origin of the principle of legitimate expectation, the position of the Mexican Supreme Court of Justice on this matter, and its application in other countries, with special emphasis on European Community law where more pronouncements have been made.

II. CONCEPTUAL FRAMEWORK

Throughout history, societal coexistence and the evolution of the organization of the State are, among other factors, those that have made it possible to build principles that tend to ensure the stability and safety of the governed.

One of these legal principles stands out, not only because of its scope and transcendence, but because it is a pillar for peace of mind, certainty, and the fair and equal freedom of the people who make up the State. We are referring to the principle of legal security, which has its etymological origin in the Latin word *securitas*, from *securas* which means “to be free from care,” that is, to be safe from danger.

It is confidence in the law itself and its impartial and fair application, serving as a guideline or reference for action, with three elements: legal security, effectiveness of the law and the absence of arbitrariness, since the actions of public authorities, especially the Judiciary, must be fully justified by an enabling law.²

Therefore, this principle can be applied in two ways: objectively and subjectively. The first represents the existence of a just and effective social order whose compliance is ensured by public coercion. The subjective dimension represents the certainty an individual has that his property will be respected.³

This principle is enshrined in the Mexican Constitution, specifically in Article 16. Along this vein, the country's highest court considers this the basis of the Mexican legal system, to the extent that it protects the rights of the governed not to be placed in a situation of legal uncertainty and, consequently, in a state of defenselessness.

The above has two implications: on the one hand, it grants certainty to the governed and on the other hand, it grants access to means of defense.

Regarding the first one, it is still necessary to implement and enforce better administrative practices to safeguard the rights of the governed, which is why authorities must incorporate such practices in their acts and decisions in order to avoid infringing fundamental rights. This can be achieved, for instance, by minimizing the margin of discretion and even avoiding the use of intimidating language, rights that are already set forth in Article 2 of the Federal Taxpayer Rights Law.⁴

As to the second aspect, the means of defense are the mechanisms granted by legislators so that individuals can fight for State conduct they deem serious, authoritarian or illegal. In other words, it is the instrument that allows placing the interest of the governed in opposition to the arbitrariness of the monarch or whoever represents the power of the State. It also addresses the premise of "knowing what to expect" from the content of the laws, the actions of the authority itself and legislative acts, which undoubtedly implies giving certainty to the governed.

In this context, one of the principles that has emerged in the reiterated interpretation of legal certainty is that of legitimate expectations. It is worth

² Regueros de Ladrón de Guevara, Sofía, "La seguridad jurídica en el derecho tributario", *Lecciones de derecho tributario inspiradas por un maestro*, Bogotá, Universidad del Rosario, 2010, Colección Institucional, vol. I, 250.

³ *Diccionario Jurídico Mexicano*, *op. cit.*, p. 3429.

⁴ Procuraduría de la Defensa del Contribuyente, criterio sustantivo 7/2015/CTN/CS-SASEN, 2015, available at: http://www.prodecon.gob.mx/buscador_c/buscarcrit/166.

mentioning that this principle was once thought to have appeared only recently in Mexican law, but it is not so.

This principle of the protection of legitimate expectations, as such, has its origins sixty-three years ago in post-war Germany.

1. *Legitimate expectations in the “Berlin Widow” case*

In the German system, the principle of protection of expectations can be traced back to the mid-19th century, but its exact definition and form is found after World War II, specifically in the case tried by the German Federal Administrative Court on October 28, 1959, which upheld a decision of the Berlin Superior Administrative Court, and which is better known as the “old widow’s case”.⁵

The case centered on the validity of revoking the widow’s pension of a Berlin widow “living in the eastern part of the city who applied to the authorities of the western part of the city to receive her pension in that part of the city and, once this possibility was approved, she moved there and began to receive her pension payments”.⁶

But having already settled in her new home and borne the expenses of relocating there, the German authorities reviewed the pension application again, even after her having received pension payments. From this second review, the authorities decided to revoke the authorization and not only stopped covering it, but also demanded the return the pension already paid. In other words, the affected party had made a key decision that would be difficult to revoke in the expectation of the legality of administrative action.

Therefore, this woman appealed before the Berlin Administrative Court of Appeals, which found that even though, after a second review, the requirements for obtaining the pension had not been met, the authority’s actions undoubtedly instilled a sense of stability and confidence in the validity of the pension; even more so when the court had instructed the woman to change her place of residence in order for her pension application to be admissible. In view of this, we hold that the authority violated the expectations of the governed in the legality of administrative action.⁷

⁵ Santamaría Pastor, Juan Alfonso, *Los principios jurídicos del derecho administrativo*, Madrid, La ley, 2010, p. 1179.

⁶ *Idem*.

⁷ Malvaez Pardo, Gabriela, “El principio de la protección de la confianza legítima en México”, *Ars Iuris. Revista del Instituto Panamericano de Jurisprudencia*, Mexico, No. 51, December 2016, pp. 75 and 76.

In Germany, this principle was called *Vertrauensschutz*, which literally translates as “protection of trust”. Later and with the everyday judicial activities in Europe, the adjective “legitimate” was added since it was deemed that it could not be applied to any expectation of rights, but only to those in which the actions of the authorities were such and sufficient to be presumed to have generated enough certainty in the governed.⁸

Legitimate expectations are then a subprinciple which stems from: “... legal certainty ...the sum of certainty and legality, hierarchy and regulatory disclosure, the non-retroactivity of the unfavorable, the interdiction of arbitrariness... legal certainty is the sum of these principles, balanced in such a way as to promote justice and equality in freedom throughout the legal system”.⁹

But the principle of legal certainty does not protect the need to indefinitely uphold the legal system established at a given historical moment. In German law, the principle of protection of expectations is used as a limit to the legislative power on the retroactivity or non-retroactivity of laws, *i. e.*, it is the trust of the governed in observing the law in force.

Hence, we agree that the principle of legal certainty in one rule of law aims to protect the governed from arbitrary acts and wayward changes done by the ruling class as it recognizes that the actions of the authority may generate people’s legitimate expectation of rights, and when this is violated, it transgresses the sub-principle of legitimate expectations. However,

The regulations that by law exclusively affect the future appearance of legal situations, rights or relationships do not clash with the principle of the protection of expectations. Citizens cannot rely on the fact that laws enacted at a given time will remain unchanged. Much less can legislators be expected to act in a certain way if they have to react to new developments or evolutions, admit new knowledge and impose new political (and we would also add economic and geopolitical) concepts.¹⁰

⁸ According to the Mexican Supreme Court of Justice, the expectation of rights is understood as the intention or hope that a given situation will occur and subsequently result in a right. It is a forward-looking situation that is different from an acquired right, which is one that has come into the individual’s possession, ownership or legal assets, or that implies that an asset, power or benefit has been introduced into an individual’s possession or legal assets. But it should be remembered that in tax matters, we can only invoke the expectations of rights. *Cfr.* Tesis 2a. LXXXVIII/2001, *Semanario Judicial de la Federación y su Gaceta*, Novena Época, t. XIII, June 2001, p. 306.

⁹ García de Enterría, Eduardo, *La responsabilidad patrimonial del Estado legislador en el derecho español*, Navarra, Thomson Civitas, 2005, p. 30.

¹⁰ García de Enterría, Eduardo, *La responsabilidad patrimonial del Estado...*, *op. cit.*, p. 34.

2. *Legitimate expectations in the “Barracas slaughterhouses” case*

It should be pointed out that while most scholars in the field find the origin of legitimate expectations in the “Berlin widow case”, this is not actually the case. In the late 19th century, the Supreme Court of Justice of Argentina had already alluded to the idea of legitimate expectations in its judgments, as in the case of the “Barracas *saladeristas*” case (a case filed by drysalters Mr. Santiago, Mr. José and Mr. Podestá, Mr. Guillermo Betram, Mr. Guillermo Anderson, Mr. Casimiro Ferrer, Mr. Jerónimo Rocca, Mr. Constant Santa María, Mr. Juan Smith and Mr. Jerónimo Soler *v.* the Province of Buenos Aires for compensation for damages) in which the *saladeristas*¹¹ challenged a provincial ordinance that suspended their operations for discharging waste into the Riachuelo river. The plaintiffs argued that they did so by official permission and that they could freely work where they had installed themselves, invoking legitimate expectations to those to who invested their capital in the salting business. The Supreme Court ruled that the “Barracas *saladeristas*” could not invoke their permit to claim acquired rights because it was granted to them under the implicit condition of their operations not harming the general interests of the community because no one can have an acquired right that compromises public health¹²

This shows that by the end of the 19th century, the expectation of rights legitimated by government actions was already recognized and, therefore, they demanded the protection of legitimate expectations.

3. *The figure of legitimate expectations in Britain*

The British system assumes a different position through a figure called estoppel, which is applied in a similar way as the principle of protection of legitimate expectation in civil law countries and recognizes common elements like trust in the acts. Hence, the contracting parties must not perform acts that undermine the trust they generated by their actions or previous practices by other parties.¹³

¹¹ In Argentina, *saladeristas* is the name given to the workers who cure meat with salt. *Cfr.* Leyes, Rodolfo, “Del saladero a la fábrica de extracto de carne: Transformaciones de los procesos de trabajo en la industria de la carne. Entre Ríos, 1864-1935”, *Trabajo y Sociedad*, Argentina, No. 26, 2016, available at: <https://www.redalyc.org/pdf/3873/387343599020.pdf>.

¹² López Mesa, Marcelo J., *Presupuestos de la responsabilidad civil*, Buenos Aires, Astrea, 2013, p. 569.

¹³ The estoppel is primarily procedural in nature. *Cfr.* Jiménez García, Francisco, *Los comportamientos recíprocos en derecho internacional: a propósito de la aquiescencia, el estoppel y la confianza legítima*, Madrid, Dilex, 2002, p. 49.

The figure of estoppel revisits the general legal principle of *venire contra factum proprium non valet* (to come against one's own fact is not allowed), which consists in that individuals have the legal duty not to contradict past acts since the interpretation of said behavior must be made under clear criteria that include the following elements: a) a past, valid and legal binding act, which enables a party to identify that it would act thus in the future; b) in contrary intent, the subject who engendered expectation through the action has an intent contrary to that which was initially conceived; c) recognizing harm to third parties, which refers to the binding behavior that has modified its condition; and d) identity of the parties in that prior and subsequent behavior must be attributed to the same party. In other words, the core of the theory of estoppel lies in the legitimate expectations vis-à-vis third parties and that are justified based on legal reasons.

The United Nations Terminology Database defines the concept of “estoppel” as “a legal bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true”¹⁴ *i. e.*, whoever has induced another to act in a certain way cannot deny what has been said or done; therefore, the person cannot retract their statement when it is unfavorable to them. In this respect, in the case of “Abrill Alosilla *et al.* v. Peru” of March 4, 2011, the Inter-American Court of Human Rights ruled on the express statement of the government of Lima that the plaintiffs had complied with the requirement of exhausting the internal remedies and had subsequently turned to the Inter-American Commission of Human Rights, which expressly stated that, under the principle of estoppel, the Peruvian State could not change its position by arguing that the defendants had not exhausted domestic legal remedies. In our opinion, this theory applies in procedural and regulatory aspects of contracts, but differs in meaning from that of legitimate expectation, *i. e.*, it is one of the parties seeking to modify the content or meaning of the contract without bringing into play the actual content of the regulation.

Thus, without discussing who is responsible for the origin of this principle of legitimate expectations, it is clear that the principle stems from the legal certainty that the governed must be able to foresee any State interference that could affect them, and that the authority must act within the law, always prioritizing public interest.

¹⁴ The United Nations Terminology Database, Estoppel, available at: <https://unterm.un.org/UNTERM/Display/Record/UNHQ/NA?OriginalId=e0e12b3d9a92d47a852569fd00029aa9>.

III. LEGITIMATE EXPECTATIONS UNDER EUROPEAN COMMUNITY LAW

Given the dynamism of the economic reality of the European Community and the nature of the abovementioned principle, the criteria have focused on economic law and on the temporary validity of the provisions.

Thus, through the General Court of Justice, the European Community has issued various criteria on the principle of the protection of legitimate expectations which, coupled with the structural principle of loyal cooperation or community loyalty established in the Amsterdam Treaty, makes Community institutions accountable to the Community agents or operations who have placed their trust in them.¹⁵

Community stakeholders' indiscriminate invocation of this principle, as well as the elusiveness of a precise definition of the baseline for legitimate expectations, the nature of which requires a case-by-case assessment, have made it difficult for the Court of Luxembourg to establish the specific aspects for applying the principle of protection of legitimate expectation.

On this point, European Community case law has consistently held that the principle of the protection of legitimate expectation may be invoked by any economic operator when a Community institution has generated well-founded expectations.¹⁶ However, recognizing that this principle is accessible to any Community operator also implies establishing the three requirements that must be jointly observed:

- The Union's administration must provide the interested party with specific and consistent assurances from authorized and reliable sources.¹⁷
- These guarantees must be such as to raise a legitimate expectation in the mind of their intended target.¹⁸

¹⁵ Jiménez García, Francisco, *Los comportamientos recíprocos en derecho internacional: a propósito de la aquiescencia, el estoppel y la confianza legítima*, Madrid, Dilex, 2002, p. 66.

¹⁶ See the judgment of March 11, 1987, Van den Bergh in Jurgens y Van Dijk Food Products (Lopik)/CEE, 265/85, EU: C: 1987:121, apartado 44, available at: <https://eur-lex.europa.eu/legal-content/ES/TXT/?qid=1549046495742&uri=CELEX:61985CJ0265>.

¹⁷ See the sentence of June 30, 2005, Branco/Comisión, T-347/03, EU: T: 2005:265, apartado 102, available at: <http://curia.europa.eu/juris/celex.jsf?celex=62003TJ0347&lang1=en&type=TEXT&ancre=>.

¹⁸ See the judgment of February 23, 2006, Cementbouw Handel & Industrie/Comisión, T-282/02, EU: T: 2006:64, apartado 77, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62002TJ0282_SUM&from=MT.

- The guarantees given must be in accordance with the applicable provisions.¹⁹

Upon fulfilling these requirements, the prudent and diligent economic operator will be in a position to foresee the adoption of the measure that may affect its interests since otherwise this principle could not be invoked to their benefit.²⁰

Thus, the principle of protection of legitimate expectations is part of the fundamental principles of the European Community; its application is rationalized in the Community interest. Suffice to revisit Community case law, which states that Community agents cannot legitimately trust that an existing situation will be maintained since limiting the capacity of Community institutions to modify legal situations based on variations of reality would harm the Community,²¹ invalidating the possibility of invoking an acquired right to maintain an advantage.

What is noteworthy is that the Court has recognized that the principle of legitimate expectations also applies to cases in which Community authorities, by modifying their behavior, cause damage to economic agents even when the modification is legally justified. But if a transitory provision was not issued, in which it a reasonable term was given for its implementation, it must be evaluated according to the nature of each case.²²

From the above, we can infer that its application in the exercise of the regulatory power to control a situation to benefit the Community, whether in the administrative or legislative sphere, is temporary in order to allow Community stakeholders to adapt to the new reality so that they can take the necessary precautions and not be negatively affected by it.

Thus, Community case law has repeatedly analyzed the concept of foreseeability that amendments must have so that the actors can adjust their actions. In this regard, in order to determine whether a rule is foreseeable, the following should be considered:

¹⁹ See the judgement of June 30, 2009, CPEM/Comisión, T-444/07, EU: T: 2009:227, apartado 126, available at: <http://curia.europa.eu/juris/celex.jsf?celex=62007TJ0444&lang1=en&type=TXI&ancre=>.

²⁰ See the judgment of Di Leonardo Adriano Srl y Dilexport Srl, Asuntos acumulados C-37/02 y C-38/02, apartado 70, available at: <https://eur-lex.europa.eu/legal-content/ES/TXT/?qid=1549049278095&uri=CELEX:62002CJ0037>.

²¹ *Idem*.

²² Sentencia de LVM, Elf Atochem, Shell y DSM y DSM Kunststoffem, T-305/94, T-306/94, T-307/94, T-313/94, available at: <http://curia.europa.eu/juris/document/document.jsf?docid=44539&doclang=ES>.

- The new law resulting from the change in the public authority's the point of view is not normally foreseeable.
- A new rule resulting from a change in circumstances may be foreseeable for a prudent operator.
- A provision that solves pre-existing problems is foreseeable for all operators.²³

As seen, legitimate expectation operates in favor of the economic agents when an unforeseen alteration affects their usual operation. Since these modifications are usually duly justified in favor of the Community, legitimate expectations then operate by safeguarding the existence of a reasonable period for the entry into force of the new regulations or by guaranteeing the existence of transitory provisions. However, the latter will only be granted on a particular basis since it cannot be considered a generality.

IV. LEGITIMATE EXPECTATIONS IN MEXICO

The concept of legitimate expectations alludes to the situation of a subject endowed with a justified expectation of obtaining a benefit, an abstention or a statement favorable to their interests from another, arising from the latter's behavior, in the sense of fostering such an expectation. In Mexico, the relationship that gives rise to legitimate expectation generally involves the Administration.²⁴ All the above allows us to affirm that legitimate expectations are the certainty created in the governed by the government authority and constitutes a legitimate expectation of rights, whose evaluation is left to the discretion of the judges who must determine whether the positive and negative elements of the actions were sufficient to legitimize said expectation since not all expectations of rights are legitimate. These can be simple because they do not have any protection whatsoever since granting them would imply a paralysis in the evolutionary development of the law and would lead to multiple parallel regulations and, hence, chaos.

In other words, there are two aspects in which this principle can be invoked in the administrative and even the legislative spheres. When ap-

²³ Sanz Rubiales, Íñigo, "El principio de confianza legítima limitado del poder normativo comunitario", *Revista de Derecho Comunitario Europeo*, Spain, Year 4, No. 7, January-June 2000, p. 114.

²⁴ Rondón de Sansó, Hildegard, "El principio de confianza legítima o expectativa plausible en el derecho venezolano", *El derecho venezolano a finales del siglo XX*, Venezuela, Biblioteca de la Academia de Ciencias Políticas y Sociales, 1998, p. 311.

plied in administrative law, it is interesting when speaking of the legitimate expectations that have been raised in the governed by administrative acts and different from the legislative work, considering that the latter can only be invoked in certain cases and under specific criteria. Therefore, if we are dealing with an act that motivates its exercise, it is administrative in nature and the scope of this principle encompasses the expectations of law since it can result from the express recognition by the authority or from its silence, that is by tolerating, as in the above-mentioned case of the “Berlin widow”.

However, in legislative acts, this principle is valid only for acquired rights as allowing its application in the expectations of law would imply paralyzing legislative work or slowing down the development of the right to the detriment of society.

V. THE POSITION OF THE MEXICAN SUPREME COURT OF JUSTICE

We start from the premise that legitimate expectations represent the expectations of rights in the case of administrative acts and acquired rights when it involves legislative acts.²⁵ Based on this classification, the Supreme Court of Justice narrows the scope of application of the principle of legitimate expectations by differentiating between administrative and legislative acts.

As regards administrative acts, the principle is invoked to safeguard mere legal expectations because even when there was no rule regulating certain behaviors or circumstances (objective law) if the administrative authorities had previously issued an act in which it recognized a private individual the possibility of enjoying a right or committing a behavior or, as the case may be, had tolerated it or even kept silent for a prolonged period of time, it is thereby generated the expectation that the situation would be upheld. Then, regarding administrative acts, legitimate expectations must be understood as the protection of the expectations reasonably created in favor of the governed since the authority itself induced or tolerated said expectations from its actions or omissions, which were moreover maintained permanently over time. Hence, the individual assumed this behavior, but due

²⁵ Concerning administrative acts, the Mexican Supreme Court of Justice has granted individuals the prerogative of an expectation of rights, as shown in the following isolated opinion: “revalidación de permisos o autorizaciones para realizar una actividad de interés público. el particular tiene una legítima expectativa de derecho que obliga a la administración pública a motivar ampliamente (motivación reforzada) su negativa”. Tesis I.18o.A.81 A (10a.), *Gaceta del Semanario Judicial de la Federación*, Décima Época, July 2018, t. II, p. 1599.

to a sudden and unforeseeable change, that expectation was broken. Public or collective interests must then be weighed against private interests to see which will prevail since authorities may modify the decision in response to an imperative need of the public interest, but without infringing on the rights of the governed.

Our analysis must be closely related to:

...the principle of unilateral irrevocability of the administrative acts that contain favorable resolutions, within the framework of what is prescribed in Articles 2, last paragraph, and 13, section III, of the Federal Law of Administrative Contentious Procedure, in addition to Article 36 of the Federal Tax Code, from which it follows that the modification of a ruling in favor of an individual can only be modified before the competent court, *i. e.*, the Federal Court of Administrative Justice, specifically through the trial of harmfulness.²⁶

Therefore, legitimate expectations are considered the subprinciple that protects the expectations reasonably created in favor of the governed based on the hope that the authority itself conveyed with its actions or omissions, which were sustained over time and generated security in the individual in which the individual's behavior adjusted (expectation) but that, due to a sudden and unforeseen change, said expectation was broken.

It is clear that regarding those legislative acts, legitimate expectations:

Should be invoked only under the perspective of non-retroactivity of the provisions enshrined in Article 14 of the Political Constitution of the United Mexican States because attempting to protect mere legal expectations against legislative acts would be equivalent to freezing the right, to its total or partial immobilization and subsequent definitive closure to social, political and economic changes, which would go against the democratic rule of law and the power of lawmakers to tailor the law to the changing needs of society and reality.²⁷

The above makes even more sense in a globalized world with a fast-paced technological dynamic.

Moreover, specifically in the tax sphere, its legislation is a matter for the Congress and, therefore, entails a wide margin of freedom in its design. Thus,

²⁶ Tesis 2a. XXXVIII/2017 (10a.), *Gaceta del Semanario Judicial de la Federación*, Décima Época, March 2017, t. II, p. 1386.

²⁷ Tesis 2a. XXXIX/2017 (10a.), *Gaceta del Semanario Judicial de la Federación*, Décima Época, March 2017, t. II, p. 1387.

there is not constitutionally protected right for the tax system to remain unmodifiable and static; on the contrary, it is indispensable for the public power to adapt tax regulations to public needs, always seeking the collective interest, which outweighs the individual interest of each taxpayer. Therefore, by guaranteeing the protection of the principle of general taxation, the ultimate aim of the State—the common good—is protected, but this can only be possible if the necessary financial resources are available. The constitutional reform on energy was specifically intended to bring about a trade opening that would allow Mexico to receive technology and investments that would make the State self-sufficient in hydrocarbons. Although the country potentially has the resources, it is necessary and very costly to extract them, and this requires capital. But it is not in the interest of generating economic development that we can accept an attempt to petrify the rules for the benefit of business interests and to the detriment of the State, and even less so in such a dynamic field where not only national factors, but also geopolitical interests, have an impact. Accordingly, legitimate expectation does not have the power to oppose lawmakers with mere legal expectations to question the constitutional regularity of the acts determining the establishment, modification or elimination of regulations on contributions, costs or prices because it is impossible for the taxpayer to expect that a rate, tariff or even tax system will remain unchanged in the future. We find this contrary to constitutional principles to do so.

Therefore, there are two reasons for which the possibility of enforcing to protection of legitimate expectations against acts of the legislative branch cannot be invoked:

1. Its application would imply the paralysis of the law and consequently the definitive shutdown to social change.
2. Processes of reform or enacting new laws must be in the public interest and not in the interest of private parties.

Legitimate expectation in national law must be understood as a sub-principle or manifestation of the principle of legal certainty as an interdiction or prohibition to arbitrariness or excess. Hence, the expectation generated cannot be modified capriciously, untimely and unpredictably by the authority, except when so required by the public interest, for which it is essential to justify and state the reasons, *i. e.*, to apply the “test of damage and public interest *ex officio*”. It is then necessary “to distinguish these differences and formulate a suitable and adequate classification of the information,

thus generating an individualized and pertinent rule for the case by applying the test of damage and public interest *ex officio*...”.²⁸

It is important to point out that the application of legitimate expectation must be qualified according to the case when it is invoked in defense of administrative acts. In legislative acts, it must be assessed whether it is an issue for legislators. Therefore, there can only be a violation of rights by the retroactive application of the rule and in that case, the legal sphere of the governed would be violated.

Specialization that arises every day in the law makes it possible to clearly identify allusive aspects of the application of the rules, where it is necessary to point out that in the interpretation of the constitutional text and general principles of law, they allow the judge to positivize such refined institutions as legitimate expectations in their resolutions, although not with the same background and development, but in the material results. Therefore, when our courts hold that legitimate expectations are the manifestation of the right to legal certainty in its aspect of interdiction or prohibition of arbitrariness or excess, then its different nuances be recognized, depending on whether it is invoked against administrative or legislative acts,²⁹ but the important thing is that its existence is recognized and that it can be invoked.

VI. THE PRINCIPLE OF LEGITIMATE EXPECTATIONS IN LEGISLATIVE ACTS *VERSUS* ADMINISTRATIVE ACTS

The principle of legal certainty, as mentioned, does not cover the need to indefinitely preserve the legal system established at a given historical moment since the social and economic dynamics are dialectic. The regulations by law that exclusively affect the future emergence of situations, rights or legal relations, in our opinion, do not condition the principle of protection of legitimate expectations because the governed cannot assume that laws must remain unchanged. It is essential for legislators to be ready to react to new scenarios, application of technologies and even correct the mistakes they may have made, always assuming that lawmakers will respond to the will of the people in a democratic regime since a democracy cannot exist if, when faced with a change in the legislative order, compensation could be

²⁸ Tesis 2006299. I.1o.A.E.3 K (10a.), *Gaceta del Semanario Judicial de la Federación*, Décima Época, April 2014, p. 1523.

²⁹ Tesis 2a. /J. 103/2018 (10a.), *Gaceta del Semanario Judicial de la Federación*, Décima Época, October 2018, t. I, p. 847.

demanded from the State under the argument that rights like trust in the previous law were transgressed. A statement of this type would paralyze energy economic activities. The road map of the changes that began late last century must be maintained where, from a legal perspective, the pursuit of objectives of general interest stands out, separating the operating companies from the political agents and technical authorities that regulate it. However, not only the economic aspect should be protected, but modern, clean and energy-efficient technologies must be sought so as to promote the reduction of greenhouse gases and mitigate climate change, factors that allow us to advance in research, development and innovation and this cannot be achieved by paralyzing the regulatory system.³⁰

Thus, the principle of legal certainty is a superior value that constitutes the very concept of the rule of law. It has even been asked whether the State must respond financially for a modification to the law, and the answer is no, because we should remember that this principle is the sum of certainty and legality, hierarchy and regulatory publicity, non-retroactivity and a deterrent to arbitrariness, which allows justice and equality in freedom, but never the immobility of the law. For this reason, lawmakers must prioritize clarity and not opacity in the regulatory content and must therefore avoid confusing and ambiguous situations to provide certainty.

We cannot say that the principle of legal certainty can protect the need to indefinitely preserve a legal system or provision that was established at a certain time and under certain conditions, but it must guarantee citizens' trust in adherence to and respect for the situations resulting from the application of valid rules in force. In terms of the procedural rules of the provision to be applied, it is the one in force at the time the regulatory assumption is made. Therefore, to argue that the State intends to give retroactive effects to a provision by applying the new rule to a situation that occurred previously, but that is updated in the procedure of calculation or price, is incorrect in our opinion.

In this context, the principle of expectations is a limit to the legislative power, but only in relation to the non-retroactive application of the new regulatory constructs, a right embodied in Article 14 of the Mexican Constitution. This article also implies the need to not freely repeal the rules that establish guarantees for the governed, but we cannot go to the other extreme and pretend that, invoking the principle of protection of legitimate

³⁰ Hernández-Mendible, Víctor and Orjuela Córdoba, Sandra, *Energía eléctrica: regulación de fuentes convencionales, renovables y sostenibles*, Venezuela, Editorial Jurídica Venezolana, 2017, p. 55.

expectations, compensation can be requested because lawmakers changed the law. Fortunately, there are no precedents in Mexico's jurisprudence or courts recognizing and declaring compensation for legislators' patrimonial liability, but it should be pointed out that the possibility of compensation would only apply to acts or rulings by the administrative authority when its actions are irregular.

VII. THE IMPLEMENTATION OF THE PRINCIPLE OF LEGITIMATE EXPECTATIONS IN THE FIELD OF HYDROCARBONS

In Mexico, after the constitutional reform of December 20, 2013, the reforms and additions to various provisions of the Political Constitution of the United Mexican States on energy were published, with amendments made to Articles 25, 27 and 28. The reform to Fourth Transitory Article established that for 120 calendar days following its entry into force, the necessary adjustments to the legal framework would be analyzed to enforce the provisions of the law in question, among which contracting modalities stand out.

Thus, on August 11, 2014, the Hydrocarbons Law was published in the Federal Official Gazette to regulate Article 25, paragraph four; Article 27, paragraph seven; and Article 28, paragraph four, of the Constitution concerning the oil industry and which were published in the Federal Official Gazette on November 29, 1958, but it was not until October 31, 2014, that the Regulations of the Hydrocarbons Law was published in the Federal Official Gazette.

In this context, the ruling is issued to set the methodology to determine the maximum prices of natural gas subject to first-hand sale. Published in the Federal Official Gazette on February 15, 2016, it entered into force on March 1, 2017, with Energy Regulatory Commission Resolution (CRE) RES/998/2015. In response, contractors filed *amparo* suits against the Decree by which the Hydrocarbons Law is issued and various provisions of the Foreign Investment Law, the Mining Law and the Public-Private Partnerships Law are amended, published in the Federal Official Gazette on August 11, 2014, particularly Articles 81, Section VI, 82 and Thirteenth Transitory Article of the Hydrocarbons Law. The CRE was one of the authorities held responsible in the various *amparo* proceedings and was sued for issuing and ordering the abovementioned resolution, as well as for issuing the preliminary draft and regulatory impact statement prior to such resolution and its sole annex. Petróleos Mexicanos was sued for implementing the above reso-

lution and violating the rights embodied in Articles 1, 14, 16, 25 and 28 of the Federal Constitution.

The central argument was that, while considering the estimated value of the price of natural gas in southern Texas, the new ruling considers the long-term relationship between the Houston Ship Channel, Henry Hub and southern Texas markets, as opposed to the arithmetic average previously used.

The CRE simply stated that such a ruling was because of the need for first-hand sales of natural gas to reflect the conditions of a competitive market, the opportunity cost and conditions to compete in the international energy market, but without saying how the changes made would contribute to reaching that end, so that the provisions have the same purpose but a different methodology. It was also argued that the absence of a reasonable period of time for the transition process to this new methodology violated its legal sphere.

In other words, Articles 81, Section VI and 82, as well as the Thirteenth Transitory Article of the Hydrocarbons Law, in accordance with RES/998/2015 and its sole annex, violated the rights of legality and legal certainty because they lacked the necessary justification, since before the new constitutional and legal framework applicable to natural gas prices, RES/524/2015 and its sole annex were in force, contemplating two different methodologies depending on the place where the first-hand sale took place, whether in Reynosa, Tamaulipas or in Ciudad Pemex, Tabasco.

Therefore, in the first-hand sale of natural gas conducted in Ciudad Pemex, Tabasco, the daily or monthly price of the maximum first-hand sales price in Reynosa, Tamaulipas, was taken as a basis and the netback rate applicable to the net rate from the Reynosa border to Ciudad Pemex was added to it. That is, the price was the same in one place and the other, only that the cost of transportation from Reynosa would be added. This is reflected in the opportunity costs and in the conditions of competition in the international gas market and even where the sale is made, but the new methodology to determine maximum first-hand natural gas prices was modified.

Thus, if we bear in mind that according to Article 25 of the Constitution, the State must guarantee the country's economic growth, it was argued that this methodology contravened rights and even violated Articles 33, 34 and 35 of the Charter of the Organization of American States and Article 26 of the American Convention on Human Rights, since Mexico has the duty to protect the economic and cultural rights provided in the Constitution, specifically the right to comprehensive development. As it is violated, when there is a rise in natural gas prices, this attitude must be analyzed

and reined in because it undoubtedly affects the entire production and sales chain, in addition to the fact that this measure was neither grounded nor justified as to why said amendment was made, which then led to an imbalance in the development of the private sector. Therefore, the new methodology is believed to be contrary to the spirit of Article 25 of the Constitution, as it slows down economic development and does not encourage fair growth; on the contrary, it generates an increase in electricity prices. Therefore, the ruling issued regarding Article 81, Section VI, Article 82 and the Thirteenth Transitory Article of the Hydrocarbons Law is deemed contrary to Article 28, third paragraph of the Constitution.

Under this context, the following were brought before Mexican courts as claimed acts:

- The discussion, approval, enactment, order of publication and endorsement of the Hydrocarbons Law, particularly Article 81, Section VI, Article 82 and the Thirteenth Transitory Article;
- The issuance of the regulation of activities referred to in Title Three of the Hydrocarbons Law, in particular with respect to the Seventh Transitory Article;
- The issuance of resolution RES/998/2015 and its sole annex;
- The preliminary draft of the methodology resolution and the regulatory impact statement attached thereto, and
- The invoice showing the increase in the gas.

All the above, under the argument of that the principle of legal certainty and legitimate expectations was violated.

We will begin by pointing out that it is questionable as regards the invoice that there is no conclusive evidence to determine if the plaintiff knew about the invoice on the date the digital tax receipt was issued. In these cases, two moments can be identified: the first, in attaching the digital Tax Administration Service seal; and the second, placing the voucher at the disposal of the taxpayer for which it is issued and claims to argue that it was aware of the acts that are claimed, not on the date of issuance, but until the corresponding payment was made. Then, it is not possible to indicate that the act was known until the corresponding payment was made since it is necessary for the invoice to be processed for it to be issued. On the other hand, Pemex's issuing the invoice is not an act of authority for effects of the *amparo* because the company's action does not mean that it was performed as an authority since it was carried out in a commercial relationship and is therefore an act between private parties.

It should be established that the Energy Regulatory Commission has the authority to supervise the regulated activities and, among others, to take measures like issuing general provisions for the regulation of the activities set forth in the Hydrocarbons Law, including the terms for providing services and determining the applicable considerations, prices and tariffs, except for the activities of retail sales, liquified petroleum gas (LP), gasoline and diesel. Therefore, it is incumbent on the CRE to issue the pertinent resolutions and therefore Resolution 998, issued in 2015, is legal and constitutional.

In this way, the regulations should contemplate the applicable taxes, the opportunity cost and the competitive conditions of the international market. Hence, the Regulatory Energy Commission can establish the generally applicable methodology for calculating the considerations, prices or tariffs applicable to goods or services that cannot be traded on the international market, whereby the methodology should consider an estimate of efficient costs to produce the good or provide the service and obtain an acceptable return that reflects the opportunity cost of the capital invested, the estimated cost of financing and the risks inherent to the project.

Thus, first-hand sales of hydrocarbons, oil products and petrochemicals will be subject to asymmetric regulation prices issued by the Energy Regulatory Commission, in accordance with the provisions of the Law of Income on Hydrocarbons. In addition to all of the above, the opportunity cost and the conditions of competition in the international market should be taken into account. On the other hand, the third paragraph of Article 28 of the Mexican Constitution states that the laws will set the bases for establishing the maximum prices of articles, materials or products needed for the national economy or for mass consumption; that is, the constitutional text empowers ordinary legislators to use ordinary laws to regulate the determinations of the maximum prices of goods or services needed for national economy or mass consumption so that the corresponding regulatory aspects are delegated to the laws issued by Congress. Through them, the mechanisms, procedures and authorities in which such power can be exercised may be established.

In view of the above, we believe the principle of legal certainty is not affected because based on the provisions of the Hydrocarbons Law, the governed have the certainty of the instances in which the Energy Regulatory Commission can and must establish the maximum first-hand prices for the sale of natural gas, as well as the cases in which such authority can be exercised by the Federal Executive branch. Attempts have been made to argue that there are inconsistencies between the provisions of Article 9, Sections I and II of the Federal Antitrust Law and Article 81, Section VI, Article

82 and Thirteenth Transitory Article of the Hydrocarbons Law, by trying to prove the violation of the principle of certainty because there is no certainty as to who the competent party is to establish maximum prices for first-hand sales of natural gas. Such attempts are not valid because Article 9 of the Federal Antitrust Law stipulates that the determination of the maximum prices of goods and services necessary for national economy or mass consumption corresponds solely to the Federal Executive Branch, who, under the terms of Article 28 of the Constitution, may determine by decree the goods and services that may be subject to maximum prices as long as there are no conditions of effective competition in the corresponding market while the Commission is the body to issue the statement as to whether there are conditions of effective competition or not.

Therefore, the Ministry, without affecting the powers of other agencies or entities and prior opinion of the Commission, will set the prices corresponding to goods and services based on criteria that prevent supply shortages. So, it is feasible to impose maximum prices for goods and services necessary for the national economy or mass consumption, but for this, it is essential for the Commission to determine, through the corresponding statement, that there are no conditions of effective competition. As a result of said statement, the Federal Executive Branch can then determine prices by decree.

To this end, the Congress expressly empowered the Energy Regulatory Commission to determine the maximum first-hand sale prices of hydrocarbons, oil products and petrochemicals and even to establish the corresponding methodology so as to limit Pemex's dominant power to the extent that greater participation of economic agents is achieved in a way that encourages market development and competition. Accordingly, Article 9 of the Federal Antitrust Law grants an exceptional power to the head of the Federal Executive Branch, which can only be exercised after the Federal Antitrust Commission issues a statement indicating that there is no effective competition, in which case the Mexican President can set the maximum prices for the sale of goods and services.

Thus, secondary laws on hydrocarbons, oil products and petrochemicals empower the Energy Regulatory Commission to issue, in principle, the regulations on the applicable considerations, prices and tariffs so as to encourage the participation of new parties in the energy sector and open up the market.

The Hydrocarbons Law contemplates the common and particular assumption of competence to regulate such matters while the provision in the Federal Antitrust Law is a rule of exception for specific cases established

by law; therefore, there is no violation of the principle of legal certainty. In contrast, the provisions are compatible and complement each other as to whether the Energy Regulatory Commission has the power to regulate first-hand sales of hydrocarbons and to determine the methodology and prices of these goods. It should be noted that as a coordinating regulatory body on energy issues, belonging to the centralized public administration, with technical, operational and administrative autonomy to regulate and promote the efficient development of, *inter alia*, the transportation, storage, distribution, compression, liquefaction, regasification and sale to the public of oil, gas, natural gas, liquefied gas, petroleum, petroleum products and petrochemicals, it is therefore a body that has been constitutionally granted technical authority. The commission is also responsible for regulating the national energy sector, which includes the gas, refined products, hydrocarbon derivatives, and electricity industries. Therefore, there is no violation whatsoever,³¹ as argued by the governed.

As to the argument seeking to give permanence to the provision that establishes the methodology to determine gas prices with Resolution 998/2015, costs are indeed increasing. However, no violation of the principle of legitimate expectation can be alleged since the terms of the contract are not modified and, when the logistics change, it is necessary to adjust calculation procedures, but no right is violated because prices in the oil products market are driven by factors, even at the international level, and in the logistics for their transportation, there are contingencies that the market must recognize and assume. Therefore, the law must regulate new scenarios to prevent potential abuses or arbitrariness. To understand it differently would imply accepting that the markets are static or that lawmakers would have to undertake a case-by-case approach to be able to reflect all the scenarios that might be considered. This is an impossible task, especially considering that these types of markets are extremely dynamic.

In addition to this, it must be recalled that Article 25 of the Constitution does not give the governed any individual guarantee to use the *amparo* proceedings to demand that the authorities adopt certain measures to comply with the principles pertaining to their fundamental rights. Therefore, no violation can be claimed in economic terms when the authorities issue specific measures in this field in order to ensure the country's growth and development as in this case. Hence, the concepts of violation invoked by the plaintiffs are unfounded since they are not a constitutional or human right susceptible of being restored through an *amparo* proceeding.

³¹ See the judgment of *Amparo en revisión 29/2018*, quejosa y recurrente Caleras Bertrán, S. A. de C. V.

However, we feel that without the authority being obliged to do so, it was feasible to set a reasonable period of time for the transition process. Therefore, the amendments to Articles 81 and 82 and the Thirteenth Transitory Article of the Hydrocarbons Law do not violate the right to the economic development of the State when allowing an increase in prices in the first-hand sales of natural gas. The authority is then not obligated to consider the principle of legitimate expectation in adopting economic measures and expect legislators to include all the necessary elements to determine the price of natural gas. This is not possible since, as mentioned above, the variable of these types of markets are in constant flux.

Above all, we must consider that energy issues are related to a structural change of the State's economic model seeking the participation of new economic agents in the energy sector and undoubtedly increased logistics costs for the sales of gas is an issue intimately linked to economic aspects, including "economic costs". Therefore, legislators cannot provide a detailed definition of each of the words or terms used in the text of the law. Consequently, this argument is unfounded when claiming the violation of the principle of legality in terms of legitimate expectations.

In hydrocarbons issues, the violation of the principle of legitimate trust may be invoked when a provision that entered into force after the signing of the contract is invoked and the new provision modifies the terms of the contract. Since hydrocarbons are a strategic sector for Mexico, public interest must always prevail over that of the contractor, but the principle of *pacta sunt servanda* cannot be violated. In these cases, the principle of legitimate expectations "does not apply in cases in which the law confers the authority a wide margin of discretion to regulate situations characterized by the absence of a protected right in favor of the governed, which enables the relative legal order to be preserved without modifications".³² This is the spirit of the agreement and contractual participation, unlike other issues that are not strategic in nature, where it can even be weighed in the light of conforming interpretation.

VIII. CONCLUSIONS

The principle of legitimate expectation is a sub-principle derived from the principle of legal certainty embodied in Article 16 of the Mexican Constitution.

³² Tesis I.1o.A.E.248 A (10a.), *Gaceta del Semanario Judicial de la Federación*, Décima Época, February 2019, t. II, p. 2925.

The expectation of a right must be understood as the claim or hope that a given situation will come about to subsequently generate a right, but it can never be understood as an acquired right because, even when demanded, public interest will prevail in the behavior of the authorities.

In their decisions, Mexican courts have indicated that the principle of legitimate expectation must be understood as the protection of reasonably created expectations in favor of the governed. This is closely tied in with the principle of unilateral irrevocability of administrative acts comprising resolutions that benefit the governed.

The principle of legitimate expectation in administrative acts does not provide indefinite protection in relation to the regulatory framework in force in a given space and time, but it does require that provisions not be applied retroactively. In other words, a rule issued *a priori* cannot modify or affect a legal situation concluded in the past.

In matters of hydrocarbons, the principle of legitimate expectations does not apply to the acts of legislators and even less so to claim compensation because it exercised its duties, which are to legislate, based on new conditions of competition in the international gas market.

The methodology of general application to calculate the considerations, prices or tariffs falls under the authority of the Energy Regulatory Commission. Therefore, exercising its authority in no way transgresses the content of the clauses since only the logistics changed, implying that the calculation procedures were updated.

Based on the origin of the principle invoked, which emerged in German law, in ordinary and constitutional case law and then became part of the case law of the Court of Justice of the European Communities with different nuances, under no circumstance is it accepted that a rule must remain static in the acts and rulings of the authority, under the argument of relying on legal expectations. Still less can the legislator be expected to petrify the rule since it must evolve based on social and economic dynamics.

The principle of legitimate expectation, which is constitutionally based on Article 16 and stems from the principle of legal certainty, cannot be invoked against acts of authority that modify provisions based on resolutions intended to make the law more dynamic, and even less so can legislators be asked not to enact legislation in order to maintain a status of personal benefit or comfort.

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