PART FOURTH

OIL & GAS SECTOR

THE TAXONOMY OF UPSTREAM CONTRACTS IN MEXICO'S HYDROCARBONS INDUSTRY

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Summary: I. *Introduction.* II. *The internationality of contracts.* III. *Legal nature.* IV. *Structural elements*. V. *Minimum necessary regulation*. VI. *Conclusions*. VII. *Bibliography*.

I. Introduction

The structural energy reform implemented in Mexico[1] has marked a new constitutional and legal stage in the protection of the country's hydrocarbons. According to the current text of the constitution and although they are regarded as strategic for the nation,[2] the exploration and extraction of these non-renewable resources, as well as the economic benefits resulting from these activities, may be carried out and shared with national or foreign collective legal entities through various contractual arrangements,[3] making a systematized analysis of their structures and nature essential, due to their legal, economic and social implications.

Thus, we pose the hypothesis that contracts for hydrocarbons exploration and extraction in Mexico are hybrid figures in that they are protected by a special regime, they are mainly regulated by administrative law and their fulfillment is governed by private law, but under a common international framework, requiring interpretation from an interdisciplinary per-

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1 Published in the *Diario Oficial de la Federación*, on December 20, 2013.

2 *Constitución Política de los Estados Unidos Mexicanos*, Article 28, paragraph IV, published in the *Diario Oficial de la Federación* on February 5, 1917.

3 Transitory Article 4 of the Constitutional Energy Reform, published on December 20, 2013.

spective that confirms their *sui generis* legal nature, framed within energy law as an independent branch of legal science.

The general aim of this paper is to analyze the characteristics and aspects related to hydrocarbons exploration and extraction contracts so as to establish their legal nature, components and structures because although the international scope does not have a predominant specific legal framework of protection and configuration of such contracts, it is possible to delve into their generally accepted structures and components by the parties in the industry.

II. The internationality of contracts

Globalization has led to the economic interdependence of nations and the creation of an international policy geared toward entering into treaties that facilitate regional or bilateral trade agreements, which in turn allows the creation of contractual relationships between individuals from different nationalities or between these individuals and nations themselves. At the same time, the legal field has adapted to such fast-paced changes brought about by the so-called "global village".

While it is true that the phenomenon of globalization primarily revolves around economic issues, in the legal sphere it has caused legal provisions, i.e., constitutional, commercial, civil, criminal, tax, social security, labor, etc., to be influenced by the geopolitical, economic, social and technological rearrangements generated especially in the last decade of the 20th century and in the years that have passed since then. In the formal order, there is evidence of the breaking down of political constraints with the loosening of social and economic systems so as to facilitate the implementation of commercial practices around the world that break with the formal patterns traditionally conceived by national legal systems and such a break has been encouraged. In the legal order, this has been brought about through the action of international bodies that prepare the non-formal legal and economic development frameworks to regulate such practices.[4]

As a result, multilateral agreements become more complex because their characteristics and content must be organized according to several variables, such as the national legal framework, the type of business involved, the nationality of the contracting parties, the origin of the economic resources, and the volume of the capital, among many other aspects. This is why Darío Lamanna states that "from the legal point of view, industry

[4] Castrillón y Luna, Víctor M., *Contratos mercantiles*, Mexico, Porrúa, 2014, p. 67.

activities are characterized by the presence of complex contractual systems between the various actors".[5]

On the subject of international contracts, Jorge Oviedo highlights one of the more controversial points, centered on the fact that "we can find with different legal answers for the same factual situation, as in the rules related to capacity, the validity and making of contracts, the execution of obligations and resulting effects, among others".[6]

Precisely because of this author's statement, there has been an attempt to strengthen the standardization of principles and international trade contracts. Hence, the need arises to have consistent rules that can be applied to the transaction, regardless of the nature and nationality of the person involved in the act, or the location of the goods concerned of the business, or even the different political-economic systems. In this way, the legal problems caused by trying to find the applicable law of the contract, as well as the court and the applicable law to regulate any eventual legal conflicts that may arise, are avoided.[7]

Likewise, contracts known as "oil contracts", entered into between States and companies to compete for oil and other hydrocarbons concessions or contracts in countries where investments are made:

> …are a challenge for international law, from which the theories that form part of the study of this branch of law emerged and which has been accompanied by the mechanisms for dispute resolution that give rise to international arbitration and many other significant changes in the world oil market.[8]

For this reason, the international community has also undertaken the task of creating clusters of countries in the form of economic and political blocs, including *a)* the European Union (EU); *b)* the Southern Common Market (MERCOSUR); *c)* the Andean Community (CAN); *d)* the Carib-

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[5] Lamanna, Darío G., *Aspectos jurídicos y contractuales de la industria petrolera*, Mexico, Lid Editorial Mexicana, 2017, p. 31.

[6] Oviedo Albán, Jorge, "La unificación del derecho privado: UNIDROIT y los principios para los contratos mercantiles internacionales", a presentation given at the Seminario Internacional "Compraventa Internacional", Bogota, Colombia, Pontificia Universidad Javeriana, Colombia, Aula Mutis del Colegio Mayor de Nuestra Señora del Rosario, May 16, 2002.

[7] Vásquez del Mercado Cordero, Óscar, *Contratos mercantiles internacionales*, Mexico, Porrúa, 2011, p. 289.

[8] Arroyo Chacón, Jennifer Isabel, *Retos del Derecho Internacional del Petróleo frente a la preocupación ambiental y las nuevas fuentes de energía en Centroamérica*, p. 20, February 2017, available at: *http://www.oas.org/es/sla/ddi/docs/curso_derecho_internacional_2017_materiales_lectura_Jennifer_Isabel_Arroyo_Chacon_1.pdf.*

bean Community (CARICOM); United States-Mexico-Canada Agreement North American Free Trade Agreement (USMCA).

These are instruments whereby States agree on the clearest possible rules to regulate commercial interactions between their own countries and individuals of different nationalities, as well as the mechanisms for interpreting contracts and settling any disputes that may arise.

1. *International contractual principles*

The contracts with elements of internationality are normally based on the general principles of most contracts and protected by national legal systems. However, due to their complexity and the dynamics of world trade, they are also based on principles that must be accepted by the other members of the international community and that contribute to the better functioning of these legal relationships. These principles are set out below:

A. *Consent*

As Sarmiento and Florez point out, this principle is known as the aptitude or moral disposition to do something. In unilateral legal acts we speak of will; in bilateral acts, it is more precise to speak of consent, which tends to establish some kind of legal effect.[9]

In other words, based on this principle, the persons who enter into the contract act must and may bind themselves in the way they so decide as the most important premise is full knowledge and understanding of the scope of the legal consequences of the expression of their will, beyond the form in which their converging wills are expressed.

On this principle, it is important to stress the words of Carmen Otero, who said that "the limits on the autonomy of conflictual will, which will indirectly condition those that exist for the autonomy of material will, shall depend on the rule for determining the applicable law used by the entity for settling disputes arising during the life of the contract".[10]

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[9] Sarmiento Bejarano, Roberto and Flórez Aristizabal, Eduardo, *Principios rectores de los contratos civiles y mercantiles*. Professor Level Research Work for a Law Degree, Colombia, Universidad de la Sabana, 2002, p. 71.

[10] Otero García-Castrillón, Carmen, "Consideraciones sobre la ley aplicable a los contratos petrolíferos internacionales", *Revista di Diritto Internazionale Privato e Processuale*, Italy, April-June 2009, p. 356, available at: *https://eprints.ucm.es/9223/1/Commenti-Otero.pdf.*

To illustrate the above statement, we can evoke Clause 26 of the Contract for the Exploration and Extraction of Hydrocarbons under the Deepwater License Modality, entered into by the Mexican Government through the National Hydrocarbons Commission (CNH) and the China Offshore Oil Corporation E&P Mexico, S.A.P.I. de C.V. company,[11] in which number 26.1 states that the applicable regulations shall be governed according to Mexican laws, but this does not prevent it from being aligned with the provisions of subsequent 26.5 where the parties agreed that any controversy arising from or related to this contract shall be resolved through arbitration in accordance with the United Nations arbitration rules on trade laws.

B. *Custom*

Custom can be defined as "a set of legal provisions arising from the more or less constant repetition of consistent acts".[12] And it is precisely this habitual nature that makes custom used and accepted as a rule governing legal relations. In order to be considered a contractual principle and a source of law, the custom must be:[13] consistent, public, repeated and specific.

C. *Clausula rebus sic stantibus*

The term of reference has been accepted by doctrine and national legislations, most of which have accorded it a letter of acceptance because although every contractual agreement must be fulfilled in the form and terms agreed upon by the parties, it is also possible that social, economic or political circumstances suffer changes after the signing of the contract. This may cause disproportionate obligations for one party, thus making compliance much more onerous than the real motivation and expectations had at the time of expressing their will. On this subject, Valencia Zea has said that:

> Contracts must be executed in the manner agreed upon by the contracting parties. But it may be that in the interval between the signing of a contract and

[11] Contract number: CNH-R01-L04-A1.CPP/2016. There is currently the CNH resolution.E.29.002/2021, concerning the procedure for early termination of a part of the committed contractual area, issued on 22 April 2021.

[12] Torres, Abelardo, *Introducción al derecho*, 5th ed., Buenos Aires, Abeledo-Perrot, 1965, p. 21.

[13] Sarmiento Bejarano, Roberto and Flórez Aristizabal, Eduardo, *Principios rectores…*, *op. cit.*, p. 96.

> its execution, an unforeseen event may occur that significantly alters the balance that existed between the benefits at the time of celebrating said contract. A similar situation may present itself in supply contracts and in contracts for successive or recurring services. In this respect, since time immemorial people have defended the idea that the balance of benefits existing at the time of the contract must be upheld during its execution, which indicates that when, due to extraordinary circumstances, such balance is broken and one of the contracting parties is significantly affected, said party has the right to have the benefits reviewed in name of the basic principles of equity.[14]

Hence, it bears mentioning that the Mexican Federal Judiciary has issued the following interpretation: "Article 78 of the Code of Commerce does not demand any formality or requirement for commercial contracts to be valid since it only establishes that these must be fulfilled in the form and terms that the parties wished to bind themselves". Therefore, it is clear that said legal provision embodies the principle of *pacta sunt servanda*, which implies that what was stipulated by the parties, however established, must be carried into effect. Therefore, it is indisputable that, in the case of commercial acts, it is not possible to apply the theory of unforeseen contingencies, which holds that the courts have the right to suppress or modify contractual obligations when the conditions of execution have been changed by the circumstances, without the parties having been able to foresee this change that medieval canonists enshrined in the *clausula rebus sic stantibus* since such principle is contrary to that enshrined in the aforementioned precept.[15] Nonetheless, it is true that there are contracts or legal relationships that, due to their particular characteristics or origin, are more susceptible to present drastic variations that may be excessively onerous for some of the parties, such as the contracts related to fossil resources. For such cases, the *clausula rebus sic stantibus* is a way to make these agreements more flexible for the sake of the preservation of the business and trade relationships.

D. *UNIDROIT principles*

Hernany Veytia poses a crucial question: How is it possible to avoid that, in different parts of the world, rules conceived in the international sphere are interpreted differently? The author points out that the answer is

[14] Valencia Zea, Arturo, *Derecho civil. Parte general y personas*, Bogota, Temis, 1996, pp. 167 and 168.

[15] Tesis III.2o.C.13 C, Aislada (Civil), *Semanario Judicial de la Federación y su Gaceta*, Novena Época, t. VIII, September 1998.

found in the principles of the International Institute for the Unification of Private Law (UNIDROIT), which are being widely accepted in academic circles and in practice among lawyers and businesspeople.[16]

In contrast, there is a school of thought that questions the judgments and opinions on the efficiency and enforceability of the UNIDROIT principles,[17] arguing that these are not issued by a national authority, much less by a legislative body, thus making their enforcement uncertain.

On this last point of criticism, Jorge Oviedo Albán argues:

> The source of the binding nature of the UNIDROIT principles is found in the autonomy of the will of the parties as a guiding principle of contract law, although it also notes that some international courts have found them applicable to contracts because they constitute general principles of international trade contracts recognized in various legal systems throughout the world.[18]

It is precisely the extraterritoriality of international contracts, the distance normally found between the contracting parties, the current information and communications technologies used to make the agreement and the different legal frameworks that may be related, which makes this type of legal acts even more complex in its composition, execution and interpretation. However, as Kozolchyk states, the effectiveness of these figures depends on the analysis carried out by the authority since within the legal framework of nations, the legislative principles governing the interpretation of trade contracts are few, and their wording is so general that their application requires serious analytical effort by the contracting authority and the legal doctrine.[19]

III. Legal nature

Considering the structure of the hydrocarbon's contracts celebrated and the national and international legal framework in which they are framed, studying them from a single specific branch of law would have a limited scope, which

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16 Veytia, Hernany, "El capítulo uno de los principios del UNIDROIT. Disposiciones Generales", *Contratación internacional: comentarios a los principios sobre los contratos internacionales del* UNIDROIT, Mexico, UNAM-Universidad Panamericana, 1998, pp. 36-38.

17 Principios del UNIDROIT, available at: *https://www.UNIDROIT.org/spanish/principles/contracts/principles2010/blackletter2010-spanish.pdf.*

18 Oviedo Albán, Jorge, "Los Principios UNIDROIT para los Contratos Internacionales", *Díkaion. Revista de actualidad jurídica*, Colombia, Year 16, No. 11, 2002, p. 101.

19 Kozolchyk, Boris, *La contratación comercial en el derecho comparado*, Madrid, Dykinson, 2006, p. 252.

would not fully cover their study or their characteristics. To uphold this stance, we address the following branches of law, whose principles and institutions contribute to the essence, purposes and protection of contracts for the exploration and extraction of fossil resources, subject of this academic paper.[20]

1. *Administrative law*

Referring to the study in this field of law, Miguel A. López Olvera notes: "A distinction must be made between the fundamental principles that form the basis of the legal system and are found in the Constitution as well as in supranational sources, and those institutional principles that derive from a given institution based on its organizing idea".[21]

Following the abovementioned author, administrative law is governed by the following principles.[22]

Supremacy of the law: which expresses the subordination of the administration to the existing laws and means that it must act according to these laws and must not adopt any measures contradicting them.

Of legal reserve: according to this principle, the administration may only act if it has been so empowered by a law.

Within the framework of the doctrine of this branch of law, there is the need to clarify what an administrative contract is and what it consists of. Miguel A. Bercaitz holds that administrative law contracts are understood as those that:

> …are entered into by the public administration for a public purpose, a circumstance by which they can confer rights and obligations to an individual contracting party with regard to third parties, or that, in their execution, may affect meeting a collective public need, which is why they are subject to rules of Public Law exceeding those of Private Law, which place the contracting party of the public administration in a situation of legal subordination.[23]

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[20] For more details see: Lázaro Sánchez, Iván, *Los contratos petroleros. Un nuevo paradigma constitucional en México*, México, IUP-UJAT, Tirant lo Blanch, 2019.

[21] López Olvera, Miguel Alejandro, "Los principios del procedimiento administrativo", Cienfuegos Salgado, D. and López Olvera, M. A. (coords.), *Estudios en homenaje a Don Jorge Fernández Ruiz*, t. I, *Derecho administrativo*, Mexico, UNAM, 2005, p. 178.

[22] *Ibidem*, pp. 113 and 114.

[23] Bercaitz, Miguel Ángel, *Teoría general de los contratos administrativos*, 2nd ed., Buenos Aires, Depalma, 1980, pp. 246 and 247.

The Federal Judiciary makes a distinction between administrative contracts and contracts governed by other branches of the law, clarifying that:

> To determine the nature of an administrative contract as opposed to a civil or commercial one, certain factors must be taken into account. In private contracts, the will of the parties is the supreme law and their object is private interests, while in administrative contracts, social interest is paramount and their object is public services. In private contracts, there is equality of the parties; in administrative ones, there is inequality between the State and the contracting party. In private contracts, the clauses are those that naturally correspond to the type of contract; in the administrative ones, exorbitant clauses are given. In private contracts, the jurisdiction to settle disputes lies with ordinary courts; in administrative ones, special jurisdiction intervenes, either in administrative courts, if any, or at the administrative seat itself, according to the procedures established by law or as stipulated in the contract itself. In summary, in order to have the distinctive characteristics of an administrative contract, the following elements must exist: 1) social interest and public service; 2) inequality between the parties, of which one must necessarily be the State; 3) the existence of exorbitant clauses; and 4) special jurisdiction.[24]

It is necessary to point out that the perspective of a solely local administrative law has been changing as government administration and individuals have been increasingly interacting through legal relations that require standardization. On many occasions, this has led to blurring the distinction between public and private activity.

Despite the peculiarities of national administrative systems, it is very difficult at present to question the existence of a global administrative law, as well as its far-reaching impact on national administrative systems. One of the areas that best reflects the process of creation, development and consolidation of this global administrative law is undoubtedly that of public procurement.[25]

2. *Civil law*

While it should be stressed that civil law is the branch that provides the conceptual content to institutions in other areas of law, it is also true that, given the scope and diversity of this subject, it is very difficult to arrive at

[24] Tesis VI.3o.A.50 A, Aislada (administrativa), *Semanario Judicial de la Federación y su Gaceta*, Novena Época, t. XIV, October 2001, p. 1103.

[25] Moreno Molina, José A., *Derecho global de la contratación pública*, Mexico, Ubijus, 2011, p. 1.

a universal definition of civil law. Even so, all or almost all legal scholars agree in that it is: "The branch of private law, common to all men, which governs their relations as human beings, members of a family and subjects of an estate, including the regulation of their property and interpersonal relationships of a pecuniary nature, as well as the liquidation of their estate after death".[26]

One important civil law institution connected with the study and protection of individuals and their property is obligations, defined as "the legal need of a person, called debtor, to render to another, called creditor, an obligation to give, to do or not to do",[27] which are essentially based on the ownership and dispositions of personal rights and rights *in rem*.

Personal rights are the power to obtain a behavior from another person, which may consist of doing something, in not doing something or in giving something.[28]

Jorge A. Domínguez Martínez defines rights *in rem* as "the legal power that a person exercises directly or immediately over a thing, which allows the person to take full or partial advantage of said thing in a legal sense and is enforceable before third parties".[29]

Hence, such contractual figures are instruments created and based on the autonomous will of individuals and their free decision, by means of which they dispose of their property and rights within the limitations imposed by the law itself.

Based on the above, emphasis is placed on the fact that the essential components of contracts protected under civil law are the will of the intervening parties, and the only limits are not to pact anything unlawful or contrary to morality and good customs.

3. *Trade law*

Trade law is a complex branch stemming from the increasingly dynamic exchange of goods and services in line with the development and competitiveness of a globalized society. In the specific case of the Mexican legal system, there are legal activities and acts that are protected by special fed-

[26] Baqueiro Rojas, Edgard y Buenrostro Báez, Rosalía, *Derecho civil. Introducción y personas*, 2nd ed., Mexico, Oxford, 2010, p. 10.

[27] Bejarano Sánchez, Manuel, *Obligaciones civiles*, 6a. ed., Mexico, Oxford, 2010, p. 4.

[28] *Ibidem*, p. 2.

[29] Domínguez Martínez, Jorge Alfredo, *Derecho civil. Parte general, personas, cosas, negocio jurídico e invalidez*, Mexico, Porrúa, 2000, p. 323.

eral laws, but that establish the supplementary application of commercial and common law, as in the case of the Hydrocarbons Law which states that "Contracts for exploration and extraction shall be governed by the provisions of said law and its regulations. For the effects of their execution, commercial and common law shall be applicable in a supplementary way and if it does not oppose this law and its regulations".[30]

In this way, in the energy industry, special and general provisions come together for its protection, such as the Hydrocarbons Law, its regulations, the Federal Law of Economic Competition and commercial law. It is precisely due to such plurality where it is clearly observed that it is impossible to frame or protect contractual acts for the exploration and extraction of hydrocarbons in Mexico on an independent or specific basis since none of the branches of law analyzed so far fully covers its study and protection because it is perceived, on the one hand, as a strategic activity and, on the other, as a commercial activity with an international scope.

4. *Lex Mercatoria*

The legal framework and regulation of this industry in general and that of contracts for the exploration and extraction of hydrocarbons in particular are connected with public law and, in turn, with private law, without clearly knowing whether their nature is framed in one specific framework or the other.

The truth is that contracts of this type are governed according to their own characteristics and are conceived as bilateral legal acts of an onerous and protected nature, not only by national laws on the specific matter, but also by other complementary customary legal frameworks, such as the new *Lex Mercatoria*, which Oscar Vásquez defines as: "A new law with its customs and practices, which constitutes a spontaneous law, a new autonomous system, created by traders themselves for the fundamental purpose of avoiding the always conflicting application of the local laws of their respective countries in their international transactions".[31]

As Silvana Grande points out, *Lex Mercatoria* is not autonomous, as can be inferred at least from the fact that it is not applied exclusively, but as a complement to local law, or alongside trade customs and practices,

[30] Article 22, Ley de Hidrocarburos, Cámara de Diputados, *Diario Oficial de la Federación*, August 11, 2014. Last reform published May 20, 2021.

[31] Vásquez del Mercado Cordero, Oscar, *op. cit.*, p. 106.

the general principles of the most widely recognized conventions or the UNIDROIT principles.[32]

It is precisely on the effectiveness of this self-regulating framework for commercial contracts that Konradi and Fix-Fierro ask: Does the *Lex Mercatoria* exist as an autonomous corpus of transnational rules, separate from national law? And, if so, to what extent are said rules used in international legal practice? To the extent that they exclude national law? Or are they used concurrently with national law? Much of the debate on *Lex Mercatoria* revolves around these questions.[33]

That said, the above is a reality of the current context that, beyond the arguments for or against:

> …the Lex Mercatoria, enriched, perfected and consolidated, with its particular customs and practices, is cast as a spontaneous, autonomous and standardized law that naturally tends to distance itself from State regulations, in its attempt to provide a definitive solution to the new conflicts inherent to international trade.[34]

5. *Lex Petrolea*

Strategic in contemporary macroeconomy and of great importance due to the legal relationships that are established as a result of the agreements reached between States and the collective private entities hired or the alliances created to perform one, several or all of the aspects of the value chain of the energy industry, hydrocarbons have led organizations like the OECD, the IMF and the WB,[35] among others, to work on building a regulation to be integrated into a transnational legal ecosystem for the standardization and possible dispute resolution. This in turn would establish parameters and principles generally accepted by industry components as customs, practices and constitutive elements essential to their synergies and alliances.

In this sense, there is already talk of a *Lex Petrolea*, which somehow emerges as a particular branch of the new *Lex Mercatoria* and is also still being consolidated as an international standard of protection for the oil business.

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[32] Grande, Silvana, "La *Lex Mercatoria* en los Laudos de la Cámara de Comercio Internacional", *Díkaion. Revista de fundamentación jurídica*, Colombia, Year 22, No. 17, 2008, p. 241.

[33] Konradi, Wioletta and Fix-Fierro, Héctor, "La *Lex Mercatoria* en el espejo de la investigación empírica", *Boletín Mexicano de Derecho Comparado*, No. 117, 2006, p. 699.

[34] Vásquez del Mercado Cordero, Oscar, *op. cit.*, p. 109.

[35] These are the acronyms for the Organisation for Economic Co-operation and Development, the International Monetary Fund and the World Bank, respectively.

According to Tom Child, "*Lex Petrolea* should be understood as the continuing development of customary law relating to international oil and gas exploration and development".[36] For Talavera and Ferreyros, *Lex Petrolea* "is a species within the broader genus of *Lex Mercatoria*. In other words, it is defined as the set of rules that regulate the commercial practices of the international oil industry in its various forms".[37]

On the creation and initial development of the *Lex Petrolea*, Timothy Martin says that the term *Lex Petrolea* entered the lexicon of oil and gas legal literature more than a quarter of a century ago. The term first emerged in a landmark international arbitration case in 1982 when it was argued that international law applied to the oil industry in its disputes had led to a customary rule applicable to the industry which was called *Lex Petrolea* and began to be considered a type of particular branch derived from a more general one known as the new *Lex Mercatoria*.[38]

For John Bowman, four possible sources of that *Lex Petrolea* can be currently identified: *a)* national oil laws; *b)* international oil contracts; *c)* trade customs, and *d)* practices in the international oil industry.[39]

In addition to this, we agree that the international arbitration awards linked to the hydrocarbons industry are also an important source of *Lex Petrolea*.

One of the most important sources from which we can draw the principles that make up *Lex Petrolea* is international arbitration case law since, in recent decades with the proliferation of transnational oil activities around the world, a greater number of arbitral awards have been issued in disputes arising from investment contracts in oil activities. This makes it possible to study the rules and principles that arbitral courts have adopted and applied, and, therefore, to outline those precepts that can be considered part of the common customs and practices of the arbitration.[40]

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36 Childs, Tom, "*Lex Petrolea*", *The International Energy Arbitration Newsletter*, available at: *https://studylib.net/doc/8379649/lex-petrolea---king-and-spalding.*

37 Talavera C. Andrés and Ferreyros, Manuel, "Alcances preliminares para la aplicación de la *Lex Petrolea* en el Perú", *Forseti. Revista de Derecho*, Lima, 2015, No. 1, available at: *http://forseti.pe/revista/derecho-ambiental-y-recursos-naturales/articulo/alcances-preliminares-para-la-aplicacion-de-la-lex-petrolea-en-el-peru.*

38 Martin, Timothy, "*Lex Petrolea* in International Law", 2012, p. 1, available at: *http://timmartin.ca/knowledge/publications/.*

39 Bowman, John, Lex Petrolea*: Sources and Successes of International Petroleum Law*, available at: *https://www.kslaw.com/blog-posts/lex-petrolea-sources-successes-international-petroleum-law*, 2015.

40 Talavera C., Andrés and Ferreyros, Manuel, *op. cit.*, available at: *http://www.forseti.pe/revista/derecho-ambiental-y-recursos-naturales/articulo/alcances-preliminares-para-la-aplicacion-de-la-lex-petrolea-en-el-peru.*

If we examine the international construction of the customary framework, we can point to the 1987 ruling issued by an arbitral court in the case of Mobil Oil Iran Inc. v. Islamic Republic of Iran and the NIOC,[41] where it was found that the legality of the disputed expropriation should be considered from the standpoint of international law. Moreover, it was clarified that a contractual clause stated that the contract should be interpreted according to Iranian law, which the Court applied to the letter, arguing that this law is used to resolve issues of interpretation, but the principles of commercial and international law are the ones that govern all the other issues.[42]

In this regard, the arguments against this Latin definition, known as Lex Petrolea, which implies an extraterritorial system for oil business, must not be overlooked. As Terence Daintith points out:

> Since 1998, there has been a small but steady flow of articles employing the concept of "*lex petrolea*" to evoke the existence of a distinct, and distinctive, group of rules that govern —or might govern— international petroleum transactions and relationships, alongside applicable national and international law. This article argues that we should dispense with this concept, on the grounds that it is ill-defined, that there is little or no evidence to support the claims made for it, that it lacks any sound theoretical basis, and that it may be capable of employment in a way that damages legitimate interests of petroleum host states. We should certainly continue to look for common elements in international industry, state and arbitral petroleum practice that might guide future policy, agreements and dispute settlement in the field, but these can be adequately described in ordinary English ("transnational petroleum law") instead of bad Latin.[43]

However, the importance of the model contracts the industry has been using is undeniable in this design and development of the so-called *Lex Petrolea*. Said contracts are drafted and proposed by professional or specialized associations and are used more as guides since their content tries to reflect practices and terms commonly accepted by the oil community.

There are internationally recognized organizations with experience in the hydrocarbons sector that have prepared draft model or standard con-

41 The National Iranian Oil Co (NIOC) is the national oil company of the Islamic Republic of Iran.

42 Mobil Oil Iran Inc. *v.* Islamic Republic of Iran, *The American Journal of International Law*, vol. 82, No. 1, January 1988, pp. 136-143, available at: *https://www.jstor.org/stable/2202887?readnow=1&seq=5#page_scan_tab_contents.*

43 Daintith, Terence, "Contra la *Lex Petrolea*", *World Energy Law & Business*, pp. 1-13, available at: *https://academic.oup.com/jwelb/article-abstract/10/1/1/2807096?redirectedFrom=fulltext.*

tracts for each legal relationship to be used separately or combined into a single document in oil agreements, and that in general may refer to confidentiality, farmout, joint operation, dispute resolution, accounting procedures, and unitization, among others.

These practices are observed in the Mexican case, as in the Hydrocarbons Exploration and Extraction Contract in the form of a deep-water license signed between the Mexican government, executed through the CNH, and the legal entities known as Shell Exploración y Extracción de México, S. A. de C. V. and QPI México, S. A. de C. V. The clauses of this contract include agreements on change of operator (2.6), accounting reporting of benefits (2.7), unification procedures (9.1), applicable law and dispute resolution (26), and confidentiality (29).[44]

Among the specialized bodies that have advocated these contractual parameters, the following stand out.

The American Association of Petroleum Landmen (AAPL):[45] a US organization established in Fort Worth, Texas. This was one of the first bodies to develop model contracts for the hydrocarbon industry.

Petroleum Joint Venture Association (PJVA):[46] A body established in Calgary, Alberta, Canada. It provides a multidisciplinary forum for issues related to common projects linked to the development and extraction of hydrocarbons in Canada. It predominantly specializes in infrastructure.

Association of International Petroleum Negotiators (AIPN):[47] This organization brings together more than 1,500 members in 65 countries who represent themselves or represent national or international companies in the sector.

American Petroleum Institute (AIP):[48] This organization based in Washington D. C. was founded for oil and gas marketing. It has developed standards, industry statistics and contract models.

IV. Structural elements

From its initial stages, the energy industry requires a series of complex agreements and synergies that permit the location and commercial extraction of

44 Contract number: CNH-R02-L04-AP-PG07/2018. Contract active and in progress.

45 American Association of Petroleum Landmen, available at: *http://www.landman.org/*.

46 Petroleum Joint Venture Association, available at: *https://pjva.ca/*.

47 Association of International Petroleum Negotiators, available at: *https://www.aipn.org/*.

48 American Petroleum Institute, available at: *http://www.api.org/*.

hydrocarbons. Each project must build, operate and finance a numerous group of joint contracts around the original or main contract, which is the actual oil contract.

The OpenOil study[49] indicates that a wide range of public and private parties may be involved in the contracts, such as:

— Governments and their national oil companies.
— International oil companies.
— Private banks, mutual fund companies or other regulated or non-regulated financial institutions.
— Specialized exploration, drilling and maintenance services companies.
— Transportation, refining or trading companies.

It should also be considered that in shaping these agreements, the location of the place where exploration and extraction activities are planned to be carried out has a decisive influence as said places can be *a)* onshore; *b)* in shallow water and c) in deep and ultra-deep water.

It is highlighted that the components underpinning these agreements aim to reconcile the interests and perspectives of the contractual parties, which, in summary, are:[50]

a. Governments:

— Maximization of State revenue.
— Guaranteeing national supply.
— Technological development of the domestic content industry.
— Environmental protection.
— The contractor's fulfilment of the minimum work commitments.

b. Contractors:

— Proportionality between project risk and reward.
— Booking reserves.
— Contractual flexibility and regulatory stabilization.
— Ability to recover investment costs.

[49] OpenOil UG, *Contratos petroleros, cómo leerlos y entenderlos*, Berlin, 2012, p. 11, available at: *http://openoil.net/wp/wp-content/uploads/2014/03/OilContracts_ESP.pdf.*

[50] Grunstein, Miriam, *De la caverna al mercado, una vuelta por el mundo de las negociaciones petroleras*, 2nd ed., Mexico, Tirant lo Blanch, 2015, pp. 32 and 33.

— Minimal administrative control of the contract.
— International arbitration.

In this sense, delving further into the items that make up the content of upstream contracts, it can be said that the *specific structure* consists of the legal instruments normally organized according to a certain structure and content. The contractual parties involved in a hydrocarbons industry contract are the State and the contractor, both of which are described in detail below.

The State. The country that, through its competent government entity and subject to the internal rules of minimum necessary regulation, enters into a contract to carry out the first phase of the activities in the hydrocarbons industry.

The contractor. Who, for the effects of this legal relationship, must be a legal entity that, besides complying with the technical and financial requirements, specifically or primarily engages in the exploration and extraction of oil and other hydrocarbons.

The special law for the Mexican State oil industry considers the contractual parties to be Petróleos Mexicanos and any other State productive enterprise or private entity that enters into a contract with the National Hydrocarbons Commission (CNH) for exploration and extraction, whether individually or as a consortium, under the terms of the law.[51]

It must always be kept in mind that these legal relationships usually involve multiple individuals or groups with different scopes, participation and responsibilities, such as in the case of consortiums made up of operating companies and investment groups or partnerships, which essentially participate with the financial leverage of the initial economic obligations of the operating contractor.

1. *Terms and definitions*

This section, a common feature in the structure of contracts, has an important function as it serves to describe and analyze the conceptual and semantic scope of the technical, every day or official terms arising from the obligations established for the duration of the contractual agreements. This helps prevent confusion as to the responsibilities of each party, as well as the role of government bodies, thus saving time and money for those involved in legal relationships of this type.

[51] Article 4, Section X, of the Ley de Hidrocarburos.

2. *Essential purpose:Investment in exploration and development*

The main object of these contractual arrangements are the commitments assumed by national or foreign private collective legal entities, regarding their obligations to do (explore, appraise and extract), times or deadlines to do so, the specific place or field where they will do so, the techniques and ways of carrying out the work, the technology to be used, as well as the information on the costs and amounts of the investment.

Concerning the specification of the area or the field where the exploration, development and extraction works are to be carried out, countries through their governmental entities indicate in the contractual agreements the express commitment of the minimum works per period or phase of the contract in the specifically demarcated areas and detailing the geological and geophysical activities to be carried out.

Concretely, these clauses must establish:

> The demarcation and specification of the area or field where the exploration, development and extraction works must be carried out; the obligation of having a work and investment plan; the terms in which each phase must be carried out and its costs; the agreement to return to the State the areas that will no longer be used or required in the event that the search for the resource is not successful; the regular assessment and evaluation of any hydrocarbon discoveries and the plan for field development, as well as the contractors' obligation to provide the government with data and reports on a regular basis or when required in order to furnish information that facilitates decision-making processes.[52]
>
> Government decisions regarding the size of the blocks or contractual fields to be put up for tender that are directly related to the probability or lack thereof of finding oil fields since the larger the area of the contract, the greater the probability of finding hydrocarbons resources.
>
> The size and definition of the contractual area or concession that the government makes available to oil companies for potential exploration activity is of paramount importance in many aspects. One of the most important reasons is that contractual rights, as granted to oil companies, are limited to the specific area set out in the contract. This means that whatever has been agreed in the contract is only applicable in the area defined therein and nowhere else.[53]

52 OpenOil UG, *op. cit.*, p. 41.

53 *Idem.*

3. *Discovery of depositsand development plans*

The contracts addressed in this paper usually refer to this topic in clauses with terms like *commerciality decision, discovery, development and production*, or similar ones.[54] However, it is common for countries with more detailed regulations, as in the case of Mexico,[55] to stipulate in the clauses or in a special law itself that the contracting parties must inform the regulatory or technical bodies of the contracting State, so that these can in turn give their opinion and a decision can be taken consensually between the parties.

4. *Disclosure and reporting on data resulting from the contractual activities*

These clauses indicate the type of information to be provided to the host or contracting government while also ensuring that the latter has the right to inspect such data.

Each country has different regulations on the delivery or disclosure of the data gathered by the companies when exploring or extracting their hydrocarbons, which influences whether the disclosure of said data for the contractor's own business purposes outside the contractual relationship can be agreed upon or not.

5. *Applicable law*

As Daniel Casal notes, the contract models are based on the premise that the legal system at the place of operations allows the application of a foreign law to be agreed upon since it is common for parties of different nationalities to try to ensure that the applicable law is not that of any of them.[56]

In this regard, it must be said that in the use of their sovereignty, countries usually determine the legal framework the contracting parties must abide by, which is why the above-mentioned author recommends that:

If the agreement is made under the law of a third country, it is advisable for the parties to inquire as to: *i)* the provisions of that law; *ii)* the advisabil-

54 *Ibidem*, p. 47.

55 Articles 43 to 47 of the Ley de Hidrocarburos.

56 Casal, Daniel, "Panorama de los contratos de operación para la actividad hidrocarburífera", *Revista Argentina de Derecho de la Energía, Hidrocarburos y Minería*, Buenos Aires, Year 1, No.1, May-July 2014, p. 12.

ity of waiving renvoi, and iii) the existence of conventions that may make the law of one country the same as that of the other.[57]

6. *Environmental and health protection clauses*

More than a private agreement, these clauses are an international obligation that must be included in contracts concerning fossil resources and their exploitation, due to the potential damage or impact that this industry's activities can cause to the environment and to people in general.

In most nations, precautionary measures for environmental impacts are a matter of human rights, as well as a fundamental part of the minimum necessary regulation that must be defined in the body of extraction contracts given that through these clauses, which must coincide with national legislation and international treaties, the preventive actions of oil companies regarding the conservation of the other natural resources is also agreed upon. In this part of the contract, the importance of the concept now known as *corporate social responsibility* is evident, as it is based on the assertion that "organizations that respect this social awareness are legitimized for performing their activities. Therefore, it must be understood that the organization also has a social purpose".[58]

7. *Financial considerations*

It is undeniable that the complexity of the numbers in modern contracts coincides with the complex political and economic relationships in the oil industry. The rise of resource nationalism, the increased number of State-owned oil companies and the volatility of the oil prices indicate that governments are trying to keep as much money as possible while continuing to encourage investors to put their money into projects that might fail through no fault of their own.[59] But the basic premise in agreeing on these clauses is directly related to the risks that the contractor intends to assume in the search, development and extraction of hydrocarbons in the area, block or field contracted with the State. As explained above, the execution of a hydrocarbon-related contract implies the disbursement of large amounts of

[57] *Ibidem*, p. 13.

[58] Navarro García, Fernando, *Responsabilidad social corporativa: teoría y práctica*, 2nd ed., Mexico, Alfaomega Grupo Editor, 2012, pp. 52 and 53.

[59] OpenOil UG, *op. cit.*, p. 62.

money over an extended period of time, and the probability of unforeseen contingencies occurring and making the execution of the project even more onerous or, in the worst-case scenario, resulting in the loss of the invested capital.

Consequently, these calculations are roughly made in the oil industry, estimating the price at which oil can be sold, considering the time in which the oil will probably be extracted, whether the marketing will be handled by the State or directly by the contractor, which will depend on the type of contract signed, and which deductions should be made for *a)* the costs and expenses incurred by the contractor to carry out the project and *b)* the payments to the contracting State under the concept of *Government take*.[60]

It follows from the foregoing that, considering the different components that make up the contractual instruments in this financial sector, it is imperative to fully evaluate the objectives that the parties freely define, which must be adapted to the requirements and clauses that necessarily arise from the special or general rules of each nation.

V. Minimum necessary regulation

Since most nations consider hydrocarbons strategic natural resources, the forms and dynamics for conducting the first stage of the hydrocarbons industry, known in the sector as "upstream" and where the exploration and extraction of hydrocarbons takes place, are governed by the Constitution, as well as by special, general or supplementary commercial and civil laws. Accordingly, in its formulation, the minimum necessary regulation imposed by the national legal system must be observed, whereby the individual and specific objectives of the parties must be taken into account.

As a result of the reform to Articles 25, 27 and 28 of the CPEUM,[61] Mexico has established the following:

> …the Congress of the Union shall make the necessary adjustments to the legal framework in order to make the provisions in this Decree effective, including the regulation of contract modalities which shall be, *inter alia*: of services, of shared profits or production, or of license to carry out, on behalf of the Nation, the exploration and extraction of oil and solid, liquid or gaseous hydrocarbons, including those carried out by State-run productive companies

60 *Idem.*

61 Reform published in the *Diario Oficial de la Federación* on December 20, 2013. Constitutional text currently in force.

with private individuals, in the terms of Article 27 of this Constitution. In every case, the State shall define the contract model that best suits to maximize the Nation's income.

The law establishes the modes of consideration the State shall pay to its productive companies or to individuals for the exploration and extraction of oil and other hydrocarbons said companies may carry out on behalf of the Nation. Among other forms of compensation, the following must be regulated: I) in cash, for service contracts; II) with a percentage of the profit for shared profit contracts; III) with a percentage of the output obtained, for shared production contracts; IV) with the onerous transfer of hydrocarbons once they have been extracted from the subsoil, for licensing contracts; or V) any combination of the above. The Nation chooses the mode of consideration always with a view to maximizing revenues to ensure the greatest benefit for long-term development. The law also establishes the considerations and contributions to be paid by the State's productive enterprises or individuals and regulates the cases in which these parties are required to pay to the Nation for the extracted products transferred to them.[62]

As seen in the above precept, a minimum necessary regulation is set for the modes the State may choose or adopt to carry out exploration and production activities for its hydrocarbons by contracting private parties or its own productive enterprises.

Furthermore, as a result of the amendments to the Mexican constitution, the Hydrocarbons Law was enacted.[63] Article 19 of this law establishes the minimum stipulations that must be included in any type of contract entered into by the State through its competent public entity.[64]

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62 Transitory Article 4 of the Reforma Constitucional. Published on December 20, 2013.

63 LH, published in the *Diario Oficial de la Federación* on August 11, 2014.

64 Exploration and Extraction contracts must at least include clauses on: I. The definition of the Contractual Area; II. The Exploration and development plans for Extraction, including the time limit to submit them; III. The minimum work and investment program, if applicable; IV. The Contractor's obligations, including the economic and tax conditions; V. The effective term, as well as the conditions for its extension; VI. The procurement of guarantees and insurance; VII. The existence of an external audit system to oversee the effective recovery, if any, of the costs incurred and any other accounting involved in the execution of the contract; VIII. The grounds for terminating the contract, including early termination and administrative rescission; IX. The transparency obligations that enable access to the information contained in the contracts, including the disclosure of the considerations, contributions and payments contemplated in the contract itself; X. The minimum percentage of national content; XI. The conditions and mechanisms for the scaling down or return of the Contractual Area; XII. Dispute resolution, including alternative means of conflict resolution; XIII. The penalties applicable in the event of non-compliance with the contrac-

Hence, it follows that this minimum regulation in the drafting of hydrocarbons contracts, especially those related to exploration and production, is mandatory, making it essential to anticipate and understand it in order to duly define these legal relationships.

VI. Conclusions

As expressed and demonstrated in this paper, on it having been constitutionally established in Mexico, the participation of the private sector in the primary activities of the hydrocarbons industry value chain through the adoption of the contractual system has made it advisable to carry out a scientific study of the characteristics, scopes and repercussions of the current legal framework by which the Mexican State can create commercial ties with private, national or foreign collective entities so that as contractors they can explore and extract the fossil resources belonging to the Mexican State.

Considering that this study and analysis must be approached from the standpoint of energy law, seen as an independent branch of legal science, with its own principles and institutions that allow the effective and efficient protection of the relationships created within this globally important economic and strategic sector.

The legal treatment of international oil contracts is usually determined by a set of regulatory systems that in most cases are applied simultaneously and jointly. Beyond the fact that the parties use their contractual independence to set their respective material commitments by resorting to trade usages in the sector (*Lex Petrolea*), it is common for the choice of governing law clauses to opt for a combination of regulatory packages, which in most cases include the law of the forum and international law and/or its principles.[65]

Although contracts for hydrocarbons exploration and extraction emerged during the 20th century and are now widely used internationally, they are a new form of governance in 21st century Mexico, as has been pointed out by prominent researchers, such as Cárdenas Gracia, as a way of destabilizing the national economy and shifting it to the market economy.

Regardless of the above, it is a fact that as of 2013, Mexico is facing a new constitutional and legal paradigm where structural changes have been

tual obligations; XIV. The Contractor's and the operator's liability pursuant to international best practices. In the event of an accident, the Contractor's or operator's liability shall not be limited if fraud or fault is proven against them, and XV. The observance of international best practices for the operation of the Contractual Area.

65 Otero García-Castrillón, Carmen, *op. cit.*, p. 386.

made regarding the oversight of these activities, the very essence of which is the eligibility of private investment to participate, speculate and obtain economic benefits for locating, extracting and harvesting the nation's hydrocarbons, which is currently carried out through a contractual system in which private parties can participate without restrictions of nationality.

In this sense, we would like to point out that at the time of concluding this paper, the Mexican State has awarded and signed 107 contracts with national and foreign companies and consortiums for the exploration and extraction of oil and gas from Mexican fields through the tender processes known as *Rondas Mexico*. It should be highlighted that in the agreements signed up until the last tender held, *Ronda 3.1*, the Mexican government has decided to use only two types of contracts: Shared Production (31) and License (76).

From the above, it can be noted that there will undoubtedly be a gradual readjustment of the structure and types of contracts chosen by the government in accordance with the current economic and energy policies implemented. This, in turn, has allowed us to posit the theory that the contracts for the exploration and extraction of hydrocarbons in Mexico are figures that although with special regulation, their protection is framed in both administrative law and private law, but under an international customary framework. Therefore, their structure and interpretation require an interdisciplinary perspective, allowing us to affirm their *sui generis* legal nature, protected within energy law as an independent branch of legal science.

We conclude by contributing our opinion that, in order to ensure efficiency in choosing the type of contract for an exploration and extraction area or block, it should be done from a multidisciplinary, public, clear, accessible, objective, scientific and responsible approach, reflecting the underlying premises on which the contractual instrument chosen by the Mexican State was built.

Contractual figures must incorporate the eminently financial objectives of the contracting companies, but above all and most importantly, Mexico's sovereigns' interests since the country's development and stability are at stake.

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