1. Petroleum regulation in an international context: The universality of petroleum regulation and the concept of *lex petrolea*

Alex Wawryk

While energy and resources law is on the one hand national law – sometimes supplemented in the case of regional economic integration as in the European Community – the organisational and contractual practices are greatly affected by the specific technical and economic logistics of the industry. An international ‘*lex mercatoria*’ of energy and resources law has emerged. Commercial, financing and other contractual practices are often alike, if not identical, all around the globe; with sometimes only scant influence from the idiosyncrasies of national law. The frequent recourse to arbitration tends to enhance the international customary law aspect of energy and resources law. Contractual innovations leapfrog from country to country and over the barriers of different legal systems. Comparative law therefore needs to understand how industry practices and imperatives on the one hand, [and] national law constraints on the other, shape legal instruments and concepts.1

1. INTRODUCTION

Petroleum exploration and production activities present complex legal, technical, economic, financial, political and environmental problems.2 Upstream petroleum activities require considerable financial resources and infrastructure, and involve a high degree of geological and commercial risk. Most of the world’s oil reserves are in developing countries with

---

limited financial resources, infrastructure and technical capabilities, whose governments are unable to bear the risks of exploration and production and thus contract with international oil companies (IOCs) to undertake operations on their behalf.\(^3\) Because these contracts are for very long terms, IOCs are exposed to sovereign risk, that is, the risk of political events that affect petroleum developments. A classic example is the risk of a change of government, which might lead to a change in the regulatory regime, the renegotiation of contracts, a unilateral change in the terms of a contract by the host government, or the expropriation of property in oil reserves.

In order to spread risk and obtain access to capital, oil companies engage in co-operative business relationships. Rather than risking many millions of dollars alone in one project, a company may invest smaller amounts in several projects through joint ventures or other types of industry arrangements with other companies. Major international oil companies work around the world, as do independent companies specializing in operations such as offshore drilling and cementing, regularly moving personnel and equipment from one country to another. Integrated operations may cross national boundaries.\(^4\) Business transactions also take place across nations, and capital flows globally.

Although oil companies operate globally, petroleum exploration and production activities worldwide are regulated by national legal regimes. These usually consist of a petroleum law, regulations and, in many countries, a contract between the government and international oil company which undertakes upstream activities. There is no multilateral treaty which governs the exploration and production of onshore or offshore oil, placing particular legal obligations upon nation states regarding industry regulation. This is because energy supply and consumption, onshore resource exploitation and environmental protection have historically been viewed as matters for internal control by nation states, and not matters of international concern. Also, as most offshore oil exploration and production takes place on the continental shelf, over which states have sovereign rights to explore and exploit resources as an extension of their land territory, the regulation of offshore oil and gas has also been regarded as a matter of domestic concern.

One aspect of the international oil industry that is heavily regulated by treaty is the international legal regime for the protection of the marine

\(^3\) Duval et al (n 2) 6.

environment from pollution caused by the maritime transport of oil. This is no coincidence, as the environmental impacts of marine pollution are often transboundary and require international co-operation for effective regulation.\(^5\) Also, environmental and human rights treaties place obligations upon the states that are party to them, thereby influencing the content of national laws which affect the oil and gas industry as well as other industries. Thus, a range of environmental and social issues are dealt with through national petroleum and/or separate environmental laws.

Despite this, it is still very much the case that the regulatory aspects of upstream petroleum activities are not the subject of treaty law. And yet, to characterize regulation of the international petroleum industry as a set of unrelated, standalone national petroleum regimes is to misrepresent the reality of the governance of this global industry. Although there is no treaty giving rise to common principles of law, there has been a process of internationalization of domestic principles and rules and ways of conducting business, which has led to the development and spread of many legal principles now common to petroleum arrangements around the world. This process of internationalization reflects the international nature of world oil markets and the nature of onshore and offshore oil exploration and exploitation as truly global industries.

The global nature of the industry and the internationalization of principles of national law have given rise to an increasing sense that the industry is governed to some extent by ‘international’ or ‘transnational’ petroleum law. This international or transnational petroleum ‘law’ covers a multitude of legal issues, which may include laws relating to exploration, production/generation, transportation, investment and financing, business and contractual arrangements, access to pipelines, royalties and taxation, trade, dispute resolution and environmental and safety issues, to name but a few. International petroleum law transcends legal boundaries

\(^5\) Legal initiatives aimed at dealing with oil tanker accidents, including those regarding safety at sea, the construction standards of ships and liability and compensation for oil pollution from ships, are addressed by multilateral and regional treaties, the common principles of which are applied internationally through national laws. Other matters regulated by treaties include the decommissioning and disposal of energy installations such as offshore oil platforms at sea, the routine operational discharge of oil from tankers into the ocean and the discharge of oil and wastes from land-based installations. However, existing conventions governing marine pollution caused by oil generally do not extend to liability for, and restoration of, damage caused by oil pollution arising from exploration and production activities conducted from offshore installations.
and may encompass, for example, aspects of contracts, property, administrative law, taxation law, environmental law and competition law. It is crucial to recognize that this is not an easily identifiable international petroleum ‘law’ established by traditional sources of international law. Rather, this ‘law’ stems from a number of broad and disparate sources of principles and norms that regulate the allocation of rights and duties concerning the exploitation of petroleum resources between individuals, between individuals and governments, and between states. It encompasses a concept of international governance and regulation that is broader than that of traditional international law, being a conglomeration of, and complex interaction between, the rules of custom, treaties, national and regional laws, the principles of intergovernmental organizations (IGOs) and non-government organizations (NGOs) and codes of conduct and guidelines of industry associations, which together regulate the various facets of oil exploration, production, transport, consumption and trade.

It is within this context that this chapter aims to examine the concept of *lex petrolea*. The phrase is most often used to refer to an idea that there is a specialized ‘transnational petroleum law’ that derives from the internationalization of business practice, usages and customs of the members of the international petroleum industry or community. This ‘lex

---


7 Global governance has been defined as ‘a continuing process through which conflicting or diverse interests may be accommodated and co-operative action may be taken. It includes formal institutions and regimes empowered to enforce compliance, as well as informal arrangements … There is no single model or form of global governance, nor is there a single structure or set of structures. It is a broad, dynamic, complex, process of interactive decision-making’: Commission on Global Governance, Our Global Neighbourhood (Oxford University Press, Oxford, 1995), cited in Patricia Birnie, Alan Boyle and Catherine Redgwell, International Law and the Environment (3rd ed, Oxford University Press, Oxford, 2009) 43.

petrolea’ is a type of *lex mercatoria*, or international ‘law of merchants’; the principles and norms, and their legitimacy as law, are derived from their use and acceptance by the members of the international petroleum industry, to serve its own needs, separately and autonomously from principles of customary international law derived from state practice.⁹

There is a focus on the internationalization of common contractual principles and practices in relation to the contracts between oil companies engaged in upstream activities, and the contracts between host governments (and/or their national oil companies) and international oil companies, reinforced by the decisions (where published) of international dispute resolution bodies in relation to contractual disputes.

There is, however, no generally accepted definition and understanding of the scope, jurisprudential basis for and sources and content of *lex petrolea*. *Lex petrolea* may also be sourced from the common norms and principles of petroleum law contained in domestic legal systems that have come to be ‘internationalized’, that is, applied worldwide by different countries, even though there is no treaty binding state parties to apply these principles of law. It also may be derived from the principles enumerated in traditional sources of international law, such as environmental and human rights norms contained in treaties, and customary international law; from so-called soft law, including treaties expressed in non-mandatory language, and the codes, guidelines, resolutions and standards of IGOs; and from the guidelines and standards of international petroleum industry associations, NGOs and international lending institutions, which regulate behaviour in the energy industries and are of key importance in the governance of the international petroleum industry.

The structure of this chapter is as follows. In order to provide the necessary background on the development of *lex petrolea*, section 2 briefly describes the internationalization of the petroleum industry over the course of the 20th century and demonstrates how common principles of contractual and commercial law of specific application to the petroleum industry, contained in contracts between companies and common clauses in host government contracts, have spread globally. It also explains the importance that international dispute resolution in the international petroleum industry plays as a source of *lex petrolea*, in particular international commercial arbitration and investment arbitration.
Section 3 contains the main discussion of the scope and meaning of *lex petrolea* – the different conceptualizations and meanings attributed to *lex petrolea* by scholars and practitioners, the jurisprudential basis for the doctrine and the very real challenges posed in recognizing the existence of a *lex petrolea*. Section 4 concludes.

2. THE INTERNATIONAL PETROLEUM INDUSTRY AND THE EVOLUTION OF PETROLEUM AGREEMENTS

To understand the process of internationalization, and thus claims regarding the existence of a *lex petrolea*, which will be explored in some depth in section 3, it helps to have an understanding of the history and structure of the international petroleum industry. The structure of the industry, the role and conduct of international oil companies and host governments, and the interaction between the two, has affected the development of norms and principles contained in international petroleum agreements. While the nature, type and content of international petroleum agreements have changed from the infancy of the international petroleum industry in the early 20th century, there are common types of agreements and clauses that are used across the globe.

**Brief History of the International Petroleum Industry**

The origin of the petroleum industry is generally traced to the United States in 1859.\(^\text{10}\) The early discovery of oil in the US fostered the growth of the domestic oil industry in that country well before oil was discovered in other countries. Discoveries in Russia (1873), Iran (1908), Mexico (1910) and Venezuela (1922) created important oil-producing centres outside the US, with oil discovered in the Middle East later, in the 1930s.

---

Before World War I, the international petroleum industry was still in its infancy and primarily involved US, British and Dutch interests. These countries, as part of their colonial empires, were involved in the search for oil through their national oil companies (NOCs). By 1938, the international oil industry was largely controlled by seven companies, the ‘majors’ or ‘seven sisters’. These were large, vertically integrated oil companies that dominated the world’s oil reserves, assuming near-complete control over oil exploration, production and transportation, and building complex networks of refining and marketing facilities to sell their products on a global scale. The six majors were: the US companies Standard Oil of New Jersey (now merged in ExxonMobil), Standard Oil of California (Chevron), Gulf (now merged into Chevron) and Texaco (now merged into Chevron); the UK company British Petroleum (BP); and the Dutch company Royal Dutch Shell. CFP of France (now Total) could have been added as an eighth sister.

Until World War II, the dominance of the seven sisters over non-US sources of oil was reflected in the petroleum arrangements the companies made with host countries. In the US, petroleum was first found on lands belonging to private landowners, and a body of contract law developed to expedite exploration and production on private land. When the US oil companies extended their activities across the globe over the course of the 20th century, they carried with them their customary forms of contracts, business organization and jurisprudential concepts. Based on the US domestic oil and gas lease, the key type of petroleum arrangement for the exploitation of oil from non-US sources in the early 20th century was the concession contract.

12 Duval et al (n 2) 43.
13 For the history of the seven majors, see Anderson (n 10); McLean and Haigh (n 10); Yergin (n 10); G Barrows, International Petroleum Industry, Vols I and II (International Petroleum Institute Inc, New York, 1967); Hartshorn (n 11).
14 Ibid 42.
The early concessions were extremely advantageous to the companies having the right to develop petroleum. Common features were: exclusive access for the IOC over massive areas for very long terms; no obligations on the company to drill on the lands granted or to release the territory if exploration and drilling were not undertaken; and no right for the host country to participate in managerial decisions. The only financial benefits received by the host country were a fixed sum paid to the host country upon signing the contract and the right to royalty, usually calculated at a flat rate per tonne or barrel of oil produced. Many early concessions exempted the oil company from obligations to pay taxes such as income tax.

As the major oil companies of the US and Europe explored and produced in the Middle East, Africa and Asia, the principles of the concession contract spread globally. The first concession agreements were largely ad hoc, but over time, as the number of concessions increased and exploration became more widespread, a more systematic way of dealing with petroleum agreements developed, with common features. Changes in political power and the structure of the industry after World War II saw the renegotiation of concession contracts (into the ‘modern concession contract’) and the development of new types of petroleum arrangements (including the production sharing contract and service agreements/risk service agreements) on terms much more favourable to host countries. These agreements have now spread internationally and are common across the globe.

From World War II the Middle East became the centre of world oil production. Major discoveries in Africa occurred from the 1950s onwards, particularly in Libya, Nigeria and Algeria, and these countries have become large producers of oil, with the international petroleum industry viewed as truly global since this time. Crucial events that contributed to the renegotiation of concessions and the introduction of new types of agreement included: the entry of the independents into the international petroleum industry in the 1950s, these being companies that typically invested only in upstream operations into the international oil

---


17 Duval et al (n 2) 43, 59–62.

18 Ibid 44.
industry; the nationalization of oil industries in the major exporting countries in the 1970s (along with the expropriation of host country oil reserves); and the formation of the Organization of the Petroleum Exporting Countries (OPEC) in the 1970s. In the 1980s, following the surge in prices as a result of the Iran–Iraq war in 1979, investment in oil exploration and new technology brought the previously uncompetitive offshore oil fields of the North Sea and the Gulf of Mexico into production. Currently, the ‘shale revolution’ is redefining economic and political analysis of the industry.

Today, when reference is made to the ‘international petroleum industry’ or ‘international oil industry’, this includes a number of actors and institutions operating on the world stage. First, the largest oil and gas producing companies in the world include many NOCs, which now hold approximately 90 per cent of the world’s oil reserves. These corporations were either created, or had their roles significantly expanded, by the nationalization of domestic foreign-owned assets in the major oil-producing and exporting countries in the 1970s. In the country where the industry is nationalized, NOCs may carry out upstream operations or they may act as ‘partners’ of IOCs in joint projects, where the state decides to participate by acquiring an interest in the IOC ventures.

Many NOCs operate as an extension of the state, pursuing development and other objectives of the government. Others, such as Statoil (Norway) and Petrobras (Brazil), operate independently, with strategic and operational autonomy; they may support their country’s goals but are primarily profit-driven. In the 1970s, most NOCs operated solely within the borders of their own country (distinguishing them from state-owned independent oil companies). However, in the last decade, many of the NOCs that once operated only domestically adopted a strategy to diversify internationally into upstream investments abroad. They are now competing with the supermajors on extremely large projects outside of their domestic territories.

---


20 Z Mikdashi, Transnational Oil: Issues, Policies and Perspectives (Frances Pinter (Publishers), London, 1986) 7. The USSR, following the Russian revolution, nationalized the industry after 1917; Bolivia in 1937; Mexico, following the Mexican revolution, expropriated domestic oil assets of the IOCs and created its own national oil company Pemex in 1938; and Iran nationalized its industry in 1951, following conflict with Britain.

their home country, investing in in-house research and development and developing in-house service companies, looking to buy smaller exploration and production (E&P) companies and also targeting specialized shale drilling companies in the US for investment, in order to obtain access to technology for shale oil and gas drilling which can be transferred to their home countries.\(^\text{22}\)

Secondly, the international petroleum industry includes the large, vertically integrated privately owned international oil corporations such as BP, Exxon Mobil, Chevron and Shell. These IOCs became ‘supermajors’ after a wave of mergers and acquisitions conducted since the 1990s, by which the majors incorporated a number of the competing international oil companies of the 20th century. This group comprises former national oil companies that have been privatized since the 1990s, including not only BP and Shell, but also Total (France), ENI (Italy), Repsol YPF (Spain’s Repsol and Argentina’s YPF) and Petro-Canada. The new Russian corporations formed from the large oil and gas companies of the former Soviet Union, such as Lukoil, Rosneft and Gazprom, are often referred to as supermajors, despite varying degrees of state ownership.\(^\text{23}\)

Thirdly, the actors in the international petroleum industry include the ‘independents’; the smaller oil companies that entered the international petroleum industry and began to challenge the dominance of the seven sisters from the 1940s and 1950s.\(^\text{24}\) These include companies such as Andarko and Apache, which engage in upstream exploration and production but have no downstream operations,\(^\text{25}\) and highly specialized service companies and independent contractors offering support services such as


\(^{23}\) Duval et al (n 2) 52; Al-Fattah (n 21) 4.

\(^{24}\) In 1945, only six US companies other than the five majors had any foreign exploration interests. Between 1953 and 1972, some 350 privately owned oil companies had entered the international industry or increased their activity: Anderson (n 10) 53; Hossain (n 11) 8.

\(^{25}\) In the domestic industry, the term ‘independents’ refers to non-integrated companies whose activities are largely concentrated in one function of the petroleum industry, such as crude oil production, transport, refining or marketing. Independents comprise a wide and diverse spectrum of operators. Mikdashi (n 20) 9.
offshore rig operation, drilling and cementing, for example Schlumberger, Halliburton, Baker Hughes and Weatherford.26

Furthermore, a myriad of industry associations can be seen as part of this international community, of which just a few are the International Association of Oil and Gas Producers (OGP), the International Association of Drilling Contractors (IADC) and the International Association of Petroleum Negotiators (IAPN). This is from a purely commercial, industry perspective. If we take an extended and holistic approach to the social/community ‘licence to operate’ we might include other stakeholders with interests such as local communities, indigenous peoples and environmental groups as actors within the international petroleum industry.

Contracts between Oil Companies

Because of the degree of risk involved in exploration and protection, and the long timeframes required for investments, international oil companies frequently join together in co-operative business arrangements in order to spread risk and obtain access to capital. The industry has come to be characterized by the use of numerous standardized model contracts which govern the commercial relations between international oil companies worldwide.27

Modern model contracts originated from the contractual documents that companies have used independently for over 100 years.28 When the international oil companies extended their activities globally over the course of the 20th century, they carried with them their customary forms and sets of contracts incorporating their own individually preferred precedents, which would be altered after one-on-one negotiations with another company. This, however, took up significant time and resources, because of the vast sums of money, substantial risk and massive liabilities, and complex and difficult issues involved. With some contracts taking years to draft, negotiate and sign, the whole process became very time-consuming and inefficient.29

Many model contracts or model agreements have now been developed by national and international petroleum industry organizations to improve

26 Al-Fattah (n 21) 7–9.
28 Ibid 5.
29 Ibid 5–6.
efficiency and save time.\textsuperscript{30} The continuing development, widespread acceptance and use of model petroleum contracts drafted by national and international organizations such as the Association of International Petroleum Negotiators (AIPN), which span a whole range of commercial issues and incorporate common clauses and principles, including (to name but a few) model farmout agreements, unitization agreements, joint international operating agreements, lifting agreements and confidentiality agreements, has contributed to a global standardization of upstream petroleum contracts.\textsuperscript{31}

The existence of common clauses worldwide, in model industry contracts governing commercial transactions between oil companies, is a fundamental aspect of the internationalization of petroleum law. Furthermore, this standardization of the principles of law applicable at an international level to the global petroleum industry is integral to the argument that there is in existence a nascent \textit{lex petrolea} – a specific legal regime, or body of international norms – which instructs or regulates the international petroleum industry.\textsuperscript{32}

\textbf{Contracts between Host Governments and International Oil Companies}

Unlike contracts between oil companies, there are no generally accepted model petroleum agreements between international oil companies and the governments of oil-producing countries, as these tend to be drafted to meet the specific ends and goals of the country involved. However, across the world today, we can observe the existence of common types of host government contracts, namely the production sharing contract, the modern concession contract and service agreements. Furthermore, these contracts contain similar provisions, clauses, structures and approaches, regardless of the identity of the host state.\textsuperscript{33}

A range of terms will typically be included in a modern host government contract to reflect the interests of the parties. The aims of host governments now include, in addition to the historical and classic aim of seeking revenue: the greater involvement of their national oil

\textsuperscript{30} For a discussion of the advantages and disadvantages of model contracts, see ibid 5–6.


\textsuperscript{32} Bishop (n 8); Childs (n 8).

\textsuperscript{33} Talus, Looper and Otillar (n 8) 185, 192.
companies in managerial decisions and control; the development of their own technology and trained labour force; and the achievement of sustainable development. The interests of IOCs have remained reasonably constant, and include ensuring the following: access to petroleum resources; an acceptable level of profitability in upstream operations; and the most investment-friendly terms in contracts, such as lower taxation, and regulatory and legal certainty in the face of sovereign risk. Modern host government contracts will generally contain clauses addressing the following matters, among others:

- the ownership of petroleum produced;
- the area for, and term of, development;
- host country control over the rate and extent of exploration and production;
- an option for the host country to participate in upstream operations;
- the right of the host country to an equity percentage of the production;
- access to oil for the domestic or export market;
- the possibility of state participation in midstream or downstream operations;
- the generation of revenue through a variety of mechanisms, such as royalty, rentals and taxes;
- social benefits such as training and employment of nationals and a preference for purchasing local goods and services for use in petroleum operations;
- environmental protection;
- stabilization clauses, which provide certainty by limiting the right of a host country to unilaterally modify the petroleum agreement;
- adaptation clauses, to allow the host country and IOC to mutually renegotiate the agreement; and
- dispute resolution clauses.

The basic features of various types of host government contracts are shared to such an extent that it has been estimated that at least 80 per cent of the contents of these agreements consist of the same clauses, ‘irrespective of their label’.

---

34 Duval et al (n 2) 31–2.
35 Ibid.
36 Ibid 54.
While each contract category provides for different concepts and different levels of control, the modern contracts provide very similar end results and the choice between various contractual regimes has much to do with historical developments in the country. Furthermore, the content of various Host Government Contracts is often similar because the contract parties ‘borrow terms and conditions’ from other pre-existing contracts. Specific contract language tends to vary only when dependent on country- or time-specific external factors such as oil prices, global economic situation and the host government’s internal political forces.37

The global spread of common national principles of petroleum law occurred as host country governments looked to other national legal regimes to find ways to better protect their interests. For example, the existence of one entity, OPEC, representing the interests of similarly situated countries, helped efforts to renegotiate the original concessions in the 1970s through the sharing of information among its members.38 More recently, the use of common types of host government contracts has become increasingly globalized through: (a) their application by actors such as the World Bank, to foster development of petroleum resources in developing countries, and a relatively small group of private lawyers with expertise advising host governments internationally; (b) by the desire of governments to learn from previous experience, in order to both attract foreign investment and to obtain benefits and opportunities offered in other jurisdictions, while protecting their interests in matters such as environmental protection and fiscal terms; and (c) by growing international education and awareness in this area.39

Although the particular degree to which individual contracts will favour host governments or oil companies depends on prevailing market and political conditions, common principles have come to be incorporated in host government contracts across the globe, ‘not so much a result of a conscious choice to include internationally accepted contract provisions’, but as the result of a process of internationalization of principles of law, whereby, ‘in order to stimulate foreign direct investment, host governments must establish terms that reasonably assure investors that their investments will earn the profits for which they bargain’.40 Again, it is the standardization of the principles of law applicable at an international level – in this case to agreements between international oil companies and host governments – which is integral to the argument that

---

37 Talus, Looper and Otillar (n 8) 188.
38 Ibid 192.
39 Ibid 191.
40 Ibid 192.
there is in existence a nascent *lex petrolea*, or ‘body of international norms’, which instructs or regulates the international petroleum industry.41

**The Role of International Arbitration in Contractual and Investment Disputes**

Because the international petroleum industry invests in very large, complex, highly capital-intensive projects with long lifespans of 30 years or more, the need for legal and political stability is ‘particularly acute’.42 However, the long timeframes of oil and gas projects mean that ‘circumstances, economics, governments and parties invariably change’ over the lifetime of a project, leading to a significant risk of disputes.43 International arbitration is the major type of dispute resolution procedure for the international petroleum industry. It allows companies to use a neutral forum,44 and overcomes the concern that foreign court judgments may not be enforced at home or abroad, as countries that are parties to arbitration treaties are obliged to enact laws to ensure international arbitral awards are recognized and enforced domestically.45 The positing by scholars and practitioners of the existence of a *lex petrolea* has gone hand in hand with the determination of disputes through international arbitration procedures.

There are two major types of dispute that arise in the international petroleum industry. The first of these are disputes between an international oil company and the host government, called investor-state or state investment disputes. Investor-state disputes arise when a government significantly changes the conditions or terms of a host government contract, or nationalizes or expropriates an investment.46 The expropriation by the state of the rights of private oil companies to oil reserves is

---

41 Bishop (n 8); Childs (n 8).
44 Martin (n 43) 334.
46 Martin (n 43) 334.
a major issue of sovereign risk. Historically, the process of nationalization, particularly where it involved the expropriation of the IOC’s assets, has been very contentious. Expropriation without compensation has been a major topic of international arbitration proceedings, and indeed, some of the earliest cases adjudicated by international arbitral tribunals in the 20th century concerned the expropriation of international oil companies’ property interests by host governments.47

Modern international petroleum contracts and international investment treaties (including numerous bilateral investment treaties, the International Convention for the Settlement of Investment Disputes, and the Energy Charter Treaty) contain various provisions that seek to achieve stability by reducing political and regulatory risk, in order to protect investments and facilitate investment flows and trade.48 Disputes between investors in the international oil industry and host governments regarding breaches of international petroleum contracts and investment treaty provisions continue to form a key part of the case load of international arbitral panels. The international petroleum industry is a major global investor, and the energy sector forms the highest percentage of international commercial and state investment disputes in the world.49 While many awards pre-1998 concern expropriation through nationalization of the industry, since 1998, most expropriation cases concern claims relating to the host state’s fiscal regime, that is, through ‘creeping expropriation’, and a range of other contractual matters are now also determined by arbitration.50

The second major type of dispute to arise in the international oil industry is international commercial disputes between oil companies. These include, first, disputes between joint venture participants regarding contracts such as joint operating agreements, unitization agreements, farmout agreements, sale and purchase agreements and confidentiality

49 Martin (n 43) 332.
50 Martin (n 8) 99.
agreements, and, secondly, disputes between operators and service contractors under agreements such as drilling and well service agreements, seismic contracts, construction contracts and equipment and facilities contracts.\(^\text{51}\)

It has been stated that the determination of investor-state disputes and international commercial disputes in international arbitral tribunals is fundamental to claims that there is a \textit{lex petrolea}.\(^\text{52}\) When determining a contractual dispute, the arbitrator(s) must apply the substantive law identified in the parties’ arbitral agreement as the law governing the contract. The agreement may specify that the national laws of a particular country are to govern the contract. However, some international contracts do not expressly provide for a single domestic legal regime to govern the transaction. Instead, they may require the application of principles common to both the international oil company and host government regimes, and/or the agreement may empower the arbitrator(s) to apply ‘general principles of international law’ to the dispute. Also, where a contract does not specify the substantive law to be applied (and sometimes even when it does), the rules of the arbitral institution may require the arbitrator(s) to use principles of international law and of trade usage as a supplementary source of law. The rules may make reference to the ‘guidelines, customs and principles of international commercial law’, ‘generally accepted commercial usage and practices’, ‘generally accepted principles of international commercial law’, ‘principles of trade usage’, ‘usages of international commerce’ or some such variation.

Arbitrators seek to rely on credible sources of law in determining their awards, including principles from traditional sources of international law, and national systems of law. By their application to disputes, international arbitral tribunals confirm certain commercial practices have authority as custom; while the international petroleum ‘community’ accepts the norms/principles articulated by arbitral tribunals. Thus, as arbitral institutions identify and apply principles of international law to make their decisions, including principles of commercial or trade usage, they also legitimize these principles as standardized principles of international law of particular application to the international petroleum industry. This then becomes part of the \textit{lex petrolea} – the ‘body of international norms’ which instructs or regulates the international petroleum industry.\(^\text{53}\)

\(^{51}\) Martin (n 43) 335.

\(^{52}\) Bishop (n 8); Childs (n 8).

\(^{53}\) Ibid.
3. THE CONCEPT OF LEX PETROLEA

Although there is broad agreement that there are common or international norms, rules, standards and best practices that apply to or exist in the international petroleum industry, regardless of geographical location, there is no one definition and accepted understanding of the existence, scope, jurisprudential basis for and content of lex petrolea. The phrase lex petrolea is used narrowly or widely to encompass some or all of a number of sources of law or regulation. While some international scholars will not recognize these principles as sources of international law, most scholars who accept the existence of a lex petrolea or ‘transnational petroleum law’ also accept the idea that international law and/or governance in the transnational or international petroleum industry is comprised of more than the traditional sources of international law, such as treaty and customary international law. In particular, lex petrolea is often claimed to be a particular branch of a general universal lex mercatoria, or ‘law of merchants’.

Lex Mercatoria

While there is no single accepted universal definition of lex mercatoria, one is that it is a ‘set of general principles, and customary rules spontaneously referred to or elaborated in the framework of international trade, without reference to a particular national system of law’. Some jurists have claimed lex mercatoria is a third legal order, which is neither national nor international law, but a mixture with the characteristics of both. Recognition of the existence of a lex mercatoria stems from the conviction of many jurists that neither municipal law nor international

54 Ibid; Talus, Looper and Otillar (n 8); Martin (n 8); De Jesús O (n 8); Carmen Otero García-Castrillón, ‘Reflections on the Law Applicable to International Oil Contracts’ (2013) 6 Journal of World Energy Law and Business 129; Mary B Ayad, ‘The Vienna Convention as Authority for the Use of Precedent as Customary Practice in International Arbitrations of Oil Concessions and Investment Disputes in North Africa and the Gulf Arab States; or a Lex Mercatoria for a Lex Petrolea’ (2013) The Journal of World Investment and Trade 918.

law are appropriate or suitable for dealing with international commercial disputes when parties from different countries are involved.\(^{56}\)

Although the basic premise sounds simple, it is a difficult concept to grasp jurisprudentially. There is disagreement among scholars on the definition, sources, scope and parameters, and purposes of *lex mercatoria*, as well as to its existence as a body of law, and whether it exists or qualifies as a law, legal system or legal order. There is also a lack of consistency in the use of terminology. It is beyond the scope of this chapter to discuss the jurisprudence associated with the idea of *lex mercatoria*, but there are some key ideas that can be identified for the purposes of this chapter.

First, a fundamental characteristic of *lex mercatoria* is that it arises ‘spontaneously’ from the trade usage and business practices of ‘merchants’. It is not deposited or set down by a sovereign. *Lex mercatoria* is designed to serve the international business community’s aspirations, interests, needs and expectations, in particular the need for effectiveness of businesses that operate beyond or across national boundaries.\(^{57}\) It is practical and transcends national borders and jurisdictions.\(^{58}\) The customary norms of international commerce – that is, the body of law respected and followed by merchants – are the basis for the *lex mercatoria*.

However, there is no general agreement on the sources of *lex mercatoria*,\(^{59}\) for example, whether it may be derived only from the general principles of law or trade usages, or whether it may also be derived from the rules of international organizations, standard form contracts and the reporting of arbitral awards. There is some disagreement as to whether *lex mercatoria* can be drawn from the law deposited by states, with a number of jurists accepting it may be drawn from principles of public international law and uniform laws, if incorporated into the *lex mercatoria* through frequency of use and/or adoption in contracts and arbitral awards, and provided the principles are accepted as custom, serving the needs of the international business community. A corollary of this disagreement as to the sources of *lex mercatoria* is that there is also disagreement as to the content of this law.\(^{60}\)

---


\(^{57}\) Ibid 713–14.

\(^{58}\) Ibid 669; Ayad (n 54) 925; De Jesús O (n 8).

\(^{59}\) For a discussion on this point, see Maniruzzaman (n 56), 665–7, 672–3.

\(^{60}\) However, it has been recognized that the development of the UNIDROIT Principles of International Commercial Contracts, and the Principles of European
One of the great debates is whether *lex mercatoria* is a separate legal order or legal system, or whether it is limited to comprising a set of certain norms or principles or rules. This chapter cannot do justice to that debate, but some jurists assert that it is a separate legal order; others do not, rather recognizing its existence (if at all) as a set of norms. Some assert that it is autonomous to and independent from national and international legal orders, although it seems difficult to accept this in a practical sense as, at the least, national legal systems are necessary for the enforcement of arbitral awards. Without the national enforcement of international arbitral awards, international arbitration would lose its effectiveness as a form of binding dispute resolution mechanism, and a fundamental source of the *lex mercatoria* would be lost.

Indeed, despite the disagreements over the sources and content of *lex mercatoria*, the arbitral tribunal is universally considered an ‘indispensable instrument’ for the creation and development of *lex mercatoria*. Where arbitral tribunals are empowered to apply the ‘principles of international law’, or principles of law ‘common’ to the home jurisdiction of each party, or ‘the generally accepted customs and usages of international trade’, either because the arbitral agreement or rules of an arbitral institution specifically requires it, the international arbitrator must identify and confirm the principles/usages that apply. If common rules are not available, the arbitrator selects and applies the rule that appears most appropriate and equitable. The international arbitral tribunals confirm certain commercial practices have authority as custom; while the international community then accepts the norms/principles articulated by arbitral tribunals as authoritative.

Those who do not accept that *lex mercatoria* is a separate legal order, or complete supranational body of rules, that exists autonomously and independently of national or international legal systems, may recognize it as an additional or supplementary option in the search for the law applicable to governing contractual disputes. Under this approach, *lex mercatoria* is recognized as an additional or supplementary set of norms derived from international business practice and usage that can be translated into ‘hard’ law through incorporation in contracts, legislation or other posited national sources of law, or in traditional instruments of Contract Law, have collated certain principles considered suitable for cross-border transactions: Maniruzzaman (n 56) 673–8.

61 For a discussion on this point, see Maniruzzaman (n 56) 697–705.
62 For a discussion on this point, see ibid 671.
63 Ibid 693.
64 Ibid 715; Ayad (n 54) 928; García-Castrillón (n 54) 137.
international law such as treaties and resolutions, and be interpreted, developed and enforced through decisions of arbitral tribunals and courts.

**Lex Petrolea**

As a part of, branch or type of *lex mercatoria*, these difficulties extend to the *lex petrolea*. What appears to be a simple idea – that there is a *lex petrolea*, or set of customary rules valid for the international petroleum industry based on the needs, practices and usages of its members – is a complex concept, that has not been rigorously defined, is used inconsistently and has uncertain scope and parameters. The possibilities suggested to date are that:

- *lex petrolea* is comprised of norms of traditional customary international law between nation states, of specific relevance to the international petroleum industry;
- *lex petrolea* is comprised of the principles of law applied by international arbitral tribunals, of specific relevance to the international petroleum industry;
- the common principles of law and/or clauses found in host government contracts and in model industry contracts between oil companies, as a part of business usage or custom, are a part of, comprise norms of, and are also a source of, *lex petrolea*;
- that the norms, principles and standards of industry associations, NGOs and IGOs are also a part of, comprise norms of, and are also a source of, *lex petrolea*, including principles concerning human rights, indigenous rights and environmental protection; and
- *lex petrolea* is an autonomous legal system, separate from national and international legal systems.

The idea that there may be a *lex petrolea*, comprised of norms of traditional customary international law of specific relevance to the international petroleum industry, arose in *Kuwait v AMINOIL*.65 Part of this dispute concerned the assessment of compensation for the expropriation of Aminoil’s property through the nationalization of the oil industry by the Kuwaiti government. The Kuwaiti government suggested that a ‘series of transnational negotiations and agreements about compensation’ for expropriations conducted in the Middle East and elsewhere in the

---

world during 1971–77 ‘had instituted a particular rule, of an international and customary character, specific to the oil industry’.

In these agreements, the assessment of compensation was ‘not identical but had certain common features’: it was ‘very incomplete’ and was determined by a certain valuation method, whereby compensation was limited to the net book value of the companies’ redeemable assets. The Kuwaiti Government argued these precedents had ‘generated a customary rule valid for the oil industry – a *lex petrolea* that was in some sort a particular branch of a general universal *lex mercatoria*’. The Arbitral Tribunal rejected both the contention that such a rule existed, and even if it had, its application to the present case.

First, the Tribunal distinguished Aminoil’s case from other negotiations. In Aminoil’s case, all relations had been severed with the Kuwait government and compensation was to be determined by the Tribunal; in the cases forming the precedents, compensation for expropriation was determined through negotiations where there was an ongoing relationship between the international oil companies and governments. The overall results of the negotiations in other cases were complex. In addition to an indemnity, the companies often received other benefits through ongoing contracts of service, and long term supply. A crucial point of distinction was thus that in the other cases referred to by the Kuwaiti government, in addition to the compensation determined according to the net book value of assets, the international oil companies also either received or maintained a preferential relationship with the host government. While it would be ‘difficult to express in figures the value in terms of money of these preferential arrangements’, as they depended in each case on this structuring and policy of the former concessionaire companies, the advantages for major integrated oil companies were often considerable, unlike for Aminoil, an independent exploration company for whom all ties with the government had been severed. Thus, even if there were such a rule, it did not apply in Aminoil’s case on the facts.

Secondly, the Arbitral Tribunal queried the formulation of the suggested rule, stating:

> at the most it might be possible to go so far as to say that certain large transnational groups may have preferred compensation that had no relation to the value of their undertaking, if it was coupled with the preservation of good relations with the public authorities of the nationalizing State with, possibly,

---

66 Ibid 1035.
67 Ibid 1036.
68 Ibid 1036.
resulting prospects for the future giving promise of greater worth than the compensation forgone.\(^{69}\)

Thirdly, citing the *North Sea Continental Shelf Case*,\(^{70}\) the tribunal stated that if reliance were to be placed on the precedents presented by the Kuwait government, then ‘it would still be necessary for them to constitute expression of *opinio juris* to be viewed as a customary rule of international law.\(^{71}\) Here, the policy of OPEC, the ‘crucial preoccupations of concessionaire companies to ensure the continued supply of petroleum products to consumers’, and the ‘passivity’ of the oil importing states, led the transnational petroleum companies facing expropriations in the 1970s to ‘accept de facto what the exporting countries demanded’.\(^{72}\) While such acceptance was ‘wise’, it ‘would be somewhat rash to suggest that it had been inspired by juridical consideration: the *opinio juris* seems a stranger to consents of that type’.\(^{73}\) Therefore, even the practice as to net book value could not be viewed as a rule of international law because of the lack of ‘mental element’ – a belief that the practice is binding or obligatory as a matter of law.

Finally, the Tribunal found the consents of investors to the use of the net book value had been given ‘under the pressure of very strong economic and political constraints’. While in the case of Aminoil there was no duress, ‘the economic pressures that lay at the root of [the consents] had nothing to do with law, and do not enable them to be regarded as components of the formation of a general legal rule’ that could be applicable in other cases.\(^{74}\)

In rejecting the contention that a rule existed, the Arbitral Tribunal does not distinguish nor discuss the concept of *lex petrolea* as comprised of rules of traditional customary international law between nation states and *lex petrolea* as part of a *lex mercatoria*, which is the law of merchants. Rules of traditional customary international law between nation states require evidence of state practice and *opinio juris*, the belief that a practice is obligatory as a matter of law, as per the *North Sea Continental Shelf Case* cited by the Tribunal. In contrast, the concept

\(^{69}\) Ibid.
\(^{70}\) *North Sea Continental Shelf Case*, ICJ Rep (1969).
\(^{72}\) Ibid.
\(^{73}\) Ibid.
\(^{74}\) Ibid 1037.
behind *lex mercatoria* is that it is comprised of the practices and customs accepted by the international business community, and there is no strict requirement of *opinio juris*. When it looks for an expression of *opinio juris* and rejects its existence, the Tribunal clearly refers to the lack of belief of the *transnational petroleum companies* that the net book value is binding as a matter of law, and not to the intention or belief of the nation states that the net book value is binding as a matter of law. While its acceptance of transnational petroleum companies is necessary for a rule to be part of *lex mercatoria*, it is not necessary for it to be a rule of traditional customary international law, which is only concerned with nation states. The Tribunal’s reasoning is thus not particularly helpful in delineating the source, scope and basis of *lex petrolea*.

Although not accepted in that case, the existence of *lex petrolea* has become a subject of subsequent academic research and writing, although the existence, definition, scope and jurisprudential foundation of *lex petrolea* is as yet unclear.\(^7^5\) One approach is that *lex petrolea* is comprised of principles of law applied by international arbitral tribunals. The seminal article on this topic was published in 1998 by R Doak Bishop, an experienced international practitioner and arbitrator, who surveyed the key published arbitration awards relating to the international petroleum industry, to identify the rules or range of rules established by these published arbitral awards. Stating that the public awards provide the source material from which customary law may be drawn, and noting the argument of the Kuwaiti government in *AMINOIL*, the thesis of the paper was that the published awards ‘have created the beginnings of a real *lex petrolea* that is instructive for the international petroleum industry’\(^7^6\).

Many of the awards surveyed by Bishop relate to procedural issues concerning international commercial arbitration or, substantively, to disputes concerning host government expropriation of the property of international oil companies, although a few other matters of dispute are addressed. Bishop concludes:

> While the published international arbitral awards involving petroleum issues are not so numerous yet and do not indicate such unity of opinion in the international community as to create anything like blackletter law rules, nevertheless, immense progress has been made in the past 25 years. The publication of awards has allowed later arbitrators to learn from the opinions of earlier tribunals and to build upon the foundations already constructed, rejecting unfounded reasoning and showing a growing sophistication and

---

\(^7^5\) See references above, (n 8).

\(^7^6\) Bishop (n 8) 1113.
clarity. The result of this progress is that on some petroleum issues, clear legal rules have evolved, while on others at least the proper range of rules has been identified. This has not yet created a mature set of legal regulations, but it has developed the beginnings of a lex petrolea that serves to instruct, and in a certain sense even regulate – within broadly-defined boundaries – the international petroleum industry. As international arbitration continues to grow (provided that the publication of awards also continues), this lex petrolea may yet mature into a fully-developed subset of international law.\(^77\)

Continuing in this tradition, in 2011, Thomas CC Childs surveyed the key substantive rulings in arbitral awards published since 1998 that relate to the international petroleum industry.\(^78\) Childs’s thesis was also that ‘the published awards relating to the international exploration and production industry have created a “lex petrolea” or customary law comprising legal rules adapted to the industry’s nature and specificities’.\(^79\) Childs’s survey reveals a definite shift in the proceedings brought before international arbitral tribunals. First, many of the post-1998 awards relate to proceedings by IOCs brought under bilateral investment treaties (BITs); prior to 1998, no BIT arbitrations had been brought by an IOC. Secondly, post 1998, only one award relates to the nationalization of an IOC’s assets; whereas a large number of the awards surveyed by Bishop related to nationalizations. Several of the awards since 1998 deal with claims relating to changes to the host government’s fiscal/taxation regime.

Some of the substantive matters brought before tribunals since 1998 address preliminary issues (pre-contractual liability, the validity of the E&P agreement, the nature of the agreement and state responsibility for the conduct of its NOC). Other matters the subject of dispute range from application and issue of the exploration licence, project management, the conduct of petroleum operations, taxation, in particular the imposition of windfall profits tax, the disposal of produced hydrocarbons, the transfer of interests in the project and force majeure to the frustration and repudiation of host government petroleum agreements and remedies for breach of contract. In conclusion, Childs claims:

the rulings on substantive issues summarized in this article reflect the specific characteristics of international oil and gas exploration and production projects. While the published awards represent only a small fraction of the universe of awards relating to the exploration and production industry, they

\(^{77}\) Ibid 1208–9.

\(^{78}\) Childs (n 8).

\(^{79}\) Ibid 214.
address a sufficiently wide range of issues to create a ‘lex petrolea’ or customary law comprising legal rules adapted to the industry’s nature and specificities.80

The approach of Bishop and Childs is that a specific regime, lex petrolea, has developed through dispute settlement in the international petroleum industry, in particular through the published awards of international arbitrators and arbitral tribunals. To resolve the disputes, the arbitrators apply ‘general principles of international law’, which are derived from sources of international law such as United Nations General Assembly resolutions and declarations, treaties and customary international law, or from comparative studies of national laws. From these published arbitral awards, norms or principles of law are developed and discerned. These rules, which can be found from a survey of published awards, form the lex petrolea – the rules accepted by members of the international petroleum industry, through the arbitral process, as being developed and adapted to serve the industry’s needs and specificities.

More recently, scholars and practitioners have moved beyond this approach, arguing that the rules/norms/standards of lex petrolea can be found not only in the published decisions of arbitral tribunals but in the common clauses and principles found in petroleum legislation and Host Government Contracts and the industry business practices found in model contracts.

Timothy Martin has argued that lex petrolea has developed from governments’ petroleum legislation and contracts.81 In his analysis, he notes that many of the awards concerning state-investor disputes are now publicly available, in particular claims made under investment treaties, according to the rules of arbitral institutions such as the International Centre for Settlement of Investment Disputes (ICSID). Talus, Looper and Otillar also discuss the idea that the internationalization of host government contracts may contribute not only to the internationalization of petroleum law but also to the existence of a lex petrolea.82 As discussed earlier in this chapter, although there are no model host government contracts in the same way there are model industry agreements, the latter part of the 20th century has seen the global adoption of common types of Host Government Contracts, as well as common principles, clauses, terms and conditions in those agreements. If lex petrolea can be derived directly from common principles contained in petroleum agreements, this

80 Ibid 259.
81 Martin (n 8) 95.
82 Talus, Looper and Otillar, (n 8) 189.
Petroleum regulation in an international context

is a far broader idea than that posited by Kuwait v AMINOIL and Bishop and Childs.

It has also been suggested that lex petrolea has developed from international industry business practices, which are found in its model contracts.\textsuperscript{83} Martin notes that disputes arising from international commercial petroleum contracts are mainly decided in international arbitral tribunals and the awards are not usually publicly available because of confidentiality requirements.\textsuperscript{84} International commercial awards are therefore often of little help in establishing a lex petrolea, given the scarcity of such awards.\textsuperscript{85} Martin thus argues the best way of determining the lex petrolea of international oil agreements is by referencing the industry’s business practices, captured in model contracts and the guidance notes, commentary and research arising from these model agreements, as the manner in which the industry develops the model contracts is the ‘most thorough, documented and peer-reviewed process for international oil and gas agreements and thus the most credible source of lex petrolea for such agreements’.\textsuperscript{86} These contracts, which serve the needs and specificities of the industry, are not drafted or set down by national or international law (although their enforcement relies on national laws). Because they are drafted by industry associations such as the AIPN and are widely used and accepted, they have legitimacy and are accepted as part of custom and usage.

Carmen Otero García-Castrillón also recognizes the existence and relevance of lex petrolea as a branch or type of lex mercatoria, being the ‘self-produced professional norms regulating commercial transactions’.\textsuperscript{87} These may arise specifically from the petroleum industry to meet its own needs or be general principles of law incorporated as part of the lex petrolea. For García-Castrillón, the sources of lex petrolea include: the model contracts prepared by professional associations; general contractual principles codified in international law, for example, the UNIDROIT

\textsuperscript{83} Ibid 95.
\textsuperscript{84} Ibid 102.
\textsuperscript{85} Martin also points out that much domestic oil and gas law thus falls short of establishing a relevant lex petrolea for the international oil and gas business. Much of the publicly available case law interpreting oil and gas agreements comes from the US, Canadian and English domestic courts, which deal with disputes arising from their own jurisdiction. These national/domestic operations and agreements can vary significantly from the international industry’s business practices and agreements, which makes domestic oil and gas cases a limited source for understanding international oil and gas agreements. Ibid 106.
\textsuperscript{86} Ibid.
\textsuperscript{87} García-Castrillón (n 54) 140.
(International Institute for the Unification of Private Law) Principles of Contract Law; and the principles, standards, recommendations or guides elaborated by international organizations or associations, whether general or specific. She argues that *lex petrolea* is applied directly when it is incorporated or mentioned in contracts, treaties, and/or national legal systems and when it is viewed as a rule of customary international law; and that it can also be established through the arbitral resolution of disputes.88

García-Castrillón and Martin have also extended their claims regarding the content of *lex petrolea* to include principles concerning human rights and the environment and recognize that traditional law posited by states (such as treaties) can form part of the *lex petrolea*.89 García-Castrillón argues that codes of conduct and principles/norms and rules regarding matters such as human rights, environmental protection, public transparency, etc, which may be required as conditions for obtaining financing from multilateral organizations such as the World Bank, can also be seen as part of self-regulation or a governance regime for the petroleum industry and part of a *lex petrolea*.90 Martin has also extended the concept of *lex petrolea* beyond the published results of commercial and investment arbitration to include the application of norms of traditional international law, particularly those in relation to the environment and human rights. In this regard, Martin specifically embraces the sources of *lex petrolea* to include the application of traditional sources of international law, such as treaties.

*Lex petrolea* covers a wide area of international law, given the size and significance of the industry. It can be viewed as either the application of

---

88 Ibid 142.
90 García-Castrillón (n 54) 141–2.
international law to the petroleum sector or as a specific legal regime that has evolved to meet the needs of the international oil and gas sector – or as both. The growing development of *lex petrolea* in areas such as boundary disputes, human rights and environmental claims is more akin to the former – that is, the application of international law to the petroleum sector, whereas the areas of international commercial disputes and state investment disputes are more the latter – that is, a customary law of the international petroleum sector that has been adapted to the industry’s nature and specificities.91

Finally, in what is perhaps the most extreme position, Alfredo de Jesús O has formulated an idea of *lex petrolea* existing as an autonomous, transnational legal order completely independent of both public international law and national law, comprising more than a set of norms developed by international arbitration or set out in model contracts. His conceptualization of *lex petrolea* is derived heavily from the idea of *lex mercatoria*. *Lex petrolea* arises from and attains legitimacy through acceptance and usage by the ‘transnational petroleum society’, independently of national and traditional public international legal systems. To him, the debate on transnational legal orders is not focused on whether they exist, but on their ‘plurality and their content and methodology’.92

[T]he *Lex Petrolea* exists and the idea roots date back to at least the 1970s … In [this] theoretical framework, the *Lex Petrolea* is not reduced to a bunch of rules designed to govern transnational petroleum contracts or the ones that can be extracted from the analysis of the international arbitral awards related to the oil and gas industry, nor the principles that can be inferred from the model contracts made by professional associations of the petroleum world etc. Those aspects are mere parts of a larger and more complex phenomenon. … [T]he *Lex Petrolea*, as the *Lex Mercatoria*, is a system of law, more precisely a transnational legal order that is autonomous from both national and international legal orders as well as from other transnational legal orders … The abovementioned transnational rules merely constitute the normative aspect of the whole construct.93

He argues that in the last decade, the transnational petroleum community has seen the emergence of new rules of a private origin specifically designed to govern petroleum contracts, which compete with state rules, are treated as rules of law and applied by arbitral tribunals, and which better satisfy the needs and interests of the transnational petroleum industry. These new rules are created spontaneously by the ‘transnational

---

91 Martin (n 8) 108.
92 De Jesús O (n 8) 21.
93 Ibid 22.
petroleum society’ itself, which is comprised mainly of oil producers, national and international oil companies and, to some extent, also some corporations engaging in ‘parapetroleum activities’. These rules are in addition to traditional sources of petroleum law, such as national petroleum codes or statutes, regulations and the ‘overall legal, fiscal and regulatory texts’ applicable to petroleum operations.

As to the source of the normative rules, de Jesús argues that the ‘ever evolving series of best oilfield practice’ are the origin of much of the transnational rules; but also the rules from the standardization and internationalization of contracts and clauses in international petroleum contracts; the publication of ‘doctrinal codifications of rules applicable to oil and gas contracts’; and the works and reflections of both contract and investment treaty international tribunals. Arbitral jurisprudence is also a crucial source of rules; he states that although arbitral awards are meant to be confidential, even commercial awards meant to be confidential are easily accessible in the petroleum society.

Thus, by the ‘practices and progressive construction of specific types of contracts (the standardization and modelization of such contracts and clauses) and the arbitral jurisprudence, the members of the transnational oil and gas industry have created a number of rules that are specially designed and conceived to govern transnational petroleum contracts that simply transcend the concept of the Nation-State’. For de Jesús, only the rules and codifications that satisfy the needs and interests of the transnational petroleum industry are considered as part of the transnational legal order, that is, of the lex petrolea. The rules are specialized. Thus, for example, even though general codification of contract law principles such as the UNIDROIT principles of International Commercial Contracts are useful, they are not part of the lex petrolea unless and until incorporated into the lex petrolea through, for example, their adoption in oil industry practices, standards and usages, or by application by an arbitral tribunal, if the general rule or principle satisfies the needs and interests of the transnational petroleum society.

While the contractual legal order created by petroleum contracts is fundamental, de Jesús argues that this is only one aspect of the wider transnational legal order created by the ‘transnational petroleum society’.

---

94 Ibid 39.
95 Ibid 23.
96 Ibid 23.
97 Ibid 25. Cf Martin (n 8).
98 De Jesús O (n 8) 19.
Nonetheless, his work is very much focused on the contractual/commercial practices of the transnational petroleum industry and the idea that various rules/norms/principles/standards have developed by the transnational petroleum society to meet the commercial needs of its members. He does, however, refer to good oilfield practice – the idea that members of the community are ‘constantly seeking to determine the best oilfield practices that over time will become industry standards leading to the creation of new transnational rules’. He seems to have a concept of \textit{lex petrolea} beyond contractual and commercial practices and rules, referring in his analysis to the norms, rules and standards concerning the environment/health/safety/engineering/geological aspects of the industry. However, this aspect is very much underdone, in terms of the definition and idea of ‘best oilfield practice’ (a tricky concept at the best of times) and the sources that are relevant to determining ‘best oilfield practice’.

A corollary of de Jesús’s conceptualization of \textit{lex petrolea} as a separate, independent and autonomous legal order is that parties to transnational petroleum contracts may chose the \textit{lex petrolea} as the system of law that is the law governing their contract, and international arbitrators may apply the rules/norms/standards of this particular body of law to solve disputes. \textit{Lex petrolea} may thus serve an important function in international arbitrations – as a resource for legal principles common to domestic regimes and as a substantive law when commonality is not present. However, whether practitioners and clients are prepared to do so is another question. Given the gaps and uncertainties in the \textit{lex petrolea} – like \textit{lex mercatoria}, it is not yet a complete body of laws, nor is there one easily identifiable and accessible source of law – practitioners and clients may prefer to nominate a national legal regime as the law governing the contract, as choosing a concept that is still so vague and uncertain may lead to appeals from the decision of the arbitral body.

Despite the various positions taken on the source and content of \textit{lex petrolea}, there is a very definite general consensus among those who accept its existence that it arises primarily from the decisions of international arbitration and court cases resolving disputes within the

\begin{flushright}
100 Ibid 40. \\
101 See also García-Castrillón on this point: (n 54) 136–40. \\
103 Ayad (n 54) 928.
\end{flushright}
international oil and gas sector, ‘as this is where the contracts, legislation and treaties that affect the petroleum sector are tested and interpreted’. While the decisions of arbitral tribunals are not binding on other tribunals, the global commercial and investment sectors seek consistency and predictability, and as more arbitral awards are published, arbitrators will look to previous decisions for consistency and excellence in legal reasoning. Thus Martin, for example, has claimed that as arbitrators ‘make their decisions in context and not in a vacuum’ and as ‘counsel use precedent in arguing their cases and arbitrators refer to precedent in writing their awards’, the ‘practical result is that precedent is relied on in international arbitration and a lex petrolea has developed accordingly’.

Nonetheless, there are limitations regarding the development of law through international arbitral tribunals. At least as far as disputes between private international oil companies are concerned, the decisions and reasoning of international arbitration remain confidential, while in the absence of a court hierarchy, a doctrine of stare decisis and formal processes for the reporting of major cases or decisions, there are limitations to the extent to which decisions will bind future tribunals. Also, the fact that some oil-exporting countries have been unwilling to recognize international arbitral boards in relation to contractual disputes has created some uncertainty for the development of law through this means.

4. CONCLUSION

The exploration for and production of petroleum is a global business, involving transnational flows of capital, labour and equipment. Although upstream activities are largely regulated by national petroleum regimes, as the industry has become truly globalized, we have witnessed a corresponding internationalization of law. Model contracts are evidence of international best practices being applied globally regardless of the location of individual commercial transactions, while the existence of similar types of host government contracts and similar clauses within

104 Martin (n 8) 95–6.
105 Talus, Looper and Otillar (n 8) 189. For a discussion of lex petrolea and precedent, see Ayad (n 54).
106 Martin (n 8) 96.
107 Talus, Looper and Otillar (n 8) 189.
those contracts are evidence of the internationalization of initially domestic principles of oil and gas law.\textsuperscript{108}

In this context, the claim that there is a \textit{lex petrolea} – norms or principles of law of particular relevance and application to the international petroleum industry, developed through the usage and practices of the industry to meet its needs and specificities and which attain their legitimacy as ‘law’ through their acceptance by the industry and the decisions of international arbitral tribunals – resonates within the industry.

However, there has been very little rigorous jurisprudential discussion, analysis and criticism of \textit{lex petrolea} as a legal doctrine. Despite the posited existence of \textit{lex petrolea}, there is no universal agreement regarding its sources, content and nature. The work of de Jesús is a major contribution to the literature in its attempts to define the jurisprudential basis for \textit{lex petrolea}. While it has been well beyond the scope of this chapter to critically examine de Jesús’s thesis in depth, jurists who disagree with the existence of \textit{lex mercatoria} as a separate and autonomous system of law will also take exception to the posited existence of \textit{lex petrolea} as an autonomous legal system. In addition to jurisprudential criticisms, there remain very practical difficulties with \textit{lex petrolea}, in particular its identification as a set of norms or standards that can be applied as blackletter law. Until their legitimization by an arbitral tribunal, it remains extremely difficult to identify which rules, norms and practices are accepted as binding as forming part of ‘law’ – as opposed to something less than law – and their scope.

Despite the ambiguities and different approaches to the source and content of \textit{lex petrolea}, the recognition that there has been and is a continuing internationalization of law and practice in the transnational petroleum industry, with an impact beyond systems of national law, is beyond doubt. The existence of international best practices and norms that are applied globally irrespective of national boundaries has had a direct impact on the way companies and governments conduct their petroleum activities today. The transnational petroleum industry is part of a global governance regime that is far more complex, broad, dynamic and interactive than can be conceived of by examining national regimes alone.