THE MEXICAN LIMBO FOR INTERNATIONAL INVESTMENT ARBITRATION: MEXICO AND THE TRANSNATIONAL MODEL. INVESTMENT ARBITRATION UNDER THE *ENERGETIC REFORM* AND THE LATEST POLITICAL CHANGEOVER

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RESUMEN: La Constitución mexicana de 1917 recordó los ideales de la "Revolución mexicana", en particular el enfoque proteccionista y nacionalista de la inversión extranjera expresado por las doctrinas Carranza y Calvo, que dieron lugar a la nacionalización de la industria del petróleo en 1938. Fue solo en los años 80 que México cambió su modelo económico y comenzó un proceso de liberalización, adoptando la doctrina del libre mercado. A diferencia del comercio y otros sectores, el sector del petróleo de México, anteriormente cerrado a la inversión extranjera y fuertemente regulado por un marco legal particularmente proteccionista, experimentó una liberalización gradual que terminó en 2013, con la Reforma Energética. Parte del proceso de liberalización del país implicó la transición de su modelo legal del principio de jurisdicción nacional exclusiva a la incorporación de la doctrina del conflicto de leyes, para permitir la aplicación de leyes extranjeras e internacionales. El país celebró numerosos acuerdos de libre comercio e inversión con otros países que prevén la solución de disputas comerciales y de inversión a través del arbitraje, así como convenios multilaterales que prevén la ejecución de laudos arbitrales internacionales resultantes de tales procedimientos arbitrales. No obstante, la inversión extranjera y el arbitraje continúan siendo asuntos delicados, especialmente en el sector energético. México sigue siendo un notorio ausente de la Convención de Washington para la solución de disputas de inversión y, en consecuencia, de su Centro Internacional para la Solución de Disputas de Inversión (CIADI), muy probablemente porque la sujeción del Estado a un tribunal meta-nacional es inadmisible e inconsistente con los principios constitucionales de México. Sin embargo, México superó el dilema al acordar arbitrar disputas sobre inversiones y petróleo a través de un arbitraje ad hoc bajo las reglas de instalaciones adicionales del CIADI o mediante otros conjuntos de reglas arbitrales como las de la Cámara de Comercio Internacional o las reglas de arbitraje ad hoc de la CNUDMI.

A pesar de la efectividad de la solución mexicana a su alienación del Convenio de Washington, la membresía completa del CIADI representaría enormes ventajas en términos de aplicación y revisión de las adjudicaciones, pero principalmente como un instrumento clave para la protección de las inversiones mexicanas en el extranjero, particularmente en el escenario adverso de la retirada de los Estados Unidos del TLCAN o la no ratificación de la USMCA. Cuando México finalmente abrió su sector del petróleo a la inversión extranjera, y sus empresas estatales como PEMEX tienen la capacidad de celebrar acuerdos arbitrales, México no renunció al imperio de sus leyes nacionales sobre las inversiones y los contratos que se ejecutarán en su territorio ingresado bajo la Reforma Energética. México no solo mantuvo los contratos

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regidos por las leyes nacionales y la jurisdicción de los tribunales, sino que también mantuvo la figura legal de la "rescisión administrativa" que resta de los asuntos arbitrables la mayoría de las disputas que pueden surgir de los contratos en materia petrolera. Sin embargo, dicha elección de ley aplicable, destinada a evitar la aplicación de leyes extrañas, es teórica debido a la incorporación de tratados internacionales al marco legal mexicano a través del artículo 133 de la Constitución mexicana que eleva los acuerdos internacionales de inversión a nivel constitucional en combinación con la referencia expresa, también sobre la Constitución y los estatutos, a las mejores prácticas sectoriales en el sector del petróleo. Ambas incorporaciones abren la puerta, en caso de disputa, a la aplicación de un catálogo ampliado de normas de diversa naturaleza, ya que los contratos internacionales suscritos por PEMEX y la Comisión Nacional de Hidrocarburos incluyen cláusulas arbitrales por las cuales el árbitro resolverá la disputa aplicando las leyes nacionales y "otras normas y principios del derecho internacional".

En la era de la Reforma Energética, en casos de disputa, la cuestión será cómo los conceptos legales nacionales tales como "interés público", "política pública", "jurisdicción exclusiva nacional" y "rescisión administrativa" operarán en combinación con la competencia del árbitro para determinar su propia competencia y los estándares de protección de la inversión comúnmente incorporados en los acuerdos de inversión, especialmente el trato justo y equitativo, y los mejores usos y prácticas del sector. Además, con respecto a la ejecución de laudos arbitrales, hay lecciones que aprender del caso COMMISA v. PEMEX, donde los conceptos de "rescisión administrativa" y "orden público" fueron manipulados de manera desigual por el Estado en violación de las obligaciones e inversiones internacionales; normas, como el trato justo y equitativo, la no retroactividad y la violación del principio de buena fe. Tales prácticas horribles se evitarán en el futuro para mantener la confianza de los posibles inversores, porque a México debe importarle mantener su reputación internacional aceptable como un país que cumple con sus acuerdos y respeta el estado de derecho internacional

PALABRAS CLAVE: Arbitraje, Reforma Energética, Inversión, Derecho Internacional, Derecho Transnacional, Petróleo y Gas, Exploración, Extracción, Lex Petroleatorum, Lex Causae, Lex Forum, Lex Arbitri, Tratado, Convención de Nueva York, Convención de Washington, CIADI, UNCITRAL, ICC, Derecho Aplicable, COMMISA, PEMEX, Doctrina Calvo, Doctrina Carranza, Soberanía, Inversión Extranjera, TLCAN, TMEC, Resolución de Controversias, Jurisdicción, Mejores Prácticas, BIT, FTA, IIA, Cláusula Arbitral, Inversión Extranjera Directa, IED, Hidrocarburos, Rescisión Administrativa, Laudo Arbitral, Ejecución, Exequatur, Orden Público, Contratos Upstream, Pacta Sunt Servanda, Incorporación, Estándares de Protección de Inversiones.

ABSTRACT: The Mexican Constitution of 1917 recollected the ideals of the "Mexican Revolution," notably the protectionist and nationalistic approach to foreign investment expressed by the Carranza and Calvo doctrines, which gave place to the nationalization of the oil and gas industry in 1938. It was only in the 80s that Mexico changed its economic model and started a process of liberalization, embracing the free market doctrine. In contrast with trade and other sectors, Mexico's oil and gas sector, formerly closed to foreign investment and strongly regulated by a particularly protectionist legal framework, experimented a gradual liberalization that ended in 2013, with the Energetic Reform. Part of the liberalization process of the country implied the transition of its legal model from the exclusive national jurisdiction principle to the incorporation of the conflict of law doctrine, to allow the application of foreign and international laws. The country entered numerous free trade and investment agreements with other countries that provided for the settlement of trade and investment disputes through arbitration, as well as multilateral conventions that provided

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for the enforcement of international arbitral awards resulting from such arbitral proceedings. Nonetheless, foreign investment and arbitration continue being sensitive matters, notably in the energetic sector. Mexico keeps being a notorious absentee of the Washington Convention for the settlement of investment disputes and, consequently, of its International Center for the Settlement of Investment Disputes (ICSID), very likely because the subjection of the State to a meta-national tribunal is inadmissible and inconsistent with Mexico's constitutional principles. Yet, Mexico overcame the dilemma by agreeing to arbitrate investment and oil and gas disputes through ad hoc arbitration under ICSID's additional facility rules or through other sets of arbitral rules like the ones of the International Chamber of Commerce or UNCITRAL ad hoc arbitration rules.

Despite the effectiveness of the Mexican solution to its alienation from the Washington Convention, the full ICSID membership would represent enormous advantages in terms of enforcement and revision of awards, but primarily as a key instrument for the protection of Mexican investments abroad, particularly in the adverse scenario of the U.S. withdrawal from NAFTA or the no ratification of the USMCA. As Mexico finally opened its oil and gas sector to foreign investment, and its State-owned companies like PEMEX have capacities to celebrate arbitral agreements, Mexico did not surrender the imperium of its domestic laws over investments and upstream contracts to be executed in its territory entered under the Energetic Reform. Mexico not only kept upstream contracts governed by national laws and courts jurisdiction, but also maintained the legal figure of the "administrative rescission" which subtracts from the arbitrable matters most of the disputes that may arise from oil and gas contracts. Such applicable law choice, meant to avoid the application of extraneous laws, is however theoretical due to the incorporation of international treaties to the Mexican legal framework via Article 133 of the Mexican Constitution which elevates international investment agreements to constitutional level in combination with the express reference, also on the Constitution and statutes, to the best sectorial practices in oil and gas sector. Both incorporations open the door, in case of a dispute, to the application of an expanded catalogue of norms of diverse nature as international contracts entered into by PEMEX and the National Hydrocarbons Commission include arbitral clauses by which the arbitrator shall settle the dispute applying national laws and "other rules and principles of international law."

In the Energetic Reform era, in cases of dispute the issue will be how national legal concepts such as "public interest," "public policy," "national exclusive jurisdiction" and "administrative rescission" will operate in combination with the arbitrator's competence to determine its own competence and the investment's standards of protection commonly imbedded in investment agreements notably the fair and equitable treatment, and the best usages and practices of the sector. Moreover, with regards to the enforcement of arbitral awards, there are lessons to be learnt from COMMISA v. PEMEX case, where the "administrative rescission" and the "public order" concepts were inequitably manipulated by the State in violation of international obligations and investment standards namely as fair and equitable treatment, non-retroactivity and the violation of the good faith principle. Such hideous practices shall be avoided in the future to maintain the confidence of potential investors, Mexico must mind keeping its acceptable international reputation as a country that honors its agreements and abides international rule of law.

KEYWORDS: Arbitration, Energetic Reform, Investment, International Law, Transnational Law, Oil and Gas, Exploration, Extraction, Lex Petroleatorum, Lex Causae, Lex Forum, Lex Arbitri, Treaty, New York Convention, Washington Convention, ICSID, UNCITRAL, ICC, Appli-

cable Law, COMMISA, PEMEX, Calvo Doctrine, Carranza Doctrine, Sovereignty, Foreign Investment, NAFTA, USMCA, Dispute Settlement, Jurisdiction, Best Practices, BIT, FTA, IIA, Arbitral Clause, FDI, Hydrocarbons, Administrative Rescission, Arbitral Award, Enforcement, Exequatur, Public Order, Upstream Contracts, Pacta Sunt Servanda, Incorporation, Investment Protection Standards.

SUMMARY: INTRODUCTION. 1. EVOLUTION OF MEXICO'S LEGAL FRAMEWORK FOR FOREIGN INVESTMENT IN THE OIL AND GAS SECTOR. FROM THE CARRANZA DOCTRINE TO THE ENERGETIC REFORM (1917 TO 2013). 2. MEXICO'S POSITION TOWARDS THE WASHINGTON CONVENTION. 3. INVESTMENT ARBITRATION UNDER FTAS AND IIAS. 4. THE *ENERGETIC REFORM*. 5. RECOGNITION AND ENFORCEMENT OF INVESTMENT ARBITRAL AWARDS BY MEXICAN COURTS. 6. THE "ADMINISTRATIVE RESCISSION" AND ITS INTERACTION WITH TRANSNATIONAL LAWS. 7. CONCLUSIONS. 8. BIBLIOGRAPHY.

INTRODUCTION

As Mexico opened definitively its hydrocarbons industry to foreign direct investment thanks to the long-time debated *Energetic Reform* (2013), the country joined one of the largest international investment markets, that of the oil and gas exploration, exploitation and commercialization. The new legal framework is complemented by overlapping layers of international arbitration agreements, investment agreements and free trade agreements, entered by Mexico and incorporated into its domestic legal system by constitutional provision.

Notwithstanding the liberal facade of the so-called *Energetic Reform*, there is a reminiscent aura of the 20th-century protectionist laws and doctrines regarding the sovereign right of the States over their natural resources. In a first approach, Mexico formally appears to keep an over-cautious, not to say reluctant, position with regards to matters such as the choice of law in oil contracts, the reservation of exclusive jurisdiction of Mexican courts for certain disputes or causes of rescission reserved exclusively to the State. Nevertheless, a second-layer piercing approach reveals the application of a plurality of norms of diverse nature such as international law and other rules and practices developed by non-State actors, that some authors refer to as a transnational or third legal order[2], others call it *lex petroleatorum*[3].

By reviewing the evolution of the Mexican legal framework for investment in the oil and gas sector, the present study attempts an exegesis of this intricate building of norms applicable to oil and gas contracts under the *Energetic Reform.* The central objective of the present work is to determine whether the remaining protectionist provisions of the reform are compatible with the Transnational Model, the effect of the applicable-law provisions embodied in international arbitral rules, international agreements signed

2 See: Slaughter, Anne-Marie, *New world order,* Princeton University Press, 2004.

3 See: De Jesus O., *The prodigious story of the lex petrolea and the rhinoceros. Philosophical aspects of the transnational legal order of the petroleum society*.

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by Mexico and the effect of the incorporation of international law and non-State rules in the Mexican legal system. Finally, this work analyzes the Mexican government's practice and compliance with the rule of law and the *pacta sunt servanda* principles, based on recent cases, namely *COMMISA v. PEMEX*, and their overall effect on the attraction or deterrence of new investments.

1. EVOLUTION OF MEXICO'S LEGAL FRAMEWORK FOR FOREIGN INVESTMENT IN THE OIL AND GAS SECTOR. FROM THE CARRANZA DOCTRINE TO THE *ENERGETIC REFORM* (1917 TO 2013)

A. The incorporation of the *Calvo* clause in the Mexican Constitution

Like many Latin American nations, Mexico's openness to foreign investment in the oil and gas sector, was relented and strongly determined by 19th and early 20th centuries' historic context characterized by intervention and armed persuasion exerted by foreign oil-producing powers. In response to this interventionist élan, Mexico modeled its concerning legal framework under a public policy of achieving and preserving economic and political autonomy and independence over its natural resources. Despite being immersed in a civil war, in the first quarter of the 20th century Mexico transited from a legal framework of open participation of foreign companies in the oil sector to the vindication of the Nation's sovereignty over its hydrocarbons.

In turn, Mexican diplomacy worked hard to gain international recognition in favor of the new government formed by the winning faction. Such recognition was most needed to renegotiate the sovereign debt, contract new sovereign loans and neutralize the "gun-boat diplomacy" exerted by the superpowers who easily moved to war to collect loans' installments or recover damages, suffered by their expatriated subjects, resulting from internal conflicts in the host country. The defense of two equally important interests implicated a dilemma: whether to raise oil-exports' taxes or to stop servicing the sovereign debt. Such financial strategies could move either foreign oil companies or foreign banks to appeal to their governments' protection to revert Mexico's government taxes or collect the installments using the armed force; foreign companies did similarly to claim damages.[4] The international recognition of the Mexican government that resulted from the 1910 civil unrest was conditioned by the superpowers to the prevalence of oil and gas concessions, low taxes on oil exports granted in favor of their subjects, and the recognition of old and new debt.

Diplomacy eventually developed defense strategies under international law principles expressed by numerous doctrines, notably those of the Latin-American jurists Drago and Calvo[5] condemning, respectively, the illegal use of a State's armed force to collect

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4 Bazant, *Historia de la Deuda Exterior de México (1923-1946),* p. 193.
5 Arellano García, *Evolución de la Cláusula Calvo y la Zona Prohibida en el Derecho Constitucional Mexicano y en el Derecho Internacional*, p. 41.

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debts and the exclusive jurisdiction of national courts to settle disputes related to foreign investment. The *Carranza* doctrine, expressed by Mexican president Venustiano Carranza, subsumed and embodied those doctrines as a quintessential principle of the Mexican Constitution of 1917. Both doctrines' principles remain in the core and rule across the Mexican legal framework. [6]

The Mexican Constitution of 1917 also barred foreigners from the acquisition of real property near the borders and the coasts, to prevent further secessions of territory. As to the rest, under 1917's constitution, foreigners' land property rights were conditioned to a written renunciation of any privilege resultant from their alien status, waiving their right to invoke their country's protection[7] and convening the exclusive jurisdiction of Mexican laws and tribunals over any dispute arising from their rights of property over land or investments.[8] For almost one century, Mexico's oil and gas legal framework banned foreign investors' direct participation in the exploration, extraction and production of hydrocarbons. Such policy is often erroneously attributed to the historical landmark of the Mexican oil "expropriation" conducted by President Cardenas (which was in fact a full nationalization rather than a single act of expropriation). At any case, the "expropriation" only brought to its end a long legal battle, based on the new Constitution's provisions, started by President Carranza and continued by his successors – Presidents Obregon and Calles – to recover control of the State over its most profitable resource, oil.[9]

6 Arellano García, op. cit., p. 40.

7 Such agreement has limited or null effect under international law, as it does not preclude the right of the State of their nationality to exert Diplomatic protection of its nationals, nor the rights of those individuals and companies to consular assistance and advise. See: Ortiz Ahlf, *"Mecanismos Internacionales para la Solución de Controversias Internacionales en Materia de Inversión Extranjera,"* p. 389-390.

8 *"Art. 27.- . . . I.- Sólo los mexicanos por nacimiento o por naturalización y las sociedades mexicanas, tienen derecho para adquirir el dominio de las tierras, aguas y sus accesiones, o para obtener concesiones de explotación de minas, aguas o combustibles minerales en la República Mexicana. El Estado podrá conceder el mismo derecho a los extranjeros siempre que convengan ante la Secretaría de Relaciones en considerarse como nacionales respecto de dichos bienes y en no invocar, por lo mismo, la protección de sus Gobiernos, por lo que se refiere a aquéllos; bajo la pena, en caso de faltar al convenio, de perder en beneficio de la Nación, los bienes que hubieren adquirido en virtud del mismo. En una faja de cien kilómetros a lo largo de las fronteras y de cincuenta en las playas, por ningún motivo podrán los extranjeros adquirir el dominio directo sobre tierras y aguas. . .."* [Only Mexicans by birth or by naturalization, and Mexican societies, have the right to acquire ownership of lands, waters and their accessions, or to obtain concessions for the exploitation of mines, waters, or mineral fuels in the Mexican Republic. The State may grant the same right to foreigners as long as they agree with the Ministry of Foreign Relations to consider themselves as nationals in respect of such goods and not to invoke, therefore, the protection of their Governments as far as they are concerned; under penalty, in case of breach of the agreement, to lose to the benefit of the Nation, the goods that they have acquired by virtue of it. In a belt of one hundred kilometers wide along the borders and fifty on the beaches, for no reason can foreigners acquire direct dominion over land and water. . ..] *Constitución Política de los Estados Unidos Mexicanos*, Diario Oficial de la Federación (February 5, 1917).
See also: Tena Ramírez, *Leyes Fundamentales de México 1808-1957,* p. 770, 827 and 882.

9 Bazant, *op. cit.*, pp. 184-205

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B. The prolegomenon of the oil sector's nationalization

Under Article 27 of its Constitution, the Mexican Nation possesses an original property right over its territorial lands and waters, exclusive control and regulatory faculties on concessions and the exploitation of the natural resources therein. The Constitution also provided a base to expropriation measures for public utility.[10] From 1917 to 1936, the Mexican 'revolutionary' governments attempted to enforce the State's powers under Article 27 to recover control over the oil exploration, extraction and exportation. It must be noted that Mexican post-revolutionary governments had few or no alternative sources of finance out of oil export taxes because the internal market and national industry were devastated after ten years of civil war. Those governments issued Executive ordinances intended to limit or preclude foreigners' concessions on oil; such measures, however, were ruled out by the judiciary, deemed contrary to principles of vested rights and the non-prejudicial retroactive application of the law.[11]

The Great Depression, the fall of oil prices due to the discovery of reserves in South America and Middle East, and the beginning of World War II created the perfect storm for the Mexican government to vindicate ownership over its natural resources and abolish old oil and gas concessions at once. [12] Following the enactment of the Expropriation Act (1936) by Congress, the Mexican President Lazaro Cardenas decreed, in 1938, the nationalization of oil and gas companies. The national oil company *Petróleos Mexicanos* (PEMEX) became the sole beneficiary of the rights of exploration, extraction, commercialization and transformation of oil and gas.

C. The world's new economic order

Mexico was not an isolated case, other developing countries in Latin America made analogous vindications of their natural resources. During the 50s and 60s, the whole affair became a global phenomenon acutely and widely discussed at the highest international fora, notably the United Nations General Assembly, as a component of the world's New Economic Order. Contemporarily, the decolonization process went on and the former colonies embraced the new order along with their independence. The

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10 "*Art. 27.- . . . Corresponde a la Nación el dominio directo de todos los minerales o substancias que en vetas, mantos, masas o yacimientos, constituyan depósitos cuya naturaleza sea distinta de los componentes de los terrenos, tales como. . ., el petróleo y todos los carburos de hidrógeno sólidos, líquidos o gaseosos*." [It corresponds to the Nation the direct dominion over all the minerals or substances in veins, mantles, masses or deposits, whose nature is different from the components of the lands, such as. . ., petroleum and all solid, liquid or gaseous hydrogen carbides] *Constitución Política de los Estados Unidos Mexicanos*, Diario Oficial de la Federación (February 5, 1917).

11 Bazant, *op. cit.*, pp. 192-193. See also: Meyer, Lorenzo, *México y Estados Unidos en el conflicto petrolero (1917-1942),* El Colegio de México, 1968.

12 *Idem*, pp. 207-227.

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international principle of the permanent sovereignty of the States over their natural resources crystalized in the International Law of Development.[13]

Ever since, the liberalization processes of the energy sector and the rest of the industrial activities evolved at a different pace. In 1973, the Mexican Investment Promotion and Foreign Investment Regulation Act was enacted.[14] The statute's name already reflected Mexico's protectionist policy consisting in a detailed, technically precise legislation on the conditions and requirements to be imposed on foreign investors.[15] The statute was radically modified in 1989 with the issuance of its new regulations.[16] In other words, aside the *prima facie* rigid constitutional provisions regarding foreign investment, discreet statutory and regulatory reforms allowed the construction of an open policy towards foreign investment.[17]

Compelled to acknowledge the relevance of arbitration as the preferred alternative for international commercial disputes, Mexico joined three major multilateral treaties on the recognition and enforcement of civil and commercial arbitral awards, a first step forward towards the insertion of Mexico into the "Transnational law."[18] In 1971, Mexico ratified the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (The New York Convention, 1958); in 1978, it ratified the *Inter-American Convention on International Commercial Arbitration* (The Panama Convention, 1975), both instruments providing for the recognition and enforcement of international commercial arbitral awards.[19] Finally, Mexico ratified, in 1987, the *Inter-American Convention on Extraterritorial Validity of Foreign Judgements and Arbitral Awards* (Montevideo, 1979), providing for the enforcement and recognition of foreign arbitral awards related to international commercial, labor and civil disputes.[20] All those treaties provide for the enforcement of national courts' rulings abroad and international arbitral awards in the States party, giving support to transnational trade and investment activities after the second half of the twentieth century.

D. Mexico's insertion into the free-trade era

Years later, in 1986, Mexico took further steps towards free-market economic policies and liberalization when adhered to the *General Agreement on Tariffs and Trade* (GATT)

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13 Vallée, « *Le droit international du développement* », p. 601.

14 López Velarde Estrada, *Contratos Internacionales de Petróleo y Gas. Algunas Consideraciones Jurídicas,* p. 547.

15 Gómez-Robledo Verduzco, *"Soberanía Permanente sobre Recursos Naturales" Temas Selectos de Derecho Internacional*, (2003), p. 511.

16 Pereznieto Castro, *Derecho Internacional Privado Parte General,* p. 122.

17 See also: I. Gómez Palacio, *"The new regulation on foreign investment in Mexico: a difficult task,"* Houston Journal of International Law, vol. 12, no. 2, (spring 1990).

18 Gilles Sourgens, Frédéric, *Supernational Law*, Vanderbilt journal of transnational law, vol. 50:155, 2017, p. 164. See also Philip C. Jessup, Transnational Law 2 (1956).

19 Siqueiros, *"La cooperación procesal internacional,"* p. 326.

20 López Velarde Estrada, *op. cit.,* p. 546.

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and, in 1993, when enacted its Foreign Investment Act.[21] Mexico got actively involved in the Inter-American Conferences on International Private Law (CIDIP) and adhered to the resulting Conventions. Also, joined similar efforts at the International level in The Hague and in the frame of UNCITRAL works. By the same token, in 1988, Mexico implemented a transcendental reform to its Commerce, Civil and Procedural codes to harmonize its domestic regulations with the international and Inter-American treaties on international private law to properly address conflict of laws and better provide for international judicial cooperation in civil and commercial matters.[22] The reform incorporated relevant principles of the conflict-of-law doctrine such as: (1) moderated territorialism; (2) faithful application of foreign laws; (3) exceptional application of the *renvoi*; (4) independence of preliminary and interlocutory matters; (5) harmonic blend of foreign and national law under the principle of equity; (6) analogic resolution of conflict of domestic laws; (7) public policy and evasion exceptions to the application of foreign laws; (8) attenuation of the exception of unknown legal institution.[23]

At the same time, Mexico sustained negotiations to enter free trade agreements with major economies, namely the North American Free Trade Agreement (NAFTA) and the Foreign Trade Agreement between Mexico and the European Union.[24] Although, NAFTA included investment provisions and special provisions—Chapter Six and Annex 602.3—with regards to oil and gas and their derivatives as a matter of trade, the hydrocarbons industry, labeled as strategic under the Mexican Constitution, remained under the Mexican State's monopoly and strict protection.[25] The Mexican State, through its public company PEMEX, retained exclusive prerogatives over oil and gas exploration, extraction, exportation and basic petrochemical transformation (refinement).[26]

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21 The Foreign Investment Act (1993) abrogated the Mexican Investment Promotion and Foreign Investment Regulation Act of 1973.

22 García Moreno, "*Reformas de 1988 a la legislación civil en materia de derecho internacional privado,*" p. 238.

23 Vázquez Pando, *"Comentarios sobre el Nuevo derecho internacional privado mexicano,"* pp. 23-36.

24 Babiy *et al*., *Should Mexico join ICSID?* p. 8.

25 Annex 602.3, Reservations and Special Provisions, Reservations: "1. The Mexican State reserves to itself the following strategic activities, including investment in such activities and the provision of services in such activities:

a) exploration and exploitation of crude oil and natural gas; refining or processing of crude oil and natural gas; and production of artificial gas, basic petrochemicals and their feedstocks and pipelines;
b) foreign trade; transportation, storage and distribution, up to and including the first hand sales of the following goods: (i) crude oil, (ii) natural and artificial gas, (iii) goods covered by this Chapter obtained from the refining or processing of crude oil and natural gas, and (iv) basic petrochemicals;
c) the supply of electricity as a public service in Mexico, including, except as provided in paragraph 5, the generation, transmission, transformation, distribution and sale of electricity; and
d) exploration, exploitation and processing of radioactive minerals, the nuclear fuel cycle, the generation of nuclear energy, the transportation and storage of nuclear waste, the use and reprocessing of nuclear fuel and the regulation of their applications for other purposes and the production of heavy water." (North American Free Trade Agreement https://www.nafta-sec-alena.org)

26 Private participation of Mexican nationals only (individuals and legal entities) was permitted in the form of subsidiary services and secondary petrochemical industry. See López Velarde Estrada, *op. cit.*, p. 546.

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As tensions caused by the nationalistic constitutional provisions eased, the Mexican legal framework reforms made between the 60s and the 80s gradually allowed a certain degree of participation of foreign capitals in almost all industrial and commercial activities, except for those considered strategic under the Constitution, like energy and hydrocarbons. Nevertheless, the requirement under Mexican laws to foreign investors and traders doing business in Mexico to renounce to their right to invoke their country's protection stayed in force as well as the jurisdictional territorialism, although moderated.

In contrast, Mexico's showed a very uneven approach with respect to the application of foreign law and arbitration, sometimes committed in civil and trade matters, other times over-cautious, perhaps unbelieving as to investment matters. These two different approaches, may be inferred respectively from Mexico's positions towards two sets of key international treaties for the recognition and enforcement of international arbitral awards: the New York and the Inter-American Conventions, on one side, and the Washington Convention on the other.

2. MEXICO'S POSITION TOWARDS THE WASHINGTON CONVENTION

A. The Transnational Model

Whereas Mexico's economic policy drove the country to embrace the Transnational Law, or Transnational Legal Order, by entering international trade and investment agreements that provided for arbitration as the mean to settle disputes derived thereof, Mexico adopted dissimilar criteria towards the two main international conventions on the recognition of arbitral awards: the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention) and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (The Washington Convention). As it was established, Mexico ratified the former in 1971 but it only signed the latter ad referendum in January 2018. While the New York Convention is fully in force for Mexico, its adhesion to the Washington Convention will not be completed until the Mexican Executive branch submits the text of the Convention to the Mexican Senate for its approval, only then the Executive branch will be able to deposit the adhesion instrument. To this day, the Washington Convention is not yet in force for Mexico, who has selectively consented to arbitration on investment matters under bilateral or regional agreements' provisions either using The United Nations Commission on International Trade Law UNCITRAL's arbitration rules or the International Centre for Settlement of Investment Disputes ICSID's additional facility rules of arbitration which do not require Mexico to be an ICSID's full member; the awards are executed before national courts according to the New York Convention.

A legal framework that not only welcomes but purportedly prizes international free trade and foreign investment cannot pretend that its statutory provisions suffice to

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guarantee international investors' legitimate expectations. The global economic context is driven by transnational companies whose interests worth more than many developing States' budgets. Those transnational companies prefer arbitration as the dispute resolution method because the parties or, the arbitrators in default of the parties, are free to choose the applicable law from a multiplicity of sources not only the national laws; this is described in the doctrine as the "Transnational legal order"[27] or the *Lex Petrolea*[28] with regards to the hydrocarbons sector. The "Transnational Model" is characterized by its transnational accrual of laws. It is largely debated whether that myriad of norms of diverse nature form a "system," or what some text writers call "the third legal order."[29] The harmonization of national legal systems with the "transnational law" must signify an advantage, *vis-a-vis* other countries: an added value to the country's competitiveness.

Following the transnational model, either to attract foreign investors or to better insert its own nationals into the global market, a State must embrace principles such as the freedom of the parties to agree on the laws, rules and practices applicable to their private transactions. In words of professor Julián De Cárdenas: international arbitration has the advantage of solving transnational problems that otherwise would have no solution through the exclusive, positive and predominant intervention of State actors.[30] International private law, and its conflict of laws method, proved to be burdensome, insufficient and discordant with the "Transnational Model's" dispute resolution mechanism, preferred by multinational companies and foreign investors given its characteristic plurality of sources of applicable norms. Benoit Frydman, quoted by De Cárdenas, asserts that neither international public nor international private law suffice to solve globalization's problems.[31]

B. The false dilemma of the applicable law

Under the international private law and its conflict of laws method, the national law would establish rules to determine the applicable law to solve the dispute. Such applicable law could be national or foreign law in which case is applicable thanks to the imperium of domestic law and the State's exclusive jurisdiction. Alfred Boulard, also quoted by De Cardenas, described this issue of the loss of the exclusive jurisdiction of

27 De Jesús O. and Feris, *The New World Order of Economic Relations in the Light of Arbitral Jurisprudence,* Position Paper, International Chamber of Commerce, Beaune Meeting (2014);

28 See: De Jesús O., "*The Prodigious Story of the Lex Petrolea and the Rhinoceros Philosophical Aspects of the Transnational Legal Order of the Petroleum Society,*" Series on Transnational Petroleum Law, Vol. 1, No. 1, Transnational Petroleum Law Institute, (2012).

29 A. Z. El Chiati, *"Protection of Investment in the Context of Petroleum Agreements,"* p. 135. See also: De Jesús O., "*Contribución del árbitro a la autorregulació*n y unificación del derecho de los contratos del comercio *internacional,"* p. 321.

30 Cárdenas García, *Tendencias transnacionales en la reglamentació*n del sector de hidrocarburos. La hibridación del derecho estatal y el derecho transnacional del petróleo, p. 128.

31 *Idem.,* p. 129.

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the State as a "false dilemma of the applicable law," having to choose between "your law or my law" given the availability of a plurality of sources of law.[32] The Transnational Model "places the world markets and their methods of transnational regulation and governance, at the center. . ." [33] allowing the parties and the arbitrators, to choose the applicable law deemed more appropriate to solve their dispute. That applicable-law panoply could comprise national and international norms, principles of law, other rules of diverse nature and, frequently, usages and practices without restricting themselves to national legal systems. The Transnational Model contrasts with the "International Model, based on the conflict of laws method that centers arbitration exclusively on the law of the seat of arbitration".[34]

It could be said that Mexico's Senate found no contradiction between the New York, the Panama and the Montevideo conventions (*supra*) with respect to the Mexican constitutional principles, concretely those contained in Article 27, as the conventions provide for the recognition and enforcement of arbitral awards proceeding from international resolution of disputes between individuals or private entities. Therefore, the obligations assumed by Mexico (or any other State party) under those conventions do not entail the subjection of the State to arbitral tribunals nor surrendering its exclusive jurisdiction over investment disputes, hence its sovereignty was not at stake. However, unlike its enthusiast approach to the above-mentioned conventions of New York, Panama and Montevideo, Mexico showed a manifest aversion to join the *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* ("The Washington Convention," 1965). Even though Mexico makes part of the Breton Woods institutions, namely the World Bank under which auspices the Washington Convention and its *International Center for the Settlement of Investment Disputes* ICSID are run, such aversion has been sustained on the chauvinistic premise that joining ICSID would imply a submission of the Mexican State to the jurisdiction of meta-national arbitral tribunals for the resolution of disputes that, under the Mexican Constitution, are of exclusive competence of national courts. The specter of the *Carranza doctrine* continues to haunt Mexico's policy to this regard.[35]

If such statements come up to be true, the spirit of the Washington Convention would be in conflict with the quintessential, though nowadays partly unsustainable, principles contained in Article 27 of the Mexican Constitution. Whereas the ratification of the Washington Convention would only require the approval of the Mexican Senate, the Executive branch of the past administration was neither pressed to obtain the Senate's approval nor to ratify the instrument. Regrettably the *momentum* was lost. The incoming Mexican government has to deal with other priorities and the ratification of the Washington Convention does not seem to be amidst the top of the list, moreover

32 *Idem,* p. 159.
33 De Jesús O. and Feris, *op. cit.*
34 *Idem.*
35 Ortiz Ahlf, *op. cit.,* p. 397.

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there is a risk that the new government deems that the spirit of the Convention is in contradiction with the aforementioned Constitutional principles or that the Executive branch dislikes the scenario of Mexico being sued by investors under the Washington Convention from any of the States party. A constitutional reform of the stone-carved article 27 is unthinkable as even though the Mexican Constitution is not a rigid one but a continuously updated document according to the political times, the Carranza doctrine has a historic weight and value, its reform would entail an encumbering and unaffordable political enterprise, involving all the states' legislatures. However, such interpretation would be inexact as the Washington Convention also requires from its member States a renunciation to their prerogative to exert diplomatic protection over their nationals investing in another member State. This approach coincides perfectly with the spirit of the *Calvo* and *Carranza* doctrines, and is more efficient since the Convention avoids an eventual direct claim between States related to disputes arising from private transactions and investments, such disputes are settled, instead, through arbitration before ICSID.[36]

C. The Mexican solution to ICSID arbitration model

Any legal system oriented to the global model acknowledges the advantages of the Washington Convention in terms of investment attraction.[37] Yet, what seemed unnegotiable under the Mexican Constitution was the exclusive jurisdiction of Mexican laws and courts over foreign investment matters and, more importantly, the abhorred idea of subjecting the State to a meta-national arbitral tribunal. In that sense, the remarks made by Mexican arbitrator Francisco González de Cossío, regarding the effects of Mexico's apparent disaffection from the Washington Convention's ICSID solution are notable:

> ...the failure [of Mexico] to adhere to ICSID raises eyebrows. And the surprise turns into astonishment when one learns that Mexico has included ICSID in most all [sic] of its investment treaties. However, because ICSID arbitration is only available when the Host State is party to the ICSID Convention, the ICSID option becomes theoretical. The investor may only avail itself of the second best: the Additional Facility [Rules].[38]

Prominent Mexican diplomat and publicist Bernardo Sepúlveda, strongly advocated also for the adherence of Mexico to ICSID, emphasizing the advantages of ICSID for Mexican investments abroad:

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36 *Op. cit.*, p. 392.

37 López Velarde Estrada, "*El sometimiento al derecho extranjero por medio de la cláusula de derecho aplicable*", p. 423.

38 González de Cossío, "*Mexico Before ICSID, Rebel Without a Cause?*" p. 2.

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> [W]hen a dispute arises between a Mexican investor and the government of one of the 142 ICSID member states, [[39]] such dispute cannot be settled based on the Convention, as Mexico is not a contracting party to ICSID. In the best scenario, the dispute may be settled through the ICSID Additional Facility Rules, but only if a contracting state and Mexico have agreed to submit to that jurisdiction in a bilateral investment treaty. This will not necessarily be the case in all circumstances.[40]

Given that Mexico opted for an alternative casuistic and lower-profile approach: the selective celebration of bilateral investment treaties (BITs) and free trade agreements (FTAs) with investment provisions or, more comprehensively, International Investment Agreements IIAs, including arbitration clauses for disputes' settlement,[41] foreign investors doing business in Mexico and Mexicans investing abroad rely on BITs and FTAs for the protection of their investments. Depending on the treaty, notwithstanding the provision of the still theoretical ICSID option, investors may arbitrate investment disputes only in accordance with either ICSID Additional Facility Rules, the International Chamber of Commerce arbitration rules, or UNCITRAL's arbitration rules. Out of those three sets of rules, ICSID's additional facility rules and UNCITRAL's constitute *ad hoc* arbitrations while others such as the International Chamber of Commerce ICC's arbitration option is administered by the Chamber.[42]

Alfred Boulard's "false dilemma of the applicable law"[43] which faithfully wraps and describes Mexico's constitutional principles enunciated by the Carranza doctrine, the protectionist and nationalistic position and the reluctance to wave national jurisdiction on investment matters, was not the only false dilemma in which Mexico incurred. The unwillingness to ratify the Washington Convention—and become and ICSID's full member—to avoid the State's submission to an international arbitral body proved to be another false dilemma because Mexico entered numerous international investment treaties and free trade agreements with investment provisions under which the Mexican State agreed to arbitrate investment-related disputes. Nevertheless, one must concede that the number of International Investment Agreements (IIAs) signed by Mexico hardly amounts the number of ICSID members. By selectively entering IIAs, Mexico tailored the conditions under which it limited its sovereignty and undertook to arbitrate.

39 To date, ICSID accounts 161 member States.

40 Sepúlveda Amor, *Mexico and the Settlement of Investment Disputes: ICSID as the Recommended Option*, p. 2.

41 Rodríguez Jiménez, *"México y el CIADI ante un Nuevo panorama latinoamericano,"* p. 126.

42 O*p. cit.*, p. 157.

43 Cárdenas García, *op. cit.*, p. 159

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3. INVESTMENT ARBITRATION UNDER FTAS AND IIAS

A. The applicable-law expansive network

Under the described circumstances, it could be argued that, in Mexico, foreign investors' access to international arbitration mechanisms is no longer at stake, as Mexico makes part of a wide network of international investment agreements with most of the major foreign direct investment exporting countries.[44] In other words, notwithstanding the Constitutional principles, and reminiscences of the chauvinistic rhetoric of the *Carranza* doctrine, and the reticence to adhere to the Washington Convention, Mexico successfully inserted itself as a host State into the new global economic order by negotiating arbitral clauses in IIAs. Such international instruments are incorporated to the national legal order under Article 133 of the Mexican Constitution which provides that those treaties, together with the Constitution itself and the general laws derived therefrom, make part of the Supreme Law of the Union.[45] However, federal courts and the Supreme Court have contradictory inconsistent interpretations of the principle of constitutional supremacy and the hierarchy of international treaties with respect to federal and local statutes.[46] The Supreme Court has a non-authoritative ruling where it equals those treaties to federal and local laws and another one where the Court sustains that treaties have a higher hierarchy with regard to federal and local statutes but lower than the Constitution. The implications of this contradictory interpretations on the hierarchy of treaties, with regards to federal laws, may limit investors capability to resort to international investment protections expressly those provided by IIAs, FTAs and the Washington Convention if it is to be ratified.

Through their applicable-law clauses, those international instruments incorporate other principles and norms of international law, foreign rules and sectorial practices—*best practices*—which by virtue of article 133 become supreme law of the union together with the international agreement. Such incorporation by reference may be also explained through the concept of 'remission' developed by the International Private Law doctrine since the treaties ultimately remit to diverse bodies of norms that become applicable to the relationship between the investor and the host State. Altogether, those treaties constitute a complex system, interconnected through 'the

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44 Babiy *et al*., *op. cit.,* p. 6.

45 Article 133.- "This Constitution, the laws of the Congress of the Union that emanate therefore, and all treaties that have been made and shall be made in accordance therewith by the President of the Republic, with the approval of the Senate, shall be the supreme law of the whole Union. The judges of each State shall conform to the said Constitution, the laws, and treaties, in spite of any contradictory provisions that may appear in the constitutions or laws of the States". [Unofficial version in English]. www.oas.org/juridico/mla/en/mex/en_mex-int-text-const.pdf

46 Constitutional supremacy and hierarchic legal order, principles of. Interpretation of article 133 of the Constitution that contains them. "*Supremacía constitucional y orden jerárquico normativo, principios de. Interpretación del artículo 133 constitucional que los contiene" Jurisprudencia constitucional, Tesis* 1ª./J.80/2004 *Primera Sala, Semanario Judicial de la Federación y su Gaceta, Novena Época*, 180240, *Tomo* XX, *October* 2004, p. 264.

most favorable treatment' clauses that have the virtue of expanding the benefits of a given treaty to signatories and beneficiaries of the other treaties. One of those benefits is, clearly, the choice of law—substantive and procedural: *lex causae* and *lex arbitri*. In addition, in the case of the oil and gas sector, not only through international agreements but also as a result of the recent *Energetic Reform*, both article 25 of the Mexican Constitution and article 19 of the Hydrocarbons Act (2014) provide for the application of the best international practices in the sector as part of the applicable law sources for oil exploration and extraction contracts.[47]

Not only international treaties but also customary international law are applicable and entail Mexico as the host State to fulfill the minimum protection standards on international investment contained in most IIAs. The Mexican Supreme Court of Justice recognized in a dictum that customary international law binds the Mexican State and becomes part of the Mexican legal order through the automatic incorporation mechanism.[48] Also, articles 14 of the Mexican Constitution and article 19 of the Federal Civil Code provide that, for the interpretation and application of the law, Mexican courts must resort also to the general principles of law most of which inform international law norms as it is recognized by the article 38 of the Statute of the International Court of Justice. The incorporation of the ICJ statute into the Mexican legal order by article 133 of Mexico's Constitution implies the recognition of international law sources different from treaties, therefore extending the protection of non-conventional international law to international investors. This is an unneglectable resource for investors whenever they find themselves unable to invoke an international investment agreement. Article 133 window-effect makes also available transnational and customary law principles recollected by international protocols, guidelines, declarations and unilateral obligations assumed in the framework of international organizations such as the Organization Economic Cooperation and Development (OECD), International Labor Organization (ILO), Doha summit, United Nations Conference on Trade and Development (UNCTAD), World Bank, etc.[49]

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47 See Cárdenas García, *op. cit.*, p. 133.

48 "International treaties. Incorporated to national law. Their constitutionality control comprehends that of the national law." *Tratados internacionales. Incorporados al derecho nacional. Su análisis de inconstitucionalidad comprende el de la norma interna., Tesis aislada I.3º.C.79 K, Tercer Tribunal Colegiado de Circuito, Semanario Judicial de la Federación y su Gaceta, Novena* Época*, 171888, Tomo XXVI, julio de 2007, p. 2725. Suprema Corte de Justicia de la Nación.*
See also: "Time zones. The originating agreements had been honored by Mexico in conformity with international customs." *Husos horarios. Los acuerdos de los que emanan han sido respetados por México conforme a la costumbre internacional., Jurisprudencia Constitucional P./J. 105/2001, Pleno, Semanario Judicial de la Federación y su Gaceta, Tomo XIV, septiembre de 2001, Novena Época, p. 1098. Suprema Corte de Justicia de la Nación.*

49 Torres González, *"Cooperación procesal internacional en materia comercial"*, p. 568.

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B. Free Trade Agreements, Investment Agreements and Arbitration

NAFTA is only one of the many FTAs signed by Mexico during the 90's whose scope is not limited to trade but provides also for investment protection and remedies. Other equally important negotiations fructified in FTAs with the European Union, the Central-American countries and the major South-American economies.[50] Contemporaneously to NAFTA, following the trend of the biggest economies, Mexico signed close to thirty FTAs as well as many IIAs.[51] However it is still running behind in the matter compared to similar-size economies. Such treaties were signed between Mexico and the countries of origin of the most significant sources of foreign investment fluctuating into Mexico or with the most popular countries of destination for Mexican investments. Investment protection treaties signed by Mexico include arbitral clauses that, depending on the BIT, enable investors to resort to arbitration under ICSID, ICSID's additional facility rules, ICC's and UNCITRAL's rules, or other agreed between the host State and the investor; applicable-law clauses are pretty much the same in all treaties entered by Mexico. [52]

Like other countries, Mexico also developed a BIT model text in which arbitration under ICSID rules is provided despite Mexico's non-adherence to the Washington Convention.[53] As it was stablished, Mexico's failure to adhere to the Washington

50 Babiy *et al*., *op. cit., Idem.* p. 10

51 Rodríguez Jiménez, *op. cit.*, p. 155.

52 *E.g.: Acuerdo para la Promoción y Protección Recíproca de Inversiones Entre el Reino De España y los Estados Unidos Mexicanos.* Article XV *"Cualquier tribunal establecido conforme a esta Sección decidirá las controversias que se sometan a su consideración de conformidad con las disposiciones de este Acuerdo y las reglas y principios aplicables del derecho internacional."* [Any tribunal established under this Section shall decide the disputes that are submitted for its consideration in accordance with the provisions of this Agreement and the applicable rules and principles of international law] *Acuerdo para la promoción y protección recíproca de inversiones entre el Reino de España y los Estados Unidos Mexicanos*, (1995).

E.g.: Article 18 "A tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and the applicable rules and principles of international law" Agreement between the government of the United Mexican States and the government of the State of Kuwait on the promotion and reciprocal protection of investments, (2015).

53 *E.g.* Rondas México "25.5 Arbitraje. Sin perjuicio de lo previsto en la Cláusula 25.4, cualquier otra controversia que surja del presente Contrato o que se relacione con el mismo, y que no haya podido ser superada después de tres (3) Meses de haber iniciado el procedimiento de conciliación o que éste hubiera sido rechazado por cualquiera de las Partes conforme a la Cláusula 25.2 deberá ser resuelta mediante arbitraje conforme al Reglamento CNUDMI. Las Partes acuerdan que el Secretario General del Tribunal Permanente de Arbitraje de la Haya será la autoridad nominadora del procedimiento arbitral. La ley aplicable al fondo será la estipulada en la Cláusula 25.1 y las controversias deberán resolverse conforme a estricto derecho. El tribunal arbitral se integrará por tres miembros, uno nombrado por la CNH, otro nombrado conjuntamente por el Operador y todas · las Empresas Participantes, y el tercero (quien será el Presidente) nombrado de conformidad con el Reglamento CNUDMI, en el entendido de que: (i) la Parte demandante deberá nombrar a su árbitro en la notificación de arbitraje y la Parte demandada tendrá treinta (30) Días contados a partir de que reciba personalmente la notificación de arbitraje para nombrar a su árbitro y (ii) los dos árbitros nombrados por las Partes tendrán no menos de treinta (30) Días contados a partir de la aceptación del nombramiento del árbitro designado por

Convention was due to internal political and ideological reasons, nevertheless IIAs entered by Mexico included ICSID arbitration option probably looking forward to Mexico joining ICSID in the future or to giving its investment. In the meanwhile, arbitrations took place many times under ICSID additional facility rules.

> ...all BITs and FTAs signed by Mexico already contain the possibility to arbitrate disputes under the ICSID Convention, although provided that both the disputing Party and the Party of the investor are parties to the Convention. As a consequence, on the one hand, an eventual ratification of the Washington Convention by Mexico will not entail any need of modification of current IIAs.[54]

C. Mexico and the ICSID

Some believed that the Mexican solution made little difference from the full ICSID membership scenario. However, a closer look allow us to differ as latent issues remain.[55]

Firstly, it is to be noted that Mexican BITs' archetypical arbitral clause's scope is narrow meaning that the application of the arbitral solution is restrictive: only to disputes arising out of a breach of the treaty by the host State and only if the investor suffered economic or material damage. Such narrow scope clause leaves out the possibility to dispute, for instance, frustrated expectancies as there is no actual loss or damage; therefore a narrow-scope arbitral clause bans the possibility to arbitrate any dispute *in connection with* the investment.[56] Furthermore, the treaty may be invoked only by foreign investors with regards to those sectors and economic activities comprised by the treaty's scope. In such cases, all Mexican BITs applicable-law clauses are consistent: the arbitrator will solve the dispute based on the treaty and international law and principles. In exchange, controversies falling out of the scope of the governing treaty

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el demandado para designar, en consultas con las Partes, al árbitro que actuará como Presidente del tribunal. El procedimiento arbitral se conducirá en español y tendrá como sede la Ciudad de La Haya en el Reino de los Países Bajos." CNH-R01-L02-A4/2015 https://rondasmexico.gob.mx/esp/contratos/

54 Babiy, *et. al.*, *op. cit.*, p. 10.

55 *Idem.*

56 *E. g.* "ARTICULO 8 Arbitraje: Ámbito de Aplicación, Derecho de Acción y Periodos de Tiempo (1) Un inversionista de una Parte Contratante podrá someter una reclamación a arbitraje, en virtud de que la otra Parte Contratante ha incumplido una obligación establecida en este Acuerdo, y que el inversionista ha Viernes 9 de agosto de 2002 DIARIO OFICIAL sufrido pérdidas o daños, en virtud de ese incumplimiento o como consecuencia de ello." Acuerdo entre el Gobierno de los Estados Unidos Mexicanos y el Gobierno de la República de Corea para la Promoción y Protección Recíproca de Inversiones. Diario Oficial de la Federación, 9 de agosto de 2002.

E. g. "Capitulo dos: solución de controversias primera parte: solución de controversias entre una parte contratante y un inversionista de la otra parte contratante articulo 8 Ámbito de Aplicación y Derecho de Acción 1. Esta parte se aplica a controversia entre una Parte Contratante y un inversionista de la otra Parte Contratante, respecto a un supuesto incumplimiento de una obligación de la primera conforme a este Acuerdo, que ocasione pérdida o daño al inversionista o a su inversión." Acuerdo entre el Gobierno de los Estados Unidos Mexicanos y el Gobierno del Reino de Dinamarca para la Promoción y Protección Recíproca de las Inversiones. Diario Oficial de la Federación, 30 de noviembre 2000.

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should be settled by the competent tribunal under the applicable law, that of the situs (*lex fori),* and its international private law rules that may also eventually allow the application of foreign and international law. It is to be noted that Mexican tribunals are used to operate with domestic law and rarely adventure themselves to rule out disputes under international law supported on incorporation doctrine arguments, even less by expanding the rules supported on 'the most favored country' clause.

Secondly, until the Washington Convention is ratified, foreign investors from countries that had not entered an IIA with Mexico, will not have the causes of action and remedies derived from the IIAs' standards, notably fair and equitable treatment, full protection and security, no discriminatory treatment, and most favored nation clause; but more importantly, they will not have access to international arbitration for the settlement of the disputes related to an eventual failure of the host State to comply with those standards, unless the *lex fori* provides for those remedies or their investor status derives from a contract, entered with the government, providing for those remedies. Whereas big corporations and multinational companies, in the transnational system, find solutions to these type of challenges, for instance by 'treaty shopping' which supposes the change of nationality of their investment by relocating their headquarters, or their investments' source, or incorporating subsidiaries in other countries; so that their investments attain the protection of a determinate BIT, those solutions are not always accessible or affordable to small investors. The affordability issue remains, however, a barrier for small investors to ICSID or alternative arbitral tribunals.

Thirdly, until Mexico ratifies the Washington Convention, absent an IIA, Mexican investors abroad are unprotected as they cannot enforce a foreign host-State's obligation to arbitrate under ICSID if Mexico is not a State party. This is particularly relevant in the measure that Mexican investors venture more and more into non-traditional markets out of NAFTA and Latin-America regions.[57] Also, having in mind the new free trade agreement between Mexico, Canada and the United States (TMEC) which has not been ratified by Mexico's partners and the latent possibility of the U.S. to withdraw from NAFTA, since no survival clause was agreed in the latter treaty, back

57 "As we saw earlier, Mexican companies do business in different jurisdictions of the world, but not all jurisdictions are covered by an Investment Treaty (BIT/IIA/FTA) in force between Mexico and the host states. Mexico has signed 28 BITs and 14 FTAs to secure investment protection to its investors abroad. Nonetheless, Mexico falls behind many other countries with respect to the number of IT signed. Many Mexican businesses face the risk of not being covered by any investment protection treaty if involved in disputes with the host countries where they operate. This situation creates uncertainties for Mexican investors' rights and their protection abroad and subjects their businesses abroad to high political risks. In order to evade the above mentioned inconvenience, Mexican corporations can be established under the laws of a third country and gain protection from BITs signed by them with the host country of their operation. Consequently, there are examples of Mexican companies involved in investment disputes with host countries under third countries BITs. The most relevant example is represented by CEMEX Caracas Investment and CEMEX Caracas Investment II v Bolivarian Republic of Venezuela Case which was filed under the Netherlands-Venezuela BIT." Babiy, *et. al.,* p. 100.

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in 1994, any benefit accorded by NAFTA to Mexican investors would expire within six months and the same scenario in the newly agreed USMCA.[58] Under such scenario, Mexico's adherence to ICSID is most advisable and desirable, as it could be a great of a deal useful to Mexican investors to guarantee their access to investment protection standards listed above. Mexico's adhesion to ICSID becomes more relevant when Mexican tribunals would hardly recognize the customary authority of investment protection standards as international customary law. Otherwise, without the protection of an IIA, foreign direct investment is vulnerable to abrupt law reforms, changes of regime, executive economic policies, discriminatory practices, corruption and abuses from the host State's agents and judiciary such as arbitrary acts and expansion of the public-policy exception.[59]

Lastly, when Mexico acts as respondent State (host State), and the situs of the arbitration is Mexico, Mexican domestic law is normally the applicable *lex fori* provided by IIAs entered by Mexico unless another *lex arbitri* is chosen by the parties. Hence, the available plurality of law sources, characteristic of the transnational model, will only be applicable to the extent allowed by the applicable *lex arbitri*. This is only a relative issue because even if investment arbitrations take place under other arbitration rules such as the International Chamber of Commerce's (ICC) arbitral services and rules or the United Nations Commission on International Trade Law (UNCITRAL) *ad hoc* rules, which are generally agreed as alternative mechanisms of arbitration and, in principle, the applicable law to the core of the matter is the Mexican law, according to those arbitration rules, the arbitrators are free to choose the applicable law be it international or national law; secondly because according to article 133 of the Mexican Constitution international treaties are part of the Supreme Law of the Union and arbitrators are free to use them to solve a dispute; and finally because Mexican conflictual law rules could imply the application of foreign law rules and principles.

Accordingly, the narrow scope of arbitral clauses provided by IIAs entered by Mexico, their limited applicability to investors from the signatory States', the insufficient remedies provided by the national laws to protect foreign direct investment (FDI), the not-so-effective resources of the conflictual law model to protect transnational

58 North American Free Trade Agreement. Chapter twenty two, Final Provisions, Article 2205: "Withdrawal. A Party may withdraw from this Agreement six months after it provides written notice of withdrawal to the other Parties. If a Party withdraws, the Agreement shall remain in force for the remaining Parties." https://www.nafta-sec-alena.org/Home/Legal-Texts (last visit July 26, 2019).
Protocol replacing the North American Free Trade Agreement with the Agreement Between the United States of America, The United Mexican States, and Canada; also known as United States, Mexico and Canada Agreement USMCA. Chapter 34, Final Provisions, Article 34.6: "Withdrawal. A Party may withdraw from this Agreement by providing written notice of withdrawal to the other Parties. A withdrawal shall take effect six months after a Party provides written notice to the other Parties. If a Party withdraws, this Agreement shall remain in force for the remaining Parties." https://www.gob.mx/cms/uploads/attachment/file/465855/34FinalProvisions.pdf (last visit July 26, 2019)

59 Cárdenas García, *op. cit.*, p. 139, 141.

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investments, the inexistence of a BIT with a given country, are some of the FDI-deterring disadvantages that could be redressed if Mexico joined ICSID.

D. Investment protection scenarios

Contrarily to the case of transnational contracts where the parties can freely choose the applicable law. The foreign investor quality can or cannot derive from a public contract containing an arbitral clause and an applicable-law clause. For instance, under the new Mexican *Energetic Reform*, investments in the hydrocarbon sector depend on a contract signed between the investor and the State through the National Hydrocarbons Commission such contracts provide for international arbitration of disputes so long that disputes are not related to an "administrative rescission" of contract, a sort of privilege of the Mexican State to unilaterally terminate the contract whenever the investor fails to comply with a set of obligations expressed in the agreement. Those contracts could eventually overlap with IIAs benefits and protection standards accorded to the same investors depending on their nationality and the existence of an IIA in force between Mexico and their country of origin, applying the *lex specialis* principle for the contract to govern.

The other possible scenario is the foreign direct investment where no contract between the State and investor is needed, such is the case of the majority whjere the investor quality is granted or recognized by law according to given criteria. In such cases, absent a contract and an IIA, international investors have no option to invoke and argue the applicable law (*lex causae*) or to resort to arbitration. Applicable law will be determined by national courts based on international private law principles[60] such as: the law of the place of the execution of the contract as to the formalities and requisites of validity (*locus regit actum*); the law of the place where the assets are located (*lex rei sitae*); the law of the place where the contract has effects (*lex loci contractus*); and the host State's law as the situs of the dispute (*lex fori*).[61]

What makes a real difference is the available resources to arbitrate and to enforce an arbitral award as well as the difference between ICSID's enforcement advantages compared to other mechanisms and arbitral rules such as ICC's and UNCITRAL's. As the Washington Convention provides less basis for the revision of the merits of the award compared to the New York Convention, the award annulment procedure is cognized by an autonomous organ of ICSID instead of a potentially biased national court; and, finally, the enforcement of an award under ICSID mechanism is easily executable and institutionalized under the World Bank's umbrella.[62]

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60 Torres González, *"Cooperación procesal internacional en materia comercial"*, p. 566.

61 García Castillo, *"La lex contractus en los contratos internacionales"* p. 73. See also: García Moreno, *op. cit.*,

62 "By joining ICSID, Mexico can spread a global message to its investor partners consisting of:
• Mexico intends to create sound grounds for investments made on its territory.

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4. THE *ENERGETIC REFORM*

A. PEMEX contractual autonomy and its powers to execute arbitration agreements

In the specific case of the oil and gas sector—until very recently, thanks to the *Energetic Reform*—foreign companies could only do business in Mexico by providing services to PEMEX or by investing in the secondary petrochemical industry. Oil refining and gas liquefaction were reserved exclusively to the State-owned company. Unless PEMEX contracted with a transnational company in which cases PEMEX was authorized to enter arbitral agreements, service contracts were generally awarded to national companies or subsidiaries incorporated in Mexico, such contracts were generally subject to the national laws' imperium and national courts have exclusive jurisdiction. As it was expressed by A. Z. El Chiati: "…No sovereign State accepts today to submit its petroleum agreements to a foreign law. Under principles of private international law, the national law is the law which normally governs such agreements."[63] However, as it was established (supra), in case of dispute due to damages imputable to the host State, foreign investors in addition to contractual remedies and causes of action provided by national law, could also invoke IIA's remedies and protection only if such agreements were signed and in-force between their country of origin and Mexico.

In 1958, the *Constitution's Article 27 Regulatory Act*[64] conferred powers to PEMEX to execute international contracts governed by foreign law, to subject itself to foreign courts' jurisdiction and to enter arbitral agreements for the resolution of disputes.[65]

• Mexico grants foreign investors not only formal protection through BITs/FTAs, but also the means to achieve that protection. It gives foreign investors access to a dispute settlement mechanisms tailored for investor-state disputes which makes effective the BITs/FTAs formal protection.

• The tendency of investment claims against Mexico experienced under ICSID/AFR reflects the tendency of investment claims registered against other countries under ICSID. As a result, the future situation would not be unpredictable for the Mexican government.

• Mexico is already a top-responding state in investment disputes and was ranked third in 2010. The choice for ICSID non-signature did not prevent this from happening. This fact demonstrates that there is no clear link between ICSID membership and increase of investment claims against a country. In practice, investment claims can hit the reputation of a country by passing through the back door, i.e., through other arbitration rules." Babiy, *et. al., op. cit.,* p. 88.

63 A. Z. El Chiati, *op. cit.*, p. 121.

64 *Ley Reglamentaria del Artículo 27 Constitucional* (1958).

65 *"Artículo 6o.- Petróleos Mexicanos y sus organismos subsidiarios podrán celebrar con personas físicas o morales los contratos de obras y de prestación de servicios que la mejor realización de sus actividades requiere. Las remuneraciones que en dichos contratos se establezcan serán siempre en efectivo y en ningún caso se concederán por los servicios que se presten y las obras que se ejecuten propiedad sobre los hidrocarburos, ni se podrán suscribir contratos de producción compartida o contrato alguno que comprometa porcentajes de la producción o del valor de las ventas de los hidrocarburos ni de sus derivados, ni de las utilidades de la entidad contratante.*

Petróleos Mexicanos no se someterá, en ningún caso, a jurisdicciones extranjeras tratándose de controversias referidas a contratos de obra y prestación de servicios en territorio nacional y en las zonas donde la Nación ejerce soberanía, jurisdicción o competencia. Los contratos podrán incluir acuerdos arbitra-

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Later, in 1993 and 2008 legislative reforms to the oil sector's legal framework, succeeded in liberalizing PEMEX's outsourcing of exploration, location and perforation services, whenever its technical expertise or physical capacity required so.[66] Under Article 115 of

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les conforme a las leyes mexicanas y los tratados internacionales de los que México sea parte." [*Petróleos Mexicanos* and its subsidiary entities may conclude with physical or legal persons the contracts for works and services, as required for the best performance of their activities. The remuneration established in these contracts will always be in monetary and in no case such services and works rendered will confer property rights over the hydrocarbons, nor can they sign shared production contracts or any contract that compromises percentages of the production or value of sales of hydrocarbons or their derivatives, or the profits of the contracting entity. In no case, shall *Petróleos Mexicanos* submit to foreign jurisdictions in the case of disputes relating to works contracts and services rendered in the national territory and in areas where the Nation exercises sovereignty, jurisdiction or competence. Contracts may include arbitration agreements under Mexican law and international treaties to which Mexico is a party.] *Ley Reglamentaria del Artículo 27 Constitucional,* 1958 [Abrogated in 1992]. http://www.diputados.gob.mx/LeyesBiblio/abroga.htm

"Artículo 14.- Los actos jurídicos que celebren Petróleos Mexicanos o cualquiera de sus Organismos Subsidiarios se regirán por las Leyes Federales aplicables y las controversias nacionales en que sea parte, cualquiera que sea su naturaleza, serán de la competencia de los tribunales de la Federación, salvo acuerdo arbitral, quedando exceptuados de otorgar las garantías que los ordenamientos legales exijan a las partes, aun en los casos de controversias judiciales. Tratándose de actos jurídicos de carácter internacional, Petróleos Mexicanos o sus Organismos Subsidiarios podrán convenir la aplicación de derecho extranjero, la jurisdicción de tribunales extranjeros en asuntos mercantiles y celebrar acuerdos arbitrales cuando así convenga al mejor cumplimiento de su objeto." [The legal acts entered into by *Petróleos Mexicanos* or any of its Subsidiary Entities shall be governed by the applicable Federal Laws and the national controversies, of whatever nature, in which they be parties shall fall within the jurisdiction of the courts of the Federation, being exempted from granting the guarantees that the legal orders demand from the parties, even in cases of judicial disputes. In the case of international legal acts, *Petróleos Mexicanos* or its Subsidiary Entities may agree to the application of foreign law, the jurisdiction of foreign courts in commercial matters, and may conclude arbitration agreements when it is in order to best comply with its purpose.] Ley Orgánica de Petróleos Mexicanos y Organismos Subsidiarios, 1992 [Abrogated in 2008]. http://www.diputados.gob.mx/LeyesBiblio/abroga.htm

"Artículo 72.- Los actos jurídicos que celebren Petróleos Mexicanos y sus organismos subsidiarios se regirán por las leyes federales aplicables y las controversias nacionales en que sea parte, cualquiera que sea su naturaleza, serán de la competencia de los tribunales de la Federación, salvo acuerdo arbitral, quedando exceptuados de otorgar las garantías que los ordenamientos legales exijan a las partes, aun en los casos de controversias judiciales. Tratándose de actos jurídicos de carácter internacional, Petróleos Mexicanos y sus organismos subsidiarios podrán convenir la aplicación de derecho extranjero, la jurisdicción de tribunales extranjeros en asuntos mercantiles y celebrar acuerdos arbitrales cuando así convenga al mejor cumplimiento de su objeto." [The agreements entered to by *Petróleos Mexicanos* and its subsidiary entities shall be governed by applicable federal law and, save arbitral agreement, the federal courts shall have jurisdiction over the national disputes to which they may be parties, whichever be their nature, and shall be exempted from granting the guarantees that the legal orders require to the parties even in cases of judicial disputes. In the case of international agreements, *Petróleos Mexicanos* and its subsidiary entities may agree on the application of foreign law, the jurisdiction of foreign courts in commercial matters and enter arbitration agreements where appropriate for the best fulfillment of its object.] *Ley de Petróleos Mexicanos*, 2008. [Abrogated in 2014]. http://www.diputados.gob.mx/LeyesBiblio/abroga.htm

66 During the past decade, the Mexican Congress, anchored in the same deeply rooted populist protectionist rhetoric once-patriotic *Carranza* doctrine, systematically disavowed every initiative to liberalize the hydrocarbons' sector legal framework. The legislative debate and initiatives were conceived by the

the PEMEX Act of 2014 (in force) the State-owed company's powers to enter arbitral agreements were maintained.[67]

Some of those reforms were contemporaneous to NAFTA negotiations, where Mexico gave up some of its hardline protectionist positions regarding foreign investment, therefore, disputes regarding those transactions become arbitrable. Under NAFTA, the parties agreed that international hydrocarbons sales and purchases made by PEMEX were to be considered private transactions—*acta jure gestionis*—governed by private law. The effect of such covenant is not trivial, Mexico cannot invoke State immunity to avoid neither arbitral nor foreign courts' jurisdiction, over disputes related to sales and purchases of oil and gas. For instance, under the U.S. Foreign Sovereign Immunities Act, trade transactions made by the States agencies and companies enjoy no immunity, such is known as the *ius commercii* doctrine.[68] Moreover, by means of the most favored nation clauses convened in other FTA's and BIT's, such benefit is extensive and may be invoked by other countries' nationals and companies.

B. Prior investment statutes

The reforms made to the Mexican legal framework on investment, as a consequence of NAFTA negotiations, allowed the participation of foreign companies in almost all sectors, even hydrocarbons sector was sensibly opened to foreign investment, the protectionist-nationalist rhetoric was tempered by the statutes and regulations, to avoid a

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rightist political party *PAN* during the two presidential periods the *PAN* held the Presidency (2000-2012).

67 "*Artículo 115.- Las controversias nacionales en que sean parte Petróleos Mexicanos y sus empresas productivas subsidiarias, cualquiera que sea su naturaleza, serán de la competencia de los tribunales de la Federación, quedando exceptuados de otorgar las garantías que los ordenamientos legales exijan a las partes, aun en los casos de controversias judiciales. Sin perjuicio de lo anterior, Petróleos Mexicanos y sus empresas productivas subsidiarias podrán pactar medios alternativos de solución de controversias, cláusulas o compromisos arbitrales, en términos de la legislación mercantil aplicable y los tratados internacionales de los que México sea parte. Tratándose de actos jurídicos o contratos que surtan sus efectos o se ejecuten fuera del territorio nacional, Petróleos Mexicanos y sus empresas productivas subsidiarias podrán convenir la aplicación del derecho extranjero, la jurisdicción de tribunales extranjeros en asuntos mercantiles y celebrar acuerdos arbitrales cuando así convenga al mejor cumplimiento de su objeto.*" [National disputes involving *Petróleos Mexicanos* and its subsidiaries, regardless of their nature, shall be the responsibility of the courts of the Federation, the parties shall be excepted from granting the guarantees required by the law, even in case of judicial disputes. Notwithstanding the foregoing, *Petróleos Mexicanos* and its subsidiary productive companies may agree alternative means of dispute resolution, arbitration clauses or commitments, in terms of the applicable commercial law and international treaties to which Mexico is a party. In the case of legal acts or contracts which effects or execution take place outside the national territory, *Petróleos Mexicanos* and its subsidiary productive companies may agree on the application of foreign law, the jurisdiction of foreign courts in commercial matters and enter arbitration agreements where appropriate for the best fulfillment of its object.] *Ley de Petróleos Mexicanos,* Diario Oficial de la Federación, 11 agosto 2014. http://www.diputados.gob.mx/LeyesBiblio/index.htm

68 28 U.S.C. §1605(a)(2)

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constitutional reform. Foreign investment was allowed either directly, through equity or through the incorporation of national companies, holdings and other mechanisms of control were admitted as long as they complied with the restrictions of participation set out by the Foreign Investment Act of 1993. The law provided the means to circumvent the constitutional restrictions to foreign investment for example by renouncing in writing to resort to the protection of the government of their countries of origin in case of an investment dispute. Another legal mechanism to avoid foreign investment restrictions were the neutral shares or "N-shares" that conferred to their holders full economic rights but limited corporate rights to avoid foreign control over a 'Mexican' company, suitable for equities and holdings. Also, the legal figure of the *fideicomiso* (trust) still plays a key role as a vehicle to foreign investment liberalization. Under a *fideicomiso* a Mexican banking institution (trustee) holds the property rights over the assets, notably land, which can only be invested and managed in accordance with the beneficiary's instructions, such beneficiary could be a foreigner—person or entity.

Regardless the statutory liberalization of foreign investment restrictions, private companies (national and foreign) were banned from the activities of exploration and extraction of hydrocarbons unless they were awarded with a contract by PEMEX, though final commercialization corresponded to the State's company. The liberalization remained in the national political debate for two decades until the political parties represented in the Federal Congress reached a general accord approving one of the most transcendental constitutional reforms, the so called *Energetic Reform* in 2013. Under the reform, it corresponds to the National Hydrocarbons Commission to award the concessions for the exploration and exploitation of oil and gas; PEMEX became only one of the many concurrent companies in the sector.

C. Arbitration under the *Energetic Reform's* Hydrocarbons Act

Thanks to the *Energetic Reform*, foreign capitals and companies can compete in equal circumstances with PEMEX and Mexican companies for concessions of exploration, extraction and commercialization of oil and gas, or form joint ventures among themselves or with PEMEX. Under Article 21 of the *Ley de Hidrocarburos* (Hydrocarbons Act, 2013), oil and gas exploration and extraction contracts to be licensed by the National Hydrocarbons Commission may provide for arbitration as alternative method for resolution of disputes, only if the agreed applicable law (*lex contractus* and *lex causae*) is the Mexican Federal law, the language is Spanish and the parties agree on the irrevocability of the award. [69]

69 "Article 21. In regard to disputes referring to Exploration and Extraction Contracts, except as provided for in the preceding Article, alternative dispute-resolution forms may be set forth, including arbitration agreements as provided for in the Fifth Book, Fourth Title, of the Commercial Code and the international arbitration and dispute-resolution treaties to which Mexico is a party.
The National Hydrocarbons Commission and the Contractors shall under no circumstances be subject to foreign laws. The arbitration procedure shall be adjusted to the following conditions in every case:

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The new Hydrocarbons Act provides applicable rules to hydrocarbons exploration and extraction contracts awarded by the National Hydrocarbons Commission, such norms cannot be waived or modified by the parties. Those contracts are awarded through an international tender procedure. Beneficiaries of the allocated contracts have no bargaining power to modify, among others, the arbitral agreement and the applicable law clauses of the model contract. The Hydrocarbons Act regulations' clause remits the parties and the arbitrator to Mexican Federal laws as applicable-law, however international treaties and international law are also applicable, as stated (*supra*), incorporated by Article 133 of the Constitution, namely IIAs and the expanded benefits of their most favored clauses. Moreover, as stated above also, the Constitution and the Hydrocarbons Act incorporate by reference the 'best international practices' of the sector which become applicable and must be ascertained on a case-by-case basis. All those applicable norms of diverse nature and sources shall be ascertained and applied by Mexican federal courts in cases of "administrative rescission" and by the arbitrator, depending on the nature of the dispute and the dispute resolution mechanism.

Before the end of 2018, eleven tenders for the allocation of exploration and extraction of oil and gas under the Hydrocarbons act (2013), were accomplished within the three rounds scheduled. Within the three first rounds, 107 exploration and extraction contracts were allocated out of which 12 are already producing oil and gas. Around 73 small and medium-size companies from 20 different countries have been awarded with contracts.[70] The contracts allocated under Mexican Hydrocarbons Act provide for arbitration of disputes under UNCITRAL rules; except for controversies arisen from "administrative rescission," in which case Mexican federal courts will have exclusive jurisdiction.[71] It is to be noted that other disputes falling out of the scope of the contract, but within the scope of a given IIA, may give place to the enforcement of the arbitral clause contained in the IIA and invoke the remedies agreed therein.

Despite the global fall in the oil prices in 2014, the sector was expected to regain profitability and stabilize as of 2019. Mexico expects considerable increments of foreign investment in oil and gas projects, so far investments under the Hydrocarbons Act amount close to two billion dollars. Probabilities of disputes connected to those investments will proportionally increase as well: unsettled social conflicts for affectations left by PEMEX to communities; undisclosed environmental damages made by PEMEX; theft of equipment making part of the licensing contracts; inaccessible isolated fields; local authorities corruption; and organized crime, to name a few, that

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I. The applicable laws shall be Mexican federal laws;

II. They shall be conducted in Spanish; and

III. The award shall be strictly at law and shall be binding and final for both parties." *Hydrocarbons Act, 2014.* http://www.eisourcebook.org/cms/December%202015/Mexico%20Hydrocarbons%20Law%202014.pdf

70 https://rondasmexico.gob.mx/esp/cifras-relevantes/ (consulted on July 25, 2019)

71 *Idem.*

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could trigger disputes or give occasion to claims from the investors on State's liability for breaching the IIAs, defrauding investors' expectancies and violating investments protections. Following such trend, it is logical to expect an increment in the number of arbitral awards resulting from arbitration proceedings as well as an increment in their enforcement either before national courts or abroad.

5. RECOGNITION AND ENFORCEMENT OF INVESTMENT ARBITRAL AWARDS BY MEXICAN COURTS

A. Enforcing an award under the New York Convention

As stated above, Mexico did not ratify the Washington Convention but instead joined the New York Convention on the Recognition and Enforcement of International Commercial Arbitration Awards. Therefore, arbitral awards where Mexico is interested party are likely to be enforced under the New York Convention. The winning party may enforce its award at any State member of the New York Convention; such country will be the *forum executionis*. The choice will depend on the location of the losing party's assets location in sufficient amount to guarantee the recovery of the awarded damages, or in the forum where a given performance is expected to be executed as part of the remedies.[72] A party seeking to execute an award will choose the *forum executionis* based also on different aspects of its judicial system such as efficiency, rule of law, corruption indexes, and likelihood of annullability of the award by local courts.

Torres González sustains that whoever pretends to enforce an arbitral award in a country different than his must face the phantom of the foreign judiciary system to obtain its recognition and execution.[73] As it was established, enforcement involves dealing with national courts for the recognition of the enforceability of the award—*exequatur*—, its actual execution, and the resolution of challenges, objections and remedies provided by the New York Convention. Also, in accordance with the Convention, only the courts of the seat of arbitration are competent to vacate or annul the award under the laws of the forum *lex fori*. Attention must be paid to avoid the host State as the seat of the arbitration because an eventual award averse to the State could attract a set aside by potentially biased national courts in countries where the judiciary branch is not independent from the executive or where judiciary adopts nationalistic postures.

Nevertheless, a set aside of an award by the courts of the seat of arbitration does not necessarily bring about the impossibility of its execution elsewhere because the courts of other member States to the New York Convention are free to recognize and enforce the award despite its annulment by the seat's courts. The French schoolarship or *école de Dijon,* that during the second half of the 20th century developed judge

72 Goodrich, Riquelme y Asociados, *Mexico, Business opportunities and legal framework,* p. 265.
73 Torres González, *op. cit.,* p. 558.

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Philippe Jessup's proposition of the existence of a Transnational Legal Order different and autonomous from the national legal orders, permitted French courts—and other countries' courts that follow the French school's postulations—to grant the *exequatur* status to an arbitral award despite being set aside by the courts of the situs. The opposite posture, generally adopted by U.S. courts, tends to respect the authority of an award or its annulment under the *lex forum,* unless the issuance or annulment manifestly divert from the facts or result contrary to justice and equity.

Further or multiple national recognitions—*exequatur* procedures—of arbitral awards and their respective enforcement procedures represent a major risk that investors want to avoid. Such legal enterprises are time and money consuming, they shall be kept in mind while taking investment-wise decisions. Contrary to the New York Convention model, based on national courts' recognition-and-enforcement, under the ICSID model the State parties assume the obligation to grant awards the quality of *res judicata* without a prior *exequatur* procedure. The revision of the awards is conducted by ICSID only.[74]

Under Article V.1 of the New York Convention, an arbitral award, may be vacated if either of the parties proves that the arbitral agreement is void for lack of capacity of either party, improper notice given to either party during the process, if the dispute fell out of the scope of the agreement, for improper composition of the arbitral authority, or if the award is not yet binding or was set aside under the *lex forum*. [75] Under Article

74 Ortiz Ahlf, *op. cit.,* p. 392.

75 "*ARTICLE V.* 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place;
or (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.
2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
(b) The recognition or enforcement of the award would be contrary to the public policy of that country." Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958).

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V.2 of the New York Convention, a national court may deny the recognition and execution of an award if, according with the *lex forum*: the award is contrary to public policy because the dispute and the award is not a subject matter of arbitration; the arbitral procedure violated basic procedural or legal principles, such as the right to due process; or because the arbitrator exceeded the mandate of the parties (*ultra vires* acts).[76] The three main causes of action to prevent enforcement of an award shall be invoked at the incidental procedure under national law of the *forum executionis*.[77]

B. Executing an award in Mexico

In 1993, Mexico incorporated UNCITRAL's arbitration rules and principles into both its Commerce Code and its Federal Civil Proceedings Code which were reformed to provide for the recognition and execution of foreign arbitral awards, respectively in commercial and civil matters. Based on the conflict of laws method, Mexico built an intricate system intended to foster arbitration as an alternative method to the judicial resolution of disputes, allowing the execution of foreign awards in national territory.[78] Under Article 1461 of the Mexican Commerce Code, an arbitral award from any country may be recognized as binding and executory. However, recognition and enforcement are two different concepts that require to substance an incidental procedure before the Mexican courts. Likewise, Article 569 of the Federal Civil Procedure Code provides that non-commercial foreign arbitral awards will be recognized and enforced to the extend they are not contrary to public policy.[79] Both articles realize and comply with the obligations assumed by Mexico under the Ney York Convention.

Whereas in principle arbitral awards are definitive and cannot be recurred or appealed unless the parties so agreed, the public policy exception in Mexican law compels national courts to analyze the merits and findings grounding the award to determine whether it complies with both procedural and substantive public policy. Moreover, public policy in Mexico is not a core of fundamental directives but it is decreed by the Congress: almost every federal statute in Mexico is expressly deemed public policy: "public order." Therefore, the recognition-enforcement of a foreign arbitral award—also known as "homologation" in Mexican law—will require the national court to assess whether the arbitral procedure and award are vitiated before it declares its *exequatur* and provides for its execution.

The arbitral award, not having a judicial nature, cannot be recurred through an ordinary procedural remedy but, instead, given the private nature of both the arbitral agreement and the mandate given to the arbitrator, the award can only be annulled;

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76 *Op. cit.*, p. 685.

77 See also Arellano García, *Derecho Internacional Privado*, p. 768.

78 López Velarde Estrada, *El sometimiento al derecho extranjero por medio de la cláusula de derecho aplicable*, pp. 423-431, 438; ver también Torres González, *op. cit.*, p. 567.

79 *Idem.*

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in other words, declared void. According to Sánchez Medal, the legal nature of an arbitrator's appointment is analogue to that of a mandate or commission, because of the arbitral agreement entered between the parties. [80] The parties act as mandators and the arbitrator acts as a mandatory who, following the instructions of the parties to substance an arbitral procedure, issues an award to solve a dispute between the parties (mandators).

The grounds for annulment of non-ICSID awards are contained in the *lex arbitri* of the seat of arbitration. Although there is a certain degree of uniformity in the grounds and proceedings for set aside, substantial differences may exist, especially in the practice and in the interpretation given to such grounds by local courts.[81]

Aside of the three main causes of action to claim the annulment of the awards, procedural resources and objections pertaining to the incidental procedure are available to the parties. When a party of an arbitral procedure resorts to a national court to claim the *homologation* and enforcement of an arbitral award, the expectation is that the national court will provide for its coercive execution. The only possible rejoinder against the incidental interlocutory resolution that recognizes and provides the arbitral award execution, is the *amparo,* a remedy against the violation of procedural rights of any of the parties to the incidental procedure.[82] The loser against whom the award is being executed, may therefore resort to the *amparo* resource in case of violation of his right to due process.

C. The national courts conundrum

Unfortunately, Mexican courts are not prepared to apply conflictual norms in combination with international law, and less prepared to operate transnational law concepts and rules.[83] Often, they have substandard knowledge of international law, and face multiple challenges to apply principles and norms of foreign law due to language barriers and exoticism of foreign law concepts. All of which easily leads to misinterpretations and unsatisfactory enforcement of foreign arbitral awards, or worse, to enforcement denials based on arbitrary findings of awards being contrary to the expansive concept of public policy or non-arbitrable matters under Mexican law without considering international treaties prevalence.[84]

For instance, the Mexican 7th Circuit's Civil Court held in an *amparo* resolution (2012) that where the annulment of an arbitral award is sought under Article V.1 of the New York Convention, incorporated into Article 1457 section I of the Mexican Commerce

80 Sánchez Medal, *"Medios de Impugnación del Laudo Arbitral,"* p. 681-691.
81 Babiy *et al*., *op. cit.*, p. 52.
82 Sánchez Medal, o*p. cit.*, p. 686.
83 López Velarde Estrada, *op. cit.*, p. 419.
84 *Torrez González, op. cit*., p. 653.

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Code, the judge must also *ex officio* analyze and, if it is the case, set the award aside if it is found that the subject of the dispute is not arbitrable or if the recognition or execution of the award is contrary to "public order;" even if such grounds of annulment were not invoked by the parties.[85] In that sense, the same Court held in a different ruling that because the concept of "public order" is not defined in the Constitution or in the Commerce Code, it becomes necessary to determine its meaning on a case-by-case basis, to protect the Mexican legal order from extraneous intrusions. Hence, an award not only transgresses the "public order" when it is contrary to a statutory provision expressly denominated as such, but further and deeper analysis by the judge is required to determine if a given award's recognition and execution would breach the national "public order."[86]

Another potential source of difficulties to enforce an award in Mexico is Article 1457, sección II, of the Mexican Commerce Code when it provides that an award is null if the controversy is not arbitrable under the Mexican law. According to the Third Civil Tribunal of the First Circuit whenever the matter of the award is deemed not arbitrable what is really at stake is the legal validity of the arbitral agreement either because the matter has been previously settled—*res judicata*—or because the parties are not free to enter an arbitral agreement upon it, which would reveal a lack of subject matter jurisdiction of the arbitrator.[87] Although such holding of the Third Civil Tribunal of the First Circuit is not authoritative, it exemplifies the few knowledge that national courts could have of concepts such as *competence-de-la-competence*, severability, and preeminence of international law, to mention a few. That lack of subject matter jurisdiction, as ground to set aside an award, freely considered by national courts is particularly perilous when national legal orders, like the Mexican, denominate as "public order" or "exclusive jurisdiction of the State's courts" matters that, by nature, belong to private law and that are susceptible of arbitration in most national legal orders, such as the rescission of a contract. Under Mexican law, before and after the *Energetic Reform*, upstream operations contracts' rescission by the State, "administrative rescission," are not arbitrable.

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85 *Amparo directo 6/2012. Bergesen Worldwide Limited. 19 de abril de 2012. Unanimidad de votos. Ponente: Julio César Vázquez-Mellado García. Secretario: Carlos Manríquez García. Tesis Aislada I.7o.C.17 C (10a.), Séptimo Tribunal Colegiado de Circuito en Materia Civil, Semanario Judicial de la Federación y su Gaceta; Libro X, julio de 2012, Tomo 3; Décima Época, p. 1877.*

86 *Amparo directo 6/2012. Bergesen Worldwide Limited. 19 de abril de 2012. Unanimidad de votos. Ponente: Julio César Vázquez-Mellado García. Secretario: Carlos Manríquez García. Tesis Aislada I.7o.C.20 C (10a.), Séptimo Tribunal Colegiado de Circuito en Materia Civil, Semanario Judicial de la Federación y su Gaceta; Libro X, julio de 2012, Tomo 3; Décima Época, p. 1878.*

87 *Amparo en revisión 195/2010. Maquinaria Igsa, S.A. de C.V. y otra. 7 de octubre de 2010. Unanimidad de votos. Ponente: Neófito López Ramos. Secretario: José Luis Evaristo Villegas. Tesis aislada I.3o.C.948 C, Tercer Tribunal Colegiado en materia Civil del Primer Circuito, Semanario Judicial de la Federación y su Gaceta, Tomo XXXIII, Mayo de 2011; Novena Época, p. 1239.*

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In addition, there is the possibility of political pressure over national courts to influence the awards recognition-enforcement and annulment procedures. If that politicization becomes a practice of national courts, it could become a risk to be calculated or an investment deterrent. The same inconveniences could be faced by Mexico if it is in the position of enforcing or challenging an award before a foreign court.[88] This is the legal scenario in which the *Energetic Reform* and its investment projects will navigate. Eventually, foreigners investing in Mexico may start arbitral procedures related to oil investments, enforce or challenge arbitral awards both in Mexico and abroad.

6. THE "ADMINISTRATIVE RESCISSION" AND ITS INTERACTION WITH TRANSNATIONAL LAWS

A. The unlearnt lessons from *COMMISA v. PEMEX* case

With the *Energetic Reform*, the new Mexican setting of oil and gas exploration and production contracts is administered by Mexico's National Hydrocarbons Commission (CNH). Also, a new scenario emerges where multiple transnational investors, alongside PEMEX and its subsidiaries, will enter oil and gas exploration and extraction agreements with the CNH, extraction, and related services. Upstream contracts to be awarded by the CNH as well as contracts entered by PEMEX on its own legal capacity, will be governed by the Hydrocarbons Act, its regulations and other Mexican administrative-law statutes.

Under the Hydrocarbons Act, the Executive branch, acting through the National Hydrocarbons Commission may administratively rescind an Exploration and Extraction Contract and recover the Contractual Area when the counterparty incurs in any of the serious faults set by Article 20 of the Act.[89] The rescission is resolved by the

88 Rodríguez Jiménez, *op. ct.*, p. 140.

89 [Article 20.-The Federal Executive, acting through the National Hydrocarbons Commission, may administratively rescind Exploration and Extraction Contracts and recover the Contractual Area only when any of the following serious causes is present:
I. The Contractor fails to commence, or suspends the activities stipulated in the Exploration plan or development plan for Extraction for more than one hundred and eighty uninterrupted calendar days in the Contractual Area without just cause or authorization from the National Hydrocarbons Commission;
II. The Contractor fails to comply with the minimum work commitment, without just cause, pursuant to the terms and conditions of the Exploration and Extraction Contract;
III. The Contractor transfers all or part of the operation or rights conferred in the Exploration and Extraction Contract without having been authorized in advance as prescribed in Article 15 of this Law;
IV. A serious accident occurs due to the Contractor's misconduct or negligence, which causes damage to the facilities, death, or loss of production;
V. The Contractor, more than once, maliciously or unjustifiably submits false or incomplete information or reports to, or hides them from, the Ministry of Energy, the Ministry of Finance and Public Credit, or the Ministry of Economy, or the National Hydrocarbons Commission or the Agency, regarding the production, costs, or any other relevant aspect of the Contract;

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CNH, in other words, by the own licensor and has a great margin of discretion. This unilateral cause of termination of the agreement may rise concerns amidst potential investors in the oil and gas sector. Administrative rescission disputes are not arbitrable according with the Hydrocarbons act and the energetic tenders' model contracts, and are ultimately settled by para-judicial courts which make part of the executive branch of the government, not the judicial branch, which raises concerns about their autonomy. In the past, the figure has been the occasion of arbitrary and unjustifiable terminations of contracts entered by PEMEX. It is also a perfect vehicle for corrupt practices and conflicts of interests. This infamous "administrative rescission" concept of Mexican administrative law, now available to the CNH to unilaterally terminate an upstream contract, was a key element in the case of *Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración y Producción* (also known as *COMMISA v. PEMEX*). [90]

The dispute of the case had its origin in technical differences related to the construction of two off-shore platforms; best sectorial practices were at stake in the heart of this matter. After PEMEX gave notice of the "administrative rescission" to COMMISA, the latter attempted to challenge the constitutionality appropriateness and timeliness of the "administrative rescission" through the *amparo* action. The *amparo* ruling confirmed the constitutionality of the "administrative rescission." After a conciliation period failed, COMMISA took PEMEX to arbitration, in accordance with the contract entered between the parties, the dispute was settled under ICC arbitration rules, with Mexico City as the seat of the arbitration and Mexican law as the agreed applicable law (*lex causae*).

After a preliminary award enjoining PEMEX, and foreseeing the imminent adverse award, before the arbitration ended, the Mexican Congress reformed the law and vested the Mexican Fiscal Tribunal of Administrative Justice—an administrative authority depending on the Executive branch—with exclusive jurisdiction over disputes related to public contracts, such as those entered by PEMEX with national and foreign investors like COMMISA. "Not incidentally, the switch curtailed the applicable statute of limitations: previously, ten years for suits in the Mexican District Courts; afterward, for suits in the Tax and Administrative Court, 45 days." [91] Also, the Mexican Congress reformed the Law of Public Works and Related Services to abrogate the rules that

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VI. The Contractor breaches a final resolution of the federal courts which constitutes res judicata; or VII. The Contractor unjustifiably fails to make any payment to the State or to deliver Hydrocarbons to it in accordance with the time limits and terms stipulated in the Exploration and Extraction Contract. ..."] *Ley de Hidrocarburos* (2014) www.eisourcebook.org/cms/December%202015/Mexico%20Hydrocarbons%20Law%202014.pdf

90 *Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración Y Producción*, 832 F.3d 92 (2d Cir. 2016).

91 *Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración Y Producción*, 832 F.3d 92, 99 (2d Cir. 2016).

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provided for the arbitrability of claims such as those risen by COMMISA.[92] When the arbitral tribunal awarded COMMISA a USD$300 million damages recovery, PEMEX and the Mexican government challenged the award before the Fiscal Tribunal and had it set aside. Facially, the immediate purpose of the *ex post facto* reform was to provide the conditions for the annulment of the award under national law so that it could not be enforced under the New York or the Panama Conventions. [93]

Under the reformed regulations, the Mexican Fiscal Tribunal of Administrative Justice was bestowed with exclusive jurisdiction over public contracts' and consequently over disputes arisen from "administrative rescission," subtracting the issue from the scope of arbitrable matters and therefore, making the award annullable and leaving COMMISA without defense because the statute of limitations had passed. However, despite the set aside, COMMISA enforced in the United States where a U.S. court confirmed the award regardless its annulment judged by the Mexican Fiscal Tribunal. PEMEX appealed and moved for vacatur of the award based on the supervening set aside of the award by Mexican courts. The U.S. Court of Appeals for the Second Circuit vacated and remanded to the district court which, on remand, confirmed enforcement:

HOLDINGS: [1]-District court properly exercised its discretion in confirming award because giving effect to the subsequent nullification of the award in Mexico would run counter to U.S. public policy and would (in the operative phrasing) be "repugnant to fundamental notions of what is decent and just" in this country; [2]-Appellant's personal jurisdiction and venue objections were without merit; [3]-The district court did not exceed its authority by including in its judgment $106 million attributed to performance bonds that appellant collected; [4]-Although the Panama Convention afforded discretion in enforcing a foreign arbitral award that has been annulled in the awarding jurisdiction, and thereby advances the Convention's pro-enforcement aim, the exercise of that discretion here was appropriate only to vindicate fundamental

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92 "Two developments in Mexican law transpired while arbitration proceedings were ongoing. In December 2007, the Mexican Congress changed the available forum for claims that (like COMMISA's) raise issues related to public contracts, and vested exclusive jurisdiction for such disputes in the Tax and Administrative Court. Not incidentally, the switch curtailed the applicable statute of limitations: previously, ten years for suits in the Mexican District Courts; afterward, for suits in the Tax and Administrative Court, 45 days.
Second, in May 2009, the Mexican Congress enacted Section 98 of the Law of Public Works and Related Services ("Section 98"), which ended arbitration for certain claims (such as those by COMMISA):
An arbitration agreement may be executed regarding the disputes arising between the parties related to the construction of contractual clauses or related to issues arising from the performance of the contracts ... The administrative rescission, early termination of the contracts and such cases as the Regulation of this Law may determine may not be subject to arbitration proceedings.
J.A. at 3758." *Idem*.

93 Under article V(1)(e) and V(2)(a) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the execution of the award may be denied respectively: if the award was set aside by a competent authority of the *situs* and if the dispute is not arbitrable under the law of the State where its execution is sought.

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notions of what was decent and just in the U.S. The district court's judgment was affirmed.[94]

Although US courts' policy is rather to respect awards' annulments issued by foreign courts, in *COMMISA v. PEMEX*, the US District Court for the Southern District of New York granted the enforcement and confirmed on remand when it found that the set-aside of the Mexican court was "repugnant to fundamental notions of what is decent and just" because it was issued under extremely inequitable circumstances and violated fundamental principles of law.[95] The case constitutes an ignominious landmark of enforcement of international arbitral awards despite their annulment. The figure of the "administrative rescission" grounded the annulment of the award in violation of fundamental principles such as the no retroactive application of the law in prejudice of the party and the vested-rights doctrine, which are general principles of both Mexican and U. S. law. The set aside was issued under political duress, grounded on an impinging legal reform made *a modo,* the Mexican administrative and judicial authorities acted both biased and under pressure. Altogether in contravention of general principles of law notably the fair and equitable treatment, good faith, due process, and the *pacta sunt servanda* principle with respect to the arbitral agreement and the obligation of the parties to respect and comply with the award.[96]

Even if the case was finally settled in 2018 when PEMEX agreed to pay $300 million dollars plus interests to the claimant, which amounted to $435 million dollars, the ten year long *COMMISA v. PEMEX* case had important effects. Firstly, at a transnational level as the U.S. District Court's ruling proved that the enforcement of the award is still possible despite its annulment by a court of the situs of the arbitration; secondly, at a national level, as the reform made *a modo* stayed and the figure of the "administrative rescissions" was declared constitutional by the Supreme Court seen as a prerogative of the State to promote the public interest. Under the *Energetic Reform* era, CNH and PEMEX contracts have express clauses under which the disputes related to administrative rescissions are not arbitrable but exclusive jurisdiction of Mexican courts. However, the core of the matter is not the jurisdiction but rather the position that Mexico, whether PEMEX or the CNH, adopts towards new arbitration procedures. It is not to be forgotten that the Hydrocarbons Act may be

94 *Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración Y Producción*, 832 F.3d 92, 97 (2d Cir. 2016).

95 *COMMISA v.* PEMEX is the second case where a US court grants a motion in despite of an award's vacatur. *See, TermoRio v. Electranta*, 487 F. 3d 928, 938 (D.C. Cir. 2007).

96 Furthermore, although is not related to oil and gas sector and its facts are not quite the same, there are a few lessons that should have been learnt with regards to governmental acts *ex post* award, with respect to the violation of fair and equitable treatment standard—and derived components of good faith, due process and no discrimination—drawn at a prior case where Mexico was also involved as respondent host State, *TECMED v. Mexico* which also became a landmark. See *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2 at: https://www.italaw.com/cases/1087#sthash.YCJog2mj.dpuf

inconsistent with international law, namely International Investment Agreements. If an IIA provides a base for the arbitration of oil investment disputes it will be directly in conflict with the "administrative rescission" doctrine, yet the treaty shall prevail in accordance with the supremacy principle set forth by Article 133 of the Mexican Constitution.

The *competence-de-la-competence* doctrine allows the arbitrator to determine its own jurisdiction regardless the carefully woven upstream contract awarded by the CNH and the eventual findings of the Mexican Fiscal Tribunal.

The "administrative rescission" would scarcely discourage potential investors in the Mexican oil and gas sector because oil companies are used to transact and do profitable business in the most adverse political and geographical environments. Since the 90s Mexico is recognized for its advantageous investment environment. So far, the international tenders called by the CNH under the *Energetic Reform* era have registered an enthusiastic participation of transnational actors. Yet there is a lot at stake for Mexico in the field of international arbitration, notably its reputation as a fair-play State.

It is foreseeable that as contracts increase the probability of disputes and arbitrations will also increase. PEMEX, the CNH and the Executive branch authorities must be extremely scrupulous to avoid profiling Mexico as a non-compliant country that eludes its contractual obligations or disobeys arbitral awards. Oil and gas contracts, in the *Energetic Reform* era, apparently purge the possibility of another *COMMISA v. PEMEX* by subjecting the contract exclusively to Mexican laws and courts jurisdiction in the case of "administrative rescission" disputes. However, as it was established, that prophylactic legal construction and provisions are facial or ineffective when inconsistent with treaty provisions backed up by the French school of arbitration that will recognize full effects to an award even if set aside by foreign courts.

B. The incorporation of the best sectorial practices

Lastly, although it could be matter of a diverse extensive study, it is important to note that one of the characteristic aspects of the *Energetic Reform* is the incorporation to the Mexican legal framework, both at a constitutional and statutory level, of the best international practices of the oil sector. That incorporation adds to the incorporation of international treaties and international law under article 133 of the Mexican Constitution as well as the general principles of law under Articles 14 of the Constitution and 19 of the Federal Civil Code. If an incidental procedure sets aside an arbitral award in violation of such practices or principles, foreign courts will find useful the holdings from *COMMISA v. PEMEX* to enforce regardless the annulment of the award.

Such best practices constitute transnational norms of conduct that equally bound the host State and the investors but are not controlled exclusively by neither of them. Those norms overlap the national and international law, and have a diverse nature. The transcendence of their incorporation into the Mexican energetic sector legal

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framework relies on the fact that, in Mexican trade and civil law, the binding character of the usages and practices constitutes an exception. The best practices operate by constitutional mandate (Article 25, fifth paragraph) and restrain the Mexican State, its agencies and instrumentalities, as well as private actors. The constitutional provision elevates such usages to a higher hierarchical level with respect to federal laws' provisions including the "administrative rescission" which could inadvertently clash with the international best practices and give place to new disputes.

7. CONCLUSIONS

At the beginning of the 20th century the Mexican Constitution of 1917 recollected the ideals of the "Mexican Revolution," notably the protectionist and nationalistic approach to foreign investment and the nationalization of the oil and gas industry in 1938. Such protectionist position reached its most astringent point under the Mexican Investment Promotion and Foreign Investment Regulation Act of 1973. It was only in the 80s that Mexico changed its economic model and started a process of liberalization, embracing the free market doctrine. Mexico's oil and gas sector, formerly closed to foreign investment, strongly regulated by a particularly protectionist legal framework, experimented a gradual liberalization that ended in 2013, with its opening to foreign participation in hydrocarbons exploration and extraction activities thanks to the *Energetic Reform.*

Economic integration to the new world scenario dominated by the 'International model', required a legal framework capable to dialogue and interact with other national legal orders and implement the international agreements on trade and investment. The Mexican legal framework, based on the international private law method, developed a complex system of conflictual laws that allowed the indispensable legal dialogue between Mexican and foreign laws for the governance of investment and the resolution of disputes. Such dialogue facilitated the interaction between Mexican and global economic actors, acknowledged private contractual practices such as the choice of applicable law to contracts including rules and principles of international law. Among those principles, international arbitration stands out as the preferred method for the settlement of disputes in connection to those international contracts. Principles of international private law as well as international law rules were incorporated to the national legal order to give full credit and faith to international arbitral awards.

Nonetheless, foreign investment and arbitration continue to be a sensitive matter, notably in the energetic sector. Mexico is a notorious absentee of the Washington Convention and, consequently, of its International Center for the Settlement of Investment Disputes (ICSID). Probably under the assumption that the subjection of the State to a meta-national tribunal was inadmissible for it is inconsistent with constitutional principles; probably also under the presumption that in an *ad hoc* arbitration, Mexico can control the applicable substantive and procedural laws, or because ICSID membership obligations seemed too burdensome and ideologically

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incompatible with the Mexican political class. Yet, Mexico overcame the dilemma and became a believer of arbitration as alternative mechanism for the settlement of investment disputes and has agreed, under International Investment Agreements and Free Trade Agreements with investment provisions, to arbitrate disputes through ICSID's additional facility rules or through other sets of arbitral rules like the ones of the International Chamber of Commerce or UNCITRAL *ad hoc* arbitration rules.

Despite the effectiveness of the Mexican solution to its alienation from the Washington Convention, the full ICSID membership would represent enormous advantages in terms of enforcement and revision of awards, but primarily as a key instrument for the protection of Mexican investments abroad, particularly in the adverse scenario of the U.S. withdrawal from NAFTA or the no ratification of the USMCA, being the U.S. the principal destination for Mexican investments.

Regarding the countries' natural reluctance to apply other-than-their-own law to investment matters, which was described by Alfred Boulard as the "false dilemma of the applicable law," Mexico's tip-toes around the incorporation of the Transnational law model that dominates and characterizes transnational corporations' investments. As Mexico finally opened its oil and gas sector to foreign investment, and its State-owned companies like PEMEX have had capacities to celebrate arbitral agreements related to international contracts or to agree on applicable law different to the Mexican law for contracts executed abroad, Mexico did not surrender the governance of its domestic laws over investments and upstream contracts to be executed in its territory entered under the *Energetic Reform*.

With the *Energetic Reform,* the electric power production and hydrocarbons sectors dragging-feet liberalization was finally concluded and tuned up with the actual international environment of openness to transnational corporations' investment. The Energetic Reform regulatory framework however incurred again in Boulard's "false dilemma of the applicable law." With the pretension to control the applicable law, Mexico not only kept upstream contracts governed by national laws and courts jurisdiction, but also maintained the legal figure of the "administrative rescission" which subtracts from the arbitrable matters most of the disputes that may arise from the contracts.

Such false dilemma, meant to avoid the application of extraneous laws, is however theoretical and rapidly dismantled by the legal effects of the incorporation of international treaties to the Mexican legal framework via Article 133 of the Mexican Constitution—which elevates IIAs to the highest hierarchical level within Mexico's national legal order—in combination with the express reference, also in the Constitution and statutes, to the best sectorial practices in oil and gas sector, open the door, in case of a dispute, to the application of an expanded catalogue of norms of diverse nature. The sole reference to international law has the window-effect of placing those investments and contracts under the governance of an expansive network of international investment treaties with their protection standards and remedies interconnected

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thanks to their most-favored-nation clauses. If the dispute is cognized by a national court, in case of conflict with federal laws, international law norms, principles and the best sectorial practices prevail by hierarchy and constitutional mandate.

This unique phrasing mirrored in the applicable law clause in PEMEX and CNH's contracts opens interpretation possibilities of the most relevant effect whenever a dispute between the parties is settled through international arbitration. So much so that in the actual Mexican oil and gas investment framework, international contracts entered into by PEMEX and the CNH include arbitral clauses by which the arbitrator shall settle the dispute applying national laws and "other rules and principles of international law." In addition, applicable-law default provisions contained in Article 35 of UNCITRAL rules of arbitration, Article 21 of ICC rules and Article 42 of ICSID's additional facility rules which, failed the applicable-law designation made by the parties, allow the arbitrator to freely ascertain the most appropriate norms from a wide variety of applicable sources, both national and international, taking into account any usage or trade, including the best sectorial practices, without being subjected, as national courts are, to a hierarchical positivist order.

This singular path, formerly explained by the scholars through the conflict of laws method, or otherwise private international law, for some jurists after the second half of the 20th century evolved into the 'transnational legal order' or *lex petroleatorum* characterized by norms whose source could be national or international law, general principles, and notably by usages and practices, no longer monopolized by the States but characterized by the relevant actors of the industry, private corporations inclusive. In the Transnational law model, the conflictual norms are only a small share of the potentially applicable norms.

In the *Energetic* Reform era, and the investment disputes to take place under it, the issue will be how national legal concepts such as "public interest," "public policy," "national exclusive jurisdiction" and "administrative rescission" would operate in combination with the arbitrator's competence to determine their own competence *competence-de-la-competence*, the investment's standards of protection commonly imbedded in IIAs notably the fair and equitable treatment standard, and the best usages and practices of the sector.

There are plenty of lessons to be learnt from *COMMISA v. PEMEX* case, where disagreement on best practices gave place to the dispute and where the "administrative rescission" and the "public order" concepts were inequitably manipulated by the State in violation of international obligations and investment standards namely as fair and equitable treatment, national treatment, as well as other fundamental principles like non-retroactivity, good faith, access to justice and due process. Such hideous practices shall be avoided in the future to maintain the confidence of potential investors; otherwise, the *energetic reform* environment will be vitiated and the elements given for new disputes similar to *COMMISA v. PEMEX*. Mexico must mind keeping its acceptable international reputation as a country that honors its agreements and abides

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international rule of law by complying not only with international courts resolutions but also with eventual adverse arbitral awards related to international investments and trade.

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