The 2012 U.S.-Mexico Agreement on Transboundary Hydrocarbon Reservoirs in the Gulf of Mexico: A Blueprint for Progress or a Recipe for Conflict?

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I. INTRODUCTION

On February 20, 2012, Hillary Rodham Clinton, U.S. Secretary of State, and Patricia Espinoza, Mexican Secretary of Foreign Relations, formally signed the U.S.-Mexico Agreement on Transboundary Hydrocarbon Reservoirs in the Gulf of Mexico. In the remarks made at the signing of this agreement, Secretary of State Clinton said:

If a reservoir straddles the boundary, then there would be disputes over who should do the extraction and how much they should extract. The agreement we sign today helps prevent such disputes. It also helps promote the safe, efficient, and equitable exploration and production of cross-boundary reservoirs. Each country maintains its own right to develop its own resources. . . . [T]his agreement creates new opportunities. And for the first time, American companies will be able to collaborate with PEMEX, their Mexican counterpart.
The signing of this truly unprecedented agreement is unique for the following reasons: (a) The agreement offers the prospects of opening up for commercial exploitation submarine oil and natural gas reservoirs deemed to be the fourth largest in the world;\(^3\) (b) The agreement removes uncertainties regarding the development of transboundary resources of nearly 1.5 million acres of the U.S. Outer Continental Shelf;\(^4\) (c) The agreement establishes a legal regime whereby companies of both countries will be able to jointly develop transboundary reservoirs; (d) The agreement allows U.S. oil companies to invest and to enter into contracts with PEMEX for the exploration and exploitation of these reservoirs, a most unprecedented legal change in the legislative history of Mexico; (e) And, finally, this agreement moves the United States and Mexico closer to completing all the needed maritime boundary delimitations between both countries in the Gulf of Mexico and the Pacific Ocean regarding marine waters, the continental shelf and the corresponding seabed and subsoil areas.

Given the agreement’s significant importance, on May 19, 2010, President Barack Obama announced his intention to negotiate the agreement following the Joint Statement adopted by Presidents Obama and Calderón at the conclusion of President Calderón’s State Visit to Washington on May 19, 2010.\(^5\)

From the Mexican side, the Secretariat of Energy (SENER) reported that six bilateral technical meetings and three formal negotiating reunions by the corresponding teams of Mexico and the United States were
necessary to agree on the numerous legal questions included in the final
text of this long and technical agreement. The negotiation of this bilateral
instrument was a most difficult task for both SENER and the Secretariat
of Foreign Affairs (SRE). Nine days after the agreement was signed, the
Secretariat of the Interior (Secretaría de Gobernación) transmitted
the 2012 Agreement to the Mexican Senate with the purpose of obtaining
the “Senate’s Approval” required by Article 76, Paragraph I, and Article
133 of Mexico’s Political Constitution.

Scientifically, the Gulf of Mexico has virtually become a “marine
province” of the United States, because of its peculiar configuration, its
geographical contiguity to the U.S., and especially because of its valuable
resources, in particular oil and natural gas. In a foremost scientific
compilation by the Department of Geological Sciences of the University
of Texas at Austin, published under the auspices of The Geological Society
of America in 1991, these statements are made regarding the petroleum
resources known to exist in that Gulf:

6. Luis Carriles, México y EU firman Pacto sobre Crudo en el Golfo [Mexico and
eluniversal.com.mx/notas/831288.html; see also Tania Rosas, México y Estados Unidos
Pactan Explotación en el Golfo [Mexico and the U.S. Agree on Gulf Exploitation].
eu-firman-acuerdo-petrolero. While commenting on the new agreement, Senator Juan
Bueno Torio of the Senate’s Energy Commission suggested the necessity of addressing
the vast trans-frontier reservoirs of water and natural gas in the State of Tamaulipas that
are currently being tapped by the United States from the contiguous lands in Texas. Id.

7. Insta SG a Senado a Ratificar el Acuerdo Petrolero con EU [Secretariat of the
Interior Seeks Ratification of the Oil Agreement with the U.S.]. RADIO LA NUEVA
was transmitted by the Secretariat of the Interior to the Senate’s Commissions of Energy
and Foreign Relations for their consideration and ratification. Id.

8. Constitución Política de los Estados Unidos Mexicanos [C.P], as amended,
Art. 76, pfo. I. Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.). The
Political Constitution of Mexico includes among the exclusive powers of the Senate
“[T]he approval (Aprobación) of international treaties and diplomatic conventions that
the Federal Executive subscribes, as well as his decision to terminate, denounce,
suspend, modify, amend, withdraw reservations and formulate interpretive declarations
regarding said treaties and conventions.” The Senate’s exclusive powers (Facultades
exclusivas) include “the approval of international treaties and diplomatic conventions
signed by the Federal Executive.” SISTA, CONSTITUCIÓN POLÍTICA DE LOS ESTADOS
UNIDOS MEXICANOS: TODOS LOS GOBERNANTES DE MÉXICO 97, 183 (2012). Mexico’s
Senate “approval” of treaties and conventions is equivalent to the U.S. Senate’s advice
and consent required by the Executive from the U.S. Senate regarding international
instruments pursuant to the Constitution of the United States (Art. II, Section 2).
The Gulf of Mexico basin is one of the foremost petroleum provinces of the world. As of the end of 1987, it has demonstrated ultimate known recovery of 112.7 billion barrels of crude oil, 22.5 billion barrels of natural gas liquids (for a total of 136.6 billion barrels of petroleum liquids, and 523.8 cubic feet of natural gas), for a total of 222.5 billion barrels oil equivalent.

As a producing petroleum province, the Gulf of Mexico basin belongs in the same rank as the Arabian-Iranian province of the Middle East and the West Siberian province of the Soviet Union. The Gulf of Mexico basin contains approximately 9% of the world’s known recovery of petroleum liquids (crude oil and natural gas liquids) and approximately 11% of the world’s known recovery of natural gas.

The Gulf of Mexico basin is primarily an oil-producing petroleum province. Of the 222.5 billion barrels oil equivalent ultimate recovery as of the end of 1987, 50.7% were crude oil, 10.1 were natural gas liquids, and only 40.2% were natural gas. The relative importance of petroleum liquids and natural gas varies substantially across the basin. The southern half (in Mexico) is highly oil prone, with more than 81% of its oil equivalent known ultimate recovery consisting of crude oil and natural gas. By comparison, the northern half (in the United States) is more gas prone, gas providing more than 52% of its oil equivalent ultimate known recovery.9

These authoritative scientific statements leave no doubt as to the importance the Gulf of Mexico plays regarding its oil and natural gas deposits not only for today but especially for the next seven or eight decades to come, when the scarcity of oil will increase on a global scale, a serious consideration that underlines the clear strategic value of this basin for the United States and Mexico.

In a world that is already witnessing the alarming increase in the costs of oil and natural gas due to the rapid diminution of oil reserves, the 2012 Agreement acquires greater significance as every day that goes by. This agreement may be described as the very first business partnership between the United States and Mexico. A partnership that lays down fair rules and objective mechanisms to avoid disputes; establishes a modern legal regime to share a fluid transfrontier resource based on mutually agreed principles, allowing both countries to proceed with an equitable, safe and efficient utilization of that resource; and, at the same time, promotes and protects the preservation of the marine environment.

In sum, this is the first business partnership between the United States and Mexico; a partnership that took almost two centuries to come to fruition. One that will grow stronger as time goes by and that is likely to be extended to other business areas, as these two neighboring countries improve their mutual confidence and understanding.

9.  Nehring, supra note 3, at 446.
This Article is divided into four parts. Parts I and II describe each of the four previous U.S.-Mexico maritime delimitation treaties of 1970, 1976, 1978, and 2000. These treaties represent different degrees of progress in the process of completing the maritime boundaries that geographical contiguity imposes upon these contiguous countries. This was a slow and careful process that spanned almost half a century. Part III analyzes the 2012 U.S.-Mexico Agreement on Transboundary Hydrocarbon Reservoirs in the Gulf of Mexico from an international law perspective, with special reference to the interests of the United States and Mexico. Finally, Part IV advances a number of conclusions.

II. THE PROCESS OF ESTABLISHING THE BOUNDARIES BETWEEN MEXICO AND THE UNITED STATES

From an international law viewpoint, the establishment of international boundaries is among the most important and delicate questions to take place in the course of diplomatic relations between countries. Experience demonstrates that the demarcation of international boundaries—whether territorial or maritime—represents the end of an intricate balancing of legal, technical, diplomatic, strategic, and political considerations. The establishment of these boundaries constitutes an act of state that takes place when an agreement is reached between geographically contiguous countries as reflected in the language of the corresponding treaties or in the decisions rendered by international tribunals, including the International Court of Justice (ICJ). Under international law today, no international boundary between countries is to be established unilaterally by a single state.

In the United States, according to Feldman and Colson, there is a “constitutional tradition that boundaries are [to be] made by treaty. . . .”


11. See Mark B. Feldman & David Colson, The Maritime Boundaries of the United States, 75 AM. J. INT’L L. 729, 739–740 (1981). For constitutional provisions supporting these assertions, and for the various treaties entered into by the President pursuant to this interpretation, see footnote 43 in same article.

12. Id.
This tradition is based on compelling prudential considerations. The President makes boundary treaties with the advice and consent of the Senate, but he alone negotiates. The power to negotiate encompasses the power to define a negotiating position. In the context of boundary treaties, the power to propose translates into the power to claim territory or jurisdiction for the United States. Moreover, pending conclusion of a boundary treaty, U.S. law must still be enforced in boundary regions.\footnote{13}

The importance of international boundaries resides in the fact that they define the territory under the sovereignty of the state, subject to its exclusive control, jurisdiction and authority. As predicated by the Declaration of Uruguay of 1933, the territory is one of the four indispensable components required by international law to recognize the modern concept of state.\footnote{14}

Historically, it should be recalled that the very first boundary between Mexico and the United States was not the result of a mutual agreement but it was imposed to Mexico as a consequence of a war lost by that country when the United States was undergoing an era of territorial expansionism. As a consequence of its military defeat, Mexico lost more than half of its territory, as detailed in Article V of the Treaty of Guadalupe Hidalgo of 1848.\footnote{15} In his message to Congress to report on the end of his “war of conquest” (sic) against Mexico, President Polk estimated that the newly acquired territory totaled over 851,598 square miles, more than half of the Republic of Mexico’s territory.\footnote{16} Pursuant to Article 12 of the Guadalupe Hidalgo Treaty, “in consideration of the

\begin{itemize}
\item \textit{Id.} These considerations were made in light of the establishment of a Fishery Conservation and Management Act of 1976. In 1976, “emphasis was placed on the determination of a U.S. position in each boundary situation that would be consistent with U.S. political, security, and economic interests, and justifiable under international law.” \textit{Id.} at 737.
\item \textit{Convention on the Rights and Duties of States Adopted by the Seventh International Conference of American States, Dec. 26, 1933, 165 L.N.T.S. 19, 25. Article I of this Convention reads: “The State as a person of international law should possess the following qualifications: (a) permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other States.” \textit{Id.} (emphasis added); see JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 45–46, (2d ed. 2006); see also HANS KELSEN, GENERAL THEORY OF LAW AND STATE 207 (1961).
\item \textit{Treaty of Peace, Friendship, Limits and Settlement Between the United States of America and the United Mexican States, art. 5, Feb. 2, 1848, 9 Stat. 922 [hereinafter Treaty of Guadalupe Hidalgo]; TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 207, 213–16 (Hunter Miller ed., 1937) [hereinafter TREATIES AND OTHER INTERNATIONAL ACTS]. The Treaty was ratified by the United States on March 16, 1848, and by Mexico on May 30, 1848. TREATIES AND OTHER INTERNATIONAL ACTS, supra note 15, at 207. The ratifications were exchanged in Querétaro, Mexico, May 30, 1848, and it was proclaimed on July 4, 1848. \textit{Id.}
\item \textit{See} LUIS G. ZORRILLA, HISTORIA DE LAS RELACIONES ENTRE MEXICO Y LOS ESTADOS UNIDOS DE AMERICA, 1800–1958, at 227 (1977). Luis G. Zorrilla, a diplomat and historian who studied the relations between both countries, characterizes this Treaty “imposed to Mexico as one of the harshest in modern history, if the World War II treaties are excepted, given the enormous extension of territory which was taken away from Mexico.” \textit{Id.}
\end{itemize}
extension acquired by the boundaries of the United States,” the United States paid Mexico fifteen million dollars.17

A. The Land Boundary Between Mexico and the United States

Not surprisingly, during the first decades of the bilateral relationship between these two countries, questions pertaining to land boundaries were considered to be a delicate diplomatic matter.18 As a consequence of the 1848 Mexican-American War and the profound impact that its devastating effects produced upon the psyche of the Mexican people and the economy of their country, boundary relations between the United States and Mexico were placed in a special category.

Thus, boundary questions formed an old and technical chapter where the professional and efficient work of the original International Boundary Commission—later expanded by the Treaty of 1944 to become the current International Boundary and Water Commission (IBWC)—whose professional and technical work has played an important role in these matters.

The history of the boundary chapter between the United States and Mexico commenced with the laborious demarcation of the land boundary between both countries based on Article V of the Guadalupe Hidalgo Treaty of 1848,19 as modified by Article I of the Gadsden Purchase of 1853.20 Today, and since 1848, the international land boundary between

17. Treaty of Guadalupe Hidalgo, art. 12, Feb. 2, 1848, 9 Stat. 922. According to Zorrilla, the price of an individual hectare of Mexican land acquired by the U.S. was less than ten cents of a U.S. dollar! This author points out that one generation prior to the Treaty of 1848, the United States used to sell the lands that it had obtained from the Indians at no less than $1.25 per acre, which is close to $3.00 U.S. dollars per hectare (one hectare equals 0.405 acre per hectare, or 2.471 acres per hectare). Based on this calculation, the sum that the United States should have paid Mexico, according to Zorrilla, was in the order of over half a billion dollars! See Jorge A. Vargas, Is the International Boundary Between the United States and Mexico Wrongly Demarcated? An Academic Inquiry into Certain Diplomatic, Legal, and Technical Considerations Regarding the Boundary in the San Diego-Tijuana Region, 30 CAL. W. INT’L L.J. 215, 253 (2000).

18. See Feldman & Colson, supra note 11, at 743. Due to the delicate historical background created by the 1848 Treaty, two members of the U.S. Office of the Legal Adviser of the Department of State wrote: “Even in modern times, some boundary issues with Mexico have been very difficult.” Id.


20. Gadsden Purchase Treaty, art. 1, Dec. 30, 1853, 10 Stat. 1031. This treaty is known in Mexico as Tratado de La Mesilla and was signed on December 30, 1853. Article I of the treaty modified a portion of the international boundary between the
both countries extends for a total of 1,951.67 miles. This boundary consists of two types of limits:

1. A natural or arcifinious boundary formed by the River Grande (known in Mexico as Río Bravo del Norte, jointly with the rivers Colorado and Tijuana), which runs 1254 miles from El Paso, Texas, to the Gulf of Mexico; and

2. An artificial boundary established by straight lines that unite specific points defined by their coordinates of latitude and longitude. These artificial lines measure 179.96 miles in New Mexico, 376.98 miles in Arizona (including today’s twenty-four miles of the Colorado River) and 140.73 miles in California, for a total of 697.67 miles.

During the first 122 years, the IBWC, originally established in 1890,
addressed only land boundary cases based on a number of specific treaties designed to resolve problems resulting from the natural meandering of the international rivers. Towards the end of this long period, the most important case was the resolution of the “Chamizal case” in 1963. This case is considered perhaps the most controversial case whose final settlement was delayed for decades because of the refusal by the United States to comply with the arbitral award rendered in 1911 by an International Arbitral Commission established ex profeso to resolve this land dispute.

The severe conditions imposed upon Mexico by the Guadalupe Treaty of 1848, and later the unexpected refusal by the United States to comply with the arbitral award, contributed to the difficult diplomatic relationship between the two countries that prevailed until the first half of the twentieth century.

Today, given the technical and professional work of the IBWC, there are no boundary problems between the two countries. The work in this area generally consists in the replacement of boundary monuments, vigilance

25. Id. Subsequent to the Treaty of 1848, which established the U.S.-Mexico international boundary, the following specially negotiated bilateral agreements were created: 1) the Convention of July 29, 1882; 2) the Convention of November 12, 1884; 3) Convention of March 1, 1889; 4) Convention of February 1, 1933; 5) Treaty of February 3, 1944; and 6) the Chamizal Convention of August 29, 1963. Id.

26. See generally JORGE A. VARGAS, EL CASO DEL CHAMIZAL (1963). This 100-year old case was finally resolved by the Chamizal Convention of August 29, 1963. The IBWC relocated 4.34 miles of the Rio Grande Channel and lined this portion of the channel with concrete. The United States received portions of Corte de la Isla de Córdoba and transferred 437 acres of land to Mexico. Id.

27. The Chamizal Case involved a dispute over lands in the area of El Paso, Texas, and Ciudad Juárez, Chihuahua, Mexico, that resulted from the meanderings of the Rio Grande. The IBC was unable to resolve the dispute, and both countries submitted the case in 1910 to an International Arbitral Commission formed by the U.S. and Mexico Commissioners and a third arbiter, Canada’s Eugene LaFleur. The arbitral award, rendered by a majority vote on June 15, 1911, divided the land between the contending parties pursuant to well recognized Civil law principles. However, Anson Mills, the U.S. Commissioner, cast a dissenting vote and later objected the award based on Excés de pouvoir. He declared the award invalid and refusing to abide by the decision. After many decades of a difficult impasse, both countries negotiated an agreement based on the Chamizal Convention of 1963. See id. at 111–12; see also ANTONIO GÓMEZ ROLEDO, MÉXICO Y EL ARBITRAJE INTERNACIONAL: EL FONDO PIADOSO DE LAS CALIFORNIAS: LA ISLA DE LA PASIÓN Y EL CHAMIZAL 221–30, 235 (2d ed. 1975); 1 Hackworth Digest § 60, at 417.
of the boundary, flood control works and the punctual and annual delivery of international waters of the Colorado River to Mexico, as established by the applicable treaties and minutes between these countries.

B. Maritime Delimitations Based on Four Bilateral Treaties

According to international law, maritime boundaries are the agreements between states consisting of boundary lines that separate the areas under the sovereignty, control, or authority of the respective coastal states in the marine environment (involving the waters, the seabed and the corresponding subsoil). Conceptually, the term “delimitation” is commonly used to refer to the “establishment of boundaries between neighboring states.”

Traditionally, international boundaries may be established by land, marine environment, or atmosphere. Because of their legal nature, the establishment of these boundaries—including maritime boundaries—constitutes an act of a given state, as a subject of international law. Accordingly, maritime agreements are always understood to be entered into “in good faith” between the contracting states, which must recognize, respect, and protect those boundaries before the international community in conformance with international law and practice.

In the past, the demarcation of maritime boundaries was an activity performed by cartographers and geographers. It was during the late 15th century when the discovery of remote and unknown lands—such as the distant provinces of America, Africa, and Asia—was an exercise that tended to fluctuate between the “era of imaginary geography,” when the cartographers found it difficult to distinguish between fantasy and reality, and the era when the determination of degrees of latitude and longitude accurately placed a ship or a continent anywhere in the geography

28. This technical work of the IBWC should not be confused with the protection of the international boundary between both countries conducted by the Border Patrol (Patrulla Fronteriza) of the Department of Homeland Security.


30. See Oxman, supra note 10, at 243–95; see also Vargas, Mexico’s Legal Regime, supra note 10, at 190.

31. See Feldman & Colson, supra note 11, at 738. According to Feldman and Colson, “the duty to negotiate in good faith flows . . . from the principle of the sovereign equality of states and the obligation of states to settle their international disputes by peaceful means, which are both recognized in the Charter of the United Nations.” Id. Feldman and Colson assert that this principle has been “affirmed by the International Court of Justice in the North Sea Continental Shelf cases” and that “[t]he United States [has] recognized this principle in the 1945 Truman Proclamation [on the Continental Shelf] and continues to attach importance to it.” Id.

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of this planet. It was at this time when boundary delimitation was transferred to diplomats, jurists, and naval officers.\(^3^3\)

However, as a result of the scientific and technological advancements (such as the computer, artificial satellites and the positional location by Global Positioning System (GPS)), in recent decades the drawing and graphic depiction of boundary delimitations have been conducted under the technical and specialized work of scientists, engineers, and computer technicians.

1. Treaty to Resolve Pending Boundary Differences and Maintain the Rio Grande and Colorado River as the International Boundary (1970)

Turning now to the United States and Mexico, it was not until 1970 when the IBWC was officially asked to become involved in the first case that required the establishment of an \textit{international maritime boundary} between both countries. This was the case that took place as a result of the Treaty to Resolve Pending Boundary Differences and Maintain the Rio Grande and the Colorado River as the International Boundary, signed in Mexico City on November 23, 1970.\(^3^4\)

Between the 1950s and 1970s, a number of developing states made maritime claims extending out 200 nautical miles in order to control the utilization of living resources off their coasts.\(^3^5\) This trend was initiated by three countries in Latin America—Chile, Ecuador, and Peru—whose tripartite “Santiago Declaration of 1952” was the first to establish a maritime zone of 200 nautical miles off their coasts.\(^3^6\) Around that time,

\(^3^3\). See \textsc{Marques Antunes, supra} note 29, at 1–9.

\(^3^4\). Treaty to Resolve Pending Boundary Differences and Maintain the Rio Grande and Colorado River as the International Boundary, U.S.-Mex., Nov. 23, 1970, T.I.A.S 7313 [hereinafter Treaty to Resolve Pending Boundary Differences]. The treaty was signed in Mexico City on December 18 and 21, 1970. Ratification was advised by the U.S. Senate on November 29, 1971, and the treaty was ratified by Mexico on January 24, 1972. The treaty was proclaimed by the President of the U.S. on May 2, 1972, and entered into force on April 18, 1972.

\(^3^5\). See Robert D. Hodgson & Robert W. Smith, \textit{Boundary Issues Created by Extended National Marine Jurisdiction}, 69 \textit{Geographical Rev.}, 423, 423 (1979). From the perspective of two leading U.S. specialists on maritime delimitation, as a consequence of these extended maritime claims, “every coastal state in the world will eventually have to negotiate at least one maritime boundary with at least one neighbor.”

\(^3^6\). See \textsc{Jorge A. Vargas, Mexico and the Law of the Sea: Contributions and Compromises} 127–41 (Vaughan Lowe & Robin Churchill eds., 2011) [hereinafter
Mexico had a different but special interest in enlarging its territorial sea out to twelve nautical miles to place this width in symmetry with the latest trends taking place at that time among developing coastal states.

In the 1960s and early 1970s, the width of the territorial sea was not only fluid but also subject to a strong expansionist trend. According to the Secretariat of Foreign Affairs (SRE), by 1969, thirty-nine states had already adopted a twelve-nautical-mile territorial sea. The large number of states that had already adopted this new width convinced Mexico to join this movement. This movement was indicative of an emerging state practice that was reasonable and uniform at that time.37

From an original marginal belt of three nautical miles established in 1902,38 Mexico enlarged its territorial sea to nine nautical miles in 1906, and by means of a Presidential decree, it further amended its General Act of Immovable Assets (Ley General de Bienes Inmuebles) in 1969, enlarging its territorial sea to twelve nautical miles (22,224 meters).39 Thus, Mexico became one of the very first countries in the Western hemisphere to adopt a twelve-nautical mile territorial sea.40

Today, in consonance with Article 3 of the United Nations Convention on the Law of the Sea (to which Mexico is a party), Article 25 of the Federal Oceans Act (Ley Federal del Mar)41 establishes a twelve-nautical mile territorial sea along Mexico’s maritime littorals.

Since the time the United States became a nation in 1776, this country has adhered to the traditional three-nautical-mile limit of the territorial sea that was originally established by England, and historically associated with the range of a cannon.42 In the 1950s, when certain Latin American
countries made their claims for an extended maritime jurisdiction out to 200 nautical miles, the United States and other major maritime countries strongly opposed the claims as an intrusion on the freedom of the high seas.\textsuperscript{43}

International rivers that function as international boundaries, such as the Rio Grande and the Rio Colorado, for example, are subject to natural phenomena such as floods, changes of course, and formation of islands, as reported by ancient Roman law.\textsuperscript{44} Over the passage of considerable time, i.e., between 1848 when the boundary was established and 1970 when the treaty in question was signed, these river phenomena had become cumulative and, as a consequence, they altered considerably the course and direction of the river. This created confusion and associated problems that may have resulted in serious legal and diplomatic situations between the American and Mexican towns with populations located at each side of these international rivers.

To avoid these problems, it is common practice between neighboring States confronting these river changes to enter into bilateral agreements to try to restore and re-establish the original river boundary whenever possible and practical or, in the alternative, to agree to undertake engineering and other river works to establish a new and more practical international river boundary. This was precisely the purpose of the 1970 treaty.

However, because at that time—as indicated earlier\textsuperscript{45}—many coastal states in the international community started to advance maritime claims over contiguous marine areas, such as was the case of Mexico enlarging its territory in 1969,\textsuperscript{46} both the United States and Mexico agreed that since the IBWC was already engaged in establishing a more practical and convenient river boundary along certain segments of the international line, it was only proper to ask that Commission to also address the question of establishing the new international maritime boundary of a twelve-nautical-mile territorial sea in the Gulf of Mexico (starting at the center of the mouth of the Rio Grande\textsuperscript{47}), and the same maritime boundary

\begin{footnotesize}
\begin{enumerate}
\item The Treaty was signed in Mexico City on November 23, 1970 with Exchange of
\item See VARGAS, MEXICO AND THE LAW OF THE SEA, supra note 36, at 86–90.
\item Id. at 88.
\item See Treaty to Resolve Pending Boundary Differences, supra note 34, at art. 5, para. A.
\item See Implementation and Enforcement of Laws, 37 Fed. Reg. 11,906 (June 1, 1972); Submerged Lands Act, 43 U.S.C. § 1301(a)(2) (1995)).
\item See Action by Other Countries, 4 Whiteman § 4, at 796, 798–99.
\item See Institute, Lib. II, Tit. I, § 2; Gaius, Lib. II, § 70; Digesto, Lib. I, § 20; see also Code Napoleon (1804), bk. 3, tit. 1, ch. 5, § 3 at 796, 798, 800.
\end{enumerate}
\end{footnotesize}
in the Pacific Ocean (beginning at the western most point of the mainland boundary).\footnote{See Treaty to Resolve Pending Boundary Differences, supra note 34, at art. 5, para. B.}

Both countries agreed that the definition and establishment of these maritime boundaries was to be done through a series of straight lines, and in conformance with the “Principle of equidistance,”\footnote{See id. at art. 5, paras. A–B} as provided by Articles 12 and 24 of the U.N. Geneva Convention on the Territorial Sea and the Contiguous Zone of 1958,\footnote{Convention on the Territorial Sea and Contiguous Zone, Apr. 29, 1958, 516 U.N.T.S. 205.} to which both countries were a party.

The new maritime boundaries were recognized as “permanent” and as having superseded the provisional maritime boundaries referred to in the Commission’s Minute No. 229.\footnote{Minutes Between the United States and Mexican Sections of the IBWC No. 229, INT’L BOUNDARY & WATER COMM’N, http://www.ibwc.gov/Files/Minutes/Min229.pdf (last visited Oct. 23, 2012).} The new maritime boundaries were duly charted in the corresponding maps\footnote{VARGAS, MEXICO AND THE LAW OF THE SEA, supra note 36, at 122–23.} and recognized to be in place as of the date on which the 1970 treaty entered into force.\footnote{The 1970 Treaty entered into force on April 18, 1972. Treaty to Resolve Pending Boundary Differences, supra note 34.}

However, mostly fueled by scientific and technological developments, the expansionist trend initiated by developing coastal states in the early 1950s did not stop with the enlargement of the width of the territorial sea out to twelve nautical miles. These states continued to further advance their interests for larger and bolder maritime claims over the waters, the submarine areas and the subsoil of the continental shelves, and even for the creation of novel maritime spaces such as the seabed and ocean floor beyond the limits of national jurisdiction\footnote{G.A. Dec. 25/2749(XXV), ¶ 1, U.N. Doc. A/RES/25/2749(XXV) (Dec. 17, 1970). The United Nations formally declared that the seabed and ocean floor beyond the limits of national jurisdiction is the “common heritage of mankind.” Id. This submarine area was recognized as the “International Seabed Area” in Part XI of the 1982 Convention. U.N. GAOR, 25th Sess., U.N. Doc. A/PV.1933 (Dec. 17, 1970).} and the exclusive economic zone of 200 nautical miles.

From a regional Latin American movement these maritime claims were successfully transplanted to Africa and Asia to be finally placed in the agenda of the General Assembly of the United Nations in the late 1960s. Considering the global importance of these claims, the United Nations agreed to convoke the Third U.N. Conference of the Law of the Sea and, at the end of its sessions, this multilateral conference produced

Notes signed in Mexico City on December 18 and 21, 1970. The corresponding maps are reproduced in VARGAS, MEXICO AND THE LAW OF THE SEA, supra note 35 at 122–23.
the United Nations Convention on the Law of the Sea, signed by 117 states at Montego Bay, Jamaica, on December 10, 1982.\textsuperscript{55}

The new maritime spaces created by this Convention, in particular the exclusive economic zone of 200 nautical miles (and its legal implications to the continental shelf and the international seabed area) required Mexico and the United States to engage in diplomatic negotiations to now delimit the continental shelf and the overlapping claims of jurisdiction resulting from the establishment of the respective 200-nautical-mile zones in the Gulf of Mexico and in the Pacific Ocean.

2. Treaty on Maritime Boundaries Between the United States of America and the United Mexican States, Signed at Mexico City on May 4, 1978

As indicated by President Carter, the Treaty on Maritime Boundaries between the U.S and Mexico\textsuperscript{56} is necessary to delimit the continental shelf and overlapping claims of jurisdiction resulting from the establishing of a 200-nautical-mile fishery conservation zone off the coasts of the United States in accordance with the Fishery Conservation and Management Act of 1976 and the exclusive economic zone of 200 nautical miles established by Mexico in 1976.

This treaty establishes the maritime boundary between the United States and Mexico for the area between twelve and two hundred nautical miles off the coasts of the two countries in the Pacific Ocean and the Gulf of Mexico.\textsuperscript{57} Regarding maritime matters, this treaty also supplements the 1970 treaty which established the maritime boundaries out to twelve nautical miles off the respective coasts.

According to the United States, this treaty served three purposes: first, it was in the U.S. interest to sign it; second, it was to facilitate law enforcement activities and to provide for certainty in resources development.

\textsuperscript{55} The final text of the Convention was reproduced as U.N. Doc. A/CONF.62/122 (Oct. 7, 1982). On December 10, 1982, the date the Convention was opened for signature, 117 States and two other entities became signatories.


activities; and third, it was consistent with the “U.S. interpretation of international law that maritime boundaries are to be established by agreement in accordance with equitable principles in the light of relevant geographical circumstances.”

At that time, Mexico had already delimited a 200-nautical-mile exclusive economic zone in the Gulf of Mexico and in the Pacific Ocean by means of a decree that amended its Political Constitution and added a new paragraph to its Article 27. The legal nature and characteristics of this zone were later detailed in the Reglamentary Act of February 13, 1976. The corresponding outer boundaries of this zone, formed by a series of arcs that joined specific points as established by geodetic lines, are described by the Decree of June 7, 1976.

In 1976, the United States fishery zone extending out to 200 nautical miles and the treaty with neighboring Mexico was required for two reasons: first, to avoid the overlapping of extensive maritime claims by the U.S. and Mexico; and second, “to establish and recognize their maritime boundaries in the Gulf of Mexico and in the Pacific Ocean,” as indicated by Article I of the Treaty. As is customary for these types of delimitations, the respective boundaries were established by geodetic lines connecting appropriate points identified in the treaty by specific coordinates.

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59. For a detailed discussion of this topic, see Vargass, Mexico and the Law of the Sea, supra note 36.

60. The text of this decree is reproduced in Jorge A. Vargass, La Zona Economica Exclusiva de Mexico 59–60 (1980). The area of Mexico’s EEZ (excluding its Territorial sea) totals 584,208.47 square miles in the Pacific Ocean and 186,875.47 square miles in the Gulf of Mexico and Caribbean for a total of 771,083.94 square miles. Vargass, Mexico and the Law of the Sea, supra note 36, at 200.

61. The Reglamentary Act to Paragraph Eight of Article 27 of the Political Constitution was published in the D.O. of February 13, 1976. For the text of this decree, see Vargass, supra note 60, at 61–63. For legal and diplomatic reasons, this decree imposed a vacatio legis to make it enter into force 120 days after its publication, in other words, on June 6, 1976, exactly one month after the ending of the Fourth Session of UNCLOS III, when the Informal Revised Negotiating Text (IRNT) was released. This vacatio legis also applied to the decree that added the eighth paragraph to Article 27 of the Political Constitution.

Since these countries had already agreed on maritime boundaries seaward to a distance of twelve nautical miles by the Treaty of November 23, 1970, the U.S. Department of State reported that discussions between officials of both governments, held in the Spring of 1976, led to an Exchange of Notes on November 24, 1976, establishing “provisional maritime boundaries in accordance with equitable principles.”

a. The Exchange of Notes Establishing Provisional Maritime Boundaries Between Both Countries of November 24, 1976

Mark B. Feldman and David Colson, U.S. Department of State officials who negotiated the agreement with Mexico, reported that this agreement effected by means of a diplomatic Exchange of Notes “was not cast in the form of a treaty at that time because the parties wanted to consider whether further technical work was necessary to establish a scientifically more precise boundary. Later . . . both Governments concluded that the coordinates contained in the agreement . . . were suitable for a permanent boundary, and a treaty using these coordinates was signed on May 4, 1978.”

However, the U.S. Senate never gave its advice and consent to this international instrument which remained for years in legal limbo. Notwithstanding this, the “provisional maritime boundaries” established by the Exchange of Notes were simply reproduced and incorporated in toto in the subsequent Treaty of May 4, 1978.

It should be clarified that in a diplomatic note dated November 24, 1976 sent by Dr. Alfonso García Robles, then Mexican Secretary of Foreign Affairs, to the U.S. Ambassador Joseph John Jova, it was agreed that the “provisional boundaries” recognized by both countries did not apply to the continental shelf. The Mexican note read in part:


65. See Feldman & Colson, supra note 11, at 740.

66. See Vargas, Mexico’s Legal Regime, supra note 10, at 227 (explaining that provisional boundaries recognized by both countries in 1976 did not apply to the continental shelf or to the submarine area beyond twelve nautical miles, as asserted by Dr. Alfonso García Robles, Mexico’s Secretary of Foreign Affairs, per diplomatic note of Nov. 24, 1976); see also Vargas, The Gulf of Mexico: A Binational Lake Shared by the U.S. and Mexico: A Proposal, 9 TRANSNAT’L LAW 459, 459–82 (1996).
I take the liberty of pointing out that our two countries have not yet delimited their respective continental shelves beyond twelve nautical miles seaward from the respective coasts, and that the present arrangement with respect to maritime boundaries, based on the Treaty to Resolve Pending Boundary Differences and Maintain the Rio Grande and the Colorado River as the International Boundary, concluded in 1970, only extends to the maritime boundary to 12 nautical miles.67

This meant that, even with the new Treaty of 1978, the bilateral maritime boundaries between both countries remained inconclusive. In other words, the recently formalized boundaries in the 1978 Treaty were simply incomplete because the presence of a submarine oil and gas reservoir contiguous to the already established maritime boundary, both in the Pacific Ocean but especially in the Gulf of Mexico, was located in the submarine continental shelf; a submarine area whose maritime boundaries had not been negotiated yet, as explicitly pointed out to the United States by Dr. García Robles.

Therefore, the necessity of having to reach an agreement on the continental shelf and other submarine areas in the central and deepest portion of the Gulf of Mexico finally moved the United States to negotiate and sign the maritime delimitation agreement contained in the 1978 Treaty with Mexico.

b. The Operative Part of the 1978 Treaty

The operative portion of the 1978 Treaty is quite brief and consists of only four articles. Article I sets out the specific geographic coordinates that define the maritime boundary established in the treaty. According to the U.S. Department of State, the maritime boundaries consist of three segments:

(1) In the western Gulf of Mexico extending eastward from the international boundary separating Texas from Mexico; (2) in the eastern Gulf of Mexico, where the 200-nautical-mile zones developed from the Louisiana coast and islands off the Yucatan coast overlap; and, (3) in the Pacific Ocean, extending westward from the international boundary separating California from Mexico.

In the western Gulf of Mexico, the maritime boundary begins at the terminus of the twelve nautical mile boundary established by the 1970 Treaty and extends through two turning points and then to a point which is 200 nautical miles from the coasts of the two countries.

In the eastern Gulf of Mexico the maritime boundary begins at the western most point at which the 200 nautical mile zones off the Louisiana and Yucatan coasts

overlap, continues through a turning point, and terminates at the easternmost point at which the 200 nautical mile zones overlap.

In the Pacific Ocean the maritime boundary begins at the terminus of the twelve nautical mile boundary established by the 1970 Treaty and extends through two turning points and then to a point, which is 200 nautical miles from the coasts of the two countries (See Appendix 4).

The boundaries are geodetic lines which connect these points. The coordinates are determined with reference to the 1927 North American Datum and the Clarke 1866 ellipsoid.

The U.S. Department of State made an explicit reference to underline that the maritime boundaries described in this Article “are negotiated boundaries developed on the basis of (a) equitable principles in light of the relevant geographical circumstances, including the delimitation principles of the 1958 U.N. Geneva Convention on the Continental Shelf (to which the U.S. and Mexico are parties); (b) the criteria set forth by the International Court of Justice in the North Sea Continental Shelf Cases; and (c) the principles utilized in determining the twelve nautical mile maritime boundaries under the 1970 Treaty. The application of these principles to the factual circumstances off the coasts of the United States and Mexico resulted in agreement on the maritime boundaries described in Article I.”68 (See Appendix 4.)

Article II describes the legal effect of the maritime boundaries, providing that “neither country shall claim or exercise for any purpose sovereign rights or jurisdiction over the waters or seabed and subsoil on the other country’s side of the maritime boundary.”69 Although drafted in a rather obscure or even cryptic language, this phrase apparently alludes to the possibility that the maritime boundaries established, or the ostensible gaps where no boundary was agreed upon, may be bisecting a possible transboundary hydrocarbon reservoir located in the Gulf of Mexico and in the Pacific Ocean. One interpretation of this apparently innocuous language may be that if such a transboundary hydrocarbon (or natural gas) reservoir did exist, neither the United States nor Mexico may claim or exercise sovereign rights or jurisdiction over said reservoir.

When this treaty was being negotiated (first in 1976 and later in 1978) there was no certainty at that time, based on geological and other scientific

69. Id.
data, of the existence of such a transboundary reservoir either in the Gulf of Mexico or in the Pacific. To avoid any possibility that Mexico, or more likely the United States (given its technological advancement in the exploration and exploitation of submarine reservoirs in ultra-deep waters), would make any attempt to extract oil or natural gas from the other side of the maritime boundary, both parties explicitly added this language to Article II of this treaty to avoid or reject such claims, or the possible exercise of sovereignty rights over natural resources in that submarine area.

While this treaty was being negotiated, a number of institutions and individuals in Mexico (including members of the Senate) expressed serious concerns that if a transfrontier hydrocarbon reservoir existed where the maritime boundaries had been established, U.S. oil companies appeared to be already poised to immediately proceed to commercially exploit said the reservoir, tapping its mineral resources from the U.S. side of the boundary. However, from a legal viewpoint, because said resources were to be extracted from a “transfrontier hydrocarbon reservoir,” American companies would be tapping not only from U.S. resources but also from Mexican resources, thus not disregarding or circumventing the maritime boundaries but clearly breaching the purpose of the treaty. At that time, the most vigorous warnings in Mexico were made by Senator José Angel Conchello (Partido Acción Nacional or PAN).

Article III clarifies that the sole purpose of the treaty is to establish the location of the maritime boundaries between the two countries without affecting or prejudicing either country's position with respect to any other marine space, or of sovereign rights or jurisdiction for any other purpose. This disclaimer is commonly included in these kinds of treaties, especially considering that in this case the United States and Mexico maintained different legal positions at that time (i) on the breadth of the

70. See Juan E. Pardinas, La Soberanía, la Naturaleza y el Calendario [Sovereignty, Nature and the Calendar], in CRUZANDO LÍMITES: MÉXICO ANTE LOS DESAFÍOS DE SUS YACIMIENTOS TRANSFRONTERIZOS 14–23 (David Enríquez et al. eds., 2007); David Enríquez, Cuando la Razón Tapona los Popotes [When Reason Clogs Up the Straws], in CRUZANDO LÍMITES: MÉXICO ANTE LOS DESAFÍOS DE SUS YACIMIENTOS TRANSFRONTERIZOS 50–70. (David Enríquez et al. eds., 2007).

71. See Editorial, Agujero de la Dona, Extraña Cesión a Estados Unidos: ¿A cambio de qué? [The Doughnut Hole, Strange Cession to the United States], SIEMPRE, June 8, 2000, at 4–5. Senator Conchello is also attributed with having coined the Spanish expression “Efecto Popote” (“Straw Effect”) to indicate that the U.S. was technologically able to “suck up” Mexico’s oil and natural gas from the U.S. side of the boundary by utilizing a submarine horizontal drilling technology in the Gulf of Mexico based on the U.S.-Mexico Treaty on the Delimitation of the Continental Shelf in the Western Gulf of Mexico of June 9, 2000.
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territorial sea;\(^{(72)}\) (ii) the nature of the jurisdiction exercised within the 200 nautical mile zone;\(^{(73)}\) and (iii) the nature of the submarine area beyond 200 nautical miles,\(^{(74)}\) declared to be the “common heritage of humankind” by the United Nations General Assembly in 1967.\(^{(75)}\)

Article IV provided that the treaty was to enter into force on the date of exchange of instruments of ratification.\(^{(76)}\)

Notwithstanding that the central purpose of this treaty was to establish clear and explicit boundaries between these two states, the 1978 bilateral agreement did not adhere to this fundamental principle. In the central and deepest portion of the Gulf of Mexico, as depicted in the corresponding map (see Appendix 4), the agreed maritime boundary was formed by two separate but interrupted lines, leaving an \textit{undefined} gap between them. For purposes of the treaty, the boundaries in this Gulf consisted of two separate boundary lines between the “Western” and the “Eastern” Gulf of Mexico, leaving between them a gap of some 129 miles. However, as indicated below by Mr. Feldman, the resulting “gaps” were due to the fact that at that time the international community represented at the Third U.N. Conference on the Law of the Sea had not agreed yet on a legal definition of the outer edge of the continental margin.

In a prepared statement submitted to the Committee on Foreign Relations of the U.S. Senate on June 30, 1980, Mark B. Feldman, Deputy Legal Adviser of the U.S. Department of State said:

\begin{itemize}
\item \textbf{72.} At that time, the United States had a three nautical mile territorial sea in contrast to Mexico’s 12 n.m. territorial sea.
\item \textbf{73.} The U.S. had a 200 n.m. Fishery Conservation and Management Act (exercising jurisdiction over living resources only) whereas Mexico had established an Exclusive economic zone of 200 n.m. (exercising sovereignty rights over both living and \textit{mineral} resources). However, the U.S. claimed sovereign rights for the purpose of exploring and exploiting the resources of the continental shelf pursuant to the Convention on the Continental Shelf and the Outer Continental Shelf Lands Act (as amended). See Feldman & Colson, \textit{supra} note 11, at 730.
\item \textbf{74.} For the United States, the submarine area beyond 200 n.m. was considered to be the high seas; for Mexico, the superjacent waters were recognized as the high seas but the seabed and ocean floor was considered a part of the Common heritage of humankind, later defined as the “International Seabed Area” by Part XI of the 1982 U.N. Convention on the Law of the Sea.
\item \textbf{76.} \textit{See} Letter of Submittal from Cyrus Vance, Sec’y of State, to Jimmy Carter, President of the U.S. (Dec. 27, 1978), \textit{in} \textit{THREE TREATIES}, \textit{supra} note 57, at 3.
\end{itemize}
In the central Gulf of Mexico there is a reach of waters approximately 129 nautical miles in length where there is no fisheries boundary between the two countries. In this area the coasts of the two countries opposite each other are more than 400 nautical miles apart, so our fisheries zones do not overlap. We have not drawn a continental shelf boundary in this area . . . because the limit of the outer edge of the continental margin is presently a matter under active negotiation at the Third United Nations Conference on the Law of the Sea (UNCLOS III).\(^77\)

From a Mexican perspective,\(^78\) the absence of the submarine boundary in the deepest area where considerable mineral resources were believed to exist, was wrongfully interpreted by certain politicians and members of the press in Mexico as a strategy by the United States to take advantage of its technological prowess not only to explore that submarine area but also to be able to exploit said resources. Later on, this Mexican perception became stronger based on the declarations made by Dr. Hollis Hedberg during the ratification proceedings of the U. S. Senate Committee on Foreign Relations regarding this treaty with Mexico.\(^79\)

\(\text{i. Dr. Hedberg Raises Objections to the 1978 Treaty}\)

When the U.S. Senate Committee took testimony from a number of specialists on this matter, Dr. Hollis Hedberg, former Executive of the Gulf Oil Corporation, past President of the Geological Society of America and Professor emeritus in Geology at Princeton University, made a number of objections to the Mexican Treaty and opposed its ratification by the Senate based on three arguments:

\(\text{a. The Methodology Used in the Treaty to Delimit the Boundaries in the Gulf of Mexico was Flawed}\)

Dr. Hedberg strongly opposed the use of a Mexican reef (Arrecife Alacrán, off the Yucatan peninsula) as a base point to delimit the outer boundary of the 200 n.m. zone. Instead of this methodology, he proposed that the boundary in the Gulf should have been calculated based on the continental slope, an unprecedented practice completely out of sync with


\(^78\). See generally supra notes 69–70 and accompanying text.

\(^79\). See Statement of Hollis Hedberg, Three Treaties, supra note 57, at 28–33 [hereinafter Hedberg’s Statement]. Dr. Hedberg wrote: “Island dependencies situated on continental shelves and slopes should not control national boundaries beyond the base of the continental slope.” Id. at 33 (emphasis added).
both international practice and the then undergoing negotiations of the Third U.N. Conference on the Law of the Sea.³⁰

Dr. Hedberg’s methodology was based on the erroneous premise that “[i]sland dependencies situated and continental shelves and slopes should not control national boundaries beyond the base of the continental slope.” This premise was excluded from the discussions of UNCLOS III and did not appear in any of the several formal drafts that preceded the formulation of the final text of the 1982 Convention on the Law of the Sea.

A number of serious defects marred Dr. Hedberg’s proposal: first, it was made without taking into account the diplomatic negotiations already conducted between Mexico and the United States; second, it disregarded the multilateral negotiations at UNCLOS III, as reflected in the latest UN Draft Treaty produced in 1980; and, third, it advanced a maritime boundary methodology that was Dr. Hedberg’s own personal creation, formulated from the confines of an academic ivory tower with no relationship to the international practice and the legal principles recognized by the majority of the 160 states participating at the sessions of UNCLOS III. In fact, these legal principles were recognized by many countries (Mexico included) as a part of customary international law principles of universal recognition that were in the process of being incorporated into the final text of the law of the sea treaty being formulated by the law of the sea conference.

b. Dr. Hedberg Objected to the Use of Mexican Islands and Proposed That These Islands Should Not Be Used for the Demarcation of the Maritime Boundaries³¹

In the drawing of the maritime boundaries, both the United States and Mexico took advantage of the fact that customary and conventional international law allow coastal states to use islands as basepoints for the drawing of maritime boundaries. As indicated by Mr. Feldman,

[T]he use of islands as basepoints gives the United States substantial areas in the Pacific off the coast of California. In the Pacific, two islands, San Clemente and San Nicolas, are used as basepoints and they bring under U.S. jurisdiction about 18,000 square miles of area, which includes four banks of fisheries importance:

³⁰ For a rebuttal of Dr. Hedberg’s arguments, see Vargas, supra note 10, at 220–26. For a technical explanation, see Smith, supra note 63, at 402–05.
³¹ See Hedberg’s Statement, supra note 79, at 33.
Tanner Bank, Cortez Bank, the 40-Mile Bank, and the 60-Mile Bank. In addition to fisheries interests, the Pacific also has hydrocarbon potential.  

Moreover, the use of numerous islands by the United States in six different water bodies: the Atlantic Ocean, the Gulf of Mexico, the Caribbean Sea, the Pacific Ocean, the Bering Sea, and the Chuckchi Sea, used as basepoints for the establishment of a U.S. fisheries zone, as allowed by international law, gave the U.S. an area enclosed that “includes approximately 2,222,000 square nautical miles off the coasts of the fifty states and 885,000 square nautical miles off the coasts of the possessions and commonwealth.” The use of islands gave the United States the largest U.S. fisheries zone in the world at that time.

However, as recognized by the United States (and many other countries), “the proposed boundary lines resulted from using islands as basepoints for determining an equidistance line.” The use of this method produced immediate benefits for both countries, considering that Mexico and the United States used islands located in the Gulf of Mexico and in the Pacific as basepoints for the drawing of the boundary. In addition, the use of islands follows the precedent already established by the 1970 Treaty between the United States and Mexico, as asserted by Mr. Feldman.

Contrary to Dr. Hedberg’s ideas, international law has traditionally recognized islands as basepoints for maritime delimitation purposes. This international practice goes back as early as the 1958 U.N. Geneva Convention on the Territorial Sea and the Contiguous Zone (Article 10, to which the United States and Mexico were parties at that time), and the final text of the 1982 U.N. Convention on the Law of the Sea (Articles 13 and 121, paragraph 2).

82. Feldman & Colson, supra note 11, at 744.
83. See Smith, supra note 63, at 395, 398 (listing the following islands: American Samoa, Guam, Howland and Baker Islands, Jarvis Island, Midway Island, Northern Marianas, Palmyra Island, Puerto Rico, Virgin Islands and Wake Island). Later on, the 200 n.m. fisheries zones were changed into a U.S. 200 n.m. exclusive economic zone.
84. See Feldman & Colson, supra note 11, at 744. On this point, in his Prepared Statement, Mr. Feldman said, “[T]he use of islands as basepoints gives the United States substantial areas in the Pacific off the coast of California. In the Pacific, two islands, San Clemente and San Nicolas, are used as basepoints and they bring under U.S. jurisdiction about 18,000 square miles of area, which includes four banks of fisheries importance: Tanner Bank, Cortez Bank, the 40-Mile Bank, and the 60-Mile Bank. In addition to fisheries interests, the Pacific area also has hydrocarbon potential.” See THREE TREATIES 2, supra note 77, at 7.
85. With respect to the use of islands as basepoints for maritime delimitation purposes, see the authoritative and supporting position of Dr. Robert W. Smith, Chief of the Marine Boundary and Resources Division, Office of The Geographer, U.S. Department of State. Smith, supra note 63, at 404–05.
86. See THREE TREATIES 2, supra note 77, at 11.
c. The Draft Treaty Would Give Mexico a Most Promising Petroleum Prospective Submarine Acreage

Dr. Hedberg asserted that the Draft Treaty “would needlessly lose to the United States almost all of the northwestern deep water part of the Gulf of Mexico (about 25,000 square miles) which would comprise some of the most promising, although very deep-water, petroleum prospective acreage off the U.S. coast anywhere,” adding:

The practical importance of ocean floor boundaries in the Gulf of Mexico is highlighted by the fact that the entire Gulf of Mexico basin is prospective petroleum territory. The prolific petroleum production of the Gulf region, both in the United States and in Mexico, has to date come largely from the landward limb of the huge semicircular geocyclone of thick sediments whose axis lies some distance offshore paralleling the periphery of the Gulf. However, the undrilled seaward limb of this sediment-filled through, raising basinward under the deep water beyond the slope, may also be abundantly petroliferous... The northwestern part of the central Gulf which we appear to be preparing to relinquish (some 25,000 square miles) could be by far the most promising deep-water petroleum territory to which the United States rightfully has claim.

Anyone recommending ratification of the Mexican-United States draft treaty is recommending the needless giving away of more than a million acres of our most promising off-shore petroleum territory at a time when domestic petroleum resources are of paramount importance to this country.87

Although the U.S.-Mexico Treaty on Maritime Boundaries was reported favorably on August 5, 1980 by the Senate Foreign Relations Committee,88 it was withdrawn from consideration on the Senate floor on September 16, 1980, as a result of the statement and objections made by Dr. Hedberg in calculating the maritime boundaries in the Gulf of Mexico. Since some concern was voiced by Senators Zorinsky and Javits regarding the legal basis for establishing maritime boundaries on a provisional basis by executive agreement (i.e., the Agreement effected with Mexico through a diplomatic Exchange of Notes on November 24, 197689), it was determined that said Agreement “remained provisionally in effect pending final

87. See Hedberg’s Statement, supra note 79, at 33.
89. Regarding the Exchange of Notes of 1976, see supra note 67 and the corresponding text.
determination by treaty of the Maritime Boundaries between the two countries off both coasts.”

In October of 1997, the Committee favorably recommended the treaty for Senate advice and consent, noting that “the untapped reserves of crude oil and natural gas in the Gulf of Mexico along the 200 nautical mile boundary and the technological advances that have made it more likely that U.S. companies will recover these oil and gas deposits. The Department of the Interior was already receiving bids for exploration in this area and several new drilling vessels capable of operating in water depths of up to 10,000 feet were already under construction.”

Thus, the U.S. Senate finally gave its advice and consent to the ratification of the 1978 Treaty on Maritime Boundaries between the United States of America and Mexico in October of 1997, almost twenty years after it was signed at Mexico City on May 4, 1978, approving international boundaries for the Gulf of Mexico and the Pacific that had been negotiated and agreed upon by both countries in the Exchange of Notes that took effect since November 24, 1976.

3. Treaty with Mexico on the Delimitation of the Continental Shelf in the Western Gulf of Mexico Beyond 200 Nautical Miles, Signed at Washington, D.C. on June 9, 2000

As indicated in the letter that President William J. Clinton addressed to the U.S. Senate seeking its advice and consent, “the purpose of this treaty was to establish a continental shelf boundary in the western Gulf of Mexico beyond the outer limits of the two countries’ exclusive economic zones where those limits do not overlap. The approximately 135-nautical mile continental shelf boundary defines the limit within which the United States and Mexico may exercise continental shelf jurisdiction, particularly oil and gas exploration and exploitation.”

At the treaty’s signing ceremony between U.S. Secretary of State Madeleine Albright and the Mexican Secretary of Foreign Affairs Rosario Green, it was disclosed that both countries started negotiating the 2000

91. See U.S.-MEXICO TREATY ON MARITIME BOUNDARIES, supra note 88, at 5.
92. Id. at 6.
93. See Letter of Transmittal of the Treaty on the Delimitation of Continental Shelf from the President of the United States to the United States Senate, July 27, 2000, S. TREATY DOC. NO. 106-39, at iii (2000) [hereinafter Letter of Transmittal of the Treaty on the Delimitation of Continental Shelf]. Originally, the length of the continental shelf boundary was estimated to be of 129 nautical miles.
Treaty since early 1998 to reach agreement on the only maritime boundary that was still left undefined between both countries at that time.

Basically, the 2000 Treaty defines the limits within which each Party may exercise its sovereign rights over the seabed and the subsoil of the continental shelf in a submarine area located in the western Gulf of Mexico, beyond the limits of their respective exclusive economic zones extending out to 200 nautical miles (in an area known as the “Western Gap”) for the purpose of exploring the continental shelf and exploiting its natural resources. Under international law, and according to the 1982 U.N. Convention on the Law of the Sea, coastal states exercise over the continental shelf “sovereign rights for the purpose of exploring it and exploiting its natural resources.”

When the U.S. Senate was receiving testimony regarding the 1978 Treaty as part of the ratification proceedings, Dr. Hedberg, former Executive of the Gulf Oil Corporation, said that “the northwestern part of the central Gulf (located in the Area) (some 25,000 square miles (equivalent to more than a million acres)) could be by far the most promising deep-water petroleum territory to which the United States rightfully has claim.”

This statement generated tremendous interest among the powerful oil industry (including the American Association of Petroleum Geologists), who immediately started lobbing to stop the U.S. Senate from giving its advice and consent to the 1978 Treaty. The pressure was so intense and successful that said Treaty was withdrawn from consideration on the

95. Letter of Transmittal of the Treaty on the Delimitation of Continental Shelf, supra note 93, at v.
97. See Hedberg’s Statement, supra note 79 and the accompanying text.
98. See David Applegate, Doughnut Holes in the Gulf of Mexico, 5 BOUNDARY & SECURITY BULL. 71, 72 (1997).
99. In Mexico, it was reported that Mexico had been engaged in “secret negotiations” with the United States to modify the submarine maritime boundaries in the Gulf of Mexico to the benefit of the United States, as a result of pressure exercised by the United States oil industry. It is alleged that Mexico ended up losing a substantial submarine area of the Western Gap, including the “Sigsbee Escarpment,” which is rich in mineral resources. See FABIO BARBOSA, EL PETROLEO DE LOS HOYOS DE DONA [THE OIL IN THE DOUGHNUT HOLES] 29–49 (2003).
Senate floor on September 16, 1980, and did not receive the advice and consent of the Senate until seventeen years later, on October of 1997.

Accordingly, to reach agreement with Mexico on the precise maritime boundary of the submarine continental shelf in the central and deepest part in the middle of the “Western Gap,” in a submarine area beyond 200 nautical miles known to have rich mineral deposits, was of paramount importance for both the United States and Mexico, especially when one considers that the maritime boundary of the submarine continental shelf to be drawn in that part of the Gulf was going to bisect a transboundary hydrocarbon reservoir to be shared by both countries.

Based on the geological, geophysical and other scientific studies previously conducted, both parties agreed that the “Western Gap” comprised a total area of “approximately 5,092 square nautical miles (17,467 square kilometers), an area slightly smaller that the state of New Jersey. The agreed submarine maritime boundary divided the continental shelf in the “Western Gap” in the following manner: the United States received 1,913 square nautical miles (6,562 square kilometers) or 38% of the total area; and Mexico received 3,179 square nautical miles (10,905 square kilometers) or 62% of the total area.

a. Treaty Negotiations Between Mexico and the United States

It was the United States who took the initiative of proposing to Mexico, in the early years of the 1990’s, the maritime delimitation of the continental shelf boundary in the Western and Eastern Gaps of the Gulf of Mexico, according to Lic. Jorge Palacios Treviño, who served as Adviser to the Legal Department of the Secretariat of Foreign Affairs (SRE).

Mexico was “categoric” in answering to the United States that it would not engage in such negotiations until the day the U.S. Senate would give its advice and consent to the 1978 Treaty. In the early 1970’s, the Mexican government learned that the Department of the Interior was auctioning submarine tracts in the continental shelf of the Western Gulf.
of Mexico in an area that would correspond to the United States, if that area were to be divided by the equidistance method. On May 21, 1997, the SRE submitted a note to the U.S. Department of State suggesting that the auctioning of the tracts by the Department of the Interior “would be in violation of international law and this would run contrary to resolving the matter in a just and equitable manner.”

Furthermore, in a subsequent diplomatic note, SRE indicated that “pursuant to conventional and customary international law, States are under the obligation of delimiting the continental shelf through a [bilateral] agreement and, therefore, if no [maritime delimitation] is agreed bilaterally, Mexico would object any attempt by the United States of acquiring any submarine areas by unilateral possession (reivindicación); the adjudication of licences for the exploration and exploitation of hydrocarbons; or the possible acquisition of rights by U.S. private companies in the [submarine] areas not yet delimited.”

As a consequence of these notes, the American oil companies proceeded to request the U.S. Senate to give its advice and consent to the 1978 Treaty. The Senate, as discussed earlier, finally ratified the Treaty on October 23, 1997, during President Zedillo’s visit to Washington, D.C., on November 13, 1997.

To clarify newspaper articles printed in Mexico City regarding the Treaty and the delimitation of maritime boundaries, the Secretariat of Foreign Affairs (SRE) issued the following press release:

The sovereignty of Mexico over its natural resources has been defended and no agreement has been negotiated with the United States on maritime boundaries. During President Zedillo’s working visit to Washington, D.C. . . . on November 13 . . . the Exchange of Instruments of Ratification with the United States [took place regarding the 1978 Treaty]. Said Treaty was approved by the Mexican Senate [on November 28, 1978].

On its part, the U.S. Senate, decided to leave pending the approval of the Treaty because at that time it considered even doubtful the [possible] delimitation of the maritime boundary drawn in the Gulf of Mexico, 200 miles from the reefs Alacrán, Arenas and Cayo Arenas belonging to Mexico and located north of the

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103. Diplomatic Note from the Secretaría de Relaciones Exteriores (May 21, 1997), cited in Palacios Treviño, supra note 101, at 84.
105. Palacios Treviño, supra note 101, at 84–85.
106. See Michael M. Phillips, Gulf of Mexico Dispute Stymies Drilling, U.S. Agencies Want to Set Boundary with Mexico for Oil and Gas Bounty, WALL ST. J., Mar. 18, 1999.
107. See Palacios Treviño, supra note 101 and accompanying text.
Yucatán peninsula and of the states of Tabasco and Campeche. For Mexico, it was of vital importance that the original drawing of the maritime boundary agreed in the 1978 Treaty be respected because of the existence [in that area] of important natural resources, including hydrocarbons, located within its Exclusive economic zone, namely, within the 200 nautical miles from its coasts.

The ratification of the Treaty took place according to its original text, such as it was approved by the Senate of the Republic in 1978, with no modification whatsoever. The negotiation with the United States and with the U.N. [International Seabed] Authority that administers the International Seabed Area regarding the delimitation of the so-called “Western and Eastern doughnuts in the center of the Gulf of Mexico” shall be initiated after concluding a series of technical studies which are still undergoing.

As of this moment, the government of Mexico has no knowledge that any foreign oil company had attempted to drill and even less to claim rights over the [submarine] areas located within the “Western doughnut.” The government of Mexico shall continue to give maximum priority to the defense of its sovereignty over those natural resources for the [benefit of the] country and for its future generations.108

Lic. Palacios Treviño adds that Mexico accepted a new U.S. proposal to delimit only the continental shelf in the western zone of the Gulf of Mexico, and he speculates that this proposal was made because the continental shelf in the eastern zone necessarily involved Cuba, and the United States would not appear interested in negotiating with that country.109

b. Operative part of the 2000 Treaty

The treaty consists of nine articles and two annexes. Article I establishes the maritime boundary between the United States and Mexico beyond 200 nautical miles by means of geodetic lines connecting the listed sixteen turning and terminal points. In keeping with the methodology used in the previous U.S.-Mexico maritime boundary treaties,110 the agreed line

109. This author reports that Cuba and the United States periodically extended the bilateral agreement they subscribed establishing provisional maritime boundaries between these countries. Id. at 88; see also José María Valenzuela Robles Linares, Yacimientos Transfronterizos de Hidrocarburos [Transboundary Hydrocarbon Reservoirs], 10 Anuario Mexicano de Derecho Internacional [Mex. Y.B. Int’l L.] 353, 353–88 (2010).
“represents an equidistance line drawn from the respective U.S. and Mexican coastal baseline, including the baselines of islands.”

Article II sets out the technical parameters of the boundary based on the 1983 North American datum (NAD 83) and the International Earth Rotation Service’s Terrestrial Reference Frame (ITRF 92), as depicted in a map attached to the Treaty as Annex 1. (See Appendix 2).

Article III reproduces the provision the United States includes in “all modern maritime boundary treaties” that, “north of the boundary, Mexico will not, and south of the boundary, the United States will not claim or exercise for any purpose sovereign rights or jurisdiction over the seabed and subsoil.”

Articles IV and V contain specific provisions applicable to “reservoirs that may extend across the continental shelf boundary” (i.e., Transboundary reservoirs) (i) creating a cooperative framework by which the Parties can exchange information to help determine the existence of these reservoirs; (ii) establishing a “buffer zone” (called “the Area”) which comprises a continental shelf area of 1.4 nautical miles on each side of the boundary; (iii) requiring each party to facilitate requests from the other party to authorize geological and geophysical information “to determine the possible presence and distribution of transboundary reservoirs;” (iv) obliging each party to notify the other party “if it has knowledge of the existence and possible existence and location of transboundary reservoirs” and to supply the other a “written summary of their respective national laws and regulations pertaining to offshore and gas development;” (v) dictating that the parties must meet periodically during the ten year moratorium “for the purpose of identifying, locating, and determining the geological and geophysical characteristics of transboundary reservoirs;” and (vi) “seek to reach agreement for the efficient and equitable exploitation of such transboundary reservoirs;” etc.

These two articles address the most important substantive questions of the treaty: first, the recognition of the “possible existence of [oil and gas] transboundary reservoirs” and the obligation by either party to “notify” the existence of said reservoirs to the other party; and second, the establishment of a “buffer zone” where parties agreed to a ten-year moratorium on petroleum drilling or exploitation. In addition, parties

111. See Letter of Transmittal of the Treaty on the Delimitation of Continental Shelf, supra note 93, at v.
112. Id. at vii.
113. Id. at vii–viii.
are to meet periodically during the moratorium to exchange information regarding said reservoirs. And all of this is to be done within the special cooperative framework amicably structured by both parties. The establishment of a similar kind of a “cooperative framework” is replicated in Article 1 of the subsequent 2012 Agreement regarding the delicate matter of “the joint exploration and exploitation of geological hydrocarbon structures and reservoirs that extend across the delimitation line.”

According to Article VI, the parties are required to consult to discuss any issue regarding “the interpretation or implementation of the Treaty upon a written request” and the parties must solve any dispute concerning the Treaty “by negotiation or other peaceful means as may be agreed upon by the parties (Article VIII).”

Article VII provides that the boundary established in the Treaty “does not affect or prejudice in any manner” the positions of either Party regarding the extent of internal waters, the territorial sea, the high seas, or of sovereign rights or jurisdiction for any other purpose. Article IX provides that “the Treaty is subject to ratification and that it will enter into force on the date the Parties exchange instruments of ratification.”

It should be noted that the language of the 2000 Treaty provides no information as to the extension of the total area of the “Western Gap,” nor does it describe the submarine areas that resulted as a consequence of the establishment of the continental shelf boundary by the 1978 Treaty. This boundary was estimated to have a length of 135 nautical miles, composed by fifteen segments. Based on a “Background” sheet made public by the U.S. Department of State on June 9, 2000, when U.S. Secretary Madeline Albright and Mexican Secretary of Foreign Relations Rosario Green signed the 2000 Treaty during the official visit to Washington, D.C. by President William J. Clinton, the following was stated:

The total area of the “Western Gap” is approximately 5,092 square nautical miles (17,467 square kilometers), an area slightly smaller than the state of New Jersey. The boundary splits the “Western Gap” continental shelf in the following manner: the United States receives 1913 square nautical miles (6,562 square kilometers) or 38% of the total area; Mexico receives 3,179 square nautical miles (10,905 square kilometers) or 62% of the total area.

114. Id. at viii.
However, Lic. Palacios Treviño, an advisor to the Legal Department of the Secretariat of Foreign Affairs (SRE) who served as a member of the Mexican delegation who negotiated the 2000 Treaty, has indicated that “based on the equidistance method agreed by Mexico, out of the total submarine area of the Western Gap, 10,620 square kilometers correspond to Mexico (equivalent to 61.78% of the total submarine area) and 6,570 square kilometers to the United States (equivalent to 38.22%).”

The Treaty with Mexico on the Delimitation of the Continental Shelf in the Western Gulf of Mexico beyond 200 Nautical Miles probably represents the most important accomplishment in the area of maritime delimitation between both countries for a number of reasons:

1. **The Treaty Broke the Long and Difficult Diplomatic Impasse That Adversely Affected the Friendly Relations Between Both Countries**

For almost twenty years, Mexico anxiously awaited for the U.S. Senate to approve a bilateral agreement that established “provisional” maritime boundaries between the respective 200 nautical mile zones in the Gulf of Mexico and the Pacific Ocean in 1976.

The lack of a bilateral agreement dividing a submarine area in the central and deepest part of the Gulf of Mexico possibly containing a transfrontier hydrocarbon reservoir made Mexico fear that U.S. oil companies, in the absence of a clear and precise maritime boundary, may start drilling for mineral riches from the American side, unilaterally draining out the mineral resources located in Mexico’s side. In that country, this fear (popularly known as the “Efecto popote”) became a grave concern on a national scale fueled by intense patriotic sentiments.

The breaking up of the *impasse* and the signing of the 2000 Treaty were interpreted by both countries as a clear sign of good faith on their part, clearly indicating that they were ready to turn their attention to the most important matter in front of them: the definition of the limits of the continental shelf in the submarine area of the western Gulf of Mexico beyond 200 Nautical Miles, Background Sheet, U.S.-Mex., June 9, 2000, 2143 U.N.T.S. 417.

117. See **Palacios Treviño, supra** note 101, at 103. However, in the Foreword of this book, author Agustin Gutiérrez Canet provides slightly different figures: “The Western Gap comprises an area of approximately 17,000 sq. km. Out of this area, 10,556 sq. km. correspond to Mexico, equivalent to 60.36% of the total area, and to the United States 6,932, equivalent to 39.64%.” *Id.* at vi.
beyond the limits of their respective exclusive economic zones (EEZs), along the approximately 129 nautical miles of the area known as the “Western Gap.” At that time, the delimitation of this gap had become of the highest priority to the U.S. interests as petroleum exploration had moved into deeper waters.

**ii. The Ten Year “Moratorium” Did Away With Mexico’s Fears That the United States Was Going to Unilaterally Exploit the Transfrontier Hydrocarbon Deposit**

For almost two decades, Mexico’s attention (as reflected in the national press reports) was centered on the perceived threat that American oil companies were getting ready to use their advanced technologies (especially the so-called “horizontal drilling”) to start tapping into the mineral resources in the Western Gap. The 2000 Treaty by the United States and Mexico that put in place a “ten year moratorium on petroleum drilling or exploitation,” included in Article IV (1), was lauded in that country as a triumph of Mexico’s diplomacy.

**iii. For the First Time in the Diplomatic History of Both Countries, the 2000 Treaty Addressed the Delicate Question of A “Transboundary Hydrocarbon Reservoir” in the Gulf of Mexico, Beyond the Respective 200 Nautical Mile Maritime Zones**

“Transboundary reservoirs” (whether containing hydrocarbons, natural gas or water, for example) constitute today a most delicate and highly technical question under international law. Thus, the definition of these reservoirs, their boundaries and especially the manner in which the resources contained in these reservoirs are to be allocated between the involved States are pending matters that today continue to require careful analysis and consideration from the viewpoint of international law, both conventional and customary.

For many years, the existence of “binational underground aquifers” bisected by the international boundary between the United States and Mexico has been a difficult and controversial question that the International Boundary and Water Commission (IBWC) has not been able to resolve to the satisfaction of its member countries.

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A similar issue, recently pointed out by the Mexican press, has been the contrasting difference (quantity wise) between the utilization of natural gas extracted from a transboundary reservoir that has been exploited by Mexico and the United States. Whereas in the State of Tamaulipas, on the Mexican side, there are only nine wells that extract gas from the reservoir, on the American side across the boundary, the contiguous State of Texas currently operates 174 wells that tap gas from the same “transboundary natural gas reservoir” bisected by the boundary line between both countries. However, until today, it seems that Mexico has not taken any diplomatic steps to bring to the attention of the United States this apparent disproportionate utilization of the natural gas coming from this “transboundary reservoir,” that seems to run contrary to the international law principle that advocates “the efficient and equitable exploitation” of the resources contained in any kind of these reservoirs. Principles embraced by both countries and recently reiterated in the recent instruments of 2000 and 2012.

Given the growing importance that water and natural gas have for the economic development of the border areas along the U.S.-Mexico boundary, it may not be unexpected if in the future Mexico may decide to bring to the attention of the United States the question of the “fair and equitable utilization” of (i) transboundary aquifers or (ii) transboundary natural gas reservoirs bisected by the international boundary.

iv. The Treaty Established A Timely and Efficient Mechanism for the Parties to Consult and Exchange Information on Technical and Administrative Questions

Articles IV, V and VI of the Treaty detail these areas, such as facilitation of requests from the other party to authorize geological and geophysical studies; the exchange of information resulting from scientific studies “to

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119. See Alejandra Buendía & Palmira González, Sacar EU ventaja en gas a México [The U.S. Takes Advantage of Gas from Mexico], REFORMA, Apr. 9, 2012, at 1 (pointing out that the total gas production from the Mexican States of Coahuila, Nuevo Leon and Tamaulipas totals 2,879 wells, producing 1,345 million cubic feet of gas daily; on the U.S. side, across the border, Texas has 95,014 wells that produce 21,700 million cubic feet of gas daily). See also Christopher D. Henry & Robert A. Morton, Trans-Boundary Geothermal Resources of Texas and Mexico, 22 NAT. RESOURCES J. 973 (1982).
determine the possible existence and location of transboundary reservoirs;”
written summaries of national laws and regulations pertaining to offshore and gas development, etc.

The conduct of marine scientific research by vessels is the most common way of acquiring scientific and other technical information to determine the location, presence, quantity and quality of geological structures and other formations that may contain mineral resources in the Gulf of Mexico. In 2002 and 2003, the vessel “Veritas Vantage” was chartered by Mexico’s SENER and the Mexican Navy to conduct a 3D survey of the Alaminos Canyon in the Gulf of Mexico; also, in 2002, the ship “Gyre” of Texas A&M University conducted marine scientific research to study the Sigsbee Deep in the same gulf.120

Anticipating the probable existence of a transfrontier hydrocarbon reservoir that was to be scientifically confirmed as a result of all of these technical studies, Mexico took advantage of this opportunity to amend and update key federal statutes having to do with PEMEX, and with the exploitation of oil and natural gas as a natural resource under the direct control of the Nation pursuant to Article 27 of Mexico’s Political Constitution of 1917 (as amended).121 These amendments (made at the initiative of President Calderón) were especially made to allow U.S. investors to enter into contracts with PEMEX in order to explore and exploit the mineral riches in the deep and central part of the Gulf of Mexico, without conflicting with Mexico’s Political Constitution.122

120. See Vargas, Mexico and the Law of the Sea, supra note 36, at 387–88, 390; see also id. at 281–404.
121. In general, Article 27 of the Political Constitution prescribes that: “. . . the Nation is vested with the direct ownership of all natural resources of the continental shelf and the submarine shelf of the islands; of all minerals or substances, which . . . form deposits of a nature distinct of the components of the earth itself; . . . petroleum and all solid, liquid and gaseous hydrocarbons . . . . In these cases] the ownership of the Nation is inalienable and imprescriptible and the exploitation, use and utilization of the resources in question, by private individuals or by companies incorporated under Mexican law, may not be undertaken except through permits [concesiones] granted by the Federal Executive, pursuant to the rules and conditions established by the law.” Id. at 6–14, 40–42 (emphasis added).
122. For a detailed discussion and analysis of these amendments -generally known as the “Reforma Petrolera,” see generally Universidad Panamericana, La Reforma Petrolera [The Oil Reform] (Francisco de Rosenzweig Mendialdua & José Lozano Díez eds., 2008), and Instituto Tecnológico Autónomo de México, Regulación Energética Contemporánea: Temas Selectos [Contemporary Energy Regulation: Selected Topics] (2009).
v. In Sum, the 2000 Treaty May Be Characterized As A “Preparatory Treaty” That Established the Required Legal, Technical and Administrative Infrastructure for the United States and Mexico to Move Up to the Next Level: The Negotiation and Signing of the 2012 Agreement

Accordingly, the 1970, 1978 and 2000 Treaties should be perceived not as individual treaties but as three components in a legal process gradually converging into the signing of the 2012 Agreement. However, the process of defining maritime boundaries in key submarine areas between the United States and Mexico will not be completed until these countries enter into a maritime boundary agreement for the Eastern Gap of the Gulf of Mexico and a similar agreement in the Pacific Ocean.

The final step in the process of establishing maritime boundaries in submarine areas of the continental shelf in 200 nautical mile zones will be when the United States and Mexico individually sign a similar delimitation agreement with Cuba.

III. THE 2012 UNITED STATES-MEXICO AGREEMENT ON TRANSBOUNDARY HYDROCARBON RESERVOIRS IN THE GULF OF MEXICO

As time goes by, the 2012 Agreement will be recognized as among the most important treaties in the diplomatic and economic histories of the United States and Mexico. For a number of reasons explained later in this section, the 2012 Agreement deserves to be placed in a special, almost unique, category. Rather than the usual type of “treaty,” it is to be noted that both parties decided to call it an “Agreement.”¹²³

Once the submarine maritime boundary was established in the Gulf of Mexico (western and eastern portions) and in the Pacific by the 1978 Treaty; and that both parties agreed in the 2000 Treaty on the exploration and exploitation of possible oil and gas reservoirs extending across the

¹²³. Both doctrine and international jurisprudence have expressly asserted that the name or “terminology” used to refer to a treaty “is not a determinant factor as to the character of an international agreement or undertaking. In the practice of States . . . and in the jurisprudence of international courts, there exists a great variety of usage; there are many different types of acts to which the character of treaty stipulations has been attached.” South West Africa (Eth. v. S. Afr., Liber. v. S. Afr.), 1962 I.C.J. 319, 331 (Dec. 21) (emphasis added); see also Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahr.), 1994 I.C.J. 112, 120 (July 1).
continental shelf boundary, then the United States and Mexico were finally ready to sign the 2012 Agreement—a long and bumpy diplomatic and legal road that took the parties over three decades to transit. This bilateral instrument was specifically formulated “to establish a legal framework to achieve safe, efficient, equitable and environmentally responsible exploitation of transboundary hydrocarbon reservoirs in the Gulf of Mexico.”

Rather than signing a traditional formal treaty like those concluded in 1978 and 2000, this time the United States and Mexico entered into an “Agreement” creating an international contractual relationship for the exploration and exploitation of one of the largest submarine reservoirs located in the central and deepest part of the Gulf of Mexico—in other words, a contractual business relationship.

The allocation of submarine mineral resources contained in transborder hydrocarbon reservoirs that belong to different countries has been for the last five or six decades a relatively novel, intriguing and a most challenging question under international law. Given the considerable strategic value of these vast submarine resources (consisting of liquid and gas hydrocarbons), their major economic importance and the incredible technological advancements accomplished by major oil companies to be able to tap these resources under most challenging physical and geological conditions, countries with these transborder resources have been compelled to find equitable, practical and peaceful arrangements to proceed with the commercial exploitation of these submarine resources. Accordingly, these arrangements have produced an increasingly growing number of international legal arrangements (reflected in decisions by the International Court of Justice (ICJ) as well as in bilateral treaties) that have influenced the formulation of subsequent international arrangements.

The 2012 Agreement simply could not escape being influenced by the legal content of these seminal international judicial decisions by the ICJ:


125. From a terminological viewpoint, the Agreement Concerning Transboundary Hydrocarbon Reservoirs in the Gulf of Mexico, supra note 124, may be categorized as a “Treaty-Contract”, with some of its provisions governed by international law (i.e. art. 3, art. 19, and art. 25).

and other agreements. Thus, the U.S.-Mexico agreement emulated in substance and format parts of these agreements, especially those delineating the legal and cooperative framework for the joint development of transborder hydrocarbon resources between coastal States.\textsuperscript{127}

The business relationship built into the 2012 Agreement is both unprecedented and unique. It is unprecedented because there has been no other bilateral instrument between these countries that resembles neither in legal substance nor in format the 2012 Agreement. Accordingly, the purpose of this section is to discuss, analyze and comment on the most important Articles (i.e., “clauses” or legal sections) of this agreement. And it is unique because of the clear commercial content of this international contract. Customarily, the United States reserves entering into this type of “business agreements” only with countries placed at a similar level with the United States such as the United Kingdom, Germany, France, and Canada.

This section is divided into these parts: Part I, simply lays down the advantages and disadvantages of this Agreement for each of the parties; Part II, provides a discussion of the operative part of the Agreement; Part III offers a commentary of the different international law principles—whether conventional or derived from customary international law—that are incorporated into this Agreement; and, finally, Part IV discusses on the implications this Agreement may produce upon other legal, economic and diplomatic areas between the United States and Mexico.

\textit{A. Part I: Advantages and Disadvantages of the 2012 Agreement}

Evidently, the 2012 Agreement was signed because both the United States and Mexico considered it mutually beneficial. From an optimistic perspective, this legal instrument allows to convey the relative impression that today’s relations between both countries are close and friendly.

The long and uncomfortable era of distant and prickly diplomatic interactions between both countries (emanating from the 1848 war, the Chamizal case, the expropriation of the oil industry and the unilateral closing of the “Bracero” program) has been erased and abandoned. Today, the United States and Mexico seem to have become true allies sharing not only a binational boundary but a common destiny for the present and the future; a stronger relationship that is naturally imposed by geographical contiguity, by firmer and more fluid economic ties and by a growing relationship between their respective peoples, accentuated by the increasing demographic presence of Mexican-Americans and Mexican people in the United States and, at the same time, the larger presence of U.S. nationals in Mexico.

From a strategic and economic angle, the 2012 Agreement neatly fits within the latest policy predicating that the United States is to sever its decades-long dependency of importing oil from Arab countries and rely more and more from closer and safer sources, such as Canada and Mexico and, eventually, the Arctic. The tensions caused by the Arab spring upheavals in Lybia, Egypt, Tunisia and currently Syria, in addition to the headaches produced by a possible nuclear Iran and a likely Israeli attack to destroy Iran’s nuclear installations, resulting in the closing of the Strait of Hormuz, have clearly exposed the vulnerability of the United States in these tense and unpredictable scenarios. In light of these eventualities, having a close, safe and unobstructed access to rich transboundary hydrocarbon reservoirs in the Gulf of Mexico and in the Pacific is, without a doubt, the best alternative.

From a pessimistic viewpoint, the 2012 Agreement may be nothing more than a “Pandora’s box.” Given the technical and legal complexities contained in the agreement, the colossal economic and political interests at stake, and especially the contrasting differences between PEMEX, until now a governmental structure with poor international experience, and the savvy major U.S. oil companies, added to the intricacies embedded in two different legal systems, these components combine to produce a distasteful and unusual cocktail similar to mixing oil and water.

1. For the United States

From the U.S. perspective, this agreement had been long awaited by U.S. oil companies for decades that needed it to provide them with requisite clear and open legal access to the oil rich areas located in the

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Western Gap, beyond 200 nautical miles, along the central 135 nautical mile boundary line in the Gulf of Mexico.

It is clear that the government of the United States (through the coordinated work of the Department of State and the Department of the Interior) simply functioned as the official legal conduit to negotiate and sign the 2012 Agreement to open up the legal way for American oil companies to exploit one of the richest and untapped reservoirs in the Gulf of Mexico.129 The agreement clearly responded to the interests of the U.S. oil industry and was in conformance with both U.S. law and international law, including the pertinent provisions of the 1958 U.N. Geneva Convention on the Continental Shelf and the 1982 U.N. Convention on the Law of the Sea, including those principles forming a part of customary international law.130 It can be reasonably assumed that the language of the Draft Agreement initially submitted by the U.S. Department of State to Mexico had already been cleared by the American Petroleum Institute on behalf of the U.S. oil industry.

In this regard, the 2012 Agreement may share some similarities with the North American Free Trade Agreement (NAFTA), in the sense that this was also an “agreement” (and not a Treaty) that established the rules for the opening and expansion of trade with Mexico (and Canada) for the benefit of American companies principally in the industrial, pharmaceutical and agricultural sectors.

Some of the disadvantages may include the contrasting difference between the large, complex and technically advanced oil industry of the United States, considered to be among the most modern and technologically advanced on a global scale, and the relatively modest profile of PEMEX at the international level. Jesús Reyes Heroles, Director General of PEMEX, in his presentation before the Mexican Senate at the forum titled “Legislative Reform to Strengthen PEMEX,” said:

129. In his prepared statement before the U.S. Senate Committee on Foreign Relations, Dr. Hedberg said that this “northwestern part of the central Gulf [of Mexico]—some 25,000 square miles—could be by far the most promising deep-water petroleum territory . . . .” See Hedberg’s Statement, supra note 79. It should also be remembered that there is a second transborder hydrocarbon reservoir in the “Eastern Gap” in the Gulf of Mexico and a third one in the Pacific, all of which will be subject to the negotiation and signing of similar bilateral “Agreements” with Mexico in the near future.

PEMEX has been condemned to be a corporation without a strategy for growing, without international presence, with no policy for technological modernization, without a strategy for human resources, without international positioning, a hostage of normativity and bureaucracy and, what is worst, [a corporation] without a vision for the future.131

There is no question that PEMEX is likely to take a relatively long period of time to learn and adjust to properly interact, communicate and especially negotiate on specific administrative, technical, financial or legal questions with U.S. federal entities and with corporate executives from U.S. oil industries within the context of the 2012 Agreement. This difficult and relatively delicate process may range, inter alia, from simple language problems, timely compliance with deadlines, technical and scientific terminology, format and style of technical reports, interpretation of highly technical and scientific data, handling of advanced and highly expensive computers and the use of sophisticated software to less technical questions such as social and cultural differences.132

2. For Mexico

From the Mexican perspective, the 2012 Agreement may be advantageous for a number of reasons. First, because it eliminated that country’s perceived threat that American oil companies may start exploiting unilaterally the transboundary reservoir from the U.S. side, tapping the oil located in the Mexican side of the reservoir. The Agreement established a legal framework stipulating the manner in which both parties, after proper consultations and exchanges of information, would conduct any exploration and exploitation activities near the delimitation line (Article 4.1). At the same time, the Agreement obligates each party to provide written notice to the other when either party “is aware of the likely existence of a Transboundary reservoir” (Article 4.2, subparagraph a). And Article 6 provides that “any joint exploration and/or exploitation of a Transboundary reservoir or Unit Area pursuant to the terms of the Unitization agreement must be approved by the parties.”

In more general terms, the 2012 Agreement will allow Mexico—through the Secretariat of Energy, PEMEX and Mexican Oil Institute (Instituto


132. Some examples may include telephone and email protocols, lunch habits, and deadlines.
Mexicano del Petróleo) to step fully into the world arena where the American and international oil companies have decades of experience in what is known to be a very aggressive, slippery and confrontational business environment. This international exposure for PEMEX (and other Mexican federal agencies) is considered to be both practical and educational but also quite challenging.

PEMEX will also benefit from having direct access to the U.S. regulatory system of the oil industry through the administrative activities of the Minerals Management Service (MMS), the Department of the Interior, and other federal and state agencies.

At the international level, PEMEX has kept a relatively modest profile considering that this governmental company has lacked adequate financial resources, advanced equipment and technologies and human expertise. To say nothing of the technical and complex legislation the United States (or other countries like the U.K., Germany, Norway, France, Brazil, etc.) applies to regulate the activities of the oil industry, including its prolific and technical case law. Sooner than later, and especially in light of the 2012 Agreement, PEMEX will have to devote steady and substantial financial resources to either create or strengthen certain technical areas for this fully-owned governmental company to operate at the highest level of efficiency on the challenging oil international business arena.

Another disadvantage Mexico is likely to overcome is the contrasting differences between the U.S. legal system and the Mexican legal system. Today, the U.S. legal system is among the most complex and technical on a global scale. The sole area of “oil law,” as a part of an even larger area of “energy law,” is composed of thousands of pages of highly technical statutory materials and detailed regulations, with no comparison with the relatively simple and concise federal laws and regulations recently amended by Mexico as a result of the so-called 2008 “Oil Reform” (Reforma

133. See Agreement Concerning Transboundary Hydrocarbon Reservoirs in the Gulf of Mexico, supra note 124. See also Martin Miranda, The Legal Obstacles to Foreign Direct Investment in Mexico’s Oil Sector, 33 FORDHAM INT’L L.J. 206, 242 (2009).
135. See VARGAS, MEXICO AND THE LAW OF THE SEA, supra note 36; see supra note 130 and accompanying text.
Petrolera), undertaken at the initiative of President Calderón on April 8, 2008.\textsuperscript{136}

At the same time, it can be anticipated that in the same manner Mexico has been for decades regularly “adopting and adjusting” numerous U.S. statutes and regulations in a number of areas (such as environmental law, pollution controls, tax law, intellectual property, trade, family law, condominiums, etc.)\textsuperscript{137} Mexico is now likely to incorporate into Mexican statutory materials, \textit{mutatis mutandis}, U.S. technical principles and regulations to be applied to the Mexican oil industry in the near future.

Mexico simply cannot afford to devote the first one or two years after the 2012 agreement enters into force as a kind of “training or adjustment period” to become familiar with the practical intricacies associated with the factual implementation of the complex 2012 bilateral instrument. Accordingly, it is imperative for that country to be prepared financially, legally, technically and administratively, and be fully operational at the technical level, on the first day the Agreement enters into force.

Assuming the 2012 Agreement is to enter into force after the U.S. Senate gives its advice and consent, and considering the legal and technical complexity of this bilateral instrument, it can be anticipated that some of its articles may lead to diverging interpretations. Therefore, both parties are to be cautious, flexible and open minded during the first years of implementation of this bilateral instrument to allow for its normal and unobstructed implementation. Only the passage of time will tell. The manner in which this Agreement is to be implemented will dictate not only its effective compliance and enforcement but, more importantly, its legal longevity.

\textbf{B. Part II: Operative Part of the 2012 Agreement}

The extraordinary advancements of oil technology (combined with the conduct of resource-oriented marine scientific research and the construction of specialized space and marine platforms), added to the necessity of finding hydrocarbon reservoirs in an oil-thirsty global market, has prompted coastal States to turn to the oceans in their insatiable search for oil.

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136. \textit{See generally José de Jesús Martínez Gil, El Petróleo de México: Breve Historia, Evolución y Estado Actual [Mexico’s Oil: Brief History, Its Evolution and Current Situation]} (2012); \textsc{Instituto Tecnológico Autónomo de México, supra note 120, at 411; Universidad Panamericana, La Reforma Petrolera: El Paso Necesario [The Oil Reform: The Necessary Step]} 3 (Francisco de Rosenzweing Mendialdua ed., 2008). For a discussion of Mexico’s federal statutes relative to its “Oil Reform,” see Section X in Part V of this article.

137. The long and pervasive U.S. influence upon Mexican law was referred to as the “Americanization of Mexican law.” \textit{See generally Stephen Zamora, The Americanization of Mexican Law, 24 LAW & POL’Y INT’L BUS. 391 (1993)}.
\end{flushright}
Virtually, this trend by coastal States was initiated by the United States when President Truman issued his Presidential Proclamation on the Continental Shelf in 1945.  

From a legal perspective, coastal States in all the ocean basins of the world turned first to their immediate and closer continental shelf areas where they started exploring and then commercially exploiting hydrocarbon resources in these submarine areas. As soon as these closer and shallow oil deposits became depleted, coastal States became compelled to move into submarine areas that were distant from the coast and found at deeper water depths. On a number of cases, these distant and deeper hydrocarbon reservoirs were bisected by the maritime boundary of two or more coastal States, thus posing challenging and delicate legal and technical questions under international law to determine how to allocate the mineral resources contained in these transboundary reservoirs among the involved States.

Many of these cases found their way to the ICJ seeking a fair and legal solution; others were resolved by means of special agreements or treaties similar to the 2012 Agreement.  

In general, all of these seminal and interesting cases have produced a rich and varied jurisprudential and case law outcomes that, to a larger or minor extent, have influenced—and continue to do so—the crafting of the legal documents (whether agreements, treaties or contracts) addressing more recent cases.

Regarding some of these seminal cases, some authors have said that the Timor Gap Treaty is the most comprehensive treaty of this kind that provides a model for the creation of Joint administrative bodies, the division of the hydrocarbon reservoir into two areas and the strong emphasis on cooperative arrangements between the parties, including the obligation to share geological and scientific information, tax questions and dispute resolution provisions.

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140. Regarding these examples, see THE PEACEFUL MANAGEMENT OF TRANSBOUNDARY RESOURCES, supra note 127, at 3–19.
The 2012 Agreement has not escaped from studying these legal outcomes, emulating and adjusting some of those past arrangements, and even creating or establishing novel legal frameworks that may fit the special or unique legal and technical contours of those submarine areas in the central portion of the Gulf of Mexico. Because of this characteristic, the 2012 Agreement may be characterized as a “Composite Agreement,” in the sense that it incorporated in its language selected portions, specific arrangements, administrative structures, etc. of previous treaties or international arrangements.

The 2012 Agreement is composed by twenty-five articles. This number is in symmetry with similar agreements entered into on this subject by other coastal states with transborder hydrocarbon reservoirs in different parts of the world. For purposes of discussion and brevity, a comment will be made in reference to each of the major seven Chapters forming the body of this international agreement, discussing only those articles considered to be important because of their substantive legal content.

Chapter I is titled: “General Principles” and is formed by five articles. Article 1 defines the “Scope” of the Agreement as it applies to the “cooperation between the Parties with regard to the joint exploration and exploitation of geological hydrocarbon structures and reservoirs that extend across the delimitation line, the entirety of which are located beyond nine nautical miles from the coastline.”

The central purpose of the Agreement is for both Parties to undertake the “joint exploration and exploitation of two types of geological features: (i) geological hydrocarbon structures per se; and (ii) geological hydrocarbon reservoirs. The first type consists of large structures that may contain one or more reservoirs whereas the second type refers to a geological hydrocarbon reservoir. Both of these structures must comply with these two conditions: (a) they must straddle across the maritime delimitation boundary line (i.e., be transborder in nature) and (b) must be located, in their entirety, beyond nine nautical miles from the coastline.

Pursuant to the international law of the sea (both dating back to the 1958 U.N. Geneva Convention on the Continental Shelf of 1958 and the current 1982 U.N. Convention on the Law of the Sea), it should be underlined that the coastal State does not outright own the submarine continental shelf but merely exercises over it “sovereign rights for the

141. For a scientific definition of these technical terms, see PETROLEUM EXTENSION SERV., UNIV. OF TEX. AT AUSTIN, A DICTIONARY FOR THE OIL AND GAS INDUSTRY (2005).

142. See United Nations Convention on the Continental Shelf art. 4, Apr. 29, 1958, 499 U.N.T.S. 311, 312 (Both the United States and Mexico are parties to this Convention); see also United Nations Convention on the Law of the Sea art. 78, Dec. 10, 1982, 1833 U.N.T.S. 397, 430 (Mexico is a party to this Convention, but the United States is not).
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Purpose of exploring it and exploiting its natural resources.” However, “no one may undertake these activities “without the express consent of the coastal State.”

Article 1 of the Agreement should be read in conjunction with Article 3, which provides that “Nothing in this Agreement shall be interpreted as affecting the sovereign rights and the jurisdiction which each Party has under international law over the continental shelf which appertains to it.”

Accordingly, the 2012 Agreement does not confer to the Parties any rights over living or mineral marine resources but, instead, simply establishes a legal cooperative framework between the United States and Mexico with regard to the joint exploration and exploitation of “geological hydrocarbon structures and reservoirs” in the central part of the Gulf of Mexico. In this regard, the same conventions prescribe that the rights over said natural resources “do not depend on occupation, effective or notional, or on any express proclamation.”

Article 2 of the Agreement contains a number of technical, scientific and legal “Definitions.” In particular, the following merit special attention:

a. “Delimitation Line” means the maritime boundary line established in the Gulf of Mexico by the corresponding 1970 and 1978 Maritime Boundary Treaties and 2000 Treaty on the Continental Shelf, and any future maritime boundary lines mutually agreed by the United States and Mexico in the Gulf of Mexico;

b. “Reservoir” is defined as “a single continuous deposit of hydrocarbons in a porous or permeable medium, trapped by a structural stratigraphic feature.”

c. “Transboundary Reservoir” means any reservoir which extends across the delimitation line and the entirety of which is located beyond nine nautical miles from the coastline,

143. See Convention on the Continental Shelf, supra note 142, at art. 2; see also Convention on the Law of the Sea, supra note 140, at art. 77, para. 2. These rights may be traced back to the 1945 Truman Presidential Proclamation over the Continental Shelf, the original antecedent of this submarine space.


145. Agreement Concerning Transboundary Hydrocarbon Reservoirs in the Gulf of Mexico, supra note 124.
exploitable in whole or in part from both sides of the delimitation line.”

d. “Transboundary Unit means a single geological hydrocarbon structure or reservoir which extends across the delimitation line the entirety of which is located beyond nine nautical miles from the coastline, exploitable in whole or in part from both sides of the delimitation line.”

e. “Unit area means the geographical area described in a Transboundary Unit, as set out in the Unitization Agreement,” and

f. “Unit Operating Agreement means an agreement made between the Licensees and the Unit Operator that, among other things, establishes the rights and obligations of the Licensees and the Unit Operator including, but not limited to, the allocation of costs and liabilities incurred in and benefits derived from operations in the Unit Area.”

The definition of “Transboundary Reservoir” reproduced above in paragraph c) of Article 2 of the 2012 Agreement does not correspond with the explicit language of Article 1 of the Reglamentary Act of Article 27 of the Constitution in the Area of Oil (Ley Reglamentaria del Artículo 27 Constitucional en el Ramo del Petróleo), although it is clearly in symmetry with its legal substance. Article 1 of the Reglamentary Act reads:

For purposes of this Act, transborder reservoirs are considered those found within the national jurisdiction and having physical continuity outside said jurisdiction. Transborder reservoirs may also be considered those reservoirs or mantles outside the national jurisdiction shared with other countries in accordance with the treaties to which Mexico is a party or pursuant to what is prescribed by the [1982] United Nations Convention on the Law of the Sea.

Since Mexico is a party to the 2012 Agreement, the definition provided by this Agreement clearly prevails.146

Article 4 is one of the most detailed provisions in the Agreement. It refers to the modus operandi the Parties are to adhere to with respect to the “exploration and exploitation activities carried out within three statute miles of the Delimitation line.”

Given the delicacy of these activities, the emphasis was placed on the obligation of the Parties to consult when these activities are first contemplated to be conducted. Evidently, disregarding the explicit protocol imposed by the Agreement is likely to only generate serious doubts

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146. Id. (A similar interpretation would apply to the “Transboundary Unit” defined in the agreement.)
and misapprehensions between the contracting Parties, likely to lead to most serious problems stemming out of the lack of trust or good faith.

This seems to be a particularly important article whose compliance Mexico is to follow very closely, given the uncomfortable situation experienced by this country when, in the absence of a binational agreement, the American oil companies remained silent when certain politicians and the American press in Mexico suggested that said companies were considering to proceed to the exploitation of the transborder hydrocarbon reservoir unilaterally siphoning out oil from Mexico’s side.

The last article of this chapter, Article 5, establishes the manner in which the Parties, through their corresponding Executive Agencies determine whether a “Transboundary Reservoir” exists, as a result of a process of mutual consultations and once the Licensees, at the request of said Agencies, have already provided all the geological information relevant to such determination.

Chapter 2 of the Agreement—composed of Articles 6 through 9—may be described as the core components of this unique instrument. This technical chapter addresses unitization questions (Article 6); the management of the transboundary reservoir prior to the formation of a transboundary unit (Article 7); the allocation of production (Article 8); and redetermination of the allocation of production (Article 9). Although paragraph 2 of Article 6 enlists twelve important components of the Unitization Agreement, the complete text of this agreement remains confidential. In general, the language of Article 7 shows the special effort and detail put into this article by both Parties in order to agree on how to proceed with the exploitation of the reservoir based on the unitization agreements and associated Unit Operating Agreements and the conciliatory mechanisms put in place to move the Parties to approve said agreements. Similar conciliatory efforts are also found in relation with the delicate matter of the allocation and re-allocation of production, described in Articles 8 and 9.

During the negotiation of the 2000 Treaty it was informally suggested by one of the members of Mexico’s team of negotiators, Lic. Palacios Treviño, that based on the principle of equidistance and the corresponding results reflected in the international maritime boundary that bisected the Western Gap in the Gulf of Mexico, out of the total submarine area of said Gap, “10,620 sq. km. correspond to Mexico (equivalent to 61.78%
of the total area) and 6,570 sq. km. to the United States (equivalent to 38.22%).

However, these percentages neither appear in the language of the 2000 Treaty nor in the pertinent Articles of the 2012 Agreement. Which may lead to the interpretation that possibly the percentages to apply to the Unitization of the transborder hydrocarbon reservoir may be a delicate question still to be confidentially negotiated between the United States and Mexico at the right time, once the 2012 Agreement enters into force.

Chapter 3 refers to the Unit Operating Agreement (UOA), and is composed of Articles 10 through 13. In case of conflict between the UOA and the Unitization Agreement, the provisions of the latter should prevail. According to Article 13, income generated from the exploitation of the Transboundary reservoirs shall be taxed in accordance with the applicable legislation of Mexico and the United States, respectively, including the 1992 Treaty for the Avoidance of Double Taxation between these countries.

Chapter 4, consisting of Article 14, details the institutional arrangements in particular the Joint Commission to be in place to assist the Executive Agencies in administering the 2012 Agreement. Chapter 5 addresses the question of Settlement of Disputes, ranging from Consultations and Mediation (Article 15) to Expert Determination (Article 16) and Arbitration (Article 17).

Chapter 6 refers to Inspections, Safety, and Environmental Protection, where the respective national law of each Party is going to play a preeminent place, subject to the procedures to be developed and agreed by both Parties.

From the viewpoint of comparative law, given the dissimilarities between the technical and detailed U.S. regulations, on the one side, and the more general and concise Mexican counterparts, on the other, as well as the drastic differences between the monetary sanctions imposed under each domestic legal system, the activities under this chapter may lead to possible disagreements and eventual conflicts that may become quite serious when they may delay, suspend or outright stop oil production activities with costly economic consequences. For example, when a given environmental violation committed by a U.S. company may be sanctioned severely under U.S. law and the same violation may receive a nominal sanction under Mexican law, this clear discrepancy is likely to lead to protests from the U.S. side for the allegedly unfair and discriminatory treatment. Similar problems may arise regarding the preparation, experience

147.  See supra text accompanying note 115.
and competency of the Mexican Inspectors vis-à-vis those of the United States.

Given the importance of these activities and their sometimes dire consequences in the important areas of safety and environmental protection, the United States and Mexico should consider harmonizing or formulating uniform or binational standards especially designed for their applicability to the exploitation of the transborder hydrocarbon reservoirs in the Gulf of Mexico (and eventually in the Pacific).

As a relatively closed ocean basin, the Gulf of Mexico has been severely affected by a number of oil spills and oil platform catastrophes ranging from the severe and persistent Ixtoc spill by PEMEX to the relatively recent but ecologically disastrous BP catastrophe.148 Accordingly, given the well-known risks and dangers associated with the exploitation of the transborder reservoir in the ultra-deep waters of the Gulf of Mexico, both the United States and Mexico should seriously consider entering into a bilateral agreement to protect this Gulf from a possible accident, spill or any other environmental catastrophe. Moreover, the creation of a special contingency fund, as part of such an agreement, should also be considered.

In addition, a special protocol may also be necessary as an indispensable security measure against any possible terrorist attack intended to damage or destroy oil platforms, ducts or any infrastructure associated with the exploitation of the transborder hydrocarbon reservoir in the Gulf of Mexico.

Chapter 7 of the Agreement contains the Final Clauses, and is composed of Articles 20 through 25, relative to confidentiality, amendments, entry into force, termination, ending of the moratorium established by the 2000 Treaty, and the relationship with other agreements, respectively.

C. Part III: The 2012 Agreement and International Law

The relationship between international law and transborder hydrocarbon reservoirs within the context of American case law dates back to the 1930’s and 1940’s when the Institute of Mining and Metallurgical Engineers and the Midcontinental Oil and Gas Association addressed the novel and challenging question of adopting a “Unitization” scheme for

the joint development of certain oil pools. Soon after, the signing of a number of international treaties by European and Asian countries and later on the decisions by international tribunals (including the well-known *North Sea Continental Shelf* cases of 1969) placed this legal discussion more squarely within the ambit of international law.

The passage of time, the advancement of oil technologies and especially the proliferation of treaties and international jurisprudence on this rapidly growing area of international law, are beginning to produce some principles, policy guidelines and recommendations in an attempt to introduce clarity, order and a useful legal and business methodology that may contribute to the progressive development and eventual codification on this specialized and technical subject. Time is to do its part.

At the bilateral level, the United States and Mexico have systematically adhered to certain commonly shared international law principles, conducting themselves in conformance with their treaty obligations according to the old well-known maxim of *pacta sunt servanda*. Over the last couple of decades, the relations between these two countries appear to have gained in frequency and depth as reflected in the unprecedented and composite 2012 Agreement.

It is important to recall that Mexico, in the conduct of its foreign affairs, officially embraces a selected number of international law principles of a fundamental nature that are endowed with special historical and legal significance to that country. These principles deserved to be recalled and they are enunciated by paragraph X of Article 89 of that country’s Political Constitution:

> **Article 89.** The faculties and obligations of the President are the following:

> . . . .

> X. To direct the conduct of foreign affairs and to enter into international treaties . . . . In the conduct of this policy, the head of the Executive Power shall observe the following normative principles: self-determination of peoples; no intervention; peaceful settlement of disputes; proscription of the threat or the use of force in international relations; legal equality of States; international cooperation for development; respect, protection and promotion of human rights and the defense of peace and international security.

In the area of transborder hydrocarbon reservoirs, and more specifically in relation with the 2012 Agreement, there are a number of principles,

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151. Constitución Política de los Estados Unidos Mexicanos [C.P.] art. 89 (Mex.).
normative guidelines and recommendations that seem to have been adhered to by the provisions of said Agreement. These salient legal norms belong to both conventional and customary international law. Some of them are well-recognized principles whereas in others their degree of recognition and acceptance ranges from solid principles to mere recommendations.

1. The Equidistance Principle and the Exploitability Principle

In the course of signing several international maritime boundary treaties, in particular the 1970, 1978 and the 2000 Treaties, both the United States and Mexico, as parties to the 1958 U.N. Geneva Convention on the Continental Shelf, have agreed to establish their maritime boundaries according to the Principles of Equidistance and Exploitability predicated by Articles 6 and 1, respectively, of said convention.

Article 1 of the 2000 Treaty describes the continental shelf boundary between these countries in the Western Gulf of Mexico beyond 200 nautical miles as geodetic lines connected the listed sixteen turning and terminal points. In more explicit terms, in the Message of the President of the United States Transmitting the 2000 Treaty to the Senate he underlined that “this line represents and equidistant line drawn from the respective U.S. and Mexican coastal baseline, including the baselines of islands.”

As usual, in the United States the technical work relative to the drawing of the maritime boundary was left to be done by the Department of Marine Boundary and Resource Division, Office of The Geographer of the Department of State and, in Mexico, the General Directorate of Boundaries and International Rivers of the Secretariat of Foreign Affairs (SRE) and

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by each of the respective sections of the competent International Boundary and Water Commission (IBWC).

The “Exploitability Principle” applies for the determination of the outer boundary of the geological continental shelf. Therefore, based on this principle and pursuant to Article 1 of the 1958 U.N. Geneva Convention on the Continental Shelf, the outer boundary of this submarine territory may extend out “to a depth of 200 meters or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of said areas,” including islands.

Article 1 provides that the continental shelf of a coastal State extends beyond a depth of 200 meters “where the depth of the superjacent waters admits of the exploitation of the natural resources” of the shelf. The 1982 U.N. Convention on the Law of the Sea, to which Mexico is a party and which “the United States considers reflects customary international law” in this respect, provides a more scientifically based definition of the continental shelf. Article 76 provides that the continental shelf of a coastal State comprises the greater of either the area in which the seabed and subsoil of the submarine areas extend beyond a country’s territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or the area to a distance of 200 nautical miles from the baselines from which the territorial sea is measured. Under both definitions, the coastal state has exclusive control over the exploration and exploitation of the natural resources, including oil and gas, of the continental shelf.

In the Senate document regarding the 2000 Treaty, the Department of State wrote that “With respect to areas beyond 200 nautical miles from coastal baselines, the 1958 Geneva Convention and the 1982 U.N. Convention on the Law of the Sea provide that certain criteria must be met to qualify as continental shelf. During the negotiations, both sides agreed that all the seabed and subsoil of the submarine areas beyond 200-mile EEZ limit in the Western Gulf of Mexico meet the legal requirements described in both Conventions.”

In an article on the maritime boundaries of the United States, Feldman and Colson, Deputy Legal Adviser and Assistant Legal Adviser designate of the State Department (who negotiated the 2000 Treaty with Mexico), explicitly recognized the applicability of these international law principles to the 1978 and the 2000 Treaties with Mexico. Interestingly, these

154. Id.
155. Id.
156. See Feldman & Colson, supra note 11, at 743–45, 750 (recognizing that these maritime delimitation agreements are based “on the equidistance method giving full effect to islands” and adding that “[t]he choice of method of methods of delimitation in
authors recognized the principle of sovereign equality of States recognized by Mexico also.

From Mexico’s perspective, Lic. Palacios Treviño points out that at the beginning of the negotiations of said treaty, the U.S. delegation submitted to Mexico a draft treaty that drew the maritime boundary in the Western Gap strictly based on the equidistance method. The Mexican side did not accept this boundary because “this line was based exclusively on the equidistance method and it was necessary for Mexico to know both the hydrocarbon potential of the reservoir, as well as its distribution.”

Palacios Treviño adds that Mexico argued that if the reservoir was located only in the U.S. side, then the delimitation proposed simply did not provide an equitable solution. Furthermore, if the hydrocarbon reservoir may have been divided by the maritime boundary, then this would be a case of a “transborder reservoir” and, also in this case, the treaty would have to then include “a regime for the exploration and exploitation of this reservoir.”

When Mexico announced the initiation of these negotiations with the United States in addition to underlining its support for the “method of equidistance,” it also pointed out that its respect for the following international law principles: (i) To preserve and guarantee the utilization of the natural resources in the zone [Western Gap] that correspond to the Mexican State; (ii) To guarantee the legal equality of the [negotiating] States; (iii) Its respect for international law; and (iv) Its observance of the norms of equity and reciprocity.

According to Palacios Treviño, Mexico suggested to the United States to also take into account Principle 21 of the Stockholm Declaration of 1976:

any given case, whether under the 1958 Convention or customary law, has therefore to be determined in the light of those [geographical and other relevant] circumstances and of the fundamental norm that the delimitation must be in accordance with equitable principles”) (quoting the Anglo-French 1977 Award). See also Smith, supra note 63, at 402 (asserting that “[e]quidistance was an appropriate method of delimitation in each of the boundary regions . . . including an exchange of notes in Mexico City on November 24, 1976” (emphasis added).  

157. See Palacios Treviño, supra note 101, at 90–92. In this Communiqué the treaty negotiations in question were conducted with a “constructive spirit, recognizing them as a continuation of the Maritime Boundary Treaty of 1978 and taking into account international law.” Id. at 91.

158. Id. at 91–92.

159. Id. at 90.
Principle 21. States have, in accordance with the charter of the United Nations and the principles of international law, their sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.\textsuperscript{160}

Principle 21 remains a cornerstone of international environmental law. According to Philippe Sands, this fundamental principle comprises two elements which cannot be separated without fundamentally changing their sense and effect: (1) the sovereign right of states to exploit their own natural resources; and (ii) the responsibility, or obligation, not to cause damage to the environment of other states or of areas beyond the limits of national jurisdiction. That Principle 21 reflects customary law was confirmed by the ICJ’s 1996 Advisor Opinion of The Legality of the Threat of Use of Nuclear Weapons.\textsuperscript{161}

However, none of the principles suggested by Mexico found its way into the 2000 Treaty or into the 2012 Agreement.\textsuperscript{162} In contrast to Mexico’s interest in including a number of principles in the resulting agreements, the United States only made special reference to the equidistance principle and the exploitability clause.

2. There is No Rule of Capture at the International Level

Prof. Masahiro Miyoshi, while explaining the basic concept of “Joint development,” asserts that this concept is opposed, by definition, to “individual or unilateral development,” characterized by application of the rule of (unrestricted) capture.\textsuperscript{163}

Historically—according to this author—this rule was considered to be “a legitimate principle in the development of land-based petroleum.”\textsuperscript{164} However, when this rule came under close scrutiny by a group of international law experts and transborder oil specialists at the Third Workshop on the South-East Asian Seas at the East-West Center that


\textsuperscript{161}. Id.

\textsuperscript{162}. See Palacios Treviño, supra note 101, at 96. According to Palacios Treviño, Mexico made a proposal to the United States based on the U.N. General Assembly Resolution 1803 (XVII) of December 14, 1962, which was also declined.

\textsuperscript{163}. Miyoshi, supra note 127, at 6 (with special Reference to the discussions at the East-West Center workshops on the South-East Asian seas).

\textsuperscript{164}. The so-called “rule of capture” may be stated this way: “One who has the right to drill for and produce oil and gas from a particular tract of land may so produce such hydrocarbons even though the oil and gas produced is drained from beneath the land of another.” Joseph W. Morris, The North Sea Continental Shelf: Oil and Gas Problems, 2 INT’L LAW 191, 206 (1967).
discussed “The Basic Concept of Joint Development of Hydrocarbon Resources on the Continental Shelf,” this workshop reached the unanimous conclusion that “[n]o international rule of capture exists although as a practical matter nations will aggressively pursue resources and conflicts may arise.”

Moreover, in relation with this legal issue, Prof. Jon Van Dyke added that nations with claims to hydrocarbon resources that overlap national boundaries have these duties under international law: (a) to consult with each other; (b) to share information about the nature of the resource; (c) to negotiate in good faith to reach and equitable agreement on the sharing of these resources; and (d) to refrain from taking resources clearly within the other nation’s jurisdiction. All of these duties are present in the language of the 2012 Agreement.

In other words, whereas the “rule of capture” may be validly applied within the ambit of domestic law, neither customary international law nor conventional international law recognize the applicability of this domestic rule at the international level. Today, no country has the right to use the rule of capture to extract oil and gas from a particular tract of a submarine territory when the oil and gas in question is drained from beneath the submarine territory (whether a continental shelf or from the continental margin) that lawfully belongs to another coastal State.

When this conclusion is applied to the situation of the Western Gap in the Gulf of Mexico between Mexico and the United States, it is evident that the United States, despite its advanced oil technology, simply did not have the right under international law to exploit the transborder hydrocarbon reservoir in the Western Gap, unilaterally draining Mexico’s oil and gas from Mexico’s side, because this would have been in clear violation of international law.

It would seem that the ardent pleas made by Senator Conchello regarding the threat of the “Popote effect,” the numerous news articles in the Mexico City press and those authored by academicians, missed the important fact that there is no rule of capture at the international level.166

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165. See Miyoshi, supra note 127, at 18.
166. See Pardinas, supra note 70, at 15–23, 50–72; see also Editorial, supra note 71.
3. *International Law Rules Advanced by the Experts*

Over the last decades, international law experts studying the legal ramifications derived from the joint development of transboundary hydrocarbon reservoirs have advanced a number of principles or rules applicable to these reservoirs, including these:

a. The practice of negotiating and seeking agreement on the exploitation and apportionment of a common deposit is not mere usage but, rather, a current customary rule of international law;\(^{167}\)

b. State practice today has clearly established the obligation to negotiate in good faith about the exploitation and apportionment of international common petroleum deposits as a rule of customary international law;\(^{168}\)

c. Obligation from abstention from unilateral development; If one State should proceed to exploitation without the consent of the other interested States, it would deprive them of the profit which they might otherwise have made and therefore be inequitable. Thus all the States involved are obliged to refrain from unilateral exploitation. This obligation is understood to be embodied in Articles 74(3) and 83(3) of the 1982 U.N. Convention on the Law of the Sea.\(^{169}\)

d. Obligation to negotiate in Good faith; Cooperation to avoid unilateral exploitation is a legal obligation. There is an obligation to negotiate in good faith towards positive cooperation for joint development;\(^{170}\)

e. Agreement by oil companies to transfer sufficient technical expertise to the participating governments to reduce the gap between and among the parties would ensure a better basis for cooperation;\(^{171}\)

f. A factor of major importance in such joint arrangements is the acceptance and understanding on the part of the operating companies that the control and management require consideration

\(^{167}\) See Miyoshi, *supra* note 127, at 8 (this assertion was made by Dr. William T. Onorato.)

\(^{168}\) *Id.* at 9. Some writers disagree with this statement, opining that any actual subsequent cooperation in the exploitation and development of such deposits “is compelled only by practical considerations rather than by legal mandate. Nevertheless, relevant precedent and current State practice support the contention that the law requires such cooperation.” *Id.*

\(^{169}\) *Id.* at 10 (emphasis added).

\(^{170}\) *Id.* at 12 (emphasis added).

\(^{171}\) *Id.* at 16.
of the politics, security, and culture of the participating countries;\textsuperscript{172} and
g. There are advantages and disadvantages in trying to harmonize laws of the two nations establishing the joint development zone. . . . It may be more important to harmonize laws relating to the relationship between the nations and the operators than laws governing the personnel on the offshore rigs.\textsuperscript{173}

Compared with similar treaties, the 2012 Agreement is relatively brief. Its content lays down the basic rules that both Parties must comply with to make this joint venture functional, establishing a number of administrative bodies involved in its implementation and supervision and spelling out the mechanisms for the effective peaceful settlement of disputes.

Domestically, this agreement will impose a number of very specific and technical tasks especially on PEMEX but also in other structures of Mexico’s public administration, including the Secretariat of Energy, the Secretariat of Foreign Affairs, the Secretariat of the Navy, the National Institute of Geography and Statistics and the National Commission on Hydrocarbons.

More importantly, for this Agreement to function effectively, President Calderón took the initiative of adjusting the legal framework of Mexico’s hydrocarbon industry, a task that had not been attempted since 1938 when the oil industry was nationalized in that country. This major legislative overhaul already demanded not only the amendment a number of existing key statutes related to the oil industry but also the enactment of brand new federal statutes that will require salient changes in energy policies, entrepreneurial practices and the formulation of modern and efficient technical regulations.

In anticipation of the 2012 Agreement, and its effective implementation, President Calderón on April 2008 submitted to the Mexican Senate legislative bill intending to restructure and restrengthen PEMEX, that country’s government’s sole public company. Eventually, with the support of the Senate and the Chamber of Deputies, and of all political parties, the initial bill was transformed into an ambitious package of amendments to modernize Mexico’s oil public sector.

\textsuperscript{172} Id.
\textsuperscript{173} Id. at 18; see infra App. 3.

This legislative overhaul required both substantial changes to key statutes governing the oil industry as well as the enactment of brand new pieces of legislation introducing changes in Mexico’s energy policies, PEMEX’s entrepreneurial practices and the formulation of modern and efficient technical regulations throughout the oil public sector. Given the profound impact and serious transformation of the most important public company of Mexico’s Federal Public Administration, these changes become known in Mexico as the “Reforma Petrolera” (The Legislative Oil Reform).174

To set up the required administrative infrastructure and to make it work in a smooth and efficient manner, both internally and internationally, will demand a tremendous effort by Mexico—an effort that is nothing less than indispensable for the 2012 Agreement to be able to function properly, effectively and internationally.

4. Mexico’s Senate Approves the 2012 Agreement with the United States

As soon as the 2012 Agreement was duly signed at Los Cabos, Baja California Sur, President Calderón gave instructions to the Secretary of the Interior (Segob) to submit said Agreement to the Senate seeking its prompt ratification, pursuant to Article 76, paragraph 1 of Mexico’s Political Constitution.175 At the request of the Chamber of Deputies and


175. Serving as the Legislative Liaison Office, Segob submitted the Agreement to the Senate of the Republic on February 23, 2012, pursuant to Article 71, paragraph 1 which enumerates the exclusive powers of the Senate, including the power to “approve the international treaties and diplomatic conventions signed by the Executive . . . .”
given the importance of this bilateral instrument, the Senate shared a copy of this Agreement with the lower Chamber of the Congress of the Union.\textsuperscript{176}

Within the Senate, this matter was submitted to the Commissions of Foreign Affairs, North America and Energy for its final consideration and technical opinion. On April 12, 2012, these three Commissions rendered their opinion,\textsuperscript{177} underlining the following considerations:

1. First, that pursuant to Article 27 of the Constitution, in the commercial exploitation of hydrocarbons neither permits [Concesiones] nor contracts shall be granted; and second, that it corresponds to the Nation the exploitation of hydrocarbons pursuant to the terms established by the Reglamentary Act (Ley Reglamentaria del Art. 27 Constitucional en el Ramo del Petróleo), including its specific language regarding the legal definition of “transborder reservoirs” (yacimientos transfronterizos);

2. The transborder reservoirs may be exploited “in the terms prescribed by the treaties to which Mexico is a party, entered into by the President of the Republic and approved by the Chamber of Senators.”

3. The Legislative Power, while discussing the oil reform [Reforma energética] of 2008 specifically decided to include the exploitation of said transborder reservoirs. Within this context, the purpose of the legislature was to guarantee through the law the full exercise of national jurisdiction over the energy resources that form a part of the Mexican patrimony. Therefore, as it occurs in international practice, it

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\textsuperscript{176}Constitución Política de los Estados Unidos Mexicanos [C.P.], as amended, art. 71, ¶ I, Diario Oficial de la Federación [DO], 8 de Septiembre 2012 (Mex.).


\textsuperscript{177}Dictamen de las Comisiones de Relaciones Exteriores, América del Norte y de Energía respecto del Acuerdo entre los Estados Unidos Mexicanos y los Estados Unidos de América relativo a los Yacimientos Transfronterizos de Hidrocarburos en el Golfo de México [Opinion of the Committees on Foreign Relations, North America, and Energy Regarding the Agreement Between Mexico and the United States of America Regarding Transboundary Reservoirs of Hydrocarbons in the Gulf of Mexico], GACETA DEL SENADO, Apr. 12, 2012.
is necessary to have an international instrument allowing the different States sharing hydrocarbon reservoirs an equitable exploitation under the rules guaranteeing sovereignty, providing legal certainty and allowing Mexico, in this case, to have access to the resources located in the submarine soil.

4. For the above reasons, the three Commissions coincide in their opinions that the 2012 Agreement between Mexico and the United States constitutes a step of major importance that the country may have access to the hydrocarbons that eventually may share with its northern neighbor. Furthermore, is the Commissions consider that this Agreement does not contradict any constitutional or legal provision, given the fact that the national sovereignty may be exercised, without restrictions, since the signatory countries cannot interpret such Agreement unilaterally for the benefit of their own interests. Having established clear rules regarding the exploration and exploitation of hydrocarbons found in possible transborder reservoirs, these activities may be undertaken in an efficient, safe, and equitable manner, with due respect to the environment.

5. In order to formulate their technical opinion (dictamen), these Commissions have taken into consideration the comments and observations made by the SRE in the document: “Description of the Agreement” (Descripción del Acuerdo) that was enclosed with the international instrument when it was sent to the Senate, in these terms:

“The Agreement between Mexico and the United States of America relative to Transborder Reservoirs in the Gulf of Mexico establishes the bases for cooperation between both States regarding the joint exploration and exploitation of the geological structures of hydrocarbons and reservoirs that straddle the maritime boundary, whose totality is situated beyond nine nautical miles from the coastline. It should be clarified that the mentioned limit of nine nautical miles is due to the fact that the federal government of the United States does not have jurisdiction over the resources in the marine subsoil found within said distance because in that country the sovereignty over said resources belongs to the States of the Union, and in this specific case to the State of Texas, with which the signing of a treaty is not
possible, some forms of cooperation similar to those
contained in the Agreement will be explored.”

“The Agreement provides full certainty to both countries
through the establishment of a clear legal framework that
will allow a safe, efficient, equitable and environmentally
responsible exploitation of the transborder hydrocarbon
reservoirs that may be found along the maritime
boundaries established between Mexico and the United
States in the Gulf of Mexico.”

6. The SRE added:

Regarding Mexico’s sovereignty, “the Agreement’s
language provides that its text shall not be interpreted in
a manner that may affect the sovereign rights and the
jurisdiction that both Mexico and the United States exercise
over their respective continental shelf, in accordance with
international law.”

“Adhering to the international practice in those cases
when there are transborder hydrocarbon reservoirs between
two or more States, the governments of Mexico and the
United States decided to adopt the method of “unification
of reservoirs” (unificación de yacimientos) as the proper
mechanism for the exploration and exploitation of
the transborder reservoirs existing between both
countries, because this mechanism offers the best
utilization and efficiency of the transborder reservoir.”

Based on the favorable technical opinion rendered by the
three Senate Commissions, with a vote of 69 votes in
favor, 21 against and 1 abstention, the Senate of the
Republic ratified the 2012 Agreement on April 12, 2012.

178 Id.
IV. CONCLUSIONS

1. The 2012 U.S.-Mexico Agreement on Transboundary Reservoirs in the Gulf of Mexico is a unique and unprecedented bilateral agreement in the history of both countries. It is *unique* because it establishes a cooperative legal framework to proceed with the joint commercial exploitation and further exploration of the transboundary hydrocarbon reservoir located in the Western Gap in the Gulf of Mexico. And it is *unprecedented* because this agreement practically operates as a business partnership for these countries to embark upon in what may be described as the very first commercial venture between them. A venture of enormous significance for the strategic and economic consequences it provides for the present and future of both countries.

2. Evidently, this agreement is mutually beneficial for Mexico and the United States. Mexico will benefit enormously to become directly engaged with the country whose oil industry occupies a salient and singular place on a global scale for its advanced scientific, technological and industrial developments in this important economic sector. For the United States, the commercial exploitation of this transboundary reservoir—placed on its own backyard—will no doubt guarantee the United States a safe and unimpeded access to a domestic and rich oil reservoir. Having this safe and easy access to a highly needed source of oil will substantially reduce the growing dependency from Arab oil the United States has been experiencing over the past decades and the threat that this Arab supply may simply disappear should the transit through and over the Strait of Hormuz be violently interrupted by a military conflict.

3. This Agreement also contributes to enhance and better define the policy that predicates that, in the near future, the United States, Canada and Mexico should structure a plan that would rely in guaranteeing close and safe hydrocarbon reservoirs located in the western hemisphere, i.e., the United States, Canada and Mexico, including future Arctic sources.

4. In anticipation of this bilateral Agreement, Mexico undertook the delicate task of overhauling the legal, administrative and


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technical infrastructure of its oil industry, centered around that monolithic and monopolistic governmental structure known as PEMEX. For over seventy years, this official corporate entity became not only an essential but literally an indispensable component for Mexico’s economic and social development, including the financing of its own public sector. On April 8, 2008, President Calderón submitted to the Mexican Senate a major legislative bill to modernize and restructure PEMEX, jointly with several other bills amending federal statutes closely related to the oil industry, for consideration to the Mexico’s Congress. Indeed, a monumental and well-coordinated effort.

However, the manner in which these substantial changes are to be effectively implemented will determine, to a large and delicate extent, the practical and efficient implementation of the 2012 Agreement. It may not be exaggerated to say that the smooth and effective implementation of the bilateral agreement will depend upon on the legal content of the corresponding regulations and especially their appropriate enforcement. A vital and delicate task left exclusively in the hands of Mexico.

The contrasting differences between the legal systems of the United States and Mexico are not likely to contribute to ameliorate the legal differences between these countries. Therefore, a special effort is to be made to be prepared with mechanisms that will assist in reconciling such differences and, more importantly, solve problems in a quick and practical manner.

5. Today, there are two existing transborder hydrocarbon reservoirs that are still pending to be divided by a maritime boundary line between the United States and Mexico: first, the Eastern Gap in the Gulf of Mexico and, second, a similar one in the Pacific Ocean. In light of the 2012 Agreement, it is expected that these two pending reservoirs may follow the same cooperative and joint development arrangement reflected in the language of the current agreement. Furthermore, it is only logical to expect that the positive example of the joint partnership established by the 2012 Agreement may be applied to other commercial, economic and industrial areas between these two countries in the years to come.
6. Eventually, the United States and Cuba may have to negotiate a possible transboundary agreement if scientific studies determine the existence of such a reservoir between these countries in the Gulf of Mexico. From Mexico’s perspective, it is likely that in the future Mexico may have to negotiate separate maritime boundary agreements with Cuba, Belize, Guatemala and Honduras.

7. In sum, the 2012 Agreement may be Mexico’s best opportunity to modernize and strengthen its oil industry, solidify its economy and become a business partner with the United States. This bilateral instrument opens up a path to forge a brighter and more prosperous future for the people of Mexico in their transit towards a true democratic nation where peace and justice prevail and where corruption and violence no longer exist.
The 2012 U.S.-Mexico Agreement
SAN DIEGO INT’L L.J.

APPENDIX 1

Unnecessary to Develop Oil and Gas Resources, 2668 BACKGROUNDER 7 (2012).