

**MEXICO ENERGY REFORM: DISPUTE
RESOLUTION FOR OPERATORS FACING
ADMINISTRATIVE RESCISSION OF THEIR
EXPLORATION AND PRODUCTION
AGREEMENTS**

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I.	THE NEW OIL AND GAS SCENARIOS IN MEXICO	6
II.	THE LEGAL CHANGES.	9
III.	UPSTREAM IN MEXICO AFTER THE ENERGY REFORM OF 2013.....	12
IV.	THE ADMINISTRATIVE RESCISSION IN COMMISA V. PEP	17
V.	THE ADMINISTRATIVE RESCISSION IN THE NEW FRAMEWORK.....	20

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6	<i>HOUSTON JOURNAL OF INTERNATIONAL LAW</i>	[Vol. 39:1
	A. <i>The Constitution</i>	20
	B. <i>The Hydrocarbons Law</i>	20
	C. <i>The Executive Regulations on the Hydrocarbons Law</i>	22
	D. <i>The Exploration and Production Agreements</i>	22
VI.	REMEDIES.....	29
	A. <i>Standard of Proof</i>	30
	B. <i>The Specific Procedure Before the Mexican Courts</i>	33
	C. <i>Bilateral Investment Treaties (BITs)</i>	48
VII.	CONCLUSION	53
	A. <i>Administration of the Exploration and Production Agreement</i>	54
	B. <i>Investigation Period</i>	54
	C. <i>The Administrative Rescission Procedure</i>	54
	D. <i>File Amparo</i>	55
	E. <i>Claim for Damages in Federal Court</i>	56
	F. <i>File BIT Arbitration</i>	56

I. THE NEW OIL AND GAS SCENARIOS IN MEXICO

December 20, 2013 was likely the most significant date for the Mexican oil and gas industries in the past 100 years. The decree issued by the Mexican President Enrique Peña Nieto appeared in the afternoon publication of the Mexican Official Gazette, which formally amended the Mexican Constitution to allow the participation of the private sector in all activities of the hydrocarbons industry of the country.¹

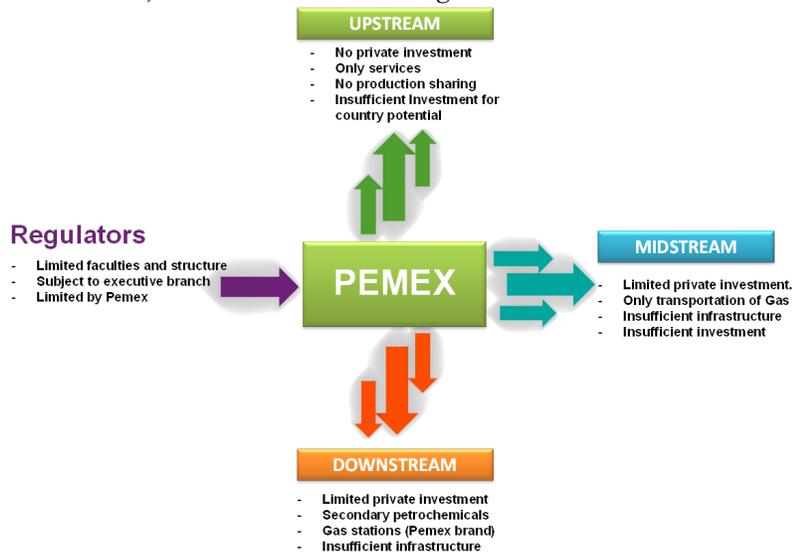
Although most analysts expected such an amendment to occur in some capacity in Mexico, it was a real surprise that the

1. Decreto por el que se reforman y adicionan diversas disposiciones de la Constitución Política de los Estados Unidos Mexicanos, en Materia de Energía, Diario Oficial de la Federación [DOF] 20-12-2013 (Mex.); Gustavo Guerra, *Mexico: Constitutional Amendment on Energy*, GLOB. LEGAL MONITOR (Feb. 12, 2014), <http://www.loc.gov/law/foreign-news/article/mexico-constitutional-amendment-on-energy/> [<http://perma.cc/5M85-LMDW>].

end result, at least on paper, was a 180-degree transformation of the industry. No one would have predicted a reform of this depth after the major failure of the 2008 reform.²

The next major milestone regarding the implementation of the Reform occurred in August 2014. Well short of a year from the approval of the constitutional amendment, the Mexican Congress approved the core secondary or implementing legislation to bring into life the core provisions of the *Carta Magna* amendment.³

After the publication of these implementing laws, I devoted a significant amount of time to understanding the real effect of the Reform. At that time, I created the following charts which remain valid and useful to visually understand what happened. Prior to the Reform, the Mexican oil and gas arena looked like this:



The core concepts associated with this initial chart are as follows: (i) the entire industry was *Pemex Centered*,⁴ (ii)

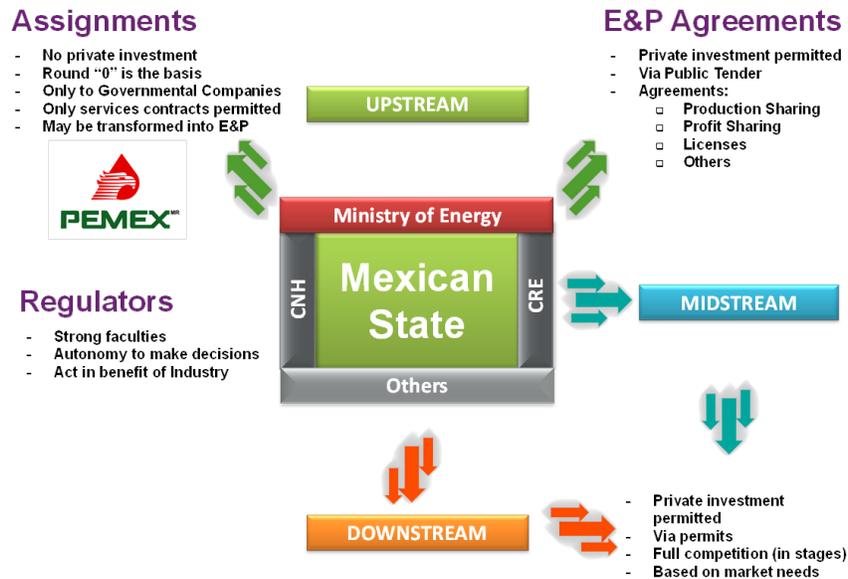
2. When the 2008 reform was finally approved, the general comment in Mexico was that the approval responded to what was *possible* in political terms but not what was *needed* with respect to technical, economic, and commercial matters.

3. Ley de Ingresos Sobre Hidrocarburos, DOF 11-8-2014 (Mex.).

4. The government, the regulators, private parties, consumers, and any other actor rotated around Pemex, which was the center of all possibilities. Nothing could or would occur in the industry if not approved, or at least acknowledged, by Pemex. *E.g.*, CLARE RIBANDO SEELKE ET AL., CONG. RESEARCH SERV., R43313, MEXICO'S OIL AND GAS SECTOR:

regulators were poorly structured and had no real authority against the monopolist and absolute power of Pemex,⁵ (iii) upstream activities were completely prohibited for private investors,⁶ and (iv) midstream and downstream had minimal private investment which also led to lack of infrastructure.

After the Reform, the new map looks like this:



The core concept, as seen in this chart, is that the Mexican

BACKGROUND, REFORM EFFORTS, AND IMPLICATIONS FOR THE UNITED STATES 2 (2015). During this stage of the oil and gas industry in Mexico, a (joke) story was created, and holds a great deal of reality. When a new President assumed its position in Mexico, the press would be informed that Mr. X was appointed as the new Minister of Energy. The immediate response was who had been appointed as CEO of Pemex? That would be the real boss.

5. These regulators were said to be white sharks without teeth. See Elisabeth Malkin, *In a Change, Mexico Reins In Its Oil Monopoly*, N.Y. TIMES (Apr. 23, 2012), http://www.nytimes.com/2012/04/24/business/energy-environment/mexico-reins-in-oil-monopoly.html?_r=1 (lamenting the fact that Pemex's unsupervised oil and gas production led to inefficient recoveries of oil and gas).

6. This prohibition led to the consequent reduction in investment and development of infrastructure. See John Donnelly, *Mexico's Challenge*, J. PETROLEUM TECH., Apr. 2009, at 16, 16 (explaining that upstream development has been hampered by Mexico's constitutional prohibition on private investment in the oil industry).

State reassumes its position in the center as the owner of the reserves. For the first time in years Pemex is not at the core of the industry, but is instead seen as one additional actor—a critical and significant one, but one more. The regulators have now grown teeth and have full authority to rule over private parties and governmental entities.⁷ Private investment is now permitted, one way or another, in all sectors of the map: upstream, midstream, and downstream.⁸

One critical regulator for upstream that is also critical to understanding the content of this article is the National Hydrocarbons Commission (*Comisión Nacional de Hidrocarburos* or *CNH*). This regulator is the technical expert of the upstream industry and it is in charge, along with others, of (i) conducting all bidding procedures for the award of upstream fields in the country, and (ii) signing and administering all exploration and production agreements awarded by the Mexican government.⁹

II. THE LEGAL CHANGES

Legally speaking, the Reform is understood by considering the upstream scenario on one hand and everything else on the other. Upstream is now the only *Strategic* oil and gas constitutional activity. For years, Article 28 of the Mexican Constitution included a distinction between Strategic (*Estratégicas*), Priority (*Prioritarias*), and other activities.¹⁰ The explanation of such concepts was included in the Constitution, Mexican case law, and the non-binding opinions of Mexican legal experts and analysts.¹¹ Strategic activities were those expressly

7. See DAVID L. GOLDWYN ET AL., ATL. COUNCIL, ADRIENNE ARSHT LATIN AM. CTR., MEXICO'S ENERGY REFORM: READY TO LAUNCH 14 (2014), http://www.atlanticcouncil.org/images/files/MexEnRefReadytoLaunch_FINAL_8.25_1230pm_launch.pdf [<http://perma.cc/26D5-LZDM>] (examining the key agencies that are responsible for supervising upstream licensing).

8. *Id.* at 9; Ricardo Rendon & Eduardo Valenzuela, *Mexico Enacts Energy Reforms: Oil & Gas*, INT'L TAX REV., Nov. 2014, at 34, 34.

9. Ley de Hidrocarburos [LH] arts. 13, 31, DOF 11-08-2014 (Mex.).

10. Constitución Política de los Estados Unidos Mexicanos [CPEUM], art. 28, DOF 05-02-1917, últimas reformas DOF 29-01-2016 (Mex.). Article 25 outlines social activities (as opposed to public and private activities) and the constitutional bases for these activities, such as laws related to labor organizations and the rights of workers. *Id.* art. 25.

11. *Id.* art. 28; e.g., Certificados de Energías Limpias. Contra los efectos del artículo

mentioned in the Constitution that the Mexican State was mandated to execute directly without the assistance of private investors.¹² Priority activities were those that the Mexican State could execute with the assistance of private and social sectors.¹³ All other thinkable activities could be freely developed by either the Mexican State or any private party.¹⁴

With the Reform, the legal concept and its content changed. We still do not know the extent of such change, but future writings or theses in Mexico and the United States will likely focus on shedding some light on the new understanding of what a *Strategic* activity in Mexico is. Even though the Constitution classifies upstream as strategic, the transitory provisions of the constitutional amendment and the secondary, or implementing, legislation expressly allow for private investment in such activities.¹⁵ The distinction may now be focused on the high regulation of strategic activities to maintain the highest level of control by the Mexican State, rather than prohibiting private parties from associating with the government. This need to maintain and assure control is consistent with the new upstream opportunities, which are to be mandatorily awarded via public

68 de la ley de transición improcedente conceder la suspensión provisional en el amparo indirecto, Tribunales Colegiados de Circuito [TCC], Gaceta del Semanario Judicial de la Federación, Décima Época, tomo IV, Junio de 2016, Tesis IV.2o.A.121 A (10a.), Página 2819 (Mex.) (denying an *Amparo* petition on the basis of Article 28); LISA LOFTUS-OTWAY ET AL., AN EVALUATION OF MEXICAN TRANSPORTATION PLANNING, FINANCE, IMPLEMENTATION, AND CONSTRUCTION PROCESSES 6 (2009); BANCOMEXT (MEXICAN BANK FOR FOREIGN TRADE), BASIC GUIDE FOR FOREIGN INVESTORS 9-10 (4th ed. 2002), <http://embamex.sre.gob.mx/singapur/images/BasicGuideForForeignInvestors.pdf> [<http://perma.cc/TM7W-KAVE>]; see also A.K. Kuhn, Comment, *The Mexican Supreme Court Decision in the Oil Companies Expropriation Cases*, 34 AM. J. INT'L L. 297, 297-98 (1940) (documenting a series of Mexican court cases construing Article 28 in its infancy).

12. Some of these activities included coining of currency; some telegraph and radio telegraph activities; radioactive minerals; the creation of nuclear energy, oil and gas, electricity; and others. CPEUM, art. 28, DOF 05-02-1917, últimas reformas DOF 29-01-2016 (Mex.).

13. Some of these activities included and still include satellite communication, railroads, and others. *Id.* art. 28.

14. *Id.* art. 25.

15. LH art. 5, DOF 11-08-2014 (Mex.); Loretta R. Cross & Mark R. Patten, *Mexico Ends Its Decades-Long Oil Industry Monopoly*, STOUT RISIUS ROSS 2 (2014), <http://www.srr.com/assets/pdf/mexico-ends-its-decades-long-oil-industry.pdf> [<http://perma.cc/87TY-LD8Z>].

tender.¹⁶

Midstream and downstream activities are now linked to two core concepts. First, just like in the United States, there is a regulator in the middle of the spectrum that exclusively regulates the actors and their ideas, projects, and business strategies instead of directing the market or creating tendencies or strategies for directing the market.¹⁷ Second, the scheme is based on the Mexican legal regime used for the transportation and commercialization of natural gas, which had been open to private investment in the country for years, and was expanded into all midstream and downstream activities.¹⁸ Generally, Mexico has a free market¹⁹ scenario for midstream and downstream activities, conditioned or limited by a strong regulator—either the *Comisión Reguladora de Energía* (CRE) or the Ministry of Energy, depending on the matter—who has the authority to issue the corresponding permits.²⁰

16. There are very minor exceptions to this general rule: (i) a direct award of associated gas exploitation agreements to current mining companies with awarded and existing concessions; and (ii) the migration of exploration and production services agreements awarded by Pemex prior to the Energy Reform, which may be migrated directly to the services operator into a production sharing agreement, profit sharing agreement, or license agreement, with the approval of the Ministry of Energy.

17. See Miriam Grunstein, *Coordinated Regulatory Agencies: New Governance for Mexico's Energy Sector*, BAKER INST. FOR PUB. POLY 1, 3 (2014), http://www.bakerinstitute.org/media/files/files/275f4a5c/BI-Brief-061014-Mexico_NewGovernance.pdf [<http://perma.cc/58VE-R923>] (summarizing the legal powers of the upstream regulator, CNH, and the midstream and downstream regulator, CRE).

18. See Juan Rosellón & Jonathan Halpern, *Regulatory Reform in Mexico's Natural Gas Industry: Liberalization in the Context of a Dominant Upstream Incumbent* 7 (World Bank, Policy Research Working Paper No. 2537, 2001), <http://documents.worldbank.org/curated/en/638201468056046545/pdf/multi-page.pdf> [<http://perma.cc/Q3LV-EM8Q>] (explaining that beginning in 1995, private investment was authorized in “transportation projects and distribution, storage, and commercialization of natural gas”).

19. Please note that as of the date of writing of this article, not all midstream and downstream activities in Mexico are free market, since, due to the struggles created by Pemex's monopoly, the deregulation of some activities will be done gradually. All activities will be subject to free market rules no later than January 1, 2018. LH art. 131; see also Paula Dittrick, *OTC: Mexico Implementing Energy Reforms, Stressing Transparency*, OIL & GAS J. (May 3, 2016), <http://www.ogj.com/articles/2016/05/otc-mexico-implementing-energy-reforms-stressing-transparency.html> [<http://perma.cc/KAG6-WNLS>] (stating that as part of Mexico's energy reform, the country would be “opening up exploration and production to free-market access”).

20. For example, the following activities in Mexico require separate and different

III. UPSTREAM IN MEXICO AFTER THE ENERGY REFORM OF 2013

After the enactment of the Reform in 2013, the first step taken by the Mexican government with respect to upstream in Mexico was known as *Round Zero*. This round constituted a process by which Pemex filed a request with the Ministry of Energy to obtain the direct assignment of oil and gas fields and assets prior to any private tender procedure to be issued on the matter.²¹ Pemex requested 83 percent of the 2P reserves of the country, plus 31 percent of the prospective resources.²² The government granted Pemex 100 percent of the 2P reserves, plus 67 percent of the requested prospective resources.²³ Based on these assignments, the government estimated that Pemex was awarded reserves of about 44 *mmbboe* which would allow the company to produce at a rate of 2.5 *mmb* per day for 20.5 years.²⁴ In addition, Pemex, like any other interested investor, now had the flexibility to bid for new blocks and fields issued by the Mexican government and to also perform oil and gas activities in any other country in the world.²⁵

As soon as *Round Zero* concluded (one month before the scheduled date²⁶), the government immediately started the

permits to be issued by either CRE or the Ministry of Energy: (i) import and export of gasoline and diesel, (ii) transportation of hydrocarbons, (iii) refining of oil, (iv) processing of gas, (v) storage of hydrocarbons, and (vi) commercialization of hydrocarbons. GOLDWYN ET AL., *supra* note 7, at 21.

21. *Id.* at 11.

22. *Id.* at 10; David Alire Garcia, *Factbox-Mexico's Round Zero and Round One Oil Projects*, REUTERS (Aug. 14, 2014, 5:26 AM), <http://in.reuters.com/article/mexico-reforms-energy-idINL2NOQJ2Z620140813> [<http://perma.cc/8KZR-M3LB>].

23. GOLDWYN ET AL., *supra* note 7, at 10.

24. LUIZ CARVALHO ET AL., HSBC GLOB. RESEARCH, MEXICO OIL & GAS: ENERGY REFORM: A MARATHON, NOT A SPRINT 4 (2015), <https://www.research.hsbc.com/midas/Res/RDV?p=pdf&key=RmCnupz8ci&n=469107.PDF> [<http://perma.cc/GY9M-5JJK>]; Adam Williams, *Pemex Granted All Probable Reserves Sought in Oil Opening*, BLOOMBERG (Aug. 13, 2014), <http://www.bloomberg.com/news/articles/2014-08-13/pemex-s-production-future-set-at-21-share-of-potential-deposits> [<http://perma.cc/E3W3-BKXX>].

25. See GOLDWYN ET AL., *supra* note 7, at 9-13 (discussing the impact of the hydrocarbon reform in Mexico on Pemex, and noting that Pemex has the potential to become an international oil major in the future).

26. This is a very uncommon situation in Mexico, as most deadlines are actually missed. This sent a very good message to private investors, since it demonstrated Mexico's

process known as *Round One*.²⁷ Unlike *Round Zero*, this new round was directed to any investor, including Pemex.²⁸ Although the calendar for *Round One* was originally different, it ended up considering four different bidding procedures: (i) R1.L1—shallow waters for exploration, (ii) R1.L2—shallow waters for production, (iii) R1.L3—onshore fields for production, and (iv) R1.L4—deep waters for exploration.²⁹

The government used different types of contracts for these biddings included in *Round One*. For biddings R1.L1 and R1.L2 the government used a Production Sharing Agreement (*PSA*), while for biddings R1.L3 and R1.L4 a License Agreement was used.³⁰ While one would love to think that the use of different contracts was due to a deep analysis of the resources and the best alternative for their exploitation, that was not the case. The government, specifically the CNH, followed a brilliant approach when implementing the Reform. Most analysts in the oil and gas industries agreed that deep water resources were the most attractive that Mexico could offer.³¹ While the government

willingness to attract investments.

27. David Enríquez, *A New Frontier: Round One Tender and the Mexico Energy Reform*, OIL & GAS YEAR (Feb. 3, 2015), <http://www.theoilandgasyear.com/articles/a-new-frontier-round-one-tender-and-the-mexico-energy-reform/> [<http://perma.cc/GZ4H-7Z3V>] (framing specifics concerning the timing of phases of Round One).

28. See GOLDWYN ET AL., *supra* note 7, at 9 (noting that acreage that was either not included or kept by Pemex from Round Zero will be auctioned off to other private companies).

29. *Ronda 1*, GOB.MX, <http://rondasmexico.gob.mx/r01-licitaciones/> [<http://perma.cc/N7W3-8PDW>] (last visited Nov. 8, 2016).

30. *Rondas*, GOB.MX, <http://rondasmexico.gob.mx/> [<http://perma.cc/T75K-UPTP>] (last visited Nov. 8, 2016). For historical reasons, the Mexican government was very cautious to avoid the use of the term “concessions” for the exploitation of oil and gas. Article 27 of the Mexican Constitution still declares that oil and solid, liquid, or gas hydrocarbons that remain underground belong to the nation and no concessions shall be given with respect to these hydrocarbons. CPEUM, art. 27, DOF 05-02-1917, últimas reformas DOF 29-01-16. However, the License Agreement is essentially a concession. For legal purposes, one could argue that the essential difference is that the Operator or even the owner of the land in fee simple absolute (unless such owner is the Mexican government) has no right to the mineral rights of the field. While the resources are underground, there is only an economic expectancy. They only become part of the Operator’s assets at the time of effective extraction and payment.

31. See Robert Perkins, *New Frontiers: Tapping Mexico’s Gulf of Mexico Oil Reserves*, S&P GLOB. PLATTS: THE BARREL (Dec. 1, 2014), <http://blogs.platts.com/2014/12/01/mexico->

understood this, they were also humble enough to recognize that they lacked the necessary expertise to conduct complex bidding procedures, instead opting to start with the less attractive resources and concluding with the cherry on top.

R1.L1 and R1.L2 generated a significant level of interest by both national and international investors. Companies like BHP Billiton, Chevron, Diavaz, ENI, Exxon Mobil, Hess, Hunt, Lukoil, Maersk, Pacific Rubiales, Pemex, Petrobal, Shell, Sierra Oil & Gas, Statoil, and Total actively participated and were pre-qualified by the government to submit bids.³² However, most of them did not bid in any of the rounds.³³ Many analysts, myself included, believe that these companies used the process for two purposes: (i) to understand and get acquainted with the new bidding procedure in Mexico; and (ii) to define whether or not the process was fair, equitable, and worth taking into consideration on their investment portfolio when more attractive resources were put for bid.³⁴

gulf-opening/ [http://perma.cc/WV58-QVSA] (explaining the attractiveness of Mexico's deep water areas because they have not been explored); Laurence Iliff, *Mexico Plans Deep-Water Oil Auction Next Year*, WALL ST. J. (Dec. 16, 2015, 7:35 PM), <http://www.wsj.com/articles/mexico-plans-deep-water-oil-auction-next-year-1450312499> (describing the tender of deep water blocks as "highly anticipated").

32. *Ronda 1 Aguas Someras Licitantes Precalificados*, GOB.MX, <http://rondasmexico.gob.mx/l01-seguimiento-y-trasnparencia/#presentaron> [http://perma.cc/DU7F-SSHE] (last visited Nov. 8, 2016); *Ronda 1 Aguas Someras Licitantes Precalificados*, GOB.MX, <http://rondasmexico.gob.mx/l02-seguimiento-y-transparencia/#precalificados> [http://perma.cc/Q4NH-AH8H] (last visited Nov. 8, 2016); Jules Gray, *Mexico Opens Up Its Energy Industry*, WORLD FIN. (Nov. 2, 2015), <http://www.worldfinance.com/strategy/mexico-opens-up-its-energy-industry> [http://perma.cc/MRV8-JV8E].

33. Clifford Krauss, *Mexico Auctions Oil Blocks in Attempt to Increase Production*, N.Y. TIMES (July 15, 2015), <http://www.nytimes.com/2015/07/16/business/international/mexico-auctions-oil-blocks-in-attempt-to-increase-production.html>?

34. See, e.g., *id.* (quoting oil executives' willingness to bid on deepwater blocks in later rounds); Alfredo Alvarez & Oscar Lopez-Velarde, *A Work in Progress: Lessons Learned From Mexico's First Round of Oil Rights Bidding*, ERNST & YOUNG (July 2015), [http://www.ey.com/Publication/vwLUAssets/EY-lessons-learned-from-mexicos-first-round-of-oil-rights-bidding/\\$FILE/EY-lessons-learned-from-mexicos-first-round-of-oil-rights-bidding.pdf](http://www.ey.com/Publication/vwLUAssets/EY-lessons-learned-from-mexicos-first-round-of-oil-rights-bidding/$FILE/EY-lessons-learned-from-mexicos-first-round-of-oil-rights-bidding.pdf) [http://perma.cc/6ZA5-W3LL] (opining that many companies used Round One as a test run because of the inherent uncertainty in the new bidding process); see also Velda Addison, *Mexico's Offshore Auction Attracts Robust Bids*, OIL & GAS INV. (Sept. 30, 2015, 3:38 PM), <http://www.oilandgasinvestor.com/mexicos-offshore-auction-attracts-robust-bids-820886#p=full> [http://perma.cc/CYS9-JS9L] (explaining that Round One bidding terms were not favorable to many companies).

Due to the unattractiveness of the resources and a poor effort by the Tax Ministry (*Secretaría de Hacienda y Crédito Público*) in setting the minimum acceptable economic standards for each field, only two out of fourteen blocks were awarded in R1.L1—both to the same group of companies.³⁵ The results were better with R1.L2, adjudicating three out of five areas.³⁶

Based exclusively on the awarded results, R1.L3 was a huge success. Aimed at independent Operators and newly formed companies, the bidding awarded all 25 blocks tendered.³⁷ Despite these results, most economic analysts believe that the bids presented for most of the fields were poorly thought out, conceding to the government more than would be economically feasible to recover costs and make a profit.³⁸ The subsequent likelihood of breaching these contracts was anticipated by the industry, demonstrated by the failure of awarded bidders Geo Estratos, Strata and Sarreal in signing six agreements. These bidders faced a drawing by the government from the bid guaranty—a total of \$390,000 (USD), or \$65,000 (USD) for each agreement.³⁹

35. Krauss, *supra* note 33; Press Release, Talos Energy LLC, Talos Energy Enters into Production Sharing Contracts for Blocks 2 and 7 For Call One of Mexico's Oil and Gas Auction (Sept. 25, 2015), <http://www.taloseneryllc.com/news/Talos-Energy-Enters-Into-Production-Sharing-Contracts-For-Blocks-2-and-7> [<http://perma.cc/F9E2-LDLC>].

36. The successful bidders were ENI International; Pan American Energy LLC, with E&P Hidrocarburos y Servicios; and Fieldwood Energy LLC, with Petrobal. Elisabeth Malkin, *Successful Auction for Oil Drilling Rights in Mexico Follows Weak Debut*, N.Y. TIMES (Sept. 30, 2015), <http://www.nytimes.com/2015/10/01/business/international/successful-auction-for-oil-drilling-rights-in-mexico-follows-weak-debut.html>.

37. Karen Boman, *Mexico's Onshore Oil, Gas Bidding Round a Success*, RIGZONE (Dec. 16, 2015), http://www.rigzone.com/news/oil_gas/a/142142/Mexicos_Onshore_Oil_Gas_Bidding_Round_a_Success [<http://perma.cc/QV9F-9HB6>].

38. *See id.* (cautioning that many companies conceded too large a royalty to the Mexican government and may back out); *see also* Alfredo Alvarez & Deborah Byers, *Commentary: Mexico's Third-Round of Lease Auctions Gives Domestic Energy Industry a Jump-Start*, FUELFIX (Dec. 29, 2015), <http://fuelfix.com/blog/2015/12/29/commentary-mexicos-third-round-of-lease-auctions-gives-domestic-energy-industry-a-jump-start> [<http://perma.cc/DPX7-T9YC>] (noting that generous profit-sharing terms tendered to the government could prevent winning bidders from turning a profit).

39. *Mexico to Re-Award 6 Oil Blocks Due to Lack of Financial Guarantees*, FINANCIAL.ORG (May 11, 2016, 5:00 AM), <https://www.financial.org/Pages/NewsDetails.aspx?i=KuE%2FyNjgEeeMj%2FPNhZRtUw%3D%3D> [<http://perma.cc/KGA9-5ZWS>]; *see also Mexico Infrastructure Project Tracker*, ARAMONI, http://www.aramoni.com/Project_

Round One is currently in the process of awarding its cherry: deep waters. This bidding procedure includes a total of ten areas: four located in the north portion of the Gulf of Mexico at a spot known as *Cinturón Plegado Perdido*, or simply *Perdido*, and six in the south portion, identified as *Cuenca Salina*.⁴⁰ Because deep water extraction is a complex and costly mean of obtaining hydrocarbons, it is not difficult to guess some of the names that are currently in the process of being prequalified by the CNH for bidding: BHP Billiton, BP, Chevron, ENI, Exxon Mobil, Hess, Lukoil, Mitsubishi, Mitsui, Murphy, Pemex, Repsol, Shell, Statoil, and Total.⁴¹

The CNH and the Mexican government have also announced and published rules for *Round Two* (which so far includes exploration and production both onshore and on shallow waters) and the first Pemex assignment (improperly referred to as *Farmout*) for a block known as *Trión*, which is adjacent to block number one of the blocks under bid at R1.L4 on the *Perdido* area.⁴²

tracker.php [http://perma.cc/ZLB9-Y37J] (last visited Nov. 8, 2016) (tracking the progress of the R1.L3 bid process). Although the companies argued that they could not sign the agreements because they could not comply with the issuance of the performance guaranty as per the terms of the draft agreement and the tender rules, I personally believe the real reason was that after a second thought and analysis, they realized that the numbers offered to the government were out of market and would put them at risk of significant loss if they had gone through with the agreements. For example, for the field *Paso de Oro*, Geo Estratos offered an additional royalty of 67.61 percent, while the second bidder (which ended up being the awarded bidder) offered an additional royalty of 10.20 percent. Resultados del Área Contractual 17 – Paso de Oro, COMISIÓN NACIONAL DE HIDROCARBUROS (May 10, 2016), http://rondasmexico.gob.mx/wp-content/uploads/2016/03/17_Paso_de_Oro.pdf [http://perma.cc/EQE5-WDEM].

40. *Update 1 – Mexico’s First-Ever Deep Water Gulf Oil Auction Set for Dec 5*, REUTERS (Feb. 26, 2016, 12:15 PM), <http://www.reuters.com/article/mexico-oil-idusl2n1651bl> [http://perma.cc/5EKX-LUA3]; Addison, *supra* note 34.

41. *Rondas México – L04 Seguimiento y Transparencia*, GOB.MX, <http://rondasmexico.gob.mx/l04-ap-seguimiento-y-transparencia/> [http://perma.cc/FL2K-78DL] (last visited Nov. 8, 2016).

42. *Rondas México – L02 Licitaciones*, GOB.MX, <http://rondasmexico.gob.mx/r02-licitaciones/> [http://perma.cc/G3LJ-NJTY] (last visited Nov. 8, 2016); *Información disponible de Trión en el Centro Nacional de Información de Hidrocarburos*, COMISIÓN NACIONAL DE HIDROCARBUROS (May 2, 2016), <https://www.gob.mx/cnh/documentos/informacion-disponible-de-trion-en-el-centro-nacional-de-informacion-de-hidrocarburos> [http://perma.cc/EPZ9-6RZ2].

IV. THE ADMINISTRATIVE RESCISSION IN *COMMISA V. PEP*

It is important to note that this article does not intend to provide a full description and explanation of *Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploración y Producción*. Instead, this case is used to provide elements of conviction on three matters: (i) arbitration against a sovereign does not necessarily provide a fair and reasonable alternative dispute resolution, (ii) enforcement of an arbitration award or judicial sentence is the critical matter with respect to dispute resolution mechanisms, and (iii) an administrative rescission is seen as a public policy issue in Mexico.⁴³

I personally believe that, at least for the Mexican portion of the litigation, this case is the Mexican Vietnam of judicial cases—it never should have happened. It was poorly decided by the highest courts of Mexico and the case was decided on political rather than legal grounds.

The case involved Pemex Exploración y Producción (*PEP*), a subsidiary of Pemex.⁴⁴ The *Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. (Commisa)* was a subsidiary of KBR, Inc.⁴⁵ PEP and Commisa entered into a contract for the construction of two offshore natural gas platforms, subject to Mexican law and a dispute resolution

43. *Corp. Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploración y Prod.*, 962 F. Supp. 2d 642, 653-56, 660-61 (S.D.N.Y. 2013). Several articles and information have been written regarding this case. *E.g.*, Ted Folkman, *Case of the Day: Corporación Mexicana de Mantenimiento Integral v. PEMEX-Exploración Y Producción*, LETTERS BLOGATORY: BLOG OF INT'L JUD. ASSISTANCE (Sept. 16, 2013), <https://lettersblogatory.com/2013/09/16/commisa-pemex> [http://perma.cc/D92D-AF5H] (commenting that arbitration against a sovereign may favor a state enterprise over a private party); Sofia Gomez Ruano, *El caso Pemex Exploración y Producción vs Commisa*, ARBITRAJE EN MEX. (Oct. 3, 2013), <https://arbitrationmexico.wordpress.com/2013/10/03/el-caso-pemex-exploracion-y-produccion-vs-commisa/> [http://perma.cc/C74M-NBR2] (invoking public policy concepts in an administrative law setting); Lorraine M. Brennan, *The Pemex Case: The Ghost of Chromalloy Past?*, LAW.COM (Mar. 4, 2014), <http://www.law.com/sites/lorrainebrennan/2014/03/04/the-pemex-case-the-ghost-of-chromalloy-past/?sreturn=20160615170015> [http://perma.cc/5XSR-N5R9] (reaffirming the idea that enforcement of an arbitration award is the critical step in dispute resolution).

44. *Corp. Mexicana*, 962 F. Supp. 2d at 644.

45. *Id.*

mechanism of arbitration in Mexico City.⁴⁶

At some point during the execution of the agreement, a controversy between PEP and Commisa arose.⁴⁷ The parties were unable to settle and Commisa filed for arbitration, which PEP responded to by giving notice that it was proceeding by administrative rescission.⁴⁸

Commisa filed a constitutional claim against PEP in a Mexican federal court.⁴⁹ The technical name of the claim is known as *Juicio de Amparo (Amparo)*.⁵⁰ Based on *Amparo*, Commisa argued that the administrative rescission by PEP was not properly supported and thus, because PEP was a governmental entity, a federal court should order the annulment of the administrative rescission resolution, bringing things back to the way they were before such determination was made.⁵¹ After several procedures, the Court's final resolution was that the rescission made by PEP was valid on the merits.⁵²

With respect to the arbitration, the tribunal sustained its jurisdiction over the matter and the parties. While the arbitration resolution was pending, the Mexican Congress enacted a new Article 98 of the Public Works Law, which included express wording declaring that an administrative rescission could not be subject to arbitration.⁵³ The arbitration tribunal finally solved the case in favor of Commisa and awarded damages against PEP for ordering an invalid administrative rescission of the agreement.⁵⁴

PEP moved to have the arbitration award annulled at another

46. *Id.* at 644-45.

47. *Id.* at 645.

48. *Id.*

49. *Id.* at 645-46.

50. *Id.*; Felipe Tena Ramirez, *The International Expansion of the Mexican Amparo*, 1 INTER-AM. L. REV. 163, 163 (1959); Bruce Zagaris, *The Amparo Process in Mexico*, 6 U.S.-MEX. L.J. 61, 61 n.4 (1998). For purposes of understanding this section, in order for a claimant to have standing at this trial, it must be a private party (not an official entity) looking to have a Mexican federal court suspend or deter a governmental entity or government official from affecting certain fundamental rights of the private party.

51. *Corp. Mexicana*, 962 F. Supp. 2d at 645-46.

52. *Id.* at 646.

53. Ley de Obras Públicas y Servicios Relacionados con las Mismas [LOPSRM] art. 98, DOF 04-01-2000, últimas reformas DOF 13-01-2016 (Mex.).

54. *Corp. Mexicana*, 962 F. Supp. 2d at 648.

federal court in Mexico.⁵⁵ Although initially unsuccessful, PEP obtained a final resolution declaring the award null as being contrary to public policy at *Amparo* level.⁵⁶ The core concept of this resolution was that an administrative rescission is at the nucleus of the *Imperium* of the Mexican State and thus could not be subjected to arbitration under any case or circumstance.⁵⁷ Although the Court did not expressly state that the resolution was based on the content of the enacted Article 98 of the Public Works Law, it did cite the article as a reference to the public policy principle.⁵⁸ At this point, the award had no legal effect in Mexico, making it unenforceable against PEP inside the country.⁵⁹

Commisa moved to have the award enforced by a Federal Court in New York.⁶⁰ The enforcement was filed under the Organization of American States Inter-American Convention on International Commercial Arbitration (the *Panama Convention*).⁶¹ As per the terms of the convention, a Court in the country of one of the contracting parties to the Convention may refuse to enforce an arbitration award if it has been declared null by the courts of the country where the award was issued.⁶² The District Court in New York decided to enforce the award despite the annulment based on the idea that although courts generally should not confirm a nullified award, there is a narrow public policy exception where the foreign nullification judgment is repugnant to fundamental notions of what is decent and just in the United States.⁶³ In August 2016, the decision of the District Court was reaffirmed by the U.S. Court of Appeals for the Second Circuit.⁶⁴ Despite the win by Commisa in the U.S. court system,

55. *Id.* at 649.

56. *Id.* at 649-50.

57. *Id.* at 650-51.

58. *Id.* at 650.

59. *Id.* at 651.

60. *Id.* at 649.

61. *Id.* at 653.

62. *Id.* at 654; Inter-American Convention on International Commercial Arbitration art. 5, Jan. 30, 1975, 104 Stat. 449, 1438 U.N.T.S. 245.

63. *Corp. Mexicana*, 962 F. Supp. 2d at 657.

64. *Corp. Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploración y Prod.*, 832 F.3d 92 (2d Cir. 2016).

the company still needs to find a material way or strategy to enforce the award against PEP. We will surely hear more regarding this case in the upcoming months.

V. THE ADMINISTRATIVE RESCISSION IN THE NEW FRAMEWORK

A. *The Constitution*

The constitutional amendment was a conceptual rather than a specific concepts effort. Because of this, the amendment itself and the transitory provisions of the amendment—which are the key components for understanding the amendment—do not deal with the issue of the administrative rescission.

B. *The Hydrocarbons Law*

The *Commisa* case had a major influence in Mexican administrative law, and the new Hydrocarbons Law published on August 11, 2014 is no exception. The following wording was directly translated into English from Article 20:

The Executive Branch, through the National Hydrocarbons Commission shall have the right to administratively rescind the Exploration and Production Agreements and recover the Contractual Area if any of the following serious conditions occur: I. That for more than one hundred and eighty calendar and continuous days, the Operator does not commence or suspends the activities included in the plan for the exploration or production of the contacting area, without due cause or approval form the National Hydrocarbons Commission. II. The Operator fails to comply with the minimum work commitment, without due cause as per the terms and conditions of the exploration and production agreement; III. If the Operator assigns totally or partially, the operation or the rights conferred in the exploration and production agreement without the corresponding prior approval as per the terms specified in Article 15 of this Law; IV. The occurrence of a serious accident caused by the willful misconduct or negligence of the Operator, which causes damages to infrastructure, fatality and loss

or production.⁶⁵

Article 20 then explains that the administrative rescission is independent of other termination grounds that may be included in the specific exploration and production agreement, or contractual termination causes.⁶⁶ Article 20 also describes the procedure that the Mexican government—via CNH—shall follow to administratively rescind an exploration and production agreement. First, CNH will notify the Operator regarding the administrative breach identified. The Operator will then be given 30 days to provide arguments and evidence against the breach alleged by the government. CNH will have 90 days, from either the time of the response filed by the Operator or the expiration of the term to do so, to make a final determination based on the Operator’s arguments and evidence.⁶⁷ The resolution of CNH must be *fundada y motivada*⁶⁸ and duly notified to the Operator.⁶⁹

The above process is troublesome enough to justify the writing of another legal paper explaining the intricacies surrounding the faculties of a government to administratively rescind an exploration and production agreement while denying the same or a similar right to the Operator.⁷⁰ However, the reason for writing this paper is only the wording and effects of Article 21 of the Hydrocarbons Law. Article 21 states “[f]or disputes arising from Exploration and Production Agreements, with the exception of what it is included in the preceding article [Administrative Rescission], the parties may agree on alternative dispute resolution mechanisms, including arbitration agreements.”⁷¹ In simple terms, this means that all disputes surrounding the administrative rescission of an exploration and production

65. LH art. 20, DOF 11-08-2014 (Mex.) (emphasis added).

66. *Id.*

67. *Id.*

68. These are two key concepts to the analysis contained in this article. *See infra* Part VI.

69. LH art. 20.

70. As surprising as it may seem, there are no termination rights in favor of the Operator for breaches by the government. The government assumes, erroneously in my view, that the Operator would never be in a position to terminate an exploration and production agreement.

71. LH art. 21.

agreement must be dealt with and finally resolved by the Mexican federal courts with jurisdiction over the matter.

C. The Executive Regulations on the Hydrocarbons Law

Due to the content of the Hydrocarbons Law, the Regulations issued by the executive branch in Mexico had little or no room to address substantive topics regarding the enforcement of the administrative rescission. Following our natural tendency as Mexicans to add issues when all have been decided, the Regulations added that: (i) the administrative rescission must be approved by CNH, the governing body of the regulator;⁷² (ii) CNH must notify the Operator of the corresponding breach of contract;⁷³ and (iii) the administrative rescission is a penalty of cumulative nature, so it shall be applied in addition to—not in lieu of—any other penalties that the Operator may be held liable for.⁷⁴ This last provision appears to be the only one that offers some value to the inclusion of the subject matter in the Regulations. Although highly improbable, without this article a court may have concluded that the administrative rescission was in fact the exclusive penalty that could be imposed against the Operator as a result of its breach of the provisions of the exploration and production agreement.

D. The Exploration and Production Agreements

As explained, there are different types of exploration and production agreements that the Mexican government can use to grant to a private party the right to explore and produce hydrocarbons on Mexican fields. Article 18 of the Hydrocarbons Law states that the Ministry of Energy has the discretion to define the applicable contracting model for the specific block to be tendered; for such purposes, it may use production sharing agreements, profit sharing agreements, license agreements, or another agreement.⁷⁵ As previously discussed, the government

72. *Id.* art. 20.

73. *Id.* This provision is totally unnecessary since the Hydrocarbons Law already imposes this burden on CNH.

74. *Id.*

75. *Id.* art. 18.

used a production sharing agreement for R1.L1 and R1.L2, while license agreements were used for R1.L3 and R1.L4.⁷⁶

The type of exploration and production agreement used is not relevant with respect to the issue of the administrative rescission. Because the Hydrocarbons Law and its Regulations are clear on the matter, CNH does not have the discretion to set aside or incorporate a different alternative. I am not saying that the content of each model is identical—CNH has tried to find ways to mitigate this issue and make the risk more measurable for international oil and gas companies—but the core of the administrative rescission is included in all agreements used by CNH. Since a comparison of each model used by CNH highly exceeds the scope and content of this paper, we will use and focus the discussion on the version published by CNH for R1.L4 at the time of writing (CNH Agreement).⁷⁷

The first thing that should be noted about the CNH Agreement is that it contains both an administrative rescission and a contractual termination for breach. Article 23.1 of the CNH Agreement deals with the administrative rescission, and Article 23.4 is the classic termination for breach provision that you would find on a typical international procurement agreement.⁷⁸

Because the administrative rescission clause may not be subjected to arbitration, it is seen as the clause with greater importance, higher liability, and major concern for Mexican and international investors. The administrative rescission clause of the CNH Agreement states that:

If any of the serious causes for administrative rescission in accordance with article 20 of the Hydrocarbons Law and as provided below take place and upon termination of the prior investigation period referred to in Article 23.2, CNH may administratively rescind this Contract

76. See *supra* notes 29—30 and accompanying text.

77. Contrato para la Exploración y Extracción de Hidrocarburos Bajo la Modalidad de Licencia (Aguas Profundas), COMISIÓN NACIONAL DE HIDROCARBUROS (Dec. 17, 2015), <http://rondasmexico.gob.mx/wp-content/uploads/2015/11/Licencia-AP-Consorcio-publicado.pdf> [<http://perma.cc/GE38-RXRD>], translated at <http://ronda1.gob.mx/wp-content/uploads/2016/01/R01L04-LicenceDeep-Water-ConsortiumClean-V2.pdf> [<http://perma.cc/77JQ-SQ55>] [hereinafter *Contrato*].

78. *Id.* at arts. 23.1, 23.4.

after completing the procedure for administrative rescission provided for in Article 23.3 and the Applicable Laws: (a) The Contractor fails to commence activities provided in the approved Exploration Plan, Appraisal Plan or Development Plan for a consecutive period of more than one hundred eighty (180) Days or suspends such activities for a consecutive period of more than one hundred eighty (180) Days, in each case Without Just Cause and authorization by CNH; (b) The Contractor fails to comply with the Minimum Work Program Without Just Cause; (c) Any Participating Company assigns all or a portion of the operation of the rights conferred pursuant to this Contract without obtaining prior authorization on the terms and conditions provided in Articles 24.1 and 24.2; (d) A Serious Accident occurs as a result of the Willful Misconduct or Fault of the Operator or a Participating Company which causes damage to the facilities, loss of life or loss of production; (e) The Contractor repeatedly, willfully or Without Just Cause, provides False or Incomplete Information or Reports regarding production, Costs or any other relevant aspect of the Contract or repeatedly fails to disclose such information or reports to the Ministry of Energy, the Fund, the Ministry of Finance, Ministry of Economy, CNH or the Agency; (f) Any Participating Company fails to comply with a final resolution of any federal jurisdictional entity relating to the Contract or the Petroleum Activities which constitutes an adjudicated matter; or (g) The Contractor, Without Just Cause, fails to make any payment or delivery of Hydrocarbons in accordance with the periods and terms established in this Contract.⁷⁹

Article 23.1 then includes the following definitions, which are useful to understand the extent and applicability of the causes for administrative rescission:

For the purposes of this Article 23.1 the following definitions will apply: (i) Serious Accident: Any accident in which the following circumstances concur: (1) Damage to the facilities that prevents the Contractor from carrying out the Petroleum Activities in part of or in the

79. *Id.* art. 23.1.

whole Contract Area during a period exceeding ninety (90) Days; (2) Fatality, and (3) When the daily average loss of production during thirty (30) Days is higher than 25% of the daily average production obtained as a result of this contract during the previously immediate semester. In case that no Petroleum Activities exist during such period, the temporary reference will be the last two months. (ii) Without Just Cause: Any cause attributable without any doubt to the Contractor in which the conduction of reasonable efforts within its reach has been omitted to avoid the corresponding prevention of any of the obligations in terms of the Contract that implies the possible update of any of the causes for administrative rescission provided in this Article 23.1, as soon as the Contractor is aware of the prevention or its immediate materialization. Such efforts shall include notice to CNH of the competent Governmental Authorities; (iii) Fault: Any action or omission of the Contractor that causes a result that was not foreseen, being foreseeable or that was foreseen relying upon the fact that it would not materialize and that results in the violation to the Applicable Laws or to a duty that was objectively required to be observed; (iv) Willful Misconduct: Any action or omission of the Contractor or the Participating Companies with the intention of pursuing a result directly, and (v) False or Incomplete Information or Reports: such information or reports relative to price logs, Costs, production of Hydrocarbons and any other information required to calculate and verify the State Considerations; Petroleum Activities subject to approval, and insurance and guarantees that are simulated, contrary to the truth or that are deliberately insufficient in such a way that the minimum necessary elements they should contain cannot be withdrawn from themselves, according to their nature and purpose.⁸⁰

It is arguable whether or not the rescission clauses identified above are so serious that the penalty of removing the possibility of arbitration for these potential controversies from these parties is necessary. Nonetheless, these specific causes are expressly

80. *Id.*

included in the Hydrocarbons Law and thus, CNH does not have the discretion or flexibility to modify or adjust them.⁸¹ Also, generally speaking, the causes identified are clear and, at least as per the terms of the document, the Operator is aware of the grounds that should be avoided while performing under the exploration and production agreement.⁸² This is true for most of the above identified rescission grounds, except for subsection (a). If we compare the administrative rescission provision with subsection (a) of the contractual termination for breach of Article 23.4, it is difficult to find the differences in certain scenarios and therefore determine whether certain actions trigger the administrative rescission or the contractual termination for breach. The contractual termination for breach in the CNH Agreement states “(a) The Contractor delays by more than one hundred eighty (180) Days in any approved Work Program or Development Plan, without just cause.”⁸³ This language does not differ significantly from the administrative rescission provision of Article 23.1: “(a) The Contractor fails to commence activities provided in the . . . Development Plan for . . . more than one hundred and eighty (180) Days . . . Without Just Cause.”⁸⁴

However, even though CNH has been seriously limited on this matter by the provisions of the Hydrocarbons Law, CNH has inserted several provisions in the exploration and production agreements to mitigate the effects of the administrative rescission due to the pressure generated by the international community (and the real threat and possibility of not receiving bids from such community). First, CNH created specific definitions in the CNH Agreement that reduce the exposure of the Operator if the scenario ever arises. The definition of *Serious Accident* is tied to the occurrence of all three possibilities—damage to the facilities, fatality, and loss of production—not just one of them.⁸⁵ There are also limits for each possibility. Damage to the facilities must prevent the Operator from performing under the CNH Agreement for more than 90 calendar

81. LH art. 20, DOF 11-08-2014 (Mex.).

82. *Id.*

83. Contrato, *supra* note 77, art. 23.4(a).

84. *Id.* art. 23.1(a).

85. *Id.* art. 23.1(i).

days.⁸⁶ A formula for loss of production has been included, which states that loss of production during 30 calendar days must be higher than 25 percent of the daily production for the preceding semester.⁸⁷ Also worth noting is the definition of *Without Just Cause*, which sets a heightened standard of proof in the benefit of the Operator by defining the term as causes attributable to the Operator *without any doubt*.⁸⁸ So, arguably, the evidence provided must be absolute.⁸⁹

Second, CNH has created an *investigation period*, included in Article 23.2 of the CNH Agreement,⁹⁰ which must be completed prior to commencing any administrative rescission procedure.⁹¹ This investigation period includes some core and critical provisions. One such provision states that CNH is required to notify the Operator about the initiation of the investigation period, who will then provide CNH with elements to determine whether or not an administrative rescission procedure should be initiated.⁹² The length of the investigation period may span from thirty calendar days to two years.⁹³ This time frame may allow CNH and the Operator to treat this investigation period as an analogous *discovery* procedure as considered in the United States' Federal Rules of Civil Procedure.⁹⁴ During the investigation period, the Operator has the right to continue with the operation of the contractual area, unless prevented by technical

86. *Id.* art. 23.1(i)(1).

87. *Id.* art. 23.1(i)(3).

88. *Id.* art. 23.1(ii).

89. Although Without Just Cause is a very high standard of proof, it is not to be confused with the *beyond a reasonable doubt* standard used in U.S. criminal law. While Without Just Cause is a high standard, it means that if all elements against the Operator can be proven by a preponderance of the evidence, then it would be imputed to have been committed without due cause.

90. *Id.* art. 23.2.

91. Note how the wording inserted in the administrative rescission section indicates that "upon termination of the prior investigation period referred to in Article 23.2, CNH may administratively rescind this Contract." This language makes the procedure mandatory, not discretionary. *Id.* at 23.1.

92. *Id.*

93. *Id.*

94. Compare *id.* with FED. R. CIV. P. 26 (putting a minimum of 30 days on disclosure obligations in pre-hearing or pre-trial processes).

impossibilities.⁹⁵ The Operator is also given the right to directly inform CNH about the existence of any potential breach that had not been discovered by CNH, and provide a cure program in order to avoid commencement of the administrative rescission procedure.⁹⁶

Third, as provided for in the Hydrocarbons Law, CNH must follow the administrative rescission procedure: (i) CNH notifies the Operator regarding the administrative breach identified; (ii) the Operator has 30 calendar days to provide arguments and evidence against the alleged breach; and (iii) counting from the time of the response filed by the Operator or the expiration of the term to do so, CNH has 90 calendar days to make a final determination, considering the arguments and evidence presented by the Operator. The resolution is then duly noticed to the Operator.⁹⁷

Except for the termination of the CNH Agreement for the expiration of its term (with any applicable extensions), any other termination—administrative or contractual—represents a very serious issue for the legal, economic, and commercial interests of the Operator. Article 23.5 of the CNH Agreement deals with such consequences, which may be summarized as follows: (i) the Operator is required to pay either the liquidated damages included in Articles 4.6 and 4.7 of the CNH Agreement or any direct damages caused (excluding loss of profit) to the Mexican State due to the termination;⁹⁸ (ii) the contractual area reverts to the Mexican government without any payment or compensation, including all *Materials* used for the development of the corresponding field or fields;⁹⁹ and (iii) the Operator remains

95. *Contrato*, *supra* note 77, art. 23.2.

96. *Id.*

97. *Id.* art. 23.3; LH art. 20, DOF 11-08-2014 (Mex.).

98. *Contrato*, *supra* note 77, art. 23.5. Loss of profit is generally understood to be an indirect damage under general U.S. contract law. However, under Mexican law this concept does not apply in the same way. This difference is why the document drafted by CNH specifies that direct damages to be paid by the Operator do not include loss of profit generated against the Mexican State.

99. Chattels, or what is defined as Movable Property, and materials leased by the Operator to non-affiliates or owned by non-affiliate subcontractors are excluded from such transfer. *Id.* at arts. 1.1, 13.1. “Materials” is defined as “all machinery, tools, equipment, goods, supplies, pipes, drilling or production platforms, marine devices, plants,

liable for all abandonment activities as per the terms and conditions included in the CNH Agreement.¹⁰⁰

VI. REMEDIES

After CNH notifies the Operator of the administrative rescission of the CNH Agreement, the Operator must determine what remedies are available as per the terms of the CNH Agreement and the applicable law.

First, it must be determined if there are any contractual remedies available to the Operator. Under Article 21 of the Hydrocarbons Law and Article 26.4 of the CNH Agreement, any claim regarding CNH's final determination to administratively rescind the agreement may not be subjected to and are expressly excluded from the arbitration procedure in Article 26.5 of the CNH Agreement.¹⁰¹ Furthermore, a conciliation procedure under Article 26.2 or the designation of independent experts are not valid in administrative rescission cases, as these are all non-arbitrable issues included in the CNH Agreement.¹⁰²

Although the CNH Agreement does not provide a contractual remedy against CNH's administrative rescission decision, and also expressly excludes the right of the Operator to bring a claim for this matter to a neutral non-biased forum through arbitration, there are several other avenues that the Operator may explore.

Article 26.4 of the CNH Agreement clarifies that: "All disputes between the Parties in any way arising from or related to the events of administrative rescission provided in Article 23.1, without prejudice of the provisions set in Clause 23.6, first paragraph, shall be resolved exclusively by the Federal Courts of Mexico."¹⁰³ The initial mechanism of defense against the administrative rescission resolution would have to be filed before

infrastructure and other facilities acquired, provided, leased or otherwise held for use in the Petroleum Activities, including Recollection facilities." *Id.* art. 1.1.

100. *Id.* art. 23.5.

101. LH art 21 (allowing alternative dispute resolution forms in the Exploration and Extraction Contracts); *Contrato*, *supra* note 77, at arts. 26.4-.5 (limiting the forum in deciding disputes arising from events of administrative rescission to federal court).

102. *Contrato*, *supra* note 77, at arts 23.2, 26.2.

103. *Id.* art. 26.4.

a Mexican court and resolved in accordance with Mexican law, meaning that the Operator must prevail against the Mexican government in Mexico using Mexican substantial and procedural rules and regulations.

As concerning as this may appear to be, Mexican federal courts usually offer a reasonable forum for national and international companies to obtain judgments against illegal or unconstitutional resolutions issued by the Mexican government.¹⁰⁴ First, based on the separation of powers considered in the Mexican Constitution, the administrative rescission resolution will be issued by the executive branch, while the judicial branch reviews the validity of these resolutions.¹⁰⁵ Second—and potentially more important for business, commercial, and practical purposes—there are solid precedents of international companies obtaining favorable awards against the Mexican government in Mexican federal courts.¹⁰⁶

A. *Standard of Proof*

Before explaining the procedure that an Operator would have to follow in Mexican federal court, we need to look at the burden of proof imposed on the Mexican government, which is one of the main benefits in the defense of an Operator.

If the government had done things differently at the legislative process and elected to subject all claims included in the CNH Agreement to arbitration, the burden of proof would have been the one required by the applicable law to the agreement—here, the Mexican federal laws. The Mexican Federal Code of

104. It is worth noting here that, as required by the Hydrocarbons Law and its Regulations, exploration and production agreements in Mexico may only be signed with Mexican companies. LH art. 11. So, technically speaking, the dispute would be between the Mexican government and one or more Mexican companies (the Operator).

105. CPEUM, art. 49, DOF 05-02-1917, últimas reformas DOF 29-01-2016; LH art. 20.

106. See, e.g., Cemex Corp., Annual Report (Form 20-F) (June 29, 2007) (detailing favorable rulings from the Mexican federal court in suits challenging the constitutionality of several amendments); Mexican Economic Development, Inc., Annual Report (Form 20-F) (June 29, 2006) (detailing Coca-Cola FEMSA's favorable ruling from a Mexican Federal Court when it challenged the Mexican Antitrust Commission's request that certain Coca-Cola bottlers, including some of its Mexican subsidiaries, provide information).

Civil Procedure specifies that the plaintiff is required to prove its claims and the defendant its affirmative defenses, meaning there is no special standard of proof.¹⁰⁷ If the preponderance of the evidence weighs in favor of one of the parties, that party will prevail in the controversy.¹⁰⁸ The Mexican government opted for doing something different. It subjected itself to the highest degree of proof that exists in the Mexican legislation: *fundar* and *motivar*.¹⁰⁹

This *fundar* and *motivar* concept is a common legal term used in litigation in Mexico, especially when dealing with government acts and determinations. The general rule, as included in the Federal Law of Administrative Procedure, is that there is a presumption that any administrative act or determination issued by the government is valid and enforceable.¹¹⁰ In order to destroy the presumption, a competent court of law must declare that the specific act did not comply with the necessary elements.¹¹¹

Procedurally, the act issued by the government authority will

107. Código Federal de Procedimientos Civiles [CFPC], arts. 81, 82, DOF 24-02-1943, últimas reformas DOF 09-04-2012 (Mex.).

108. *See id.* (detailing the amount of proof needed for either the defendant or the plaintiff to prevail at trial).

109. I will keep the Mexican legal terms in Spanish throughout this article. Just like some terms in English do not have an accurate translation into Spanish (such as *accountability*), these two terms may not be properly translated into English. For the purpose of understanding the article, *fundar* is identifying the specific article or articles in a law or code that support the specific decision made by the authority, while *motivar* is the judicial act of assuring that the specific conduct fits the elements of the article or articles identified by the competent authority. Additionally, please note that I will be using *fundar y motivar*, *fundado y/o motivado* and *fundamentación y motivación* interchangeably as the context requires.

110. Ley Federal de Procedimiento Administrativo [LFPA] art. 8, DOF 04-08-1994, últimas reformas DOF 09-04-2012 (Mex.) (declaring an administrative act valid until declared invalid by administrative or judicial authority).

111. There are several elements that are required for an act or resolution issued by the government to be valid. Due to length restrictions on this article, I will only focus on the core concept that the administrative act must be *fundado* and *motivado*. Some of the additional qualifications not discussed are: (i) issued by a competent authority; (ii) limits its scope to time and place conditions associated to the subject matter; (iii) has as exclusive purpose the social or public welfare; (iv) issued in writing and including the signature of the competent issuer authority; (v) issued in accordance with the legal administrative procedure included in the law; (vi) issued without mistake on the scope, cause, motive or end; and (vii) issued without willful misconduct or violence. *Id.* art. 3.

be presumed valid, regardless of how defective it is.¹¹² A party with standing—a party who is essentially affected by the act—can submit the government act to a court of competent jurisdiction to determine the validity of the act. The court must then verify if the act complied with all the requirements established in the Mexican legislation or not; specifically, if the act was properly *fundado* and *motivado*.¹¹³ Both the government and the party with standing will be allowed to argue during the procedure and file the necessary evidence so that the court can verify if the act or resolution is valid or not.¹¹⁴

Once the specific case gets into a Mexican competent court, it is not enough for the responsible authority to prove that a preponderance of the evidence supports the resolution issued by the authority. The act must also comply with all the formal requirements specified in the corresponding Mexican laws to be valid, in order to protect citizens against the *Imperium* of the government.¹¹⁵ In almost all countries, the government usually imposes on itself a heightened level of scrutiny to its resolutions that could affect the rights and privileges of private citizens.¹¹⁶ There are innumerable cases, precedents, and stories of cases that, although adequate on the substance, missed this heightened level of scrutiny and were thus rendered null by the Mexican courts.¹¹⁷ I would even dare to affirm that most administrative

112. See *id.* art. 8 (stating that the act is valid unless invalidated by appropriate authority).

113. *Id.* at arts. 3-8, 83 (explaining the “elements and requirements of [all] administrative act[s]” and that the omission of any of the elements will result in the “revocation or cancellation of the administrative act”).

114. See *id.* at arts. 46-56, 83-90 (detailing the procedures by which the plaintiffs and the defendants argue their case).

115. *Id.* at arts. 3-6, 83.

116. See Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3098-101 (2015) (surveying the doctrine of proportionality as it relates to the review of government actions in the United States, Canada, Israel, and Germany, noting that these countries balance harms caused by government with the reasons underlying why the harm is caused).

117. See, e.g., Alfredo Narváez Medécigo, *Enforcement of Fundamental Rights by Lower Courts: Towards a Coherent System of Constitutional Review in Mexico*, 6 MEXICAN L. REV. 3, 6-7 (2013) (looking at the *Nuevo León* case to demonstrate the unconstitutionality of a criminal statute because it could not survive a heightened level of scrutiny).

acts are declared null and void for lack of formal *fundamentación* and *motivación* rather than substantive matters. This very high standard of proof was the one self-imposed by the government on the administrative rescission resolutions that could be issued by CNH.

B. *The Specific Procedure Before the Mexican Courts*

A final determination by CNH that administratively rescinds the CNH Agreement is considered an administrative act and is therefore subject to all the regulations, limitations, and restrictions in the Federal Law of Administrative Procedure described in the previous section. This is expressly ratified by the law that regulates the operation and structure of CNH.¹¹⁸

Usually, the following procedure is used to challenge an administrative act: (i) file a *reconsideration review* with the issuing authority; (ii) if the reconsideration fails, an *annulment trial* is attempted before special tribunals in Mexico created to review administrative acts of the government;¹¹⁹ and (iii) if this procedure is unsuccessful, the losing party may file an *Amparo*, the legal figure critical to understanding how the Mexican legal system functions.¹²⁰

Some argue that the most analogous figure to *Amparo* in United States law is the *writ of habeas corpus*; however, nothing is further from the truth. Habeas corpus has a very specific purpose—to order the presentation of a person before a competent court.¹²¹ In comparison, *Amparo*'s end goal is to determine

118. Ley de los Órganos Reguladores Coordinados en Materia Energética [LORCME] art. 22, DOF 11-08-2014 (Mex.) (detailing the general powers of the Coordinated Regulatory Agencies, including the power to supervise and monitor compliance with all administrative provisions, interpret those provisions, and other various powers that limit and restrict administrative acts).

119. The Tribunal is called in general terms the Tax and Administrative Tribunal (*Tribunal Federal de Justicia Fiscal y Administrativa*). Ley Orgánica del Tribunal Federal de Justicia Fiscal y Administrativa [LOTFJFA] art. 14, DOF 06-12-2007, últimas reformas DOF 03-06-2011 (Mex.).

120. CPEUM, art. 107, DOF 05-02-1917, últimas reformas DOF 27-01-2016 (Mex.); Ley de Amparo, Reglamentaria de los Artículos 103 y 107 de la Constitución Política de los Estados Unidos Mexicanos [LARACPEUM] art. 5, DOF 02-04-2013, últimas reformas DOF 18-12-2015 (Mex.) (describing the qualifications needed to be a party to the amparo).

121. 28 U.S.C § 2243 (2012); see Leonard V. B. Sutton, *Habeas Corpus – Its Past*,

whether a specific act or resolution by a governmental authority complies with the text of the Mexican Constitution, specifically with the fundamental rights included in such legal document, therefore making the closest, most analogous figure to *Amparo* in the United States a constitutional trial.¹²²

One key component to *Amparo* is that, unlike the legal system of the United States, state and municipal or county courts in Mexico do not have the authority to review constitutionality issues.¹²³ These courts are known to be *legal courts*, in the sense that they only determine legality of the issues brought before them. They are not *constitutional tribunals* as they have an express prohibition for ruling on constitutional matters.¹²⁴

This implies that all *Amparo* trials or procedures in Mexico may only be tried before the federal courts. This gives an Operator facing a trial regarding an administrative rescission by the Mexican government two main advantages. The first is

Present and Possible World-Wide Future, 44 DENVER L.J. 548, 548 (1967) (defining the writ of habeas corpus as a civil remedy ordering the presentation of a detained person before a court to determine whether detention is lawful).

122. LARACPEUM art. 1.

123. *See id.* art. 33 (listing which courts are competent to hear *Amparo* injunctions).

124. Article 6 of the United States Constitution imposes an obligation on all judges to review the constitutionality of acts and rule accordingly to protect the text of the Constitution.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

U.S. CONST. art. 6, cl. 2 (emphasis added). The Mexican Constitution has a frightening similar article which translated into English reads:

This Constitution, and the laws from Congress which shall be made in pursuance thereof; and all treaties made, or which shall be made, according to the same, shall be the Supreme Law of the Union. The judges in every state shall be bound thereby, notwithstanding any contrary provisions included in the Constitutions or laws of the states.

CPEUM, art. 133, DOF 05-02-1917, últimas reforma DOF 29-01-2016 (Mex.) (emphasis added). As seen, the article in the Mexican Constitution was translated almost verbatim from the original United States text. However, this article of the Mexican Constitution is applied as a hierarchical set of norms, rather than granting state or municipal judges the power to rule on the constitutionality of issues. The Mexican *Amparo* Law (*Ley de Amparo*) clarifies that, as a general rule, an *Amparo* may only be tried before the Mexican Federal Courts. LARACPEUM art. 33.

theoretical, and supported by the same arguments as diversity jurisdiction for federal courts in the United States. By having exclusive access to federal courts, the Operator has a more neutral and fair forum than if the Operator had to file its claim before a state or municipal court in Mexico. The second is based on the practice of law in Mexico. Federal courts are by far the most capable, properly structured, and knowledgeable forums that litigators may encounter in the country.¹²⁵ Because almost all resolutions by a state or municipal court may be reviewed at some point by a federal court via *Amparo*, most litigators in Mexico know that the federal courts are the real forum for issues to be litigated.¹²⁶

Additionally, *Amparo* has a rule called the Definitiveness Principle (*Principio de Definitividad*). This principle implies that if there are remedies available for the litigating party before the *Amparo*, those remedies must be exhausted first to have access to a *constitutionality review* trial.¹²⁷ This principle has made litigation in Mexico longer, more expensive, and highly tedious.¹²⁸ Arguments that were not exposed in front of the lower courts may not be newly introduced with the federal court on the *Amparo* trial, so one legal procedure may be in the lower courts for several years before the *Amparo* trial where it will be finally settled.¹²⁹

With this in mind, and in order to reduce some of the stress for private investors and the international community, both the Regulators Law and the Hydrocarbons Law clarify that procedurally any resolution by the CNH, including the administrative rescission, will be directly solved via *Amparo*.¹³⁰ This means that the Operator will not have to waste necessary resources, like time and money, with the lower courts, but instead

125. Robert M. Kossick, Jr., *Litigation in the United States and Mexico: A Comparative Overview*, 31 U. MIAMI INTER-AM. L. REV. 23, 25 (2000).

126. Carl E. Schwarz, *Rights and Remedies in the Federal District Courts of Mexico and the United States*, 4 HASTINGS CONST. L.Q. 67, 71-72 (1977).

127. CPEUM, art. 107; Jose Gamas Torruco, *Constitutional Jurisdiction in Mexico*, 49 DUQ. L. REV. 293, 309-10 (2011).

128. Kossick, *supra* note 125, at 83-84; Alberto Székely, *Democracy, Judicial Reform, the Rule of Law, and Environmental Justice in Mexico*, 21 HOUS. J. INT'L L. 385, 412 (1999).

129. Kossick, *supra* note 125, at 83-84.

130. LORCME art. 27, DOF 11-08-2014 (Mex.); LH art. 25, DOF 11-08-2014 (Mex.).

gets a direct shot at the highest and most qualified courts in Mexico.

Article 27 of the Regulators Law establishes that:

The general regulations, acts or omissions of the Regulators may only be refuted via indirect Amparo and will not be subject to suspension . . . Resolutions issued by the Regulators after the conclusion of a procedure that follows the same form of a trial [like the one declaring the administrative rescission], may only be refuted after its conclusion due to violations committed in the final resolution or during the procedure . . . In decisions by the Regulators which are founded [fundadas] and supported [motivadas] there shall be no right to claim damages or prejudices in the economic interests of the regulated activities.¹³¹

This article has many core and key components. First, as discussed above, the law clarifies that only the Mexican federal courts via *Amparo* have jurisdiction with respect to legal determinations made by CNH. These determinations include regulations; acts, like the administrative rescission; and omissions.

The second key concept is that there is no right to have a federal court via *Amparo* review interlocutory or non-final determinations made by CNH in procedures similar to a trial. Instead, the right to *Amparo* arises only against a final determination made by CNH.¹³² This is consistent with general principles of *Amparo*, which are similar to the injury-in-fact and redressability principles under U.S. law.¹³³ Mexican legislators have determined, *a priori*, that no injury is worth reviewing until the specific procedure is finally resolved. The administrative rescission procedure included in the CNH Agreement is one that qualifies as being followed in the form of a trial, subjecting it to this rule and making only the final decision by CNH able to be

131. LORCME art. 27.

132. *Id.*

133. See LARACPEUM art. 5, § 3, DOF 02-04-2013, últimas reforma DOF 18-12-2015 (Mex.) (detailing who may be a party to an amparo suit). The seminal case exploring injury-in-fact requirements and redressability in the United States is *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

disputed.¹³⁴

The third key component is, unfortunately, a major flaw in the Regulators Law. I am almost 100 percent certain that what I am going to explain was not intended, but it is the wording included in the article and thus, legally applicable. The article specifies that the general regulations, acts, or omissions issued by CNH are not subject to suspension.¹³⁵ However, one of the major tools that federal courts have in *Amparo* procedures is the possibility of *suspending* the resolution of the authority until it has been fully reviewed by the federal court.¹³⁶ This prevents the claimant from suffering further or irreparable injury, which would make even a court resolution irrelevant.

I want to think that this component of the article was intended to avoid having litigators filing *Amparos* against general regulations issued by CNH—like those already issued for superficial recognition and exploration and the procedure for public bidding of fields—and preventing the enforceability of these general documents by requesting a suspension under *Amparo* law. Unfortunately, by not being clear enough, this rule is also applicable to any other resolution issued by CNH, meaning that once the CNH Agreement has been administratively rescinded, the Operator has no right to have the resolution suspended until the Federal Court has an opportunity to review the determination.¹³⁷ This may result in the field or fields that the Operator possessed being awarded to a third party, and then having a federal court rule in favor of the Operator, declaring the resolution null and void and commanding CNH to revert the fields to the Operator.

The above situation is absurd and very problematic. When an administrative rescission reaches a federal court, my best guess

134. It is important not to confuse the idea that only the final decision may be refuted via *Amparo* with the erroneous knowledge that prior or interlocutory acts or omissions by CNH may not be refuted. They can be refuted and legally destroyed, but only after the final resolution is issued. See LORCME art. 27.

135. *Id.*

136. See LARACPEUM arts. 125-26, 130-32.

137. See LORCME art. 27 (stating that “[t]he general rules, acts or omissions of regulatory bodies on Energy Coordinated may be contested only by indirect amparo and not be subject to suspension”).

is that such court will try to do one of two things: (i) strictly construe the article so that the suspension is only prohibited with respect to general resolutions or norms issued by CNH that may have an impact on Operators, arguing that an opposite ruling would defeat the purpose of the *Amparo* law; or (ii) rule that although no suspension of the administrative rescission resolution may be ordered, CNH cannot award the field or fields to a third party on a permanent basis, but exclusively to maintain the *status quo* until there is a ruling on the merits in the trial.

The final core aspect of Article 27 is that if the specific decision by CNH is held to be *fundada* and *motivada*, the Operator has no right to claim damages or prejudices in its economic interests regarding such resolution.¹³⁸ This is true of all *Imperium* acts—if they are properly supported, no compensation right arises even if damage is caused to any third party. In the end, the key concept that will be debated and the basis of claims by the Operator is whether the determination made by CNH was *fundada* and *motivada* or not.

Article 27 of the Regulators Law has corresponding provisions within the Hydrocarbons Law. First, the Hydrocarbons Law does not expressly state that the Operator has the right to file an *Amparo* with the Mexican federal courts against the resolution of an administrative rescission. The Law only expresses that any controversy regarding an administrative rescission may not be subjected to arbitration.¹³⁹ The Hydrocarbons Law also states that CNH is not subject to foreign laws.¹⁴⁰ Finally, the Hydrocarbons Law determines that the Mexican hydrocarbon industry is under exclusive federal jurisdiction.¹⁴¹ By linking all these provisions, it is logical to conclude that any controversy regarding an administrative rescission procedure in Mexico regarding an exploration and production agreement shall be finally resolved and settled by the Mexican federal courts. The Regulations to the Hydrocarbons Law do not deal with this specific issue.

138. *Id.* art. 27.

139. LH art. 21, DOF 11-8-2014, (Mex.).

140. *Id.*

141. *Id.* art. 95.

Finally, the agreement specimens published by CNH, as seen in the CNH Agreement, expressly submit any claims by the parties regarding an administrative rescission to the jurisdiction of the federal courts, stating “All disputes between the Parties in any way arising from or related to the events of administrative rescission provided in Article 23.1, without prejudice of the provisions set in Clause 23.6, first paragraph, shall be resolved exclusively by the Federal Courts of Mexico.”¹⁴²

One provision of the CNH Agreement that I have not been able to understand, but is certainly worth noting is included in the final part of the clause above:

The Contractor [Operator for the purpose of the language used in this article] may initiate proceedings before an arbitration tribunal in terms of Article 26.5, only for the determination of the existence of damages, and in such case, their quantification, that result in a cause or causes of administrative rescission considered as unfounded by the Federal Courts in a definite manner.¹⁴³

If the Operator has already obtained a resolution by a federal court in Mexico expressing that the administrative rescission executed by CNH was not properly *fundada* and *motivada*, why in the world would the Operator file for arbitration to determine the existence of damages and their quantification? If you already have a favorable resolution from a Mexican federal court, you now file whatever is needed with the Mexican federal court system to quantify and enforce damages against the government.¹⁴⁴ This reduces any additional waste of time and money associated with filing arbitration and also eliminates the need to enforce a potential arbitration award against the government.¹⁴⁵

For now, we will focus on the *Amparo* procedure associated with the administrative rescission of the CNH Agreement. The

142. Contrato, *supra* note 77, art. 26.4.

143. *Id.*

144. See LARACPEUM arts. 192-98, DOF 02-04-2013, últimas reformas DOF 18-12-2015 (Mex.) (detailing the process for enforcing judgments served in amparo proceedings).

145. The legal inclusion of this wording is supported by the concept that the Amparo procedure is independent of any trial for damages, which would have to be filed independently. See *infra*.

Mexican Congress expressly stated in the Regulators Law that affected parties may directly file for *Amparo* against the decisions of CNH.¹⁴⁶ This means that they do not have to comply with the Definitiveness Principle and have to go to a lower or specialized court before having a shot at the federal level.¹⁴⁷ If the Operator believes that its rights have been violated by the final resolution of the CNH with respect to the administrative rescission procedure, it has the right to file the corresponding *Amparo* lawsuit and prove that the resolution was not *fundada* or *motivada*.¹⁴⁸ Please note that in order to be valid, the resolution need to be both *fundada* and *motivada*; otherwise it will be declared null and set aside by the federal court.¹⁴⁹

The *Amparo* procedure will work as follows:¹⁵⁰

- (i) The parties to the suit will be the Operator as the claimant (*quejoso*); CNH, the Ministry of Energy, the Ministry of Finance and other governmental entities as responsible authorities (*autoridades responsables*); any third party that could be affected by a resolution on the *Amparo* procedure; and the prosecutor designated by the Mexican State, who also has a right to be a party on all *Amparo* procedures.¹⁵¹
- (ii) The Operator will have a limited and reduced statute of limitations of just 15 calendar days to file the *Amparo* lawsuit.¹⁵²

146. LORCME art. 27, DOF 11-08-2014 (Mex.).

147. See *supra* notes 127-29 and accompanying text.

148. See LARACPEUM art. 196 (stating that the court will issue a decision on whether a judgment was founded and motivated in an *amparo* lawsuit).

149. LFPA art. 3(V), DOF 04-08-1994, últimas reformas DOF 09-04-2012 (Mex.).

150. There are two different types of *Amparo* procedures: *Amparo Directo* (Direct Suit) and *Amparo Indirecto* (Indirect Suit). The explanation of the differences and legal intricacies of each process escape the extent and content of this article. The difference between the two *Amparo* procedures is not fundamental—both procedures tend to solve the same substantive issue, which is declaring the unconstitutionality of a determination made by a Mexican authority. In this case, an *Amparo Indirecto* is the right procedural route.

151. LARACPEUM art. 5.

152. *Id.* art. 17.

- (iii) The *Amparo* lawsuit will be filed with the corresponding federal district court in Mexico City (*Juzgado de Distrito*) and it must contain: (a) the name and address of the claimant; (b) the name and address of any interested third party known to the claimant; (c) the authorities designated by the claimant as responsible;¹⁵³ (d) the resolution claimed to be in violation of the Constitution; (e) the facts of the case, which must be presented under oath; and (f) the violations attributed to the responsible authorities.¹⁵⁴
- (iv) The Federal Court will determine within 24 hours from the filing of the *Amparo* lawsuit whether the lawsuit should be admitted or denied.¹⁵⁵
- (v) The responsible authorities will be required to prepare and send the Court a report regarding the case and the reasons why the determinations made by the authority do not violate the Constitution.¹⁵⁶
- (vi) The Federal Court will hold a *Constitutionality Hearing (Audiencia Constitucional)*. All parties are allowed to intervene at this hearing and file the necessary evidence regarding their respective affirmations or denials.¹⁵⁷
- (vii) The Parties have a right to make closing arguments in writing, which are filed with the Federal Court.¹⁵⁸
- (viii) The Federal Court will make a final determination

153. In this case, all involved authorities should be included: those who issued the resolution, those who reviewed the resolution, those who approved the resolution, those who implemented the resolution, and any others.

154. *Id.* art. 108.

155. *Id.* art. 112.

156. *Id.* art. 117.

157. *Id.* art. 118; Hector Fix Zamudio, *A Brief Introduction to the Mexican Writ of Amparo*, 9 CAL. W. INT'L L.J. 306, 330 (1979).

158. See LARACPEUM art. 124 (explaining that parties file written arguments with the Court); Fix Zamudio, *supra* note 157 (stating that parties can submit written briefs at the public hearing).

on the subject matter.¹⁵⁹

The Operator and the responsible authorities have the right to an *Amparo* appeal (*Recurso de Revisión*), which will be analyzed and solved by a federal collegiate circuit tribunal in Mexico.¹⁶⁰ Unfortunately, based on the wording of Article 27 of the Regulators Law, the administrative rescission resolution issued by CNH and its effect are presumably not subject to suspension during the duration of the *Amparo* procedure.¹⁶¹

Everything covered so far is the *Amparo* procedure that may be filed against CNH for a not *fundada* or *motivada* administrative rescission. One would think that this procedure should take care and dispose of the entire claim, but it must be noted that, at its core, the *Amparo* procedure is not a contractual claim process. As previously discussed, the nature of the procedure is only to review the constitutionality of a determination made by a governmental authority.¹⁶² Arguably, there are at least three additional alternatives for the Operator: (i) without filing an *Amparo* procedure, the Operator can file a breach of contract claim against CNH with a Federal Court in Mexico; (ii) along with the filing of the *Amparo*, the Operator can file a breach of contract claim against CNH with a Federal Court in Mexico; and (iii) after the *Amparo* is solved, the Operator can file either an arbitration or a lawsuit in a Federal Court in Mexico for damages associated with the wrongful termination. Let us now discuss each of these alternatives to define what would be the best option for the Operator.

The first scenario is filing a contractual claim in Mexican federal court. Remember that Article 26.4 of the CNH Agreement does not say that all controversies surrounding the administrative rescission shall be solved via the *Amparo* procedure, but only that the Mexican federal courts should solve any disputes or controversies.¹⁶³ Based on this clause, the

159. Fix Zamudio, *supra* note 157.

160. LARACPEUM art. 84.

161. LORCME art. 27, DOF 11-08-2014 (Mex.); *see supra* notes 135-37 and accompanying text.

162. *See supra* text accompanying note 122.

163. *Contrato, supra* note 77, art. 26.4.

Mexican Commerce Code and the Federal Code of Civil Procedure contain the necessary provisions for the two parties in dispute to file the corresponding claims in federal court and solve such dispute.¹⁶⁴ Because the oil industry falls under exclusive federal jurisdiction without regard to the amount in dispute or the parties in controversy, the Operator may try to file a breach of contract claim against CNH as to the resolution that administratively rescinded the CNH Agreement.¹⁶⁵ However, the problem with this approach is that Article 27 of the Regulators Law (which, as a specific law, prevails over general laws such as the Commerce Code or the Code of Civil Procedure) expressly states that any claims against acts or resolutions issued by CNH must be filed with the Mexican federal courts via an *Amparo* trial.¹⁶⁶ Based on Article 27, it is likely that if the Operator files a contractual claim in Mexican federal court, the federal court will likely reject the claim, arguing that the procedural route to obtain a remedy here is to first have an *Amparo* trial.¹⁶⁷

The second scenario is to file both claims concomitantly. If this occurs, it would be important for the federal courts to be aware that both claims have been filed. The federal courts would then be the ones to define or determine if each claim can be independent of the other.

Finally, the third scenario is to file the *Amparo* claim first and then, once resolved in favor of the Operator, file a contractual claim for damages against CNH on a Mexican federal court. If this route is followed—which, to me, is the most reasonable and consistent of all applicable provisions—the Operator should be extremely cautious and make sure that the statute of limitations for the contractual claim for damages does not expire while the

164. Código de Comercio [CCom], art. 1063, DOF 13-12-1889, últimas reformas DOF 13-06-2014 (Mex.); CFPC, art. 70, DOF 24-02-1943, últimas reformas DOF 09-04-2012 (Mex.); see LH arts. 22, 97, DOF 11-8-2014 (Mex.) (explaining all contracts for exploration and extraction are governed by the Act, while all other matters not covered are governed by the Commercial Code and the Federal Civil Code).

165. LH art. 95.

166. LORCME art. 27.

167. This may put the Operator in a very risky situation. There are only 15 days to file for the *Amparo*, so it is very likely that the Federal Court will make its determination on jurisdiction after those 15 days, meaning that the statute of limitation may have already expired for the Operator who will end up with no claim to be filed.

Amparo is being reviewed and solved by the corresponding federal court. However, this scenario is very unlikely, since the general statute of limitations for commercial claims is ten years.¹⁶⁸

In all three scenarios above, the contractual claim against CNH would be filed using the trial provisions of the Commerce Code and the Federal Code of Civil Procedure as supplemental law.¹⁶⁹ This trial procedure will work as follows: (i) like in the United States, the trial will start with a complaint filed by the aggrieved party, in this case, the Operator; (ii) the defendant, CNH in this case, will be served with legal process of the claim; (iii) both parties will have the right to present the necessary evidence to the tribunal; (iv) both parties will have the right to file written closing arguments; and (v) the tribunal will make its final decision on the merits.¹⁷⁰

The losing party will have the right to appeal the decision to a higher court.¹⁷¹ The losing party on appeal will still have the right to file for an *Amparo* trial, but against the constitutionality of the legal resolution issued by the trial and appellate courts, rather than the resolution issued by CNH.¹⁷²

Although the trial procedure in Mexico seems similar to a traditional civil action in the United States, there are at least three differences worth noting: (i) discovery is not considered in Mexican law and is not applied by Mexican courts;¹⁷³ (ii) there is no right to a jury trial in Mexico;¹⁷⁴ and (iii) for commercial and

168. CCom, art. 1047.

169. LH arts. 22, 97.

170. CFPC, tit. 3, cap. 1, DOF 24-02-1943, últimas reformas DOF 09-04-2012 (Mex.).

171. *Id.* art. 231.

172. LARACPEUM art. 97, DOF 02-04-2013, últimas reformas DOF 18-12-2015 (Mex.) (providing the procedure for a party to appeal a court ruling on a CNH rescission).

173. Helen Bergman Moure et al., *E-Discovery Around the World*, 21 PRAC. LITIGATOR 41, 56 (2010). Because there are no discovery rules, the parties have no obligation to share the evidence that they may have regarding the case—all evidence is filed with the Court. If one of the parties has an element of proof that does not support its case, it can validly hide it from the other party and the Court. If a party is aware of evidence held by the other party, it shall request the Court to compel the presentation of such evidence. *But see* CCom, art. 1151 (stating there are limited procedures entitling a party to information for preparing a lawsuit).

174. David Luhnnow, *Presumption of Guilt*, WALL ST. J., (Oct. 17, 2009, 12:01 AM), <http://www.wsj.com/articles/SB10001424052748704322004574475492261338318>.

civil matters, oral trials are still not a reality in the country, so most of the procedure occurs through the filing of written documents, including evidence and arguments.¹⁷⁵

If the Operator is successful in its federal court claim, it is entitled to remedies and enforcement of said remedies against the Mexican government. First, if the *Amparo* is won by the Operator, the legal consequences would be to definitively suspend the resolution issued by the governmental authority, CNH.¹⁷⁶ A favorable resolution in the *Amparo* for the Operator would render the rescission of the CNH Agreement null, and the Operator would recover its rights and expectations under the CNH Agreement.¹⁷⁷ Therefore, the resolution in the *Amparo* procedure will not confer an immediate right to contractual damages to the Operator.

However, looking at the interpretation of all associated norms, it seems that the necessary key element to be able to file for damages against CNH for an unlawful rescission of the CNH Agreement is a favorable resolution in an *Amparo* procedure against CNH. Once the favorable resolution is achieved, the Operator should make the decision on whether to file for arbitration or to file a claim in Mexican federal court as per Article 26.4 of the CNH Agreement.¹⁷⁸

As previously expressed, I do not understand why an Operator would subject the damages claim and quantification of damages to arbitration.¹⁷⁹ If the Operator intends to obtain a higher amount of damages via the arbitration procedure, this may be a fallacy on its part. The arbitration would be subject to Article 26.5 of the CNH Agreement, meaning that it has to be filed in The

175. CFPC, arts. 276, 280. *But see* ORG. FOR ECON. CO-OPERATION & DEV., OECD ECONOMIC SURVEYS: MEXICO 60 (May 2013) (discussing a reform passed in 2011 mandating a shift to oral trials in civil cases and noting delay in the implementation of the reform).

176. Fix Zamudio, *supra* note 157, at 317.

177. LARACPEUM art. 77. Note that if the *Amparo* was resolved in favor of the Operator due to procedural mistakes made by CNH, nothing in the Mexican Law prevents CNH from commencing the administrative rescission procedure again to cure such mistakes.

178. Contrato, *supra* note 77, art. 26.4.

179. *See supra* notes 143-45 and accompanying text.

Hague in the Kingdom of the Netherlands.¹⁸⁰ This may result in serious expenses for the Operator as claimant to find both local counsel in the Hague for procedural matters and adequate Mexican counsel to conduct the arbitration, as the CNH Agreement is subject to Mexican law. On top of legal fees, the Operator will also be subject to travel expenses and payment to the arbitrators, of which, as per the terms of the CNH Agreement, there shall be three.¹⁸¹ The Operator must also consider the cost of the administering authority (UNCITRAL). Finally, there are no assurances that the arbitrators will award a higher amount of damages to the Operator; they will be limited by Mexican law, the governing law of the CNH Agreement, since the award would have to be issued in the same terms as a Mexican court or tribunal would rule on the matter.¹⁸²

Assuming the Operator follows this weird route and is also successful in its arbitration claims, there is the issue of enforcing the award. The *Commisa* case proves that an arbitration award alone is not sufficient—enforceability is critical.¹⁸³ Therefore, the Operator needs to have the award validated by a Mexican court, subject to all the restrictions and rights granted to an enforcing party by the applicable international conventions dealing with the enforcement of foreign arbitral awards.

In my opinion, the alternate scenario that does not involve arbitration is much more attractive and reasonable. The Operator already has a final resolution by a Mexican court (*Cosa Juzgada* or *Res Judicata*) that states that the administrative rescission was not properly supported.¹⁸⁴ This makes it almost legally impossible for a Mexican court not to find any damages associated with the wrongful termination, essentially guaranteeing

180. Contrato, *supra* note 77, art. 26.5.

181. *Id.*

182. New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (1959) (recognizing that foreign arbitral awards will be enforced in accordance with the laws and procedures of the territory from which the award originated).

183. See *Corp. Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploración y Prod.*, 962 F. Supp. 2d 642, 661 (S.D.N.Y. 2013) (holding that the arbitration award must be enforced because unenforcement would violate basic notions of justice).

184. CFPC, art. 354, DOF 24-02-1943, últimas reformas DOF 09-04-2012 (Mex.).

damages. The only controversy (*Litis*) would be the amount of damages. Under this alternative, once a final resolution on damages becomes effective, CNH would be judicially required to pay for such damages.¹⁸⁵ This scenario would be significantly cheaper for the Operator and provides a significantly higher rate of success and enforceability.¹⁸⁶

After receiving an award—either through arbitration or from the Mexican courts—the issue then becomes how to execute a favorable sentence against the Mexican government. Of course, the first scenario would be legally requiring the government to pay. If they refuse, there are several situations to analyze. If the execution or enforcement is to be made via government assets located outside of Mexico, then it will be necessary to have the award recognized and enforced by the courts of the country where the assets are located by ordering the seizure, foreclosure, or embargo of these assets, along with their subsequent sale and payment of the sale proceeds to the Operator. Therefore, it is necessary for the Operator to review whether the country where the assets are located has signed treaties or international conventions on the recognition and enforcement of foreign judgments or arbitration awards, or if the internal laws of the country provide a reasonable legal mechanism to recognize and enforce foreign judgments or arbitration awards.¹⁸⁷

If the Operator cannot find and seize sufficient assets of the Mexican government internationally, it will have to enforce the award or judgment inside Mexico. If this was the enforcement of an award or judgment against a private party, the procedure is rather simple: (i) the Court would require the debtor to pay within a certain period of time; and (ii) if the debtor does not pay, the Court would order the seizure and sale of assets and pay the

185. LORCME art. 27, DOF 11-8-2014 (Mex.).

186. Remember that once the *Amparo* determines that the rescission was unlawful, the Operator regains access to the exploration and production area, so it is no longer suffering from receiving no income from the *rescinded* agreement. This provides an additional incentive to take the Mexican Court trial to its latest consequences.

187. See, e.g., New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra* note 182 art. 1; Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, art. 2, May 8, 1979, 1439 U.N.T.S. 87 (1980).

creditor with the proceedings of the sale.¹⁸⁸

However, according to Article 4 of the Mexican Federal Code of Civil Procedure, which supplements the provisions of the *Amparo* Law and the Commerce Code, all governmental entities are immune from: (i) seizures, embargoes, foreclosures, or executions against their assets; and (ii) the presentation of guaranties to comply with their obligations.¹⁸⁹ This means that the only way to have the government pay for the corresponding damages caused is through their willingness to comply with the resolution issued by the corresponding court—though this does occur in most cases.¹⁹⁰

C. *Bilateral Investment Treaties (BITs)*

It must also be determined if BITs have any type of role in the issues covered thus far. According to the provisions of Article 21 of the Hydrocarbons Law, the issue of the administrative rescission may not be subjected to arbitration and must be solved directly by the Mexican federal courts.¹⁹¹

Based on Article 21, the first argument the Mexican government will likely make is that BIT arbitration may not be used to dispute the validity of the administrative rescission determined by the Mexican government. This argument is probably somewhat limited. First, as discussed later, the arbitration would be filed against a *de facto expropriation* of rights and assets without due compensation, rather than against the administrative rescission.¹⁹² Second, the Mexican Supreme Court has held that international treaties fall higher on the

188. CFPC, arts. 424-26.

189. *Id.* art. 4.

190. *Id.*; see also Alan Alexandroff & Ian Laird, *Compliance and Enforcement*, in *THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW* 1171, 1173 (Peter Muchlinski et al. eds., 2008) (noting that governmental respondents generally comply with adverse arbitral awards after exhaustion of judicial review processes, but that substantive empirical evidence is lacking).

191. LH art. 21, DOF 11-08-2014 (Mex.).

192. See Agreement on Promotion, Encouragement and Reciprocal Protection of Investments, Mex.-Neth., art. 5, May 13, 1998, 2159 U.N.T.S. 393 (documenting the bases on which one would attempt to use this remedy).

hierarchy of Mexican law than federal legislation.¹⁹³ So, even if there was a conflict or contradiction between the provisions of the Hydrocarbons Law and provisions of a BIT signed by Mexico, the provisions of the BIT should arguably prevail.¹⁹⁴

The provisions of the BIT may also be impactful. To examine the impact of these provisions, the content of the BIT between Mexico and the Netherlands will be used as an example.¹⁹⁵ The investment made by the Operator in the upstream Mexican industry would qualify as an investment for purposes of the treaty.

[E]very kind of asset and more particularly, though not exclusively: a) movable and immovable property acquired in the expectation or used for the purpose of economic benefit or business purposes . . . (b) rights derived . . . other kinds of interests in companies . . . (c) claims to money, to other assets or to any performance having an economic value . . . (e) rights derived from a concession.¹⁹⁶

The Operator and its shareholders or stockholders would also

193. Amparo en Revisión 1475/98. Sindicato Nacional de Controladores de Tránsito Aéreo, Pleno de la Suprema Corte de Justicia de la Nación [SCJN], *Semanario Judicial de la Federación y su Gaceta*, Novena Época, tomo XI, Marzo de 2000, Página 442 (emphasizing the supremacy of treaties over legislation).

194. Please note that Mexican law does not have, nor does it consider, the distinction between “treaties” and “executive agreements” that the United States does. Under U.S. law, all treaties signed by the President and ratified by the Senate are the supreme law of the land and trump any prior inconsistent federal law on the matter. This is not true of executive agreements, which are signed by the President and only preempt state law, not federal law regarding the subject matter. In Mexico, all international agreements are signed by the President and ratified by the Senate, which makes them the supreme law of the land and, based on the criteria issued by the Supreme Court, trump over every law in Mexico except for the Mexican Constitution.

195. See Agreement on Promotion, *supra* note 192, art. 12. During the first three bidding procedures of Round One in Mexico, several investors (including United States companies) decided to incorporate in the Kingdom of the Netherlands to have access to the protection granted by such BIT. The North American Free Trade Agreement (NAFTA) was not used due to doubts as to whether the investment provisions would apply, since Mexico expressly excluded oil and gas from the provisions of the treaty. I do not think the fear is supported, since Section B of Annex III of NAFTA clarifies the issue, but I do understand that taking a safe approach without interpretation may be the way to go. Further discussion on this topic exceeds the scope of this article.

196. *Id.* art. 1, cl. 1(a)-(c), (e).

qualify as nationals for purposes of the treaty:

“Nationals” shall comprise with regard to either Contracting Party: (a) natural persons having the nationality of that Contracting Party; (b) legal persons constituted under the law of that Contracting Party; (c) legal persons constituted under the law of the other Contracting Party but controlled, directly or indirectly, by natural persons as defined in (a) or by legal persons as defined in (b) above.¹⁹⁷

Article 5 of the treaty between Mexico and the Netherlands deals with expropriation and compensation, identifying the elements of an expropriation:

Neither Contracting Party shall take any measures depriving, directly or indirectly, nationals of the other Contracting Party of their investments, unless: (a) the measures are taken in the public interest and under due process of law, (b) the measures are not discriminatory, and (c) compensation is paid in accordance with paragraphs (2) to (4) of this Article.¹⁹⁸

This is the most significant provision regarding the possibility of using a BIT to protect an upstream investment in Mexico. It is clear that expropriation does not arise only from formal expropriation actions, but from any depriving of an investment. The administrative rescission of the CNH Agreement should qualify as a depriving measure as per the terms of the treaty.¹⁹⁹

It is also necessary to determine if this deprivation was legal under the terms of the BIT. The first element to prove deprivation is that measures were taken in the public interest and under due process of law.²⁰⁰ The Mexican government will almost certainly argue that if the administrative rescission is a deprivation of investment, it was done in the public interest, since the Operator was endangering the natural resources of the country, and with due process of law. The CNH Agreement only states that arbitration is not an alternative—it does not say that there are no remedies for the Operator against an administrative rescission.

197. *Id.* art. 1, cl. 3.

198. *Id.* art. 5, cl. 1.

199. *Id.*

200. *Id.*

In comparison, the Operator will argue that the administrative rescission was with the sole intention of depriving the Operator of its investment in the country without just compensation. It will also argue that the due process conceded was a complete disguise since it deprived the Operator of a neutral and fair forum to present its claims and it was directed by the Mexican government to deprive the Operator of its investment without just compensation. To make the claim plausible, the Operator must show strong evidence that the Mexican government only used the procedure in federal court to hide an expropriation of assets against the foreign Operator.²⁰¹

As long as the Operator can prove that there was no due process and it had no real opportunity to defend its claims, then the article of the Hydrocarbons Law that declares no payment or compensation to the Operator for the transfer of the field and the assets will be null and void, making the following wording from Article 5 of the Treaty applicable:

Compensation shall be equivalent to the fair market value or, in the absence of such a value, to the genuine value of the expropriated investment immediately before the expropriation took place and shall not reflect any change in value occurring because the intended expropriation had become known earlier . . . Compensation shall be paid without delay and be fully realizable.²⁰²

The procedure under the terms of the Treaty that the Operator should pursue is as follows: (i) any dispute shall be submitted to an arbitral tribunal, composed of three members; (ii) each party shall appoint one arbitrator, with the two appointed arbitrators appointing the third arbitrator, who is not a national of either party, as their chairman; (iii) if one party fails to appoint its arbitrator, the other party may invite the President of the International Court of Justice to make the appointment;

201. This is not going to be an easy task, of course, but a case like *Commisa* may support a claim under a BIT. On paper, there was due process; in reality, the Operator had no opportunity to be fairly heard and protect its rights and investment. The investor will have to prove that all major components of due process were flagrantly violated by the Mexican government.

202. *Id.* art. 5(2)-(3).

(iv) if the two arbitrators cannot reach an agreement on the choice of the third arbitrator, either party may invite the President of the International Court of Justice to make the necessary appointment; (v) the tribunal shall decide on the basis of law; (vi) the tribunal shall determine its own procedure; (vii) the tribunal shall reach its decision by a majority of votes; and (viii) the decision shall be final and binding on the parties.²⁰³

One critical concept that the parties must pay attention to is the statute of limitations. Article 2(3) of the Schedule of the Treaty states, “A national may not make a claim if more than three years have elapsed from the date on which the national first acquired, or should have first acquired, knowledge of the alleged breach and knowledge of the loss or damage suffered by it.”²⁰⁴

Additionally, the final hurdle that the investor will have to overcome to have a claim under the BIT is included in Article 2(5):

In case a national of the Kingdom of the Netherlands or its enterprise initiates proceedings before any judicial or administrative tribunal of the United Mexican States with respect to a measure that is alleged to be a breach of this Agreement, the dispute may only be submitted to arbitration under this Article if the competent national tribunal has not rendered judgement in the first instance on the merits of the case. The foregoing does not apply to administrative proceedings before the administrative authorities executing the measure that is alleged to be a breach.²⁰⁵

Therefore, an Operator faced with an administrative rescission determined by CNH which investment is protected by this Treaty would have to make a choice. The first alternative would be to file the *Amparo* and expect to be victorious. In this scenario, if the *Amparo* is finally resolved on the merits, the Mexican government would arguably have a right to invoke Article 2(5) of the Schedule of the Treaty.²⁰⁶ The second alternative would be to directly file for arbitration under the BIT and forget about the *Amparo* trial. However, if the *Amparo* trial is not followed, the Mexican

203. *Id.* art. 11.

204. *Id.* art. 2(3).

205. *Id.* art. 2(5) (emphasis added).

206. *Id.*

government will have a stronger case in arguing that Mexican law provided due process for the arguable deprivation of the investment and that the Operator decided not to pursue such process. The third alternative—which would likely be my suggestion—is to file for the *Amparo* trial, make sure that *Amparo* is solved before the statute of limitations of the treaty expires,²⁰⁷ and then file the BIT claim if unsuccessful. The strategy, once filed, would be to construe the wording of the Schedule to explain that the *Amparo* was not originally filed to dispute a breach of the Treaty, but as a claim arising from the CNH Agreement and that only after the Operator realized that the procedure was a complete disguise by the government to illegally deprive the Operator of its investment did the Operator become aware of a potential violation of the provisions of the BIT.

As seen, filing a claim under a BIT due to an administrative rescission declared by CNH under the terms of the CNH Agreement will not be an easy task for the Operator. Nevertheless, structuring the deal so that the investment is protected by a BIT remains a solid strategy since it provides an additional element of protection and negotiation against a potential loss of investment due to an administrative rescission.

VII. CONCLUSION

This article was intended to provide a perspective and initiate a discussion on the administrative rescission included in the Mexican legislation and transferred to the exploration and production agreements published by CNH. This article also set up some arguments as to whether international arbitration against a sovereign is really an effective legal tool. Finally, elements of what may be the legal route to be followed by an international Operator facing an administrative rescission were presented. To conclude this article, a summary of what the legal process should look like and some of the identified challenges at each stage is now presented.

207. This is very likely since the Operator may directly file for *Amparo*. See LH arts. 17, 25, DOF 11-8-2014 (Mex.).

A. Administration of the Exploration and Production Agreement

First and foremost, the best strategy to reduce the Operator's exposure to a potential administrative rescission is to have a solid, detailed, and transparent administration of the CNH Agreement. There should be no issues left for further discussion or understanding. All reports need to be filed on time and in accordance with the terms of the CNH Agreement. Documents, measurements, and other necessary items should be properly kept and made. By doing this, the Operator may reduce its exposure and leave the government with limited chances to administratively rescind the CNH Agreement. It would also allow for the documentation of a solid case against the Mexican government in either Mexican federal court or international arbitration.

B. Investigation Period

This stage should be used as a *discovery* period by the Operator. The Operator will have the opportunity to know and understand the strength of the case that could be filed by CNH. The Operator will also be able to show its teeth to the government. Without the commencement of formal legal procedures, the Operator can show the government, cautiously, the consequences of not settling the dispute.

If the Operator is indeed in breach, the investigation period may be used to immediately implement measures to remedy the breach and request that the Mexican government avoid initiating an administrative rescission procedure.

C. The Administrative Rescission Procedure

This stage of the process is critical for what will happen next. The truth of the matter is that in most cases, the authority conducting the administrative rescission procedure and reviewing the evidence presented by the Operator will conclude its investigation and procedure by effectively rescinding the CNH Agreement. For the Operator, this result is not what matters.

While it would be ideal for the Operator to convince the Mexican government not to rescind the CNH Agreement, this stage is still critical for the Operator since (i) the evidence and

arguments presented here serve as the basis for what may be further argued in Mexican federal court or at a BIT arbitration procedure, and (ii) the resolution issued by CNH in this procedure must be *fundada* and *motivada*. After this, the participation of CNH in future litigation—whether a potential *Amparo*, federal trial, or international arbitration—does not have to be *fundada* and *motivada*. Instead, what will be actually reviewed in future litigation is if the decision was in fact *fundada* and *motivada*.

Based on the above, the Operator must file all the evidence and arguments of the case during this procedure. For example, let us assume that CNH commenced an administrative rescission procedure because the Operator failed to commence activities provided in the approved exploration plan, appraisal plan, or development plan for a consecutive period of more than 180 days.²⁰⁸ The Operator, under the assumption that it will have a right to present evidence at a later trial procedure or *Amparo*, decides against both answering the procedure and providing evidence of a force majeure event that would clearly make the breach not attributable to the Operator. The CNH Agreement is then rescinded and several claims are consecutively filed by the Operator. Although the Operator's case may be fully supported, an *Amparo* court, a federal court, or an international arbitration panel may all find that although there was no breach by the Operator, the administrative rescission was duly *fundada* and *motivada* by CNH and thus valid under the terms agreed by the parties in the CNH Agreement, based on the information available to CNH during the rescission procedure.

D. File Amparo

As explained in this article, *Amparo* has proven to be the most effective legal tool of a private party against the government. In fact, *Amparo* may provide more certainty than filing for a BIT arbitration. Therefore, even if the BIT claim is at risk, I would file the *Amparo* and would try to beat the system by using its own Courts. This has happened several times before and will happen plenty of times going forward.

208. Contrato, *supra* note 77, art. 23.1.

E. Claim for Damages in Federal Court

If the *Amparo* trial was successful for the Operator, I would file a contractual claim in Mexican federal court. As previously explained, filing for an international arbitration does not make a lot of sense to me. Federal court is the cheapest and easiest way to obtain a restitution of damages due to the unconstitutional administrative rescission determined by CNH.

F. File BIT Arbitration.

If all else fails, it will not hurt to file the BIT claim. This is by far the most complex case to be supported, but I believe in certain instances, like the *Commisa* case, it may be worth pursuing and could be successful.