CHAPTER 7
LEX PETROLEA IN INTERNATIONAL LAW

7.1 Introduction

The term ‘lex petrolea’ entered the legal lexicon and the international oil and gas industry more than a quarter of a century ago. The term first emerged in a landmark international arbitration case in 1982, which concluded that the international petroleum industry in its disputes had “generated a customary rule valid for the oil industry a lex petrolea that was in some sort a particular branch of a general universal lex mercatoria”.¹ In a seminal 1998 article, the thesis was put forth that in the previous 25 years “an increasing number of international arbitral awards relating to the petroleum industry have been published [which] created the beginnings of a real lex petrolea that is instructive for the international petroleum industry”.² A more recent article on the subject updated “all arbitral awards published since 1998 that relate to the international oil and gas exploration and production industry”, while furthering the argument that “the published awards relating to the international exploration and production industry have created a lex petrolea or customary law comprising legal rules adapted to the industry’s nature and specificities”.³ Those two articles primarily relied on a number of published awards from state investment disputes, along with a couple of commercial arbitration awards, to draw their conclusions on the meaning of ‘lex petrolea’.

This analysis supports the thesis that a lex petrolea has developed over the years, but widens the scope of inquiry to the full range of disputes encountered in the international petroleum sector. Lex petrolea primarily arises from international arbitration and court cases. However, it has


also developed in a number of other forums, from governments’ petroleum legislation and contracts to the industry’s business practices, which are found in its model contracts.

Unlike the courts, the world of international arbitration is not bound by precedent that is, decisions of arbitral tribunals are not binding on other tribunals. However, arbitrators make their decisions in context and not in a vacuum. Counsel use precedent in arguing their cases and arbitrators refer to precedent in writing their awards. The practical result is that precedent is relied on in international arbitration and a *lex petrolea* has developed accordingly.

The worlds of commerce and investment seek out consistency and predictability in making their decisions. So clarifying what *lex petrolea* means and how it is applied is helpful to both the world of international arbitration and the world of international oil and gas, which generates the largest percentage of disputes in both the investment state world and international commercial disputes. Arbitrators attempt to rely on credible sources in determining their arbitral awards. This analysis helps to explain where they can find such sources in deciding international oil and gas arbitration cases.

*Lex petrolea* is most often established from decisions arising from disputes within the international oil and gas sector, as this is where the contracts, legislation and treaties that affect the petroleum sector are tested and interpreted. Therefore, in order to determine the full extent of *lex petrolea*, the full range of disputes in the international oil and gas business must be considered.

### 7.2 Types of Dispute

There are essentially four types or categories of dispute found in the international oil and gas sector.

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This categorisation was first used by Tim Martin in a primer on international dispute resolution—written for the Independent Petroleum Association of America and the Association of International Petroleum Negotiators in 2011, which was subsequently published as: “Dispute Resolution in the International Energy Sector: an Overview”, 4:4 *J World Energy Law & Business*, 332-368 (December 2011).
7.2.1 State versus State Disputes

These are primarily boundary disputes concerning oil and gas fields that cross international borders, most of which are located in maritime waters. They involve governments, since only they can claim sovereign title and resolve boundaries with their neighbouring states. However, oil and gas companies sometimes get indirectly involved in these disputes when they are granted concessions that straddle disputed boundary lines.\(^8\)

7.2.2 Company versus State Disputes

These are state investment disputes (sometimes called investor-state disputes). They occur when governments significantly change the terms of the original deal or nationalise (or ‘expropriate’) an investment. The investor (in this case an oil and Gas Company or a consortium of oil and gas companies) can base its claim on its investment contract (either a production sharing contract or risk service agreement) or an investment treaty, or possibly both. Most treaty claims are now made under bilateral investment treaties (BITs), and some under a multilateral treaty such as the Energy Charter. These are the disputes on which the two lex petrolea articles primarily based their analysis.\(^9\)

7.2.3 Company versus Company Disputes

These are international commercial disputes arising out of oil and gas contracts. There are two subcategories of dispute occurring between energy companies. The first is between holders of interests in oil and gas concessions such as joint venture participants or buyers and sellers of such interests or the production from such interests. They are found in agreements such as:

- confidentiality agreements;
- joint operating agreements (JOAs);
- unitisation agreements;
- farm-out agreements;
- area of mutual interest agreements;\(^10\)
- study and bid agreements; and

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\(^10\) *Id.*, at 97.
• sale and purchase agreements.

The second subcategory is disputes between operators and service contractors for providing services or equipment in the following kinds of agreement

• drilling and well service agreements;
• seismic contracts;
• construction contracts;
• equipment and facilities contracts; and
• transportation and processing contracts.

They make up the majority of disputes in which oil and gas companies find themselves. Such disputes are primarily resolved in arbitration rather than in the courts in the international oil and gas business.\(^\text{11}\)

### 7.2.4 Individual versus company disputes

There are a number of situations where individuals initiate claims against oil and gas companies. The first is when an individual suffers a personal injury and begins a tort claim against a company. This is common in US jurisdictions, but increasingly happens in other countries. A second area of individual claims arises from human rights or environmental claims. These are sometimes filed in US courts using the Alien Tort Statute or in other jurisdictions using a variety of innovative legal mechanisms.\(^\text{12}\) The third group of claims by individuals arises when promoters of oil and gas deals claim that they have an interest in a host government contract and the accompanying joint operating agreement as a result of a third-party tortious action or by way of agreement. The final group of claims concerns agents or consultants who demand payment under their agent agreements for winning a government contract for a company. There has been a series of arbitrations over the last 50 years where companies have refused to pay their agent based on corruption allegations after securing the host government contract.\(^\text{13}\)

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\(^{11}\) Ibid.


\(^{13}\) *Supra* not 7.
7.3 Boundary Disputes

“Because of the many undelimited maritime boundaries across the globe, international oil and gas exploration and production companies will often encounter boundary-related uncertainty as they enter new exploration areas.”14 As a result, boundary disputes between sovereign states form part of the body of lex petrolea that affects the world of international oil and gas. Boundary disputes clearly fall within the area of international public law. But it “is a somewhat esoteric activity and the number of true experts in the field is quite small”.15 That activity and that expertise often revolve around oil and gas operations.

Both land and maritime boundary disputes can involve control over natural resources, but the greatest number occur in the world’s oceans and seas. The primary source of law for delimiting maritime boundaries is the United Nations Convention on the Law of the Sea (UNCLOS). Most of the world’s states have ratified it and many of its provisions are now considered to be customary international law.

The primary forums for the binding resolution of international boundary disputes are:

- the International Court of Justice (ICJ) in The Hague, established under the Charter of the United Nations in 1945;
- the International Tribunal for the Law of the Sea (ITLOS) in Hamburg, established under UNCLOS in 1996; and
- ad hoc arbitration tribunals.16

The ICJ has issued more than a dozen boundary awards and at the time of writing ITLOS has one boundary case pending. States involved in ad hoc arbitrations usually keep the results confidential. The awards from these cases interpret the customary international law around the delimitation of sovereign boundaries.17

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14 Derek Smith and Martin Pratt, “How To Deal With Maritime Boundary Uncertainty In Oil And Gas Exploration And Production Areas”, AWN, 25(2007).
15 Id., at 31.
16 Supra note 8 at 98.
17 Ibid.
There is now sufficient jurisprudence in this area to provide some certainty around delimiting a boundary. However, both states and tribunals have sometimes been creative in establishing boundaries, so boundary delimitation is still as much an art as a science.\textsuperscript{18}

There is an extensive body of boundaries literature. The most comprehensive study of international maritime boundaries and the relevant law is the American Society of International Law’s International Maritime Boundaries.\textsuperscript{19} An excellent introduction to understanding how international boundaries are established and their impact on oil and gas companies is How to Deal with Maritime Boundary Uncertainty in Oil and Gas Exploration and Production Areas, published by the Association of International Petroleum Negotiators (AIPN).\textsuperscript{20}

7.4 State Investment Disputes

Most of the published arbitration awards that have established a lex petrolea arise out of state investment disputes. Given their public nature and the rules of institutions such as the International Centre for Settlement and Investment Disputes (ICSID), those awards are usually published and made available in the public domain. These are the cases relied on by the two articles on \textit{lex petrolea} by Doak Bishop and Tom Childs respectively. What is striking about those cases is that not only have they established a \textit{lex petrolea}, but on a larger scale they have established the customary international law for dealings between states” and private investors. This is because the oil and gas business has historically been one of the largest and most active global industries. The industry invests in very large, complex and capital-intensive projects with long lifespans. People, companies, governments and circumstances invariably change in such projects, and misunderstandings arise that often result in disputes. Hence the significant impact of \textit{lex petrolea} on state investment disputes.\textsuperscript{21}

The impact of the early cases described in the first \textit{lex petrolea} article has influenced the behaviour of both investors and governments in the post-1998 cases described in the second article. Most of the post-1998 awards arose from BIT claims. There were none prior to 1998. Only one award since 1998 deals with the nationalisation or expropriation of assets, whereas many of the

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\textsuperscript{18} \textit{Ibid.}
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\textsuperscript{20} \textit{Available at:} www.aipn.org. (Visited on 17 march, 2014).
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\textsuperscript{21} \textit{Supra} note 8 at 99.
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pre-1998 awards are about this issue. Many of the post-1998 awards deal with claims relating to changes in the host state’s fiscal regime (ie, creeping expropriation). In contrast, none of the pre-1998 awards addressed such claims. Some of the highlights and observations on *lex petrolea* that flow from these state investment disputes follow.

### 7.4.1 Expropriation

States have the right to expropriate investments. However, in doing so, states must compensate the investor. It is only unlawful “if it is discriminatory, it is not motivated by the public interest of the expropriating country, it breaches stabilization clauses of the parties’ contract, or if no compensation is paid, offered or other provision for it made. The modern effect of such illegality, however, is merely to permit an award of additional compensation”. The result under *lex petrolea* and customary international law is that once expropriation has been established, the only issue remaining is how to calculate properly the compensation to the investor.

### 7.4.2 Duress

The defence of duress is not effective in most creeping expropriation cases: “In the absence of a written record of reservations of rights, protests or a lack of consent, this claim is seldom given much credence.” Therefore, the best legal course for an investor that is suffering creeping expropriation is to establish a clear written trail of protests that it can point to in its arbitration with the state. Unfortunately, as a practical matter, this is often not a viable formula for working successfully on an ongoing basis with a government and its officials.

### 7.4.3 Force Majeure

Force majeure clauses in an investment contract can be effective. Tribunals have held that “force majeure is a general principle of law that may be applied even if the contract is silent on the point”. However, these clauses cannot be taken for granted. Much will turn on the wording of the force majeure clause and the circumstances in which force majeure is invoked. Negotiators of

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22 *Ibid*.
23 Bishop, *supra* note 2 at 1156 and 1158.
24 *Id* at 1164.
25 *Ibid*.
26 *Id.*, at 1168.
host government contracts must therefore pay a lot of attention to what is included (or not included) in a force majeure clause.27

7.4.4 Transfer of Interest

Failure to obtain required government approvals on transfers of interest can result in termination of a host government contract. This risk can occur even when an oil company attempts to bifurcate the title and claim that no ‘legal’ title was transferred and thus prior government approval was not required.28 This may be an acceptable practice in some domestic jurisdictions, but not in many international operations: “Even though bifurcation of title is regularly used in farmout agreements in North America where it is legally recognized and valid, that is not always the case in international farmout agreements in other parts of the world. If the HGC or hydrocarbon law does not recognize the bifurcation of title and requires prior government approval of a title transfer in the HGC to a third party, there is significant risk in not obtaining prior written government approval to a farmout agreement and the bifurcation and transfer of title.29

There are policy reasons around this risk. The control and development of natural resources are important to petroleum producing countries. One of the primary means that such countries control how their natural resources are developed is by approving which international oil companies (IOCs) are allowed to acquire an interest in their host government contracts. As a result, failure to obtain the prior authorisation of the designated ministry to the transfer of any interest in the host government contract may result in its termination and a potential state investment dispute with significant downside for the investor.30

7.4.5 Remedies

(a) Specific Performance

Investors should not count on the remedy of specific performance in seeking to enforce their host government contracts. With one notable exception, international arbitration tribunals

27 Ibid.
30 Ibid.
have consistently awarded damages rather than specific performance after determining that there
has been an expropriation. That exception is TOPCO v Libya.\textsuperscript{31} The sole arbitrator in that case
“found that restitution in integrum is an appropriate remedy under the Libyan Civil Code and
Muslim law, and cited the Chorzow Factory case as applying the rule of restitutio in integrum”\textsuperscript{.32} Unfortunately for TOPCO, Colonel Gaddafi and his regime ignored the arbitrator’s award that
granted it specific performance and never did allow the company back into the country to perform
its contract.

International tribunals have continued to take this approach as shown in recent cases. In
Al-Bahloul v Tajikistan the tribunal denied the claimant’s request that it order specific
performance of Tajikistan’s obligation under the Energy Charter Treaty’s umbrella clause to issue
exclusive exploration licences to the claimant because it would be materially impossible to
implement a remedy of specific performance.\textsuperscript{33} A tribunal denied Occidental Petroleum’s request
for provisional measures for specific performance of its contract, which Ecuador had terminated
by declaring a ‘caducidad’ on the grounds that Occidental had no right to specific performance
under international law.\textsuperscript{34} In another case, Argentine company Bridas Petroleum requested
specific performance of its joint venture agreement with Turkmengaz, a Turkmenian state
company, but subsequently withdrew it.\textsuperscript{35} The tribunal stated that it considered this a “wise”
decision because it was unrealistic to assume either that Turkmengaz would obey the
tribunal’s order of specific performance or that a national court having personal jurisdiction over
it would enforce the order.

(b) Damages

There are a number of approaches to calculate damages in any dispute, including asset-
based, income-based and market-based approaches. Tribunals have considered and used many of
them, such as net book value, discounted cash flow (DCF), going concern value and liquidation

\textsuperscript{31} Texaco Overseas Petroleum Co (TOPCO) v Government of the Libyan Arab

\textsuperscript{32} Supra note2 at 1173.

\textsuperscript{33} Mohammad Ammar Al-Bahloul v Republic of Tajikistan, SCC Case No V (064/2008),
Final Award, Juhep: 2010, paragraphs 35, 45-63.

\textsuperscript{34} Ibid.

\textsuperscript{35} Joint venture Yashlar v. Government of Turkmenstan, ICC Arbitration Case No. 9151,
Interim Award, June 8 1999, paragraph 538-40.
value. Where more speculative assumptions are used in the calculations, tribunals become less comfortable with and unwilling to consider them. Tribunals are comfortable in awarding out-of-pocket costs and losses investors. They are not so comfortable in awarding lost profits, even when it claimant cloaks them in creative ways.  

The DCF method is probably the most controversial valuation methodology. Investors rely on it in their preliminary investment decisions and their subsequent investment claims since they expect growth and profits in their investment. States often reject it because they consider the valuation method to be speculative and that any potential gains should stay with the ultimate owner of the resource (ie, the state). Some tribunals have accepted the DCF method of calculating value, “provided that the claimant could establish a likelihood of future lost profits with sufficient certainty”. Claims made on assets that are expropriated at the exploration stage where there is uncertain geology, questionable financing, no proven reserves, no production and no established revenue stream will have difficulty convincing a tribunal to apply the DCF methodology. Despite the uncertainty in the upstream petroleum sector, at least one tribunal has been willing to use a ‘risk economies’ methodology and awarded some value to an exploratory concession based on a dry well that provided information about the potential of the subsurface geology.

7.5 Commercial Disputes

The sources for determining the *lex petrolea* arising from commercial disputes in the international oil and gas business are different from those arising from state investment disputes. Most of the publicly available case law that interprets commercial oil and gas agreements comes from US (primarily Texas), Canadian (primarily Alberta) and English courts. Those cases deal with disputes arising from oil and gas operations in their own domestic jurisdictions. Oil and gas domestic operations and their agreements can vary significantly from the international industry’s business practices and agreements, which are illustrated in the analysis provided below on JOAs and farm-out agreements. Therefore, domestic oil and gas case law often falls short in establishing a relevant *lex petrolea* for the international oil and gas business.

36 Supra note 2 at 1175 & 1176.
37 Supra note 3 at 53.
39 Supra note 8 at 102.
Disputes that arise from international oil and gas agreements are mostly decided by international arbitration tribunals, which reflect the dispute resolution forums chosen in those agreements.40 Those decisions are usually not publicly available because of the confidentiality requirements under the applicable dispute resolution clauses. Since international commercial arbitration awards are invariably not publicly available and domestic oil and gas cases usually deal with very different kinds of operation and agreement, the best way of determining the *lex petrolea* of international oil and gas commercial agreements is by referencing the industry’s business practices, which are captured in its model contracts.41

The international petroleum industry uses model contracts extensively in its transactions and operations.42 They are developed and published by petroleum industry associations. Parties regularly use and accept model contracts in the negotiation and drafting of their agreements. Model contracts that are widely used contain clauses that reflect industry practice and commonly accepted terms.43 Model contracts standardise the terms governing certain common types of agreement used in the petroleum business.44 They are drafted to be flexible enough to allow the parties to pick and choose the alternatives and options that work best for them: “With the acceptance of a particular model contract, it becomes widely used as the industry standard. The result is that transactions are drafted and handled more consistently and it is easier for parties to understand how they have addressed key issues in their contracts. With increased consistency and understanding, parties inherently reduce potential grounds for dispute and, therefore, their litigation risk.”45

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40 The 2002 AIPN Model JOA drafting committee sent a list of questions to all AIPN members asking them how they used the existing JOA and what revisions would be most beneficial. The survey confirmed that few disputes arose under the 1995 model JOA, that international arbitration was the preferred forum and that English law was widely chosen (with Texas and New York law being chosen less often than was once thought). See Philip Weems and Michael Bolton, “Highlights of Key Revisions - 2002 AIPN Model Form International Operating Agreement” 6 Alt’; *Energy L & Tax’n Rev*, 169,171 (2003). The result was that the 2002 AIPN Model JOA did not provide for litigation as a binding mechanism in its dispute resolution clause, but only international arbitration. This approach was continued in the 2012 AIPN Model JOA.

41 *Supra* note 8 at 102.


45 *Id* at 446.
7.5.1 Joint Operating Agreements

The most significant and long-term contract used among oil and gas companies in the upstream oil and gas business is the JOA. It sets out the fundamental and overarching relationships in a joint venture consortium, from the initial exploration to the ultimate production of hydrocarbons. In international petroleum transactions describes the primary purposes of an international JOA: “Each international JOA has two main functions. The first is to establish the basis for sharing rights and liabilities among the parties. In most cases, these will be shared in proportion to the interests of the participants in an operation. The second is to provide for the manner in which operations will be conducted by a designated operator subject to the supervision of an operating committee comprised of one representative from each party to the JOA.”

The evolution of JOAs in North America has been different from that in the International oil and gas business for a number of fundamental reasons: “The oil and, gas operating agreement has evolved as an industry-wide document over several decades. The widespread need for it in the United States onshore operations has resulted in the development of a relatively uniform agreement for domestic activities. However, as the complexity and size of the operation increases, as in the case of offshore and international exploration and production, modifications in standard terms of the onshore agreement become necessary. Domestic offshore and international JOAs are not only more detailed and significantly different from onshore counterparts but exhibit important variations from transaction to transaction.”

Onshore domestic operations are relatively simple and straightforward. It is a less diverse and complicated operating environment. Operators usually conduct one operation at a time—such as shooting seismic or drilling a well—by issuing an authority for expenditure that non-operators sign, allowing the operator to carry out that particular operation without further ado. Parties delegate broad authority to an operator in onshore North American operations. The result is a relatively simple and uniform agreement for domestic activities.

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47 Supra note 45.

48 Andrew B Derman and James Bames, Inst on Oil and Gas Agreements, Autonomy versus Alliance: An Examination of the Management and Control Provisions of Joint Operating Agreements §4.03 at 10. (Rocky Mt Min L Fdn, 1996).
International projects are larger in scale and more technically difficult than most domestic operations, located in places where there may be very little infrastructure and lengthy logistical chains. Operators of international JOAs do not have broad discretion and do not make unilateral decisions on their own that bind non-operators. Instead, international JOAs provide for a management committee that exercises authority and control over operations. Management committees review and approve each item. The result is a more diverse and complex agreement.\textsuperscript{49}

As a result, international oil and gas operations and their agreements are very different from agreements in domestic oil and gas operations.\textsuperscript{50} Domestic US and Canadian onshore model JOAs\textsuperscript{51} contain a limited number of elections, whereas the UPN international model operating agreement” has many.\textsuperscript{52}

There is a limited number of published arbitration awards dealing with international JOAs or similar agreements. ICC Case 11663\textsuperscript{53} involved three parties that had a shared management agreement (SMA) and participation agreement for a production sharing agreement. The SMA provided for the sharing of costs and expenses and required that if a party was in default for more than 60 days after receiving a default notice, it had to forfeit and assign its participating interest to the non-defaulting party on the request of that party. One of the parties consistently failed to pay its share of cash calls. The other two parties served it with a default notice and demanded that it assign its interest to them. The tribunal found that it was a “fundamental principle” of the SMA that each party must pay its share of cost and expenses under such an agreement and issued a declaration that the non-paying party had forfeited its participating interest in the project.\textsuperscript{54} It found that this was consistent with standard practice in the oil and gas industry, as demonstrated by the

\begin{itemize}
\item \textit{Supra} note 45at 564.
\item Michael D Josephson, “How Far Does the CAPL Travel? A Comparative Overview of the CAPL Model Form Operating Procedure and the AIPN Model Form International Operating Agreement”,\textit{Alta L Rev} 1, 3,41(1), (2003).
\item See the American Association of Petroleum Landmen (AAPL) (www.landman.org) for the Onshore JOA 610 and the Offshore JOAs (Shelf 710 and Deep 810), which are the standards for the US oil and gas industry, and the Canadian Association of Petroleum Landmen (CAPL) (www.landman.ca) for the CAPL Operating Procedure, which is the Canadian oil and gas standard.
\item Model International Operating Agreement published by the AIPN available at: www.aipn.org, which is the standard used in the international oil and gas industry.(Visited on 12 Agust, 2014).
\item ICC Case 11663 of 2003, Final Award on Jurisdiction, in XXXII Y.B. COM ARB 60 (2007).
\item \textit{Id.}, at 7-15.
\end{itemize}
AIPN model international JOA, which contained an alternative clause similar to what was in the SMA.

In addition, the tribunal found that the management committee had the right to remove the operator and replace it with another party if it was in material breach of any of the parties’ agreements. In this case, the non-paying party was also the operator and failed to provide a timely letter of credit to the ministry. This case supports the ability of management committees to carry out their responsibilities under industry operating agreements. It also illustrates that tribunals are prepared to grant requests for specific performance (in this case, forfeiture and assignment of a JOA interest) in commercial disputes where damages are an inadequate remedy. Based on this case, it can be concluded that a party that fails to pay its share of project costs and expenses can result in its default of a JOA and an obligation to forfeit and assign its participating interest to the other party(s) that pays the defaulting party’s share.

7.5.2 Farm-out Agreements

International oil companies will often raise capital for exploration work programmes by funding joint venturers through a farm-out. This helps them to spread both the risk and the cost associated with exploration. Farm-outs are usually structured in one of two ways with regard to when a farmer assigns a part of its interest to the farmee: “Farmout agreements traditionally have taken the form either of an agreement to convey or a conditional assignment. The essential difference in the two is the point in time when the farmee acquires an interest in the farmed out property. When the farmout is in the form of an agreement to convey, the farmee obtains its rights only if it performs the conditions made prerequisite by the contract. When the farmout is in the form of a conditional assignment, the farmee obtains an interest in the farmed out property when the agreement is made, subject to an obligation to reconvey or to automatic termination if the conditions subsequent are not performed.”

Traditionally, the term ‘farm-out’ is applied to a ‘drill to earn’ arrangement. What usually happens in the North American oil and gas industry is that the farmee in its; own capacity undertakes either to shoot seismic or to drill a well or several wells (or both) on the farmer’s oil

55 Id. at 48-56.
56 Id., at 69-72.
and gas lease. Once the farmee completes that undertaking,” it has earned its interest in that oil and gas lease. The farmee usually continues to; operate that lease, rather than the farmor resuming its former operator role. These types of arrangement are relatively straightforward in North American operations,; where the land registry systems are efficient and government approval is not required for the transfer of mineral rights. The international oil and gas industry also uses the term ‘farm-out’, but the mechanics of the transaction are handled differently. Quite often, the fannee agrees to provide the funds to the farmor so that the farmor can carry out the agreed-upon operations, while the farmee retains the’ ability to approve or not approve what the operator (ie, the farmor) does. This reflects the legal, political and operational challenges encountered in the international oil and gas business. Failure to take these/differences into account can result in the kinds of dispute described in the Occidental case referenced above is its model contracts. The model contracts developed and published by the AIPN are the main source for confirming business practices in the international oil and gas business.\(^58\)

### 7.6 Individual and Non-Governmental Organisation Disputes

A body of lexpetrolea has developed over the past two decades where individuals and groups, including non-governmental organisations and plaintiff lawyers who represent them, have pursued international oil and gas companies in the US and other courts around the world on charges of human rights and environmental violations. One of the largest and most spectacular cases is the Lago Agrio case against Chevron. This long-running case has been fought in multiple forums, including international arbitration tribunals and the US, European and Ecuadorian courts. It arose from the operations of Texaco (which was acquired by Chevron in 2001) in the Lago Agrio area of the Oriente region of Ecuador between 1964 and 1990. The plaintiffs, who are native Indians, allege that Texaco dumped toxins into the water supply that resulted in the destruction of the local rainforest and physical harm to the indigenous people. In February 2011 a judge in Sucumbios Province, Ecuador, delivered a judgment of $18.2 billion against Chevron. The native Indians are represented by a group of US plaintiff lawyers who are financed by publicly traded investment funds.\(^59\) There have been subsequent legal actions by Chevron in the US and European courts

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58. Supra note 8 at 107.

59. Roger Parloff, “Have you got a Piece of this Lawsuit? The Bette Environmental Suit Against Chevron in Ecuador opens a Window on a troubling New Business : Speculating in Court Cases”, 163: 8 Fortune,69 (June 1 2011) .
against the lead plaintiffs’ lawyers alleging fraud, intimidation of judges, fabricated evidence and criminal collusion. At the time of writing, the case is still unresolved, even though Chevron has recently been successful on several claims dating back to 1991 in a United Nations Commission on International Trade Law dispute administered by the Permanent Court of Arbitration in The Hague.60

The majority of human rights cases have been brought in the United States under the Alien Tort Statute. However, there is an increasing trend of such cases being brought in other domestic courts around the world, such as Ecuador, Colombia and Australia; and before international bodies, such as the committees responsible for the following UN conventions:

- the Torture Convention;
- the Optional Protocol to the International Covenant on Civil and Political Rights; and
- the Convention on the Elimination of All Forms of Discrimination against Women.

Other tribunals responsible for regional conventions are getting involved in similar human rights charges, such as:

- the Convention for the Protection of Human Rights and Fundamental Freedoms, enforced by the European Court of Human Rights;
- the American convention on Human Rights, enforced by the Inter-American Commission; and
- The African Charter on Human and people Rights, enforced by the African Commission.61

Oil and gas companies will likely see a continuing increase in these cases in multiple forums. They therefore need to be aware of developments in this particular area of lex petrolea in order to manage their risks properly.

7.7 Conclusions

Lex petrolea covers a wide area of international law, given the size and significance of the industry. It can be viewed either as the application of international law to the petroleum sector or as a specific legal regime that has evolved to meet the particular needs of the international oil and gas sector- or as both.

60 Available at: www.chevron.com/chevron/presseleases/article/ (Visited on 12, August 2014).
61 Dirimmer, supra note 8 at 133.
The growing development of *lex petrolea* in areas such as boundary disputes, human rights, and environmental claims is more akin to the former—that is, the application of international law to the petroleum sector; whereas the areas of international commercial disputes and state investment disputes are more the latter that is, a customary law of the international petroleum sector that has been adapted to the industry’s nature and specificities. No matter what the view adopted, *lex petrolea* has clearly affected a great deal of international public and private law as we know it today. It is also a law that directly impacts on oil and gas disputes around the world and, subsequently, on how companies and governments conduct their oil and gas operations.