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INTRODUCTION

Host Governments commonly retain ownership of oil and gas resources[1] with the United States and Canada being the few exceptions to this rule.[2] Regardless of the public or private nature of ownership of oil and gas resources, their exploration and production are both a risky and expensive business. Therefore, Host Governments and private owners tend to delegate the exploratory and exploitation rights to a third party with technical and financial resources to undertake such an endeavor. This delegation of powers is commonly given via a granting instrument, which assigns all, part, or none of the ownership and their exclusive rights of the oil and gas resources. In other words, the granting instrument is the "vehicle in which the state's interests in a petroleum deposit is conveyed to the private sector so that the petroleum deposit can thereby be developed."[3]

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1. BERNARD TAVERNE, AN INTRODUCTION TO THE REGULATION OF THE PETROLEUM INDUSTRY: LAWS, CONTRACTS, AND CONVENTIONS 11 (Graham & Trotman eds., 1994).

2. *Id.* at 11. NADINE BRET-ROUZAUT & JEAN-PIERRE FAVENNEC, OIL AND GAS EXPLORATION AND PRODUCTION, RESERVES, COSTS, CONTRACTS 171 (Technip Editions, 3d. ed. 2011).

3. PETER ROBERTS, PETROLEUM CONTRACTS: ENGLISH LAW AND PRACTICE 38 (Oxford Univ. Press ed., 2013).

The granting instruments take one of the following forms: concession agreement, production sharing agreement,[4] service agreement,[5] or a combination of them.[6] This Article does not analyze all of the different types of granting instruments, but focuses on those encompassed by the so-called "tax regime," which are: *concession, license,* and *lease* types of granting instruments. Although these instruments are used interchangeably,[7] they have different connotations, reputations, and implications.

An integrated assessment of granting instruments is needed given the importance of foreign investments in all areas of the economy, including oil and gas. An estimation by the International Energy Agency (IEA) regarding the investments needed to maintain the current energy supply of oil and gas reaches a staggering $11.8 trillion to be spent until 2030.[8] Many of these investments would go into upstream activities, at the basis of which lie granting instruments.[9] Despite the need for consistent investment, there is a significant number of obstacles. These include: (1) overproduction resulting in a decrease of price; (2) the desire of producing countries to exploit their national resources on their own; (3) the pressure

4. Virginia Haufler, *The Natural Resources Trap: Private Investment Without Public Commitment,* 29 REV. POLICY RESEARCH 315 (2012).

5. *Id.* at 316.

6. *See* ANTHONY JENNINGS, OIL AND GAS EXPLORATION CONTRACTS (Sweet & Maxwell 2d ed. 2008); TAVERNE, *supra* note 1; BERNARD. G. TAVERNE, CO-OPERATIVE AGREEMENTS IN THE EXTRACTIVE PETROLEUM INDUSTRY (Kluwer Law Int'l 1996); BERNARD G. TAVERNE, PETROLEUM, INDUSTRY AND GOVERNMENTS: A STUDY OF THE INVOLVEMENT OF INDUSTRY AND GOVERNMENTS IN THE PRODUCTION AND USE OF PETROLEUM (Kluwer Law Int'l 2d ed. 2008); CHRIS THORPE, FUNDAMENTALS OF UPSTREAM PETROLEUM AGREEMENTS (2009); JOINT VENTURES & SHAREHOLDER´S AGREEMENTS (Chris Wilkinson et al eds., 3d ed. 2009); CLAUDE DUVAL ET AL., INTERNATIONAL PETROLEUM AND EXPLORATION AGREEMENTS: LEGAL, ECONOMIC & POLICY ASPECTS (2d ed. 2009); ERNEST E. SMITH ET AL., INTERNATIONAL PETROLEUM TRANSACTIONS (3d ed. 2010); TERENCE DAINTITH ET AL., UNITED KINGDOM OIL & GAS LAW (Sweet & Maxwell 3d ed. 2009).

7. MARC HAMMERSON, UPSTREAM OIL AND GAS: CASES, MATERIALS, AND COMMENTARY 48 (Globe Law and Business 2011). Hammerson also mentions dissenting opinions arguing that production sharing agreements cannot be described, even loosely, as concessions, and fall into the category of commercial contracts.

8. FOREIGN INVESTMENT IN THE ENERGY SECTOR: BALANCING PRIVATE AND PUBLIC INTERESTS 9–10 (Eric De Brabandere & Tarcisio Gazzini eds., 2014) (citing an IEA World Energy Outlook from 2008) [hereinafter FOREIGN INVESTMENT].

9. *Id.*

placed on the governments to address environmental or national security concerns; (4) the lack of a global policy framework; (5) civil resistance and local activism against foreign investment or oil field development; and (6) an increased difficulty in gaining access to resources.[10]

Obstacles are generated by an apparent conflict between the interests of parties involved in the granting instrument, or better put, between the *market (private) values* and the *state (public) values*. Because oil and gas projects are both expensive and risky,[11] investors seek *clarity, stability,* and *certainty* to protect their investment and to guarantee the recovery of capital and profitability of the project. Host countries were initially concerned with their revenues and taxes, but nowadays exhibit more of an interest to increase *control over their resources and retain their right to regulate*. Finally, other stakeholders, such as the local population or community, indigenous groups, and environmentalists, gained momentum. The issues of environmental protection, energy efficiency, preservation of local communities, human rights, corruption, or other aspects of corporate social responsibility add to the list of parties' expectations and further complicate an already complicated framework.[12]

The biggest challenge, however, remains the *balancing of the conflicting interests and values*[13] in a manner that would not deter investors from getting involved, would not deprive the state of its sovereign rights, and would ensure that the societal benefits from the exploitation of its national resources in a transparent manner.[14] Oil and gas history reveals a continuous struggle toward a more equitable distribution of benefits. Several host nations have modified or expropriated several

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10. *Id.* at 13–14.

11. There are three main types of risks associated with oil and gas projects. First is the *discovery risk,* for the existence, size, and quality of the oil field are very hard to anticipate. Second is the *economic risk*, for drilling costs depend on the field's characteristics and not any deposit is commercially viable. Third, there is a *political/sovereign risk*, stemming from the fact that state own their petroleum reserves and their right to expropriate foreign investors is recognized internationally. Haufler, *supra* note 4, at 51.

12. FOREIGN INVESTMENT, *supra* note 8, at 21, 23.

13. Kim Talus, Scott Looper & Steven Otillar, *Lex Petrolea and the Internationalization of Petroleum Agreements: Focus on Host Government Contract*s 5 J. WORLD ENERGY L. & BUS. 181, 185 (2012).

14. It must be emphasized here that the issue of managing and using the generated revenues do not involve the investor as much as the other above-mentioned issues. Regarding this particular matter, the investor is a part of the equation where the society and the state require a higher level of revenues and commitments (e.g., corporate and social responsibility).

host-granting instruments throughout time.[15] Some countries moved from one type of host granting instrument to another, which serves as a strong indication of how difficult it is—if not impossible—to strike a balance. Almost a century after the extensive use of granting agreements in the oil and gas sector, they are still perceived as controversial, inequitable, and unfair.[16]

The main questions addressed are the following: (1) Is there any difference between a concession agreement, a license, and a lease?; (2) What is their legal nature?; (3) What is the interplay between public and private law regarding these granting instruments?; (4) Do the differences between granting instruments matter?; and (5) What are the implications for the parties?

To answer these questions, this Article takes both a comparative and cross-jurisdictional approach to analyzing granting instruments. The comparison is conducted between all three granting instruments and serves to achieve the goal of identifying their legal nature and the implications stemming therefrom. The cross-jurisdictional data is needed to determine whether any of the granting instruments are specific or determined by the legal family or legal system. Where deemed necessary, references to case law, arbitral awards, or specific normative provisions are made.

While petroleum experts may be familiar with granting instruments individual characteristics, the novelty and value of this Article lies with the integrated comparison and its focus on the public versus private law divide encompassed by the chosen granting instruments. Although this is a legal article, it targets a wider audience. On one hand, it offers a concise and structured overview of all challenges posed by the granting instruments' legal nature, making this Article a valuable tool not only for professionals, but also for those wishing to familiarize themselves with the intricacies of petroleum contracts. On the other hand, this Article's transnational coverage makes it relevant beyond the limits set by particular national laws.

This Article is divided into four parts. Part I presents the key definitions and characteristics of these granting instruments. Part II addresses the legal nature of the three granting instruments from both a national and an international perspective. Part III discusses the similarities,

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15. For instance, the Soviet Union nationalized the oil production in 1918, Bolivia in 1937, Mexico in 1938, Iran in 1951, Brazil in 1953, and Iraq in 1961. *See* DANIEL YERGIN, THE PRIZE: THE EPIC QUEST FOR OIL, MONEY, AND POWER, (Simon & Schuster UK Ltd., 4th ed., 2012).

16. Russia's refusal to sign the Energy Charter Treaty was motivated by the treaty's bias towards consumer countries. KIM TALUS, EU ENERGY LAW AND POLICY, A CRITICAL ACCOUNT 454 (Kim Talus ed., Oxford University Press 2013).

distinctions, and implications stemming from the legal nature of the chosen granting instruments. Part IV closes with key findings and concluding remarks.

I. DEFINING GRANTING INSTRUMENTS

Before this Article embarks on the analysis of the legal nature of the three chosen granting instruments and delves into the legal implications stemming out of them, it is useful to first define and identify the characteristics of each instrument.

A. Petroleum Concessions

The petroleum concession is an agreement that grants title of the oil and gas resources (which may include reserves) to the International Oil Company (IOC) that develops these resources. Historically, the agreement conferred exclusive rights within large areas for long periods of time in exchange for a mere obligation to pay some smaller bonuses, annual sums, or royalties. Otherwise, the concession holders were exempted from any taxes or duties, including income and profit taxes.[17] One famous example is the concession granted in 1901 by the Persian government to William D'Arcy (the D'Arcy Concession). This concession granted its holder the exclusive right to explore and develop the entire country (excluding five territories) for a term of 60 years, and it did not impose any tax liability towards the Persian government.[18] Other concessions in countries of the Middle East, such as Iraq,[19] Saudi Arabia,[20] or Kuwait,[21] were similarly long and disproportionate.

The environment created by the first petroleum concessions is no longer in existence. Many nation-states that entered into the traditional

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17. TAVERNE, *supra* note 1, at 33. For instance, the D'Arcy concession established revenues of 16% as a "quid pro quo for complete fiscal exemption." *See* ZUHAYR MIKDASHI, A FINANCIAL ANALYSIS OF MIDDLE EASTERN OIL CONCESSIONS, 1901-65, at 12–14 (F. A. Praeger 1966). The 1925 Iraqi Concession agreement also contained a complete fiscal exemption. *See id*. at 67. The worst situation appears to have been in Kuwait, where the royalty payments were lower than in all neighboring countries, doubled by a complete lack of guarantees. *See id*. at 82–83; *see also* TAVERNE, *supra* note 1, at 41.

18. TAVERNE, *supra* note 1, at 34. *See also* CAMERON PETER, PROPERTY RIGHTS AND SOVEREIGN RIGHTS: THE CASE OF NORTH SEA OIL 11–12 (New York, Academic Press Inc. 1983).

19. MIKDASHI, *supra* note 17, at 105.

20. *Id.* at 80.

21. TAVERNE, *supra* note 1, at 36.

type of concessions have removed the old system and replaced it with one that is more favorable to the host nation. Many social, environmental, economic, and political pressures have forced new versions of concessions along with new types of granting instruments that better serve the purposes of individuals and governments alike.[22] In fact, the abandonment of the old concession system is a product of many developing nation-states asserting their sovereignty and increasing sophisticated political systems.[23] Nevertheless, producing countries such as Brazil,[24] Argentina,[25] and Morocco[26] still use and offer a modernized format of concession systems.

In addition, it is important to mention the classification of concession agreements. The literature identifies two theories concerned with determining the legal nature of concession agreements, which will be developed upon in the following section. On one hand, concession agreements are perceived as *contracts,* which confers upon them a binding character (historical Middle East concessions),[27] meaning unilateral change or termination entitles the aggrieved party to obtain compensation.[28] This interpretation is in *Saudi Arabia v. Arabian American Oil (Aramco)*[29] and *Texaco Overseas Petroleum Co. v. Libya*.[30] In both cases, the arbitrators held that the concessions were more than mere administrative acts subject to the whims of the state. On the other hand, the concessions are perceived as *hybrid forms*—such as administrative contracts, governed by a special set of rules, addressing and

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22. *Id.* at 42–48.

23. *Id.* at 34–35.

24. EDUARDO G. PEREIRA, BRAZILIAN UPSTREAM OIL AND GAS: A PRACTICAL GUIDE TO THE LAW AND REGULATION (Globe Law and Business 2016).

25. EDUARDO G. PEREIRA & FERNANDO FRESCO, LATIN AMERICAN UPSTREAM OIL AND GAS: A PRACTICAL GUIDE TO THE LAW AND REGULATION (Globe Law and Business 2015).

26. EDUARDO G. PEREIRA & KIM TALUS, AFRICAN UPSTREAM OIL AND GAS: A PRACTICAL GUIDE TO THE LAW AND REGULATION (Globe Law and Business 2015).

27. TERENCE DAINTITH, THE LEGAL CHARACTER OF PETROLEUM LICENCES: A COMPARATIVE STUDY 223 (University of Dundee, Centre for Petroleum and Mineral Law Studies 1981).

28. When historical concessions were entered in the Middle East, there were neither petroleum, nor tax legislations in place. The legal framework governing operations was limited to the concession agreement itself. These agreements were of obvious contractual nature.

29. *See* 27 INTERNATIONAL LAW REPORT 117 (Elihu Lauterpracht ed., 1963).

30. *See* 53 INTERNATIONAL LAW REPORT 389 (Elihu Lauterpracht ed., 1977).

imposing limits to the pressing issue of unilateral change, without banning it altogether (France, Germany, Brazil, and to a certain extent, Romania).[31]

The administrative contract, a creation of French law, is subject to the regulatory power of the state and, therefore, allows for modification of the contract pursuant to the state's regulatory powers that would not be allowed between purely private parties.[32] A further interaction between the public and private nature of concessions occurs in certain legal systems, which either require parliamentary approval of the concession, by a specific law or are considering such requirements for their legal system (e.g., Ghana, Tunisia, Iran, and Azerbaijan).[33] In this sense, the concession might become legislation itself and part of the legal system.[34]

B. Petroleum Licenses

Petroleum licenses tend to be *administrative/regulatory acts* granted by the state. This makes them subject to unilateral change, which is a

31. VIBE ULFBECK, RESPONSIBILITIES AND LIABILITIES FOR COMMERCIAL ACTIVITY IN THE ARCTIC, THE EXAMPLE OF GREENLAND, 33–34 (Vibe Ulfbeck, Anders Møllmann & Bent Ole Gram Mortensen eds., Routledge 2016). For details concerning the importance of determining whether the license is a contract or a regulatory act, *see* HAMMERSON, *supra* note 7, at 62–63.

32. *See* HENRY CATTAN, THE LAW OF OIL CONCESSIONS IN THE MIDDLE EAST AND NORTH AFRICA (Willis L. M. Reese, Foreign Parker School of and Law Comparative eds, 1967).

33. *See* Wissem Heni & Amir Shafaie, *Tunisia'a Draft Law on Parliamentary Approval of Oil Contracts: Miss Transparency Opportunity?,* RESOURCE GOVERNANCE (Mar. 15, 2017), https://resourcegovernance.org/blog/tunisia%E2%80%99s-draft-law-parliamentary-approval-oil-contracts-missed-transparency-opportunity [https://perma.cc/2MLQ-T6PU]; Gilbert Ankrah & Richie Osei Asiedu, *Ghana: Parliament to Approve Petroleum Exploration Contract Between Ghana and AGM Petroleum*, ALL AFRICA (Nov. 29, 2013), https://allafrica.com/stories/201312020636.html [https://perma.cc/2GU4-5F97]; Alireza Ramezani, *Iran Closer to Rolling Out New Oil Project Contracts*, AL-MONITOR (Aug. 24, 2016), https://www.al-monitor.com/pulse/originals/2016/08/iran-petroleum-contract-ipc-final-confirmation-parliament.html [https://perma.cc/K9M4-VZEH]; Nermin Rehimova, *Azerbaijan Parliament Ratifies Agreements on "Umid-Babek" Block*, AZ REP. NEWS AGENCY (May 2, 2017, 4:36 PM), https://report.az/en/energy/azerbaijan-parliament-ratified-agreements-on-umid-babek-block/ [https://perma.cc/2Y85-DA9D].

34. *See* sources cited *supra* note 33.

position largely adopted by Western developed countries, such as the United Kingdom,[35] Denmark,[36] Norway,[37] and Australia.[38]

There is no written history of licenses, but in the United Kingdom[39] and Australia, the system was implemented because early efforts to develop onshore deposits were obstructed by landowners who claimed that ownership of minerals followed ownership of the land. This situation still exists in the United States and Canada, as this Article discusses in the following subsection. In the United Kingdom, the government decided to ignore the issue of ownership (onshore at that time) and retained the right to prevent any operations without a license. Such uncertainty might have prevented further oil and gas developments. However, by the introduction of the Petroleum (Production) Act of 1934 (Great Britain) and 1923 (Queensland, Australia), the ownership of mineral resources *in situ* was vested in the Crown and ended any uncertainty about this matter.[40] A similar development occurred in Norway,[41] although it is more recent. Thus, the origin of licenses must be sought in the desire of the national

35. For instance, in 1975, the legislator in the UK decided to amend all licenses' terms by new legislation, namely the Oil Taxation Act of 1975. Today each license is controlled by Model Clauses under which the license was granted, unless the new Model Clauses expressly apply retroactively. Greg Gordon & John Paterson, *Licensing the Exploration for and Production of Petroleum on the UK Continental Shelf*, *in* REGULATION OF THE UPSTREAM PETROLEUM SECTOR: A COMPARATIVE STUDY OF LICENSING AND CONCESSION SYSTEMS 111 (Tina Hunter ed., 2015). *See* Hunter, *infra* note 38.

36. MARTHA M. ROGGENKAMP, ENERGY LAW IN EUROPE, NATIONAL, EU AND INTERNATIONAL REGULATION 419 (Martha M. Roggenkamp, Catherine Redgwell & Iñigo del Guayo eds., 3rd ed. 2016).

37. TAVERNE *supra* note 1, at 58–59.

38. Tina Hunter, *Licensing and Concession System for Developing Australia's Conventional Petroleum Resources, in* REGULATION OF THE UPSTREAM PETROLEUM SECTOR: A COMPARATIVE STUDY OF LICENSING AND CONCESSION SYSTEMS 84 (Tina Hunter ed., 2015).

39. *See id.* at 109. *See also* DAINTITH *supra* note 27, at 201–02: "The petroleum license . . . has had two quite different characters in the United Kingdom: that of a pure instrument of public regulation and that of a grant of public property."

40. Hunter, *supra* note 38, at 82–83. Gordon & Paterson, *supra* note 35, at 108–09.

41. TAVERNE, *supra* note 1, at 61.

government to assert and maintain control[42] over their mineral resources in order to develop the sector.[43]

The petroleum license, like any other granting instrument, is a connection between the State's rights in petroleum resources and a company wishing to exploit those resources. In effect, a license is an administrative permission to take actions as allowed by that license, although its legal nature is not clear. British scholars, namely Greg Gordon and John Paterson, refer to the licensing process as being partly regulatory, partly contractual. Norwegian authors, such as Nordtveit, compare it with individual concessions.[44] The petroleum license is contractual in form because parties sign it and consideration is given.[45] However, it is also regulatory in effect because the object and the methods of transfer are governed by statute. The petroleum license also imposes obligations mainly on the licensee and confers powers on the relevant government.[46]

C. Petroleum Leases

Originally, land ownership covered both the surface and subsurface. Thus, any hydrocarbons would belong to the owner of the land by

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42. *Id.* at 58.

43. "The licensing and concession system has been developed by many states to interact with and govern the conduct of participating oil companies, and to maximize financial gains." Tina Hunter, *Comparison of Access to Petroleum in Developed and Developing Licensing and Concession Systems*, *in* REGULATION OF THE UPSTREAM PETROLEUM SECTOR: A COMPARATIVE STUDY OF LICENSING AND CONCESSION SYSTEMS 395 (Tina Hunter ed., 2015).

44. Gordon & Paterson, *supra* note 35, at 111. Ernst Nordtveit, *Regulation of the Norwegian Upstream Sector*, *in* REGULATION OF THE UPSTREAM PETROLEUM SECTOR: A COMPARATIVE STUDY OF LICENSING AND CONCESSION SYSTEMS 143, n.33 (Tina Hunter ed., 2015). Nordtveit ventures to affirm that in his opinion there is no difference between licenses and concession, which this article deems to be a consequence of the blurred lines between the analyzed instruments.

45. Gordon & Paterson, *supra* note 35, at 111. The contractual form of the license bears important legal consequences. The model form in force at the time the license is granted will govern the relationship between the state and the licensee. However, while in the United Kingdom, it will be (almost) impossible to change by the former without the approval of the latter or recourse to retroactive legislation, while in Norway, conditions will change and new terms will be imposed whenever the Parliament so desires, which means the license will not provide any guarantee of stability of terms. TAVERNE, *supra* note 1, at 58. Such differences between the legal regime applicable to the same granting instrument can only stem from the unclarified legal nature of the license.

46. Gordon & Paterson, *supra* note 35, at 111.

accession. Yet, with regard to petroleum resources, this system is mostly applied in the United States and Canada to private land (excluding federal or state-owned lands); thus, the owner of the land is able to grant leases to any person they choose, typically in return for royalty payments.[47] Even so, the right of ownership is curved by the interest of the state to guarantee the security and preservation of mineral resources.[48] Therefore, the legal relationship between landowners and oil and gas companies is normally based on leases, with various terms across various jurisdictions, but with a similar purpose.

Compared to the license and concession systems, the petroleum lease is a system characterized by minimalist intervention from the state in the development of petroleum resources. Private companies are provided a large amount of autonomy in conducting their operations, while contract law provides for matters related to landowners' rights. However, public leases provide for less flexibility as several regulations apply in such a case. Simply stated, in the United States, petroleum leases on state and federal lands are implemented by regulation so they can look different than the private leases, which are drafted based on custom, historical practice, and contractual freedom.[49]

It is also important to note that Canada and the United States belong to the Common Law tradition, with the exceptions of the regional jurisdictions of Quebec and Louisiana. Nevertheless, a petroleum lease would not fit within the Common Law definition of a property lease. A property lease contemplates the U.S. property for a fee or "rent," requiring the lessee to return the property in virtually the same condition. This is not the case for petroleum leases because the lessee must sever minerals from the property permanently in order to gain value from the lease.

The legal nature of the oil and gas lease is unclear. Most courts treat it as both a *conveyance* and a *contract.* A lease is a *conveyance* because the mineral owner conveys a property right to an oil and gas company to explore for and produce oil and gas retaining a royalty interest in the production. This view is apparent in Canada, where the petroleum lease is

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47. BRET-ROUZAUT & FAVENNEC, *supra* note 2, at 171; MUHAMMED MAZEEL, PETROLEUM FISCAL SYSTEMS AND CONTRACTS 8 (Diplomica Verlag ed., 2010).

48. BRET-ROUZAT & FAVENNEC, *supra* note 2, at 171.

49. Kirstin E. Gibbs, Felipe Alice, Giovanna M. Cinelli, Christopher J. McAuliffe & John Crespo, *Oil and Gas Exploration and Production Law in the United States* LEXOLOGY (Mar. 19, 2019*),* https://www.lexology.com/library/detail.aspx?g=3bb5950e-2259-43cd-9b3e-585e7b44ace4 [https://perma.cc/DM34-BLS].

referred to as a *profit à prendre*,[50] and in the American states of Kansas, Montana, California, Wyoming, and Oklahoma.[51] At the same time, it is a contract because the oil and gas lessee undertakes the right to explore and produce under certain express and implied promises.[52] For instance, in the state of Louisiana, a petroleum lease is merely a contract pursuant to the Mineral Code.[53] There are also views whereby the lease creates a "fee simple determinable estate"[54] interest, such as in Texas. This is because the lease contains a clause that allows the interest to continue indefinitely "as long as there is production" and, therefore, a royalty.[55]

Another peculiarity is that petroleum leases must be authenticated. The lessor's signature must be acknowledged, either before a notary public or with witnesses, and recorded in the public registry for real property in the relevant county, which leads some scholars to advance the idea that the lease is also a "deed."[56] In addition, while in many states consideration is not a prerequisite for the grant of the lease, lessors do receive a bonus upon execution of the lease.[57] These characteristics bring the lease closer to the concessions and licenses.

Establishing the nature of the lessee's interest is of particular importance because it will further determine the nature and extent of the lessee's rights. A *profit a prendre* or a license is incorporeal and nonpossessory. The interest may be abandoned and is not subject to the possessory remedies of trespass and ejectment. Moreover, nonpossessory actions must protect the lessee's interest. Conversely, a "fee simple estate" is corporeal and possessory, for this reason common law rules on abandonment or decommissioning do not apply, but the possessory remedies of trespass and ejectment are available. Additional distinctions arise from the application of statutory provisions regarding taxation,

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50. A *profit à prendre* is a right vested in one person entering upon another's land and taking a profit therefrom. *See* Berkheiser v. Berkheiser [1957] S.C.R. 387 (Can.); 7 D.L.R. 2d 721.

51. JOHN S. LOWE, OIL AND GAS LAW IN A NUTSHELL 187 (West Academic, 6th ed. 2014).

52. JOHN S. LOWE ET AL., CASES AND MATERIALS ON OIL AND GAS LAW 307 (West Academic, 6th ed. 2012).

53. LA. REV. STAT. § 31:114 (2018).

54. LOWE ET AL., *supra* note 52, at 309.

55. *Id*.

56. LOWE, *supra* note 51, at 68. A "deed" is a written instrument by which land is conveyed. At common law, it also means any written instrument that is signed, sealed, and delivered and that conveys some interest in the property. *Deed*, BLACK'S LAW DICTIONARY (11th ed. 2019).

57. LOWE ET AL., *supra* note 52, at 308.

succession, judgement liens, even though the current trend is to treat oil and gas rights as *sui generis*.[58] It is no wonder why both courts and parties commonly misunderstand petroleum leases.

As mentioned above, there are also public leases in North America, such as the lands owned by the U.S. federal and state governments and the Crown Lands of Canada. This private-public ownership issue makes it necessary for petroleum developers to be cognizant of differing laws and regulations that will be at the basis of the lease depending on which sovereign entity owns the land. This partially stems from an interesting sovereignty problem that arose in the United States regarding which sovereign owned the offshore minerals. Ultimately, the United States settled the issue by allowing the states the ability to control some portion of offshore minerals along its coast, but after a certain distance into the coastal waters, the Federal government owns those minerals. Therefore, there are actually many sovereign entities that can be a party to a public petroleum lease in the United States depending on whether the petroleum resource lies underneath state or federally owned lands.[59] Each of these governments will have its own form of lease that addresses the concerns of the public and the need to develop these resources for revenue and industry.

While no minerals are owned by private parties in offshore waters, the same is not true for onshore development. Therefore, it is not unforeseeable to have a private lease and public lease that cover the same petroleum if government and private lands adjoin one another (i.e., unitization). In such a case, petroleum exploration and production companies would need to be abreast of the regulations that control the public lease along with ensuring that the private lease is enough to govern the private parties.

II. THE LEGAL NATURE OF GRANTING INSTRUMENTS

Concession agreements, licenses, and leases are considered a "borderline phenomenon" between public and private law.[60] In the absence of clear international law rules or standards with general applicability to govern them, answers concerning their legal nature need to be found in the national laws of the host state. However, as shown above, these systems vary greatly with respect to the way rights are granted, the applicable legal regime, and the ownership of petroleum. Thus, for any (foreign) investor

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58. *Id.* at 310.
59. *See* Submerged Lands Act 43 U.S.C. §§ 1301, 1331(a), 1332 (2012).
60. ULFBECK, *supra* note 31, at 32.

and the host state, the legal nature of the granting instrument is of utmost importance because it will define their relationship, rights, and obligations, as well as their expectations, and therefore, any kind of comparative analysis of granting instruments must address this issue.

A. Private Contracts, Public Contracts, or Administrative Acts?

As of now, the literature identifies three theories[61] concerned with determining the legal nature of granting instruments. According to the first theory, granting instruments can be perceived as *administrative/regulatory acts*—such as (exclusive) licenses granted by the state that makes them subject to unilateral change or termination if public interest so requires. This position is largely adopted by Western developed countries such as the Netherlands, Denmark, Norway, and the United Kingdom.[62] The second theory regards granting instruments as *contracts*, which confers on them a binding character (historical Middle East concessions),[63] meaning unilateral change or termination will entitle the aggrieved party to obtain penalties. The third theory considers them *hybrid forms*—such as administrative contracts—governed by a special set of rules addressing and imposing limits to the pressing issue of unilateral change for public utility[64] without banning it altogether. This is the case in France, Germany,

61. *Id.* at 33–34. For details concerning the importance of determining whether the license is a contract or a regulatory act, *see* Hammerson, *supra* note 7, at 62–63.

62. Terence Daintith, *Contractual Discretion and Administrative Discretion: A Unified Analysis*, 69 MODERN L. REV. 555 n.4 (2005). The UK license, although contractual in appearance, is regulatory in nature. The United Kingdom has one of the oldest petroleum legislations in the world. The first act was implemented in 1918, amended in 1934 and further consolidated in 1998. The chosen model to this day is exploitation of resources based on an exclusive license from the government (administrative permission.) DAINTITH, *supra* note 27, at 200.

63. DAINTITH, *supra* note 27, at 223. The governing legal framework of the traditional concessions was contractual. In the absence of dedicated petroleum legislation, the parties had to resort to the only legal instrument available: their agreement.

64. Cristina Ionaş, *The Administrative Agreement as a Legal Form for Public Services in Comparative and Roman Law*, 5 BULL. TRANSILVANIA U. BRAŞOV: SERIES VII: SOC. SCIS. 103, 104 (2012); Adriana Magdalena Sandu & Maria Sofia Pagarin, *Study on Administrative Contracts*, 4 CONTEMPORARY READINGS L. & SOC. JUSTICE 903, 905 (2012); *see also* Elena-Mihaela Fodor, *Public Services and Private Law*, ACTA UNIVERSITATIS LUCIAN BLAGA IURISPRUDENTIA 228–32 (2012)

and to a certain extent, Romania and Brazil, but also Egypt and French law tradition Arab countries.[65]

Al Qurashi and Talus take the view that the modern concessions (in opposition to the historical ones) are "public law contracts"[66] given the fact that "they are regulatory in substance, their regulatory components being predominant vis-à-vis the contractual elements,"[67] which would increase the political risk for foreign investors, due to the possibility that the State could use its powers to unilaterally amend the "carefully negotiated equilibrium."[68] Talus does not exclude the possibility that these agreements may be administrative contracts as well with a clear reference to the French system.[69] He outright rejects the possibility that they are private law or international contracts, without proposing a detailed explanation, rather stating that "[t]hey are part of the national legal and administrative system of the host State and allow a foreign company to invest in a country."[70]

Other views are not so straightforward. Given the lack of clarity regarding the legal character of licenses issued under Norwegian law, a pure distinction between private and public law rules was dismissed as "clearly untenable."[71] A production license is a contract in the sense that it provides evidence of an agreement between the licensee and the government, but it is also a grant by the government subject to public administration legislation. However, it is emphasized that regarding the license as a contract does not necessarily mean that contract rules are applicable. Similarly, regarding it as a public administrative act does not necessarily exclude private law rules.[72] The legal relationship is a hybrid one ("a legal bastard in the sense that both public and private law are applicable but to different aspects of the relationship"),[73] because of which the question of status is deemed one of terminology rather than of substance.[74] This standpoint seems to equate the license with the French administrative contract, which would also fit Talus's divide between public

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65. Zeyad A. Al Qurashi, *Renegotiation of International Petroleum Agreements*, 22 J. INT'L ARB. 261, 274 (2005); Fodor, *supra* note 64, at 289.

66. Al Qurashi, *supra* note 65, at 263; Talus, Looper & Otillar, *supra* note 13, at 183.

67. Al Qurashi, *supra* note 65, at 263 (citing Bernardini, n.7).

68. *Id.* at 263.

69. Talus, Looper & Otillar, *supra* note 13, at 183 n.12.

70. *Id.* at 183, 192.

71. DAINTITH, *supra* note 27, at 192.

72. *Id.* at 191.

73. *Id.* at 192.

74. *Id.* at 193.

and administrative contracts, but it is still far from providing a fully satisfying explanation.

An argument similar to the one above may be made for public leases. Like the production license, the public lease is a contract in the sense that it provides evidence of an agreement between the licensee and the government, but it is also a grant by the government subject to public administration legislation. It is also arguable that the lease is more of a legal hybrid. The express terms of the United States federal lease always govern during the lease, as would be expected under private contract principles. However, the rules and regulations that the leaseholder is subject to are subject to change after the granting of the public lease.[75] This concept and the consequences will be further explored later in the paper.

The matter is more complex than it appears at first sight for *the line between private and public law is blurred in certain jurisdictions*, such as the United States and Canada. Here, the real property owner has the right to exploit the petroleum located beneath the property.[76] This weakens the distinction between private and public ownership of petroleum (especially for private leases).[77] However, public leases might provide a closer connection between the private and public nature of a granting instrument.

Carmen Otero García-Castrillón claims that the contractual nature of the lease cannot be doubted and that any divide between public-administrative and private contracts is completely irrelevant due to the fact that concession agreements belong to a "purely international category," and international law does not distinguish between such categories as national law does.[78] This position is backed by three Libyan arbitration awards: *British Petroleum Company Limited v Government of the Libyan Arabic Republic* (1979), *Texaco Overseas Petroleum Company/California Asiatic Oil Company and the Government of the Libyan Arabic Republic* (1979), and *Libyan American Oil Company v Government of the Libyan Arab Republic* (1981), which built on the assumption that from an international perspective, a concession qualified as an administrative contract under Libyan law is always a contract.[79]

75. *See* the language of the Form BOEM-2005, (Feb. 1, 2017); *see also* Century Expl. New Orleans, LLC v. United States 110 Fed. Cl. 148, 182 (2013), *aff'd*, 745 F.3d 1168 (Fed Cir. 2014), *cert. denied*, 135 S. Ct. 1175 (2015).

76. It should be kept in mind that it is possible for the mineral resource estate ownership to be severed and reserved from the surface estate in the United States.

77. HAMMERSON, *supra* note 7, at 36.

78. Carmen Otero García-Castrillón, *Reflections on the Law Applicable to International Oil Contracts,* 6 J. WORLD ENERGY L. & BUS. 129, 131 (2013).

79. *Id.* at 131, n.7.

Accordingly, it is difficult to determine the precise legal nature of each granting instrument as the legal system behind such instrument might determine if it should be a private arrangement, public contract, or a hybrid form. Another ambiguity refers to the application of national, international, or customary law to such arrangement, which will be discussed in the following section.

B. National, International, or Customary Law?

From a purely doctrinal perspective, a contract between a state and a private entity was less likely to be directly governed by international law, even if the private entity was a foreign one. Public international law was commonly applied to inter-state relations[80] as private parties were considered to lack standing under international law.[81] This view is no longer valid due to the development of international investment law. Moreover, the "foreign element" was not significant enough to change the national character of the granting instrument. By making an investment in a foreign country, one submits to the national law of that specific host state.[82] Among reasons thereof, one may mention (1) that the tender procedure is governed by national law; (2) that the granted area is part of the territory of the host state; (3) that the legal rights deriving from the granting instruments stem in most cases from the host state sovereign powers; (4) that all activities are performed in the host state; (5) that many times activities are performed through a special purpose vehicle that will be incorporated under national law of the host state; and (6) that local laws and standards apply with respect to tax, environment, and labor. Nevertheless, many granting instruments refer to best industry practices, which also involve international standards. In addition, the host granting instrument might be affected by the indirect application of international laws, such as the laws of the sea, environmental standards, and human rights protections.[83]

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80. IVAR ALVIK, CONTRACTING WITH SOVEREIGNTY: STATE CONTRACTS AND INTERNATIONAL ARBITRATION 3 (2011). *See also* Al Qurashi, *supra* note 65, at 278.

81. ALVIK, *supra* note 80, at 47. The author refers here solely to legal standing arising out of a contract. Otherwise, private entities might have rights and obligations under international law stemming from investment treaties, criminal acts, or in connection to observance of human rights.

82. *Id.* at 3.

83. For a detailed analysis of the logic that would argue for choosing the law of the host state, given the close links with the contract, *see* Otero García-Castrillón, *supra* note 78, at 138–40. Nevertheless, one must mention here that a

Despite disagreements on the international character of petroleum agreements, most authors agree there is a process of internalization concerning them. The main rationale refers to their purpose which is directly related to stimulating foreign direct investments and alleviating the worries of investors with respect to the concomitant political risk,[84] by creating a "reliable concept of state commitment."[85] For this purpose, and with the wide support of the arbitral practice (including both commercial and investment arbitration), a purely national matter was extracted from the coverage of national law and national courts and brought into the ambit of international law and investor-state arbitration.

There are two aspects to this phenomenon. On the one hand, it is the intangibility of arbitral practice, achieved through the New York Convention or the ICSID Convention,[86] which essentially might "force" national courts to recognize and enforce arbitral awards. However, such enforcement is subject to the compatibility with their legal system combined with the possibility that the national court might be less familiar or with higher constraints to review such awards on their merits. These might enable arbitral tribunals to rely less on national rules when it comes to substantive law and conflict of laws and focus on practices and customs of international commerce.[87] On the other hand, there is a complex construct by which a contract between a State and a private investor is turned into a binding agreement under international law (a set of principles

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granting instrument might be subjected to international law in various occasions such as a disputed area or stemming from international environmental laws or industry standards.

84. Talus, Looper & Otillarp, *supra* note 13, at 192. *See also* ALVIK, *supra* note 80.

85. ALVIK, *supra* note 80, at 3.

86. *See generally* Convention on the Settlement of Investment, Oct. 14, 1966, 575 U.N.T.S. 159.

87. *Id.* at 26–27. It was emphasized that internationalization of contract could find its limits in the imperative norms and the public order of the host state's courts, however, this phenomenon is on the verge of disappearance, especially since under the ICSID Convention, public order has been removed from the reasons that could be used to challenge the enforceability of arbitral awards. *See also* Otero García-Castrillón, *supra* note 78, at 138. As the matters related to international commercial arbitration exceed the purpose of this paper, they will not be developed upon further.

and practices which some refer to as *lex petrolea*)[88] based on a direct or indirect resolution of the parties thereof.[89]

Both aspects of the legal theories on which internationalization of petroleum agreements are based deserve more attention. The contractual and arbitral practice on which the concept of internationalization developed is based on the traditional concession agreements granted to Western companies in the Middle East at the beginning of the twentieth century and later in the 1950s or 1960s. These contracts, although set in a local legal vacuum and grossly unfair to the host states,[90] were deemed extremely risky for the investors. In response, the contracts brought them under the umbrella of international legal order and *disconnected* them from the legal systems of the host states, *via* express provisions in favor of international arbitration and choice of international law corroborated with stabilization clauses. Given the principles of party autonomy in contracting and the doctrine of separability of the arbitration clause, arbitral tribunals enjoyed competence to decide on their "own" jurisdiction and could base their awards on international law.[91] Today, the wide adoption of the ICSID Convention facilitates resorting to international law by providing a dispute resolution mechanism between foreign investors and States based on the model of international commercial arbitration, with a clear, explicit basis thereof.[92]

Besides the above, arbitral practice seems to also be responsible for the creation of a specific legal regime meant to govern petroleum transactions involving a cross-border element.[93] This legal regime, *lex petrolea*, is a specific type of *lex mercatoria*, meaning a mélange of general principles of international law and customary law applicable only to the petroleum sector.[94] Whether one agrees that a *lex petrolea* exists or not is open to debate. However, what is undeniable is that in their pursuit for a balanced legal regime applicable to granting instruments, both the "parties, through contract clauses, and arbitrators, through the application and interpretation of contract clauses, have given a considerable role to the

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88. Otero García-Castrillón, *supra* note 78, at 138. *See also* Talus, Looper & Otillar, *supra* note 13, at 189.

89. Otero García-Castrillón, *supra* note 78, at 138. *See also* ALVIK, *supra* note 80, at 25, 30.

90. Talus, Looper & Otillar, *supra* note 13, at 186.

91. ALVIK, *supra* note 80, at 30–41.

92. *Id.* at 42.

93. Talus, Looper & Otillar, *supra* note 13, at 189.

94. Otero García-Castrillón, *supra* note 78, at 145.

'internationalization' of the underlying legal relationship, and, therefore, to the definitive *'privatization' of state contracts*."[95]

Nevertheless, the petroleum sector is one of the most regulated due to a wide variety of public interests surrounding it, including environmental protection and national security, and most of the norms governing granting instruments have imperative character.[96] Assuming that all of the above is possible, and granting instruments do become somehow private, the question is this: how does the state get downgraded from a public international law sovereign to a mere business "partner" with limited to no regulatory powers?

Ivar Alvik suggests that the privatization of the agreement between state and IOCs is achieved when "the state surrendered its sovereign prerogatives vis-à-vis its co-contractors"[97] by resorting to a contractual mechanism designed to restrict its ability to repeal or modify a contract *via* subsequent legislation, namely a stabilization clause.[98] But, as Alvik rightfully points out, this theory fails to confront the substantive issues it addresses: can the reference to international law, general principles of law, or other international standards "lift the contract into the sphere of application of the principle of *pacta sunt servanda* to neutralize the legislative sovereignty of the state concerned?"[99] This Article would further ask: is the contract actually *lifted* from the sovereign powers of the state into a *private binding agreement*, or is it actually *downgraded* to one? The question is useful to reveal the *legal theory* created by arbitral practice and its paradox: if the relationship between the state and the foreign investor is a vertical one, then national law should apply, and the state can make use of its sovereign powers to amend the granting instrument as its public interests deem fit which might be subject to compensation and other legal protections for investors. However, if the relationship between the state and the foreign investor is a horizontal one, then international law should not apply because private entities are not commonly subject of international law.[100]

A similar issue concerning the interplay between private and public law is present in cases of expropriation for public utility. International law does not define public purpose. What constitutes public purpose varies

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95. *Id*. (emphasis added).
96. *Id*. at 146.
97. ALVIK, *supra* note 80, at 54.
98. *Id*. at 56.
99. *Id*.
100. Recently, however, private entities have been made subject to international law in regard to observance of human rights and environmental obligations.

from national security to social and economic reasons, all superseding private interests. Nevertheless, the generally accepted freedom of states to define what constitutes public interests did not preclude arbitral tribunals from scrutinizing their decisions and verifying whether the measures were reasonable and proportionate with the public objective pursued. The question is: which standards should arbitral tribunals assess the necessity of expropriation? Given that the decision of the state to expropriate is a sovereign one and that public interest varies from one state to another, the obvious answer is that the criteria employed by arbitrators should be those established by the national law of the respective state.

However, the vast majority (although not the unanimity) of arbitral practice is of the opinion that expropriation is only justified if it is necessary and no alternative measure is available.[101] There is one arbitral award where the arbitrator clearly stated that the justification of expropriation should not be a matter of concern for arbitral tribunals. Thus, in *Libyan American Oil Company v Government of the Libyan Arab Republic*,[102] the sole arbitrator took the view that "motives (for nationalization) are indifferent to international law, *each state being free to judge for itself what it considers necessary for the public good* . . . . The objectives pursued by it is of no concern to third parties."[103] Although this view was not embraced by other awards, the arbitrator's logic is sound and in accordance with the sovereignty of the State.

As previously noted, the legal nature of granting instruments is far from being settled. Leases, licenses, and concessions remain difficult to confine within the clear boundaries of national and international rules, or within those of private or public law. The large arbitral practice developed does not provide a unanimous answer, however, it does underline a trend towards internationalization of granting instruments. The legal implications are addressed in the following Part.

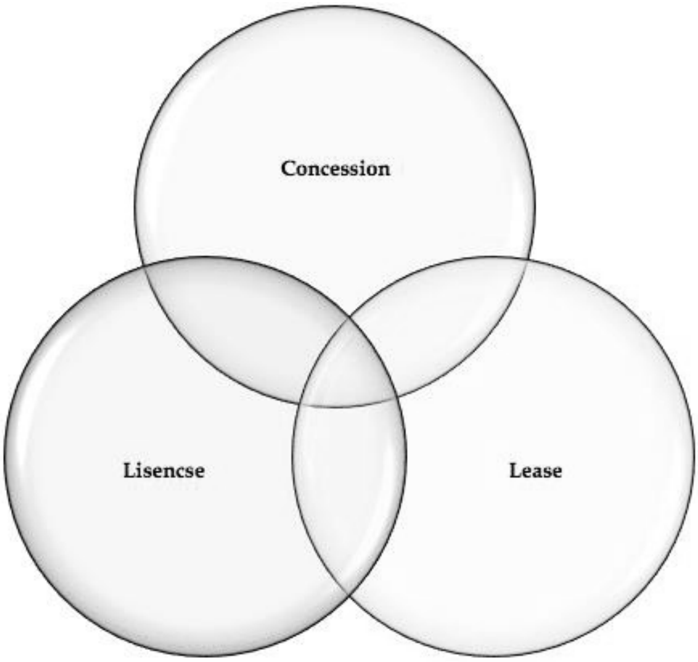
III. LEGAL IMPLICATIONS STEMMING FROM THE TYPE AND LEGAL NATURE OF THE GRANTING INSTRUMENT

In principle, the chosen type of granting instrument is not of great importance, what does matter for both the Host Government and the oil and gas companies are the terms and conditions agreed upon. Nevertheless, the granting instruments contain different implied terms, powers, and protections for the parties involved.

101. Otero García-Castrillón, *supra* note 78, at 154.
102. Libyan Am. Oil Co. v. Gov't of the Libyan Arab Republic, (Apr. 12, 1977) 20 I.L.M 1.
103. *Id.* at 58 (emphasis added).

A. Similarities and Distinctions between the Granting Instruments

At times, leases, licenses, and concessions greatly differ in the rights granted, while at other times they are nearly identical to one another, depending on the jurisdiction. It may be useful to think of these granting instruments in a Venn diagram since each instrument will have both common and distinct traits from each other.



The precise differences and similarities might vary in accordance to the terms agreed upon and based on the national law governing the relevant granting instrument. The table below presents the key similarities and distinctions between them as follows:

	Concession	**License**	**Lease**
Legal nature	Hybrid, but mostly contract	Hybrid, but mostly regulatory	Hybrid, but mostly contract
Public or private law instrument	Hybrid, but mostly private	Hybrid, but mostly public	Mostly private
Legal system	Commonly less developed	Commonly more developed	Commonly more developed

	Concession	**License**	**Lease**
Reputation	Commonly in favor of investors	Commonly in favor of the state	Possibly neutral
Reserves ownership	Commonly Host Government	Commonly Host Government	Host Government and/or Private
Production ownership	Commonly Private	Commonly Private	Commonly Private
Exclusive rights	Commonly yes	Commonly yes	Commonly yes
Non-Exclusive rights	Possible, but not common	Possible	Possible
Registration	Not common	Not common	Potentially mandatory
Multiple granting instruments over different layers of the block	Not common	Not common	Commonly yes
Duration	Commonly fixed, but possible to extend	Commonly fixed, but possible to extend	Possible to keep it until last production
Work program	Commonly fixed	Commonly fixed	Commonly fixed
Signature bonus	Commonly yes	Not common	Commonly yes
Royalties	Commonly yes	Not common	Commonly yes
Stabalization	Not common nowadays	Not common	Not common
Confidentiality	Commonly yes	Not common	Commonly yes
Different instruments for exploration, development and production	Possible	Possible	Possible

The table reveals that the three granting instruments are characterized by more commonalities than differences. The latter, however, concerns the legal nature of the instrument (regulatory, contractual or both), the governing legal framework (private, public, or a mixture), and the issue of sanctity of contract. Thus, they will constitute the focus of the following subparts.

B. Petroleum Concession

The concession is in many regards a contract, so its benefits and disadvantages are readily apparent when viewed through a bilateral contractual lens. Unlike the license regime, the provisions of a concession are generally negotiable, and in theory, easier to adjust should such a need arise. Historical concessions were not constrained by legislation, which led to more flexibility. This flexibility is crucial in areas that have not been explored before or which might pose potential unforeseeable challenges to the relevant stakeholders.[104] Should an issue arise, it can be dealt with far quicker than by changing legislation and with fewer risks than by administrative intervention (unilateral modification). Additionally, being able to negotiate the provisions allows the concession to reflect the realities of where this type of agreement is commonly seen. This is where a concession can be particularly valuable since the concession can be used to supplement legal gaps in petroleum resource development, or even a complete lack thereof.

Nevertheless, there can be challenges when using a concession as a granting instrument. First, reliance on a negotiable contract (concession) as the primary instrument granting and defining rights leads to less reliance on the laws of the host nation, even though this no longer tends to be the case in modern concessions.[105] Second, concessions were poorly negotiated in the past from the perspective of the governments granting these instruments due to lack of bargaining power and experience,[106] employment of bribes, lack of or inadequate framework, international pressure in the form of military intervention, and economic embargo. While most Host Governments have gained back the bargaining power, they still face the risk of just being unskilled negotiators in granting the

104. Haufler, *supra* note 4, at 58.

105. Nicholas Miranda, *Concession Agreements: From Private Contract to Public Policy*, 117 YALE L.J. 510, 539 (2007). As an example, Miranda refers to the case where an oil and gas concession, although not prohibiting the state to pursue alternative energy sources, may end up dissuading the government from pursuing such options. *Id.*

106. Petroleum investments are large and *highly specific* in nature, requiring a great deal or resources and specialized experience which the host state might not possess (emphasis added).

concession. Poorly negotiated concessions can leave the government short of its resource development goals.[107] While a petroleum company may not think that this affects them, an optically poor concession could place the government in a difficult spot politically and might encourage future renegotiation.[108]

Furthermore, negotiations can lead to concessions with varying provisions. This is more of a challenge for the government rather than the oil and gas company. The varying provisions require more government resources to be used for oversight and administration, one consequence of this being a more difficult implementation of the concession.[109]

Three characteristics worth addressing are discretion, confidentiality, and the stabilization and sanctity of contracts. The first—*discretion*—is concerned with the fact that a very small group of people might be deciding the provisions of the concession, behind closed doors, as opposed to a legislative body, where the concession system could be developed in a wider public forum and could be subjected to parliamentary approval.

When only a small group of individuals takes part in decision-making, the risk of corruption and short-term prioritization at the expense of future generations[110] undoubtedly increases and may result in failure to generate optimal levels of revenues.[111] This is not what companies or governments desire in today's business environment especially in light of the United States' Foreign Corrupt Practices Act and the United Kingdom's Anti-Bribery Act, expanding criminal liability of companies to actions performed in foreign countries.

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107. Both parties of an oil and gas concession stand to profit when a commercial discovery is exploited. However, some companies engage in exploration operations to diversify their resource pool and are not interested in commercial exploitation right away. Market prices may also act as a deterrent to commercial exploitation. However, such business decisions affect the state revenues and expectation for return from the discovery made.

108. Where concession holders fail to recoup investment or to make a profit on the investment due to market conditions, they usually push for changes in the concession's terms—modification of revenues, taxes, and prices, thus asking for state's support. The alternative is a disruption in provided services, which would require a retender and a replacement of concessionaire. This would not be in the interest of the state or of the stakeholders. As such, renegotiations are often a "necessary evil" in ensuring the continuation of the economic viability of a project. Miranda, *supra* note 105, at 525–26.

109. FED. MINISTRY FOR ECON. COOPERATION & DEV., NATURAL RESOURCE CONTRACTS AS A TOOL FOR MANAGING THE MINING SECTOR 12 (2015).

110. Haufler, *supra* note 4, at 58.

111. Miranda, *supra* note 105, at 521.

Confidentiality is another key factor. Considering that natural resources tend to be public ones, the government might have a competing interest in the confidentiality of a concession. The government might desire to keep the terms of each concession secret to not lose bargaining power in future negotiations with oil and gas companies, but they must also consider the public's interest in knowing the provisions of the concession since governments derive legitimacy from the public opinion.[112]

The position of oil and gas companies varies depending on whether they have already obtained the granting instrument. If they have a granting instrument, then they might have an interest in keeping the provisions confidential. However, if they do not have one, their interest is, at least initially, in knowing how far the government will negotiate. Today, many governments are more transparent and readily publish these agreements on a government website or through a third party, such as The Extractive Industries Transparency Initiative.[113]

Finally, stabilization based on the principle of sanctity of contract (*pacta sunt servanda*) is of particular importance to oil and gas companies negotiating with governments. In principle, concessions could secure a stabilization provision in a mutually binding arrangement. Stabilization is one of the first arguments raised if the government tried to change unilaterally the provisions of the concession. In the same vein, the government could make the same argument when the company inevitably requests changes in the concession, although this possibility rarely occurs in practice.

C. Petroleum License

As previously discussed, a license derives from the legislation of the host nation, consequently making the legislation the primary instrument that governs the parties' relationship. There are several benefits stemming from this. First, a legislatively defined license decreases opportunities for corruption for both the sovereign and the oil and gas company. Terms and provisions that stray from the legal norm—if not prohibited already—will undoubtedly require a logical explanation, therefore disincentivizing bad actors. Secondly, because the legislation and regulations that surround the

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112. FED. MINISTRY FOR ECON. COOPERATION & DEV., *supra* note 109, at 25.

113. "The Extractive Industries Transparency Initiative (EITI) is the *global standard* to promote the open and accountable management of oil, gas and mineral resources." (Emphasis added). EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE, https://eiti.org/explore-data-portal [https://perma.cc/8A4M-4Y5X] (last visited on Aug. 15, 2019).

license are normally public information, there is more public oversight of the licensing process and its provisions.[114] Therefore, both parties should be more conscious of the optics of the rights granted by a license.

To tie both benefits together, licenses need to be administered by a governmental body. This body will have to act within the limits of the legislation leading to a greater "security of tenure"[115] for the oil and gas companies. This helps oil and gas companies feel more comfortable in investing their own capital along with securing any outside capital to extract the petroleum resources to the extent such government does not abuse its powers.

With consistent terms and conditions, the governmental authority has a lighter burden with respect to oversight of multiple licenses in effect at any given time. Supervision and control are centralized and strengthened, experience increases, while management costs are reduced, all converging to increase efficiency. This is simply because it is easier to administer uniform provisions than a variety of provisions found in multiple agreements, which is the case in different concession agreements.[116]

Licensing regimes also have downsides for both parties. The same reason that governments and oil and gas companies benefit from a licensing regime—legislation—can also lead to difficulties. For example, because most of the provisions derive from legislation, there is little room for flexibility. From a government perspective, this can lead to it being unable to respond quickly and adequately to changing economic, technological, and market conditions. Conversely, oil and gas companies could also be constrained by not receiving the more flexible provisions when necessary (if applicable). This leads to another disadvantage of licensing regime: the reliance on legislative action. It is common that legislators might be slow in enacting legislation. This can cause a host nation to fall behind in legal developments and better legal practices in the face of advancing technology and global practices. This type of issue can be contracted around in concessions and leases as long as it is not contrary to existing laws.

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114. COMMONWEALTH SECRETARIAT & INT'L COUNCIL ON MINING & METALS, MINERAL TAXATION REGIMES 9 (2009).

115. This refers to the operator knowing: "(1) he has sufficient time to carry out exploration and/or mining operations; (2) after discovering a deposit, he also has a virtual automatic right to mine what he has discovered; and (3) there are clear and objective cancellation procedures of one's concessions." *See* Chaim Even-Zohar, *Upstream Mining Risks: Security of Tenure*, IDEX (Jan. 3, 2008), http://www.idexonline.com/FullArticle?Id=29230 [https://perma.cc/L3DB-3EAR].

116. FED. MINISTRY FOR ECON. COOPERATION & DEV, *supra* note 109.

These challenges are inherent to the license regime, notwithstanding whether the system was well-built or not. To implement a license, the host nation must spend significant time and political effort building a comprehensive and comprehensible regime, something with which it may have little experience. This may constitute the reason why licenses are common in developed countries—the United Kingdom, Norway, and Denmark. As mentioned above, the law does not operate in a vacuum; political, economic, and technological changes are constant. This necessitates the updating of laws by the legislature, and the consequences of failure to do so can lead to some of the disadvantages discussed.

Lastly, even if the legislature timely makes updates to the petroleum-licensing regime, there is difficulty in applying laws already in effect to the licenses, even though it might be possible to do so without any previous compensation. On one hand, if there is *no retroactive effect*, the administration of such licenses becomes more burdensome and the impact of legislation might be minimum, as it will not touch upon licenses in force. On the other hand, if it is *retroactive,* license holders are forced to accept different conditions than originally agreed, which might affect the investment and its profitability, leading to potential disputes as retroactive legislative changes are similar in effect to unilateral changes in a contract of adhesion. These are all aspects that license holders should contemplate.

D. Petroleum Lease

Petroleum leases are quite peculiar as they often refer to private ownership, which is less likely to exist in a concession or license regime. In this way, it is possible to suggest that a petroleum lease is closer to a petroleum concession due to its contractual nature. This is particularly true for private petroleum leases as compared to public leases, which are crucial to the United States offshore petroleum development. The public nature that affects a petroleum concession does not affect a private petroleum lease. However, a public lease does have a public nature in the United States, thus resembling a license agreement in several ways.

A private petroleum lease could have the most flexible terms among all granting instruments due to its private nature. Unlike other jurisdictions, this is partially the reason why onshore shale gas managed to grow quickly in the United States. The lease provides both private ownership and flexibility to adjust contractual terms to an extent acceptable to all parties. However, such type of agreements might be less transparent and possibly with less involvement of public policies and procedures in comparison to the other granting instruments.

In addition, the fact that a private petroleum lease is called a "lease" can bear consequences and lead to confusion. To tackle them, well-drafted statutes will provide that the petroleum lease is not included in the scope of the regulation or statute because of the previous difficulty with equating the common lease with the petroleum lease.

As mentioned, not all petroleum leases involve private individuals. Both private and public leases are subject to statutes and regulations. However, unlike a private lease, under a public lease not only are basic contractual principles applicable, but also voluminous laws and regulations on how the government will interact with the private lessee now and in the future are applicable. Further, the public lease subjects the private lessee to less stability for any issues other than those expressly stated in the lease as illustrated below.

The largest landowner is the United States. The United States Bureau of Land Management (BLM), oversees 248.3 million acres of public land and administers about 700 million acres of federal subsurface mineral estate throughout the nation.[117] Considering the government is representing people who hold a variety of opinions, the public leasing process must balance environmental concerns and safety concerns against the billions of dollars that is generated by production of oil and gas on these public lands. The United States government does this with a surprisingly short petroleum lease.

The BOEM Gulf of Mexico Oil and Gas Lease is only four pages long. This indicates that there are matters that are not expressly written in the lease itself but are provided by law. The United States federal government's oil and gas lease is very much like the ones between private parties in principle and its core function except that it incorporates the regulations "promulgated pursuant thereto, and other statutes and regulations in existence upon the effective date of a federal lease, and those statutes enacted and regulations promulgated thereafter."[118] The lease form is clear that only explicit terms of the lease are not subject to change. Importantly for the government, this language and its effects on the parties was held to be valid prospectively and retrospectively in *Century Exploration New Orleans, LLC v. United States,*[119] a post *Deepwater Horizon* case where Century Exploration New Orleans sought to challenge the new oil spill bond amounts required by the Department of Energy being applied to existing leaseholders. It is through this incorporation of

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117. CAROL HARDY VINCENT ET AL., CONG. RESEARCH SERV., RL42346, FEDERAL LAND OWNERSHIP AND DATA (2017) (this is noted in the Summary).

118. Form BOEM-2005 (Feb. 1, 2017).

119. 110 Fed. Cl. 148, 182 (2013), aff'd, 745 F.3d 1168 (Fed Cir. 2014), *cert. den'd*, 135 S. Ct. 1175 (2015).

statutes and regulations that the four-page lease can govern some of the most complicated and expensive drilling operations in the world.[120]

However, just because the government can incorporate future changes to the law and regulations in a lease that was previously granted does not mean the government is free to ignore its obligations to a private lessee. In *Mobil Oil Exploration,*[121] the E&P companies successfully argued the repudiation of their lease by the government and therefore were entitled to their fees paid to the government when the government refused to grant the permits necessary to conduct their exploration and production activities off the North Carolina coast.

A public lease also goes through a somewhat complex process in being awarded to oil and gas developers. In this way, the granting instrument looks very similar to the license and concession. For example, the United States government requires an environmental statement before a notice of proposed sale to the public and before it enters the bidding system.[122] The legislation allows for these bids to be in the form of cash payments, royalties, or a combination.

It should be noted that in public leases one refers to "legislation allows" because it is through the legislation that administrative bodies derive their power to make leasing decisions. While there is freedom to make decisions as an administrative agency, such an agency must be careful to stay within those granted powers or face judicial scrutiny from the leasing party or members of the public in general. This constraint on the administrative party is not something that is seen on private parties. While there are clearly laws that regulate the private oil and gas lease, these laws are more in line with public order and resource management concerns. Therefore, because there is considerably more freedom to contract, the private lease will contain sections and clauses to deal with a plethora of possibilities that are not necessary or desired by the government considering those same possibilities will be addressed by laws and regulations.

Simply stated, unlike a private lease, the public lease is governed by basic contractual principles combined with a large body of laws and regulations that mold how the parties interact with one another at the time of rights granting and after granting the public lease. In this sense, a private

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120. Dana E. Dupre, *What Makes the United States Offshore Leasing System So Special? A Primer on the Outer Continental Shelf Oil and Gas Lease*, 4 LSU J. ENERGY L. & RESOURCES 37 (2015).

121. *See* Mobil Oil Expl. & Producing Southeast, Inc. v. United States, 530 U.S. 604 (2000).

122. JOSEPH TOMAIN & HON. RICHARD CUDAHY, ENERGY LAW IN A NUTSHELL 257 (West Academic, 2nd ed., 2011).

lease is closer to a petroleum concession and a public lease is closer to a petroleum license.

CONCLUSION

Concessions, licenses, and leases are commonly used throughout different regions around the world. All these instruments suit different jurisdictions, but the precise terms and conditions, their legal nature, and the public-private law divide, impact the host nation and the oil and gas company's rights, obligations, and expectations. By resorting to a comparative analysis of the three granting instruments, this Article offered a systematic and integrated view of their similarities, their distinctions, and the concomitant consequences.

One cannot deny that, at their core, these granting instruments tend to be similar: (1) they have the same scope, allowing investors to own the resources they produce; (2) they have a hybrid legal nature to a certain extent; and (3) modern ones tend to be mostly present in developed countries.

Nevertheless, their distinctions are not without relevance. Petroleum concessions tend to possess a private nature, similar to private leases, while petroleum licenses tend to possess a public nature similar to public leases. Petroleum concessions, as well as private leases, tend to be confidential, while petroleum licenses tend to be non-confidential like public leases. Petroleum concessions tend to provide stability for the agreed terms, as do private leases, while petroleum licenses and public leases tend to offer less. Lastly, petroleum licenses tend to require a relevant legal system to support such granting instrument, while petroleum concessions and petroleum leases do not bear such requirement.

Additionally, it is relevant to note that historical concession agreements differed far more from licenses and leases in comparison with modern concessions. However, the concession might still suffer from the stigma of its past colonial ties or its harsh terms in favor of the investors. For this reason, Host Governments limit its use. Nevertheless, as this Article pointed out, the precise terms and conditions, and certain implied conditions, of each regime influence the development of oil and gas resources, making them slower or faster, respectively, and either more consistent or more adaptable, as the case might be.