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Mexico's Energy Reform and the 2012 U.S.-Mexico Transboundary Agreement. An Opportunity for Efficient, Effective and Safe Exploitation of the Gulf of Mexico

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MEXICO'S ENERGY REFORM AND THE 2012 U.S.-MEXICO TRANSBOUNDARY AGREEMENT. AN OPPORTUNITY FOR EFFICIENT, EFFECTIVE AND SAFE EXPLOITATION OF THE GULF OF MEXICO

Guillermo J. Garcia Sanchez¹

The purpose of this article is to introduce the topics presented during the 2016 Symposium on Improving Cooperation for a Sustainable Gulf of Mexico After the 2014 Mexican Energy Reform held in Galveston Texas on February 26, 2016. The Symposium was an effort to move beyond the traditional paradigms of cooperation by inviting participants from governmental agencies, experts, and academics from both sides of the border. The Symposium was funded through the National Sea Grant Law Center's Sea Grant Law & Policy Journal Symposium Series and organized by the U.S. and Mexican Law Center of the University of Houston Law Center, the Harte Research Institute for Gulf of Mexico Studies at Texas A&M University – Corpus Christi, and the National Sea Grant Law Center. The Symposium reflects how academia and government can work together for the benefit of our joint resources.

Nature knows no legal boundaries. Resources cannot be stopped by walls with barbed wire; no matter how high some people want to build them. They cross-national territories and expand under their logic. They belong to many nations, and they are there for the responsible exploitation of their communities. The Gulf of Mexico (Gulf) and its rich hydrocarbon deposits are no exceptions. The implication of this is that for the development of this enclosed sea area to be efficient, effective, and safe it requires not only the cooperation of government officials but also the inclusion of other actors, such as academic institutions, industry experts, and communities affected by its development.² The adoption of international treaties, such as the 2012 Agreement Between the United States and Mexico Concerning Transboundary Hydrocarbon Reservoirs in the Gulf of Mexico (2012 Agreement), that regulates the exploitation of the transboundary fields located along the maritime boundary, is just one step towards achieving that goal, but by no means is a closing chapter.³

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² See generally Guillermo J. Garcia Sanchez & Richard J. McLaughlin, *2012 Agreement on the Exploitation of Transboundary Hydrocarbon Resources in the Gulf of Mexico: Confirmation of the Rule or Emergence of a New Practice*, *The*, 37 HOUS J INTL L 681 (2015).

³ Agreement Concerning Transboundary Hydrocarbon Reservoirs in the Gulf of Mexico, U.S.

The geological and biological characteristics of the Gulf force the two nations and its communities to look beyond the official borderline, and treat the Gulf as a unit.⁴ As the 2010 Macondo and 1979 Ixtoc oil spills have taught us, an industrial accident along the coast of Louisiana or Campeche affects areas, towns, business, and ecosystems beyond human created borders.⁵ Sustainable development in the Gulf should be an ongoing conversation involving a diversity of actors and ignoring the existence of artificial legal constructions. The lack of this dialogue is one of the main challenges. States are constructed under the legal concept of sovereignty and linked to particular geographical spaces that according to laws determine the jurisdiction of government actors; yet nature, disasters, community impacts, and biological risks operate under a different logic that challenges, and even contradicts, the principles of State sovereignty.⁶ The exploitation of the Gulf is so complex that the traditional State-to-State relations headed by diplomatic envoys are ineffective to deal with such a challenge. Open channels of communication, flexible day-to-day agreements, the creation of common standards, along with the consultation and interaction with other actors is the most efficient way to ensure that the Gulf receives the best treatment for the benefit of both nations and its communities.⁷ The Gulf requires horizontal relationships, not hierarchical communications. A more traditional vertical approach would be equivalent to trying to contain an oil spill with paper. International agreements should set up the basis of cooperation, but by no means establish the limits in such a complex binational relation.⁸

-Mex., Feb. 20, 2012, T.I.A.S. No. 14-718, available at <http://www.state.gov/documents/organization/231802.pdf>

⁴ Sanchez & Mclaughlin, *supra* note 2, at 691–725.

⁵ See generally James M. West, Comment, The Ixtoc I Oil Spill Litigation: Jurisdictional Disputes at the Threshold of Transnational Pollution Responsibility, 16 TEX. INT'L L.J. 475 (1981) (discussing the Ixtoc I oil spill); Jacqueline L. Weaver, Offshore Safety in the Wake of the Macondo Disaster: Business as Usual or Sea Change?, 36 HOUS. J. INT'L L. 147, 153 (2014) (discussing U.S. changes in offshore drilling in after the oil spill). After the Deepwater Horizon oil spill, the U.S. government and the offshore hydrocarbon industry made changes to its regulations and practices. See Caroline Haquet, Macando: The Disaster That Changed the Rules, TECHNICAL NEWSL. (SCOR Global P&C Paris, France), Apr. 2014, for a summary of these changes.

⁶ Sanchez & Mclaughlin, *supra* note 2, at 691–725.

⁷ *Id.* at 789–92.

⁸ ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY (United States: Harvard University Press, New edition ed. 2009). (For a comprehensive study on how international law compliance on regulatory affairs should be analyzed through the lenses of ongoing bureaucratic and agency cooperation)

As readers of this Symposium Issue will discover, the current situation in the Gulf is one where agencies are working together to coordinate efforts. Mexico and the United States adopted International Treaties, created binational commissions, and encouraged intergovernmental dialogues. Agencies have been able to engage and share experiences.⁹ For instance, the recently created Mexican National Agency for Industrial Safety and Environmental Protection of the Hydrocarbons Sector (ASEA) is cooperating with the U.S. Bureau of Safety and Environmental Enforcement (BSEE) to identify key areas where both agencies can learn from each other.¹⁰ In many ways, the 2013 Mexican energy reform has integrated world-class safety and environmental management systems (SEMS), yet the challenge remains in their enforcement and monitoring. ASEA is tasked to supervise and implement the safety and environmental standards of all hydrocarbon-related activities in Mexico: from the deep-water fields in the Gulf all the way to the gas pumped in retail stations. Just on the Mexican coast, 250 facilities are operating.¹¹ In addition to the SEMS, ASEA has the task of issuing technical regulations, restrictive rules, and performance-based regulations. All of these tasks are aimed at having the industry operate with safe and environmentally responsible standards in Mexico.

Moreover, its primary approach is corrective enforcement before imposing fines, and this requires an adequate number of supervisors in the different chains of production. Yet, ASEA is a new agency with limited resources and personnel (only 280 employees), and has one of the broadest mandates compared to its international counterparts.¹² On the other hand, after the Macondo disaster, BSEE has developed substantial expertise on how to work with few resources and still be able to supervise and monitor compliance effectively in the Gulf.¹³ There is no reason why the hard lessons learned by BSEE cannot be transferable to the newly created ASEA. In the end, they are both dealing with the same operators in similar geological spaces. Notwithstanding the agencies' efforts to cooperate, there is a consensus that many issues are still pending resolution, such as establishing standard criteria for supervision of the fields, and the disparities of regulatory frameworks applicable to areas on the border, close to the border, and beyond the

⁹ See the transcript from comments from Alejandro Carabias, Deputy Director for Normativity and Regulation, Mexico's National Agency for Industry Safety and Environmental Protection of the Hydrocarbons Sector (ASEA); and from Allyson Anderson Book, Associate Director for Strategic Engagements (BSEE).

¹⁰ *Id.*

¹¹ See Carabias comments.

¹² *Id.*

¹³ See Weaver, *supra* note 3.

border. The application of different standards based solely on the oil field's location along the official borderline not only generates uncertainty from the industries' point of view, but also leaves the rigs under different levels of protection and scrutiny regardless of the fact that they are in the same geological and biological ecosystem. As stated by one of the commentators during the Symposium from the regulator's perspective, "it will be easier to draft legislation that covers the whole Gulf of Mexico that is in harmony."¹⁴ Among regulators, there seems to be a consensus that the long-term solution is to formalize an agreement of cooperation between the agencies, BSEE and ASEA, that would make it easier for officers in both organizations to come up with common standards and regulations. Today, the only formal cooperation mechanisms are the diplomatic channels set up by the 2012 Agreement.

Another important set of questions raised during the Symposium was related to the ability of agencies to manage and adapt to organizational changes.¹⁵ Each time there is a legislative development, creating new standards or bureaucracies (something we know has been happening on both sides of the border due to political changes or to concrete disasters), officials face the challenge of adapting.¹⁶ Their structures, cultures, and organizational routines are often entrenched in the day-to-day work of the agency and are difficult to change in the face of new challenges.¹⁷ As the presentation of some of the experts in the Symposium reminded us, preventing accidents and harm to people and the environment often depends on the skills, experience, and capabilities of the people on the ground, rather than on regulations and standards. Surely, clear and well-defined norms help to enhance the procedures of those who need to prevent disasters from happening, but they are insufficient on their own.¹⁸ Along with new regulations, new organizational cultures, structures, and practices are also needed. These changes become even more challenging when there is a disparate set of agencies working together to regulate one industry, and it becomes a monumental challenge when it has to be done in a binational way.¹⁹

¹⁴ See Alejandro Carbias comments.

¹⁵ See Jorge Piñon comments.

¹⁶ For example, BSEE was created after the Macondo disaster.

¹⁷ See comments from Jorge Piñon, Director of the Latin American and Caribbean Energy program, Jackson School of Geosciences, the University of Texas at Austin. For a review of how bureaucratic practices can be on the way for international law compliance see generally CHAYES & CHAYES, *supra* note 8.

¹⁸ See comments from Jorge Piñon.

¹⁹ Sanchez & McLaughlin, *supra* note 2, at 726–44.

The area of emergency response is only one example of this. U.S. federal agencies, such as the U.S. Bureau of Ocean Energy Management (BOEM) and BSEE, and Mexico's ASEA, National Hydrocarbons Commission (CNH), Ministry of Energy (SENER) and Navy have to cooperate with each other in terms of monitoring licensing compliance, responding to concrete emergencies, and taking actions to prevent further damages.²⁰ In total, the general operation of the deep-water fields in the Gulf depends, at different levels and stages, on the appropriate supervision of nine governmental agencies from both countries. But if we think about the region in broader terms, regulating oil and gas development also depends on the help of local authorities, primarily municipal and state governments, and the affected coastal communities.²¹ The MEXUS Plan, adopted in 1980, is the most important binational agreement that deals with transboundary oil spills, but it only contemplates coordination once a disaster has occurred and does not consider the complex diversity of actors involved in the protection of the Gulf.²² For example, the authorities involved on the Mexican side do not include the newly created agencies ASEA and the CNH, and these are the two most prominent organizations in charge of supervising the execution of the contracts signed with the government for the exploitation of deep-water fields.²³

A third important issue presented by the experts during the Symposium involves the existing facilities and capacities of the state-owned energy company of Mexico (PEMEX). For more than seventy years, this company was the only one allowed to exploit the hydrocarbons located on the Mexican side of the Gulf.²⁴ This industry giant operated as a company, regulator, government entity, and, in many ways, representative of the workers union. Functions, responsibilities, and tasks that in other parts of the world are well determined and separated among different entities were mixed, confused, and placed under one single monopoly. Today, the 2013 Energy reforms in Mexico have taken away the exclusive control of PEMEX and opened up the use of its existing facilities for the benefit of incoming private companies. Several questions remain regarding how the new regulations will allow the use of these facilities for the new fields in the

²⁰ See Mclaughlin in this Issue.

²¹ See Alyson Winnicki comments.

²² The Joint Contingency Plan Between the United Mexican States and the United States of America Regarding Pollution of the Maritime Environment by Discharge of Hydrocarbons or Other Hazardous Substances, U.S.-Mex., Feb. 25 2000, 32 U.S.T. 5899 [hereinafter MEXUS Plan].

²³ *Id.* Annex VI

²⁴ For a review of the Mexican energy reform and how it interacts with the 2012 Agreement see Sanchez & Mclaughlin, *supra* note 2, at 747-72.

borderline area. For example, the Mexican agency in charge of regulating these permits, the Energy Regulatory Commission (CRE), has the challenge to make sure that the access is open and non-discriminatory, and that there is an adequate tariff regulation. Moreover, according to the Mexican energy reforms, PEMEX has to have at least a 20% participation in any project involving transboundary fields.²⁵ For most of its existence, PEMEX only dealt with private companies using service contracts; today it has to deal with them as partners in the development of high-risk areas. The key question for the sustainable development of the Gulf is how this is achieved without losing sight that resource exploitation must be efficient for the benefit of both nations, not only due to a constitutional mandate in Mexico, but also the terms of the 2012 Agreement.²⁶ In other words, is PEMEX's existing infrastructure and corporate governance structure ready for the challenge?

Finally, there is also a consensus on the value of social indicators and consultation with communities for the decision making of regulatory agencies.²⁷ Taking these community stakeholder's views into consideration can help us to evaluate potential and actual effects of policies, programs, projects, and management actions. In the area of public health emergencies, for example, to ensure an adequate preparedness, coordination, and response, the responsibilities of different actors must be clearly broken-down.²⁸ Local communities, volunteers, and organizations are critical in addressing health preparedness challenges. Without a clear division of roles, actions easily duplicate and contradictory tasks are taken. In the same vein, Mexico faces difficulties regarding the process of consultation with indigenous communities affected by the development of the industry.²⁹ What are their components and what is expected from the regulators and the companies according to national and international standards?

Finding answers to all of these challenges will not be an easy task for Mexico and the United States, particularly now that the industry is already operating in the region. On the U.S. side of the Gulf, operations have already begun in fields that could contain transboundary resources.³⁰ On the Mexican

²⁵ *Id.* at 759.; Ley de Hidrocarburos [Law of Oil], as amended, Diario Oficial de la Federación, [DO], 11 agosto de 2014, section II, art. 16 [hereinafter National Hydrocarbons Law], art. 17.

²⁶ *Id.* at 759–61.; 2012 Transboundary Agreement, *supra* note 2, art. 12(1)–(2).

²⁷ See Victoria C. Ramenzoni and Patricia Arceo in this Issue.

²⁸ See Alyson Winnicki's comments.

²⁹ See Raul Mejia in this Issue.

³⁰ Dale Quinn, Mexico Opens Up Its Deepwater Oil Fields, THE FINANCIALIST (Mar. 14, 2014), <http://www.businessinsider.com/mexico-opens-up-its-deepwater-oil-fields-2014-3>.

side, last December, the Ministry of Energy announced the fourth phase of the Energy Reforms. This new development consists of the tendering process of ten deep and ultra-deep water blocks in the Gulf.³¹ Four of them are located in the Perdido Foldbelt, a geological area shared by both countries.³² Our plan as organizing academic institutions is to serve as a platform for collaboration between society and governmental actors to address these issues, and those that might emerge in the future. The publication of the papers and presentations in this Symposium Issue is just one mechanism to achieve that. We welcome advice from the agencies and operators on other ways in which we can help the complex relationship between Mexico and the United States to achieve safe and efficient methods for the exploitation of hydrocarbon resources from the Gulf. Perhaps in the near future, we can also invite Cuban colleagues to participate in this ongoing dialogue.³³ Given the recent opening of relations between the United States and Cuba, many of the issues addressed here will also be relevant to potential transboundary activities with that important neighbor in the Gulf.

³¹ SECRETARÍA DE ENERGÍA, SECRETARÍA DE HACIENDA Y CRÉDITO PÚBLICO, & COMISIÓN NACIONAL DE HIDROCARBUROS, REFORMA ENERGÉTICA: RONDA 1 [ENERGY REFORM: ROUND 1] 13, available at http://www.energia.gob.mx/webSener/rondauno/_doc/Reforma%20Energetica%20Ronda%201.pdf

³² Fabio Barbosa, Observatorio Ciudadano de la Energía A.C., Pozo Trion-1: Primer Descubrimiento en Aguas mexicanas en la Zona Transfronteriza del Golfo de México [Trion -1 Well: First Discovery in Mexican Waters in the Border Zone of the Gulf of Mexico] 2 (2012), available at <http://www.energia.org.mx/wp-content/uploads/2012/09/PozoTrionPrimerDescubrimiento3.pdf>.

³³ Thomas Omestad, Cuba Plans A New Offshore Drilling in Search for Big Oil Finds in the Gulf 1 Mexico, U.S. News & World Rep. (Feb. 3, 2009), <https://www.usnews.com/news/energy/articles/2009/02/03/cuba-plans-new-offshore-drilling-in-search-for-big-oil-finds-in-the-gulf-of-mexico>; Shasta Darlington, Cuban Offshore Oil Plans Gain Momentum, CNN (Sept. 1, 2010), <http://edition.cnn.com/2010/WORLD/americas/09/01/cuba.oil/>.