

SYLLABUS

Course: Transnational Petroleum Law

Time: 2:30pm-4:00pm M-W

Location: Check on the website

Professor Julián de Cárdenas

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Office Hours: Wed. 10:30 a.m. – 12:00 p.m. or
by appointment



COURSE OVERVIEW

Two important legal practice shifts are taking place in the hydrocarbons industry today: 1. the development of a specialized system of law for the oil and gas industry, and 2. the concentration of dispute resolution in transnational arbitration and litigation. These changes require to understand the current transnational regulation applicable to petroleum transactions in order to improve strategies to prepare transnational legal investments structures and how to litigate before oil and gas arbitrators.

This course features the transnational petroleum law method that provides the tools to understand the regulation that governs foreign investments in the oil and gas industry worldwide.

Transnational petroleum law is conceived as the rules of law and the transnational legal order created by the transnational petroleum community constituted by States, Corporations, Professional Associations and other industry actors, carrying out transnational petroleum transactions.

Different kinds of transnational rules are associated with the petroleum community. They are investment standards, industry standards, usages and practices of the oil industry, which transcend parties agreements and the regulation of oil producing States. We can identify two main groups of standards currently used every day in the oil and gas industry:

1) The first group refers to the “industry standards and usages” created by the petroleum industry. These standards regulate issues such as oil operations practices, the fight against corruption, the respect of human rights and the protection of the environment, all topics on which current solutions transcend national borders and require the active participation of industry actors.

2) The second group refers to the “investment standards” included in the global network of Investment Treaties and the interpretation of these standards by a number of published arbitration awards. These standards govern the relation between foreign investors, service providers and the Host State in the oil industry. They regulate relevant issues for long-term investments such as expropriation, fair and equitable treatment, transfer of funds, umbrella clauses, most favorable nation treatment, national treatment, protection and security and dispute resolution.

Both kinds of standards are considered altogether “the network” that governs transnational petroleum operations for the 21st Century. Further, since much repetition exists among these rules, the transnational petroleum law approach will give you the tools to define, classify, identify, use and to enforce these standards before arbitration tribunals or national courts. These sources of law are not isolated, they, in fact, are integrated into the context of a transnational legal order in which oil and gas arbitrators play a key role in the determination of the applicable law. This integration is the consequence of the specialization of these rules to govern the relation between the actors of this transnational and global community.

The enforcement of these standards before arbitration tribunals and national courts makes these new rules a fundamental tool for the legal practice in the petroleum industry. Also, the case law created by arbitration tribunals, national courts and international courts of justice has contributed to the conception of a specialized law and a legal order for the petroleum sector or the *lex petrolea*.

The course will provide model contracts, standardized regulation and a collection of excerpts of arbitral awards in the oil industry which will guide our understanding of the new practices in the oil and gas industry. Cases under study will cover oil and gas arbitration in Latin America, North America, Europe Asia, Africa and the Middle East. For example: cases of international arbitration related to expropriation or indirect expropriation in Russia, Venezuela and Ecuador; the use of industry best practices in Nigeria, Sudan, Mexico and Canada; the protection of foreign investments in the case of armed conflicts (Libya, Sudan and Colombia); repatriation of capital in Venezuela and dispute resolution practice for petroleum investment.

SKILLS PROVIDED BY THE COURSE

The course will provide tools to develop legal skills acting as in-house counsel or as international attorney in the petroleum industry, such as:

- 1) To recognize petroleum industry best practices from State and Non-State sources of law applicable to petroleum investment projects, based on the review of petroleum contracts, petroleum industry standards, and arbitration awards.
- 2) To identify new trends in transnational compliance and litigation involving international petroleum investments, in order to improve expertise on risk allocation, investment protection, and regulation of foreign investments.
- 3) The practice of International Investment Treaties and the most relevant investment arbitration rules such as ICSID, ICC, and UNCITRAL rules.
- 4) To identify and work under the environment of transnational legal orders
- 5) To build a global perspective of petroleum regulation through international investment treaties and best practices.

EVALUATION

50% - Research paper 12-15 pages (due at the end of semester). Research Paper: The paper will focus on the study of a case in an oil producing country.

50% - Exam: The exam to evaluate your knowledge of international investment standards. Open book final exam.

Arbitration Case: Before Spring Break it will be distributed a file for a legal discussion over an international arbitration case involving a petroleum service contract in a Latin American Country.

Research Paper: Each student will write a 10- 12 pages term paper (4,000 words) on a topic related to regulatory oil & gas issues in an oil producing country and transnational legal issues. The professor will provide the list of topics.

PROFESSOR'S BIOGRAPHY



Julian de Cardenas Garcia

Research Assistant Professor of Law

Julían de Cárdenas García is a Venezuelan attorney and Research Assistant Professor at the Environment, Energy and Natural Resources Center of the University of Houston Law Center. At UHLC he teaches Transnational Petroleum Law, Diplomacy and Geopolitics of Oil and Gas, and Transnational Investment Law and Arbitration. He has also taught investment law at the Rio de Janeiro State University (UERJ) in Brazil, and is a Visiting Professor teaching these courses at the University of El Externado, in Bogota, Colombia, and the University of Nuevo Leon in Monterrey, Mexico.

Prior to this position, he worked in private practice and also served as career diplomat at the Venezuelan Ministry of Foreign Affairs working on sovereign border issues and multilateral affairs before the United Nations and the Organization of American States.

Professor Cardenas has been retained as an expert on Venezuelan law in international arbitrations regarding the upstream petroleum sector in Venezuela. He has also been involved in ICC, AAA and ICSID arbitration cases concerning downstream petroleum transactions, direct foreign investments, and international construction projects. He is a frequent speaker on oil and gas investment arbitration, best practices in the petroleum industry and oil and gas geopolitical matters, invited by oil and gas service companies, operators, government agencies, and universities. He has been a guest speaker at conferences on energy law in the U.S., Canada, France, Scotland, the Netherlands, Mexico, Brazil, Cuba, Costa Rica, Ecuador, Colombia and Venezuela. He works effectively in Spanish, French and English, and has some working proficiency on Portuguese.

He holds a law degree and a B.A. in International Relations from the Universidad Central de Venezuela, a Diplôme Supérieur Universitaires in Business Law and a Master of Laws in Arbitration from the Sorbonne University - Paris II Pantheon-Assas, and a LL.M. with a Certificate in Energy, Environment & Natural Resources Law from the University of Houston Law Center. He was a Doctoral Fellow at the Research Center for Investment and International Trade Law (CREDIMI) at the University of Bourgogne, Dijon, France.

Professor Cárdenas is a violinist who has played with different symphony orchestras in Venezuela, France, and the U.S. He has performed at the Berlin Philharmonie, the Carnegie Hall, and the Sorbonne Amphitheatre, among other venues.

COURSE BACKGROUND

The Transnational Petroleum Law Class started to be taught at the Law Center of the University of Houston in January of 2013. The course was planned to provide an integration of transactional and dispute resolution approach in the study of petroleum investments. This approach is based on the methodology of transnational law created by the legal doctrine of the *lex mercatoria* developed by *L'Ecole de Dijon* and *le Groupe de Beaune*, and a vast research carried out at the University of Houston Law Center. The methodology is based on the notions of transnational rules and usages of the petroleum sector and the existence of a transnational legal order of the petroleum industry. These two ideas allow legal practitioners in the oil industry to better understand the transnational regime that governs petroleum transactions in the 21st Century.

This transnational approach has been also included in other programs on energy law at the Université Paris XI in France, Université de Versailles, the Universidad Autónoma de Nuevo León (UANL), Monterrey, Mexico and the Universidad del Externado in Colombia.

Further, a number of conferences under this methodology have been delivered in around 15 countries providing to National Petroleum Agencies and Corporations, the information of this new practice of the law.

Guest Speakers: Since this is a course on transnational law, we have had the support of international guest speakers that have contributed to our class, telling us about the experiences in their countries. You can see a brief note about this in the following link from the EENR Center: <http://www.law.uh.edu/eenrcenter/news/2013-07-02International-Guest-Speakers.asp>

READINGS:

The readings for the class will be provided online. You will enter to a folder corresponding the day of the class and will have a library of readings. The files marked as “M” means Mandatory Readings. The files marked as “R” means Recommended Readings. I will refer to both kinds of readings during the class. The Folder entitled “X FILES” will provide complementary readings on the topics.

COURSE SCHEDULE

FIRST PART – GENERAL ISSUES ON THE OIL INDUSTRY AND TRANSNATIONAL LAW

Week 1: Where we stand in the transnational legal scholarship of the petroleum industry?

- Overview of the Schools of Legal Thought in Oil and Gas Law
- Overview of the Transnational Petroleum Industry

Week 2: The transit from international law to transnational law. The review of basic notions

- Review of notions of International Law and Transnational Law (Sources of Law, Legal Order, Arbitration, Applicable Law and Globalization)
- The legal regime of transnational sectors of the world economy

SECOND PART – THE CONSTRUCTION OF TRANSNATIONAL PETROLEUM LAW

Week 3: Transnational Law. A New Theory of Rules and Legal Order in the Petroleum Sector

- Investment Contracts and Transnational Petroleum Contracts
- Transnational Law and Transnational Petroleum Law.

Week 4: The transnational rules applicable to petroleum investments

- Review of Investment Treaty Standards applicable to Petroleum Investments
- Review of Industry Standards applicable to Petroleum Investments

Week 5: Arbitration in the Petroleum Sector

- The Separability Doctrine and the Principle of Competence-Competence (Negative and Positive Effects)
- Applicable Law rules by international arbitrators. The autonomy of arbitration: Autonomy regarding the applicable law and the legal regime and autonomy concerning the seat and the enforcement of arbitral awards.

Week 6: The Arbitration Procedure

- The Arbitration clause and the jurisdiction of an arbitral tribunal
- The procedure on the merits. The arbitral award and the ways to challenge arbitration awards. The transnational enforcement of an arbitration award (The U.S. and the French approach: The Putrabali v. Rena Holding case and the Chromalloy v. Egypt case under scrutiny)

THIRD PART – TRANSNATIONAL PETROLEUM LAW IN PRACTICE

Week 7: The legal regime of petroleum investments in Venezuela and Bolivia.

Case under study: The Transnational Market of Investment Treaties

- The legal regime of petroleum investments in Venezuela and Bolivia.
- The practice of treaty shopping by oil and gas corporations. The protection of investments in case of denunciation of Investment Treaties and Conventions.

Readings: Legal doctrine and excerpts from petroleum arbitration cases against Venezuela and Bolivia's investment treaty practice

Week 8: The legal regime of petroleum investments in Ecuador and Russia.

Case under study: The methods of direct and indirect expropriation in oil and gas arbitration

- The legal regime of petroleum investments in Ecuador and Russia.
- Direct expropriation in the oil and gas industry. Nationalization and Expropriation. Indirect expropriation in the oil and gas industry. Expropriation through tax measures.

Readings: Legal doctrine and excerpts from petroleum arbitration awards for investments in Russia (The Yukos case v. the Russian Federation) and Ecuador (The cases Occidental; Burlington; EnCana and Duke Energy against Ecuador).

Week 9: Spring Break

Week 10: Arbitration Week. How arbitrators Think about the applicable law?

- Analysis on applicable law in an arbitration case distributed in class.
- The rules for arbitrators on applicable law. The methods of applicable law in petroleum arbitration.

Week 11: The legal regime for petroleum investments in Brazil and Nigeria.

Case under study: The international oil industry standards in practice. Their use, applicable and enforceability.

- The legal regime of oil investments in Brazil and Nigeria.
- The incorporation of environmental best practices in national regulation, petroleum contracts, and arbitration. The enforceability of industry practices by local courts or arbitration tribunals.

Readings: Legal doctrine and the review of Brazilian and Nigerian practices on environmental issues. Excerpts from judicial decisions dealing with environmental best practices: the BP Macondo case in the U.S. and the Maria Aguinda Case v. Chevron in Ecuador. Excerpts from arbitration tribunals dealing with environmental best practices: Aminol v. Kuwait and Niko Resources v. Bangladesh. The Sarayaku case before the Inter-America Court of Human Rights against Ecuador (Prior Consent).

Week 12: The legal regime of petroleum investments in Colombia, Sudan and South Sudan.

Case under study: The standards of protection and security. The Protection of investments in case of armed conflicts. Transnational rules of responsibility of corporations and corporate executives in cases of violations of human rights and criminal law.

- The Legal Regime of Oil Contracts in Colombia and South Sudan.
- The Standards of protection of investments in case of armed conflicts. The risks of corporations to incur in violations of international criminal law. Multiple Jurisdiction of litigation in cases of human rights and armed conflicts

Readings: The case of petroleum investments in Colombia, South Sudan, and Nigeria. Nigerian cases under the Alien Tort Statute in U.S. Courts.

Week 13: The Legal Regime of Angola and Kazakhstan.

Case under study: The standard of fair and equitable treatment and transfer of funds.

- The Legal Regime of Angola and Kazakhstan.
- The Standard of Fair and Equitable Treatment and Transfer of funds.

Readings: Review of standards of FET and transfer of funds in bilateral investment treaties and arbitration decisions.

Week 14: The legal regime of petroleum investments in Mexico. The Mexican Oil Opening.

Case under study: The rules of transparency and fight against corruption. Do we have a rule of transnational public order in the oil industry concerning corrupt practices?

- The Legal Regime of petroleum investments in Mexico. The Oil Opening.
- Arbitration and Corruption practices in the oil industry. Transnational public order in the petroleum industry.

Readings: Discussions on the transnational application of the Foreign Corrupt Practices Act and the Bribery Act in the United States (local courts) and the scrutiny of corrupt practices by arbitrations (transnational dispute resolution)

Week 15: Argentina Oil and Gas Regulation. Expanding and multilateralizing investment arbitration.

- Argentina Oil and Gas Regulation. National Treatment and Most Favorable Nation Treatment. The Umbrella Clause.
- Final remarks on transnational petroleum law and the lex petrolea.

Readings: Legal Doctrine. Review of excerpts of arbitration awards in multiple jurisdictions

FINAL EXAM:

Open Book. Test on substantive principles of Investment Law and notions of transnational law and arbitration.

Check the date of the final exam at the website of the University of Houston Law Center

Class: Transnational Petroleum Law
Spring 2016
Professor Julian Cardenas

You may find in the text below ten suggested topics proposed to the class with a description or suggestions of an outline to write the paper. The students can also suggest their own topic and outlines that have to be approved by the Professor.

The topics with a transnational law approach are the following:

1. The consequences of denunciation of the ICSID Convention related to an oil investment
This paper must address the different scenarios for a foreign investor in the oil industry to find access to the jurisdiction of an international arbitration tribunal in cases where the host governments have denounced the ICSID Convention. An analysis of the interpretation of articles 71 and 72 of the Washington Convention of 1965 are required.
2. The consequences of denunciation of an investment treaty related to an oil investment
This paper must address the different strategies that a foreign investor in the oil industry may have in order to continuing having investment treaty protection. Questions related to survival clauses of investment treaties, Most Favorable Nation clauses, the method of consenting to arbitration and treaty shopping must be discussed.
3. The implementation of the best practices of the oil industry in Nigeria/ Brazil/ Colombia/ Angola/ Kurdistan/ Mexico/ Libya/ Bolivia/ Norway/ Liberia/ Ghana/ UK
This paper should discuss the legal construction for the enforcement of best practices of the oil industry in one specific country from listed above or other country proposed by the student. Are best practices just voluntary practices? Are they enforceable because they are included in a contract? Are they enforceable because they find direct application in the petroleum industry? The analysis shall include a review of arbitration rules and state law related to the application of usages. The review of national regulation, contracts and excerpts of arbitration awards is required for an adequate analysis. The paragraphs 502 and 503 from the decision on jurisdiction Niko Resources v. Bangladesh (ICSID, 2012) are relevant to the analysis.

4. Is the Windfall Profit Tax a transnational practice in the oil industry in the hands of states?

Between 2005 and 2012 a number of oil producing States approved a kind of tax called the "Windfall Profit Tax" in order to increase the government take in petroleum investments. Some players have argued that this practice meet an international standard that the State, as the owner of the non-renewable resource, "is to be the main beneficiary of extra revenue resulting from high oil prices." What are the arguments to support this idea and the limits that transnational law and contract practice may provide?

5. The protection of oil investments in case of armed conflicts, the case of South Sudan?

This paper must address the obligations of South Sudan to grant protection and security to foreign investors in the oil sector in the country under an investment treaty and the applicable transnational law to foreign investors in the oil sectors related to the performance of investments in places where armed conflicts are taking place.

6. Is treaty shopping a legitimate practice in the petroleum sector?

This paper must write a comment on the decision of jurisdiction in the case Mobil Cerro Negro v. Venezuela 2010, decided by an ICSID tribunal presided by Gilbert Guillaume. The comment must highlight, Why the practice of treaty shopping is considered a legitimate practice? And What limits have been developed by arbitration practice? The paper shall make reference to other cases such as *Phoenix Action*, *Tokios Tokeles*, *Tidewaters*, among others.

7. Transnational Legal Regime for oil investments in _____

This paper shall discuss the different sources of law applicable to a petroleum investment in an oil producing country. The paper must make reference to all possible sources of law and the ways of interconnection between all these sources of law through the practice of arbitration.

8. The recent enforcement of stabilization clauses included in petroleum agreements in arbitration awards.

Stabilization clauses have been always a controversial topic in oil and gas arbitration. Some authors consider these clauses unenforceable and only useful to increase the bargaining power of oil corporations before oil producing states. However, recent arbitration decisions have provided guidelines on how these clauses can be enforceable and how the amount of damages can be calculated following industry practices. Thus, the paper must describe these new developments and analyze whether this is a practice that must continue to be implemented in long term contracts in the petroleum industry.

9. Commentary of the Sarayaku case v. Ecuador before the Inter-American Court of Human Rights. The case of Prior Consent.

The decision of 2012 issued by the ICHR in the case Sarayaku v. Ecuador contributed with guidelines in the implementation of prior consent by oil producing countries. The decision was published on the website of the ICHR and the question is whether this decision by an inter-state tribunal can affect contract and industry practices in the petroleum sector around the world. Can the Sarayaku decision be used as international case law an arbitration between a State and an oil corporation? Could States non-members of the ICHR be “forced” to follow the standards developed by the decision? Are corporations following the new guidelines in other jurisdictions different than Ecuador

10. Commentary on Yukos v. Russia

This paper must address three specific questions: 1) How the arbitral tribunal could rely on WikiLeaks cables to decide some issues in the award? 2) Indirect expropriation through tax measures in violation of the Energy Charter Treaty and 3) The reduction of compensation as a result of investor’s violation of national law (contributory fault).

Instructions:

The paper must have a maximum of 4,000 words (without including footnotes) and must be sent to the Professor the last day of the Spring Semester 2016 to the following email address: jcardena@central.uh.edu.

Appointments:

Any other appointment must be discussed with the Professor addressing an email to: jcardena@central.uh.edu