

SYLLABUS

Transnational Petroleum Law (*Lex Petrolea*)

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

Today, we are living two relevant challenges impacting the legal practice in the hydrocarbons industry: 1. the development of a specialized transnational law system for the oil and gas sector, and 2. the concentration of dispute resolution in transnational arbitration and litigation. These challenges require a better understanding of the transnational regulation applicable to petroleum transactions in order to improve strategies for structuring and performing upstream, midstream and downstream operations, and to litigate before arbitration tribunals or national and international courts. Hence, this course will feature the transnational petroleum law method that provides the tools to work in the transnational regulatory environment that governs investments in the oil and gas industry worldwide.

Transnational petroleum law or *lex petrolea* is conceived as the rules of law and the transnational legal order created by the transnational petroleum community constituted by States, corporations, professional industry associations and other industry actors, participating in the oil and gas sector.

Therefore, the course will focus on the transnational rules commonly associated with the petroleum industry such as: investment protection standards included in international investment treaties, industry standards and best practices, general principles of international law, model contracts, and arbitration jurisprudence. All these sources of law have a common element which is their transnational legal nature that makes them to transcend parties agreements and the regulation enacted by oil and gas producing States. Indeed, this plurality of sources of law are considered altogether “the network” that governs transnational petroleum operations in the 21st Century.

A decentralized system of regulation can raise a lot of questions regarding legal certainty and the rule of law. However, the appropriate identification of the relevant rules and their context of application, will demonstrate that transnational rules do not act and exist in isolation. In fact, they are integrated into the context of a the global activities of the oil and gas sector with great coherence.

Thus, the transnational petroleum law approach will provide you with the tools to identify, classify, define, use and to enforce these transnational rules when they are implemented in transnational oil and gas transactions, or in cases of transnational arbitration and litigation connected with the oil and gas industry.

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 legal practices in the oil and gas sector. The cases under review 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); the imposition of sanctions against the oil industry in Rusia, Libya and Venezuela, and environmental litigation related to petroleum investments.

SKILLS PROVIDED BY THE COURSE

The course will provide tools to develop legal skills acting as in-house counsel or as transnational 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 of globalized economic sectors.
- 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 a case study related to the oil and gas industry.

50% - Exam: Evaluation testing the use of international investment standards. Take-home final assignment.

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.

Additional Information: Counseling and Psychological Services (CAPS) can help students who are having difficulties managing stress, adjusting to the demands of a professional program, or feeling sad and hopeless. You can reach CAPS (www.uh.edu/caps) by calling 713-743-5454 during and after business hours for routine appointments or if you or someone you know is in crisis. No appointment is necessary for the "Let's Talk" program, a drop-in consultation service at convenient locations and hours around campus. http://www.uh.edu/caps/outreach/lets_talk.html

PROFESSOR'S BIOGRAPHY



Julian de Cardenas Garcia
Research Assistant Professor of Law

Professor Cardenas joined the University of Houston Law Center in 2012 as an Energy Scholar and Visiting Professor at the Environment, Energy and Natural Resources Center (EENR Center), focusing on transnational oil and gas transactions. At UHLC he teaches the courses Transnational Petroleum Law; Transnational Investment Law and Arbitration; Diplomacy and Geopolitics of Oil and Gas; and Global O&G Service and Procurement Agreements. As a visiting professor, he has taught investment law and arbitration in the O&G sector, and O&G industry practices at the Universidade do Estado do Rio de Janeiro (UERJ) in Brazil; the Universidad Autónoma de Nuevo León (UANL) in Monterrey, and the Instituto Tecnológico Autónomo de México – ITAM, in Mexico City, Mexico; the University Paris Sud, France; and the University Externado, in Bogota, Colombia.

He works frequently with companies, public authorities and governments in various areas of oil and gas law and policy. At the EENR Center, he is the coordinator of the "Inter-American Hydrocarbons Regulators Dialogue," an initiative conceived to create a nexus between national hydrocarbons agencies, the private sector, and the academia.

He is a conference speaker on oil and gas investment law and arbitration matters, best petroleum industry practices, and geopolitics of the oil and gas. He has been a guest speaker in conferences on these issues in the U.S., Canada, France, Scotland, the Netherlands, Mexico, Brazil, Cuba, Gabon, Costa Rica, Trinidad & Tobago, Ecuador, Colombia, and Venezuela. Also, Professor Cardenas is frequently interviewed by media outlets on Latin American affairs and oil and gas industry matters. Before joining the EENR Center, he worked as foreign legal clerk at the Arbitration Department of Dewey & Leboeuf, Paris, and also served for nearly six years as a career diplomat for the Venezuelan Ministry of Foreign Affairs, working multilateral affairs with the Organization of the American States (OAS) and the United Nations (U.N.) and bilateral affairs on sovereign boundary issues. He works effectively in Spanish, French, and English, and has some working proficiency in Portuguese.

He holds a law degree and a B.A. in International Relations from the Universidad Central de Venezuela; a Master of Laws in Arbitration and a Diplôme Supérieur d'Université in Business Law from the Sorbonne University - Paris II Pantheon-Assas; and an 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-CNRS) at the University of Bourgogne, Dijon, France.

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.

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

1) Final Take-home assignment:

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

2) Research Paper

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 2019 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