THE TRANSNATIONAL PRACTICE OF PETROLEUM LAW

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ABSTRACT

Transnational Petroleum Law is structured around two fundamental notions: the existence of transnational rules and the idea of a transnational legal order. This article presents a series of reflections on the revision of these two concepts in the light of the practice of transnational petroleum law.

Keywords: Transnational Law–Education–Lex Petrolea–Arbitration–Sources of Law–Legal Order–New World Economic Order.

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INTRODUCTION

If you currently practice law in the petroleum industry, regardless of whether you come from civil law or a common law jurisdiction,[1] the law school you attended taught you how national judges apply the law and how to litigate before local courts. This is largely the core of legal education offered by law schools around the world. Perhaps, if you took international law courses, you may be familiar with the way international judges apply international law. However, a question that becomes relevant to the contemporary legal practice in global economic sectors, such as the hydrocarbons industry, is whether we are familiar with how arbitrators apply the law in disputes related to the oil and gas sector.

In a similar sense, as legal education tends to focus on national regulations, contracts, and international treaties necessary to pass the bar exam, another relevant question for attorneys working in the oil and gas industry is: during their time in law school, what classes were dedicated to the study of

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1. Despite the differences between the civil law and common law systems, lawyers around the world have been educated in very similar programs in terms of two basic notions: legal rules and legal order, which we review throughout this article. In the case of systems governed by Islamic law, our analysis is also relevant in terms of the study of the hierarchy of norms and sovereignty. However, we recommend the analysis on Islamic law in the doctoral thesis by N. NAJJAR, "*L'arbitrage dans les pays Arabs face aux accords du commerce international*", L. G. D. J, 2004. *See generally* NATHALIE NAJJAR, ARBITRATION AND INTERNATIONAL TRADE IN THE ARAB COUNTRIES (2018).

customary usages of globalized economic sectors, such as international oil and gas industry practices?[2] The latter, as a form of non-state regulation, is commonly forgotten by formal legal education but frequently taught later by professional organizations once attorneys join a company or a government agency connected to the oil and gas sector. Therefore, filling the gaps in applicable law issues by knowing how to identify transnational rules, and recognizing their bidding force is part of the contribution of transnational legal studies.

During the first two decades of the twenty-first century, arbitration has been the standard dispute resolution method for major investments and commercial contracts in the oil industry.[3] This reality leads to questions about how the parties and arbitrators interpret and apply the law when doing petroleum transactions or resolving disputes. These questions refer to the manner in which the actors in the petroleum industry practice law, how the parties prepare their submissions before arbitration tribunals, and how the arbitrators interpret the law to identify and apply the legal regime of transnational petroleum transactions.[4]

The appearance of the arbitrator as an actor in transnational economic relations (or his reappearance, if we take into account his dominant role in the Middle Ages[5] or ancient times[6]) is placed

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2. *See also highlighting this issue* Carine Jallamion, *Introduction historique: de la règle coutumière à la règle transnationale*, 92 JOURNAL DES SOCIÉTÉS [J. SOC'Y] 14 (2011) (Fr.).

3. *See* U.N. Conference on Trade and Development, *Trends in The Investment Treaty Regime and A Reform Toolbox for the Energy Transition* (Aug. 2023).

4. *See* Alfredo De Jesús O., *La Contribución del Árbitro a la Autorregulación y Unificación del Derecho de los Contratos del Comercio Internacional*, 23 REVISTA BRASILEIRA DE ARBITRAGEM 117 (2009) (Braz.) (providing legal doctrine in Spanish); *see* EMMANUEL GAILLARD, ASPECTS PHILOSOPHIQUES DU DROIT DE L'ARBITRAGE INTERNATIONAL (Martinus Nijhoff ed., 2008) (Neth.) (providing legal doctrine in French).

5. *See generally* J. M. RIBAS ALBA, PREHISTORIA DEL DERECHO (Almuzara S. L. 2015) (discussing the creation of law in ancient history with special references to arbitration in tribal communities).

6. The fragmentation of power in Medieval Feudalism in Europe and during 21st Century globalisation, allowed the flourishing of arbitration in two different period of history. *See* Sergio Zúñiga Ruiz, *Reconocido edievalista francés impartirá conferencia en la UCR*, SEMINARIO UNIVERSIDAD (Aug. 8, 2012) https://historico.semanariouniversidad.com/page/693/?q=propaganda-gratis-tuum.com.br&n=22514&p=Cultura&jwsource=cl.

in the twenty-first century context of globalization. In fact, the arbitrator appears in the oil sector at the request of transnational actors such as States, oil companies (operators, services companies, among others), financial groups (banks and insurance groups), and professional organizations (such as the AIEN, IOGP, and IRF).[7] All of these transnational actors interact in a global economic order characterized by the lack of absolute power.[8]

Indeed, in this transnational economic order, state actors and non-state actors deal with transnational problems that cannot be resolved through the exclusive or predominant action of any one of them.[9] This reality creates forms of balance of powers and relationships of interdependence on many different matters, one of them being the oil and gas sector.[10] In this current balance of power, the state interacts as one amongst the other members of the community, participating in the creation of rules and complying with the rules of the global oil industry.[11] Thus, the governance in this transnational economic sector creates space for cooperation among actors, but can also produce tensions due to the constant tug-of-war among them. In a situation of conflict, arbitration tribunals are called to become the organ for dispute resolution, and as the organ of last resort for applicable law, it allows us to identify the complete characteristics of the legal regime that governs transnational oil business.[12]

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7. Association of International Petroleum Negotiators (AIPN), International Oil and Gas Producers (IOGP), International Regulators Forum (IRF).

8. Fragmentation of power during the 21st Century forces more interdepentent forms of cooperation among transnational actors, governed by transnational rules.

9. *See* MOISÉS NAÍM, THE END OF POWER: FROM BOARDROOMS TO BATTLEFIELDS AND CHURCHES TO STATES, WHY BEING IN CHARGE ISN'T WHAT IT USED TO BE (2013) (explaining the new balance of powers due to the current interaction of State and non-State actors in a global economy).

10. *See* Kim Talus et al., *Lex Petrolea and the internationalization of petroleum agreements: Focus on Host Government Contracts*, 5 J. WORLD ENERGY L. & BUS. 181, 183 (2012) ("While competition between large IOCs can be fierce in some areas like marketing of petroleum or the downstream operations, the exploration and production phase of the petroleum operations is marked by cooperation between competitors").

11. *Id.*

12. Arbitrators exercise a great degree of discretionary powers in applying the law, supported by the trust given by the industry and special rules such as finality and the limited grounds of annulment against arbitration awards.

Actors in the oil industry pay close attention to arbitration provisions in their contracts or treaties applicable to investment projects because arbitration plays a key role in the construction of the legal regime.[13] For oil companies, in fact, it is increasingly common to engage lawyers to conduct due diligence work, studying investment treaties and their arbitration provisions, which are integrated into the legal framework of a project.[14] It is important for practitioners to consider the key role arbitration plays in petroleum transactions. Thus, contemporary legal practice requires education on both matters, transnational substantive rules and arbitration law, giving practitioners a more comprehensive overview of the legal regime applicable to petroleum investments.[15]

Today, the arbitrator's mission in resolving major disputes[16] cannot be substituted by national judges, or by international judges, since the arbitrator plays the role of being the "translator of the law" in the petroleum sector.[17] As a translator of the law, the arbitrator is asked to fulfill two main tasks:

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13. A. S. El-Kosheri, *Le régime juridique créé par les accords de participation dans le domaine pétrolier*, in RECUEIL DES COURS, COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW, 1975 IV, Tome 174, Sijthoff & Noordhoff, The Hague, 1978, p. 217–405.

14. *See Fair and Equitable Treatment Standard in International Investment Law*, 2004/3 ORG. ECON. COOP. DEV., Sep. 2004, at 1, 26 (highlighting the importance of vigilance, otherwise known as the obligation to exercise due diligence in protecting foreign (oil) investments).

15. In our current practice, both types of knowledge are required to obtain a global view of the legal regime. The split of the legal career in "transactional lawyers" and "litigation lawyers" could harm the legal practice in transnational investments by increasing the legal risk. The necessary case law of transnational practice relies mostly on arbitration decisions and awards, without ignoring the due regard to national and international jurisdiction case law.

16. *See* De Jesús O., *supra* note 4 (explaining the differences between economic actors as parties of a contract as opposed to members of a transnational community with each approach being narrow or broad on an arbitrator's mission, for example, as a judge of the contract or a judge integrated in an economic sector).

17. François Ost, Conference "*La traduction comme paradigme*", Brussels October 19, 2010. Professor Ost explains to us in this exceptional conference how the last stage of transnational law studies is a method of translation of the law in the context of a global society. The parties operate as interpreters of the transnational law as the approprate practice in the 21st Century. However, in case of interpreting conflicts or executing a petroleum transaction, the arbitrator intervenes as the translator of the agreement, the institutions, values, the rules of law and the usages of trade.

1) to apply special substantive rules adapted to the legal transactions of the petroleum industry; and
2) to apply the law in a specialized manner consistent with the context of the global oil and gas industry.[18]

Thus, the selection of the arbitrator as a central organ of the petroleum sector is no coincidence. Indeed, special rules and a special way of thinking on how to apply these rules, lead to questions concerning the need for a specialized law system; hence, a transnational petroleum law system that governs transnational petroleum transactions.

Transnational petroleum law consists of a specialized legal regime that governs oil industry businesses based on a socio-legal approach. This is the result of the activity of transnational actors, who are also engaged in rule-making practices, reflecting the interests and needs of a global economic sector and considering the legitimacy of these rules.[19] These actors become subjects of transnational law by being members of a transnational community. The legitimation of these rules is the result of their constant application by the members of the community, turning them into "generally accepted practices of the industry" or international standards, such as investment protection standards, industry practices, or usages of trade, commonly referred to and incorporated in the oil industry's legal instruments such as contracts, arbitration rules, and national law.[20]

18. *See id.* (expounding upon the idea that the arbitrator intervenes as the "translator" of the agreement, institutions, values, rules of law and usages of trade, to fulfill his obligations of applying rules and laws consistent with transactions of the petroleum industry).

19. *See* MATH NOORTMANN ET AL., NON-STATE ACTORS IN INTERNATIONAL LAW (2005) (discussing the participation of non-State actors in International Law); *see also* Pierre Calame, *Non-state Actors and World Governance*, WORLD DEMOCRATIC F. (June 2, 2008), https://world-governance.org/en/non-state-actors-and-world-governance (noting that legitimacy is based on values, objectives and methods).

20. *See, e.g.*, John Bowman, *Lex Petrolea: Sources and Successes of International Petroleum Law*, KING & SPALDING (Fed. 13, 2015), https://www.kslaw.com/blog-posts/lex-petrolea-sources-successes-international-petroleum-law (providing excerpts of the 2012 Model Production Sharing Contract proposed by the Kurdistan Regional Government of

Thus, previous paradigms heavily based on state-oriented approaches have turned increasingly obsolete because they do not respond to the contemporary interaction between transnational rules created by state and non-state actors. As Benoit Friedman explains, the current reality shows that "*international law, in its public or private branch, [is] insufficient to tackle the problems of globalization*."[21] In fact, using state-oriented approaches would increase the legal risk in petroleum transactions, potentially create more conflicts, and reduce investment attractiveness in oil-producing states. State-centric approaches are at odds with the reality and needs of the petroleum industry, especially with respect to the misunderstanding of the new balance of power between industry actors. A miscalculation of this balance of power could potentially harm the host-government's prospects of bid rounds and regulations, failing to attract foreign investments for reasons such as lack of rule of law or improper taxation systems.[22]

Instead, it is through a global view of the market and the hybridization of state rules, interstate rules, and non-state rules that we can observe the transnational solutions created by private industry players and host-governments. Hence, transnational law can be perceived as a co-regulation trend where all market players are involved in the rule-making process, trying to find the appropriate balance to perform activities in the oil and gas sector. This approach dissolves the differences between hard

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Iraq as well as an excerpt from the Kashagan PSA, both including the phrase, "generally accepted," in the context of the international petroleum industry).

21. Benoit Friedman, Conferencia "*La traduction comme paradigme*", Brussels, October 19, 2010.

22. In 2018, alongside Prof. Ramanan Krishnamoorti, I led a team of UH Professors including Jacqueline Weaver, Bret Wells, Jaime Ortiz, Alfonso López, and Tom Mitro, in the UH Energy Department to formulate recommendations for the reform of the Gabon Hydrocarbons Code to fix the market misreading of the previous 2014 Hydrocarbons Code that limited the country's attractiveness for investments. After the 2019 Hydrocarbons Code was approved, the country was able to attract new investments. "*In mid-2019, Gabon enacted the 2019 Hydrocarbon Law to reinvigorate its oil market and support its 12th bidding round for the allocation of 23 deep-water and 12 shallow water blocks.*" *See* U.S. ENERGY INFORMATION ADMINISTRATION, https://www.eia.gov/international/analysis/country/GAB; *see also* Julián Cárdenas García, *Rebalancing Oil Contracts in Venezuela*, 33 HOUS. J. INT'L L. 235, 238–39 (2010) (expanding on the recalibration of legal regimes).

law and soft law,[23] thus providing authority to transnational rules among the members of the oil industry. This regulation aims to comply with a duty to regulate the operations of states and corporations to satisfy a global need to maintain efficient and sustainable production of hydrocarbons to satisfy today's energy demand of about 100 million barrels of oil per day as required by the global economy.[24] This regulation is still necessary and relevant, because as recently as 2022, 81.79% of the global primary energy consumption still relied on fossil fuels.[25]

Approaches in transnational petroleum law also arise from revisiting two legal notions according to new realities: the notion of rules of law, and the conceptual tool that allows us to identify the sociological contextualization of rules– the notion of legal order. Thus, through this study, we observe the plurality of origins of these transnational rules created by state and non-state actors alike. These rules are integrated into a transnational legal order of the oil industry, which leads to the emergence of transnational forms in which these rules interact with each other.

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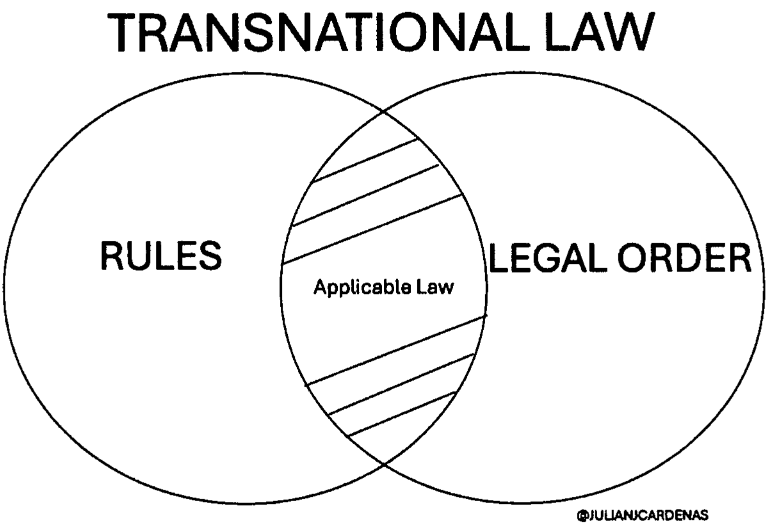
23. *See* Alfredo De Jesús O., *The Prodigious Story of the Lex Petrolea and the Rhinoceros. Philosophical Aspects of the Transnational Legal Order of the Petroleum Society*, TRANSNAT'L PETROLEUM L. INST. 1, 29 (2012) (moving from the idea of hard law being somehow the "real law," finding its origin in a legal order, and soft law representing weak law due to its lack of State legitimacy, over to law that is simultaneously hard on the outside and soft on the inside, with hard being the way the rules are applied and soft being the manner in which they are created).

24. *See* Julián Cárdenas García, *Best Industry Practices and Environmental Regulation for Offshore Petroleum Operations—A Contribution to the Study of the Lex Petrolea*, TPLI SERIES ON TRANSNAT'L PETROLEUM L., Vol. 1, N°2 (2012); *see also* Calame, *supra* note 19 (explaining the grounds of legitimacy of the transnational communities and the legitimacy of his act to provide solutions to a transnational problem since ". . . they do not have any mandate other than their own. The process and its result are what establish legitimacy, and not a supposed title of ownership over the public good.").

25. Hannah Ritchie & Pablo Rosado, *Energy Mix*, OUR WORLD IN DATA (revised Jan. 2024) https://ourworldindata.org/energy-mix.

Figure 1– TRANSNATIONAL LAW DIAGRAM I



Illustrated by the Transnational Law Diagram, the applicable law in petroleum transactions would be identified as the appropriate rule of law (from state or non-state origin such as regulation, contracts, treaties, usages, and case law, among others), applicable within the appropriate legal order, closer to the nature of the business transactions (in the forms of national, international, or transnational legal orders).

Since the oil industry operates on a global scale, legal studies should focus on the legal pluralism of sources of law such as contracts, treaties, industry usages, and arbitration rules, by analyzing the interaction of these sources of law. Based on this approach, educational programs and new pedagogical approaches should stress legal pluralism according to the transnational reality of the industry. Thus, these sources of law cannot be studied in an isolated and independent manner but dynamically, considering the way the laws interact with each other, the potential conflicts among them, and the way to solve them.

This transnational law approach is rooted in an additional component, which is the fact that legal education and research are equally transnational activities that extend beyond language barriers and culture. There are fewer borders among academics, professionals, and students in sharing and developing new ideas.

This study seeks to find conceptual tools that will allow the study of transnational law, with a greater focus on the main ideas of the *lex petrolea*, as an autonomous transnational legal order for the petroleum sector.

This article will offer some guidance for studying the plurality of sources of law in the transnational petroleum industry (Part I) and then connect these findings with the socio-legal context in which these sources interact in the transnational legal order of the petroleum sector (Part II).

II. THE LEGAL PLURALISM OF TRANSNATIONAL PETROLEUM LAW

Legal Pluralism is conceived as the simultaneous and relevant legal rules applicable in time to a petroleum operation, questioning the exclusivity of national law. Legal Pluralism acknowledges the reality of the applicability of the sources of law created outside the national legal order.[26] Consequently, legal pluralism occurs in the transnational petroleum sector due to the regulatory integration of national law into transnational law (A) and the flourishing of transnational rules in the petroleum industry (B).

A. *The State's Regulatory Integration into Transnational Petroleum Law*

A State's regulatory integration into the transnational petroleum law occurs the moment a State opens for foreign investments, and voluntarily withdraws the state's regulatory power on multiple aspects, replacing it with the rules of international or transnational law to govern petroleum operations. This transnational approach opposes the more State-centric approach developed by scholars such as Carlos Calvo, who advocated for the dominance of Host-State law. Our transnational law approach is also different from the approaches of Kassis[27] or

26. Pilar Allegue Aguete, *Pluralismo normativo, soberanía y diversidad cultural*, 16 ANUARIO DE FILOSOFÍA DEL DERECHO 169 (1999) (Spain).

27. *See generally* ANTONIE KASSIS, THÉORIE GÉNÉRALE DES USAGES DU COMMERCE (1984).

Hongju Koh[28], who conceive transnational law as a process of "incorporation" or a "transnational legal process," in which transnational rules are included in national laws because the government seeks to give authority, recognition, and application to these rules. These theories still maintain the preponderance of the State lawmaking power in a global market, and that transnational rules only acquire binding force by the acceptancy or the incorporation of the rule into a national legal order.[29] In other words, these theories insist in their belief that in the current global economic order, the State remains the ruler of globalization and that the binding force of transnational rules depends on the State's recognition of transnational law.

A different approach is based on the belief that in the current practice in transnational markets, the balance of power among transnational actors creates transnational rules of law such as treaties, contracts, usages of trades, and arbitration jurisprudence that govern the interactions among transnational players. These transnational rules are the result of the balance of power that exists in globalized sectors of the world economy. And, once a State decides to join a global economic sector, such as the oil industry, the legal regime of the global oil industry applies.

Indeed, what we observe in a transnational industry is the rise of rule-hybridization, where State rules and non-state rules create a system of law for the petroleum industry. Here, the State is not just a Host-State receiving foreign investors subject to its own national law, but it is also the State joining a global economic sector and becoming a transnational player subject to the rules of a global market.

As Professor Francois Ost has explained, this process results from the "translation" of rules that imply transferring values, institutions, and solutions created to govern transnational business transactions.[30] Thus, the State's integration into

28. Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623, 647 (1998).

29. In practice, the contracting activity of Host-State's increased its exposure to international obligations, creating delays in its capacity to incoporate the appropriate regulation into national law that can govern transnational transactions.*See generally id.*; *see also* KASSIS, *supra* note 27.

30. François Ost explains that the law of globalization would correspond to the international law that created interstate institutions seeking governance of international

transnational law and national law alignment with transnational standards are necessary for State participation in global economic markets such as the oil and gas industry. This transnational law results from the hybridization of State and non-state law.[31] Professor Benoit Frydman defines this process as an act of "convertibility," using an economic/monetary analogy in which nation-states adopt transnational rules because these rules are "convertible."[32] Such transnational rules enjoy adaptability since they are valid and acceptable among transnational actors.[33] In other words, the approaches to "transnationalization"[34] or "convertibility" of the rules show that the hybridization of sources of law is not the result of State recognition, but rather that the State itself has no option but to integrate transnational law to satisfy the energy or trade needs of its population. Therefore, a state's participation in a transnational market is made following its national interest to gain access to the benefits of being part of a global oil market, including access to capital, technology, and know-how. Through transnational law, we recognize that transnational rules adapt to and resolve problems more appropriately than State regulation. Consequently, the authority of transnational rules is *independent*, although it can be reinforced through incorporating these rules by a national legal order.

An additional contribution of transnational rules is that they allow the petroleum industry to carry on investment operations in several oil-producing States, employing transnational standards that facilitate their operations. The exclusive use of national law has proven insufficient in regulating all aspects of the petroleum industry; whether onshore or offshore; and whether upstream, midstream, or downstream. Considering this and having studied the policies employed by States regulating

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relations while the globalized law refers to the hybridization of State and non-State law through a transnational law.*See* Ost, *supra* note 17.

31. *Id.*

32. *See* Friedman, *supra* note 21.

33. *Id.*

34. Gabrielle Kaufmann-Kohler, *The Transnationalization of National Contract Law by the International Arbitrator*, in MÉLANGES EN L'HONNEUR DU PROFESSEUR JEAN-MICHEL JACQUET: LE DROIT DES RAPPORTS INTERNATIONAUX ÉCONOMIQUES ET PRIVÉ 107, 120 (2013).

exploration and production operations, there has been State integration into a global market, which has increased the use of a co-regulation approach, facilitating transnational law application to day-to-day practice in the oil sector.

The transnational approach does not suggest ignoring national law's role in the oil industry. Oil-producing States have become more sophisticated in creating constitutional rules, national regulatory agencies, national legislation applicable to the hydrocarbons sector, and contract models. At the same time, the State maintains the power to supervise[35] and regulate the many aspects that are recognized by the transnational petroleum industry. Examples of this are the regulation of taxation, the requirements of local content, environmental permits, labor regulation, and national arbitration acts, just to name a few.

However, two aspects are relevant in observing the integration of national law in regulating the transnational petroleum industry. First, it is necessary to recognize that State law withdrawal provides more deference to petroleum industry practices. Second, we see the withdrawal of national law in favor of investment protection standards.

1. National Law Withdrawal in Favor of Oil Industry Practices

A large number of oil-producing States are now following a tendency to open up their legislative regulations by incorporating oil industry practices from the transnational petroleum industry. In essence, the legislative bodies in many States now prefer to leave certain issues regarding the exploration and production of oil and gas to the standards employed by prudent operators of the transnational petroleum industry. Some of these regulations include environmental issues, government affairs, and social concerns. In other words, the prescriptive approach, where national hydrocarbon regulators tend to impose on oil companies the methods, procedures, and practices that operators must follow

35. *See* Jacqueline L. Weaver, *Offshore Safety in the Wake of the Macondo Disaster: The Role of the Regulator*, 36 HOUS. J. INT'L L. 379, 495 (2014) (emphasizing that a "good regulator is industry's best friend" as seen by the important value of work done by these regulators to supervise activities carried out by domestic and foreign operators).

when carrying out oil and gas operations, has become more inefficient, since the prescriptive approach fails in the long term, mainly because of two factors:

1) The lack of appropriate R&D budgets for the regulators of hydrocarbons (even in developed oil-producing countries) to keep regulation updated to meet industry challenges and the evolution of technology; and
2) Hydrocarbon regulators bear the burden of a responsibility that is a contractual obligation of oil and gas operators.

In other words, States attract companies to invest and provide capital, know-how, technology, and human resources for the exploration and production of hydrocarbons. The performance of exploration and production activities is an obligation widely standardized in contracts, which requires oil companies to carry out operations that comply with the applicable regulation; and also requires implementing international oil industry practices, widely developed by operators because of their multi-jurisdictional activity. This performance is considered part of the oil operators' contribution and contractual obligation in which they bear the burden of identifying and using best industry practices when performing oil operations. The rules are defined as the generally accepted methods, procedures, and practices followed by prudent operators in the international oil industry to produce hydrocarbon resources in an economically and environmentally sustainable manner.[36]

We explain below how oil industry practices have been incorporated in:

a) constitutions;

36. *See* INT'L ASS'N OF OIL & GAS PRODUCERS, REGULATORS' USE OF STANDARDS 4–5 (2010) (explaining that the "Safety Case" standard, a growing standard in offshore operations that consists of a regulatory requirement based on the duty of care of the operator, transfers to the operator the requirement to present its own regime of standards to follow, to guarantee the security of oil operations and reduce risks to a level as low as rationally possible; the operator must describe the operation installation in a document, provide details about the hazards and risks associated with the installation to minimize reasonable risks).

b) laws and regulations;
c) contract models; and
d) a State's own arguments in arbitration litigation.

a. Constitutions

The Mexican Constitutional Reform of 2013 included a request to incorporate best industry practices.[37] Article 25 provides that:

> [. . .] in the activities [of exploration and exploitation of oil and other hydrocarbons,] the law should establish the rules related to the administration, organization, operation, contracting procedures and other legal acts observed by productive companies of the State [. . .] *based on best practices*, and will determine the activities that should be performed.[38]

This excerpt of the Mexican Constitution incorporated a reference to "best practices" without specifying what type of best practices were being referred to, either national or international. However, we also observe the development of this in the 2014 Mexican Hydrocarbons Law (Hydrocarbons Law). The Hydrocarbons Law set forth in Article 19 includes a reference to international best practices:

> Art. 19. Contracts for Exploration and Extraction must have, at least, clauses on: [. . .] the responsibility of the contractor and operator in accordance with international best practices.[39]

37. Constitución Política de los Estados Unidos Mexicanos [hereinafter CP] [Political Constitution of the United Mexican States], art. 25, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 20-12-2013.

38. *See id.*

39. Ley de Hidrocarburos art. 19 sec. xiv, Diario Oficial de la Federación [DOF] 11-08-2014, últimas reformas DOF 20-05-2021 (Mex.).

These practices relate to the usages (methods and procedures) created and generally accepted by the transnational petroleum industry which are used daily in oil operations.

Here, the Mexican Legislator incorporated an obligation to use a source of transnational law in the special legislation for the petroleum sector. Commonly, industry practices are created outside the Mexican national legal order, such as general standards, guidelines, code of conduct, and model clauses from industry and professional associations. Given the transnational nature of industry standards, the Mexican Legislator has incorporated these references into the nation's Constitution by creating a constitutional basis for the best practices of the petroleum industry, making the implementation of industry practices mandatory in Mexico.[40] These references to industry practices further expanded the legal regime applicable to petroleum contracts in Mexico with further references in model contracts and arbitration rules.

b. Laws and Regulations

Regarding national laws and regulations that govern oil operations, the situation is even more relevant among producing countries. In some cases, the incorporation has been rather vague and broad, mandating that operators manage their activities according to the "best," "good" or "generally accepted" practices of the petroleum industry like those found in Indonesia, Argelia, Nigeria, Argentina, Brazil, Venezuela, Timor-Leste, Argentina, and Trinidad and Tobago.[41]

However, during the last decade, this trend has evolved into repeated references to industry practices over very specific exploration and production issues, such as the declaration of commerciality of oil discovery, associated gas, production levels, technical standards, operator obligations, drilling, production, abandonment, the prevention and response to oil spills, security

40. CP, *supra* note 37, art. 25–27.

41. *See* Decreto No. 9.478, de 6 de Agosto de 1997, Diário Oficial da União art. 8, 44 (Braz.); Decreto No. 12.351, de 22 de Dezembro de 2010, Diário Oficial da União art. 11, 30 (Braz.); Hydrocarbons Organic Law art. 19 (Venez.); Law No. 17.319, Oct. 30, 2014, B.O. art. 19 (Arg.); Petroleum Act, Dec. 31, 2011, chap. 62, art. 42–43 (Trin. & Tobago).

measures, and environmental practices.[42] Mexico, Mozambique, Angola, South Sudan, and Equatorial Guinea are countries whose hydrocarbon laws reflect this broad reference to industry practices.[43] These countries have included several references to industry practices, allowing transnational regulation to govern specific oil operations. We can see that there is a fine contrast between the vague references in just a few countries in the 20th century and the multiple numbers of references included in the 21st century. [44]

c. *Model Contracts*

It is also possible to find references to industry practices across multiple model contracts created by national regulators or professional organizations. Examples of oil contracts with several references to industry practices are the 2008 Model Contract of Angola, the 2008 Model Contract of India, the 2010 Model Contract of Brazil, and the 2014 Model Contract of Mexico. All these references happened in contracts from different regions and different countries that follow different legal traditions, but their position in the global oil industry is their common ground, and therefore, once a nation decides to join the global oil market, it is necessary to adopt the transnational rules that govern the petroleum operations.[45]

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42. Ley de Hidrocarburos art. 13, 19, 51, 54, Diario Oficial de la Federación [DOF] 11-08-2014 (Mex.); Lei 21/2014 art. 12, 27, 40, 51, 66, 67, 18 de Agosto de 2014 (Mozam.); Lei 10/04 art. 7, 21, 23, 30, 53, 64, 71, 72, 75, 12 de Novembro de 2004 (Angl.); The Petroleum Act, 2012 art. 7, 22, 29, 36, 50, 51, 56, 59, 60, 81, 84 (S. Sudan); Ley de Hidrocarburos No. 8/2.006 art. 9, 23, 33, 34, 38, 39, 52, 62, 68, 72, 73, 79, 82, 87, 94, 117, 134, 136, 145, 172, 176, 3 de Noviembre de 2013 (Eq. Guinea).

43. *E.g.,* Ley de Hidrocarburos, *supra* note 42 (referencing industry practices of productions levels, operator obligations, abandonment, environmental practices and drilling, among others).

44. *See* República Federativa do Brasil Minstério de Minas e Energia, Contrato de Concessão para Exploração e Produção de Petróleo e Gás Natural 33.9 (2013); *see also* Comisión Nacional de Hidrocarburos, Contrato para La Exploración y Extracción de Hidrocarburos Bajo la Modalidad de Producción Compartida 14.1(a) (2014) (demonstrating that both the National Petroleum Agency of Brazil and the National Hydrocarbons Commission of Mexico are forced to make administrative in accordance with national law while also being subject to industry practices).

45. In addition to the conditions of the model contract, it is very common that the bidding documents for projects of oil investment in many cases require bidders to submit

Despite the research showing more reference to oil industry practices, we should clarify that just by including one reference to the respect of oil industry practices in the contract provision regulation, the operator's obligations serve as an umbrella for the operator's obligations in carrying out petroleum activities. Another reading would suggest that even if the contract does not include a specific reference to industry practices, just by incorporating arbitration rules such as the United Nations Commission on International Trade Law (UNCITRAL) or the International Chamber of Commerce (ICC) which require arbitrators to take into account relevant "trade usages," would be a party's agreement by reference to the application of industry practices in petroleum operations.[46]

d. Arbitration Litigation

Frequently oil-producing States refer to industry practices in litigation before national courts[47] and in arbitration proceedings.[48]

In the 2010 Deepwater Horizon accident litigation, the United States District Court for the Eastern District in Louisiana

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minimum work programs that include references to the uses and practices of the industry. A recurring observation or criticism refers to the lower "hierarchy" that industry practices would have with respect to national law. We can do this find in the case of Colombia in its 2010 model oil contract and in Venezuela in the 2007 joint venture contract, where the contractual clauses establish that industry practices will be applied "as long as they de not contradict internal regulation".

46. On the reference to commercial usages in national laws, *see* Ivana Radic, Étude de Faisabilité sur le Choix de la loi Applicable Dans les Contrats Internationaux, HAGUE CONF. ON PRIV. INT'L L. (March 2007); Eric Loquin, *Retour sur les Sources Premieres de la Lex Mercatoria: Les Usages du Commerce International*, *in* LE DROIT DES RAPPORTS INTERNATIONAUX ÉCONOMIQUES ET PRIVÉS 215, 215–34 (LEXIS ed., 2013); Code de Procédure Civil [C.P.C.] [Civil Procedure Code] art. 1511 (Fr.); Thomas Clay & Phillipe Pinsolle, *De l'autonomie de la convention d'arbitrage à l'autonomie de la sentence arbitrale*, *in* JOURNAL DU DROIT INTERNATIONAL Jean-Michel Jacquet ed., (2015).

47. *See In re* Oil Spill by Oil Rig "Deepwater Horizon" in Gulf of Mexico on April 20, 2010, 910 F. Supp. 2d 891, 919 (E.D. La. 2012) (demonstrating that the litigation on the practices of the oil industry was relevant to determine the responsibility of British Petroleum).

48. *See generally* David MacDonald, *Arbitrating International Environmental Disputes*, LAW360 (Oct. 14, 2010, 11:26 AM), https://www.law360.com/articles/200518/print?section=commercialcontracts (discussing the use of best practices by producing States in arbitration).

discussed the application of industry practices regarding the industry's contingency plans in case of oil spills. In this case, the court decided that:

> Nevertheless, federal regulations did not specifically require companies to have, or to have access to, a prebuilt capping stack before the HORIZON/Macondo blowout. Indeed, prior to drilling the Macondo well, BP had submitted its oil spill response plan to the MMS for review and approval, and the MMS approved same. The evidence shows that it was not industry practice to have a pre-built capping stack prior to the HORIZON/Macondo blowout. The Court finds that BP's oil spill response plan, including the limited source control aspects, complied with federal regulations and industry practice existing at the time.[49]

Note that the court in Louisiana sought the application of industry practices for oil spill contingency plans and found that such industry practices did not exist at the time.[50] This analysis can be implemented by national judges, international judges, and arbitrators alike when dealing with cases involving oil and gas operations. The identification of industry practices and applications can be determined in any of the three different legal orders.

More specifically, with regard to arbitration cases, oil-producing States have used industry practices to support counterclaims against oil operators.[51] As illustrated by Derek McDonald:

> . . . governments and stakeholders are increasingly relying on environmental claims as one tool by which to effect or

49. *In re* Oil Spill by the Oil Rig "Deepwater Horizon", 77 F. Supp. 3d 500, 517–18 (E.D.La. 2015).

50. Subsequent to the Deepwater Horizon accident there were demands for technological advances to demand, such as an industry practice, a pre-built capping stack in offshore operations. *See* James Burroughs & Chris Hammick, *Throwback 30: From conception to completion–the Subsea Well Response Project* (pt. 1), OIL SPILL RESPONSE (Dec. 8, 2015).

51. *See, e.g.*, Burlington Res. Inc. v. Ecuador, ICSID Case No. ARB/08/5, Decision on Ecuador's Counterclaims, (Feb. 7, 2017).

> defend expropriation of private assets . . . Two common contractual provisions are often at issue: the "good industrial practice" [clause and the] "legal compliance" clause. Very significant environmental claims have been pursued based on terms requiring an operator to conduct operations in accordance with "good oil field practice" and "applicable laws and regulations."[52]

For instance, in *Aminoil v. Kuwait* [53], where, according to Kuwait, Aminoil failed to follow good practices leading to damage to an oil well.[54] Also, in the case ICC 14108[55], a North American company operating in a Middle East country, caused an accident by failing to follow its obligation to conduct oil operations in a reasonable and prudent manner. A similar incident happened in *Burlington v. Ecuador*[56], where, according to Ecuador, the operator failed to comply with industry standards related to equipment maintenance; and *Niko Resources v. Bangladesh* and *Niko*

52. MacDonald, *supra* note 48 ("[These] environmental claims will likely follow a familiar recipe. First, the State will seek to interpret the contractual requirements expansively. The State will argue that a strict standard applies due to the multinational oil company's high level of expertise, skill and knowledge of best practices. Rather than determining the appropriate standard in the context of the specific jurisdictional or geological setting, the state may instead cite the target company's operations and the operations of other multinational oil companies in the EU, the U.S. or elsewhere, as evidence of how work should have been carried out in the local country. Second, the State's claims may cover decades of activities, which will inevitably involve judging both changing environmental laws and changing on-site practices with complete hindsight. Furthermore, links between alleged poor field practices and environmental damage will be sharply drawn.").

53. *See* Government of Kuwait v. Am. Indep. Oil Co. (The Arbitration Tribunal 1982); *See also* Martin Hunter & Anthony C. Sinclair, *Aminoil Revisted Reflections on a Story of Changing Circumstances*, *in* INT'L INV. L. AND ARB.: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INT'L L. 347, 378 (Todd Weiler ed., 2005).

54. *See* Aminoil v. Kuwait, Arbitration Award, 1982.

55. *See* Final Award in Case 14108, Bulletin CCI Vol. 25 No. 2 Case CCI 14108, (August 2008).

56. American Petroleum Institute Standards were incorporated in the Environmental Regulation for Hydrocarbon Operations in Ecuador and were part of the sources of law used by the Arbitral Tribunal in finding Burlington liable for damages against Ecuador for USD $39 Million (Decision on Counter Claims 2017). *See* Burlington Res. Inc. v. Ecuador, ICSID Case No. ARB/08/5, Decision on Liability, at ¶¶ 433–57 (Dec. 14, 2012).

Resources v. Petrobangla and BAPEX, where Niko's breach of the Joint Venture Agreement with BAPEX caused a blowout in a gas well.[57] Thus, as McDonald warned more than a decade ago, litigation with regard to the obligation to comply with industry practices would become more common, as it is a way to request the compliance of contractual obligations but also with industry standards whose respect is in the interest of the global oil and gas industry.

In addition to industry practices as a source of transnational law that have been incorporated in the legal regime of petroleum transactions, international standards for the protection of the property of foreign investors have been another field of reference for, and development of, transnational rules. This is the case for investment standards included in international treaties for the protection and promotion of investments.

2. Protection Standards in Investment Treaties

The study of interstate treaties is relevant to the international petroleum industry. Energy cooperation agreements, the U.N. Convention of the Law of the Sea, treaties aimed at protecting the environment, international treaties dealing with arbitration, and treaties for the protection of foreign investments are among the relevant international legal instruments widely used in the oil and gas industry.[58]

Treaties that focus on the promotion and protection of investments have become an umbrella framework regarding oil and gas investment projects. Such treaties focus on reducing the

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57. *See* Niko Res. Ltd. v. PetroBangla et al., ICSID Case No. ARB/10/11, Decision on Liability (2020) ("The ICSID tribunal further held that Niko must pay compensation for direct injury and damage caused by the blowout and ordered that a damages phase of the arbitration continue to determine the quantum of Niko's liability."); *see also Foley Hoag Secures Victory for Bangladesh's State Owned Oil and Gas in ICSID Arbitration Against Niko Resources*, FOLEY HOAG, https://foleyhoag.com/news-and-insights/news/2020/may/foley-hoag-secures-victory-for-bangladeshs-state-owned-oil-and-gas-companies-in-icsid-arbitration-ag; *see also* Niko Resources (Bangladesh) Ltd. v. Bangladesh, ICSID Case No. ARB/10/18, Decision about Jurisdiction, (Aug. 19, 2013) (highlighting that industry practices apply, ". . . not just because they are included in the Operator's obligations under the JVA; but they have a direct application.").

58. *See* Tom Cummins & Ben Giaretta, *Investment Treaty Arbitration*, *in* DISP. RESOL. IN THE ENERGY SECTOR 225, (Ronnie King ed., 2012).

political risk of the foreign investor in case of adverse policy decisions taken by the Host-State that could negatively affect its investments in violation of international obligations.[59]

We can trace the seeds of the investment protection treaty regimes in the landmark U.N. General Assembly 1803 Resolution of 1962 of Permanent Sovereignty over Natural Resources, (G.A. Res. 1803),[60] in which paragraphs 3 and 4 open the door to a transnational regime where international law would govern the calculation of compensation to private investors in cases of nationalization or expropriation, and that international arbitration would be the appropriate jurisdiction for the application of international law. The opening created by G.A. Res. 1803 introduced the foundational pillars for a transnational system of investment protection.[61] States have developed a system which provides rules from arbitration clauses until the execution of arbitration awards, and investment treaties, such as the North American Free Trade Agreement (NAFTA), now the United States–Mexico–Canada Agreement (USMCA), specific agreements to the energy sector like the Energy Charter Treaty, and international conventions, like the Washington Convention, the New York Convention, and the Panama Convention.[62] All of these legal instruments contain norms regarding arbitration and the recognition and enforcement of arbitration awards, which are aligned with the transnational nature of arbitration awards.[63]

Investment protection treaties that govern oil investments seek to reduce the risk of Host-States' interference with foreign

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59. *See* Carolina Moehlecke & Rachel L. Wellhausen, *Political Risk and International Investment Law*, 25 ANNU. REV. POLITICAL SCI. 485, 485 (2022).

60. G.A. Res. 1803 (XVII) (Dec. 14, 1962).

61. *See generally id.*; *see* Stephan W. Schill, *Mulitilateralizing Investment Treaties through Most-Favored-Nation Clauses*, 27 BERKELEY J. OF INT'L L. 496, 518 (2009). In turn, treaties are connected through the use of the common language of standards. In addition, there are similarities between them because they belong to the same treaty generation, for example, the similarity between the treaties signed in the decade of the 90s; unlike those signed today, perhaps more extensive and detailed; or they are products of a model investment treaty such as the US model treaty; the model treaty of France, or how we can see in the similarities of the Mexican investment treaties.

62. *See Primer on International Investment Treaties and Investor-State Dispute Settlement*, COLUM. UNIV., https://ccsi.columbia.edu/content/primer-international-investment-treaties-and-investor-state-dispute-settlement (last updated Jan. 2022).

63. *Id.*

investments. Once an investment treaty enters into force, the Host-State adopts two major standards, which are fundamental for the engagement in foreign investments:

1) foreign investors' access to international law; and
2) foreign investors' access to international arbitration.[64]

Whether bilateral or multilateral, these treaties include international obligations, providing some degree of rule of law and legal predictability. Therefore, Host-States cannot unilaterally modify international agreements according to treaty rules. Even in cases where a Host-State decides to terminate a treaty, the effects of termination are controlled by survival clauses, which extend the validity of the treaty obligations for periods of ten, fifteen, and even twenty years,[65] thereby demonstrating that a special feature of these agreements is specific protection of long-term investments. Therefore, we can see here that a Host-State limits its regulatory capacity by agreeing to a treaty system that once accepted is not so easy to disassemble.

Oil-producing States have integrated themselves into this special legal regime that protects foreign investments. This regime, through several standards, limits the exclusive use of national laws versus the obligations imposed by standards of international law. As a result, State-centric approaches[66] are diminished since investment standards contradict the two main tenets of "Calvo's Doctrine," the exclusive application of national law and the exclusive jurisdiction of national courts.[67] Furthermore, the increasing number of arbitration awards that

64. G.A. Res. 1803, *supra* note 60, at 16.

65. U.S. Conf. on Trade and Dev., Denunciation of the ICSID Convention and BITS: Impact on Investor-State Claims, at 3 (Dec. 2010). In the case of Ecuador, *see* Enrique Jaramillo, *Ecuador's Ordeal: Is International Jurisdiction a Journey with No Return? (Part I)* (Oct. 12, 2017) https://arbitrationblog.kluwerarbitration.com/2017/10/12/ecuadors-ordeal-international-jurisdiction-journey-no-return.

66. Oscar Garibaldi, *Calvo Redivivus: The Rediscovery of the Calvo Doctrine in the Era of Investment Treaties*, 5 TRANSACTIONAL DISP. MGMT. J. (2006).

67. *Id.*

have interpreted investment standards are creating a transnational body of case law used by industry players and arbitrational tribunals, as having contributed to the harmonious development of investment law.[68]

Currently, the development of this system has not been excluded from criticism.[69] Despite opposition, the regime of foreign investment has not stopped growing in the last two decades, and trends show continued expansion.[70] For example, not even the strong criticism against NAFTA during the 2016 presidential campaign by President Donald Trump ended with the termination of the agreement. Instead, international rules were of such importance that the U.S. Government had to renegotiate the terms of the agreement, creating a new NAFTA version 2.0 known as the USMCA. And despite the critics of the

68. Burlington Res. Inc. v. Ecuador, ICSID Case No. ARB/08/5, Decision on Liability, ¶ 187 (Dec. 14, 2012); *see also* Duke Energy Electroquil Partners v. Ecuador, ICSID Case No. ARB/04/19, Award, ¶¶ 116–17 (August 18, 2008); Saipem S.p.A. v. Bangladesh, ICSID Case No. ARB/05/07, Decision about Jurisdiction, ¶¶ 66–67 (March 21, 2007); Noble Energy, Inc. v. Ecuador, ICSID Case No. ARB/05/12, Decision about Jurisdiction, ¶¶ 49–50 (March 5, 2008).

69. Criticisms not only come from countries that faced a large number of arbitration lawsuits such as the case of Argentina, Venezuela, Honduras and Ecuador, but also of politicians and academics in the U.S., EU, and Europe. *See, e.g.*, Elizabeth Warren, *The Trans-Pacific Partnership Clause Everyone Should Oppose*, THE WASHINGTON POST (Feb. 25, 2015), https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html; *see also* PIA EBERHARDT & CECILIA OLIVET, CORP. EUR. OBSERVATORY AND THE TRANSNAT'L INSTITUTE, PROFITING FROM INJUSTICE, 7 (2012); *see also* Payam Akhavan et al., *An open letter about investor-state dispute settlement*, McGill University (Apr. 2015), https://www.mcgill.ca/fortier-chair/files/fortier-chair/isds_letter-april_20_final.docx (signed by a group of prominent academics in the area of investment law that seek to demystify certain criticisms against the investment law system); *see also* Jeffrey Zients, *Investor-State Dispute Settlement (ISDS) Questions and Answers*, THE WHITE HOUSE (Feb. 26, 2015 3:00 PM), https://obamawhitehouse.archives.gov/blog/2015/02/26/investor-state-dispute-settlement-isds-questions-and-answers (outlining the response of a White House counselor to the critical assertions of Senator Warren); *see generally Report on the Online Consultation on Investment Protection and Investor-to-State Dispute Settlement in the Transatlantic Trade and Investment Partnership Agreement*, EUR. COMM'N (Jan. 13, 2015), https://ec.europa.eu/commission/presscorner/detail/en/MEMO_15_3202 (discussing a vision based on a system of improvement); *see also* U.S. Conference on Trade and Development, World Inv. Report 2015 Reforming Int'l Inv. Governance, at 124 (2015).

70. *ICSID Caseload–Statistics, 1-2024 and Recent Trends in IIAs and ISDS*, No. 1 Feb. 2015.

more strict terms providing State control in the new version, treaty shopping practice is still available for investors.

Thus, the investment regime has shown its utility in protecting the rights of foreign investors subject to discriminatory acts or arbitrary actions of the State and has also condemned the petroleum corporations when these companies have violated the laws of the Host-State.[71] This offered an opportunity for States and investors to resolve their disputes through the use of arbitration tribunals. Arbitration tribunal utilization reached 27% for oil and gas disputes, and the energy-related sectors reached 41% of utilization, being the global economic sector that generates most of the arbitration services, according to the International Centre for Settlement of Investment Disputes (ICSID) and the UN Trade and Development (UNCTAD) statistics reports.[72]

In sum, states open to adopting transnational regulation regarding oil industry practices and international standards for the protection of investments are not just a consequence of rule incorporation into national law; instead, national law controls the exit gate.[73] This would be a state-centered and idealist approach that ignores the new equilibriums of power in the world today. On the other hand, we can see relinquishment as the result of globalization as the predominant world economic order where the balance of power creates the integration of actors such as States, corporations, and transnational industry groups. Thus, a State seeking foreign investments has no alternative but to integrate a global market governed by its own transnational rules and standards. This provides access in exchange for technology, capital, and know-how, that would contribute to the development

71. *See generally* Occidental Petrol Corp. Occidental Expl. and Prod. Co. v. Ecuador, ICSID Case No. ARB/06/11, Award (Oct. 5, 2012)(discussing how oil companies had to withstand reductions in their compensation amounts due to violations of the right of the Receiving State in the case of the execution of a Farm-out contract in the Ecuadorian case); *see generally* Yukos Universal Limited v. Russian Federation, PCA Case Repository, Case No. AA 227, Final Award (July 18, 2014) (in which violations of Russian tax law by Disc optimization practices in the Russian case).

72. *ICSID Caseload–Statistics*, *supra* note 70.

73. The incorporation of transnational rules into State law has also been defined as "transnational legal process," which would aim to internalize "international legal norms . . . into domestic law." *See* Koh, *supra* note 28, at 626, 636.

of natural resources of the Host-State as a national goal to improve the wealth of its population.[74] In other words, the State does not act like a provider and ruler but instead, the State has to adapt and integrate itself into a new transnational reality where it participates and acknowledges a system of co-regulation.[75] As empirical evidence shows, States have adapted to this new reality; thus, legal education should follow suit by identifying new legal approaches that assist government officials and corporate attorneys to better understand the needs of transnational actors in the oil industry, being governments one of these actors, who are subject to transnational law.

B. *The Flourishing of Transnational Rules in the Oil Industry*

Transnational rules in the oil sector are specifically created to govern the relationships between oil-producing States and other industry actors in the global oil market.[76] Consequently, these transnational rules have set a distinct focal point in the paradigms of a rigid comparative law approach, relying on its conception of state law and its vision of foreign law.[77]

74. On this point the easy criticism of cheering that Brazil is known for being a country that thanks to its particular circumstances of being a large market, foreign investments have been guaranteed without needing to ratify foreign investment treaties. This makes investors from other countries in Brazil sustain themselves in the arbitration clauses included in long-term oil contracts and rely on the respect of arbitration by part of the Brazilian courts. However, it is publicly known that transnational corporations such as Petrobras and Odebrecht, when they invest outside Brazil, in countries with institutional fragility, do so through foreign investment treaties using the nationality of a country that has an investment treaty with the country of the receiving State. In this way, Brazilian companies participate in the global investment regime. Additionally, while we are aware of new legal instruments proposed by Brazil, the effectiveness of the Investment Cooperation and Facilitation Agreements that would seek to protect your investments in Africa, maintaining investment standards but through diplomatic protection, it remains to be seen. *See* J. Hamilon & M. Grando, *The New Brazil Investment Agreements*, LATIN ARB. L. (2015), http://latinarbitrationlaw.com/brazil-and-the-future-of-investment-protections/.

75. *See* Ost, *supra* note 17; *see also* ALFREDO DE JESÚS O. & JOSE RICARDO FERIS, THE NEW WORLD ORDER OF ECONOMIC RELATIONS POSITION PAPER (International Chamber of Commerce September 27, 2014).

76. *See* Djakhongir Saidov, *The Standardisation of Oil and Gas Law: Transnational Layers of Governance*, NAT'L UNIV. OF SING. CTR. FOR MAR. L., 1–2 (Oct. 2017).

77. While comparative law approaches are useful at the descriptive level of different petroleum legislation, the risk of comparative law studies is based on the focus on solutions

Transnational law presents a dynamism that is rooted in the principle of integration and hybridism of a law that is multi-jurisdictional,[78] cosmopolitan,[79] and applies to a global sector of the economy. Based on these principles, it is possible to perceive the dynamism between distinct subjects of transnational law, like the States or non-state actors who create norms, whose application and obligation result from integration into a specific transnational sector without needing the conflict of law norm. Thus, the legitimacy of a transnational rule is instead a result of recognition, repetition, and the actions of States and non-state actors, regarding their participation in a global economic market. Hence, this means that the sources of transnational law will then become applicable in a transnational order that touches all of the relevant jurisdictions such as arbitration tribunals, international courts, and national courts, therefore creating a substantive legal system of transnational law.

From the normative pluralism point of view, transnational rules are created and promoted by industry organizations that focus on different industry activities such as exploration, production, services, procurement, sales, etc. These can be identified in the forms of general principles of international law, national law with transnational effects, international treaties relevant to the sector, and most recently, arbitration jurisprudence dedicated to interpreting different sources of law that come from state or non-state origin.

Therefore, the next sections focus on transnational rules created by a State or those that are created by non-state actors.

1. Transnational Rules by States

National law was created with the purpose of resolving issues primarily regarding internal matters. Government officials and

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derived from the State norm from the conflict norm. His fragmented and static vision of study of oil regimes is its main defect. Legal regimes are considered as foreigners or strangers with each other, or from the simplification of public and private, and do not allow observing with clarity the transnational phenomenon.

78. Boris Barraud, *Le Droit sans le Territoire—Globalisation et postmodernité juridiques*, 10 SCIENCES DE L'HOMME ET DE LA SOCIETE 47 (2013) (Fr.).

79. Marilda Rosado de Sa Ribeiro, *Direito dos Investimentos e o Petróleo*, 18 REVISTA DA FACULTAD DE DIREITO DA UERJ 1 (2011) (Br.).

national legislatures concentrate their interests on the needs of their constituents, whereas transnational actors, like members of the petroleum industry, operate in a global context that allows vast access to information regarding the implementation of technology and industry practices.[80] However, in some cases, national law can have international effects, interacting with transnational rules created by non-state actors.

a. The Transnational Recognition of National Law.

National law may be recognized as rules with transnational effect or recognition by the petroleum industry through repetitive practices of efficient rules, accepted by the oil industry. An example of formal recognition has been the Safety Case in the exploration and production operations in the North Sea. A negative example is when a State has attempted to get the recognition of "windfall profit tax" as a generally accepted practice in the oil industry.

i. Recognition of the Safety Case Practice.

There are some practices in the industry that have been developed by state regulators.[81] In the case of the Safety Case, state regulation was based on the recommendations by Lord Cullen as a result of the Piper Alpha platform accident

80. "There is today an enormous gap between the way many C.E.O.'s in America—not Wall Street-types, but the people who lead premier companies that make things and create real jobs—look at the world and how the average congressmen, senator or president looks at the world. They are literally looking at two different worlds—and this applies to both parties . . . Politicians see the world as blocs of voters living in specific geographies—and they see their job as maximizing the economic benefits for the voters in their geography. Many C.E.O.'s, though, increasingly see the world as a place where their products can be made anywhere through global supply chains (often assembled with nonunion-protected labor) and sold everywhere." Thomas L. Friedman, *Made in the World*, THE NEW YORK TIMES (Jan. 28, 2012), https://www.nytimes.com/2012/01/29/opinion/sunday/friedman-made-in-the-world.html.

81. As the transnational rule is a norm of the oil lex, and arbitration an organ of the transnational legal order, we must conceive that the transnational rule is preexisting to the arbitrator's own decision that incorporates into the transnational legal order of the sector. *See* Eric Loquin, *À Propos de l'ouvrage d'Emmanuel Gaillard: Aspects Philosophiques du Droit de l'arbitrage International*, 2 REVUE DE L'ARBITRAGE 283, 317–325 (2009).

investigation, where 167 people died on June 6th, 1988.[82] The adoption of the "UKOOA Guidelines for Offshore Installation Safety Cases: Diving Operations from Vessels: A Joint Industry Guide" is the base for security measures implemented by several countries to ensure safety during the exploration and production of offshore operations.[83] These measures are robust regulations adequate for reaching objectives, and these measures are flexible and adaptable to address new technologies, which are constantly evolving in the oil industry.

ii. The Safety Case as Transnational Rule

The Safety Case is a rule of reverse action that aims to have security measures where the operator must demonstrate that the plan for exploration and production will be designed and executed to reduce the operation risk level.[84] The Safety Case has been developed during the last 30 years by the countries bordering the North Sea. There is no specific technical solution since all the projects and risk conditions may vary over time. The economic and legal rationale responds to the interest to keep the burden of proof on the operator to demonstrate the appropriateness of the practices employed. The operator is better placed within terms of research and development capabilities and global experience with activities under similar circumstances around the world. This reality places operators in an advantageous position to identify the appropriate industry practices. Indeed, in performance-based regulation, it is the operator as the industry actor, who is better prepared to analyze geological data to assess the technical risks of an operation and identify the appropriate procedures. Thus, the operator is in a better position to assume the financial risk of an accident and carry the burden of strict liability rules under

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82. *Piper Alpha: 25 Years on*, CRONER-I (July 13, 2013), https://app.croneri.co.uk/feature-articles/piper-alpha-25-years.

83. *See* A GUIDE TO THE OFFSHORE INSTALLATIONS (SAFETY CASE) REGULATIONS 2005, HEALTH AND SAFETY EXECUTIVE (3d ed. 2006), accessible at https://www.hse.gov.uk/pubns/books/l30.htm (giving an overview of safety guidelines for offshore installations).

84. Offshore Installation (Safety Case) Regulations 2005, SI 2005/3117 (Eng.); *see also* UKOOA GUIDELINES FOR OFFSHORE INSTALLATION SAFETY CASES: DIVING OPERATIONS FROM VESSELS. A JOINT INDUSTRY GUIDE, UKOOA (1993).

national law. This raises the question: why transfer that burden to national hydrocarbon regulators? The regulation of industry practices relies on more than just the interest of government oversight. As described above, the global consequences of an offshore accident can potentially end up impacting the international oil and gas industry. Keeping the burden of compliance to the operator should follow the needs and interests of all industry players, placing the charge on the appropriate actors. This security approach is based on three principles:

1) those who create risks are the ones responsible for controlling these risks;
2) the operator carries the obligation to seek solutions to meet the government's goals); and
3) all the risks ought to be reduced in order for them to fall under a threshold of acceptability, which is "as reasonably low as may be possible."[85]

The Safety Case has been adopted by different countries[86] for many offshore regions, such as Norway's Petroleum Act of 1996, as amended in 2011; Australia's Offshore Petroleum and Greenhouse Gas Storage Act of 2006; New Zealand's Health and Safety in Environment Regulation of 1999 (Petroleum Exploration and Extraction); Brazil's Resolution 43, Operation Safety Management System (SGSO); and post the Deepwater Horizon spill, the United States Safety and Environment Management Systems of 2011 (SEMS of 2011). [87]

Thus, it is common that state regulation, when proven efficient, can be copied, translated, and incorporated into other

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85. OGP STANDARDS COMM. REP. NO. 426, OGP REGULATORS' USE OF STANDARDS 4–5 (2010).

86. *Id.* at 4–5, 11, 28–29, 33–34, 45.

87. In this case, the British security philosophy is based on three principles: 1) those who create the risks are responsible for controlling these risks; 2) priority is given to the security of the contracting carried out by the institution and established goals, instead of prescriptive norms, since the government sets the objectives, the operators are developing what they consider appropriate methods to achieve these objectives; and 3) all risks must be reduced so that they are below a certain threshold of acceptability "as low as reasonably possible." *Id.* at 4–5.

national legal orders and once tested by the oil industry, it can turn into a transnational regulation followed by oil and gas operators.

iii. The attempt of WPT as Transnational Rule.

State regulations are not always recognized as transnational rules.[88] For example, in Ecuador, the country sought recognition of a Windfall Profit Tax (WPT) law, arguing that it was a practice normally accepted by the petroleum industry.[89] After the approval of the WPT law, Ecuador claimed in *Burlington v. Ecuador* that Law 42 was approved to restore the economic equilibrium of the Production Sharing Agreement signed between PetroEcuador and Burlington, whose economic equilibrium had been distorted by inflation of oil prices without precedent since the year of 2008.[90] Ecuador argued two points:

> Law 42 was a necessary and appropriate measure given the circumstances. As of 2002, there was an unexpected and unprecedented increase in oil prices. This unexpected increase in prices destroyed the economic balance of the CP-Petroleum Contracts. This economic balance must reflect the widely accepted presumption in the oil industry that the State, as the owner of the non-renewable resource, must be the main beneficiary of the extra income originated by the high price of oil. However, the CPs have a limited price elasticity, that is, the State's participation remains the same despite the price increases. With the massive and unexpected increase in oil prices, Ecuador ceased to be the main beneficiary of oil profits. As a result, the CPs stopped reflecting a fair distribution of the income generated by the extraction of oil between the State and the contractor.[91]

88. *See* Burlington Res. Inc. v. Ecuador, ICSID Case No. ARB/08/5, Decision on Liability, ¶ 137 (Dec. 14, 2012).

89. *Id.*

90. *Id.* at ¶ 377.

91. *Id.*

> The adoption of Law 42 by Ecuador was not exceptional. Since 2002, up to sixteen States have adopted measures similar to Law 42 after the increase in oil prices, including countries such as the United Kingdom or Norway.[92] In particular, ConocoPhillips, Burlington's parent company, is likely to have been affected by measures similar to Law 42 in other states, such as Algeria, China, or Alaska. Therefore, Ecuador's attempt to restore the economy of the CPs was consistent with the practice of the sector.[93]

In the *Burlington* case, Ecuador sought to find arguments outside its own legal order to justify and obtain legitimacy in its national fiscal policy by arguing a widely accepted presumption in the petroleum industry that the Host-State, as the owner of non-renewable resources, should be the primary beneficiary of extra income originating from elevated prices of oil; and that since 2002, there have been sixteen countries that have adopted a windfall profit regulation similar to Law 42.[94] Thus, Law 42 should be considered a norm accepted by the international oil industry.[95] In other words, the goal is not to argue the legitimacy and legality of the sovereign's state policy based on pure Ecuadorian law but instead, that Ecuadorian fiscal policy was in harmony with the industry's practices.

Arguments for Law 42 were not without opposition, especially on the side of investors, who argued that Law 42, having passed three reforms from 50% to 99% and then finally to 70%, was implemented in light of petroleum contracts that presented differing economic equilibriums, showing that the objective of the tax was not to reestablish the economic equilibrium of the Production Sharing Agreement;[96] rather Law 42 was used to

92. *Id.* at ¶ 378.

93. *Id.*

94. Burlington Res. Inc. v. Ecuador, ICSID Case No. ARB/08/5, Decision on Liability, ¶ 137 (Dec. 14, 2012).

95. *Id.*

96. However, authors such as Professor Jacqueline Lang Weaver have remarked that the Safety Case of the United Kingdom and Norway have not been exactly copied by the U.S. *See* Weaver, *supra* note 35, *at* 381, 389 ("While differing significantly from the Safety Case regime actually used in Norway and the United Kingdom, the new American 'Workplace Safety Rule,' also called the [Safety and Environmental Management, or

pressure the renegotiation of the contracts which ended in the expropriation of Burlington's oil assets in Ecuador. In this case, the tribunal withdrew the idea that the demands were an indirect expropriation tax under the bilateral investment treaty between the United States and Ecuador. However, it did pose to Burlington that PetroEcuador had yet to abide by the stabilization clauses regarding the taxes included in the petroleum contract.[97]

In this case, there was no recognition of transnational practice. The WPT is a practice that has been accepted among operators in Venezuela, China, the United States, the United Kingdom, and Norway. The application of these laws has notoriously failed as Ecuador could not prove the fact that they were aligned with a transnational practice of oil-producing States generally accepted by oil companies.[98]

b. *The Transnational Reach of National Law*

By way of either individual practice or by collective identity with inter-state organizations, States have the power to legislate and create rules that impact the petroleum industry.

'SEMS', rule], requires offshore operators, for the first time, to have in place a 'Comprehensive management program for identifying, addressing and managing operational safety hazards and impacts.' As explained by BSEE, the SEMS rule gives the agency" oversight and enforcement of SEMS provisions "that address "human factors behind accidents" and provides a "flexible approach to systematic safety that can keep up with evolving technologies").

97. *See* Burlington Res. Inc. v. Ecuador, ICSID Case No. ARB/08/5, Decision on Liability, ¶ 302 (Dec. 14, 2012).

98. In the decade from 1990 to 2000, numerous contracts negotiated by producing countries were made at prices in the range of $ 8 and $ 11 dollars a barrel of oil. Many of these contracts did not contain mechanisms of flexibility to support the price increase in 2008, when it reached $147 dollars a barrel. *See e.g., id.* at ¶ 377–78 (Dec. 14, 2012). Someone might suggest that the second part of the allegation suggests a conflict of law method since Ecuador uses a comparative law argument claiming that other state rights have recognized this practice. However, the reasoning went further in trying to categorize it as a practice accepted by the industry. *Id.*

i. The Transnational Application of National Law.

In the case of national law, laws such as the Alien Tort Claims Act (ATCA) or the Foreign Corrupt Practices Act (FCPA) in the United States, are intended to apply to companies with business contacts in the U.S. for wrongful acts committed abroad.[99] The application of these laws has notoriously impacted the operations of oil companies in developing countries.[100] While the implementation of the ATCA has been limited by the U.S. Supreme Court,[101] there has been a significant uptick of cases applying the ATCA, which has significantly impacted the oil sector.[102] Therefore, it has become a growing practice in the industry to increase the number of lawyers who work in compliance departments to protect companies from the violation of these rules.[103] While FCPA's practice has become globalized, [104] it remains to be seen whether this practice has a transnational rule status in the oil sector. This precarious state of the FCPA is

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99. *See* 28 U.S.C. § 1350; 15 U.S.C. § 78dd-1.

100. *See Bribery in the Oil and Gas Industry The Panalpina Bribery Scandal*, NAT'L WHISTLEBLOWER CTR, https://www.whistleblowers.org/bribery-in-the-oil-and-gas-industry/ (last visited Oct. 28, 2023).

101. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124–25 (2013).

102. *Id.*

103. We transcribe below an anti-corruption clause from a State model contract which seeks to balance the level of requirement of the clause with industry practices: "CLAUSE 16. SPECIAL CONDITIONS None of the parties will allow their agents, representatives or staff to offer or grant to the agents, representatives or staff of the other party, either directly or indirectly, gifts, loans, gratuities, commissions or fees, for the personal benefit of said agents, representatives or staff or any member of their family, or any company in which they had a stake significant, with the exception of small-scale institutional gifts that are common and are admitted by the usual practices in the oil industry. Violation of this obligation will result in immediate unilateral termination of the Contract, without prejudice to any other remedy or action that could be foreseen in the legal provisions When one of the parties receives a request from the agents, representatives or staff of the other party (or third parties that claim to act on their behalf) with respect to the granting of any gifts, loans, bonuses, commissions or fees prohibited under the above provisions, you must immediately notify the other party about such request together with all other information that it will be necessary to investigate these circumstances."

104. We must also emphasize that the FCPA has contributed to the creation of numerous codes of corporate conduct on prevention and sanctions acts of corporate corruption, or even guides interstate agencies that have provided their solutions to the Guide to Accountability and Transparency for OECD State Owned Companies.

due to the dissenting voices as to levels of recognition and acceptance of anti-corruption clause requirements in industry transactions.[105] The analysis of the application of these rules by U.S. judges gained some traction in recent years, but it is under development and analysis by international arbitrators.[106]

Norms that seek to impose international sanctions are another example of State norms or interstate regulations that have a global impact on the oil sector. When these penalties come from a State, they will reflect that State's foreign policy regarding economic issues and security, as is the case with the United States embargo on Cuba or the United States sanctions against countries such as Iran, Russia, and Venezuela that end up effecting oil business. These sanctions may imply prohibitions on trade and business with oil companies or general business bans with a country, limiting investments in the oil sector.

ii. The Transnational Scope of Interstate Regulations

Sanctions, in the form of multilateral sanctions from organizations such as the United Nations or the European Union, e.g., UN Security Council sanctions against Libya in the year 2011;[107] the sanctions imposed by the European Union against Russia after Russia's invasion of Ukraine in 2014 and 2022; or the nation-state targeted sanctions imposed in the context of the political crisis in Venezuela by countries such as the United States and Canada, are regulations that impact international transactions in the oil and gas industry.[108] We might also consider the EU oil-cap price and the G7 2022 agreement to impose an oil-cap price against Russia. These sanctions may cause the impossibility or suspension in the performance of contracts such as procurement, services, or investments in the oil sector. This

105. *See Kiobel*, 569 U.S. at 122–24.

106. *See* Yueming Yan, *Corruption and the (Un)Clean Hands Doctrine in Investor-State Arbitration: Definitional and Reciprocity Challenges,* 38 ICSID REV. – FOREIGN INV. L. J. 1, 1-13 (2024), available at https://ssrn.com/abstract=4813386; *see also* Richard L. Cassin, *France's Total SA Cracks Our Top 10 List,* THE FCPA BLOG (May 29, 2013, 4:38 PM), https://fcpablog.com/2013/5/29/frances-total-sa-cracks-our-top-10-list/.

107. *See* S.C. Res. 1973, at 1 (Mar. 17, 2011).

108. *See* PHILLIP BROWN, CONG. RSCH. SERV., R46213, OIL MARKET EFFECTS FROM U.S. ECONOMIC SANCTIONS: IRAN, RUSSIA, VENEZUELA at 2–3, 11, 24 (2020).

potential breach of contracts can be brought to local courts (national or foreign) and arbitration tribunals, leaving it up to judges or arbitrators to decide on the enforcement of contractual provisions affected by these sanctions.[109] Thus, although these provisions can have a transnational impact, their application will be settled in a national court or via arbitration, in which the judges or arbitrators decide whether sanctions are recognized by the national legal order or the transnational legal order as a legal and legitimate action that affects the obligations of performance.[110]

Additionally, organizations such as the United Nations and the Organization for Economic Co-operation and Development (OECD) have contributed to the development of transnational standards.[111] These organizations create guidelines that regulate transnational issues that could apply to oil and gas operations. These are interstate agency regulations that escape the regulatory control of Host-States or transnational corporations individually. This is the case for the "Guiding Principles on Business and Human Rights" by the United Nations framework practice to 'protect, respect and remedy', Resolution 17/4, June 16, 2011; the Articles of the International Law Commission of the Nations United on State Responsibility for internationally wrongful acts, Resolution 56/83 of January 28, 2002; the International Law Commission's Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations 2006, the OECD Guidelines for Multinational Enterprises, 2011, the Company Codes of Conduct and International Standards, Part II, Oil & Gas of the World Bank, to name a few. These are legal instruments that would gain growing implementation as applicable norms as the demand for EGS

109. Josef Ostřanský, *The Termination and Suspension of Bilateral Investment Treaties due to an Armed Conflict*, 6 J. OF INT'L DISP. SETTLEMENT 136, 161 (2015).

110. Pierre Lalive, *Ordre Public Transnational (Ou Réellement International) et Arbitrage International*, 1986 REVUE DE L'ARBITRAGE 329, 337 (1986).

111. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), PROMOTING SUSTAINABLE GLOBAL SUPPLY CHAINS: INTERNATIONAL STANDARDS, DUE DILIGENCE AND GRIEVANCE MECHANISMS 4 (2017).

standards and more responsible production evolves in the hydrocarbons sector.[112]

Another organization of great importance is the Organization of Petroleum Exporting Countries (OPEC). The organization's members can reach agreements, such as production cuts that impact oil investment operations. [113] The implementation of these commitments binds member states, and oil companies are exposed to the risk caused by these production cuts. For example, in *ConocoPhillips v. Venezuela*, awarded in 2011, [114] the company came to sign a letter agreement that operated as a clause of economic compensation linked to the implementation of OPEC production cuts agreed by Venezuela within OPEC. An arbitral tribunal recognized the obligation of the national oil company, Petróleos de Venezuela S.A. (PDVSA), to compensate ConocoPhillips for the production cuts, marking a separation between the international obligations of a State and the contractual obligations of a national oil company and a foreign investor, which should not bear the consequences of the national petro-diplomacy of Venezuela at OPEC.[115]

2. Transnational Rules by Non-state Actors

The emergence of transnational non-state oil industry rules has significant repercussions for legal practice. These rules impact the daily work of oil workers who solve numerous problems based on transnational standards such as model contracts, international rules, and industry practices. These legal

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112. *See* Virginia Harper Ho, *U.S. ESG Regulation in Transnational Context, in* CORPORATE PURPOSE, CSR AND ESG: A TRANS-ATLANTIC PERSPECTIVE (Jens-Hinrich Binder, Klaus J. Hopt, Thilo Kuntz, eds., Oxford, 2024); *see also Methane Abatement for Oil and Gas, Handbook for Policymakers*, US DEPARTMENT OF STATE, BUREAU OF ENERGY RESOURCES (2024) (describing the creation of international oil industry practices for more responsible oil production by reduction of greenhouse gas emissions).

113. The reduction of power of OPEC can be considered as a consequence of the increase in oil reserve companies in countries that are not members of OPEC, because there are new technologies, there are a lack of agreements from the fall in oil prices in 2014 and its members opted for strategies different during bonanza periods, causing very different conditions in the current price scenario.

114. Phillips Petroleum Co. Venez. Ltd. and ConocoPhillips Petrozuata B.V. v. Petróleos de Venez., S.A., Int'l Comm. Arb. Case No. 16848/JRF/CA 1, 7–12 (2012).

115. *Id.* at 99–100.

rules have characteristics that allow them to be applied in multiple jurisdictions. One such characteristic is that industry practices address transnational issues such as environmental protection, anti-corruption clauses, arbitration rules, or technical matters necessary for operational safety. Also, its balanced norm design is intended to create an equilibrium with national regulations, allowing them to obtain wide acceptance in the sector, so their use is requested by both investors and government agencies alike.

These transnational rules impact the everyday practice of industry lawyers and give them the possibility of working in multiple jurisdictions. This creates more mobility among transnational attorneys than decades ago when it was only a reality for geologists, engineers, or business managers, who could work globally on various projects on an itinerant basis. Currently, lawyers in the oil and gas industry can work in different jurisdictions based on these transnational standards, model contracts, [116] international treaty law, and arbitration rules,[117] leaving national law issues to the support of local counsel.[118] [119]

116. We refer to the contracts from the bidding documents with the contractual chain of the industry as pre-contractual documents, through the E&P contract, the Joint Operating Agreement, Farm-out Agreements, service contracts, procurement contracts, transport contracts, storage contracts. In all of them there are mentions of the generally accepted practices of the international oil industry.

117. *See* A. Timothy Martin & J. Jay Park, *Global Petroleum Industry Model Contracts Revisited: Higher, Faster, Stronger*, 3 J. WORLD ENERGY L. & BUS. 4, 6–7 (2010) (describing how standardized clauses allow parties to reduce the number of clauses to be negotiated since they are extended practices in the petroleum industry). As Professor Carine Jallamion explains, " in commercial matters [. . .] usages are fundamental since we are in the field of international [material] rule, and the State is not the only one in dictating the law. The business world also has its legal security imperatives, which States they admit without difficulty, allowing transnational commercial usages to prosper" (author's translation). Jallamion, *supra* note 2, at 17.

118. With this we do not ignore the practice of local lawyers who provide their services to solve matters before courts and national authorities in fiscal, environmental or permitting matters. However, today we know that even these measures at the national level may affect commitments acquired by the State or its entities against to foreign investors. These State measures can finally be answered before international arbitral tribunals.

119. At the University of Houston, I have witnessed how my masters students coming from different nationalities and going to work at oil companies have established their careers practicing in four or more jurisdictions in less than 10 years of practice, or have been able to work in other countries on the basis of this transnational right.

This reality has also increased the number of professional training programs and professional training certificates on legal practice in a global space. [120] [121]

a. *The Industry Practices of the Oil and Gas Industry*

Industry practices are procedures and methods performed by prudent operators in the oil and gas sector, which repeated over time, create customs in the industry. These procedures and methods find legitimacy once they become "generally accepted" by a transnational community, establishing a common usage, which turns into a customary rule within transnational law. These "best practices," or "good practices" refer to the sector's usage, defining the term contained in contract definitions and arbitration rules.[122] [123] Despite the terminological difference between best and good practices, which could make us think of a difference in

120. AIEN, Rocky Mountain Mineral Law Foundation, and IOGP courses are example of active organizations in the professional training of the sector.

121. See, for example, the industry best practice training certificate offered by the University of Houston "Upstream Energy Safety Certificate", with global applications in the sector. Educational work of the Transnational Petroleum Law Institute has been to show this reality through its various workshops to those who have attended, including oil law students as well as lawyers and executives of oil companies.

122. *See* CHARLES EBINGER, JOHN P. BANKS & ALISA SCHACKMANN, OFFSHORE OIL AND GAS GOVERNANCE IN THE ARCTIC: A LEADERSHIP ROLE FOR THE U.S. 34, 46 (Brookings 2014).

123. "'Good practice' can be distinguished from the term 'best practice' that usually means a standard of risk control above the legal minimum. Whilst regulators should encourage industry's continuous improvement, just because one operator is performing to a significantly tougher standard than the existing norm does not mean that regulators can enforce that higher standard on others. Some operators may implement standards of risk control that are more stringent than good practice for a number of reasons such as meeting corporate responsibility goals, or because they strive to be the best at all they do, but it does not automatically follow that everyone else must adopt them. However, this is not a static situation–'best practice' can become 'good practice' over time as a result of, for example, technological innovation becoming more widely adopted, costs of new approaches change or because of changes in accepted management practices. Good practice may also change because of increased knowledge about the hazard and/or a change in the acceptability of the level of risk control achieved by the existing good practice – the current position post Macondo is going to be a time when such changes are inevitable, and possibly more rapid than normal. The IRF members should encourage / influence continuous improvement such that 'best practice' becomes recognized as 'good practice' as quickly as possible." Int'l Regul.'s F. [IRF], *The Involvement of IRF in Setting Standards and Best Practices* (2011).

the degree of requirement or application, the common definitions in oil contracts coincide in that they refer to the practices "generally accepted" by the oil industry members. Thus, the "generally accepted" requirement refers to the method or procedure that has been tested under similar circumstances by international oil industry actors, which gives legitimacy to being the applicable rule among industry players. In case of disagreement, in determining the appropriate industry practices, both a national judge and an arbitrator can defer to parties' legal representatives and industry experts, who would provide support to determine whether the practice is a required rule in the oil industry that is applied by a reasonable operator under similar circumstances.

It is important to highlight that usages and industry practices are the rules with the closest relation to industry actors since their degree of mandatory rule is acquired by the general acceptance among them. As a result, industry practices are a form of transnational customary law for the oil sector that is not only based on state practice (as it is the requirement in public international law) but by the acceptance of State and non-state actors. This reality contrasts with the fact that legal doctrine and training programs tend to neglect the study of industry standards, which creates a gap between technical activities and legal practice in the sector. Thus, it is relevant for training programs to highlight two aspects:

1) the repetition and daily use of industry practices that address key issues such as proper execution of oil operations and respect for the environment; and
2) the study of identifying the legal method and application of industry practices. [124]

124. *See* Luciana Braga et al., *How Transnational Rules Can Contribute to the Improvement of the Brazilian Regulatory System for Unitization—an Analysis Under the Transnational Legal Order Perspective*, 16 J. WORLD ENERGY L. & BUS. 4, (Aug. 2023); *see also* JACQUELINE WEAVER ET AL, *Sustainable Development: Indigenous Title, Human Rights and the Environment*, in INT'L PETROLEUM TRANSACTIONS (Rocky Mtn. Min. Law Foundation Press, 3d ed. 2010); *see also* Cárdenas García, *supra* note 24.

As we have seen previously, there are references to industry practices in national legislation throughout contract practice, arbitration rules, and arbitration awards. In the most recent oil contracts in Brazil, Colombia, Mexico, India, Sudan, and Guinea Equatorial, it is common to find reference to the operator's obligation to comply with industry practices. Also, references to industry practices have been included among the sources of applicable law in arbitration rules; and once arbitration rules are incorporated in a contract, these trade usages become a contractual obligation chosen by the parties.[125] Moreover, arbitration rules require that arbitrators, when determining the applicable law, should consider the relevant usages of the sector "in all cases." [126]

b. *Oil contracts and their transnational nature*

The transnational nature of an oil contract has been part of scholarly debate for decades.[127] This discussion has shed light on various categorizations of oil contracts designating them as:

125. G.A. Res. 76/108, Expedited Arb. Rules of the United Nations Comm'n on Int'l Trade L. art. 35.3, at 24 (Dec. 9, 2021); Int'l Chamber of Com., Arb. Rules art. 21.2, at 29 (Jan. 1, 2021).

126. Loquin, *supra* note 46, at 215. This is largely thanks to those who repeat that this right belongs to a "soft law" of difficult execution, lacking coercive force that enforces the penalty. *"L'usage du commerce international est le grand oublié de la littérature conseacrée à la théorie de la lex mercatoria . . . Il est aussi étonnant de constater que l'importance des usages en tant que source de droit du commerce international est souvent sous-estimée."* *See* Alexandra Wawryk, *The Adoption of International Environmental Standards by Transnational Oil Companies: Reducing the Impact of Oil Operations In Emerging Economies*, 20 J. OF ENERGY & NAT. RESOURCES L. 402–434 (2002); Jacqueline Lang Weaver, *Sustainable Development: Environmental and Socio-economic Issues in Petroleum Development*, *in* INTERNATIONAL PETROLEUM EXPLORATION & EXPLOITATION AGREEMENTS: LEGAL, ECONOMIC AND POLICY ASPECTS 379, 382, 385–88, 398, 408 (2nd ed., Barrows Co., 2009) (recognizing the work on the practices of Alexandra Wawryk and Jacqueline Lang Weaver, these works illustrate the growing importance of industry practices contributing great value to the doctrine, with the exception that these chapters did not develop the connection of the obligatory nature of the practices through arbitration.); *but see* Weaver, *supra* note 124, at 398 (mentioning that, "Industry codes and other sources of 'soft law' are also used as reference sources in transnational dispute resolution, as arbitrators and mediators search for objective measures of what is 'reasonable' or 'equitable' or 'accepted' in a particular context.").

127. *See, e.g.*, sources cited *infra* notes 138–141 and accompanying text.

administrative contracts,[128] state contracts,[129] something halfway between public law and private law, a form of hybrid contract or *sui generis* contract,[130] an international contract, and finally, as transnational contracts belonging to the oil industry sector.[131]

Despite country-specificities that do not affect the nature of an oil contract for exploration and production, oil contracts have been mostly standardized to allow transnational oil and gas corporations to engage in global activity. In more than a century, nation-states have made progress in reforms that give more space to incorporate substantive rules developed by industry players that include international rules and transnational law in petroleum agreements. Even when national regulators draft model contracts, it is not uncommon for them to consult industry players, in an effort to adapt to industry standards to entice investment.

Furthermore, it is important to highlight that the performance of oil and gas operations transcends a territory's national scope. Many financial, insurance, or engineering obligations, which are fundamental for the performance of oil and gas activities, are executed outside the territory of the Host-State. This is the case in engineering and design works, insurance

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128. *See, e.g.*, Charles Leben, *La théorie du contrat d'Etat et l'évolution du droit des investissements*, *in* 302 RECUEIL DES COURTS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 209–377 (Martinus Nijhoff Publishers, 2004); Charles Leben, *Quelques réflexions théoriques à propos des contrats d'État*, *in* 20 SOUVERAINETÉ ÉTATIQUE ET MARCHÉS INTERNATIONAUX À LA FIN DU 20ÈME SIÈCLE, A PROPOS DE 30 ANS DE RECHERCHE DU CREDIMI, MÉLANGES EN L'HONNEUR DE PHILIPPE KAHN 119 (Litec, 2000); Prosper Weil, *Principes généraux du droit et contrats d'Etat*, *in* LE DROIT DES RELATIONS ÉCONOMIQUES INTERNATIONALS 404–414 (Litec 1982); UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, STATE CONTRACTS: UNCTAD SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS, U.N. Sales No. E.05.II.D.5 (2004).

129. A.R. Johansen, OGP Presentation to the International Standards Workshop in Mexico City: Moving towards global standards for the benefit of the oil and gas industry (May 11, 2010) (quoting the UK DTI Report the Empirical Economics of Standards, June 2005).

130. *See, e.g.*, Loquin, *supra* note 46, at 215.

131. *See, e.g.*, discussions about oil cases resulting from Libyan nationalizations by Brigitte Stern, *Trois arbitrages, a même problème, trois solutions. Les nationalization pétrolières libyennes devant l'arbitrage international*, *in* 1 REVUE DE L'ARBITRAGE 1–48 (1980) and Berthold Goldman, *Le mythe de l''ordre legal basis' (ou Grundlegung*, *in* LE DROIT DES RELATIONS ÉCONOMIQUES INTERNATIONALES: ÉTUDES OFFERTES À BERTHOLD GOLDMAN (Litec 1982).

protection, and performance project finance obligations. These obligations can be executed in a global market because they are not limited to local service providers. This opens the scope of oil operation territoriality since it expands the field in which obligations are performed, clarifying that, in practice, oil industry related activities will not be limited by the territory of the Host-State.

An example of the transnationalization of petroleum contracts is the case of the petroleum agreements issued by the Mexican Hydrocarbons Commission (CNH) in which the drafters included different sources of applicable law in the same contract. In the CNH Petroleum Contract Model, there is an applicable law clause designating Mexican Law as the applicable law. However, there are also multiple references to international best industry practices, international treaties such as the New York Convention of 1958, as well as international arbitration rules that imply the application of international rules.[132] Furthermore, the dispute resolution mechanism includes UNCITRAL Mediation and Arbitration rules, resulting in a contract that is governed by a plurality of sources of law.[133]

c. *Standardized contracts*

The need for efficiency in contract drafting in the oil industry has led to the development of contract models that reflect industry standard practices. An example of this is the work initiated by the American Association of Oilwell Drilling Contractors (AAODC), continued by the International Association of Drilling Contractors in the US; also, model contracts by the Association of International Petroleum Negotiators (AIPN, now AIEN) and Oil & Gas UK. Similarly, standards and practices are created by industry organizations (API, DNV, EEMUA, IMCA, IP, NACE, OMHEC, SNAME,

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132. Comisi6n Nacional de Hidrocarburos, *Contrato Modelo Individual* (Mex.), *supra* note 44 and accompanying text.

133. *Id.* at art. 26.

among others) or international organizations (IEC, IMO, and ISO, among others).[134]

Furthermore, there are codifications of trade-related standards that have been used in contractual practice or in arbitration, such as the UNIDROIT Principles,[135]those developed by the International Law Commission of the United Nations[136] or the International Bar Association,[137] which are applied with greater frequency in arbitration and are getting incorporated into the common legal practice of the sector. This non-state law provides solutions that have been studied by a transnational community to be recognized and accepted by its members as standardized provisions that could be efficient in multiple jurisdictions.

d. General Principles of Law Incorporated Into Transnational Law

Among the transnational regulatory plurality, the oil sector also incorporates general principles of law such as the obligation of the parties to act in good faith[138] and the principle of proportionality, both in the evaluation of state and oil

134. A. SAHRAIIAN, APPROCHE JURIDIQUE DES CONTRATS PÉTROLIERS D'EXPLORATION ET DE PRODUCTION (2009) (doctoral thesis).

135. *See* JESÚS & FERIS, *supra* note 75 (discussing transnational contracts); Kaufmann-Kohler, *supra* note 34, at 107, 109.

136. We know the cases of Venezuela and Mexico that try to escape from arbitration jurisdiction in their contracts oil tankers. In the case of Venezuela expressly, any dispute regarding the Venezuelan contract of Joint venture must be settled in Venezuelan courts. In the Mexican case, article 20 of the Law of Hydrocarbons establishes a series of cases of administrative termination in which the Mexican courts would have competition for termination of the contract. However, in the Mexican case the assumptions are limited, and the rest of the contract matters will be submitted to UNCITRAL arbitration in The Hague. Additionally, in both countries, there are bilateral and multilateral investment protection treaties that provide access to arbitration for foreign investors.

137. Ost, *supra* note 17.

138. Martin & Park, *supra* note 117, at 4–43, 7, 10 (discussing how standardized clauses allow parties to reduce the number of clauses to be negotiated since they are extended practices in the petroleum industry).

corporations' actions[139] or in the case the investor's contribution to its own damage.[140]

These principles have formed part of recent arbitration awards, and their application has been based on the precedent of the International Court of Justice's decisions, the European Court of Human Rights, or other arbitral tribunals. This application affirms that these principles have become material rules of transnational law that have application in oil investments.

e. *Arbitration Jurisprudence of the Oil Sector*

Arbitration jurisprudence is controversial terminology for those who deny its precedential value[141] by just calling it arbitration practice,[142] and those who consider it necessary for the construction of a harmonious development of investment law and the creation of a system that grants certain legal certainty to a community of states and investors.[143]

During the last two decades, there has been a noticeable increase in arbitration decisions and arbitration awards that support the practice of relying on arbitration case law or decisions

139. Cárdenas García, *supra* note 24.

140. *See* W. Ben Hamida, *Les principes d'UNIDROIT et l'arbitrage transnational: L'expansion des principes d'UNIDROIT aux arbitrages opposant des États ou des international organizations à des personnes privées*, 4 J. DU DROIT INT'L (2012) (citing a specific study on the UNIDROIT principles for several oil arbitrations).

141. Tidewater Inc., et al. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/5, Decision on Jurisdiction, ¶ 26, FN 28–29 (Feb. 8, 2013) (citing the United Nations International Law Commission's Guiding Principles); Yukos Universal Lmtd. (Isle of Man) v. The Russian Federation, PCA Case No. AA 227, Final Award, ¶ 116 (July 18, 2014) (discussing the ILC Articles on State Responsibility for Internationally Wrongful Acts).

142. Tidewater Inc., et al. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/5, Procedural Order No. 1 on Production of Documents, ¶ 6, 12–14, 21–22, 31, 33, 39 (March 29, 2011) (citing and discussing the IBA Rules on the Taking of Evidence in International Arbitration).

143. ConocoPhillips Petrozuata B.V., et al. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits, ¶ 361, 402 (Sept. 3, 2013) (applying the principle of good faith); Occidental Petroleum Corp. v. Ecuador, ICSID Case No. ARB/06/11, Decision of Annulment of the Award, ¶ 311–30 (Nov. 2, 2015) (analyzing sanction imposed by the Ecuadorian State based on the principle of proportionality).

from international courts and tribunals.[144] The use of this arbitration jurisprudence is promoted on many occasions, by the parties to the arbitration, who are actors in the oil industry and often support their arguments based on arbitration precedent.[145] This has provided arbitrators with broad power to use the precedent presented before them to support their decision's reasoning.[146] In other words, the parties are the great promoters of this practice, leaving the arbitrators with the role of being translators of the parties' intentions and the final authority in the applicability of the law in the oil sector.

Among the sources mentioned in this inventory of sources of law, arbitration jurisprudence is one of the richest sources since it integrates all the above-mentioned sources. It is enriched by the legal doctrine and inspired by it.[147] Arbitration jurisprudence offers the final interpretation of transnational rules, since it is a decision that belongs to a non-appealable issue of applicable law. The contribution of this jurisprudence is undeniable for transnational law practice.

Although confidentiality in commercial arbitration remains a frequent practice, arbitration award publicity has increased over the years. One cause is publicity in Investor-State Arbitration (ISDS) by arbitration institutions, such as the International Center for Settlement of Relative Disputes to Investments (ICSID) and the Permanent Court of Arbitration (CPA), that provide arbitration awards databases. Also, legal search engines by companies, such as italaw.com, kluwerarbitration.com, and OGEMID,[148] offer access to arbitration awards, which facilitates

144. Burlington v. Ecuador, CIRDI No. ARB/08/5, Decision on the Responsibility, December 14, 2012. ¶187.

145. *See, e.g.*, Yukos Universal Lmtd. (Isle of Man) v. The Russian Federation, PCA Case No. AA 227, Final Award, ¶ 1594–1637 (July 18, 2014) (Yukos' contribution in the damage suffered in the case of indirect expropriation by Russia).

146. *See* the position of Professor Brigitte Stern; Burlington v. Ecuador, CIRDI No. ARB/08/5, Decision on the Responsibility, December 14, 2012. ¶187.

147. Kessedjan, *La Pratique Arbitrale*, *in* MÉLANGES EN L'HONNEUR DU PROFESSEUR JEAN-MICHEL JACQUET: LE DROIT DES RAPPORTS INTERNATIONAUX ÉCONOMIQUES ET PRIVÉS / sous la direction de Marcelo Kohen et Dolores Bentolila, LexisNexis, 2013.

148. During the last 20 years, internet access and the development of legal services displaying case law online have provided more access and transparency in arbitration jurisprudence. *See generally*, Casey Chiappetta, *Technology Improves Access to Legal Information, but Issues Remain*, PEW (Sept. 21, 2022)

the writing of comments and legal doctrine and highlights the importance of arbitration jurisprudence.

This arbitration jurisprudence provides freedom to the arbitrator in terms of sources of applicable law. As a source of transnational legal order, arbitration is not necessarily bound by national law or national jurisprudence. However, as arbitration case law evolves, it embodies many persuasive cases in which an issue has been consistently resolved. Therefore, this raises the question of whether arbitration case law helps to create a harmonized system of law that can provide predictability and rule of law to states and corporations.

As a conclusion to this discussion on the normative plurality of transnational law, we can say that national law, international law, and transnational law coexist. However, despite the advance of transnational rules, even today, empirical studies show that a majority of awards resolve disputes based on a contractual provision or national law.[149] This reality must be looked at carefully; since, although the solutions can be found in these sources of law, they obtain application in the oil industry because they acquire legitimacy by the acceptance of the transnational order's players. These norms are invoked on behalf of the oil industry's transnational community and are enforced by the arbitrator as a member of the transnational community. Even so, references to transnational rules in arbitration awards are increasingly frequent, and this will increase with the expansion of the study of transnational law.[150]

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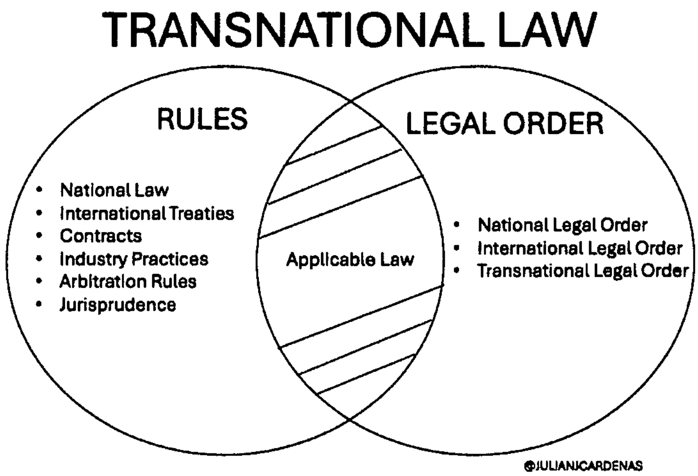
https://www.pewtrusts.org/en/research-and-analysis/articles/2022/09/22/technology-improves-access-to-legal-information-but-issues-remain.

149. *See* Gilbert Guillaume, *The Use of Precedent by International Judges and Arbitrators*, J. OF INT'L DISP. SETTLEMENT 5, 7, 16, 18, 20–21 (2010) (reporting on the high percentage of ICSID awards and decisions that are published).

150. We can see in contemporary arbitration awards how many of them begin with a list of cases analyzed by the court. We also see how courts create sections of the award to discuss cases presented by the parties to discuss interpretations of a transnational public order question, or the discussion on the application of an investment standard that are applied with due regard to previous cases.

Additionally, we demonstrated the loss of national law's monopoly in arbitration, which leads us to realize that in an environment of plurality of sources of law, the existence of the "applicable law dilemma" is a myth[151] in the diatribe of "your law or my law" between nation-states and corporations.[152] The incorporation of the oil contract into a transnational order provides legal context to the regulatory plurality of the sector.

Figure 2–TRANSNATIONAL LAW DIAGRAM II



Providing content to the Transnational Law Diagram, the plurality of rules of law from State and non-state origin includes national law, international treaties, contracts, industry practices, arbitration rules, and jurisprudence. From this brief inventory, only in national law regulation the State exercises major control. International treaties can be denounced by a State but cannot be unilaterally

151. Guillaume, *supra* note 149 at 16 n. 54 (explaining ". . . arbitration tribunals are nonetheless inclined to rely on precedent in order to evaluate their pertinence," developing that "[t]his is generally done without specifying the grounds. At the most, we can note that in Saipem S.p.A. v. Bangladesh, the tribunal declared that it 'believes that, subject to compelling grounds, it has the duty to adopt solutions established in a series of consistent cases'").

152. Clay & Pinsolle, *supra* note 46, at 13–38.

modified once signed and ratified by the State; therefore, it is not in the State's absolute control. The remaining sources of law are also out of the regulatory power of the State, although, contracts can be affected by regulation. This shows, among all potential sources of law applicable to a transnational business transaction, how the plurality of sources of law offers a potential balance in the legal regime. The application of these rules may vary depending on the forum and legal order in which a dispute is submitted: national courts, international tribunals, or arbitration tribunals.

However, the loss of national law's monopoly is not the only consequence of the transnationalization of the legal regime of petroleum investments. The transition of commercial and investment disputes from national courts to arbitration tribunals also impacts the legal practice in the oil industry. This empirical study allows us to advance to more abstract concepts that raise questions about the way in which these norms interact and find application in the transnational legal order.

III. THE TRANSNATIONAL LEGAL ORDER OF TRANSNATIONAL PETROLEUM LAW

A transnational legal order is characterized by the interaction of industry players in relations governed by transnational rules that find enforcement through transnational dispute resolution mechanisms such as arbitration.[153] A transnational legal order is differentiated from national legal orders and the international legal order by the fundamental elements of its constituency, in particular, the interaction of state and non-state actors involved in economic transactions in a globalized industry that transcends national borders.[154] Once an oil-producing nation decides to open its borders seeking foreign investments, a country joins the oil industry global market to provide capital, services, and know-how, engaging in activity outside of the host country's territory. This global oil market is governed by its own rules, adapted to relations between foreign companies and local parties.

153. *See* Emmanuel Gaillard, *Sociology of International Arbitration*, 31 ARB. INT'L 31, 1–2, 5, 7 (2015).

154. *See* JESÚS & FERIS, *supra* note 75.

These transnational rules, including but not limited to model contracts, industry practices, international law, and arbitration, do not exist in an isolated, static, and acontextual way. Instead, these transnational rules connect dynamically, allowing us to provide a context for the rule of law.[155]

The idea of a specialized transnational legal order for the oil industry solves two essential problems:

(A) it contributes to theoretical approaches to solve the problems of the interaction of these norms, in particular, how some will prevail over others and;

(B) it serves to identify the limits of the transnational order in relation to other legal orders such as a national or international legal order.

A. *Transnational Legal Order and Normative Interaction*

A transnational legal order is built in the context of players' economic and legal relationships in a transnational sector such as the oil industry.[156] We insist on using the concept of "transnational sector" because it portrays the visualization of how transnational communities fulfill global specific needs.[157] For

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155. *See* Loquin, *supra* note 81, at 2, 4–7, 16 (regarding service providers in arbitration). This interpretation conflicts with the common belief that a foreign investor entering the local market would be subject exclusively to national rules and their activity is framed by the host-country territory. This belief finds more ground when an E&P Contract includes the national law of the host-nation as the applicable law.

156. TERENCE HALLIDAY & GREGORY SHAFFER, TRANSNATIONAL LEGAL ORDERS (Cambridge University Press, 2015); Terence Halliday and Gregory Shaffer, *International Law and Transnational Legal Orders: Permeating Boundaries and Extending Social Science Encounters*, 22 CHICAGO J. INT'L L. 1 (2021); Hannah Buxbaum, *Transnational Legal Ordering and Regulatory Conflict: Lessons From the Regulation of Cross-Border Derivatives*, 1 UC IRVINE J. INT'L TRANSNATIONAL, & COMPARATIVE L. 91 (2016).

157. An example that contributes to identify transnational events, is the celebration of Soccer World Cups, or the Olympic and Paralympic games. For example, the world-known Qatar's Soccer World Cup 2022, is in reality (and more strict legal terms), the 2022 FIFA World Cup that took place in Qatar. The appropriate denomination of this event allows to identify the legal regime and how Qatar must adapt to international standards in order to host this world event. We can also use another example from arbitration institutions. International parties having an arbitration at the International Chamber of Commerce (ICC) in Paris, does not make the arbitration a "French

example, satisfying global energy security needs is the main contribution of the hydrocarbons sector. Through identifying the specific needs solved by transnational actors, we can also identify the rules of specialized niches in the global economy.[158] Thus, the identification of a transnational legal order occurs in fragmented spaces required to satisfy global needs, despite confrontation with previous positivists' conflict of law theories, and provides a method of applying standards that adapts to the transnational reality of the oil industry.

1. The Paradigm of Conflict of Laws in Contradiction with Transnational Legal Orders

During the second half of the twentieth century, much of the petroleum legal doctrine was dedicated to analyzing oil industry transactions under classical structures of positivist legal thought.[159] State control over oil reserves provided grounds for conceiving petroleum law from a nationalistic approach, influenced notably by national politics and the classic conflict of law method. This can be represented by an abundant thesis about the nature of the oil contract as an administrative contract anchored to the national legal order of the Host-State. These approaches were greatly influenced by the theories of Calvo, Kelsen, and Bobbio, or Hart and Austin, from civil law and common law countries, respectively.[160] The national law approaches proved efficient for interpreting the law in a national legal order where the balance of power favors government control, providing arguments to establish theories dealing with the

Arbitration" or "domestic." A nationalistic view would limit the international service provided by the ICC. With regard to investments in the hydrocarbons sector, the location of reserves and the role of national law anchor the investment to the Host-State. However, this should not create a blind spot in which the transnational services and necessary for the development of a project, are located outside of the territory of the Host-State (Project finance, insurance, engineering, design, technology, legal services, among many others.)

158. CHRISTOPHER DRAHOZAL, TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRACAL RESEARCH (2005).

159. De Jesús O., supra note 23, at 27.

160. *Id.*; Anthony O'Brien-Thomond, *Positivism and Monism in International Law*, 4 FRANCISCAN STUDIES 321, 334–35 (1948).

hierarchy of norms.[161] However, introducing these ideas to a different context in which the balance of power is fragmented, and where there is no monopoly in the structure of power, creation of the law, and jurisdiction, would render those ideas impractical.

In the case of the oil industry, the interdependence of state and non-state actors, such as oil companies, have great weight in the negotiation and direction of a new economic world order.[162] We observe the case of factual powers that are part of these autonomous legal frameworks separated from national law.[163] We also notice how regulation of transnational operations is found not only in national law, but also through applying the method of conflict of laws.

In globalized economic sectors, the supremacy of national law has been lost not only because of the normative pluralism previously discussed, but also by the transfer of dispute resolution from national courts to arbitral jurisdiction over a large number of contractual matters, and the protection of foreign investments through international treaties.

While the national judge is the institution designed to enforce national law, with the application of international law on an exceptional basis and subject to compliance with the respect of the local hierarchy of sources of law, the duty of the arbitrator is to the parties but not in an isolated way. The arbitrator is also part of the global economic sector in which the parties are operating.[164] This doesn't mean that an arbitrator would

161. *See* Kaufmann-Kohler, *supra* note 34 at 109 (". . . arbitrators often apply a national contract law that they do not know or, at best, know only through practice . . . . Common sense dictates that, consciously or not, the arbitrators will tend to rely more heavily on the contract provisions themselves and seek guidelines from familiar legal concepts and general principles, to the detriment of the particularities or idiosyncrasies of the applicable law.").

162. Hamida, *supra* note 140.

163. International Chamber of Commerce, *Towards a transnational approach for choice-of-law clauses: Presentation of the ICC Study on Developing neutral legal standards for international contracts*, presented at conference on Transnational Applicable Law (Sept. 11, 2015); *see also* JESÚS & FERIS, *supra* note 75; *Applicable Law in Oil and Gas Investment Arbitration*, First Annual Oil and Gas Arbitration Conference (Oct. 21, 2014).

164. *See* Asian Agricultural Products Ltd. v. Sri Lanka, ICSID Case No ARB/87/3, Award, ¶¶ 21, 24 (June 27, 1990). In this decision by the majority, Professor Ahmed El-Kosheri and Professor Berthold Goldman concluded, ". . . it should be noted that the Bilateral Investment Treaty is not a self-contained closed legal system limited to provide

completely disregard national law.[165] However, as Fabrizio Marrella explains, what happens is that *"[f]or international arbitrators there is no foreign law since they do not have a forum law. For them everything is transnational.*"[166] [167]

Indeed, there are models of order in which the parties are interested in complying with an individual (survival or economic) or collective interest in which community norms become necessary. This is the foundation of the generation of spontaneous orders in transnational markets[168] where hierarchical mandates fail to create order. It is for this reason that we have overcome the paradigm of "the pyramid" to go to *droit en reseux* (network law) explained by professors François Ost and Michel van de Kerchove:

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for substantive material rules of direct applicability, but it has to be envisaged within a wider juridical context in which rules from other sources are integrated through implied incorporation methods, or by direct reference to certain supplementary rules, whether of International law character or of domestic law nature. Such extension of the applicable legal system resorts clearly from Article 3.(1), Article 3.(2), and Article 4 of the Sri Lanka/U.K Bilateral Investment Treaty." Given this legal plurality and in the context of the foreign investment context, the tribunal concluded that, ". . . that the 'false problem' related to the preliminary determination in principle of the applicable law has no relevance within the context of the present arbitration, since both Parties agreed during their respective pleading to invoke primarily the Sri Lanka/U.K. Bilateral Investment Treaty as *lex specialis*, and to apply, within the limits required, the international or domestic legal relevant rules referred to as a supplementary source by virtue of Articles 3 and 4 of the Treaty itself."

165. *See* Walid Ben Hamida, *La prise en compte de l'intérêt général et des impératifs de développement dans le droit des investissements*, J. DU DROIT INT'L 999 (2008) (showing numerous investment treaties include rules that grant the status of "Investor" or "Investment" to all those businesses made with respect to domestic law).

166. Fabrizio Marrella, *Choice of Law in Third-Millenium Arbitrations*, 36 VAND. J. OF TRANSNAT'L L. 1137, 1156 (2003).

167. The lawyers are the specialists of the law in the oil industry because we know the various sources of law, the industry's applicable rules and regulations. This information can be shared with engineers, geologists or accountants working in the oil industry. They know to some extent the uses, practices and rules of national and international origin that govern many of the industry's operational activities. However, an aspect of the legal profession that is unique and distinguishes lawyers from other professionals in the social sciences is that we have been educated to understand how the rules of law connect and interact when they are in conflict, and when, for whatever reasons, one rule will prevail over another.

168. *See* Michael E. Porter & Mark R. Kramer, *Creating Shared Value*, HARV. BUS. REV. 1, 14, Jan.–Feb. 2011 (arguing that traditional regulation is not effective in causing companies to create social value.).

> *Avec le réseau, l'État cesse d'être le foyer unique de la souveraineté [...] ; la volonté du législateur cesse d'être reçue comme un dogme [...] ; les frontières du fait et du droit se brouillent; les pouvoirs interagissent (les juges deviennent co-auteurs de la loi [...]) ; les systèmes juridiques [...] s'enchevêtrent ; la connaissance du droit, qui revendiquait hier sa pureté méthodologique [...], se décline aujourd'hui sur le mode interdisciplinaire et résulte plus de l'expérience contextualisée que d'axiomes a priori ; la justice, enfin, [...] s'appréhende en termes de balances d'intérêt et d'équilibrations de valeurs aussi diverses que variables.*[169]

A general criticism of this transnational approach is that the identification of a transnational community is an extremely abstract concept that represents conceptual risks.[170] We agree that based on the predominant conceptions of conflict of law, it is challenging to introduce social complexity that implies the existence of transnational communities challenging our traditional territorial conception of the law. The complexity of the transnational community is perceptible through an abstract vision of a global economic sector.[171] However, the idea of a transnational community is already in existence in global markets integrated by actors that provide legitimacy to a transnational system of law through the balance of power systems.

The existence of a transnational oil community involves the complexity of economic relations. Accepting complexity makes us closer to reality, even when it can go against our senses on how to visualize a cross-border world when our legal conception has been trained based on the territoriality of the law. Addressing this, the French philosopher Edgar Morin points out that "complex thinking" is not opposed to simplification (in our case of the

169. FRANÇOIS OST & MICHEL VAN DE KERCHOVE, DE LA PYRAMIDE AU RÉSEAU: POUR UNE THÉORIE DIALECTIQUE DU DROIT 14 (2002).

170. François Ost, Address at Conferencia "*La traduction comme paradigm*" in Brussels (Oct. 19, 2010) (explaining that, in law, it is necessary to take images and metaphors seriously; these can be one of the most revealing signs of paradigms and, according to those chosen, will be immersed within a paradigm or another).

171. *See* Calame, *supra* note 19.

nationalistic leg-centrist vision); rather, "complex thinking" rejects the disjunction of elements that prevent an integral vision of the existing relations between the element components of a system. Thus, complexity is articulated around the agreed relations between four principles: order, disorder, organization, and interaction.[172] It is from an approach toward reality, through its own complexity, such as a transnational order, where we can find a method of governance.

2. The Transnational Method Adapted to the Legal Order of the Petroleum Sector

In order to identify the transnational method of applicable law, it should be taken into account that this method would contribute to identifying the transnational norm applicable to transnational transactions. A transnational community of States and foreign investors in the oil industry have created their own standards, which are employed daily as an autonomous legal framework. The presentation of these rules before an arbitrator seeks to solve the problems of a transnational community in a specialized way. The community members are the immediate interpreters of this transnational law, while the arbitrator is the translator of the parties' arguments in deciding transnational law issues.

For the parties and arbitrators, the transnational legal order provides the context and the legal method for transnational law, and establishes the system that provides enforcement to transnational rules.

a. The Transnational Legal Order as a Context for Transnational rule:

A transnational legal order is the consequence of a sociological approach to a legal system that allows the identification of transnational communities formed by state and non-state actors, which can create transnational regulation capable of being

172. Edgar Morín & Nelson Vallejo-Gomez, *La pensée complexe: Antidote pour les pensées uniques*, 4 SYNERGIES MONDE 249 (2008); Francisco Aceves González, *Factual Powers,Communication and Governance: a Conceptual Approach*, 217 REVISTA MEXICANA DE CIENCIAS POLÍTICAS Y SOCIALES 269 (2013).

enforced by settlement institutions such as arbitration tribunals. These actors are interdependently related to satisfy transnational interests such as satisfying the global economic energy demand.[173] This allows us to approach transnational realities with the appropriate balance of power among actors and identify the rules of law that govern economic interactions in transnational communities.

In the oil industry, we can see how industry actors agree on standards, contracts, create and employ industry practices, and other transnational rules that are used in day-to-day operations.[174] These transnational rules do not exist in isolation. They are connected through an idea that gives them context. A context that is the expression of a legal system in which transnational rules interact and integrate into the idea of a transnational legal order. Losing track of context in the application of law leads us to the risk of applying the law without the appropriate business or social environment.[175]

Transnational law is characterized by its specialty in which rules would interact based on the criteria of efficiency, relevance,[176] and context in which the parties or arbitrators determine a rule from national, international, or transnational origin. Authors such as Professor Emmanuel Gaillard, suggest methods for recognition of a transnational rule by identifying a dominant trend emanating from comparative law, but still, this seems to require recognition by its incorporation in national

173. In 1945 when the United Nations Security Council was created, most of the negotiations of international relations were conducted between States. Today, the Security Council's agenda increasingly involves not only conflicts between States, but conflicts between States and non-State actors, of an internal or international character. *See* JOHN R. KELLEY, AGENCY CHANGE: DIPLOMATIC ACTION BEYOND THE STATE (2014).

174. FREIDRICH HAYEK, LAW, LEGISLATION, AND LIBERTY 36 (1973) ("By order we shall throughout describe a state of affairs in which a multiplicity of elements of various kinds are so related to each other that we may learn from our acquaintance with some spatial or temporal part of the whole to form correct expectations concerning the rest, or at least expectations which have a good chance of proving correct.").

175. As a musical analogy, applying the law without its context would be like a blues guitarist playing a solo in the wrong key: the result is playing out of tune. Therefore, the rule should be applied within the appropriate legal context, or legal order.

176. OST & VAN DE KERCHOVE, *supra* note 169.

law.[177] From another position, the most realistic method would be "Legal Darwinism" suggested by Professor Eric Loquin, who seeks to "select, through all sources of law, the rules that are most apt to meet the needs of the international trade."[178] In our case, we see that the industry contextualization of the rule is the approach that brings us closer to the application of a rule because it is applied only in circumstantially analogous cases, and based on industry recognition. This contextualization of the law or its sociological industry-linkage, are not mere theoretical claims. International arbitration rules recognize this contextualization since the law has incorporated ancient traditions in which merchants have always sought to grant a place for the usages of trade in the economic sector as a source of applicable law available to arbitrators.

In arbitration rules by the International Chamber of Commerce (ICC) or in UNCITRAL arbitration rules, the freedom to apply transnational rules is recognized following a transnational approach. The call to the industry context of the applicable law requires that the arbitrator, "shall take account of the provisions of the contract, if any, between the parties and of any relevant trade usages," as we can see in Article 21.2 of the ICC Arbitration Rules.[179] This anchors the legal regime to the appropriate legal source of transnational law. The same formula is found in Article 35.3 of the UNCITRAL regulation, in which the reference to transnational sectoral law is emphasized, "*In all cases, the arbitral tribunal will decide how to arrange the stipulations of the contract, and to do this, it will have to take into account which mercantile use is applicable to the case.*"[180] The recurring reference to sector usages illustrates the sociological connection of arbitration with the objective legal relation of the dispute, and it emphasizes the importance of arbitrators specializing in the applicable law by providing application from a

177. Again, the incorporation of transnational rules into national legislation reinforce the application of these rules, but it is not a requirement or a fact that conflict with the idea of the existance of a transnational legal order. *See generally,* Loquin, *supra* note 46.

178. Loquin, *supra* note 46.

179. Int'l Chamber of Comm., Arbitration Rules & Mediation Rules art. 21.2 (2022).

180. U.N. Comm'n on Int'l Trade L. Arbitration Rules art. 35.3 (2021).

source of transnational customary law. This makes industry usages an autonomous source of law, particularly in the case of a source of law independent from the direct influence of the parties since it would be the result of general acceptance by the transnational industry.[181]

A transnational legal order grants the arbitrator great freedom to apply the law that it considers appropriate; this freedom constitutes a great degree of confidence that the transnational community offers to arbitrators, following ancient arbitration traditions.[182] Arbitrators are also granted the freedom to apply "the law that [is] considered appropriate" if there is a lack of agreement among the parties (and we also add: in case of the lack of clarity about this agreement, when the parties agree on multiple sources of law) according to the Arbitration Regulations of the ICC; or similarly, in Art 35 of the UNCITRAL Arbitration Rules, "the law that is estimated appropriate" in the event that the parties have not indicated the norms for the applicable laws. In this sense, the law, the regulations, the contract, and industry practices become sources that arbitrators should take into account and are sources that are available to them to resolve disputes.[183]

In a transnational environment, arbitrators should manage the reality of legal pluralism. They must determine if the objective of the dispute belongs to solutions of national,

181. The autonomy of trade usages as tranational rules of law also provide reasons to support their direct application by arbitrators. However, this approach may find resistance in legal scholars who require the need to incorporate those standards into national law to provide legitimacy. This ignores the fact that an arbitrator decides in a multi-jurisdictional scope supported by international conventions to enforce arbitration awards, which provide a great degree of freedom in applyint the law. The debate is open, as it has existed before in the appliation of international commercial law. *See* Marrella, *supra* note 166, at 1138 (expressing a similar concern ("In 1584, Lanfranco da Oriano, one of the first scholars of commercial arbitration in the period of the Law Merchant, published an essay in Venice in which he noticed that the "subject of arbitration is of a great utility but it is always badly explained by legal scholars." Five centuries later, many businessmen still agree with Lanfranco since their perception of the law of international trade seems completely different from that of many legal scholars, including their lawyers.").

182. *See* U.N. Comm'n on Int'l Trade L. Arbitration Rules, *supra* note 180.

183. On the transition from a hierarchical law to a polytextual law, *see* Gunther Teubner, *Les multiples corps du roi: l'auto-destruction of the herarchie du droit*, *in* PHILOSOPHIE DU DROIT ET DROITÉCONOMIQUE: QUEL DIALOGUE 320 (Marie-Jeanne Campana ed., 1999).

international, or transnational law. In the application of arbitration rules and the interpretation of Article 42 of the ICSID Convention the tribunal in *Burlington v. Ecuador* developed the following approach:

> The parties to this dispute have not agreed on the rule of law that governs the substance of the matter beyond the BIT within the meaning of the first sentence of Article 42 (1). Therefore, in accordance with the second sentence of Article 42 (1), the Court "shall apply the legislation of the State that is a party to the dispute [. . .] and those norms of international law that may be applicable." In fact, the Parties have made their allegations under the correct presumption that both Ecuadorian law and international law govern the substance of the dispute.[184]
>
> Consequently, the Court will apply (i) firstly the BIT and, if necessary, (ii) Ecuadorian law and the rules of international law "that may be applicable." In this final meaning, the Court considers that the second sentence of Article 42 (1) of the ICSID Convention does not establish that disputes should be assigned to one or the other system. Therefore, it is the task of the arbitrators to determine whether a matter is subject to national or international law. In this context, it is worth mentioning that the CPs include a provision on the application of Ecuadorian law. It should also be mentioned that a party cannot rely on its domestic law to escape an obligation under international law.[185]

Regarding paragraph 178, which embarks on the application of Article 42 of the Convention of Washington of 1965,[186] we would like to highlight two issues. First, the phrase, "it is the task of the arbitrators to determine whether a matter is subject to national or international law" illustrates the arbitrators' search for the

184. *See* Burlington Res. Inc. v. Ecuador, ICSID Case No. ARB/08/5, Decision on Liability, ¶ 178 (Dec. 14, 2012).

185. *Id.* at ¶ 179.

186. *Id.* at ¶ 178.

context (the legal order) that will frame the applicable law if a fact is subject to a national, international, and we should add, transnational law. In this case, arbitrators have the power to decide this question, which gives the arbitrators freedom, autonomy, and flexibility to apply the law. This cannot be defined as a method of disorder or uncertainty, simply because it does not meet the parameters of certainty of a hierarchical legal order.[187] In this case, the paradigm is based on the confidence given by the parties to the arbitrators' specialty as the foundation of arbitrators' power to apply the law accepting the plurality of sources of law in a *droit in reseaux*,[188] on which the arbitrators will deliberate the solution. Once determining the context of the issue, the arbitrators may more clearly determine the relevance of the sources and how the law, the contract, or the industry practices would prevail over each other.

Second, when the tribunal states that, "a party cannot rely on its internal law to escape an obligation under international law."[189] Here, we can see how the tribunal's reinterpretation of VCLT Article 27, adapted to State versus non-state actors, is presented as a general principle of transnational law that seeks to provide order for transnational obligations such as treaties, contracts, or trade usages, which will tend to prevail over national

187. Pierre Mayer, *La Liberté de l'arbitre*, 2 REV. ARB. 339 (2013) ("*La liberté de l'arbitre fait peur. Contrairement aujuge, placé dans une hiérarchie qui décide de sa carrière, et dont les jugements sont soumis à un contrôle, il apparaît comme un homme-ou une femme seul (e), comillible comme tout être humain, dont les sentences sont sans appel, et dont la responsabilité ne peut pratiquement pas être engagée.*" We must highlight we cannot conceive as a valid criticism to think that the hierarchical order of sources avoid that even national judges run the risk of being "*fameable comme tout être humain.*") To think that the theory about a legal hierarchy avoids the problems of "weakness" or temptations of national or international judges out of the positivist static thinking of law, is an exceptionally idealistic argument.

188. *See* Morín & Vallejo-Gomez, *supra* note 172, at 249. ("*. . . est tout d'abord une pensée qui relie. C'est le sens le plus proche du terme complexus (ce qui est tissé ensemble). Cela veut dire que par opposition au mode de penser traditionnel, qui découpe les champs de connaissances en disciplines et les compartimente, la pensée complexe est un mode de reliance. Elle est donc contre l'isolement des objets de connaissance; elle les restitue dans leur contexte et, si possible, dans la globalité dont ils font partie.*").

189. Burlington Res. Inc. v. Ecuador, ICSID Case No. ARB/08/5, Decision on Liability (Dec. 14, 2012).

law if national law conflicts with transnational obligations.[190] We can identify this reasoning as an interpretation that indicates that a nation's legislative power should not interfere with already agreed upon international obligations. The award is even more interesting since it seems not to be limited to State behavior but also refers to non-state actors' behavior when the court says "a party," without identifying the nature of the industry player.[191] This would lead us to think about the tribunal's interpretation of VCLT Article 27, extrapolating it from the international (public) legal order, where States are subject to international law, a transnational legal order, and where States and investors (corporations or individuals) would be equally subject to transnational law. In this case, a corporation could not ignore a contractual obligation such as the requirement to apply international oil industry best practices, based on the absence of national regulation or because of a conflict with a rule of national law.[192]

Thus, this discussion illustrates that a transnational legal order provides substantial freedom to the arbitrator, concerning the power to decide the applicable law, exposing the false dilemma of the exclusive application of national law, or the false assumption of the supremacy of national law. The empirical evidence shows that the closest legal regime to a petroleum operation is, therefore, a *lex petrolea*, understood as the legal order that contains special rules that will govern transnational petroleum transactions engaged by State and non-state actors in the global oil industry.[193] This approach has been applied for more than half of a century, beginning when an arbitral tribunal in Saudi Arabia vs Aramco in 1958, recognized that, "It cannot overlook the practices and usages of commerce, known by both Parties at the time the Agreement was signed, unless it is

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190. Vienna Convention on the Law of Treaties art. 27, May 23, 1969, 1155 U.N.T.S. 331.

191. We must always keep in mind that the litigation index of cases settled in arbitration is a very small percentage of the number of contracts executed in the oil sector.

192. On the concept of relevant relationships, *see* CHLOÉ DE PERRY-SIBAILLY, LES ORDRES JURIDIQUES TRANSNATIONAUX: CONDITIONS ET CONCRÉTISATION DES DROITS HORS DE L'ÉTAT (2014).

193. Batuhan Betin, *Lex Petrolea in International Arbitration—A Very English Dissent*, 15 J. OF WORLD ENERGY L. & BUS. 295, 295 (2022).

prepared to content itself with abstract reasoning and to lose sight of reality and of the requirements of the oil industry."[194]

Furthermore, different than the dispersed example of legal pluralism in the CNH Oil Model Contracts, in the previous section, in which different sources of law were agreed upon by the parties in different sections of the petroleum agreement, the case of the applicable law provision in the Petroleum Agreement between the Ministry of Hydrocarbons of Guyana and the companies Exxon, Hess, and CNOOC, illustrates the legal plurality of sources of collectively agreed in the applicable law clause of Article 27.1:

> *This Agreement shall be governed by, interpreted and construed in accordance with the laws of the Cooperative Republic of Guyana, and, consistent with such rules of international law as may be applicable or appropriate, including the generally accepted customs and usages of the international petroleum industry.*[195]

Transnational law has advanced, seeking to balance the interests of foreign investors and States. Undoubtedly, investors have seen how their property rights have been protected, not just by international treaties, but by arbitration as the common system for dispute resolution, which has evolved on the compensation methods in cases of nationalization and expropriation.[196] Likewise, foreign investor's behavior is not free of responsibilities. Transnational investment law sets forth the obligation of the foreign investor to respect the law of the host-state or the investor's responsibility for his contribution to

194. Saudi Arabia v. Arabian Am. Oil Co. (ARAMCO), Arb. Trib. (August 23, 1958); *see also* Arbitral Award ICC No. 3572 de 1982; Mobil Oil Iran v. Iran, 74 Iran-U.S. Cl. Trib. Rep. 61 (1987).

195. Petroleum Agreement Between the Government of the Cooperative Republic of Guyana and Esso Exploration and Production Guyana Limited CNOOC Nexen Petroleum Guyana Limited Hess Guyana Exploration Limited art. 27, July 10, 2016, https://nre.gov.gy/wp-content/uploads/2017/12/Petroleum-Agreement-Oct-7-2016.pdf.

196. Samuel Maireg Biresaw, *Appraisal of the Success of the Instruments of International Commercial Arbitration Vis-à-vis International Commercial Litigations and Mediation in the Harmonization of the Rules of Transnational Commercial Dispute Resolution*, 2 J. OF DISP. RESOL 1, 2 (2002).

his own damage.[197] Likewise, compliance with industry best practices, particularly those dealing with the prevention of accidents and environmental protection, is a contribution of transnational law that follows the interest of Host-States.[198]

The legitimacy of a transnational order among state and non-state actors, is a result of the general acceptance of transnational rules and the recourse to enforcement through arbitration. In other words, as Pierre Calame explains, the legitimacy is built in reference to a shared ethic (objectives, values, and methods), and not about an "alleged title deed over the public good" that would derive from State sovereignty and popular election.[199] It is based on this difference that we can see how the law of the environmental and social usages and practices of the oil industry advances recognition, legitimacy, and application by the actors in the transnational community.[200] In a similar perspective, Professor Eric Loquin explains that legitimacy is given by satisfying the needs and interests followed by the transnational community.[201] In our case, the interest of the transnational community is the efficient and sustainable supply of hydrocarbons for energy consumption.

The theory of transnational legal orders proposes an efficient method to understand the current world of cross-border and global business, taking into account the formation of a transnational legal order capable of providing enforcement to the special transnational rules.

197. Occidental Petroleum Corp. v. Ecuador, ICSID Case No. ARB/06/11, Decision on Jurisdiction, ¶ 33 (Sept. 9, 2008); Yukos Universal Limited (Isle of Man) v. Russia, Award, Energy Charter, PCA Case No. AA 227, ¶ 1561 (July 18, 2014); MTD Equity Sdn Bhd & MTD Chile SA v. Chile, ICSID Case No. ARB/01/7, Decision on Annulment, ¶ 101, (March 21, 2007); Niko Resources (Bangladesh) Ltd. v. Bangladesh, ICSID Case No. ARB/10/11, ICSID Case No. ARB/10/18, Decision on Jurisdiction, ¶ 502 (Aug. 19, 2013); *see also* Hamida, *supra* note 165.

198. *See* GAILLARD, *supra* note 4.

199. *See* Calame, *supra* note 19.

200. This autonomous source could only be ruled out by common agreement of the parties to exclude the application of the usage. This could be questioned in light of the arbitrator's freedom in arbitration and transnational public policy norms that would be equally independent of the will of the parties.

201. Loquin, *supra* note 46.

b. The enforcement of transnational rules

Are transnational rules enforceable in the context of a transnational legal order? The transnational oil industry provides grounds for the mandatory force of transnational rules. Second, the autonomy of arbitration rules regarding the applicable law also grants the arbitrator the freedom to enforce these transnational rules.

i. The Contribution of the Transnational Legal Order to the Mandatory Force of Transnational Rules

One of the biggest contributions of the transnational legal order is the recognition and application of transnational rules, such as the use of industry practices or arbitration jurisprudence. This would result from the recognition of these transnational rules by members of a transnational community, based on the need for predictability and the rule of law.

In *Burlington v. Ecuador*, the arbitration tribunal had to resolve two questions presented by the parties, which did not have appropriate solutions in State law or in international law.[202] In this case, the tribunal was questioned about the use of previous arbitration decisions (Paragraph 187), and on accepting arguments based in *obiter dicta* (Paragraph 221).

> As stated in the Decision on Jurisdiction, the Tribunal considers that it is not bound by previous decisions. Nevertheless, the majority considers that it must pay due regard to earlier decisions of international courts and tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It further believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law, and thereby to meet the legitimate expectations of the community of States and investors towards the certainty of the rule of

202. Burlington Res. Inc. v. Ecuador, ICSID Case No. ARB/08/5, Decision on Liability, at ¶ 187.

law. Arbitrator Stern does not analyze the arbitrator's role in the same manner, as she considers it her duty to decide each case on its own merits, independently of any apparent jurisprudential trend.[203]

> Before examining the specific cases upon which the Parties rely, the Tribunal must address a threshold matter concerning the precedential value of ICSID cases. Burlington has sought to diminish the relevance of some of the cases upon which Ecuador relies on the ground that statements which Ecuador cites are *obiter dicta*. Ecuador for its part has argued that in the context of investment arbitration, "[e]verything counts." The Tribunal tends to agree with Ecuador. It is correct that there is no formal rule of *stare decisis* in international investment arbitration. At the same time, the Tribunal considers that it should "contribute to the harmonious development of investment law" and promote a predictable legal order. In this light, there is no reason to distinguish between *obiter dicta* and holding. Whether peripheral or central to the decision, the statements of an international investment tribunal may provide guidance to investors and Host-States alike, and may serve to predict the decisions of future tribunals.[204]

The tribunal resolved both questions by providing a solution and creating a new transnational norm that it considered appropriate.[205] In paragraph 187, the majority of the arbitral tribunal decided to use arbitration jurisprudence on behalf of the

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203. *Id.*

204. *Id.* at ¶ 221; Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art 42(1), Apr. 10, 2006, ICSID/15 ("(1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable. (2) The Tribunal may not bring in a finding of *non liquet* on the ground of silence or obscurity of the law. (3) The provisions of paragraphs (1) and (2) shall not prejudice the power of the Tribunal to decide a dispute *ex aequo et bono* if the parties so agree.").

205. Burlington Res. Inc. v. Ecuador, ICSID Case No. ARB/08/5, Decision on Liability, ¶ 187 (Dec. 14, 2012).

legitimate expectations of a "community of States and investors," in an attempt to harmonize the development of investment law.[206]

Additionally, regarding paragraph 221, the tribunal went further in deciding that parties may present arguments based on *obiter dicta*, found in previous decisions, on behalf of the needs of a community of States and investors to promote "a predictable legal order".[207] Consequently, arbitrators are capable of solving the problems presented to them by creating transnational norms on behalf of the legal order formed by the community of States and investors of the oil industry. Therefore, following the tribunal's reasoning, arbitrators do not decide only "in their own name,"[208] abstracted from their social context, but consider their industry context to resolve the conflict.

In a second example, we will observe that the freedom of arbitrators and the application of transnational rules do exist not only to cover gaps in the law. Transnational rules will also serve to balance the application of national law. We can agree that if foreign investors are currently protected by the recent developments in investment law, an oil corporation that operates globally cannot hide behind national law to ignore the practices recognized by the industry. We can observe this by examining the principle of Article 27 of the Vienna Convention on the Law of the Treaties, which does not allow States to ignore international obligations on the basis of claiming compliance with its internal law.[209] In this sense, oil operators applying industry practices globally, could not object to complying with the application of industry practices, arguing that national law offers lower

206. *Id.* at ¶ 87. In this case, there was a dissenting vote by arbitrator Brigitte Stern against the majority. However, we must highlight that in other oil arbitration cases, such as Occidental v. Ecuador, October 2012, Professor Stern uses prior arbitration decisions to support arguments introduced in Occidental Petroleum Corp. v. Ecuador, ICSID Case No. ARB/06/11, ¶ 7 (dissenting opinion). Previous awards that offer illustrious or appropriate solutions produce a temptation for jurists that is very hard to resist, even for Professor Stern.

207. Burlington Res. Inc. v. Ecuador, ICSID Case No. ARB/08/5, Decision on Liability, ¶ 221 (Dec. 14, 2012).

208. Ost, *supra* note 17.

209. Vienna Convention on the Law of Treaties art. 27, May 23, 1969, 1155 U.N.T.S. 331.

standards than those that the industry has recognized.[210] Therefore, oil industry cases are not part of simple self-contained legal regime based on a contract or a treaty, and arbitrators have the power to broader views.[211]

The application of industry practices has been debated between two theses. The first gives the mandatory force to best practices based on the support provided by the parties' agreement or by its incorporation into a national law, that is, accepting them as binding through the incorporation of the rule in contracts. This first thesis involves three risks for the industry:

1) It denies the normative value of usages among industry players over which there is a direct application thereof;
2) it does not solve the problem of companies seeking to excuse themself based on local weak legal regimes; [212] and
3) it facilitates using a loophole, if parties agree to withdraw from industry practices and therefore, ignore their application.

This situation may put the industry at risk, in particular, in terms of environmental accidents, since the effects of an oil spill will affect not only the operator or the Host-State, but also the consequences could potentially have a global impact on the

210. *See* Kaufmann-Kohler, *supra* note 34, at 110–11.

211. *See* Asian Agricultural Products Ltd. v. Sri Lanka, ICSID Case No ARB/87/3, Award, ¶¶ 21 (June 27, 1990) ("... it should be noted that the Bilateral Investment Treaty is not a self-contained closed legal system limited to provide for substantive material rules of direct applicability, but it has to be envisaged through implied incorporation methods, or by direct reference to certain supplementary rules, whether of international law character or of domestic law nature").

212. This would be an example of an oil company that seeks to evade compliance with environmental regulations that could be based on the uses and practices of the industry, due to the fact that they contradict the national law or because the applicable national law has less demanding standards on the company, but which are in disagreement with the practices of the transnational industry, whose non-compliance could put the industry in jepardy.

community of industry players as we witnessed in 2010 in the Deepwater Horizon offshore catastrophic accident.[213]

A second thesis recognizes the mandatory force of industry practices derived from the economic actors' participation in a transnational community. This thesis also known as the "direct application" approach, is based on two premises:

1) recognition of practices within the transnational community and the belonging of the parties to this community (which would make such practices preexisting to the arbitration) having direct application on behalf of the community, given the common interests of its members; and
2) the nature of industry practices makes them an autonomous source of law. Industry practices affirm their existence and mandate out of any national legal system.

Thus, industry practices are refractory to any rule of conflict of laws and its application only needs the verification of its field of application and the belonging of transnational actors to a transnational community that considers these usages as generally accepted rules by industry players, thus, transcending national legal systems.[214]

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213. The negative consequences of the Deepwater Horizon accident expanded to the global oil industry with the increase of insurance prices, costs, and bid moratoriums. *See* Julia Kollewe, *BP Disaster Raises Oil Industry's Insurance Costs*, THE GUARDIAN (June 3, 2010), https://www.theguardian.com/business/2010/jun/03/oil-rig-insurance-costs-soar/.

214. JULIEN ROCHETTE, TOWARDS AN INTERNATIONAL REGULATION OF OFFSHORE OIL EXPLOITATION 6 (2012). Rochette explains how from the point of view of public international law, the industry regime Offshore is fragmented or incomplete. In a report published in 2012 by the Paris Oceanographic Institute (POI), describes how solutions in the light of regional international law (for example, through committees of the International Maritime Organization (IMO) or the Marine Environmental Protection Committee (MEPC)) have failed to create an international legal framework. This does not surprise us since these trends are based on the consensus of States that face conflicting interests that make it difficult to reach agreements. This goes in against the real agreements that can exist between State and non-state actors that are regulated under specific principles and interests that seek the satisfaction of a transnational need. This is a trend which leads to the uses, customs and practices of the industry to displace international treaties as a source of law, becoming the true transnational regulation of the sector.

This was discussed in *Niko Resources v. BAPEX and PetroBangla*. The court indicated the possibility that industry practices have a direct application when deciding issues of jurisdiction:[215]

> One may argue that compliance with these laws and standards has a contractual basis in the JVA. To this extent, a dispute concerning compliance with these laws and standards may be considered of a contractual nature in a wider sense. However, the laws to which reference is made in Article 26.2.4 and other applicable laws and *regulations apply not just because they are included in the Operator's obligations under the JVA; but they have a direct application.* This application also may have to be considered as connected to the performance of the JVA.[216]

The application of industry practices results from the mere verification that the legal relationship is within the transnational legal order. They are treated as a source of transnational law different from national law. Thus, industry practices are common rules that are applicable to transnational actors as an essential rule generally accepted by the industry. Therefore, industry practices may get direct application by arbitrators in the transnational legal order given their freedom to determine the applicable law.[217]

The thesis of direct application comes to solve a question left by the theory of *contrat sans loi* (contract without law) and the called myth of *l'ordre juridique de base* (with regard to the need for a national legal order),[218] under the assumption that arbitrators make decisions in a vacuum or case by case. [219] On the

215. Niko Resources (Bangladesh) Ltd., *supra* note 197, at ¶ 503.

216. *Id.*

217. Burlington Res. Inc. v. Ecuador, ICSID Case No. ARB/08/5, Decision on Liability, ¶ 264, 377 (Dec. 14, 2012).

218. According to Professor Pierre Mayer, the arbitrators decide with great freedom, which does not link them with any national legal order, not even that of the seat of the arbitration. *See* Mayer, *supra* note 187.

219. The use of the phrase that arbitrators do not decide "in a vacuum" is found in arbitration awards and in comments on the doctrine that refer to the practice of arbitral jurisprudence. *See* Timothy Martin, *Lex Petrolea in International Law*, *in* DISPUTE

contrary, an arbitrator never makes a decision in a vacuum.[220] Arbitrators place themselves in the socio-legal context for the issues they decide, in this case, the transnational oil industry. Trade usages or industry practices are the sources of law with the closest sociological connection to the transnational oil industry, which gives us the context for the application of law. In other words, unlike the thesis that considers the arbitrator as an institution within a contract or a treaty, the transnational method places the arbitrator as an institution of the transnational legal order.

ii. The Transnational Rule Based on the Autonomy of Arbitration Law

Arbitration rules consider transnational rules as an autonomous source of law different than the law chosen by the parties.[221] Various elements confirm the autonomy of a

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RESOLUTION IN THE ENERGY SECTOR: A PRACTITIONER'S HANDBOOK (Globe Law and Business, London, 2012). They seem to refer to the fact that there is no such vacuum given the existence of prior arbitration awards. Actually, the vision must be much broader. We insist that the absence of this void corresponds to the existence of a transnational community constituted by actors, institutions such as arbitration, and rules, and within them arbitration awards. Mayer, *supra* note 187.

220. As Emmanuel Gaillard explains, "*Au cours des dernières années, des normes destinées à assurer la protection de l'environnement ontété développés dans le plan international. Les arbitres du commerce international ne sauraient aujourd'hui and être insensitive. Ainsi, dans l'hypothèse dans laquelle an opérateur pétrolier titulaire d'un contrat de partage de production ancien qui ne prévoit aucune obligation de remise en état des sites à l'issue de l'exploitation s'oppose à l'Etat d'accueil sur les conditions dans lesquelles il est susceptible d'abandonner le site, l'arbitre ne pourra manque de constater sur le fondement des instruments internationaux qui assurent la protection de l'environnement - et notamment les pratiques de l'industrie - l'obligation de remise en état qui pesé sur l'opérateur et, correlativement, the possibilité donnée à l'opérateur de traiter les couts de remédiation comme des couts pétroliers, meme if you join telle contrainte ne résulte directement ni du contrat ni de lex contractus. Voir spécialement, in matière de protection de l'environnement marin, pertinent pour les opérations pétrolières offshore, the Convention des Nations Unies sur le droit de la mer, adopted at Montego Bay on 10 December 1982 don't Part XII Porte Sur la Protection et la Preservation du Milieu Marin.*" EMANNUEL GAILLARD, ASPECTS PHILOSOPHIQUES DU DROIT DE L'ARBITRAGE INTERNATIONAL (Académie de droit international de La Haye 2008).

221. U.N COMM'N OF INT'L TRADE LAW, UNCITRAL 2012 DIGEST OF CASE LAW ON THE MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, at 7, U.N. Sales No. E.12.V.9 (2012).

transnational legal order with respect to the applicable law, and in this reality, industry practices find their field of application. The arbitrators' freedom on the application of the law is protected and exempt from verification or review of the correct application of law by a national judge, by favoring the finality principle in arbitration. The national judge cannot exercise the role of an appellate judge. They should limit their role to verifying the formal requirements of the procedure and verifying that the arbitrator rules in law or equity, according to the parties' agreement. The trust in the arbitrator's decision of arbitrability and merits occurs with a broad spectrum of freedom. Thus, the national judge only verifies the decision if the award is not within any of the cases of annulment provided by national law or an international agreement, such as the New York Convention, all referring to the conduct of the procedure. However, failure to comply with the requirements agreed upon by the parties does not automatically lead to an award annulment. For example, French jurisprudence has even considered that the reasoning requirement of the arbitration award is not an international public order rule.[222] Thus, industry practices may be enforced by arbitrators after their determination that an industry practice meets the requirement of being the most appropriate rule.

We see how transnational rules confirm their binding force in the regime of a transnational legal order of the oil industry. Moreover, the arguments that support the thesis of direct application are equally applicable to national and international legal orders, by national judges or international judges who must decide on the application of transnational rules, such as an oil contract and industry practices. However, we understand that the political, socio-economic, and cultural realities of each legal order, could make the results inconsistent as State-centric legal approaches may prevail.[223]

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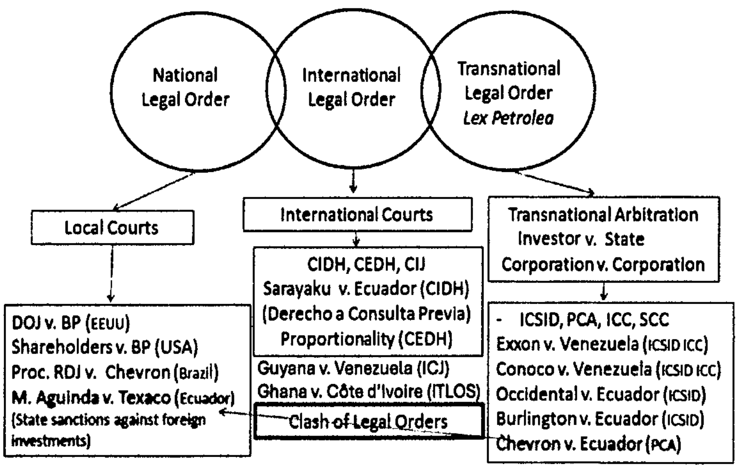
222. PASCALE DEUMIER, LE DROIT SPONTANÉ (Economica 2002).

223. This is the case of a Latin American Petroleum Regulator which between the years of 2015 and 2017 attempted to impose an inventory of oil industry practices to operators in its territory. The proposal was opposed by all players in the country and the draft regulation was finally rejected.

B. The Plurality of Legal Orders

The oil industry operates in a plurality of legal orders. Its operations of exploration, production, storage, transportation, and commerce are developed in a global space where different legal orders converge, such as multiple national legal orders, the international legal order, in particular, international jurisdictions related to human rights, and other global economic sectors such as trade, infrastructure, and finance. Each legal order contains its own framework of applicable law for national, international, or transnational law practice, and they can be active progressively or simultaneously, creating cooperation or conflict, with regard to an investment in the oil sector. Thus, a global approach is required to contextualize the appropriate legal regime regarding the facts of the legal matter and even considering the interaction of cooperation or conflict between multiple legal orders.

Figure 3–Multi-Jurisdictional Diagram



These legal orders engage in polycentric interaction, in which an individual, a corporation, or a nation-state can belong to different legal communities. A project in the oil and gas industry is exposed to all these multiple jurisdictions. Professor Teubner calls this the deconstruction of hierarchies of the right to a polytextual law.[224] These legal orders interact with each other, are nourished in their solutions, or exclude each other when they have to restrict the space of application of a legal norm through the notion of public policy.

1. The Interaction of Legal Orders

Different legal orders can be relevant to an oil operation. They are subject to be activated progressively or simultaneously, they can overlap, or be subsequently relevant based on procedural rules. In any case, different legal orders could potentially intervene in the same oil project or interact with each other by cooperating or even conflicting with each other.

For instance, in the Deepwater Horizon platform accident, the event generated disputes over the execution of obligations in different legal orders:

1) In the national order, damages claimed by third parties and violations of U.S. federal environmental regulation *before the United States District Court for the Eastern District of Louisiana.*[225]
2) In the transnational order, the contractual obligations between members of the joint operating agreement and the consortium's obligations vis-à-vis the service providers. In both cases, arbitration provisions governed disputes among the operator and non-operations, and the contractual issues between the consortium and service providers.[226]

224. Teubner, *supra* note 183. This implies the application of the method of conflict of laws; *see* ANTOINE KASSIS, THÉORIE GÉNÉRALE DES USAGES DU COMMERCE (LGDJ 1984); *see also* Koh, *supra* note 28.

225. *In re* Oil Spill by the Oil Rig "Deepwater Horizon", 496 F. Supp 3d 992, 997 (E.D. La. 2020).

226. Settlement Agreement, *In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, 496 F. Supp 3d 992 (E.D. La. 2020).

Another example, also dealing initially with environmental claims, *María Aguinda v. Chevron*, in Ecuador, has generated disputes around the oil investment in different legal orders:[227]

1) National legal order: Claims in Ecuadorian courts against Texaco dealing with environmental damage to third-party rights and violations of national law by an oil operator in Ecuador.[228]
2) Foreign jurisdiction: Claims in the New York courts against Texaco under the Alien Torts Claim Act by the Ecuadorian victims.[229]
3) In the transnational order: Obligations included in the Bilateral Investment Treaty between the USA and Ecuador, following the decision where the Ecuadorian court condemned Texaco (now Chevron) to compensate the victims of toxic waste spills in the Amazon rainforest for initially $18 billion, then reduced to $ 9 billion after review, as Chevron argued that such court decision violated the investment standards included in the BIT.[230] Chevron filed for arbitration before the Permanent Court of Arbitration in The Hague.[231]

Another example could be *Burlington v. Ecuador*:[232]

1) National legal order: Claims of the Kichwa people of Sarayaku for violation of prior consent regarding the adjudication and operations of the

227. Maria Aguinda Salazar y Otros v. Chevron Corporation, CRIN (Nov. 12, 2013 3:15 PM), https://archive.crin.org/en/library/legal-database/maria-aguinda-salazar-y-otros-v-chevron-corporation.html.

228. Chevron Co. v. Ecuador, Hague Ct. Rep. 2d (Scott) (2011).

229. Aguinda v. Texaco, Inc., 1994 WL 142006, at *1 (S.D.N.Y. Apr. 11, 1994).

230. Chevron v. Ecuador, PCA Case No. 2009-23 ¶¶ 6, 4.477, 5.172 (2018).

231. Press Release, Chevron, Chevron Files Int'l Arb. Against the Gov't of Ecuador Over Violations of the U.S.-Ecuador Bilateral Inv. Treaty (Sept. 23, 2009).

232. Burlington Res. Inc. v. Ecuador, ICSID Case No. ARB/08/5.

Burlington project in Ecuador (blocks 23 and 24).[233]

2) International legal order: The Kichwa people of Sarayaku's claim before the Inter-American Court of Human Rights against Ecuador for violation of international law obligations of the State of Ecuador.[234]
3) Transnational legal order: Burlington's claim against Ecuador related to the expropriation of oil assets in Ecuador settled by the International Center for the Settlement of Investment Disputes (ICSID).[235]

In the interaction of national legal orders with a transnational legal order, decisions taken by national courts may be referred to international courts or arbitral tribunals invoking international treaties such as human rights treaties or investment treaties, in which international courts or investment tribunals act as the last resort for review of the legal consequences of administrative

233. Before resorting to the Inter-American Court of Human Rights, the Kichwa people of Sarayaku, filed claims against the State of Ecuador in local courts that ended in the exhaustion of local remedies. *See id;* Kichawa Indigenous People of Sarayaku v. Ecuador, Merits and Reparations, Inter-Am. Court. H.R. (ser. C) No. 245, ¶ 3 (June 27, 2012).

234. Kichawa Indigenous People of Sarayaku v. Ecuador, Merits and Reparations, Inter-Am. Court. H.R. (ser. C) No. 245, ¶ 3 (June 27, 2012). In which the indigenous people of Sarayaku sued the Ecuadorian State before the Inter-American Court of Human Rights (IACHR), for the violation of their prior consultation rights before the implementation of oil operations. The IACHR ruled that the State had violated its obligations imposed by the American Convention on Human Rights and was sentenced to compensate indigenous victims. In this case, the international court's decision can be used in the contractual or arbitration practice to execute the prior consultation obligation or to interpret future discussions on the application of the prior consultation obligations in the oil industry. The Sarayaku case developments have already mobilized law firms in drafting new clauses for prior consultation in jurisdictions, including non-members of the IACHR, but in which the learning of the Sarayaku case could be invoked. This decision is worth mentioning as it contributes to the implementation of the practice of prior consultation in areas where aboriginal populations are found. This case would add to the jurisprudence that emanates from International Courts of Justice that is used in arbitrations, by example of investment, where the decisions of courts of justice are also used to guide and justify the arbitrators' arguments.

235. Burlington Res. Inc. v. Ecuador, ICSID Case No. ARB/08/5.

decisions[236] or local judicial decisions. This allows us to realize that once a State joins an international jurisdiction, such as an international system of human rights, or a global market such as the oil and gas industry where arbitration is the most common system for dispute resolution, a State accepts that administrative or judicial decisions could be under the scrutiny of international courts or arbitral tribunals.

This also creates a scenario in which these three legal orders can enter into conflict if the State rejects the legitimacy of international jurisdictions and, it can even take the position to deny recognition and enforcement to international court decisions or arbitration awards.[237] However, under the enforcement system created by the New York Convention, the Panama Convention, and the Washington Convention, an arbitration award can be enforced in multiple jurisdictions, limiting the power to entirely block enforcement, as long as the debtor's assets are located in multiple jurisdictions.[238] This shows an important characteristic of arbitration autonomy that also explains arbitrators' broad power in applying the law by knowing the potential scenario of multijurisdictional options for enforcement.

Another case in which the national legal order is in constant interaction with the transnational order is in the assistance request from arbitration tribunals to national courts in the case of interim measures or preventive injunctions, but much more

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236. U.N. COMM'N OF INT'L TRADE LAW, U.N. CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, at 4, U.N. Sales No. E.10.V.14 (2010) (describing the uses that parties can accommodate. We understand by the uses outside the field of application of the legal relationship, which have no direct application, and which are agreed by the parties. Art. 9.2 tells us about the exclusion of application of uses by agreement of the parties).

237. This has been seen in the case of Argentina and Venezuela, suffering the consequences of the negative market reactions of these defaults. For example, by the increase of country risk, higher interest rates of international debt or funding, and higher insurance risk premiums for investors. Gary Born & Claudio Salas, *Exploring Latin America's ICSID Arbitration Landscape*, LATIN LAWYER (Nov. 21, 2023), https://latinlawyer.com/guide/the-guide-international-arbitration-in-latin-america/second-edition/article/exploring-latin-americas-icsid-arbitration-landscape (pointing out Arguentina and Venezuela as the countries with more arbitration cases).

238. *See, e.g.*, U.N. Conference on International Commerce Arbitration, *Convention on the Recognition and Enforcement of Foreign Arbitration Awards*, art. III, 9, (June 7, 1959), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/new-york-convention-e.pdf.

notably with respect to the enforcement of arbitral awards. While an arbitration award is a transnational legal instrument that is not linked to any State legal order, its enforcement will rely on the interpretation made by the national courts of international treaties such as the New York Convention, the Washington Convention, or the Panama Convention, since national court intervention is necessary in cases where enforcement does not happen based on voluntary compliance.

However, in a conflict between legal orders in which national courts decide not to recognize or enforce arbitration decisions, this could trigger other negative effects by industry actors. Transnational actors such as lender banking, insurance groups, capital markets, and oil companies perceive the breach of an award as an unsatisfied debt and tend to be penalized by other negative consequences such as:

1) Higher interest and lending costs;
2) higher premium risk by transnational insurers for new projects; and
3) increased costs for new associations that must protect associated risks.

These negative consequences deteriorate countries' credit reputation; it makes funding new projects more difficult, generating negative effects on nations' economies, the reduction of cash flow in strategic companies, and, therefore, generating operational difficulties for national companies, foreign partners, and their own populations.

2. The Repeal of Legal Orders and Transnational Public Policy

Any legal order, whether of national, international, or transnational nature, has its own public policy rules. Each legal order will be endowed with rules of public policy that will recognize the adequacy of judicial or arbitration decisions, in accordance with its own values.

The emergence of a transnational public policy supposes the existence of a transnational community capable of producing norms, and in particular, a type of legal rule intended to protect the general interests of a transnational community.[239] In the case of the oil industry, the fight against corruption, environmental protection, or respect for human rights, in other words, today's pillars of ESG standards, provide such important public policies, and violating these standards could trigger negative global consequences for all members in the oil industry. These negative consequences are not only reputational, but also financial and legal.[240]

Arbitrators are tasked with verifying that the law chosen by the parties does not contravene any fundamental value of the transnational community. This allows arbitrators to invoke these prevailing values over the provisions of the *lex contractus*. Thus, public policy rules would come to protect not only the parties engaged in the litigation, but also the entire industry. These protections are conceived as constitutive rules of transnational public order, arising from the recognition that the industry generally accepts such values. Although, these could be rules created by the industry or incorporated from a national or international legal order, for instance, applying *jus cogens* rules from public international law. This is why arbitrators are not only considered immersed in a contract or international treaty, as a legal instrument organ, but they are widely accepted as the specialized dispute resolution system of a transnational community.

Here you can also see the questions about the existence of a transnational public policy, or rather, a public policy that belongs to a transnational order. The idea of a legal order is linked to a sociological conception since public policy is also closely linked to the existence of a transnational community. However, public policy rules dealing with substantive rights or procedural norms can be found in multiple spaces. The questions about arbitrability illustrate the question in which an arbitrator must decide its own jurisdiction. This would take place based on the principles of *ex*

239. *See* Niko Resources Ltd. v. Bangladesh, ICSID Case No. ARB/10/11; *see also* ICSID Case No. ARB/10/18, Decision on Jurisdiction (Aug. 19, 2013).

240. It would be hard to sustain that that the consequences of the Macondo oil spill in the Gulf of Mexico only affected the companies involved in the operation and those in U.S. territory. The negative consequences of an accident of this magnitude impact the reputations and economic components of companies that operate offshore worldwide.

dolo malo non oritur actio and *ex turpi causa non oritur actio*, meaning that no court will grant help to a person who bases their lawsuit in an illegal or immoral act or an act that goes against the values, principles, and interests of the community. Thus, it will be up to the arbitrators to decide on behalf of a transnational community, in light of the interest and needs of a transnational industry. The concept of transnational public policy is useful to understand the idea of a transnational legal rule of fundamental importance for the transnational oil industry.

A very suitable example is seen in the case of protection standards for diplomatic communications.[241] One could say that the inviolability of diplomatic communications is protected by public international law for States' protection and security in their diplomatic relations. We could think that any international court funded by public international law rules should respect that principle set forth in the Vienna Convention of Diplomatic Relations of 1969.[242] However, the reality is that diplomatic communications have been used in oil arbitrations as evidence to support factual arguments presented by States or investors, such as when arbitrators must decide on the admissibility and the veracity of U.S. cables disclosed by the Wikileaks case.[243] Thus, an arbitral tribunal must decide whether its principles are aligned with an international legal order that commonly protects diplomatic communications, or whether an arbitral is in a different position by belonging to a transnational legal order. Arbitration decisions have not reached a unique solution; thus, it serves to raise the question of whether the presentation and admission of evidence from diplomatic communications before an arbitral tribunal jeopardizes international security to the degree that justifies the application of a public policy rule. Is the arbitrator responsible for making a decision based on international public policy to protect interstate public policy

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241. *See,* Yukos Universal Lmtd. (Isle of Man) v. The Russian Federation, PCA Case No. AA 227, Final Award, ¶ 1594–1637 (July 18, 2014).

242. Vienna Convention on Diplomatic Relations art. 30–32, April 18, 1961, 23 UST 3227, TIAS 7502, 500 UNTS 95.

243. *See* ConocoPhillips Petrozuata B.V., et al. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify a Majority of the Tribunal (May 5, 2014) (describing the decisions made by arbitrators regarding the validity of WikiLeaks in arbitration hearings).

rules? These are examples of questions that should be resolved by arbitrators depending on their beliefs and the context in which such questions are presented. However, so far, some arbitration tribunals have taken into account information provided by U.S. diplomatic cables to support their decisions.[244]

Another example is related to corruption cases. Arbitration has advanced in recognizing the fight against corruption as a matter of transnational public order.[245] In arbitration, corruption allegations could be weighted and contextualized within the transnational legal order. In other words, the fight against corruption is not a rule of public policy, just by imposition of national or international law, but by the recognition of a public policy rule by arbitrators in cases involving transnational actors. Thus, an arbitrator who decides on corruption allegations must take into consideration the circumstances of the corrupt act within the context of the oil industry. In particular, arbitration tribunals should protect the arbitration system by avoiding providing jurisdiction for investments obtained through corrupt practices. Therefore, doctrines such as the clean hands doctrine serve to avoid the use of the private practice of international arbitration to favor the legitimation of capital or transactions acquired through wrongful acts. Following a similar reasoning, in the case of unilateral sanctions, arbitrators must analyze whether a sanction is in harmony with the rules of a transnational public policy and whether a sanction falls within the principles protected by the oil industry as a whole. However, since unilateral sanctions are a source of national law, they are not binding on international arbitrators unless the sanctions are connected to the applicable law in the contract, and even in that scenario, it would be relevant to the analysis of whether those sanctions conflict with an obligation under international law.[246]

A final example, and perhaps the most important with regard to the arbitrator's power in approaching the applicable law

244. Yukos Universal Ltd. v. The Russian Federation, Final Award, PCA Case Repository No. 2005-04/AA227, at 210 (2014).

245. *Id.*

246. *See* GAILLARD, *supra* note 4 (regarding the case of an arbitration tribunal discussing the application of U.S. sanctions against Cuba in a litigation before an arbitration tribunal).

question, is to highlight the transnational qualities of an arbitration award. An arbitration award can be executed in the countries whose State courts have the international obligation to enforce it. This could reach 172 countries, in the case of the 1958 New York Convention, or 158 contracting States, in the case of the Washington Convention of 1965.[247] The transnational character is reinforced by the idea that international or transnational arbitration does not belong to any national legal order, which would even allow the recognition and enforcement of the award that has been set aside in the courts of the seat of arbitration.[248] This thesis gives the arbitration award transnational characteristics, making it a real transnational legal instrument, providing access to the party that intends to execute the award to pursue assets in multiple jurisdictions. This marks arbitrators' challenge to issue an enforceable arbitration award taking into account the chances of recognition in the jurisdiction where potential enforceable assets are located in order to grant remedy. Taking the legal regime analysis until its latest consequences allows for the identification of the appropriate applicable law structure.

247. *Contracting States*, N.Y. ARB. CONVENTION, https://www.newyorkconvention.org/countries (last visited Jan. 9, 2024); *ICSID Convention*, INT'L CTR. FOR SETTLEMENT OF INV. DISP., https://icsid.worldbank.org/resources/rules-and-regulations/convention/overview (last visited Jan. 9, 2024).

248. Pierre Mayer, *Le mythe de l'ordre juridique de base '(ou Grundlegung)*, *in* SOUVERAINETÉ ÉTATIQUE ET MARCHÉS INTERNATIONAUX À LA FIN DU 20EMESIECLE, À PROPOS DE 30 ANS DE RECHERCHE DU CREDIMI - MELANGES ENL'HONNEUR BY PHILIPPE KAHN / à l'initiative de Charles Leben, Eric Loquin, Mahmoud Salem 202-203 (2000) (arguing that the contract and the arbitrator are autonomous bodies that do not need the contextualization of any legal order; however, the uses of the oil industry are necessarily linked to the existence of a community composed of members, norms and bodies that create a sectoral transnational legal order.) On this position, the most clear jurisprudential development is found in the French courts that consider that the arbitration award is not connected with any State legal order (based on the interpretation of the French courts of the New York Convention of 1958). "Attendu que la sentence internationale, qui n'est rattachée à aucun ordre juridique étatique, est une décision de justice internationale dont la régularité est examinée au regard des règles applicables dans le pays où la reconnaissance et l'exécution sont demandées," *See* Cour de cassation, [Cass.][supreme court for judicial matters] Paris, 1e civ., July 8, 2015, Bull. Civ. I, No. 834 (Fr.); *see* Cour de cassation, [Cass.][Supreme Court for Judicial Matters] Paris, 1e civ., March 23, 1994, Bull. Civ. I, No. 104, 79 (Fr.); *see also* Cour de cassation, [Cass.][Supreme Court for Judicial Matters] Paris, 1e civ., June 29, 2007, Bull. Civ. I, No. 251 (Fr.).

IV. CONCLUSION

The regulation of the oil industry has always been an engine for the development of studies on the law of contracts, national law, international law, arbitration law, and transnational law.[249] Following a pluralistic and integrative vision of the law would facilitate identifying the practice of the legal regime that governs the global market of the oil industry.

Oil operations are engaged in the context of a transnational legal order that has been created to meet the global energy economy's needs. The fulfillment of this goal by the joint action of multiple players, provides legitimacy to the transnational legal regime to which State and non-state actors are integrated. The State is a leading actor in this transnational community, although not preponderant since relationships are circumscribed in a global space that transcends its borders under a fragmented balance of power among transnational actors. In this regard, lawyers must also advance the study of these transnational legal approaches in which States, corporations, and professional associations are integrated in the construction of a transnational legal regime.

249. *See, e.g.*, Saidov, *supra* note 76, at 2–3.