

The University of Texas School of Law
The Oil, Gas and Energy Resources Law Section of
The State Bar Of Texas
The Association of International Petroleum Negotiators

***LEX PETROLEA*: Sources and Successes of
International Petroleum Law**

2015 International Upstream Energy Conference

Houston, June 11, 2015

© John P. Bowman 2015

LEX PETROLEA

Sources and Successes of International Petroleum Law

In the widely cited and sometimes wildly interpreted 1982 arbitration award issued by the tribunal in *Aminoil v. Kuwait*, the Government argued that compensation for its expropriation of Aminoil's concession should be based on precedents resulting from a series of transnational negotiations and agreements arising out of other recent nationalizations in the Middle East.¹ According to the Government, these precedents had generated a customary rule valid for the oil industry – a *lex petrolea* in some way a particular branch of a general universal *lex mercatoria*.² For this reason, Kuwait offered no more than net book value of the redeemable assets as compensation for its expropriation. For reasons of fact and law, the arbitral tribunal rejected this characterization of these so-called precedents as a *lex petrolea*.³ Aware of the complex nature of any negotiations about compensation in this context, the tribunal stressed that these settlement arrangements were more often than not complex, comprising not simply payment of indemnity but also bilateral arrangements of every type, not all of which had been made public or known with certainty. The tribunal also cited several reasons of law that weighed heavily against its finding any *lex petrolea* on this issue, among other things observing that Concessionaires often gave such consents under pressure of strong economic and political constraints having nothing to do with law. Despite this initial, notable rebuff of the notion of a *lex petrolea*, today five possible sources of a *lex petrolea* can be identified and considered – international law, national petroleum laws, international petroleum contracts, custom and practice in the international oil industry, and international arbitration awards – and questions about the existence and composition of a *lex petrolea* can once again legitimately be asked.

International Law Sources of a *Lex Petrolea*

Sources of International Law

As recognized in Article 38.1 of the Statute of the International Court of Justice, international law derives from four main sources: international treaties between States; international custom, as evidence of a general practice accepted as law; general principles of law recognized by civilized nations; and judicial decisions and teachings of the most highly qualified publicists, as a subsidiary means for determination of rules of law.⁴ For purposes of identifying possible elements of a *lex petrolea*, each of these sources of international law suggests a possible candidate for analysis. They are: the Energy Charter Treaty (“ECT”), which entered into force 16 April 1998; United Nations General Assembly Resolution 1803 (XVII) of 14 December 1962 on permanent sovereignty over natural resources; international principles of law generally agreed

¹ See *Government of the State of Kuwait v. American Independent Oil Company*, Final Award ¶ 155 (March 24, 1982).

² See *id.*

³ See *id.* ¶¶ 156-157.

⁴ See Statute of the International Court of Justice art. 38, United Nations Charter, 59 Stat. 1055, TS No. 993 at 25, 3 Bevans 1179, available at <http://www.icj-cij.org/documents/?p1=4&p2=2> (last visited May 29, 2015).

on the subject of hydrocarbons; and the Code of Uniform Petroleum Laws commissioned by the Fifth OPEC Conference in Riyadh at the end of December 1963.

Energy Charter Treaty

On the heels of the breakup of the Soviet Union, the representatives of 47 European and other countries (including representatives of Azerbaijan, Australia, Canada, Cyprus, Japan, Kazakhstan, The Russian Federation, Turkey, the United Kingdom, and the United States of America) entered into the European Energy Charter on December 17, 1991, in The Hague, with the purpose to promote the development of an efficient energy market throughout Europe and a better functioning global energy market, based on the principle of non-discrimination and on market-oriented price formation, taking due account of environmental concerns.⁵ With these objectives, the signators to the European Energy Charter committed to take joint or coordinated action under the Charter in the following fields: access to and development of energy resources; access to markets; liberalization of trade in energy; promotion and protection of investments; safety principles and guidelines; research, technological development, innovation, and dissemination; energy efficiency and environmental protection; and education and training.

Three years later, on December 17, 1994, these State parties, with the notable exception of the USA, signed the ECT in order to provide the international legal structure required to implement the principles set out in the European Energy Charter. “The fundamental aim of the Energy Charter Treaty is to strengthen the rule of law on energy issues, by creating a level playing field of rules to be observed by all participating governments, thus minimizing the risks associated with energy-related investments and trade.”⁶ Among other things, the ECT includes provisions that promote access to international markets, alleviation of market distortions and barriers to competition, cross-border transit of energy, transfer of technology, and access to capital. The ECT provides for the promotion, protection, and treatment of investments, including commitments by Contracting Parties to accord investment of other Contracting Parties fair and equitable treatment, protection and security, and freedom from unreasonable or discriminatory measures. Each Contracting Party agrees to observe any obligations it has entered into with an investor or an investment of any other Contracting Party. To provide an accessible, neutral forum to resolve disputes between investors and Contracting Parties, Article 26 of the ECT empowers investors to submit disputes to international arbitration under the arbitration rules of the International Centre for the Settlement of Disputes (“ICSID”), the ICSID Additional Facility, the United Nations Commission on International Trade Law (“UNCITRAL”), or the Stockholm Chamber of Commerce.

⁵ See Concluding Document of the Hague Conference on the European Energy Charter, in THE ENERGY CHARTER TREATY (WITH INCORPORATED TRADE AMENDMENT) AND RELATED DOCUMENTS 8 (14 July 2014), *available at* http://www.encharter.org/fileadmin/user_upload/document/Treaty_texts/Consolidated_Treaty_and_related_documents.pdf (visited on May 5, 2015).

⁶ Energy Charter Secretariat, THE ENERGY CHARTER TREATY AND RELATED DOCUMENTS 14 (2004), *available at* http://www.encharter.org/fileadmin/user_upload/document/EN.pdf (last visited May 29, 2015).

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

Title search: Lex Petrolea: Sources and Successes of International Petroleum Law

First appeared as part of the conference materials for the
2015 International Upstream Energy session

"*Lex Petrolea*: Sources and Successes of International Petroleum Law"