OIL AND NATURAL GAS

Constitutional Frameworks for the
Middle East and North Africa

Oil and Natural Gas:
Constitutional Frameworks for the Arab States Region

Center for Constitutional Transitions, International Institute for Democracy and Electoral Assistance and the United Nations Development Project

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About this Report

The Constitutional Transitions Clinic 'back office' has, from 2011 to 2014, prepared a series of thematic, comparative research reports on issues in constitutional design that have arisen in the Middle East and North Africa. Zaid Al-Ali, Senior Adviser on Constitution Building at International IDEA, acted as an adviser on these reports and oversaw International IDEA's participation in the report-drafting process. The United Nations Development Programme's Regional Center provided both material and substantive support in relation to the last three of the six reports.

The first three of these reports are jointly published by Constitutional Transitions and International IDEA. The second three are jointly published by Constitutional Transitions, International IDEA and the United Nations Development Programme. The reports are intended to be used as an engagement tools in support of constitution-building activities in the region. The full list of reports is:

- Constitutional Courts after the Arab Spring: Appointment Mechanisms and Relative Judicial Independence (Spring 2014)
- Semi-Presidentialism as Power Sharing: Constitutional reform after the Arab Spring (Spring 2014)
- Political Party Finance Regulation: Constitutional reform after the Arab Spring (Spring 2014)
- Anti-Corruption: Constitutional Frameworks for the Middle East and North Africa (Fall 2014)
- Decentralization in Unitary States: Constitutional Frameworks for the Middle East and North Africa (Fall 2014)
- Oil and Natural Gas: Constitutional Frameworks for the Middle East and North Africa (Fall 2014)

The reports are available in English and Arabic at www.constitutionaltransitions.org and www.idea.int. For more information, please visit www.constitutionaltransitions.org.

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Many of the ideas that are set out in this report were tested in a conference that took place on 1 April 2014 in Tunis, Tunisia, attended by Tunisian academics, postgraduate law students, members of the Tunisian Constituent Assembly and legal advisers to the Tunisian state. We are grateful for the helpful suggestions offered by the conference participants. This report has been prepared by the Center for Constitutional Transitions, with the assistance of students of the New York University School of Law. Michael Dafel (South Africa) contributed significantly to the final version of this report. The report does not purport to present New York University's institutional views, if any. All English-language translations of documents referred to in this report are unofficial, unless otherwise noted.

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Preface

Comparative constitutional law is at the heart of democratic development. Legal scholars, policy makers, constitutional drafters, judges and advocates all over the world have looked to other jurisdictions for ideas on how their own challenges can be addressed and to better understand which reforms are likely to be successful in their own countries. The Arab region is no exception in that regard. Since 2011, at least 10 countries in the region have either replaced, reformed or reconsidered their constitutional frameworks. In that context, national, regional and international institutions have contributed to the legal scholarship that already existed by bringing the knowledge that has been developed in other jurisdictions closer to the region. Dozens of foreign constitutions have been translated into Arabic, existing constitutional frameworks from within the region were analyzed and comparative studies have explored how international and foreign experience could be used to help resolve national problems.

In 2012, International IDEA and the Center for Constitutional Transitions established a partnership to draft a series of regional studies on constitutional law issues that were of particular importance to the Arab region. Three studies were published during the first year of that relationship, covering the composition of constitutional courts, semi-presidentialism as a mechanism for power sharing, and the regulation of political party finance through constitutional reform. The United Nations Development Programme joined the partnership in 2013 and has played a key role in the elaboration of a further three studies, including the current volume. The effort to develop these comparative studies on constitutional law was of a truly international and regional nature, involving input, discussions and debates from a large number of institutions and individuals from across the Arab region, North America, Europe, sub-Saharan Africa and elsewhere. The authors and the institutions who participated in this effort did so in the hope that the published reports will be of use to scholars, researchers, policy makers, constitutional drafters, judges and advocates throughout the region. Each report uses a comparative approach but also has as its ultimate objective to provide assistance to the effort to modernize and reform constitutional frameworks in the Arab region.

The reports that were developed by International IDEA, the Center for Constitutional Transitions and the United Nations Development Programme move beyond the general areas that are traditionally debated during constitutional reform efforts. Instead, they focus on detailed and specific areas that were identified as being of specific interest to the region. Constitutional drafters and reformers in the region have moved past discussions on general principles such as the separation of powers, judicial independence and fundamental rights and have, particularly since 2011, focused more on the mechanisms that can and should be designed to ensure that general principles such as the ones just mentioned can finally be employed to improve governance and standards of living throughout the region. Thus, for example, judicial independence as a general principle has long been accepted and incorporated in the large number of constitutions that exist throughout the region; the debate today is therefore not whether the courts should be independent from the other branches of government but rather what mechanisms can and should be incorporated into the region's constitutions to increase the likelihood that the courts, including constitutional courts, will be in a position to render justice to the people free from influence from the vagaries of politics.

The current volume focuses on the relationship between oil and gas and constitutions. Most Arab constitutions, particularly those from countries that have significant natural resources, include at least a few provisions relating to this issue. Some limit themselves to addressing the question of who is the legal owner of the natural resources that exist within their respective borders, while others discuss management issues, including which level of government should be responsible for extracting and exploiting resources. The consensus however is that the existence of provisions has done very little if anything to bring transparency and efficiency to the region's oil and gas sector, and have not been successful in ensuring that revenues derived from the sale of natural resources are distributed fairly within national borders. This report examines these issues, particularly with a view to determining what more can be done by national constitutions to resolve them. The report studies existing frameworks within the region, including some of the new constitutions that were drafted since the uprisings began in late 2010, as well as a large number of comparative examples from other jurisdictions, to determine what lessons exist for the broader region.

International IDEA, the Center for Constitutional Transitions and the United Nations Development Programme are grateful to this report's authors and to all the individuals who reviewed, commented upon and provided input to their content throughout the drafting process. This report would not have become a reality without them. We are confident that their efforts will contribute to improving constitutional frameworks throughout the region.

Executive Summary

Countries rich in oil and gas often derive great wealth from these resources. Yet such countries are also often host to chronic economic problems, regional infighting and democratic deficits – factors which lead to high levels of corruption and lack of government accountability in the oil and gas industry. When neither constitutional nor effective legal rules govern the extraction of oil and gas, the regulation of the industry or the system for disbursing revenues, these problems worsen. One way to reduce the risks is to craft constitutional provisions designed to enhance accountability, minimize disputes and clarify roles and responsibilities. With an eye to the Middle East and North Africa (MENA) region, this report, using comparative examples from around the globe, addresses possible design options for the regulation in constitutions of oil and gas resources. There is, of course, no universal or best approach. The practices of other countries provide valuable lessons; but each country has to decide for itself the best approach to regulating oil and gas resources at a constitutional level, taking into account the political, social and economic context.

The topics covered in this report are ownership, management, national oil companies (NOCs) and revenue. Ownership deals with which level of government has title over oil and gas resources; management refers to the processes by which oil and gas are extracted, transported and refined, including who has the authority to grant management rights, and to which parties; NOCs fall under the umbrella of management, as they are state-owned enterprises that may regulate or participate in the production of oil and gas; revenue management details the collection and distribution of oil and gas revenue, as well as the oversight and transparency mechanisms implemented to monitor the flow of revenue.

Analysis of Specific Issues

Ownership

Ownership provisions regarding oil and gas resources are fairly common in the constitutions of petroleum-rich countries and serve several important purposes. These include signifying the national importance of these resources and creating legal certainty over who owns them. Clarification may, in turn, assist in alleviating political tensions between spheres of government (i.e. central and subnational governments) or between ethnic, regional or identity-based groups. Certainty further promotes investor confidence, by reducing unpredictability and strengthening expectations. Ownership provisions may also affect the degree of private participation in the industry. In some countries (such as Mexico until December 2013), the state's sole right of ownership prohibited foreign participation. Ownership provisions must, however, be read and drafted with care. As this report continually highlights, the granting of 'ownership' in a constitution does not necessarily entail management authority over the resources or the right to receive the revenue generated from the exploitation of the resources. It is not unusual for a constitution to sever – or at least partially sever – aspects of management authority and claims to revenue from the title of owner. The possible reasons for splitting ownership, management and revenue in a constitutional text include ensuring national ownership, while allowing an open market, and reducing political tensions that might otherwise prevent political co-operation and economic development. Given that ownership does not necessarily entail management authority or revenue entitlement, ownership provisions in a constitution only provide clarity when they are formulated to denote the rights and obligations that accompany the title of owner. This is particularly important for federal states, where there is more political competition between spheres of government which may include competing claims to ownership. Unitary systems of government also stand to benefit from more detailed (or qualified) ownership provisions.

Management

The management of the oil and gas regime can be enshrined in the constitution across two dimensions: the management structure and the contracting regime. Design of the management structure involves the allocation of management authority to particular levels of government. Constitutional drafters may assign authority over specific management activities in four different ways: (1) solely to the central government; (2) solely to the subnational governments; (3) jointly to central and subnational governments; or (4) split between the central and subnational governments. Generally, the more successful management structures are clear and unambiguous in terms of which entities possess which authorities. However, regardless of which management structure is adopted, it must be anticipated that management disputes will arise between spheres of government or different government institutions. Constitutional drafters should therefore consider the inclusion of coordination mechanisms that could assist in resolving disagreements and political tension. In addition to management structure, the contracting regime is an essential aspect of the management of the oil and gas industry. One important tool that many constitutions employ, and that may have significant consequences for the contracting regime, is the disaggregation of management authority from the ownership of the resource. This allows foreign and private participation in the oil and gas industry in a management capacity, even though foreign and private interests do not own the oil and gas resources concerned. Other areas of contracting that occasionally receive constitutional treatment are anti-corruption and contract-enforcement mechanisms.

National oil companies

A country may elect to create a national oil company (NOC) to assume certain management functions. To date, South Sudan is the only example of a country providing for an NOC in the text of a constitution. However, given the potential importance of NOCs in a management regime, several advantages can be gained by regulating aspects of an NOC's roles, powers, structures and oversight mechanisms in a constitution. NOCs can act in three main roles. First, as a market participant, an NOC acts as a conventional commercial company seeking to maximize profits and maintain long-term financial success. An NOC often serves as a source of revenue for the government, which may withdraw funds from the NOC as needed. Second, the NOC may take on responsibilities other than maximizing profit, such as building infrastructure, managing educational facilities, or directly subsidizing other industries. Third, in addition to acting as an oil company, the NOC may also be expected to formulate and implement oil sector policy, effectively becoming the enforcer of regulations governing the oil industry. Tension can arise between these three potential roles of an NOC. A state may therefore need to decide which role(s) to prioritize – or at least how to balance competing purposes. Perhaps the most important aspect of regulating an NOC at a constitutional level is to make certain that adequate oversight mechanisms are implemented to ensure that revenue generated and expenditure incurred are accounted for. At the very least, to assist the legislature and executive in their oversight responsibilities, the financial statements of the NOC must be subject to an independent auditing process. This process assists in the detection of mismanagement and corruption in the NOC.

Revenue

One of the most controversial issues related to the oil and gas industry is revenue. In oil- and gas-wealthy countries, such as many in the MENA region, revenue from petroleum resources can account for a substantial proportion of government revenue. Revenue from oil and gas is therefore an important concern for constitution drafters. Lack of certainty and inequity regarding revenues are two significant determinants of the likelihood of conflict around natural resources. In states with significant subnational interests, the two primary legal dimensions with respect to revenues deal with revenue-raising powers and revenue-distribution powers. There is no universal approach to revenue collection and distribution. In fact, the decision on how to construct revenue-management structures is, for the most part, a political decision that is influenced by considerations such as tradition, efficiency and the nature of the relationship between the central and subnational governments/regions. Regardless of how a country elects to collect and distribute revenue, it is essential that sufficient transparency and oversight mechanisms are created to monitor the financial transactions of the petroleum industry. A constitution may, for instance, establish oversight bodies (e.g. independent petroleum oversight commissions), procedures (e.g. external auditing of financial statements and transactions) and rules (e.g. public disclosure of certain types of documents). All these mechanisms ultimately assist the legislature and executive with their oversight responsibilities for the oil and gas industry.

1 Introduction

The regulation of oil and natural gas (hereafter 'oil and gas' or 'petroleum') is an increasingly important feature of constitutional design. In fact, the unprecedented constitutional transitions witnessed in the Middle East and North Africa (MENA) region over the past decade have brought to the fore the regulation of oil and gas resources at the constitutional level. Starting in Iraq and spreading to other MENA nations following the Arab Spring, many countries in the region have entrenched constitutional principles and rules to govern aspects of petroleum ownership, management and revenue. The economic importance of oil and gas resources in many MENA nations, coupled with the fact that revenue from these resources has historically been prone to high levels of corruption, has rendered the regulation of oil and gas in these new constitutions an almost foregone conclusion.

Indeed, strong economic and political reasons justify the regulation of certain aspects of a country's oil and gas regime in the text of a constitution. Three reasons bear special mention. First, constitutional provisions offer greater stability and certainty than ordinary laws. Given that constitutional texts usually require high thresholds for their amendment, the inclusion of a regulatory framework in a constitution provides added security for stakeholders that the main principles and rules governing their activity will not easily change. This allows both government and non-government entities to coordinate their behaviour. Second, a clear constitutional framework provides guidance to both the legislature and relevant decision-making bodies. Constitutionally entrenched organizing principles assist in the prevention of disputes and may further increase the efficiency of the regime. Third, the constitutional regulation of oil and gas regimes can serve to signal the importance of the natural resources to the country. Constitutional treatment is not only symbolic, but also highlights the social and economic norms and goals that a nation may have for its natural resources.

However, precisely because constitutions are difficult to amend, constitutional drafters must take care over which aspects of the oil and gas regime are entrenched in the constitution. Changing economic and political conditions may make it desirable to alter the oil and gas legal framework, at which point constitutional rules that are difficult to change will become an obstacle. Furthermore, it bears emphasis from the outset that the questions of whether and to what extent a country should regulate oil and gas resources in a constitution (and what should be left for ordinary legislation) is an open one. At the present time, there is little empirical analysis of the impact that constitutional provisions in petroleum-rich countries have on outcomes such as economic output or equality.

With a focus on the MENA region, the purpose of this report is to suggest key components of oil and gas law that a constitution drafter may wish to consider for inclusion in the text of a constitution. By using comparative examples, the report aims to highlight important aspects pertaining to oil and gas ownership, management and revenue. As will become self-evident from the discussion that follows, there is no universal or best approach to the regulation of petroleum resources in the text of a constitution. The practices of other countries may provide valuable lessons, but each country will need to decide for itself the best approach, taking into account the political, social and economic context. To be sure, the success (or lack of success) of a given country's industry depends on a variety of both constitutional and non-constitutional factors, including the details of a country's economy, its power structure and the underlying legislative and regulatory framework governing the oil and gas industry. Context matters a great deal, and it should not be expected that a constitution can solve all problems.

1.1 Why is oil and gas a constitutional issue?

Countries that are rich in oil and gas resources are often described in the literature as suffering from the 'resource curse' or 'oil curse'.[1] Despite an abundance of natural resources, many oil- and gas-rich countries face social, economic, political and inter-regional challenges. These problems in turn hamper the effective exploitation of petroleum resources, which ultimately prevents equitable economic growth. Although these challenges are closely linked, they are set out briefly here as economic, social and political challenges, on the one hand, and as inter-regional challenges, on the other.

1.1.1 Economic, social and political challenges

- *Unpredictable markets*: Fluctuations in global oil and natural resource prices are unpredictable, leading to great difficulties in budgetary planning and in ensuring the maintenance of public services. Price fluctuations are particularly significant in countries that rely predominantly on a single commodity, such as oil or gas. Considerable falls in the price of petroleum usually have adverse knock-on effects on the financial stability of a nation.

- *Corruption and mismanagement*: Corruption and mismanagement of oil and gas revenues create economic inequality between the beneficiaries of oil and gas wealth and the general population, who ought to benefit from the revenue. The effects of corruption are particularly destructive when oil and gas provide the primary source of national revenue. Rampant corruption in many petroleum-rich countries usually occurs due to the lack of independent institutions that could prevent or mitigate acts of corruption.

- *Tax implications*: Oil and gas revenue may obviate the need to collect taxes from the population. This may make citizens less concerned with government activities and the government less responsive to the concerns of the people.[2]

In many countries that are rich in oil and gas, these economic and social challenges give rise to political instability.[3] The corrupt enrichment of political elites breeds resentment in a population that does not benefit from the oil and gas wealth. Regions that produce oil and gas may not see the benefits of their production, and may wish to secede. Finally, rebel or criminal networks may use oil and gas profits to finance political and criminal activities that undermine political stability in a country.[4]

Setting down in a constitution rules and principles for the management and regulation of oil and gas resources may help a country overcome these challenges.[5]

1.1.2 Inter-regional challenges

Economic and social disparities can arise across different regions in a country if revenue is not equitably shared throughout the country.[6] Wealth-distribution issues are exacerbated when oil production and revenue are concentrated predominantly in particular subnational regions. Oil-rich regions may comprise various racial, ethnic, religious or tribal populations, each of which seeks to benefit from oil and gas resources. This gives rise to tense debate and conflict over ownership and the right to benefit from those natural resources.

In Nigeria, the oil-producing region, the Niger Delta, is dissatisfied with constitutional rules for sharing oil revenues. This has led to tension between the subnational government and the central government and to violent conflict in the oil-producing region. Although the region's oil resources account for over 80 per cent of the country's revenue, the Constitution of Nigeria, 1999, distributes a fixed percentage of oil revenue to each of the states that make up the federal system. Despite this provision, the Delta region, populated primarily by national minorities, remains underdeveloped and exceptionally prone to oil-related violence.[7] This is largely a result of the politicization of benefits, revenue and infrastructural distribution, wrong policies, ethnic domination and the absence of transparent and accountable leadership. Moreover, the region has suffered substantial environmental degradation from the oil industry.[8] Conflict over the failure of the benefits of oil revenues to trickle down to the people of the Delta has fuelled rebel movements based in the Delta and fomented violence and oil theft.[9]

In Iraq, the Kurdish Regional Government (KRG) and the central government remain embroiled in a prolonged political conflict over the interpretation of ambiguous constitutional provisions designating management authority.[10] As detailed below (see section 3.4.3), article 112 of the Constitution of Iraq, 2005, provides that the federal government will share management and strategic policymaking authority with the subnational oil-producing regions. The Constitution does not, however, set out precisely how this authority is to be shared or how disputes are to be resolved. The conflict between the KRG and the central government is an example of how ambiguous or poorly drafted constitutional provisions on oil and gas can create major problems and national divisions.

In addition to disputes between subnational governments and the central government, political tensions may arise between subnational governments. Regions that do not produce oil or gas may feel the effects of the oil and gas industry in neighbouring regions as, for example, labour migration increases from non-producing regions to producing regions, and wages in non-producing regions or industries are driven up by wages in the extractive industry.[11] These effects may foster tension between the governments of neighbouring regions.

While a constitution will not be able to overcome or prevent all the challenges of the resource curse, it can establish mechanisms that may limit their impact. A constitution can, for example, set out clearly and unambiguously how authority for managing oil and gas resources is to be shared between the central government and subnational units, establish mechanisms to offset uneven regional development by providing for an equitable revenue-sharing mechanism, and minimize the risk of political instability by providing mechanisms to promote transparency and prevent corruption.

1.2 Analytical categories

This report is organized in response to four major questions facing any country that seeks to regulate its oil and gas regime in its constitution. First, who has *ownership* of the oil and gas resources, and, more importantly, what rights and obligations does the ownership title confer? Second, who exercises *management* over the oil and gas resources? This question pertains to the authority to contract, explore, develop, extract, refine, regulate, import, export and transport. Third, what is the function of the *national oil company* (NOC), if one exists, within this management scheme? Fourth, how is the oil and gas *revenue* collected and distributed? This question includes whether (and if so how) accountability and oversight mechanisms have been established to prevent mismanagement and corruption. While these questions overlap, and while legal and constitutional rules intended to address one question will affect rules under another, considering them separately helps to isolate and identify complex issues that are relevant to each question. The categories of analysis in this report are, accordingly, ownership, management the national oil company, and revenue.

1.3 Cross-cutting themes

In addressing the four questions of oil and gas regulation identified above, this report identifies three major recurring themes: (1) specificity; (2) decentralization; and (3) nationalization.

1.3.1 Specificity

Specificity refers to how detailed the provisions regulating oil and gas should be in the constitutional text. The varying degrees of detail with which different constitutions answer the four questions of oil and gas regulation distinguish the oil and gas regimes of different countries. For example, South Sudan has fairly extensive and specific constitutional provisions describing how its petroleum resources will be managed and how revenue will be distributed.[12] Constitution of South Sudan, 2011, outlines a system that describes in detail different institutions tasked with different responsibilities in terms of policy, management and regulation. Canada, on the other hand, assigns authority for management to subnational provincial governments, to which the resources 'belong', but does not set out in detail what this management authority involves.[13] The Constitution of Iran, 1979, contains even fewer specific details: it prohibits foreign control over natural resources and provides that 'no discrimination' shall occur between provinces 'with regard to the exploitation of natural resources, utilization of public revenues, and distribution of economic activities'.[14] While some countries' constitutions contain few specific details, those of other countries, such as the US Constitution, 1789, say nothing at all about the ownership or management of or revenues from oil and gas resources.

1.3.2 Decentralization

A prominent debate in many countries undergoing constitutional transition is the extent to which the country should decentralize political accountability, administrative authority and fiscal responsibility to subnational units of government.[15] The consideration of how much authority subnational governments should have for each of the four analytical categories of oil and gas regulation is a key element in this debate about decentralization.

In federal and decentralized unitary countries, constitutional provisions relating to oil and gas are important. As indicated above (see section 1.1.2), tensions between subnational governments and between the central government and subnational governments can have significant effects on the political stability of a country. A constitution may elect to decentralize aspects of ownership, management and the right to share in the revenue in order to politically manage inter-regional tensions caused by oil and gas. For example, ownership may be vested in the central government, but regions may be entitled to a share of the oil and gas revenue.

1.3.3 Degree of nationalization

Only half a century ago, seven major global oil companies controlled approximately 85 per cent of the world's oil reserves.[16] Today, however, over 90 per cent of oil and natural gas reserves are under the control of national oil companies that are owned, at least in part, by the governments of the countries where the oil is located.[17] This highlights the trend towards nationalizing oil and gas industries, particularly in countries with a history of colonial exploitation of oil and gas resources or extractive interventions by international and foreign oil companies.

One example is Mexico, which established national ownership of the oil and gas industry in the Constitution of Mexico, 1917, and formally expropriated all oil reserves in 1938.[18]

This reflected the Mexican government's desire to protect a precious national resource from foreign exploitation.[19] Since then, Pemex (the Mexican NOC) has managed the state monopoly on oil and gas, and for a long time was prohibited by the Constitution from granting concessions to private interests.[20] However, Pemex lacked the capacity and resources to effectively and efficiently manage and develop its country's oil and gas resources, with the result that Mexico's petroleum industry has stagnated. In large part this has been due to the Mexican government's practice of absorbing most of Pemex's profits, leaving little for Pemex to use for investment, upgrades or even to cover operating costs.[21] In an attempt to increase oil and gas production, the constitutional amendments of December 2013 now allow foreign and private entities to operate alongside Pemex in the country's oil industry.[22]

Other countries fall somewhere in the middle of the nationalization spectrum. For example, in Argentina, the NOC is part privately owned. In Indonesia, although the NOC has a monopoly over the oil and gas industry, it actively collaborates with private oil companies (see section 2.4.2).

The colonial history of the MENA region, as well as interventions by foreign and international oil companies over the years, make these debates about nationalization and NOCs relevant to the constitutional transitions of the MENA region. In Iraq, for instance, following decades of favourable concessions being awarded to (mostly) western companies, thanks first to British rule and then a British-backed monarchy, the Iraqi government started a gradual process of claiming more managerial control and profit taking. This culminated in the nationalization of major private oil companies in 1972, when the operations of these companies were transferred to the Iraqi NOC.

1.3.4 Federal and unitary systems of government

Although the constitutional regulation of oil and gas is witnessed in most countries that are rich in petroleum resources, the problems experienced with ownership, management and revenue provisions usually surface more in federal than in unitary states. As this report details, most constitutions that establish a unitary system of government vest the main aspects of petroleum management and revenue in the central government. Federal systems are, by definition, more difficult to manage, and it is therefore not surprising to observe that federal constitutions typically contain more provisions on the vesting of ownership, management authority, and the right to the revenue generated. Drafters from a unitary country must therefore show care when reading a constitution from a federal system, and vice versa. This is not to say, however, that countries adopting a unitary system of government have nothing to learn from federal constitutions. Much of the discussion that follows highlights the potential importance of entrenching relatively detailed aspects of petroleum law in the text of a constitution, regardless of the system of government. Furthermore, a unitary state that recognizes partially autonomous regions, such as Aceh in Indonesia and Kurdistan in Iraq, will benefit directly from the discussion of federal systems.

1.4 Roadmap of this report

This report is structured according to the four categories of analysis identified above: ownership, management, NOCs and revenue.

Chapter 2 defines ownership and explains its importance from a constitutional perspective. It describes different types of ownership schemes, including state ownership (both central government ownership and ownership by subnational governments), public ownership and private participation in the oil and gas industry, and ownership by or for the benefit of 'the people'.

Chapter 3 covers the management of the oil and gas industry. It describes the variety of activities that the concept of management includes, and discusses different options for establishing a management system in a constitution. The structures discussed are single, split and joint management structures. The chapter concludes with a discussion on contracting, and highlights its relevance to transparency and anti-corruption goals.

Chapter 4 discusses the operation of NOCs as a subset of management authority. The chapter discusses the purposes of NOCs, how to avoid conflicts of interest in the NOC, the relationship between international and national oil companies, the privatization of NOCs, and oversight and budget independence of the NOC.

Chapter 5 considers revenue, beginning with a discussion of what the category of revenue encompasses, as well as an outline of key issues that warrant attention in a constitutional framework. The Chapter offers an analysis of the mechanisms and entities associated with oil and gas revenue collection and distribution, and considers substantive issues in the design of revenue-sharing laws. These considerations are linked to debates about decentralization. The chapter considers constitutional mechanisms to enhance the transparency and oversight of revenue allocation.

2 Ownership

2.1 What is ownership, and why is it important to consider it from a constitutional perspective?

Ownership provisions regarding natural resources, and more specifically oil and gas, are fairly common in petroleum-rich countries and serve several important purposes. Oil and gas are often major sources of national pride, and the vesting of ownership rights over these resources may carry symbolic significance. Some countries, such as Tunisia and Egypt, will therefore endow 'the people' with ownership in their constitutional texts, to highlight the national significance of the resources.[23] An alternative approach to emphasizing the national importance of these resources in a constitution is to vest ownership in a particular state entity, but to declare expressly that the natural resources of the country must be used for the benefit of the people. The Constitution of Indonesia, 1945, employs this approach.[24] As further detailed below, an additional purpose behind prescribing ownership rights in a constitution is that this may assist in promoting legal certainty. Clarification of who owns the resources may contribute to alleviating political tensions between different spheres of government; this may prove particularly necessary in federal systems, as well as in nations that are composed of ethnic, regional or identity-based groups. Constitutional provisions detailing ownership may further increase investor confidence, as these provisions reduce unpredictability and strengthen expectations. Ownership may also delineate the permissible role of domestic and foreign oil companies in the exploitation of petroleum resources. For example, in Mexico, until December 2013, the state's sole right of ownership prohibited foreign participation.

Two important aspects pertaining to the vesting of ownership in a constitution require emphasis. First, clarification of who owns the resources is not necessarily a panacea for the political problems that ownership-vesting provisions may seek to resolve. In fact, the constitutional regulation of ownership may aggravate political conflict. As described below (see section 2.4.1), the ambiguous ownership provisions in the Constitution of Iraq have inflamed tensions between the oil-producing subnational group and the federal government. Second, the bestowing of ownership on a particular entity or group in a constitution may not necessarily confer on that entity or group the legal benefits typically granted to a property owner.[25] As the ensuing discussion will continually highlight, it is not unusual for a constitution to sever – or at least partially sever – aspects of management authority and claims to the revenue generated from the title of owner. Accordingly, unless the context suggests otherwise, ownership should not necessarily be interpreted as including management and revenue rights. The legal and conceptual distinction between ownership, management and revenues has important implications, and it is therefore imperative that this report is read with this in mind.

2.1.1 Defining ownership

In defining the concept of ownership, it is helpful to note that the specific term 'ownership' may not necessarily be used in a constitution. Examples of alternative phrases or terms that denote the concept of ownership include the following:

- Constitution of Tunisia, 2014, article 13: 'Natural resources belong to the people of Tunisia. The state exercises sovereignty over them in the name of the people'.[26]

- Constitution of Ecuador, 2008, article 261(11): 'The central State shall have exclusive jurisdiction over Energy resources; minerals, oil and gas, and water resources, biodiversity and forest resources.'

- Constitution of Brazil, 1988, article 20(IX): 'The following constitute property of the Union: … mineral resources, including those in the subsoil.'[27]

- Constitution of Namibia, 1990, article 100: 'Land, water and natural resources below and above the surface of the land and in the continental shelf and within the territorial waters and the exclusive economic zone of Namibia shall belong to the State if they are not otherwise lawfully owned'.

- Constitution of Algeria, 1968, article 17: 'Public property shall be an asset of the national community. It shall encompass … the sources of natural energy'.

- Constitution of Indonesia, 1945, article 33(3): 'The land, the waters and the natural resources within shall be under the powers of the State and shall be used to the greatest benefit of the people'.

- Constitution of Canada, Act, 1867, article 109: 'All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.'

As emphasized above the constitutional 'owner' of oil and gas resources may not be the principal beneficiary of the oil and gas revenues, or indeed the principal manager of the resources. There are three possible reasons for splitting ownership, management and revenue in a constitutional are discussed. First, splitting ownership from management and revenue allows a constitution to ensure national ownership of natural resources, while simultaneously allowing the flourishing of an open market, accessible to private concerns.

Second, separating ownership from management and revenue can reduce political disputes over ownership. Even though the central government, subnational governments, an NOC, private companies and the general public may disagree over who owns oil and gas resources, a distinct system of management and revenue can nevertheless be established to allow one or more of these stakeholders to develop and benefit from oil and gas resources. One stakeholder's loss of ownership can be compensated for by a gain in management authority or access to revenue. An example of how political conflict over the ownership of oil can be defused by separating ownership, management and revenue is the Comprehensive Peace Agreement (CPA) of 2005, signed in Sudan. Prior to 2005, the government of Sudan in the north and the Sudan People's Liberation Movement (SPLM), based in southern Sudan, had been locked in civil war since 1982. One of the causes of the conflict was oil, and in particular the complaint that the north had exploited oil resources in the south with no benefits flowing to the people of the south.[28] The 2005 CPA established a legal framework to manage and regulate oil resources and set formulae for the sharing of oil revenues between north and south, without conferring ownership of oil on the government of Sudan, the SPLM or other regional stakeholders.[29] Instead, the CPA postponed the hot-button issue of ownership, providing that 'this Agreement is not intended to address ownership of those resources. The Parties agree to establish a process to resolve this issue.'[30]

Third, establishing a distinction between ownership, management and revenue allows the owner of oil and gas resources to cede management authority and revenue rights to other institutions without relinquishing ownership. This makes it possible for governments that own oil and gas resources in terms of a constitution to contract with other entities to exploit, develop, possess or otherwise use oil and gas resources. These contracts, broadly conceived, may take the form of leases, licences, permits, concession agreements and production-sharing agreements (PSAs). None of these forms of contract need necessarily transfer ownership of oil and gas resources from the government to private companies, other levels or branches of government, or non-governmental entities. In Indonesia, however, the constitutional requirement that natural resources be 'under the powers of the State' (Constitution of Indonesia, 1945) does not authorize the state to transfer management authority or revenue rights to other entities (see section 2.4.2).

2.1.2 Why is clarity on ownership of oil and gas resources important?

In Sudan, the Comprehensive Peace Agreement that ended the civil war fought partly over access to oil resources did not determine ownership of the oil resources. Instead, the CPA sought only to end hostilities between the government of Sudan and what would later become the country of South Sudan, but left the issue of ownership for subsequent determination. In the region's volatile political climate, it was difficult to finally determine ownership in the CPA. Yet there are potential benefits that flow from determining ownership of a country's oil and gas resources with some degree of certainty. Four such benefits are enumerated below. However, given that ownership does not necessarily imply the right to manage or claim revenues generated, it is worth emphasizing that any potential benefits derived from clarifying who owns the resources are subject to similarly clear rules about whether or not ownership encompasses aspects of management and revenue.

First, a clear assignment of ownership rights over natural resources can increase investor confidence, which may in turn bring economic benefits to a country.[31] This logic motivates the assignment of ownership in a constitution, rather than in ordinary legislation, because entrenched constitutions are harder to change than legislation. In other words, investors will be more confident that the legal situation of ownership will not change unexpectedly. In Angola, for example, there is a lack of clarity over the ownership of mineral resources and uncertainty about the legal rules that govern the industry in general and ownership rights in particular. As a result, investors are hesitant about investing in the Angolan diamond industry, seeing it as a high-risk investment.[32]

Second, in countries where different ethnic, religious or linguistic groups have access to varying concentrations of mineral resources, simply because of where natural resources and different groups happen to be concentrated, ownership can help to prevent legal disputes and even violent conflict.[33] Ownership regimes can become very sensitive issues and can easily become entwined with regional or identity-based conflicts, such as those in Sudan or Papua New Guinea (see section 2.2.2).

Third, clear allocation of ownership can help to prevent conflict between central and subnational governments in federal and decentralized systems.

Fourth, even if a constitution lacks provisions on management authority, state ownership may nonetheless impact the authority to enact ordinary laws with more detailed rules for regulating management and revenue. State ownership may therefore entail the authority to enact ordinary laws with more detailed rules for regulating resource management and revenue, even though the state may not benefit directly from these laws.

There are three primary ownership regimes that a constitution or legal framework can establish: first, government ownership, which can be either central government ownership (see section 2.2.1) or subnational government ownership (see section 2.2.2); second, private ownership, or at least private participation in the market (see section 2.3); and third, ownership by, or for the benefit of, 'the people' (see section 2.4).

2.2 Ownership by governments

2.2.1 Central government ownership

When the legal system of a unitary country (i.e. a country governed as a single entity by a national government) assigns ownership of natural resources to the government, it is clear that the central government is the owner. In federal states (i.e. a country composed of a group of partially autonomous regions under a central government), by contrast, the legal framework must determine whether the central government or subnational governments will hold ownership of resources. Failure to do so can create a great deal of confusion, and can lead to disputes between the levels of government.

A number of federal states assign ownership to the central government, while also allowing subnational units other possessory rights and powers, such as management powers and rights to revenue.[34] This is a common way to mitigate political conflict over oil and gas resources. For example, the Constitution of Brazil, 1988, provides that mineral resources shall be the property of the central government (article 20(IX)), but also explicitly guarantees the subnational government units a share in the benefits of Brazil's natural resources. Article 20, section 1 provides:

> The States, Federal District and Counties … are assured, as provided by law, participation in the results of exploitation of petroleum or natural gas … in their respective territories,

continental shelf, territorial sea or exclusive economic zone, or financial compensation for such exploitation.

2.2.2 Subnational government ownership

Canada is an example of a federal state that assigns both ownership *and* management of its oil and gas resources to its provinces (article 109 of the Constitution of Canada, 1867; see section 2.1.1). In unitary states, while no subnational governments exist that are legally capable of holding ownership, competing ownership claims can arise between the central government and regional groups. These disputes can be resolved through innovative constitutional mechanisms that recognize and confer ownership on regional groups. For example, during the 1980s and 1990s, a civil war erupted between Bougainville Island in Papua New Guinea (PNG) and the PNG national government over copper ownership.[35] The central government had ownership of all natural resources in the state, but the customary system of land ownership on Bougainville Island extended to ownership of natural resources.[36] The settlement that ended the civil war in 2000 created the Autonomous Region of Bougainville within Papua New Guinea. The Autonomous Bougainville Government possesses ownership rights over natural resources on Bougainville Island.[37] In essence, this arrangement created a system of asymmetric decentralization in Papua New Guinea, accompanied by a transferal of legal ownership over mineral resources to the Autonomous Region of Bougainville. Asymmetric decentralization, including recognition of a subnational or autonomous government's ownership of mineral resources, is another way to resolve conflicts between central government and regional or indigenous communities.

2.3 Private ownership and private participation in the industry

Most constitutions guarantee the right to private property. This right usually, however, only extends to surface rights, and does not include the right to own the subterranean natural resources (the United States is a rare example, where private ownership rights over oil reserves are recognized). In addition to either allowing or prohibiting private ownership of petroleum resources, a constitution can also set out the permissible extent of private (domestic or foreign) participation in the oil and gas industry. Debates over the participation of private companies in the oil and gas industry usually centre on foreign participation; this is predominantly due to political concerns about protecting national sovereignty. However, since management (which includes extraction and production) and ownership can be disaggregated, it is possible for a constitution to protect public ownership over natural resources while simultaneously allowing private (and foreign) participation in the market.

2.3.1 Mexico

Mexico is a useful example of a country that has undergone a constitutional evolution in its approach to private participation in the market. Until recently, the Constitution of Mexico, 1917, not only established public ownership of oil and gas, but also prohibited private participation in the industry by making the ownership of oil and gas resources inalienable. The state was effectively prohibited from alienating mineral resources or transferring ownership rights to private parties.[38] Although article 27 permitted concessions to exploit natural resources, it effectively prohibited the awarding of concessions or contracts for oil and gas resources to entities other than national entities.[39] In other words, the Constitution of Mexico tied ownership and management of oil and gas together.

Restricting private participation in the Mexican petroleum market caused a number of difficulties. Mexico's state-owned oil company, Pemex, lacked the financial and technical capacity to explore and exploit new oil reserves. Given that Pemex was prohibited from partnering with international oil companies, Mexico was forced to import oil to meet domestic demand, even though it had sufficient oil resources.[40] However, in December 2013, driven by low production and poor technical capacity, Mexico passed constitutional amendments that drastically altered the oil and gas regime, opening it up to foreign investment. The state may now pursue exploration and production activities through 'allocations to productive enterprises of the State or through contracts with these or with individuals, in terms of the Regulatory Law. To fulfil the object of those allocations or contracts, the productive enterprises of the State will be able to contract with individuals'.[41] In August 2014, pursuant to these amendments, Mexico's Congress passed laws that effectively ended Pemex's monopoly over the sector.[42] The central government is now permitted to enter into oil contracts with foreign investors. As one would expect when markets are liberalized, investment indicators reacted favourably to these constitutional amendments.[43]

2.3.2 Brazil

The confusion caused by constitutions that affirm state ownership of oil and gas resources but at the same time permit private concessions may lead to constitutional disputes that fall to the courts to resolve. Brazil provides an example. Until 1997, Brazil's government-owned NOC, Petrobras, operated all petroleum-related activities in Brazil. No private companies, either domestic or foreign, were allowed to participate in the industry. However, in the 1990s, Petrobras was partly privatized, and the oil industry was significantly liberalized.[44] The Ninth Constitutional Amendment of 1995 ended the monopoly over the industry by Petrobras.[45] As amended, article 177 of the Constitution of Brazil, 1988, provides:

> The Union may contract with state or private firms to perform the activities provided for in subparagraphs I to IV of this article, observing the conditions established by law.

In the wake of this constitutional amendment, Brazil adopted Law 9478, promulgated in 1997, which established a concessions system in the oil and gas industry, under which the central government can contract with, and grant concessions to, international firms. The legislation requires international oil companies (IOCs) to incorporate an entity in Brazil to serve as the party to the contract, but Law 9478 is ambiguous.[46] On the one hand, on the one hand, article 3 affirms the continued ownership by the Brazilian state of oil and gas resources, by providing that 'the Union owns oil deposits, natural gas, and other fluid hydrocarbons existing in the country, including onshore area, territorial waters, continental shelf and the exclusive economic zone'.[47] On the other hand, article 26 of the law provides 'the concession implies, as to the concessionaire, the obligation to explore at its own risk and expense and, if successful, produce oil or natural gas in a given block, granting it the ownership of those goods, once extracted'.[48] While IOCs inferred ownership rights from this language, the Brazilian state drew a distinction between the type of property rights that the IOCs have over 'goods, once extracted' and the absolute and inherent state ownership over all national natural resources still in the soil.

In 2005, the Brazilian Supreme Court made it clear that, while foreign companies could exercise *rights* relating to oil and gas, this did not actually confer *ownership* of the natural resources on the companies – the resources themselves were still owned by the Brazilian state.[49]

2.4 Ownership by, or for the benefit of, 'the people'

As an alternative to vesting ownership in the central or subnational government, a constitution may vest ownership of oil and gas in the people. This approach appeals to nationalistic and communal sentiments, and may imply that the entire people of a country is the beneficiary of that country's natural resources. However, the vesting of ownership in the people leaves key elements of the ownership regime unclear. Does ownership by the people mean that resources are to be held in trust by a government that represents the people? Or does it denote a type of communal public ownership? If it means the former, in a constitutional system with multiple levels of government it raises the additional question of *which* level of government (central or subnational, or shared ownership) owns the resource. If it means the latter, then how exactly, and by whom or by which institution, are the rights of ownership exercised? Without additional provisions detailing resource management and revenue, a constitutional provision that vests ownership of mineral resources in the people and requires that those resources be exploited for the benefit of the people may become little more than a broad principle.

2.4.1 Ownership by the people: Iraq, Tunisia and Egypt

The Constitution of Iraq, 2005 provides in article 111 that 'oil and gas are owned by all the people of Iraq in all the regions and provinces'. The phrase 'all the regions and provinces' could be interpreted to imply subnational or regional ownership,[50] which is how the Kurdish Regional Government appears to have interpreted the constitutional provision.[51] A further complication is that the Draft Hydrocarbon Law has not been passed by the Iraqi parliament, even though the bill was approved by the Iraqi cabinet in 2007.[52] During the delay in adopting the law, the KRG passed its own Oil and Gas Law (Iraq Law No. 22 of 2007). The law references the Iraqi Constitution's ownership provision:

> Petroleum in the Region is owned in a manner consistent with article 111 of the Federal Constitution. The Regional Government is entitled to a share from the revenues from producing fields, consistent with the share of all Iraqi people, in accordance with this law and article 112 of the Federal Constitution.[53]

The provision indicates the KRG's view that the region owns the resources and is entitled to profit from their exploitation.[54] The KRG has, moreover, concluded agreements with IOCs and appears willing to share at least some of the revenue with the Iraqi federal government.[55] The KRG's interpretation of the provision thus disaggregates the concepts of revenue and ownership. It remains to be seen, however, whether the KRG's claim to ownership of the oil found within its territory in the face of an ambiguous constitutional provision will raise tensions with the central government. The Iraqi central government has already stated that it will refuse to recognize any contracts signed between the KRG and IOCs.[56] During the constitutional drafting process, the drafters failed to reach an adequate consensus on matters of resource ownership and management, which resulted in vague and imprecise concepts in the text of the Constitution. The Constitution of Iraq, 2005, is a clear case where the lack of clarity over ownership (and management) may lead to differing interpretations and political conflict.

The Constitution of Tunisia, 2014 provides a clearer approach to vesting ownership in the people. Article 13 of the Constitution makes it clear that, although the natural resources 'belong to the people of Tunisia', it is the state that 'exercises sovereignty over them in the name of the people'. Given that Tunisia has a unitary system of government, it is clear that it is the central government that acts as the managing custodian of the resources. The Constitution of Egypt, 2014, which also establishes a unitary system, adopts a similar approach. Article 32 provides that 'natural resources belong to the people', but that the state is responsible for ensuring the 'sound exploitation' of natural resources.

In the absence of additional information in the text of the constitution, ownership 'by the people' poses fewer problems in a unitary system of government than in a federal system.

2.4.2 For the benefit of the people: Indonesia

Some countries strike a balance between state ownership and public benefit, providing that the state shall own the mineral resources, but stating explicitly that those resources will be for the 'benefit of the people'. Indonesia has taken this approach. Article 33, sections 2 and 3 of the Constitution of Indonesia, 1945, provide that 'sectors of production which are important for the country and affect the life of the people shall be under the powers of the State', and that 'the land, the waters and the natural resources within shall be under the powers of the State and shall be used to the greatest benefit of the people'.

Unlike in many other jurisdictions, in Indonesia ownership of oil and gas resources may not be divorced from the management of oil and gas resources or from the revenue that flows from those resources. In 2012, Indonesia's Constitutional Court declared that it was unconstitutional for the state *regulator* of oil, BPMigas, to take part only in the supervision and regulation of the oil industry. The court found that article 33 of the Constitution requires the state to have full control of the resources, so that it can utilize them for the benefit of the Indonesian people. The court held that this requires the state not only to regulate the oil industry, but also to be involved directly in exploration and exploitation of the oil through state-owned enterprises.[57] The ruling does, however, permit the state to enter into production-sharing agreements with private entities. In sum, the court interpreted the concepts of state ownership and public good strictly, placing restrictions on the extent to which the state can contract with private companies and thus relinquish ownership or control.

2.5 Conclusion

This section has sought to highlight aspects that a constitutional drafter may wish to consider when bestowing 'ownership' of oil and gas resources on a particular entity or group in the text of a constitution. The conferring of ownership may serve important objectives, which include emphasizing the national significance of the resources, providing certainty, and alleviating conflict between spheres of government or regional groups. Ownership provisions can, however, lead to uncertainly and confusion – for example, when a constitutional allocation of ownership is not accompanied by a constitutional or statutory provision identifying which institutions hold management authority over the resources or the right to receive revenues. This lack of clarity can lead to disputes and tension between the central and subnational governments, or between governments and groups in society. The case of Iraq serves as an example of how ambiguous ownership provisions in a federal state can cause political tension. Unitary systems of government also benefit from clear and relatively detailed (or qualified) ownership provisions. The Constitution of Tunisia, for example, clearly renders ownership a largely symbolic gesture, as it expressly disaggregates ownership from the power to control the resources. Indonesia, another unitary system, shows how the constitutional requirement that natural resources be used for the greatest benefit of the people has been interpreted by the Constitutional Court to include a significant degree of management authority and entitlement to revenue. In essence, ownership provisions may provide difficulties if not formulated in sufficient detail.

3 Management

3.1 Introduction

Since ownership of oil and natural gas resources does not necessarily imply management authority or claims to revenue, management of these resources should be considered as a distinct element of an oil and gas regime. Indeed, management issues make up a large proportion of what constitution drafters must consider as they construct a legal framework for oil and gas resources. The Constitution of Sudan, 2005, for example, includes detailed provisions on oil and gas management (see articles 190–192). One reason for greater detail in this case was the deep mistrust between the southern and northern regions of Sudan, and the need to ensure that the provisions left no room for doubt about how much management control each region was entitled to exercise. The huge intricacy of managing the oil and gas industry generates a large number of specific institutional questions, and thus requires careful attention. This Chapter provides a framework for how constitutions might address management issues. It draws on examples of how countries from around the world have addressed the management of their oil and gas industries in their constitutions.

3.2 What is management?

Few constitutions refer explicitly to the 'management' of the oil and gas industry. The Constitution of Iraq, 2005, is rare in this respect, providing in article 112 that '[t]he federal government, with the producing governorates and regional governments, shall undertake the management of oil and gas'. Most constitutions, however, refer to specific management activities. The Constitution of Niger, 2010, for example, provides that the law may establish rules concerning 'research, the exploration and the exploitation of the oil and gas resources' (article 99).

One possible explanation for the lack of reference to 'management' in constitutions is that the term encompasses many different activities. Constitutional systems that share management authority among different levels of government or different entities within a single level of government may refer to specific management activities, while a constitution that consolidates management authority in a single level of government or governmental institution may use 'management' or another all-encompassing term. The Constitution of Iraq, 2005,, however, assigns management authority to the central government and the subnational governments, without specifying which functions of management each level of government will be responsible for performing.[58]

For the purposes of this Report, 'management' can be broadly defined to include the activities and processes of the oil and gas industry, as well as the higher-level business of overseeing the activities of actors in the industry. Both of these two broad categories consist of more specific elements: the activities and processes of the industry can be thought of as *upstream*, *midstream* and *downstream* activities, while higher-level oversight involves authority to *contract* with entities to perform industry activities (see section 3.5) and the administrative power to *regulate* the oil and gas industry. Table 3.1 elaborates on each of these categories of management activity and explains the significance of each category for government.

Table 3.1: Elements of management in the oil and gas industry

Management activity	**Description**	**Significance**
Industry activities		
Upstream[59]	• **Exploration**: surveying onshore and offshore sites to discover resources; drilling exploration wells; and determining site's potential. • **Production**: extracting petroleum from the site.	• Determines quantity of petroleum that a country produces. • Extremely capital intensive. • Involves major financial, environmental and political risk. • Potentially creates immense revenue for the state.
Midstream[60]	• **Transportation**: using pipelines or cargo ships to transfer resources inside and outside the country. • **Storage**: storing resources that are not transported.	• Requires cooperation across both in-country borders and national borders. • Involves environmental and security risks.

Downstream[61]	• **Refining**: transforming oil or gas into final products. • **Marketing**: sale of final products.	• May involve significant environmental risks.
Higher-level management activities		
Contracting[62]	• **Deal-making**: entering into contracts and licences with public or private entities to grant authority to perform one or more management activities.	• Involves power to negotiate terms, including royalties, local content, environmental impact and duration of contract. This includes aspects of tendering and public procurement. • Impacts significantly on foreign investment and corruption.
Regulation[63]	• **Standard-setting**: creating safety, environmental, labour and financial standards for the industry. • **Enforcement**: enforcing standards, including transparency and audits.	• Impacts significantly on foreign investment, public welfare and corruption.

From a constitutional perspective, the ability to break down management activities into discrete elements allows constitution drafters to distribute responsibilities in a way that achieves particular goals, which may include efficiency, welfare, equality, environmental protection and economic development.

3.3 Management from a constitutional perspective

Because of its divisible nature, the management of the oil and gas industry lends itself to inclusion in a constitution. However, an antecedent question is why a country would want to include management in the constitution in the first place. A brief survey of the world's constitutions shows that many petroleum-rich countries have chosen to constitutionalize at least some aspects of the management of the industry. However, even those countries with management provisions in their constitutions vary with regard to which aspects of management are included and the level of detail or specificity with which management authority is conferred.

A number of factors that influence the embedding of rules for management in the constitution. One factor is to avoid conflict. As noted above, management activities have a major impact on the economy, environment and general welfare, raising the potential for political battles among institutional actors and governments that have an interest in the industry. Since constitutions are more difficult to amend than ordinary legislation, setting out management authority in the constitution reduces uncertainty over management authority and reduces the opportunities for conflict between different actors in the government. Certainty, in turn, assists with encouraging investment.[64] A constitution may also vest management power in subnational governments to signal the country's commitment to promoting the interests of regions.

Although there are benefits to embedding the general allocation of management authority in the constitution, more specific details of management – such as the particular terms of contracts or the specific standards for local content requirements – are almost always left for elaboration in legislation and regulation. Indeed, because legislation and regulations are more flexible than constitutions and more easily adapted to changing circumstances, it would be imprudent to include in a constitution the fine-grained details of management, which require a certain degree of flexibility from project to project.

3.4 Management design

Several options exist for the constitutional design of a management regime. While the division and allocation of management authority are intuitive in federal constitutional systems with multiple levels of government, even in unitary states a constitution can allocate management authority to different institutions within the country. In addition, a constitution can establish mechanisms by which local populations can exert influence over management activity, whether or not the country is federal.

This section considers three general types of management structures. First, *single management structures* provide management authority to a single level of government: either to the central government or to the subnational governments. Second, *split management* *structures* divide the activities of management among different levels of government, conferring exclusive authority for a particular activity on each level of government. Finally, *joint management structures* provide for the sharing of management authority for a particular activity, or for all the activities, between the levels of government.

Some countries use a combination of structures, rather than just one. For example, in Canada, the provinces possess exclusive upstream management authority over oil reserves on their land (i.e. a single management structure),[65] but the provincial legislatures and parliament share the authority to legislate with regard to certain midstream and downstream activities (i.e. a joint management structure).[66]

3.4.1 Single management structures

Constitutions with single management structures confer authority for all activities related to management on one level of government. In federal countries, a constitution may lodge authority for management with either the central government or the subnational governments. Often, the central government is the only entity with the expertise, technical capacity and coordinative capability to manage the oil and gas industry. Subnational governments might not have the necessary experience to develop a regulatory framework or to engage in complex contract negotiations. Moreover, subnational units are less likely to coordinate exploration and production strategies, whereas the central government is able to develop a coherent, overarching national policy to guide how the country manages its non-renewable resources in a global market.[67] Full management authority in the subnational governments might also encourage 'race-to-the-bottom' policies, where subnational governments seek to lure foreign investment by offering lower environmental or labour standards.[68] On the other hand, vesting management authority in the subnational governments may empower local citizens and communities, if the system of government at the subnational level ensures that subnational governments and officials are accountable to citizens.[69] Management by a central government may, in addition, neglect the impacts of oil and gas operations on local communities, such as environmental degradation, labour conditions or local content issues.

Constitutions with single management structures rarely describe in detail all the discrete activities assigned to the government. Rather, they take a broad-brush approach to assigning management authority. For example, article 13 of the Constitution of Tunisia, 2014, bestows on the state the authority to 'exercise sovereignty' over the natural resources. Another example is article 27 of Constitution of Mexico, 1917, which provides that '[t]he Nation shall at all times have … the right to regulate the utilization of natural resources which are susceptible of appropriation', and that 'the exploitation, use, or appropriation of these resources … may not be undertaken except through concessions granted by the Federal Executive in accordance with the rules and conditions established by law'. These provisions ensure that only the central government has the authority to manage the oil and gas industry. This approach avoids ambiguity as to which level of government manages the industry.

Similarly, the Constitution of Brazil, 1988, confers exclusive management authority on the central government, although it does so in more detail than either the Tunisian or the Mexican constitutions. Article 177 of the Constitution of Brazil provides that 'the Union' (i.e. the central government) 'has a monopoly' on 'prospecting and exploitation' of oil and gas, 'refining' oil and gas, 'importation or exportation of products and basic by-products' of oil and gas, 'maritime transportation' and 'pipeline transportation' of oil and gas. These provisions encompass upstream, midstream and downstream activities. Article 177(1) provides that the central government 'may contract with state or private firms to perform [these] activities'. The detail and specificity of the Constitution of Brazil leave little room for subnational governments to challenge the central government's management authority. Article 25(2) of the Constitution of Brazil carves out a very small area of responsibility for subnational government, conferring on subnational governments the authority 'to operate, directly or through concessions, local services of piped gas, as provided by law'. This explicit reservation of limited local authority to subnational governments emphasizes that all other management activities are reserved to the central government, and suggests in turn that subnational governments have no authority other than the limited and explicit authority that the Constitution sets aside for them.

Within a constitutional system that assigns authority to a single level of government, there may be variation in how authority is allocated to different institutions at that level of government. Authority may be split between different departments or ministries (e.g. the ministry of energy or the ministry of natural resources), regulatory agencies and the NOC. The law may assign different powers to different institutions, including policymaking authority, contracting authority, regulatory authority and operational authority. Distributing management authority among different institutions within a single level of government creates a horizontal power structure specific to the oil and gas industry, and prevents the consolidation of power in a single institution.

The Constitution of South Sudan, 2011, divides management authority between a government agency (the National Petroleum and Gas Commission, NPGC) and the NOC (the National Petroleum and Gas Corporation). The NPGC is established as a policymaking body with respect to petroleum and gas resources, and consists of 'relevant national Ministries, other relevant institutions, and representatives of oil producing states appointed by the President in accordance with the law'. It reports to the president and to both chambers of the legislature (article 174(1)–(3)). The Ministry of Petroleum and Gas is charged with implementing the policy of the NPGC (article 175(1)). More specifically, it is responsible for, among other things, 'negotiating all oil contracts for the exploration and development of oil'; 'initiating legislation, rules, and regulations regarding the petroleum and gas sector'; 'formulating strategies and programmes' for oil and gas development and management; and, 'in consultation with affected communities, ensuring that all petroleum and gas projects be subject to environmental and social impact assessment' (article 175(2)). Finally, the 2011 Constitution established the National Petroleum and Gas Corporation as an NOC for South Sudan, which 'shall participate in the upstream, midstream, and downstream activities of the petroleum and gas sector on behalf of the National Government' (article 176). A potential advantage of disaggregating management horizontally within a single level of government is that it avoids political and bureaucratic wrangling over power, as the text clearly allocates various responsibilities within a small number of institutions.

While nearly all single management systems locate management authority in the central government, it is possible for constitution drafters to provide for a single management system with all management authority residing exclusively in the subnational governments. Although no country today vests sole management authority in subnational governments, The Constitution of Canada, 1867, comes the closest. Article 92(A)(1) provides that each provincial legislature 'may exclusively make laws in relation to (a) exploration for non-renewable natural resources in the province; [and] (b) development, conservation and management of non-renewable natural resources and forestry'. Furthermore, under article 92(A)(2), provincial legislatures 'may make laws in relation to the export from the province to another part of Canada of the primary production from non-renewable natural resources … in the province'. However, article 92(A)(3) states that article 92(A)(2) does not derogate 'from the authority of Parliament to enact laws in relation to matters referred to in that subsection'. In the event of a conflict between a law of parliament and a law of a provincial legislature related to the subject matter in 92(A)(2), the parliamentary law prevails.

One area of potential confusion and conflict in single management structures involves situations in which one level of government has exclusive management authority over the oil and gas industry, but the other level of government has the authority to regulate an area that may have an impact on the oil and gas industry. Canada has faced such a challenge with respect to environmental regulation. The Constitution of Canada, 1867, does not provide explicitly for which level of government has jurisdiction over environmental regulation,[70] but it does provide the central government with exclusive authority to legislate on and regulate inland fisheries (article 91(12)). As a result, the central government has established a regulatory framework governing inland fisheries under its exclusive constitutional authority.[71] However, this framework sometimes conflicts or overlaps with the regulatory frameworks established by provinces under their exclusive constitutional authority to manage the oil and gas industry on their land.[72] This has resulted in extensive duplication of functions between the central and subnational governments, as well as extended delays in obtaining environmental approval for projects.[73] However, the central government has cooperated with subnational governments in order to eliminate duplication and avoid delays through the use of joint approval panels, formal equivalency agreements, and bilateral administrative agreements.[74]

3.4.2 Split management structures

The split management model allocates specific management tasks to institutions at different levels of government. Often, the upstream, midstream and downstream management tasks are allocated to different levels of government. Upstream activities, which require great amounts of capital and technological expertise, are usually allocated to the central government. Localized distribution of oil and gas may, however, be granted more easily to subnational governments. Although Brazil's structure is largely a single management structure, the Constitution of Brazil, 1988, confers authority for local distribution on subnational governments (article 25(2)), but confer authority for maritime and pipeline transportation, and importation and exportation of petroleum products is on the central government (article 177). This allocation can be explained by the fact that central government is more likely to have the capacity needed to create and maintain the large-scale infrastructure that maritime, pipeline and international transportation of oil require.

3.4.3 Joint management structures

Whereas split management structures allocate discrete management tasks to different levels of government, joint management structures provide for different levels of government to perform management tasks jointly. The joint management model ensures that subnational governments have a say in management activities that impact their regions. A country may therefore adopt a joint management structure in order to ease tensions between central and subnational governments. In Indonesia, for example – a unitary country – article 18A of the Constitution requires the relations between central government and regional authorities concerning the use of natural resources to be regulated by law. The Law on the Governing of Aceh, 2006, in turn provides that 'the [central] Government and Aceh Government manage together oil and gas natural resources located inland and in the territorial sea of Aceh' (article 160(1)).

In practice, however, joint management structures are difficult to administer and can produce unintended conflicts between the levels of government due to 'overlapping responsibilities'.[75] Therefore, constitutional provisions specifically outlining how responsibilities are shared and what processes exist for resolving conflict are very important in joint management structures.

One of the most recent and best-known examples of a joint management structure is seen in the Constitution of Iraq, 2005. The issue of the division of management responsibilities between levels of government in Iraq has been a contentious and confusing one, particularly with regard to the power of the KRG to enter into agreements with IOCs without the approval of the central government.[76] Article 112(1) provides that '[t]he federal government, with the producing governorates and regional governments, shall undertake the management of oil and gas extracted from present fields, provided that it distributes its revenues in a fair manner in proportion to the population distribution in all parts of the country'. Article 112(2) provides that the federal government 'with the producing regional and governorate governments, shall together formulate the necessary strategic policies to develop the oil and gas wealth'.

Article 112 has created confusion about who is responsible for oil and gas management:

- First, it is unclear exactly what 'with the producing governorates and regional governments' entails in terms of cooperation or sharing of responsibility. Is the central government required to obtain the approval of the subnational governments before making management decisions? Is it supposed to collaborate actively with the subnational units in making those decisions? Or should it simply consult subnational governments without being required to take into account their positions?

- Second, there is uncertainty arising from the provision that the central government has management authority over oil and gas 'extracted from present fields', and from the condition that it 'distributes its revenues in a fair manner'. The Constitution does not indicate how a 'present field' is defined, or how fairness is to be assessed.

- Third, although the central government and the subnational governments shall together formulate strategic policies for oil and gas resource development, it is not clear which specific management tasks this joint authority encompasses.[77]

Article 110, to add further complication, confers exclusive authority on the federal government in a number of areas, including the negotiation and signing of international agreements, formulating foreign economic trade policy, and regulating commercial policy across regional and governorate boundaries. All of these areas of exclusive federal authority may cut into the authority of a regional government or governorate to manage its oil and gas resources and to formulate policy with regard to those resources.

In this context, debate has persisted for several years between the central government and the KRG about whether or not the KRG has the authority to enter into agreements with foreign oil companies unilaterally.[78] The central government fears that granting such power to the governorate will fuel secessionist momentum and eventually lead to the breakup of the country.[79] Meanwhile, the KRG seeks to promote development within its region without the hindrance of the central government, which has yet to pass a petroleum law.[80] The effect of the conflict has been to delay development and reduce investor confidence.[81]

Joint management schemes also exist in Australia and Canada, and have developed largely as a result of the failure of those countries' constitutions to expressly regulate ownership and management of natural resources found offshore. In Australia, after much political and legal contestation, the central and subnational governments reached an agreement over the control of offshore petroleum resources.[82] The agreement provides the subnational states with exclusive legislative authority for the petroleum resources located under the seabed in their 'coastal waters', which translates to approximately three nautical miles from the states' territorial boundaries. Federal legislation would exercise control over the remainder of the resources located offshore. However, in terms of the federal legislation, significant management functions had to be transferred to a joint authorizing authority encompassing the federal minister and relevant state minister.[83] The federal government enjoys significantly more power in this joint management scheme, as in the event of disagreement the views of the federal minister prevail.

A similar arrangement is seen in Canada. While the Constitution of Canada, 1867, specifically details the division of ownership rights within Canadian surface territory, there is no constitutional provision regarding the ownership of *offshore* oil reserves. After the discovery of commercially viable oil fields off the coast of Newfoundland (now Newfoundland and Labrador) province, both the province and the central government asserted jurisdiction over the reserves. The dispute was brought before the Supreme Court, and in 1984 it ruled that the offshore oil reserves fall under federal jurisdiction.[84] Legal certainty over this issue was, however, not sufficient to resolve the tension. After the 1984 ruling, the province of Newfoundland actively discouraged oil companies from investing in a potentially volatile environment.[85] The stand-off between the central and Newfoundland governments was resolved with a joint management agreement between the central and subnational government, known as the Atlantic Accord, 1985. However, unlike in Australia, the subnational government exercises more authority, as it not only enjoys significant powers and benefits in terms of the scheme, but also wields a veto right over important offshore development decisions.[86] Although the Atlantic Accord did not grant ownership of the offshore resources to the province, the joint management scheme created a climate that allowed for economic development to proceed. This serves as another example of how management authority can be separated from ownership rights in an effort to settle political disputes.

Although joint management structures are most relevant to federal states, unitary states may have an interest in satisfying the demands of local communities for some degree of management authority or control over local oil and gas resources. The Constitution of Ecuador, 2008, provides an example of constitutional language that embodies the goal of shared responsibility with local communities. Article 261 confers on the central government 'exclusive jurisdiction over … minerals, oil and gas' and exclusive authority to enter into contracts with domestic and foreign oil companies, but article 57(7) provides that 'indigenous communes, communities, peoples and nations' are guaranteed the right to 'free prior informed consultation, within a reasonable period of time, on the plans and programmes for prospecting, producing and marketing non-renewable resources located on their lands and which could have an environmental or cultural impact on them'. In practice, however, the central government has construed these provisions as meaning that consultation with local communities is not binding. In addition, national legislation has been enacted to allow the government and oil companies to satisfy the consultation requirement by consulting only a few members of a community and by requiring community input to be 'technically and economically viable'.[87] Indigenous communities have responded to the government's attempts to circumvent the consultation requirement by submitting challenges to the Constitutional Court.[88] A model for more extensive protection of indigenous populations is seen in Canada. Section 35 of the Canadian Constitution Act, 1982, guarantees the aboriginal population certain rights, which have been interpreted as including the right to land and to protection for its fishing and logging activities. The Canadian Supreme Court has also held that all governments have a 'duty to consult with Aboriginal peoples and accommodate their interests' when a government seeks to exploit their land.[89]

3.5 Contracting

3.5.1 Types of contract

The authority to enter into contracts with private (domestic or international) oil companies, as well as with state-owned oil companies (NOCs), is an important element in managing the oil and gas industry. Three types of contract are discussed briefly below: concession agreements, production-sharing agreements and service agreements. Although not typically referenced in a constitutional text, their implications for management authority are significant. Constitutional drafters should therefore consider the types of agreement, if any at all, that are desirable for their respective countries. It should be noted that the types of contracts detailed below are described in theoretical terms. A country can decide for itself how much of the mining rights, control over operational activities, and revenue it is willing to confer on an oil company. Indeed, many variations on these agreements are seen around the globe.

Concession agreements

Concessions involve transferring exclusive rights to explore, develop, sell and/or export oil and gas from the government to an oil company. Usually these rights pertain to the oil and gas in a particular area and are transferred to the concessionary for a specified period of time.[90] The oil company pays the government, usually with an up-front fee, royalties and taxes on whatever revenue is generated from the sale of the resource.[91] In a concession agreement for exploration and production, the oil company takes on the risk that no oil or gas will be profitably extracted. The government receives up-front payment regardless of whether oil or gas is discovered and/or whether production is feasible. Concession agreements are relatively straightforward. Due to their simplicity and ease of use, some governments and IOCs prefer such agreements.[92]

Concession agreements raise two concerns, however. First, considering the symbolic value that many countries attach to their oil and gas resources, feelings of national pride may militate against the concession of rights to foreign companies. More substantively, foreign or even domestic oil companies may not take into account the interests of the environment or local populations. Second, concessions are usually long-term agreements lasting several decades, thus prolonging any negative consequences of the concession.[93]

Production-sharing agreements

A more recent, but very common, contract regime involves production-sharing agreements (PSAs). With a typical PSA, an oil company explores and produces oil or gas on a given site. In contrast to concessions, the oil company is not, however, entitled to all the oil extracted. A portion of the oil extracted is first allocated to the oil company to cover the investment costs incurred.[94] This oil allocation to the company is usually referred to as 'cost oil'. After covering the investment costs, the remainder of the extracted oil is divided between the oil company and the state, according to an agreed ratio. The oil that the company retains after 'cost oil' is termed 'profit oil',[95] and the company is required to pay tax on the profit oil.[96] Production-sharing agreements allow the state to maintain ownership and management authority over the resources, although, in practice, most of these agreements provide the oil company with significant control over the business venture.[97]

Service agreements

In terms of a service agreement, the state contracts with an IOC for its technical services to explore and develop the oil and gas resources, in exchange for an agreed remuneration. The state, however, remains the sole owner of the resources, as well as of the business venture, and is accordingly entitled to all the oil extracted and all the revenue generated.[98] In theoretical terms, the difference between a service agreement and a PSA is the classification of the remuneration received and the extent of control over the production activities.[99]

3.5.2 Corruption risks

Authority to contract with oil companies increases the risk that state officials could make illicit monetary gains. Ensuring that transparency exists in the contracting process is crucial to avoiding corruption, inefficiency and unfairness.

Reporting each stage in the process of bidding or tendering for government resources contracts, and publicizing both winning and losing bids is one way to reduce corruption.[100] Article 150 of the Constitution of Niger, 2010, provides for the publication of contracts, 'disaggregated on a company-by-company basis', in the state's official journal. Algeria, too, requires the reporting of tender results in a national newspaper, and the publication of certain types of agreements in the state's official journal.[101] Investors may complain that publication jeopardizes confidential business information.[102] However, commercially sensitive information is rarely included in contracts, and, in reality, investors have little to lose from publication.[103] Moreover, the public and competing businesses have a great deal to gain from being able to hold government officials accountable for their contracting decisions.

Some countries include a right of access to information in their constitutions, which provides a separate route to the publication of information about contracts. Article 32 of the Constitution of Tunisia, 2014, guarantees the right to information, although it says little about how members of the public would actually obtain such information. In South Africa, by contrast, the right of access to information contained in the Constitution of South Africa, 1996, provides that national legislation must be enacted to give effect to this right. The Promotion of Access to Information Act 2 of 2000 was accordingly enacted to regulate the access to information held by the state or by private bodies.

Another mechanism employed to promote transparency and accountability in contracting is to require legislative approval for every oil and gas contract. The Constitution of Ghana, 1996, requires parliamentary approval of any contract entered into by the state involving the grant of a right or concession for the exploitation of natural resources (article 268(1)). Similarly, the Constitution of Tunisia, 2014, provides for parliamentary approval of contracts concluded by the state (article 13). These provisions create a mechanism for parliamentary oversight of the contracting process.

3.5.3 Enforcement

With respect to contracts, another issue of significant importance for both domestic and international investors is enforcement. Oil and gas contracts may stipulate how and where disputes between the government and the oil company should be resolved. However, certain issues may arise regarding the enforceability of contracts against the state by international actors in certain forums. For example, the Ukrainian Constitutional Court ruled that contract terms *requiring* the state to waive sovereign immunity were unconstitutional.[104] This was worrying to international investors, who were faced with a contract regime and legal framework in which it was uncertain whether or not contracts could be enforced against the state. The Ukrainian legislature remedied the uncertainty by amending the law governing oil and gas contracts, so that waiver of sovereign immunity was a *right* of the state rather than a *requirement*.[105] Contract enforceability is an important issue, particularly for foreign investors, and constitutional drafters may seek to allay these concerns with express constitutional provisions.

3.6 Conclusion

Given that the power to manage oil and gas resources is usually a contentious issue in petroleum-rich countries, there are compelling reasons to entrench the main principles of a country's oil and gas management regime in the text of a constitution. Certainty and the avoidance of political tension and deadlock are key reasons. This Chapter has outlined three main types of management structures: single, split and joint management structures. As well as devolving powers from central government to subnational governments (or regional groups), a constitution may divide management powers horizontally, between institutions at the same level of government, in an effort to split up power. Generally, the more successful management structures are those that are clear and unambiguous in terms of which entities possess what authority.

While certain types of management structures are more prone to political conflict, it must be anticipated that disputes will inevitably arise regardless of which structure is adopted. This can either be because two entities share the same function (as is the case in Iraq, where both the central government and an oil-producing subnational government exercise management authority), or because there is overlap between two seemingly distinct competencies (as is the case in Canada, where the central government's power to regulate inland fisheries overlaps with the provinces' power to manage their oil resources). Constitutional drafters should therefore consider creating coordination mechanisms to resolve conflicts that may arise. This could involve giving supremacy to one entity of government over the other. In Canada, for example, the Constitution expressly favours the national legislature over the provincial legislature on matters relating to the export of oil from one province to another. An alternative is to create a joint consultative authority, as for example is seen in Australia and Canada (Newfoundland) concerning offshore resources. Both these joint authorities provide rules on how disagreements are to be resolved.

Contracting is an essential component of the authority to manage oil and gas resources. Given its importance, constitutional drafters may wish to consider regulating certain aspects of these contracts in the constitution. This may include anti-corruption and enforcement mechanisms.

4 National Oil Companies

4.1 Background

Management is a broad and complex field. Quite often countries that are rich in oil and gas resources establish a national oil company (NOC) to manage those resources. NOCs vary in form, but together they control approximately 90 per cent of the world's oil.[106] NOCs can operate much as privately owned international oil companies (IOCs), but they provide an added guarantee that the state will receive revenue from oil and gas. In addition, NOCs allow the state to exert control over how oil and gas resources are exploited and can act as drivers of employment and as funders of national projects. NOCs may ultimately rely on the state for financial backing, and they can take a longer-term approach to production than their IOC counterparts.[107] Occasionally, they occupy a dual position as both a participant in the market and a regulator of the industry.

Despite the influential role that NOCs can play in what is often a state's most important industry, to date only South Sudan has explicitly established and provided for the functions of an NOC in the Constitution of South Sudan, 2011 (article 176). Other countries, particularly those with an NOC already in existence, might benefit from making the NOC institutionally accountable to the government or to the public, and setting out its mandate in the text of the constitution. Constitution drafters must, of course, anticipate that many aspects of an NOC's functions and institutional structuring demand flexibility – a feature that requires caution when incorporating these aspects into an inflexible constitution. This Chapter explores possible considerations to be taken into account when regulating an NOC in a constitution.

4.1.1 Historical context

Many countries that have an NOC also have a history of colonial occupation, in which the colonial government has been actively involved in the extraction of oil and gas resources. In both Latin America and the MENA region, oil was discovered under colonial occupation. In the MENA region, private oil companies won concessions from then-colonial governments. Following independence, post-colonial governments remained bound by pre-independence concession agreements lasting 82 years on average and encompassing most, if not all, of their territory.[108] Beginning with Venezuela in 1948, these countries responded to their long and unfavourable agreements by taxing profits to supplement royalties.[109] Some countries took full control of the rents and processes of their oil industries through a policy of nationalization.[110] In 1938, for example, after nationalizing its oil industry, Mexico established its NOC, Pemex, which is indirectly regulated by the Constitution of Mexio, 1917.[111] Other countries in Latin America and the MENA region soon created their own NOCs.[112] Not only was the growth of NOCs a response to unfair concessionary contracts, but it also allowed the state to use its oil industry to advance other social and economic objectives, such as employment and infrastructure development.[113]

4.1.2 Purposes and responsibilities of the NOC

NOCs can play three different roles. From the outset, it should be noted that these three different roles often conflict with one another. A state may therefore need to decide which role(s) to prioritize – or at least how to balance competing purposes.

First, an NOC's primary role is usually to explore and extract oil and gas resources (i.e. upstream activities). NOCs may also participate in the refinement of the resources and other downstream activities. The Constitution of South Sudan, 2011, provides that the country's NOC 'shall participate in the upstream, midstream and downstream activities of the petroleum and gas sector on behalf of the National Government. Its structure, management, and functions shall be determined by law' (article 176). This broadly worded provision does, however, leave open the way in which the NOC is to participate in the oil industry in South Sudan. The corporation was formally established by the Petroleum Act, 2012, which provides that 'the National Petroleum and Gas Corporation shall be registered as a company under the laws of the Republic, limited by shares, all of which are to be held by the Government on behalf of the Republic and non-transferable to the public' (section 13(4)). The Act further provides that the Corporation 'shall, on behalf of the Government, act as a commercial entity and safeguard the national interest in petroleum activities' (section 13(5)).

Second, NOCs may assume responsibilities other than the maximization of profit. It is not uncommon for an NOC to act as an arm of the state and serve a number of public policy goals. For example, NOCs have acted as public service providers, funding and operating education facilities, roads, communications and even airports.[114] Making the NOC an active player in the promotion of public policies can lead to a guaranteed source of employment and the political redistribution of benefits.[115] However, while the state, as an owner, may receive more revenue from an NOC than it would from an IOC, total profits from the NOC can be negatively affected if the company's duties include funding and building national infrastructure. Similarly, an NOC may also face pressure to employ too many citizens, further harming its efficiency.[116] In Mexico, for example, costly national and political obligations have made it difficult for Pemex to expand reserves, invest in much-needed technologies and attract investment.[117] As an alternative to mandating the NOC to undertake a broad array of economic and social investments, a country may grant the NOC more independence to pursue what it believes are its long-term interests. For example, Qatar allows its NOC to manage its own affairs.[118] Allowing the NOC to pursue long-term profits and maximize revenues may also yield more profits for the state in the long term. Even if the NOC has financial autonomy comparable to an IOC, the government can still receive large dividends and command substantial influence by maintaining a vote on key decisions.[119]

Third, an NOC might act as a regulator of the oil and gas industry, making management decisions and overseeing the activities of other petroleum companies. Occupying the positions of both operator and regulator presents a clear conflict of interest, as it allows the NOC to set the rules for itself and its competitors. The dangers of allowing an NOC to regulate the industry in which it participates can include privileging its own operations and exploration activities, abusing its disciplinary and licensing discretion, and seeking bribes from its competitors.[120] Conferring unfettered regulatory power on an NOC can lead to the promotion of its own self-interest over the interests of the broader public.

The discussion below examines comparative approaches to preventing conflicts of interest.

4.2 Separation of powers and the NOC

In recent years, some petroleum-rich countries have made an effort to separate the powers to regulate the oil and gas industry from participation in the industry, and have consequently established independent agencies to regulate the industry that are distinct from the NOC.[121] Mexico created the National Hydrocarbons Commission (CNH) to regulate the industry,[122] while Algeria's NOC, Sonatrach, has also been reformed to limit its regulatory role.[123] In fact, Algeria set up two distinct and independent regulators to manage and supervise its industry: (i) L'Autorité de Régulation des Hydrocarbures (ARH), which is the national agency vested with the power to implement and enforce compliance with regulations established in the hydrocarbon law,[124] and (ii) L'Agence Nationale pour la Valorisation des Ressources en Hydrocarbures (ALNAFT), which is responsible for developing and promoting the oil and gas resources of the country, including the awarding of exploitation licences to the NOC.[125]

Norway has an effective model for separating regulatory authority from industry involvement. Known as the 'trinity model', it divides power three ways: Statoil, Norway's NOC, handles its own corporate strategy; the Oil Ministry formulates oil policy for the country; and an independent regulator manages contracts and regulates operations in the oil industry.[126] Norway's Ministry of Energy still has primary control over Statoil, but only within existing legal limits related to the state's oil policy.[127] These roles include setting targets and standards for the industry.[128] Norway's independent agency then enforces those standards across the entire oil industry.[129] By contrast, several oil-rich countries in the MENA region have 'supreme petroleum councils' which, rather than have power divided up, work to harmonize the government's goals with the commercial objectives of the NOC. In Kuwait, Abu Dhabi and Saudi Arabia, the head of state chairs this body and other government officials are represented. These arrangements ensure that political elites retain power over decision making.[130]

The Constitution of South Sudan, 2011, provides for a division of institutional power that is very similar to that of Norway. Article 173 establishes an independent council to make oil policy, while the ministry in charge of oil and gas is given more contracting and regulatory responsibilities in article 174. The powers of South Sudan's NOC are detailed in The Constitution of South Sudan, 2011 leaves the 'structure, management, and functions' of the NOC to 'be determined by law', which will necessarily be limited by the existence of the regulatory and policymaking bodies also created by the Constitution.

The transfer of regulatory functions from one entity to another inevitably raises concerns about losing institutional expertise and knowledge. An NOC that has operated for a long time may have an informational advantage over the government or a newly established independent regulator by virtue of its years of experience. In times of transition, allowing the NOC to advise the government or an independent regulator in these circumstances can make the transition to a new regulatory regime smoother. This practice has been followed in Saudi Arabia, Iran and Kuwait.[131]

The appointment of senior management of the NOC also needs to be considered during the work to ensure that the NOC is free of potential conflicts of interest. Given that the state is usually the majority shareholder of the NOC, management will typically reflect the government's ownership interests in the company. This creates the risk that the NOC will be used for purposes other than for the general benefit of society. Another potential risk that is associated with political appointments is the possible increase in inefficiency and mismanagement.[132] To balance the commercial goals of the NOC with the government's interests, the participation of government officials should be clearly defined in law, detailing both how appointments to the NOC are to be made and what the responsibilities of government appointees will entail.[133] In Saudi Arabia, Kuwait and Algeria, the energy minister chairs the board of directors.[134] In Venezuela, the minister of oil is also president of the NOC, and other NOC directors work within the ministry.[135] In Malaysia, the prime minister appoints the entire board and management of the NOC.[136] Under Mexico's new laws governing Pemex, the board of ten is split evenly between members of the federal government (including a representative from the Ministry of Energy) and professional independent directors. The president appoints each of the directors.[137] Saudi Arabia's NOC retains three former chief executive officers of IOCs on its board in order to provide advice.[138] The ideal number of board members will vary with the size of the individual NOC, but it is advisable to prevent political actors and government heads from outnumbering the number of industry experts.

4.3 Relationship between national and international oil companies

A country with limited capital reserves and operational capacity may require the NOC to participate with IOCs to ensure the efficient extraction and production oil and gas resources. For instance, in the past the Constitution of Mexcio, 1917, prohibited the participation of international interests in the oil industry.[139] These restrictions left Pemex unable to spread its costs and limit its financial risks – a situation that perhaps negatively impacted the ability of Pemex to increase production. However, as noted above (section 2.3.1), the Mexican legislature has passed constitutional amendments to end the monopoly Pemex once enjoyed. Not only is the NOC now permitted to enter into contracts with IOCs to give private companies a claim on production, but IOCs may now also compete against Pemex for contracts awarded by the state.[140]

Instead of following Mexico's now defunct approach of excluding IOCs, some countries allow IOC involvement but guarantee their NOCs a minimum stake in oil ventures.[141] In Libya, prior to the fall of the Gaddafi regime, the NOC, the Libyan National Oil Corporation, acted as regulator and operator and made itself 'full equity partner' in joint ventures with IOCs when a commercial discovery was made. Furthermore, the NOC was guaranteed majority representation on the management board of the joint venture, effectively controlling the process.[142] This favourable treatment was in contrast to Petroleum Law No. 25 of 1955, which allowed open bidding from IOCs and defined a formula for sharing costs and profits.[143] In Brazil, following a large oil discovery in 2008, the government created a production-sharing contract to guarantee Petrobras, the NOC, an interest of at least 30 per cent in any consortiums formed to exploit the fields.[144]

Tunisia, too, guarantees its NOC an interest in exploitation ventures. Its Hydrocarbon Code (Law 99-93) requires an IOC to act in association with the Tunisian NOC, Enterprise Tunisienne D'Activités Pétrolierés (ETAP), as a necessary precondition for the granting of an exploration permit. The IOC is therefore required to enter into an agreement with ETAP setting out the nature of ETAP's involvement. The oil company bears the costs of the exploration, although the law allows ETAP to contribute to the costs, provided approval is received from the relevant authority. After a commercially viable petroleum deposit is found, the holder of the exploration permit may apply to the state for an exploitation concession, but ETAP has the option to acquire an interest in the concession up to a maximum of 50 per cent. The NOC will, however, be liable to contribute its share of the costs already incurred.

A possible advantage of guaranteeing the NOC a minimum stake in operations is that it assures the NOC of a portion of the oil revenue, while at the same time increasing the productive capacity of the oil and gas industry through the participation of technologically advanced IOCs. There are, of course, other mechanisms that a country can employ to ensure that oil revenues remain in the country, such as the payment of royalties and taxes. An additional benefit derived from permitting the NOC to cooperate with IOCs is the increase in the technical competence of the NOC. For example, a subsidiary of Kuwait's NOC has acquired additional expertise and advanced accounting practices from its joint venture with an IOC.[145] Furthermore, providing the NOC with a competitive advantage allows the state to make additional non-revenue gains, such as local employment and mandated infrastructure development.[146]

There are, of course, risks to favouring NOCs in exploration and exploitation activities. Mexico was unique in its hostility to IOCs, but other countries, including Iran, Saudi Arabia and Kuwait, deny IOCs any ownership interest in their reserves.[147] Management alone without ownership rights may not provide enough incentive for IOCs to participate in a country's oil and gas industry.[148] Also, there is a risk that the minimum interest granted to the NOC might be too high, as some have speculated is the case in Brazil and Algeria.[149] Whether or not to permit or encourage the participation of IOCs is a decision that depends on a state's institutional capacity and its political appetite for private investment. States that do solicit IOCs' participation must anticipate that IOCs will demand a degree of certainty and guaranteed return if they are to invest.

4.4 Privatization of national oil companies

In recent years, many countries have sought to limit their relationship with their NOC by partially privatizing these entities. It may seem counterintuitive for a central government to relinquish its exclusive right to profits and forgo its control over the management of an NOC, but a country can benefit from this move. A major advantage of partial privatization is that the state can share the financial risks and spread the capital costs that oil and gas investment incur.[150] This may prove vital when establishing a new NOC. Beyond sharing risk and liability, private shareholders can, in principle, serve as an additional check on corruption, as they seek to ensure corporate accountability and to prevent the misuse of funds. On the other hand, constitutional or statutory laws that make the NOC subject to greater oversight may obviate the need for private actors to fulfil this role. Privatization will, in all likelihood, reduce a government's capacity to direct the NOC's activities, which in turn will make the NOC less likely to receive assistance from the state.[151]

Many oil- and gas-wealthy countries have partially privatized their NOC. Beginning in the 1980s, Argentina put a majority stake in its NOC on the market, inspiring other Latin American countries to follow suit.[152] Major NOCs, including those in China, India, Pakistan, Norway and Japan, have been partially privatized in the twenty-first century.[153] Petrobras (Brazil) has diverse ownership, with the government controlling a simple majority,[154] but the government is still able to reap substantial profits and use the NOC to advance the national interest because it has maintained significant control over the voting shares.[155] Norway's interest in Statoil is slightly greater, at 67 per cent, but the state actively refrains from non-commercial policy interference.[156] Allowing private participation in NOCs is not, however, universal. Saudi Arabia prohibits any private participation in its upstream activities by statute, while policy in Kuwait, Iran and the United Arab Emirates (UAE) greatly restricts access to those countries' industries.[157] Mexico's recent constitutional amendments do much to open its market to IOCs, but Pemex remains a state-owned entity.

4.5 Oversight and budget independence

NOCs require large operating budgets to generate large amounts of revenue – a characteristic that leaves NOCs vulnerable to unwarranted political interference and misappropriation. For example, under Hugo Chavez, Venezuela's NOC, Petróleos de Venezuela, S.A., was directed to use as much as 28 per cent of its income on off-budget expenditures.[158] To guard against acts of interference and the misappropriation of funds, constitution drafters may seek to subject the NOC to oversight mechanisms. In fact, even if the state does not have a direct role in the financing of the NOC, it is arguable that the state owes a duty to its citizens to ensure that the expenditure incurred and revenues generated are accounted for.

Independent audits are the most common way of assisting the legislature and executive in the performance of their oversight responsibilities. Although a special auditing agency need not be created specifically for the NOC, the general auditing institution should include the NOC within its purview. Internal NOC auditing mechanisms may help to promote accountability, but may not satisfy public demand for independent oversight of NOC funds. Rather, independent and external audits are usually seen as a necessity to monitor effectively the expenditure and revenue of NOCs. Article 151 of the Constitution of Kuwait, 1962, for example, establishes an audit institution that reports to both the legislature and the executive. Its work has led to the dismissal of a corrupt oil minister.[159]

Legislative approval is another possible mechanism for overseeing and monitoring the budget of an NOC. In Mexico, for example, the legislature must formally approve Pemex's budget each year.[160] Legislative approval does, however, carry certain risks. Subjecting the NOC's budget to total government control risks undercutting the NOC's ability to compete with IOCs. In the past, the Mexican legislature has elected to give Pemex less than requested and has allowed government to absorb much of Pemex's profits.[161] The immediate effect of overburdening the NOC with excessive and discretionary transfers of revenue to the government is that the NOC may lack the resources needed to operate and invest in new projects.[162] Alternatives to having the legislature dictate the terms of the budget may include exerting influence through shareholder voting rights or establishing an independent agency to approve the NOC's budget.

In addition, in order to ensure transparency and accountability, mechanisms by which revenues are transferred to the government must also be clear. The payment of royalties, taxes and dividends can be clearly set out and institutionalized as methods for sharing NOC revenues with the government.[163] However, the success of these measures depends on their implementation and enforcement. In Algeria, the NOC retains much of its revenue, instead of transferring the required amounts to the state, as is required by clear rules.[164] Ineffective oversight and enforcement have prevented the state from securing revenue to be used for the general benefit of the broader public.

Another factor influencing the effectiveness of oversight mechanisms is whether the NOC's revenues must be included in the national budget.[165] In Kuwait, for example, the public has no insight into the profits of the NOC, as they are not included in Kuwait's national budget.

4.6 Conclusion

A large majority of oil- and gas-rich countries elect not to entrench the functions and structure of the NOC in their constitutions. However, given that the NOC plays a pivotal role in the management regime of a country's petroleum resources, there are many advantages to be gained by regulating an NOC at the constitutional level. As a management authority issue, regulating the role, powers and structure of an NOC may provide certainty, which in turn supports objectives like conflict resolution, efficiency and investor confidence. There is, however, a specific set of issues that arise when establishing an NOC, and this Chapter has sought to outline general considerations for regulating an NOC in a constitution. First, an NOC may be mandated with multiple functions. The NOC can act as a commercial competitor in upstream, midstream and downstream activities, with the state receiving revenue indirectly as its sole or largest shareholder. Alternatively, the NOC may eschew business operations entirely, and serve as a regulator of the industry. If the NOC functions as both regulator and participant in the oil industry, it may find itself with a conflict of interests (as was the case in Libya). To avoid this, countries such as South

Sudan and Algeria have established the NOC as a business participant only, and have created a separate commission to perform policymaking functions. Constitution drafters may also wish to regulate the NOC's relationship with IOCs. Perhaps most important in terms of regulating an NOC at the constitutional level is ensuring that the NOC is subject to adequate oversight mechanisms, which includes subjecting its budget to independent and external auditing. Improvements in accountability and transparency are likely to follow if the NOC's revenue and expenditure are reviewed. Audited financial statements, which include reporting on mismanagement and corruption, assist the legislature and executive in the performance of their oversight responsibilities.[166]

5 Revenue

5.1 Overview

In oil- and gas-wealthy countries, like those in the MENA region, revenue from petroleum resources can account for a substantial proportion of total government revenue. Mismanagement and corruption, however, impact on the collection and spending of these revenues.[167] In the 2013 Resource Governance Index, resource-rich countries earned scores that were nine points lower, on average, than less resource-rich countries. In other words, the most corrupt governments tend to be found in countries economies that are dependent on revenues gained from the sale of natural resources.[168] This is an element of what is commonly called the 'resource curse'. Given that the oil and gas industry is highly susceptible to acts of mismanagement and corruption, there are important reasons for oil-rich countries to consider how, and by whom, oil revenues are controlled, including the extent to which these issues can be governed by constitutions. In addition, as highlighted throughout this report, providing clarity on revenue issues may assist in alleviating political tensions.

5.1.1 Defining revenue

Revenues generated by oil and gas industries include royalties, taxes, licence fees, payments from NOCs, and revenues from the sale of government oil. *Royalties* are generally given to the state as a percentage of the sale of oil. *Tax revenues* are typically corporate income taxes, but can also include sector-specific 'special' taxes, profit taxes or export taxes. In the case of a concessions-based regime, the state may also receive annual *licence fees*. Payments from NOCs, such as in the form of dividends, can also be a substantial proportion of government revenue. For example, payments from Pemex account for approximately one-third of the federal government revenue of Mexico.[169]

5.1.2 Overarching considerations in managing resource revenue

This Chapter 5 considers three main areas of managing resource revenue in a constitutional framework: revenue collection (section 5.2), revenue allocation (section 5.3) and transparency and oversight of the processes of revenue collection and allocation (section 5.5). Related to the power to allocate revenue, the chapter also discusses the investment of oil and gas revenue in natural resource funds (section 5.4). Before proceeding further, there are three overarching considerations that should be taken into account for all aspects of resource revenue management.

First, the design of revenue-sharing arrangements can follow principles of *derivation* or *equalization*. Derivation refers to the allocation of resource revenue to a particular subnational unit or region as compensation for the costs associated with oil production. These costs may include environmental damage, supply of services and infrastructure for the exploitation of natural resources at the expense of that subnational government or other negative impacts, such as other industries or sectors being 'crowded out' by resource exploitation.[170]

By contrast, the principle of equalization allocates resource revenues as necessary to achieve national development or to meet non-commercial, social and economic objectives in specific regions. Revenues are allocated to regions neither in accordance with the expenses those regions incur in producing oil or gas, nor in proportion to their contribution to national oil and gas revenues, but rather according to the economic need of each region.

Second, the principles by which revenues are collected and allocated are distinct from the question of how revenues, once disbursed to the various government entities, are spent. A resource revenue law can address collection and allocation matters (including receipt, management and control of oil revenues) without regulating or constraining the expenditure of oil revenues.[171] However, some revenue laws do actually restrict the use of funds, requiring them to be spent in certain government sectors or geographic regions, or in support of general objectives like infrastructure, rural development, health or education. For example, in the Democratic Republic of São Tomé and Príncipe, the Annual Funding Amount may only be used in accordance with an established policy that requires a development plan and a national poverty reduction strategy.[172] In the absence of such a plan, the amount is allocated essentially to the education, health, infrastructure and rural development sectors, and to strengthening the state's institutional capacity.[173] It is rare, however, to find requirements for the expenditure of oil and gas revenues set out in a constitutional text.

Third, constitutional provisions regulating the flow and use of revenues can aid in conflict resolution and peace-building. Iraq, South Sudan and Aceh (Indonesia) are all examples of how revenue-sharing arrangements set out in either constitutional provisions or a peace agreement can play a stabilizing role in a transitional context. On the other hand, uncertainty about the division of revenues and the unfair (or thus perceived) distribution of revenues are identified as two principal determinants of conflict over natural resources.[174]

5.2 Raising or collecting revenue

The power to raise oil and gas revenues is an important one because, without further rules, it implies a power to decide how those revenues are to be utilized – or at least how they should be distributed among the different spheres of government. Clear and effective revenue laws typically need to address both collection 'triggers' (those events or activities that 'trigger' an institution's obligation to collect revenue) and how the revenue-raising institution manages the revenue collected. While the details of collection triggers are usually the concern of statutory or regulatory laws, the authority to collect revenues and the primary rules governing the management and sharing of revenue are matters that can be considered during a constitutional design process.

In many states, revenues are raised or collected by the central government, with revenues flowing into a single account in the finance ministry or the relevant sector ministry (e.g. the ministry of natural resources). These revenues then become subject to revenue-sharing obligations.[175] Nigeria is an example of a country with a comprehensive constitutional mechanism for the centralized collection and control of oil revenues. Article 162(1) of the Constitution of Nigeria, 1999, provides for the establishment of a single 'Federation Account', into which all revenues flow. Revenue is then allocated according to a formula approved by the legislature, on the basis of proposals tabled by the president, acting on recommendations from the Revenue Mobilization Allocation and Fiscal Commission and taking into account 'population, equality of States, internal revenue generation, land mass, terrain as well as population density' (article 162(2)).[176] Although this represents a mixture of the principles of derivation and equalization, article 162(2) goes on to provide that 'the principle of derivation shall be constantly reflected in any approved formula as being not less than thirteen per cent of the revenue accruing to the Federation Account directly from any natural resources'. In effect, each oil-producing region is constitutionally guaranteed at least a 13 per cent share of the national oil revenue generated in its territory.

An alternative approach is to devolve revenue-raising powers from the central government to subnational governments. In the United Arab Emirates, for example, given that each emirate controls all aspects of its respective industry, article 127 of the Constitution of the United Arab Emirates, 1971 provides that '[t]he member Emirates of the Union shall contribute a specified proportion of their annual revenues to cover the annual general budget expenditure of the Union, in the manner and on the scale to be prescribed in the Budget Law'. The central budget is therefore decided by the consent of all. This suggests that in the UAE, the subnational governments (the Emirates) collect revenues themselves and then make a contribution to the central government, that contribution being determined each year in the annual budget law. The allocation of direct revenue-raising powers during constitutional negotiations can reduce tensions between regional and central government, especially where there is regional distrust of, or antipathy towards, central authorities.[177]

The decentralization of revenue-raising authority can pose problems, however. First, the obligation to collect revenues may place undue strain on the institutional capacity of subnational units. Second, the regional collection of revenues may widen economic and fiscal disparities between regions, as regions rich in oil and gas resources generate more revenue. The principle of equalization in revenue sharing can mitigate the second problem, by ensuring that regions that are not rich in oil and gas benefit from transfers or grants from the centre.[178] In this way, decentralized revenue-collection arrangements can offer a response to political instability in fragmented societies, but are also justified by conventional economic arguments based on fiscal efficiency, responsiveness and equity.[179]

5.3 Revenue allocation and distribution

The most significant aspects of revenue sharing are the constitutional and statutory requirements that minimize the abuse of discretion, lack of transparency and lack of certainty in the distribution of revenue. Formula-based revenue sharing can provide guarantees to subnational governments concerned that the transfer of revenues from the central government may not be transparent or might be subject to political interference.[180]

The Constitution of Nigeria, 1999, provides for the centralized collection of resource revenue (article 162(1)). As noted above, this revenue-sharing formula, despite being constitutionally enshrined, remains a politically contentious issue. At the National Political Reform Conference in 2005, Nigeria's primary oil-producing region, the Niger Delta, initially demanded a 50 per cent share of national oil revenue, subsequently moderating its demand to a 25 per cent initial share, gradually rising over time to 50 per cent. When the Conference voted to increase the share to only 17 per cent of national oil revenue, delegates from the Niger Delta walked out and the talks stalled.[181]

The Constitution of Iraq, 2005, provides another example of a constitutionally established revenue allocation system. Article 112(1) of the Constitution of Iraq, 2005, provides:

> [t]he federal government, with the producing governorates and regional governments, shall undertake the management of oil and gas extracted from present fields, provided that it distributes its revenues in a fair manner in proportion to the population distribution in all parts of the country, specifying an allotment for a specified period for the damaged regions which were unjustly deprived of them by the former regime, and the regions that were damaged afterwards in a way that ensures balanced development in different areas of the country, and this shall be regulated by a law.

The framing of this provision is novel, in that it makes the authority granted to the federal government to manage oil and gas extracted from present fields conditional on an obligation to disburse revenues to subnational governments. Furthermore, unlike standard derivation principles, which seek to compensate oil-producing regions for economic or environmental costs, this provision envisages reparations for the harm inflicted on Kurds and Shiites – and the inequitable revenue distributions to them – during the years of Saddam Hussein's regime.[182]

This article must also be understood in the context of more general constitutional provisions setting out the framework for revenue management across levels of government. Article 121(3) provides: 'Regions and provinces shall be allocated an equitable share of the national revenues sufficient to discharge their responsibilities and duties, but having regard to their own resources, needs, and the size of their population.' By requiring the government to allocate revenues with regard to differences in the availability of resources across regions and governorates, this provision implicitly reflects an equalization approach to the uneven distribution of resources that accords with the article 111 grant of ownership of oil and gas to all Iraqi people.[183]

Despite the detail in the Iraqi provisions, there are nevertheless ambiguities in their interpretation. For example, the terms 'unjust deprivation' and 'damage' are vague, and raise questions as to how they are to be measured. The provision offers no guidance as to the comparative weight to be attributed to each of the mandated considerations for allocating revenue.[184] Furthermore, the article fails to provide details on how the fairness and equity are to be achieved.[185] Finally, and perhaps most importantly, it is unclear how federal and subnational levels of government are to work together in the formulation of policies for the management of oil and the distribution of its revenues (see section 3.4.3).[186]

Petroleum resources are expressly mentioned in article 20(1) of Constitution of Brazil, 1988:

> The States, Federal District and Counties, as well as agencies of direct administration of the Union, are assured, as provided by law, participation in the results of exploitation of petroleum or natural gas hydraulic energy resources, and other mineral resources in their respective territories, continental shelf, territorial sea or exclusive economic zone, or financial compensation for such exploitation.

Article 158 of Constitution of Brazil, 1988, establishes a comprehensive system for allocating federal tax revenue to subnational levels of government, but does not make specific reference to resource revenue. Federal revenues are typically 'earmarked' for different purposes, with petroleum revenues shared with 'producing' subnational governments, and corporate income tax revenues shared with *all* subnational governments.[187] The sharing of revenues in Brazil proceeds according to the principle of derivation (see articles 159 and 159(III)). Article 177(4), read with Law 12.734 of 30 November 2012, provides for revenue allocation to subnational entities that border oil and gas fields, that have industrial processing and treatment plants for oil and natural gas (primary production area), and that are crossed by pipelines (secondary area).[188] Tax revenue from oil company profits is shared across subnational units according to a quota system that is proportional to the population in the case of municipal governments, and inversely proportional to per capita income in the case of states.[189] While there is otherwise a high degree of fiscal centralization, this overarching framework is given effect through Law 7453 of 1985, which allows subnational governments to receive royalties from offshore production.[190] It reflects an asymmetric decentralization of revenue sharing in accordance with derivation principles, as producing regions are entitled to receive a greater percentage of resource royalties.[191]

5.4 Natural resource funds/oil funds: stabilization and saving funds

In addition to distributing petroleum revenue to various spheres of government and state ministries, a country may elect to distribute a portion of the revenue to a natural resource fund (oil fund). These funds can be created for a variety of reasons, and a few countries have even elected to establish and protect such funds within the text of the constitution. The discussion below deals with two types of natural resource funds that are created to solve two problems that commonly arise in the context of an economy dependent on natural resources: (i) the volatility of oil and gas prices (*stabilization fund*), and (ii) the finite nature of natural resources and whether to save revenue for future generations (*savings fund*).

The primary purpose of a *stabilization fund* is to offset the constant fluctuations in oil and gas prices, which in turn influence the amount of revenue received. The fund is used to mitigate the harmful effects that unpredictable and changing oil and gas prices may have on a nation's economy. In general terms, a stabilization fund operates as follows: a state deposits excess revenue received into the fund when oil and gas prices are higher than anticipated, and withdraws funds when oil and gas prices are lower.[192] The rationale for the fund is therefore to ensure that budgeted state expenditure and infrastructure investments are not affected by reductions in oil and gas revenue due to a decrease in petroleum prices. The *Oil Revenues Stabilization Fund of Mexico* is an example of a stabilization fund. In the event of market prices exceeding the budgeted price determined by the Mexican Congress, detailed rules govern the distribution of excess oil revenue among various entities, including the states, the federal government, Pemex and the federal stabilization fund.[193] The stabilization fund partially protected Mexico during the 2007/2008 financial crises.[194]

A natural resource fund can also be set up as a *savings fund*, with the objective of preserving oil and gas wealth for future generations. The Draft Iraq Oil and Gas Law of 2007 (drafted by the Iraqi cabinet in 2006–2007, but yet to be passed by Parliament, due to disagreements over the law between parliamentary parties)[195] is an example of a statutory framework for oil funds that distinguishes between present and future expenditure needs.[196] Article 11D sets up a Financial Resources Fund (previously termed the Oil Revenue Fund) for day-to-day governmental functioning and expenditure, and a Future Fund dedicated to future development needs that may arise. However, unlike most other schemes of this nature, there is no guaranteed reservation of revenue for the Future Fund. Rather, it is to be funded only after current governmental fiscal demands have been satisfied.[197]

In addition to such primary stated objectives as stabilization and future savings, if managed and regulated properly a natural resource fund can fulfil additional purposes, such as the enhanced monitoring of revenue flow, increased transparency and accountability, and the enhanced protection of a subnational region's claims on the petroleum revenue. It needs to be emphasized, however, that natural resource funds are not necessarily panaceas for the problems they are intended to resolve. In fact, some countries elect not to establish such funds. Also, where these funds are found, they can be plagued by many problems that reduce their efficiency. For example, the National Fund of the Republic of Kazakhstan was recently established to operate as both a stabilization fund and a savings fund for future generations. Although it has a board of trustees and an oversight council to ensure accountability, the president's unrestricted power to appoint members of the fund, the council's lack of independence, and the absence of disclosure requirements for key documents raise doubts about its effectiveness.[198] Other types of political and legal problems have surfaced in the context of Nigeria's oil funds: tensions have arisen between the federal government and states over the amount of excess oil revenue that the federal government is entitled to retain. This has resulted in the subnational states successfully challenging these practices in the Supreme Court, although the federal government has seemingly not adhered to the court's ruling.[199]

Natural resource funds serve important societal objectives – a characteristic that perhaps lends itself to regulation at the constitutional level. However, the need for their incorporation into the text of the constitution is debatable. The economic science of these funds is disputed and is still developing, and, given the general inflexibility of a constitution, stringent constitutional rules may get in the way of these funds being altered when new information comes to light or circumstances change. Nevertheless, if a fund is established, it remains imperative that it is subject to transparency rules and oversight mechanisms.

5.5 Transparency and oversight in resource revenue management

5.5.1 Establishing oversight bodies

Transparency, oversight and accountability are all crucial in minimizing the risks of corruption and maladministration in the management of resource revenue. Even if institutional checks are weak, transparency can empower civil society, the press and other arms of government to demand accountability and ensure that resource wealth is used for the benefit of the broader population.[200] For example, findings may be reported to governmental bodies (e.g. the finance ministry) and the legislature, and also made public.[201]

Constitutional provisions can enhance traditional legislative oversight by requiring the publication of periodic and public reports by all relevant governmental bodies. Article 150 of the Constitution of Niger, 2010, mandates that subsoil resource revenues be published in the official journal of the Republic of Niger. National audit offices and auditors general can serve to bring any discrepancies to the attention of the legislature.[202] Publicly disclosed information in turn assists parliamentarians in their oversight mechanisms, and can be relied on during parliamentary question periods, public hearings and testimony by government officials before specialized parliamentary committees. Constitutions could even provide for oversight institutions consisting of civil society representatives and other stakeholders, as diverse membership arguably enhances the independence and legitimacy of such a process and strengthens implementation and enforcement.[203] São Tomé and Príncipe, for example, employs an independent Petroleum Oversight Commission to oversee all payments, and the management and use of the oil revenues and oil resources.[204] The Commission is composed of 11 members. Apart from representatives from the legislature, executive and judiciary, it also includes one representative each from business associations, the unions and non-governmental organizations.[205]

5.5.2 Information reporting and disclosure

The secrecy associated with oil revenues in many countries has been a particular factor in facilitating concealment, embezzlement and mismanagement. Many resource-rich states (such as Venezuela) have been known to maintain a high level of secrecy around revenues, particularly through unreported off-budget accounts, which allows a high proportion of spending to be kept 'off the books' and hidden from public scrutiny.[206] Under Saddam Hussein, over half of Iraq's national budget was channelled through the Iraqi National Oil Company and remained secret. Under Suharto in Indonesia, the national oil company's accounts were shielded from public disclosure, even though they accounted for as much as one-third of the national budget.[207] These unaccounted-for revenues, especially when they are of the magnitude of oil revenues, can be used by an authoritarian regime to secure its position and to suppress or co-opt opposition.

Resource-rich countries can mitigate the risk of corruption and government accumulation of oil and gas wealth by establishing reporting and disclosure requirements. Regular reporting or public disclosure obligations may extend to: (i) all incoming revenue streams, such as taxes, profit shares, royalties, bonus payments, national oil company payments to central government, any oil-backed debt or other forms of oil collateralized borrowing;[208] and (ii) expenditure and investment payments. They might even extend to key terms of any production-sharing agreements or concession agreements with private companies. To supplement rules aimed at the transparent movement or distribution of revenues, requirements can be established before any withdrawal of funds from oil accounts can take place. These can include authority requirements as modelled by São Tomé and Príncipe, where the signatures of four officials from different parts of the government are required on withdrawal orders, which can also include attestations by signatories that the withdrawal complies with applicable oil laws.[209]

5.6 Conclusion

Revenue management is a complex issue. An overview of comparative jurisdictions reveals that there is no single best approach to regulating the collection and distribution of petroleum revenue in a constitution. In fact, some oil- and gas-rich countries elect not to regulate this issue at all in their constitutions, or to do so only at an elementary level. From a constitutional perspective, this Chapter has highlighted two important aspects of revenue management. First, states should decide how decentralized the collection and distribution of oil and gas revenue ought to be. This is, for the most part, a political decision. The construction of revenue management structures may be influenced by considerations such as tradition, efficiency and the nature of the relationship between the central and subnational governments/regions. Most countries choose to have the revenue flow primarily to the central government, which is particularly the case if the subnational states lack the financial infrastructure to handle large influxes of oil revenue. Contestation over revenue is usually seen in the context of revenue distribution. Many countries feel compelled to compensate regions that bear the costs and burdens of extraction by designating a larger share of revenue for them (Nigeria). Oil revenues may also be allocated to historically disadvantaged subnational units, irrespective of how much oil they produce (Iraq). Revenue can be distributed according to the principle of derivation, in order to compensate and reward oil-producing regions for their contribution to national wealth; or revenue can be distributed according to the principle of equalization, in order to spread oil wealth around the country and ensure that social and economic inequality between producing and non-producing regions is not great. In addition to distributing available revenues to meet current expenditure and investments, a state may elect to create a national oil fund to serve important objectives, including revenue stabilization and savings for future generations.

Second, and regardless of the chosen approach to the collection and distribution of revenue, a country should implement rules aimed at increasing transparency in the oil and gas industry, and further ensure that effective oversight mechanisms are established. The legislature and executive are ultimately responsible for the oil and gas industry, and transparency rules and oversight mechanisms are a necessity for the effective discharge of this responsibility. There are numerous opportunities in the oil and gas sector for acts of corruption and maladministration, given that oil and gas revenues are large and continuously flowing between various state entities. Anti-corruption, transparency and oversight mechanisms do not need to be specialized for oil and gas revenues, but existing mechanisms should include the oil and gas industry within their purview. Effectiveness may, however, be enhanced through the creation of a specialized petroleum watchdog, as is the case in São Tomé and Príncipe.

APPENDIX A: Existing Oil and Gas Regimes in the MENA Region

Questions of constitutional design with respect to the oil and gas resources have arisen within the transitional processes currently taking place throughout the MENA region. Gauging the potential benefit of incorporating oil and gas governance into a constitution necessarily requires a closer examination of the existing legal, institutional and regulatory frameworks in place in resource-rich countries. In this regard, an understanding of the strengths and weaknesses of the existing oil and gas regimes of key MENA countries provides critical context and guidance on the types of issues that constitutional provisions can aim to resolve.

Iraq

Iraq has the fifth-largest proven petroleum reserves in the world, and oil production accounts for over 90 per cent of government revenue.[210] It is a federal state that provides for ownership of oil and gas resources by the people,[211] has centralized collection and distribution of oil revenue, but also mechanisms to devolve management authority among oil-producing regions.[212] Ownership of oil and gas is set out under article 111 of the Constitution of Iraq, 2005, which provides that oil and gas 'are owned by all the people of Iraq in all the regions and governorates'.[213] However, the ownership provision has proved too vague for proper implementation, as conflict has arisen between the Kurdish Regional Government and the Iraqi central government. Clarification as to what the ownership provision means (specifically, whether it assigns ownership to the central government or to regional governments and what the obligations and rights that flow from ownership entail) may help reduce disagreement. Article 112 broadly establishes the framework for the management of the oil and gas regime, distinguishing between extraction from present fields and future oil and gas wealth. Article 112(1) mandates the federal government, 'with the producing governorates and regional governments', to 'undertake the management of oil and gas extracted from present fields', on condition that the federal government fulfils revenue distribution obligations in accordance with a fixed formula set out by legislation. Article 112(2) establishes a joint role for the federal government and 'the producing regional and governorate governments' in elaborating strategic policy 'to develop the oil and gas wealth in a way that achieves the highest benefit to the Iraqi people using the most advanced techniques of the market principles and encouraging investment', but with no specification of what constitute present or future fields.[214] Article 112 has generated significant debate and political conflict, due to its ambiguity as to how management authority is allocated or shared between the national and subnational governments.[215] Clarification here, too, could be useful. Irrespective of how management authority is distributed, it is subject to article 25, which expressly requires the Iraqi state 'to guarantee the reform of the national economy in accordance with modern economic principles to ensure the full investment of its resources, diversification of its sources, and the encouragement and development of the private sector'.[216]

Constitutional provisions addressing revenue allocation and auditing processes supplement the Constitution's management provisions. Article 106 provides that 'a public commission shall be established by a law to audit and appropriate federal revenues', which shall comprise 'experts from the federal government, the regions, [and] the governorates'. The provision sets out the Commission's responsibilities for verifying the fair distribution of grants, aid and international loans in accordance with regional entitlements, verifying the 'ideal' use and division of federal financial resources, and guaranteeing transparency and justice in appropriating funds to the regions. Article 121(3) further governs the revenue distribution process, by requiring that regions and governorates be allocated an 'equitable share' of the national revenues, sufficient to discharge their responsibilities and duties, taking into account their resources, needs and their proportion of the national population.

Since 2007, a proposed Oil and Gas Law (also known as the Hydrocarbon Law) has been before the national parliament, but it has yet to be passed. Negotiations remain stalled.[217] The law seeks to create the policy and regulatory framework to govern the oil and gas industry.[218] Several companion laws accompany the proposed Hydrocarbon Law, including a revenue-sharing law outlining the mechanisms that would dictate collection and distribution of revenues throughout the country.[219] The revenue-sharing law provides for the creation of a Financial Resources Fund, which would be the central repository for the collection of oil revenues, and from which oil revenues would be distributed by the central government in order to pay the expenses of the national government, the operational budgets of the national ministries, the costs of particular projects agreed on by the national and subnational governments, expenditures for governorates not organized into regions, and the cost of creating a Future Fund to safeguard the interests of future generations.[220] The same issues motivating political conflict at the constitutional level have prevented consensus on the draft oil and gas legislation: namely, the allocation of management authority between the national and subnational governments and the distribution of oil and gas revenues.[221] Moreover, problems with respect to the potential for overlapping and conflicting authority at the national level between the Council of Ministers, the Oil Ministry, and the Federal Oil and Gas Council (FOGC) have contributed to the impasse.[222]

In the vacuum created by the lack of a national oil law, the Ministry of Oil has been responsible for management and regulation of the sector, having entered into long-term contracts with IOCs following open bidding rounds.[223] Without a governing oil law, the ministry has enjoyed substantial discretion in subsequently modifying contractual terms in direct negotiations.[224] However, the absence of a national oil law has also allowed subnational governments to enter into management of the oil and gas regime within their boundaries. The oil-rich and semi-autonomous KRG began exporting crude oil in 2012, notwithstanding the national government's claim to sole authority over crude oil exports.[225] While the ministry does publish information on oil production and exports generally, in the absence of clear disclosure requirements or freedom of information laws, there remains insufficient transparency and oversight of the licensing process, concessions such as bonuses under production-sharing contracts, and the state's collection of oil revenues.[226]

Kuwait

Kuwait, which is the tenth-largest oil producer in the world and which exports the third-greatest volume of oil,[227] offers an example of constitutional provisions that address oil and gas in a highly centralized unitary state. The Constitution of Kuwait, 1962 (reinstated in 1992) broadly mandates the ownership and management of oil and gas by the state. Article 21 provides that 'all of the natural wealth and resources are the property of the State', which 'shall preserve and properly exploit those resources, heedful of its own security and national economy requisites'. Article 152 further provides that 'any concession for the exploitation of a natural resource or of a public utility shall be granted only by Law and for a determinate period', and that '[p]reliminary measures shall guarantee the facilitation of exploration and discovery and ensure publicity and competition'. Beyond the specific context of resource revenue, article 151 sets up an independent Audit Bureau, as an adjunct to the National Assembly, to 'assist the Government and the National Assembly in controlling and supervising the collection of the State's revenues and the incurrence of its expenditure within the limits of the Budget'.

The Supreme Petroleum Council, headed by the prime minister and overseen by the Ministry of Petroleum, is the principal body responsible for supervising Kuwait's oil and gas sector and for setting energy policy. The Kuwait Petroleum Corporation, the country's national oil company, controls the entire oil and gas sector and does not grant licences for oil extraction. It has numerous subsidiaries, which enter into service contracts with international oil companies, which participate as subcontractors in exchange for a fee per barrel extracted.[228]

Kuwait is a constitutional monarchy. It is also a prime example of a wealthy oil state that exhibits endemic corruption and mismanagement by a small ruling elite, which has, in recent years, fuelled public mistrust of the regime.[229] This mistrust has been further exacerbated by an absence of transparency in relation to the details of service contracts and revenue data. Even though parliamentary approval is formally required for all contracts with foreign companies, the oversight mechanism has remained weak in the absence of procedures that would allow appeals against contracting decisions.[230]

Libya

The 2011 civil war in Libya, which has the ninth-largest proven oil reserves in the world, has caused major disruption to the country's oil and gas production, while sporadic labour protests and power supply problems have caused fluctuations in output since Gaddafi was ousted.[231] Libya is currently governed by the Constitutional Declaration of 2011, which, unlike the constitutions of Iraq, Kuwait and Yemen, has no provisions discussing oil and gas specifically. Although the Constitutional Declaration provides generally for budgetary authority and control over state revenues to reside in the hands of the Transitional National Council in articles 27 and 28,[232] the current regime for ownership, management and revenue allocation in the oil and gas sector is primarily controlled by the Libyan National Oil Corporation, the state-controlled NOC.[233]

Libya's NOC was originally established under Law No. 24 of 1970 and later reorganized under decision No. 10/1979 of the General Secretariat of the General People's Congress.

It accounts for approximately 50 per cent of the country's oil and gas production and 100 per cent of its refining capacity. The NOC has retained a significant regulatory role in the sector, notwithstanding its involvement as first party to all Libya's production-sharing agreements.

As the security situation in Libya continues to be precarious, and as regional agitations continue to flare up, the future of Libya's constitutional or statutory regime for oil and gas remains uncertain. Under Gaddafi's rule, there was strong centralized control over the entire industry, but little accountability and endemic corruption.[234] Libya's NOC played a direct role in all parts of the process, and was effectively a slush fund for Gaddafi.[235] However, since the fall of Gaddafi, regional actors have called for greater authority in managing the oil and gas industry, particularly in the eastern region of Cyrenaica. In November 2013, regional authorities challenged the management powers of the national government by creating their own regional oil company, after several months of blockading oil exports.[236] The establishment of a regional oil company does not necessarily imply a diminution of the power of the NOC, since there are potential legal hurdles with respect to the purchase of oil exports from the regional company.[237] However, it does strongly suggest that Libyan constitution drafters will have to consider ownership, management and revenue arrangements that grant authority and benefits to subnational actors.

Yemen

Compared to other MENA countries, Yemen is not a major energy producer. It is the poorest nation in the Middle East and highly dependent on its oil sales, which accounted for 63 per cent of government revenue in 2010.[238] The Constitution of Yemen, 1991, offers an example of the provisions a unitary state might enact to address oil and gas ownership, the management of those resources, and the use of revenue generated. Article 8 is a comprehensive ownership provision, specifying that all types of natural resources and sources of energy – whether above ground, underground, in territorial waters, on the continental shelf or in the exclusive economic zone – are owned by the state, which must ensure their exploitation for the common good of the people. Article 18 sets up a similarly comprehensive framework for laws governing contracting concessions for natural resources and public facilities. It provides that these laws may 'illustrate cases of limited significance in which concessions could be granted according to rules and procedures clarified in the law', that they 'shall define cases and ways of granting certain immobile and mobile property, and rules and procedures to be undertaken', and that they 'shall also regulate the ways of awarding concessions to local entities/units and the free disposal/use of public funds'. Finally, Article 9 requires that the state's economic policy be 'based on scientific planning which ensures the best utilization of all resources and … which serves the common interest and the national economy'.

The country's Ministry of Oil and Minerals oversees the oil and gas sectors, setting energy policy and managing relations with foreign operators (although contracts with foreign companies are subject to legislative approval).[239] The Petroleum Exploration and Production Authority is responsible for granting rights and licences.[240] The Yemeni General Corporation for Oil, Gas and Mineral Resources, the national oil company, manages revenue and governs the numerous state-owned subsidiaries responsible for day-to-day operations in the oil and gas sectors.[241] All oil and gas revenues go through the Finance Ministry and are consolidated into the national treasury.[242] While there is a degree of information disclosure and reporting in the areas of licensing and revenue, issues remain as to contract transparency and generally weak audit capabilities.[243]

Egypt

Although Egypt does not produce significant amounts of oil, it is the third-largest natural gas producer in Africa (behind Algeria and Nigeria).[244] The country witnessed exceptional growth in its natural gas production and exports throughout the 2000s.[245] However, due to increasing domestic demand for natural gas, coupled with diminishing productivity of natural gas reserves, exports have fallen in recent years, making Egypt a less attractive investment opportunity for foreign petroleum interests.[246] Still, prospects for the exploitation of new natural gas reserves make the question of how to govern the industry an important one for constitution drafters to consider.

According to Egypt's most recent Constitution, approved by referendum in 2014, natural resources belong to the people of Egypt, and the national government is entrusted with preserving and exploiting the resources, taking into account the interests of future generations.[247] The Constitution contains no specific reference to oil or gas revenues, but provides generally that 'taxes, charges and any other sovereign proceeds' are to be 'deposited into the State public treasury'.[248] Moreover, 'the economic system shall ensure equal opportunities and fair distribution of development returns'.[249] In 2004, the national government created the Egyptian Natural Gas Holding Company (EGAS), charged with managing petroleum activities (including exploration, production, transportation and refining) in the Mediterranean Sea and Delta Areas, as well as some small areas of the Red Sea and North Sinai.[250] The Egyptian General Petroleum Corporation (EGPC) maintains jurisdiction over the rest of the petroleum activities in Egypt.[251]

As noted, Egypt's domestic energy requirements have constrained investment opportunities for foreign investors. Under Egypt's model contract agreements with the EGPC or EGAS, either company has a preferential right to purchase a proportion of the contractor's entitlement to petroleum.[252] Because of low gas prices in Egypt, this has meant that foreign petroleum companies have not been able to realize the profits originally anticipated. In January 2014, a major petroleum company declared force majeure on a liquefied natural gas contract with the Egyptian state, due to the state's diversion of gas to the domestic Egyptian market.[253] The Egyptian legal framework will be forced to consider solutions to the economic problems created by domestic energy demands, as more foreign companies may begin to reconsider their contract obligations.

Tunisia

Tunisia has far smaller oil and gas reserves than most states in the MENA region; it has the tenth-largest proven reserves of natural gas and the thirteenth-largest proven reserves of oil on the African continent. The country has a unitary system of government, and article 13 of the Constitution of Tunisia, 2014, states that its natural resources 'belong to the people of Tunisia', although it is the state that 'exercises sovereignty' over the resources. The main oil and gas law of the country, the Hydrocarbon Code (Law No. 99-93), a law that pre-dates the 2014 Constitution, does, however, vest ownership of the oil and gas resources in the state.

The minister of industry and technology is the principal authority for the regulation of the petroleum industry, and his powers include the granting of exploration permits and exploitation concessions. The minister must, however, seek advice from the Hydrocarbons Consulting Committee when exercising his power to grant permits and concessions.[254] The Committee is composed of relevant entities, including the prime minister, the Finance Ministry, the Central Bank and the minister of defence. In an effort to enhance transparency in the natural resource sector, the Constitution requires investment contracts pertaining to natural resources to be presented to the relevant committee in the Assembly of the Representatives of the People. Article 13 requires that these agreements must be approved by the Assembly before they can take effect. The Hydrocarbon Code establishes further requirements aimed at ensuring transparency. The law requires the minister of industry and technology to approve by decree the awarding of exploration permits and exploitation concessions.[255] This decree must be published in the official gazette of the Republic of Tunisia.

The Hydrocarbon Code requires an IOC to act in association with the Tunisian NOC before an exploration permit is granted. In the event of a commercial discovery, the NOC acquires a right to claim an interest of up to 50 per cent in the exploitation concession. The NOC is, however, required to reimburse the IOC for its share of the costs incurred.[256] The Hydrocarbon Code also permits the NOC to enter into a production-sharing agreement with an IOC.[257] In terms of this regime, the NOC will be the holder of the concession right, but the IOC will act as a contractor and be entitled to a share of the petroleum production.

Algeria

Algeria is the largest natural gas producer on the African continent and is regularly cited as one of the top three oil producers on the continent.[258] Despite an abundance of oil and gas wealth, resource production has, in recent years, decreased for a variety of reasons, including the lack of infrastructure, security concerns, corruption scandals and laws that are unfavourable to IOCs.[259]

Algeria is a unitary state. Article 17 of the Constitution of Algeria, 1968, prescribes that public property, which encompasses the subsoil, mines and sources of natural energy, 'shall be an asset of the national community'. The main oil and gas law – the Hydrocarbon Act (Law No. 05-07) – does, however, vest ownership of all hydrocarbon deposits in the state.[260] The minister of energy and mines is the state entity predominantly responsible for the hydrocarbon sector. The Hydrocarbon Act created two independent regulatory organizations. First, L'Autorité de Régulation des Hydrocarbures (ARH) is the national agency vested with the power to implement and enforce compliance with regulations established in the Hydrocarbon Act.[261] Second, L'Agence Nationale pour la Valorisation des Ressources en Hydrocarbures (ALNAFT) is the national agency responsible for developing and promoting the oil and gas resources of the country. ALNAFT is the exclusive holder of oil and gas mining rights, and is vested with authority to award exploitation licences.[262] The state must, however, approve the decisions of ALNAFT, and any contract between ALNAFT and an IOC must be published in the official journal of Algeria.[263] Although ALNAFT is a party to all exploration and exploitation contracts, it does not participate in the operations: it only monitors the operational performance of the contractors. The IOC, after entering into an exploration and exploitation agreement with ALNAFT, also has to conclude an additional contract with the Algerian NOC, Sonatrach. Article 32 of the Hydrocarbon Act reserves for Sonatrach at least 51 per cent of a participatory interest in all exploration and exploitation contracts.

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Comparative constitutional law is at the heart of democratic development. Legal scholars, policy makers, constitutional drafters, judges and advocates all over the world have looked to other jurisdictions for ideas on how their own challenges can be addressed and to better understand which reforms are likely to be successful in their own countries. Since 2011, at least 10 countries in the Middle East and North Africa have either replaced, reformed or reconsidered their constitutional frameworks. In that context, national, regional and international institutions have contributed to the legal scholarship that already existed by bringing the knowledge that has been developed in other jurisdictions closer to the region.

This report, which was produced by the Center for Constitutional Transitions, International IDEA and the United Nations Development Programme examines what more can be done by national constitutions to increase transparency and efficiency in the region's oil and gas sector, and what more can be done to ensure that revenues derived from the sale of natural resources are distributed fairly within national borders. The report studies existing frameworks within the region, including some of the new constitutions that were drafted since the uprisings began in late 2010, as well as a large number of comparative examples from other jurisdictions, to determine what lessons exist for the broader region.

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