



Parliamentary Guide for Approval of Natural Resource Contracts in Tunisia

MAY 2016

Cover image: Assembly of the Representatives of the People, Tunis

Photo used under creative commons license from Flickr/European Union 2016 - European Parliament

© 2016 Natural Resource Governance Institute

All rights reserved. No part of this publication may be reproduced, modified, distributed, or transmitted in any form or by any means, including photocopying, recording, or other electronic or mechanical methods, without the prior written permission of the Natural Resource Governance Institute. [For permission contact: info@resourcegovernance.org]

Guide for Implementation of
Article 13 of the Tunisian Constitution:
Parliamentary Approval of
Natural Resource Contracts

Contents

Executive summary	2
Introduction.....	4
NATURAL RESOURCES AND THE CONSTITUTION: TUNISIA AT THE CROSSROADS OF IMPLEMENTING ARTICLE 13	4
1. Global experiences with parliamentary review and approval of contracts	6
1.1 OVERVIEW OF PARLIAMENTARY APPROVAL OF CONTRACTS.....	6
1.2 LESSONS LEARNED FROM ACROSS THE GLOBE.....	7
2. State of play: Tunisia’s current contracting process.....	16
2.1 HYDROCARBONS SECTOR: TYPES OF CONTRACTS AND CONTRACTING PROCESS	18
2.2 MINING SECTOR: TYPES OF “CONTRACTS” AND “CONTRACTING” PROCESS	22
2.3 IMPLICATIONS OF THE CURRENT CONTRACTING PROCESS FOR ARTICLE 13 IMPLEMENTATION	25
3. Guiding principles for implementation of parliamentary approval of contracts in Tunisia	27
Conclusion	35
Appendix 1. Sources and methodology	36
Appendix 2. Key documents in the legal framework for hydrocarbons and minerals in Tunisia.....	37
Appendix 3. Glossary	39
Acknowledgements	41

Executive summary

The oil, gas, and mining sectors (or the “extractive sectors”) of resource-rich countries are often perceived as poorly managed and plagued by secret deals that do not benefit the country as a whole. One of the measures that several countries have introduced to ensure more transparency and accountability is requiring the approval of extractive contracts by elected representatives in parliament.¹ Tunisia is one of the most recent countries to do so through the adoption of a new constitution in which Article 13 prescribes parliamentary approval of investment contracts and agreements.

The experiences of the six countries researched for this guide suggest that parliamentary approval brings can bring benefits as well as risks when it comes to governance of the extractive sectors. Namely, contract approval can encourage public debate and transparency by involving stakeholders in public hearings and reporting parliament’s conclusions to the media. Parliamentary approval can also be an important incentive for government to negotiate the strongest possible contract terms.

On the other hand, countries with contract approval have encountered a number of significant risks including: the politicization of the contracting process and lack of capacity/resources leading to a perfunctory review; the creation of a time-consuming process that obstructs or delays investment; the creation of a legal means for contracts to deviate from the law; and an increase in potential conflicts of interest and corruption.

The lack of transparency over oil, gas and mining contracts is a major governance deficit in the extractive sectors. Parliamentary approval of contracts can help address lack of contract transparency, but the experience of other countries shows parliamentary approval does not automatically lead to public disclosure of contracts; conversely, many countries disclose contracts even without requiring parliamentary approval.

While there is no standard approval process across countries, our research shows that there are several commonalities. In almost all cases the parliamentary review and approval comes at the end of the contract negotiating process, when the terms have already been agreed. The approval often involves a yes or no vote on the whole document with little to no direct influence on modifying contract provisions.

In assessing the contract approval role of parliaments, it is important to remember that parliaments, including those without the power to approve contracts, can leverage their standard powers of lawmaking and oversight to address concerns around natural resource governance. This can include approving or amending legislation in order to increase transparency of the bidding process, enhance scrutiny of resource revenues, require regular reports on the management of the extractive sectors and using the powers of inquiry, investigation and censure where needed.

¹ For ease of reference, this guide uses “parliament” as the general term for the legislative body in various countries, though not all countries use a parliamentary system.

The complexity of Tunisia’s current contracting process in the hydrocarbons and mining sectors is indicative of the challenges that parliament may face in carrying out the role entrusted to it through Article 13. The role of the Consultative Committee on Hydrocarbons in the contracting process and the associated challenges are particularly informative. For example, the challenge of ensuring adequate review while not being sector specialists, not being involved in the negotiation process, and depending on information provided by others, are particularly relevant when thinking about parliamentary approval.

Building on global experiences, this publication proposes a number of guiding principles for the implementation of Article 13 that are adapted to the specificities of Tunisia.

Guiding Principle 1. Transparency and accountability are goals of the Tunisian Constitution. Article 13 should therefore be interpreted and implemented with these goals in mind, including by facilitating the publication of contracts and civil society engagement.

Guiding Principle 2. Parliamentary contract approval should be done according to a process with standardized timeframes, clear parameters for review, and requirements on information to be provided by the executive. This can reduce discretion and decrease the likelihood of parliamentary approval becoming an impediment to investment.

Guiding Principle 3. The roles and responsibilities of all those involved in the contracting process should be clearly defined, and key issues of interpretation and scope of Article 13 should be addressed, ideally in advance through legislation or rules of procedure. In particular agreement needs to be reached on interpreting Article 13’s reference to approval of “agreements” by the plenary and submission of “investment contracts” to the relevant committee. While this may be challenging, workable interpretations do exist, notably stemming from the two-level contractual regime established by the Hydrocarbons Code.

Guiding Principle 4. In order for parliament to fulfill its constitutional role in the contract approval process, measures should be taken to build in-house analytical capacity and to forge functional partnerships with other government bodies.

Guiding Principle 5. Parliament is strongest when it changes sector legislation and does not sanction ad hoc modification of legislation through its approval of contracts. If the contract nevertheless contains any derogations from law, these should be limited in scope and their specific justification should be published.

Guiding Principle 6. The parliament should take a holistic approach to improving governance of the extractive sectors, using all of its powers to work with the executive branch to achieve this goal, not just the power of approval of contracts.

Introduction

NATURAL RESOURCES AND THE CONSTITUTION: TUNISIA AT THE CROSSROADS OF IMPLEMENTING ARTICLE 13

The oil, gas, and mining sectors (or the “extractive sectors”) of many countries often seem to be surrounded by secrecy and suspicions of vast wealth gone missing through a combination of bad deals with foreign companies, poor management, and corruption. There has long been a sense that oil, gas, and mining contracts in particular have been beyond the reach of citizens and their representatives. One of the measures that a number of countries have introduced to combat this sentiment is the subject of this guide: requiring approval of extractive industry contracts by elected representatives in parliament.

Tunisia is one of the most recent countries to adopt this policy. One of the objectives of the Tunisian revolution of 2011 was to strengthen transparency and good governance; to fight against corruption and to establish mechanisms for accountability of public authorities. The subsequently adopted 2014 constitution includes several provisions relevant to natural resources. Article 13 specifically requires parliamentary approval of natural resource contracts in addition to establishing the Tunisian people’s ownership of natural resources and proclaiming the state’s sovereignty over such resources.² This provision was crafted in the context of efforts to strengthen transparency and accountability, both generally and in the natural resources sector, which was viewed as particularly opaque and unaccountable.³

“Natural resources are the property of the Tunisian people and the state exercises sovereignty over them on their behalf.

Investment contracts related to these resources shall be submitted to the competent committee of the Assembly of the People’s Deputies. Agreements related to these resources shall be submitted to the Assembly for approval.”

—Article 13 of the 2014 Constitution⁴

- 2 Another article of the 2014 constitution specifically addressing natural resources is Article 136 regarding the role of natural resource revenues in regional development. Other articles address general issues of particular significance to natural resource governance (e.g., Articles 10 and 130 on anti-corruption, Articles 12, 45 and 129 on sustainable development, and Article 15 and 32 on transparency and access to information).
- 3 Fadil Aliriza, “Keeping Tunisia in the Dark,” *Foreign Policy*, December 5, 2014, <http://foreignpolicy.com/2014/12/05/keeping-tunisia-in-the-dark/>. Other moves in this direction included the Government of Tunisia’s expression of interest in the Extractives Industries Transparency Initiative (EITI) in 2012 and the inclusion of specific commitments regarding natural resource transparency in Tunisia’s Open Government Partnership (OGP) national action plan of September 2014.
- 4 Government of Tunisia, 2014, Constitution of the Tunisian Republic [unofficial translation] (Jasmine Foundation) http://www.jasmine-foundation.org/doc/unofficial_english_translation_of_tunisian_constitution_final_ed.pdf. The translation has been modified per input from NRG Arabic language staff.

With the adoption of Article 13, Tunisia joined a number of countries around the world that require parliamentary review and approval of oil, gas, and mining investment contracts. However, the implementation of this legal obligation raises numerous practical questions and policy challenges. At a practical level, questions include:

- Which specific documents are covered (i.e., what is meant by “investment contracts” and “agreements”)?
- What is the difference between “submission” (of “investment contracts”) and “approval” (of “agreements”)?
- How will parliament have sufficient capacity and support to effectively review technical contracts?
- How can the process be conducted in a sufficiently efficient manner so as to not deter investment?

At a policy level, the main question is how can the powers granted under Article 13 be best used to improve natural resource governance? The assumed aim of adding parliamentary approval of contracts is to achieve this improvement through more effective oversight and additional transparency, ideally leading to greater adherence to laws and procedures, better performance of the sector and eventually better development outcomes. Accordingly, the key policy challenge is to ensure implementation of Article 13 in a manner that is most likely to achieve the intended positive impacts, while also mitigating any

potential negative impacts such as becoming a barrier to efficient investment, or becoming a means for contracts to deviate from existing law.

The aim of this guide is to assist those in Tunisia facing these challenging questions, and particularly in the application of Article 13’s parliamentary approval of contracts to the oil, gas, and mining sectors.⁵ In Chapter 1, the guide looks to the experience of other countries that mandate parliamentary approval of natural resource contracts, in order to draw lessons that may be pertinent for Tunisia. Chapter 2 provides an overview of the current contracts and contracting process used in the Tunisian oil, gas and mining sectors, and their relevance to implementation of Article 13. Chapter 3 takes global lessons learned to set out a number of guiding principles for implementation of parliamentary contract approval in Tunisia. Annex 1 lists the sources and methodology used for the compilation of this publication, Annex 2 presents an overview of key legal documents, and Annex 3 is a glossary of key terms.

It is also important to note at the outset what this guide is not meant to be. It is not a legal treatise or interpretation of the Tunisian constitution. While we hope the inputs here will be useful, the task of legal interpretation and implementation will have to be undertaken by Tunisian legal scholars, courts, lawmakers, and policymakers, guided by the needs of the country and its citizens. The context, history and political challenges specific to each country mean that the exact same language in one constitution may be interpreted differently in the constitution of another country.

5 Depending on the interpretation of “natural resources” in Article 13, parliamentary approval may apply to contracts beyond just the extractive sectors. In fact, the inclusion of such an approval requirement in the recent renewable energies law (discussed in Text Box 3) seems to indicate this will be the case. Nevertheless, given the particular attention paid to resolving issues around the application of Article 13 to the extractive sectors, the extractives focus of the Natural Resource Governance Institute, and the emphasis on the extractives sector in the experience of other countries, the present analysis is focused on application of Article 13 in the extractives context.

1. Global experiences with parliamentary review and approval of contracts

This chapter focuses on the challenges that other countries have faced with parliamentary approval of contracts. The countries researched have different and complementary experiences. While these experiences are different from Tunisia's, they can be relevant to the country's current challenges. For more information on methodology, country selection, and sources of the research, please refer to Annex 1.

1.1 OVERVIEW OF PARLIAMENTARY APPROVAL OF CONTRACTS

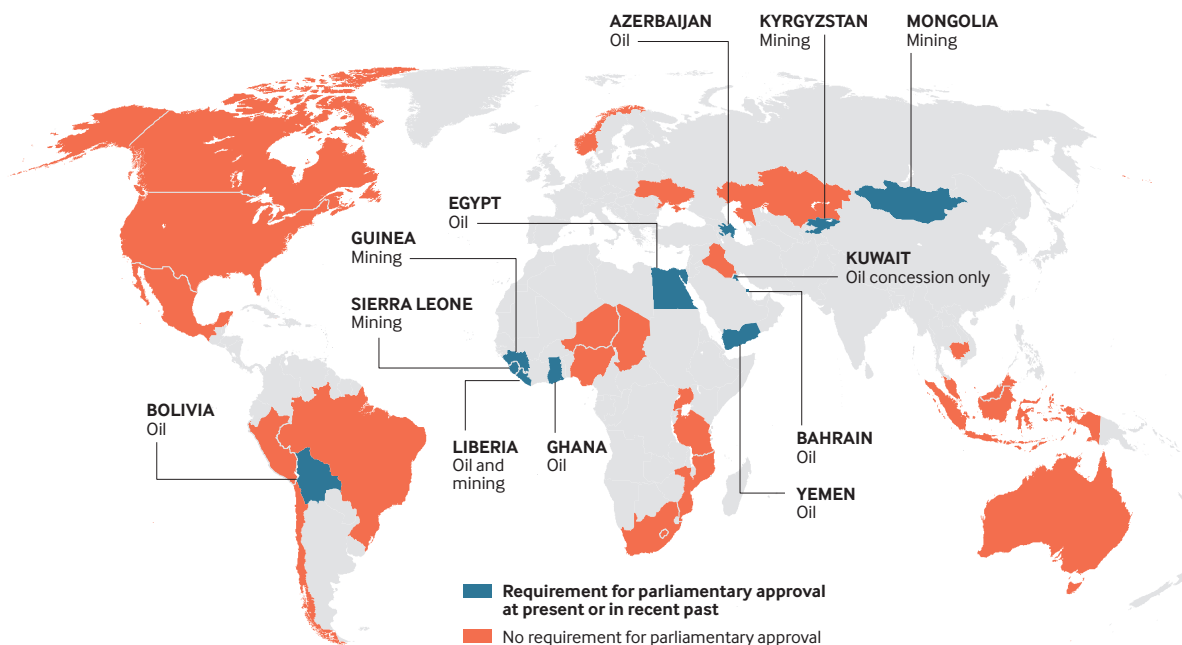
Before looking at the lessons from global experiences, it is worth providing some general background on the practice of parliamentary approval of contracts.

Approval of oil, gas and mining contracts is not new and parliamentary attention to these contracts has historically stemmed from the key role the extractive sectors have played in countries with significant natural resource wealth.

As indicated in Figure 1 below, parliamentary approval of contracts is a practice that has been adopted in different contexts, ranging from Bolivia to Mongolia. Nevertheless, it is not a particularly common practice. Of 34 countries studied⁶, only 12 are identified as having instituted the practice. In light of the Tunisian experience, it is interesting to note that a number of countries have instituted parliamentary approval of contracts after significant political changes, as with post-colonial independence in the case of Kuwait or following democratic transitions in the case of Mongolia.

Figure 1

Parliamentary approval of contracts in selected countries



Of the countries studied, the following did not have parliamentary approval: Australia, Brazil, Cambodia, Canada, Chad, Chile, East Timor, Indonesia, Iraq, Kazakhstan, Malaysia, Mexico, Mozambique, Niger, Nigeria, Norway, Peru, South Africa, Tanzania, Uganda, Ukraine and the United States.

6 The countries were selected primarily on the basis of availability of information regarding their practice with parliamentary approval of extractive sector contracts, including from sources such as the Resource Governance Index (RGI).

Different factors have motivated the adoption of parliamentary approval of contracts, including: reassurance of investors regarding the validity of their contracts; and parliaments playing a balancing role against executive branch dominance of an important economic sector.

There is also diversity in the legal routes used for instituting parliamentary approval of contracts. In some countries parliamentary approval of natural resource contracts has not been specifically set out in the constitution, coming instead from an interpretation of a constitutional provision, a requirement in sector legislation, or simply as a matter of practice.

Finally, parliamentary approval of natural resource contracts can be a contested practice that evolves over time and in some cases legal changes have been made to limit the role of parliament.

1.2 LESSONS LEARNED FROM ACROSS THE GLOBE

This section synthesizes the main lessons learned from the research into country practice with parliamentary approval of contracts conducted for this guide. The hope is that Tunisia might benefit from lessons learned elsewhere as it creates its own policies and practices.

It is worth noting that, on balance, it is difficult to assess whether parliamentary approval of contracts ultimately leads to more accountable and effective governance of the sector, an ambition that often underpins the decision to introduce such approval processes. Our review of global experience suggests that parliamentary approval brings benefits, as well as risks in different countries.

Machinery at the Kef Eddour phosphate mine



Photo by Laury Haytayan

Lesson

1

Contract approval can encourage debate and transparency, increase public understanding of the sector and potentially be used as leverage by the government in negotiations.

The experience of select countries indicates that there can be a number of benefits to parliamentary approval, including:

- **Encouraging debate and transparency.** While parliamentary approval of contracts is not a guarantee for transparency (see lesson 3), it can help encourage debate around the sector and promote transparency. In Liberia, for example, the debate surrounding parliamentary approval of contracts has helped push government to be more open and provide information on the extractive sectors, including through press releases and press conferences.⁷ Eventually Liberian parliamentarians were given full contracts for review including contract annexes through relying on the requirement for contracts to be printed (as handbills/flyers) and made available to the public.⁸ In this way Liberia's parliamentary approval system set the stage for subsequent adoption of a contract publication requirement in the 2009 LEITI (Liberia Extractive Industries Transparency Initiative) law.⁹ In Kuwait, the debate over the scope of parliamentary approval has resulted in broader discussion of the types of contracts that the country should be using and the direction

of its significant oil sector more generally. Parliamentary approval is also likely to increase media coverage of the sector, as in the Liberian example where hearings on contracts are almost always front-page news.

- **Increasing civil society knowledge and participation in the sector.** Parliamentary approval can facilitate greater involvement of civil society groups in the sector. In Ghana, civil society representatives are invited to present their views through a publicly advertised committee hearing. These hearings take place behind closed doors and each stakeholder group is heard separately. Ideally parliamentary approval of contracts also allows concerned citizens greater access to contracts and contract negotiations through their parliamentarians and parliamentary hearings.
- **Leveraging parliamentary approval in negotiations.** When contracts must be made available to the legislature and the public, countries can use this requirement to press for terms that companies would otherwise be reluctant to give. Generally, legislative hearings on contracts usually involve government representatives giving a presentation to the legislature followed by questioning on issues such as local content, state participation, training, employment, and whether the state is getting a good deal. This parliamentary check can be an important incentive to negotiate the strongest possible terms on issues, especially where there are strong opposition parties likely to be vigorous in their questioning of executive branch actions.

7 For examples, see "NOCAL News" at <http://www.nocal.com.lr/news-and-media/press-releases> for briefings and explanations about the Liberia Basin Bid Round 2014, which involved four offshore oil contracts.

8 Peter Rosenblum and Susan Maples, *Contracts Confidential: Ending Secret Deals in the Extractive Industries* (Revenue Watch Institute, 2006), 49.

9 Rosenblum and Maples, *Contracts Confidential*, 49.

**Lesson
2**

Parliamentary approval of contracts can also entail significant risks, including: politicization of the contracting process; lack of capacity in parliament to properly review contracts; creation of a process that obstructs or delays investment; creation of a legal means for contracts to deviate from the law; and corruption.

- **Politicized process and lack of capacity.** The experiences of several of the countries researched for this report suggest that parliament’s contract approval often becomes a political process, instead of one that is based on rigorous review of the current laws and policies in effect.

Parliamentary review and approval of contracts has at times seemed to be more about political point-scoring than the issues in the contract. In Liberia, members of the legislature regularly “bundle” approvals (i.e., passing contracts only if they can influence the drafts of other legislation) in order to maximize their power.

In Mongolia, populist appeals for greater state ownership of mining projects have often become the focus of public debate, while overshadowing other elements of the fiscal regime which have a greater impact on the totality of the government take from the mining projects. The politicization of the process has also meant that the Mongolian parliament had difficulty managing the approval process in an efficient manner. One former MP and minister described the challenges:

Parliamentary approvals proved to be politically extremely difficult. The Parliament managed to hear and make decisions on government equity in only four such projects during the last nine years since the approval of the law.¹⁰ All of them proved to polarize the politics, encourage populist politicians, and radicalize public opinion on mining and economic development in general.

—Honorable Zorigt Dashdorj, former Minister of Mineral Resources and Energy of Mongolia and former Member of Parliament (MP)

¹⁰ Mongolian law provides that parliament should approve the government’s equity stake in the companies holding licenses for so called “strategic deposits.” At present there are approximately 16 such deposits, though several of these may not be appropriate for parliamentary decision for different reasons such as disputes or lack of investor interest.

While it is probably unreasonable to expect that politics will play no role in parliamentary approval, it is important to note that this politicization seems to be at least partly related to parliaments' insufficient technical capacity and resources to undertake thorough reviews of contracts. Parliamentarians interviewed for this study regularly noted that they rarely have the resources and expertise required to fulfill their approval function.

While capacity-building efforts and technical support can help MPs obtain a better understanding of extractive contracts and identify key issues for review, parliamentarians tend to be generalists and are unlikely to develop the same level of expertise as sector specialists in the executive branch. Therefore, it may be equally important for MPs and committees to develop access to sources of technical

expertise, including in government, the supreme audit institution or relying on independent and reputable external experts. For instance, the parliament of Ghana is in the process of creating a scrutiny office responsible for delivering independent economic analysis for use by MPs during the annual budget review and the approval of new extractive contracts.

- **Impediment to investment.** In certain cases, parliamentary approval of contracts has come to be viewed as an impediment to investment. This can be the result of a few different factors, namely: the risk of a project becoming hostage to politicization, as mentioned above; the time delay that may be involved in obtaining parliamentary approval; and the possibility that parliament's role will lead to populist (but unrealistic) demands being included in a contract.

We as parliament do not have the resources. It is a challenge for us and for other committees as well. We need to be able to update members of parliament to raise their level of technical expertise.

—Honorable James Klutse Avedzi, Chairman of the Finance Committee of the Parliament of Ghana and Member of Parliament

Where the parliamentary contract approval process has come to be seen as a barrier to investment, countries have tended to either limit or do away with the practice of parliamentary approval. In Kuwait, as further detailed in lesson 4, the government has interpreted the constitutional provision on parliamentary approval in a manner that makes the process inapplicable to service agreements, a type of contract that the government is increasingly looking to use. In Mongolia, parliamentary approval was instituted relatively recently only to be largely set aside through a change of the mining law, as the protracted review of contracts was viewed as becoming a barrier to investment.

- **Increasing likelihood of contracts deviating from the law.** There is a risk that parliamentary approval of contracts can serve as a legal mechanism for approved contracts to deviate from existing law. Such an approach creates problematic legal inconsistencies, weakens government's position in negotiations, and renders monitoring of compliance more difficult for the administration.

Legally this situation arises where, as is generally the case, parliamentary approval of a contract is procedurally done through the passage of a law ratifying the contract. In the case of contradictions between the contract and existing laws, this allows companies to argue that the contract has the force of law and should prevail according to the general legal principle that more recent laws take priority over earlier laws. As mentioned earlier, this is in fact one of the very reasons companies have at times pushed for having their contracts

approved by parliament. This approach can create problematic situations like Liberia's where virtually none of the contracts signed strictly follow the sector law requirements on issues such as royalty levels.¹¹

- **Conflicts of interest and corruption.** Unfortunately, conflicts of interest and corruption are important risks, and the application of parliamentary approval of contracts is not an exception. For example, civil society groups in Ghana have questioned the use of the certificate of emergency procedure by government to rush contracts through the parliamentary contract approval process. They pushed for parliamentary hearings, rather than only a plenary debate and vote, as an opportunity to raise important policy issues such as the need for due diligence of technical requirements of prospective operators or the need for competitive bidding procedures in oil contract allocation.¹² Political interests and sensitivities surrounding the contract are often cited by insiders as the reason why external views may be completely ignored and not considered despite the existence of an informal, albeit established, process. In fact, there is the risk that parliamentary approval spreads corruption to a more decentralized group of decision makers. In Liberia for example, there is considerable evidence that some MPs have used their power of approval to elicit "lobbying fees" or facilitation payments from the investing companies.¹³ The rules of procedure of parliaments with regard to asset declaration and disclosure of investment interests can go a ways in mitigating these risks and safeguarding integrity and openness.

11 LEITI, *Post Award Process Audit Final Report* (Liberia Extractive Industries Transparency Initiative, 2013), http://www.leiti.org.lr/uploads/2/1/5/6/21569928/leiti_post_award_process_audit_final_report.pdf.

12 Francis Tandoh, "Parliament must protect the interest of Ghanaians on oil contracts", *News Ghana*, 9 June 2015, <http://newsghana.com.gh/parliament-must-protect-the-interest-of-ghanaians-on-oil-contracts/>.

13 Global Witness, *Curse or Cure: How Oil Can Boost or Break Liberia's Recovery* (2011).

Lesson
3

Contract approval is not a guarantee of contract transparency.

The lack of transparency over oil, gas and mining contracts is a major governance deficit in the sector. As mentioned above, parliamentary approval of contracts can potentially help address this and some countries publish their contracts as part of the parliamentary approval process. The experience of other countries shows that parliamentary approval of contracts is not a guarantee that there will be contract transparency in a country. An example here is Bolivia, where the legislature authorizes and approves natural resource contracts as required by the 2009 constitution:

The requirement of parliamentary approval gives the Bolivian assembly considerable power. However, the hearings about contracts are not public, and nor are the contracts published in the law approving them.¹⁴

At the same time there are countries such as Norway, the Democratic Republic of Congo and the United States that do not have parliamentary approval of contracts, but do publish their contracts or licenses (as the case may be) in a relatively transparent manner. Given the importance of contract transparency for oversight actors other than parliament (e.g., civil society and media), care needs to be taken to ensure that there is both parliamentary oversight and transparency of contracts.

Article 362

II. The contracts referring to activities of exploration and exploitation of hydrocarbons must have the prior authorization and express approval of the Plurinational Legislative Assembly. In the event this authorization is not obtained, they will be null and void as a matter of law, without the necessity of a judicial or extra-judicial declaration.

—2009 Constitution of Bolivia

¹⁴ Interview with Fundacion Jubileo, July 24, 2015. In 2006 after the renegotiation of oil contracts with international oil companies, the contracts were made available on the website of the Ministry of Hydrocarbons for two months. Later the contracts were withdrawn from the Bolivian website. Nevertheless a large majority of the contracts are available on international websites including www.resourcecontracts.org.

Lesson

4

There is no single standard or process used by all countries that have parliamentary approval, but there are some commonalities.

There is not a consistent international practice used to define and interpret key legal terms in this area. Concepts like “natural resources,” “agreements,” “concessions” and “contracts” may change over time as political institutions and processes change to fit the evolution of the sector and country. Accordingly, interpreting these terms from a parliamentary approval of contracts perspective will depend on the national legal context and the underlying policy objectives.

A good example of the indeterminate nature of legal texts is provided in the Kuwaiti constitution, Article 152 of which states:

Over time Kuwait’s oil sector has moved away from using concessions, which grant the company a property right over natural resources in a particular area, to using operating service agreements, which are a type of contract whereby the company explores for and develops resources in exchange for a fee based on the costs incurred and production achieved.¹⁵ This move towards using service contracts led the executive to argue that these contracts do not need to go to Parliament for approval into law, because the constitution refers to “concessions for the exploitation of a natural resource” and that the parliament need not approve “contracts” because they are not “concessions.” While this may be legally true on a strict interpretation of the text of the constitution, a number of parliaments approve “agreements” like production sharing contracts, for example in Bolivia, Yemen, Liberia and Ghana.

Every concession for the exploitation of any resource of the natural resources or public utility shall not be created except by a law and for a specified period, and the preliminary procedures shall ensure that the search and exploration activities achieve publicity [openness] and competition.

—Kuwait Constitution, Law No. 1 of 1962

¹⁵ For more information on contract types and differences see NRGi, “Reader: Legal Framework”, March 2015, http://www.resourcegovernance.org/sites/default/files/documents/nrgi_primer_legal-framework.pdf.

Despite the differences in legal language and the interpretation of this language, there are also some similarities:

- **The surveyed countries generally used the same process and procedures for approving contracts as they do for approving laws and ratifying treaties.** This means that the contracts typically were negotiated by the executive branch and then submitted to the parliamentary committee that has expertise on oil, gas and mining issues, and subsequently the normal legislative review process was followed. This often looks similar to the process described in Figure 2, which is based on the Ghanaian approach. In almost all cases the parliamentary review and approval comes at the end of the contract negotiating process, when the terms have already been agreed. The contract will often establish parliamentary approval as a condition for the contract’s effectiveness.¹⁶ The approval often involves a yes or no vote on

the whole document with little to no direct influence on modifying contract provisions.

- **Contracts submitted are typically accompanied by a report prepared by the executive or state-owned oil, gas and mining companies.** For instance, in Bolivia a detailed technical report is provided by the national oil company (Yacimientos Petroliferos Fiscales Bolivianos, or YPFB) as part of the parliamentary approval process. These reports may include price forecasts, economic modeling and other details of the contract.¹⁷
- **A hearing or other briefing to either the committee or to a plenary session of the parliament also takes place.** In Liberia and Ghana, hearings—with a presentation from the national oil company and ministers involved in the negotiation of the contract—are the primary way in which the legislative body is informed of the contract and contracting process.

Miskar gas platform off the coast of Tunisia



Photo used under creative commons license from Flickr/Paul Rogers

16 In the case of Ghana, published contracts (available on ResourceContracts.org) specifically provide that the agreement shall not take effect unless and until it has been executed by the parties and has been ratified by the parliament, whichever occurs later. In this sense ratification by the parliament could actually occur before or after the contract is executed by the parties and there does seem to be at least one example where parliament first ratified a petroleum agreement and parties subsequently executed it. See: http://www.businesswire.com/news/home/20020819_222310329_legacyID/en/Vanco-Signs-Petroleum-Agreement-Offshore-Ghana-West.

17 Interview with Fundacion Jubileo, 24 July 2015.

Figure 2

Contract approval process in Ghana

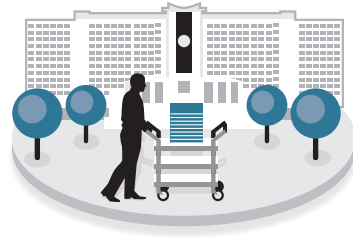
1. Negotiation and executive approval

The government and national oil company negotiate the contract. The document is then approved by the cabinet, which will then instruct the line minister to send the contract to parliament.



2. Submission to parliament

The contract comes before the speaker who sends it to the appropriate committee – in this case the Mines and Energy Committee.



3. Committee review

Once the contract is reviewed by the committee, there will be a report with recommendations in the form of a motion by the chair and ranking member of the committee.



The committee reviews the contract, particularly for compliance with the law, e.g., the Petroleum (Exploration and Production) Act.

4. Plenary debate and approval

A debate will be held by the full parliament, at the end of which a vote is taken.



5. Ratification by government

If the contract is approved, it goes back to the executive for final ratification.



Lesson
5

Parliaments, including those without authority for contract approval, can leverage their standard powers of lawmaking and oversight to effectively address a wide range of public concerns around the benefits and impacts of natural resource exploitation.

Other parliamentary powers should not be underestimated or viewed as inherently less valuable than the power of contract approval. On the contrary, the standard powers of parliament are absolutely necessary to have a full view of the sector as a whole, in terms of how it is performing and whether it is contributing to national objectives. These powers of the parliament include:

- **Legislate.** This includes passing sector laws that are in line with global good practice and reflect the country's interests and objectives for the sector. These laws can explicitly restrict the variables that are up for negotiation in contracts, which in turn reduces room for discretion in negotiations and the burden that comes from administering different types of fiscal regime, local content or operational obligations that arise when vastly divergent contracts are negotiated or approved.
- **Approving the budget.** The budget provides the government's forecasts and underlying macroeconomic assumptions for the natural resource sector, including how much revenue it will contribute to the treasury. Similarly, parliament can use its budget approval powers to channel resources to departments and agencies that are critical for effective sector management and oversight, in addition to spending resource revenues on investments that bring lasting benefits to citizens. In the case of Ghana, parliament approves the annual budget of the national oil company and votes every three years on the revenue allocations proposed by the Minister of Finance.
- **Receiving reports on government ministries and agencies, including audit reports.** A good example of this kind of oversight power comes from Norway. The parliament, or Storting, receives reports from the auditor general. The auditor general audits all ministries, and makes a report to the Storting every three-to-five years on how well the Ministry of Petroleum and Energy is achieving its objectives, working within its budget, using its budget effectively, and on its general performance.¹⁸ This sort of periodic reporting, either through a separate auditor or directly from the executive to parliament, is one among many ways in which parliaments maintain an overview of the functioning of the extractive sectors that goes beyond just the contracting process.

¹⁸ Interview with Honorable Einar Steensnæs, former Minister of Petroleum and Energy and MP, Norway, July 1, 2015.

- Powers of inquiry, investigation and censure.** In many countries, the standard power of oversight is strengthened through additional powers of inquiry, investigation and censure. For instance, in Norway, a country that does not use contracts (and therefore the Storting cannot and does not approve them), the Storting has carved out an important role regarding proposals to open new areas for petroleum licensing. While parliamentary approval is not legally required for this, in practice the Ministry of Petroleum and Energy presents its plans to the Storting that reviews the proposal and expresses its views. In line with Norway’s overall parliamentary system, the government typically follows the parliamentary view when taking the formal decision. A similar practice has evolved around the approval of new field development plans. While these plans are formally approved by the Ministry, in practice investments above a certain

level are always presented to the Storting, in line with a general constitutional requirement to present matters of great importance to the Parliament. Through these informal powers the Storting can have a say on where and how exploration can proceed as well as ensure that the executive has adhered to due process on consultations and impact assessment.

Where parliament has the power of contract approval, the contract review experience could also help parliament to exercise its other powers more effectively. For example, MPs involved in reviewing and approving contracts may develop a greater familiarity with the sector that allows them to better evaluate reports and ask stronger questions of the relevant minister when exercising their powers of inquiry or investigation. Additionally, they can more easily identify issues in existing laws and thus recognize opportunities for legislative reform.

Railway station at Seldja potassium plant



Photo used under creative commons license from Flickr/Stefan Gara

2. State of play: Tunisia's current contracting process

The previous chapter set out important lessons from the global experience with parliamentary approval of contracts. It is also important to take into account the specificities of the Tunisian context, including the legal framework and contracting process. Accordingly, this chapter describes the current contracting process in Tunisia's extractive sectors, with the aim of:

- Describing the role of contracts and hence the role of parliamentary contract approval
- Establishing an understanding of the current process in order to facilitate decisions on Article 13 implementation, including where in the process parliamentary approval could fit in¹⁹
- Identifying potential shortcomings of the current process that should be taken into account, and potentially addressed, in Article 13 implementation

As in most countries, different processes for allocating licenses and contracts apply to each of the hydrocarbons and mining sectors in Tunisia.²⁰ Accordingly we describe the system for each sector separately below. In each case we start with a section on the types of titles, contracts and agreements involved, and include a diagram on the current contracting process. We conclude the chapter with some thoughts on implications of the current contracting process for Article 13 implementation.

While we recognize that Tunisia faces the challenge of integrating parliamentary approval into its legal framework for other sectors such as renewable energy and potentially public-private partnerships (PPPs), our focus here, as with the rest of this document, is on the extractive sectors. Nevertheless, we note that certain steps have already been taken on implementation of Article 13 in the renewable energy sector and this precedent may affect implementation in the extractive sectors. Box 3 in Chapter 3 takes a look at the approach taken so far towards Article 13 in the renewable energy sector.

It is important to note that licensing and contracting systems change over time. For this guide we focus on the Tunisian system under the currently applicable hydrocarbons and mining codes. Nevertheless, some key elements of previous approaches to licensing and contracting in Tunisia's extractive sectors are also highlighted because (i) some of Tunisia's most significant extractive resources have been contracted under those prior systems which still govern important elements of their development,²¹ and (ii) these prior systems contain some important lessons relevant to today's implementation of Article 13. Box 1 includes a brief note on the role of Parliament in the contracting process under previous legal texts.

¹⁹ At a more basic level, this understanding of the existing system can also be important in considering oversight and reform of the sector.

²⁰ This is largely due to the different nature of these sectors, especially at the exploration phase. For example, in the hydrocarbons sector, there is often sufficient geologic information to allow for competitive bidding for contracts. In mining, there is rarely such information, leading in most countries to a "first-come, first-served" licensing system that does not depend on competitive bidding. Instead, the first applicant for a license area is granted the area, so long as sufficient financial and technical resources are shown in the application for the area.

²¹ For example, one of Tunisia's most important natural gas projects, Miskar, is governed by a concession that was granted in 1992 and predates the 1999 Hydrocarbons Code. This is sanctioned by provisions of the code that allows for operating concessions established before the effective date of the code to continue separately from the code.

Box 1. Parliament's role in granting and renewing mining and hydrocarbons permits and concessions under previous legal texts

The adoption of the Hydrocarbon and Mining Codes, in 1999 and 2003 respectively, did not repeal the previous legal texts.²² In fact the new codes specifically provided that existing permits and concessions would continue to be governed by the previous laws under which they were granted, unless the relevant companies specifically opted for application of the new code. Accordingly, many existing hydrocarbon concessions are still governed by previous laws,²³ while most mining permits and concessions are governed by the current mining code.

This continuing application of the older legal texts has been particularly relevant to renewal and modification of hydrocarbon conventions or concessions still governed by those legal texts. For example, where the previous legal texts required that the conventions or concessions be approved by law, renewal or modification of the convention or concession (still governed by the older legal texts) has also been pursuant to approval by law.²⁴

Another practice that may serve as an important lesson learned for implementation of Article 13 has been to use legislative approval of a concession or convention by law as a means to derogate from otherwise applicable legal requirements. For example, legislative approval has been used as a means to justify renewals of concessions or permits that did not meet the conditions required for renewal in the code.²⁵ The legal justification in these cases is based on the idea that a concession (or its renewal) enacted by law can deviate from an existing law because it represents an amendment of the existing law for the purposes of the project. As described in Lesson 2 in Chapter 1 and Guiding Principle 5 in Chapter 3, this risk of facilitating derogations from the law is one of the most important challenges faced by countries using parliamentary approval.

22 See Annex 2 for a list of legal texts of relevance for the hydrocarbons and mining sectors.

23 For example, there are 41 concessions under previous regimes and only 12 under the Hydrocarbons Code.

24 See for example the hydrocarbon exploration permit for "Jenein Nord", where the approval of the specific convention and its annexes in 1999 was by the law n°1996-106: http://www.legislation.tn/fr/detailtexte/Loi-num-1996-106-du-09-12-1996-jort-1996-100__1996100001061?shorten=gXqr. The Amendment no 2 to the convention and its annexes in 2010 was also by law n°2010-62: http://www.legislation.tn/fr/detailtexte/Loi-num-2010-63-du-28-12-2010-jort-2010-105__2010105000631?shorten=gXqr.

25 For example, the Grombalia " hydrocarbons prospection license was granted a fourth renewal pursuant to Law n° 2010-60 dated 28 December 2010 (approving addendum n° 1 to the convention and its annexes) whereas Article 28 of the Hydrocarbons Code allows only 3 renewals for prospective licenses. It is worth mentioning that the 2010 law does not mention a fourth renewal references the approval of an addendum n° 1, but a ministerial order signed in 4 August 2011 and published in the *Journal Officiel* (n° 60 for 2011) explicitly mentions a fourth renewal of the title.

2.1 HYDROCARBONS SECTOR: TYPES OF CONTRACTS AND CONTRACTING PROCESS

Under Tunisia's Hydrocarbons Code of 1999, the main contractual documents for any particular hydrocarbons project are: (i) a specific convention (or convention particuliere) to be signed by the state (represented by the minister of industry), the state-owned oil company, Entreprise Tunisienne d'Activités Pétrolières (ETAP), and the relevant investing company; and (ii) either a production sharing contract (contrat de partage de production) or a partnership contract (contrat d'association) signed in both cases by ETAP and the investing company.

Specific convention

The specific convention and its memorandum of obligations section (cahier des charges) define, in line with the Hydrocarbons Code, the terms and conditions for exploration and exploitation for a particular area, including: the work program for exploration activities, the duration / renewal of exploration permit, the process for awarding an exploitation concession, and the modalities for royalty payments.

The Hydrocarbons Code calls for a model specific convention and such a model was approved by Decree No. 2001-1842 dated 1 August 2001. The adoption of a model contract is a practice used by many countries in order to: (i) strengthen the negotiating position of the government vis-à-vis investors (ideally only limited elements that are specific to a contract are left open to negotiation); and (ii) ensure greater consistency between the various hydrocarbons projects in the country, thereby facilitating government oversight. In Tunisia, many elements of the specific convention, including the primary fiscal terms, emanate directly from the Hydrocarbons Code and are set out or referenced in the model contract.

Where a model contract, and ideally the signed contracts, are publicly available, transparency is significantly improved. Under Tunisia's Hydrocarbons Code, each specific convention should be approved by a governmental decree issued by the head of government.²⁶ While the model specific convention²⁷ and the decrees approving a particular specific convention are publicly available through the *Journal Officiel* and are referenced in the government's Open Data Platform²⁸, until very recently²⁹, actual specific

26 Prior to the adoption of the Hydrocarbons Code in 1999, there was no model specific convention and each specific convention was approved by law.

27 Government of Tunisia, "Décret n° 2001-1842 du 1er août 2001, portant approbation de la convention particulière type, relative aux travaux de recherche et d'exploitation des gisements d'hydrocarbures. Modele d'association avec l'entreprise national. Modele de partage de la production," *Journal Officiel de la République Tunisienne*, 66 (2001): 2303-2410.

28 The *Journal Officiel* information is available online through the portail national de l'information juridique (www.legislation.tn). The Open Data Platform (data.industrie.gov.tn) was recently put in place pursuant to Tunisia's national action plan under the Open Government Partnership. While the Open Data Platform does not include actual contracts, it does set out important information about hydrocarbon projects, including contract types, participating companies and percentages as well as the *Journal Officiel* references for approvals of associated concessions.

29 On 14 June 2016 the Minister of Energy and Mines announced the publication of a significant number of specific conventions on the government's open data portal (<http://catalog.industrie.gov.tn/group/contrats-petroliers>). For more on this see: <http://www.resourcegovernance.org/blog/tunisia-embraces-emerging-global-norm-contract-disclosure>.

conventions signed with companies were not publicly available. This makes it difficult for parliament and the public to: (i) ensure conformity of the actual conventions with the terms in the Hydrocarbons Code and the model convention in order to dispel any rumors about contracts deviating from the law; and (ii) obtain information on key terms that are left for negotiation in the model (e.g., the minimum work obligations of the investing company and the conditions for renewal).³⁰ Implementation of Article 13 in a way that increases transparency of the actual specific conventions (ideally through a legal requirement for their publication in the *Journal Officiel*) could help address these shortcomings.

Partnership contract and production sharing contract

Under the Hydrocarbons Code, in addition to the specific convention each investor has to also sign one of the following two kinds of contracts setting out its relationship with ETAP:

- Partnership (or joint venture) contract (contrat d'association). The partnership contract sets out the nature and terms of the partnership in cases where ETAP and the investor are co-holders of the relevant permits. Generally, the investor bears the cost and risk of exploration activities and ETAP has the option to participate when a discovery is made, subject to contributing its part (in accordance with its participation percentage) of production expenses and reimbursing its part of exploration expenses.
- Production sharing contract (PSC or contrat de partage de production). The PSC is used where ETAP acts as the holder of the relevant permits and the investor company (or group of companies) is its exclusive contractor. The Hydrocarbons Code provides that under a PSC the investor finances (at its risk) all exploration and exploitation activities on behalf of ETAP, with ETAP and the investing company both being entitled to a share of any hydrocarbon production as detailed through formulas in the PSC.

30 Other project-specific information in the specific convention includes:

- Name of the investor, its headquarters and its legal representative in the country
- Percentage shares of ETAP and the investor in the license
- Threshold values above which contracts for services and equipment are to be submitted to the oversight of the ministry and / or must involve a competitive process
- Surface area of the license

While the above contracts can be considered as largely implementing the specific convention and are generally negotiated concurrently, there are also reasons why their review and transparency could be important: (i) unlike the specific conventions, there is currently no publicly available model for the above contracts; and (ii) these contracts have also been identified as containing more terms subject to negotiation,³¹ including important financial elements such as the split of production between ETAP and the investing company (under a production sharing contract).³² Furthermore, at present these contracts are approved exclusively by the Ministry of Industry and are not subject to the opinion or the approval of the Consultative Committee on Hydrocarbons, as discussed further below.

In addition to these contractual documents, each hydrocarbon project should receive certain permits at different phases of its development: an initial prospecting permit, a subsequent exploration permit for exploration, and in the case of a discovery, an exploitation concession for production. The terms for the granting and renewal of these permits are established through a combination of the Hydrocarbons Code and the relevant specific convention.

The two categories of agreements defined in the Hydrocarbons Code – i.e., the specific conventions on the one hand, and the production sharing contracts and partnership contracts on the other – can be interpreted as matching the two categories of “agreements” and “investment contracts” referenced in Article 13 as being for approval (“agreements”) and review (“contracts”). The interpretation and implementation questions around this are further discussed under Guiding Principle 3 in Chapter 3.

Miskar B Platform



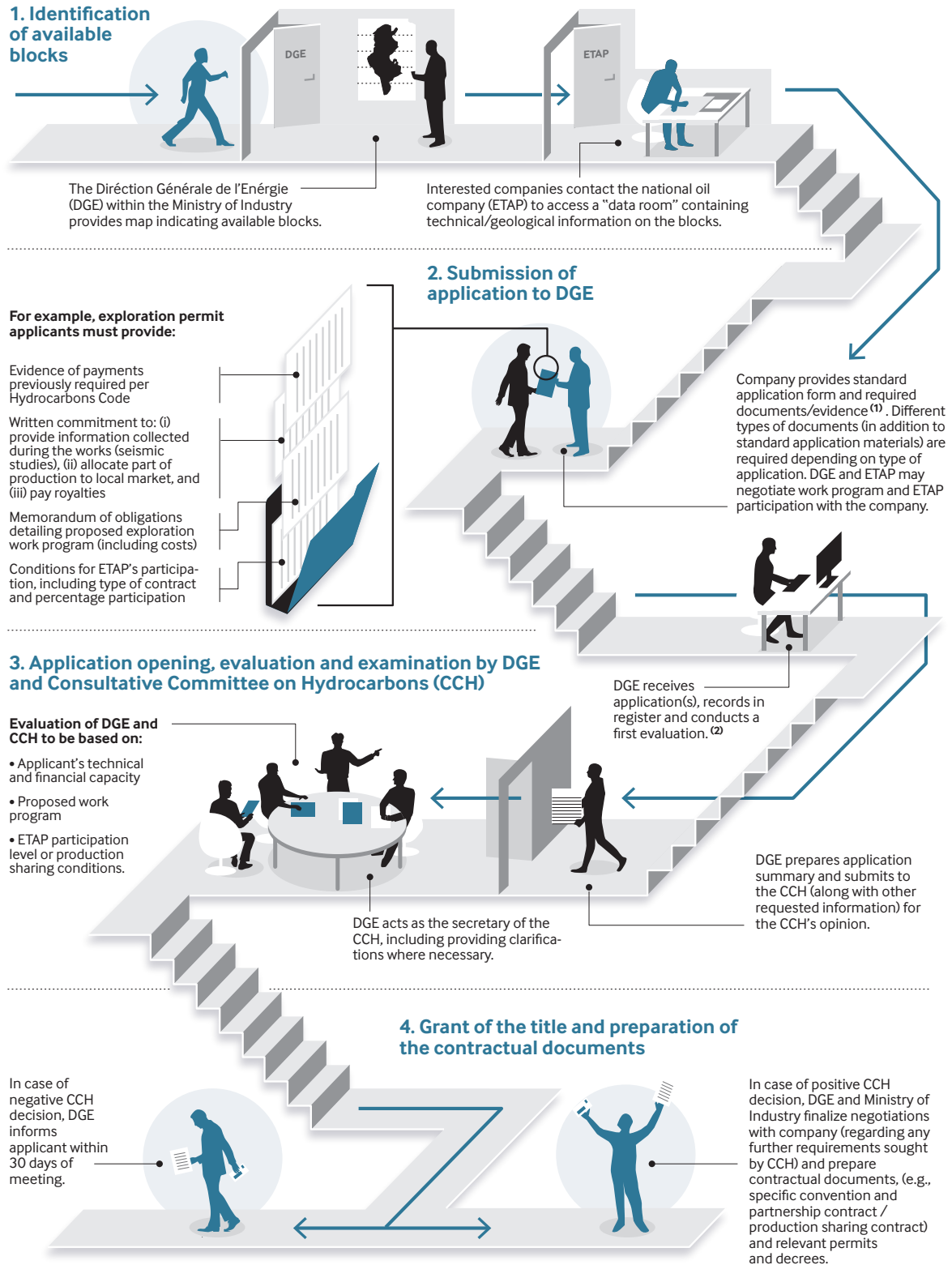
Photo used under creative commons license from Flickr/Ben Eddings

31 NRG, Resource Governance Index: Tunisia questionnaire (Natural Resource Governance Institute, 2014), 7. http://www.resourcegovernance.org/sites/default/files/country_pdfs/RGIquestionnaireHC_Tunisie.pdf.

32 Production sharing contract can be viewed as a quasi-fiscal term as it has an impact on ETAP's revenues, which can in turn impact state revenues.

Figure 3

Tunisia's hydrocarbons contracting process



(1) For example, bylaws, financial statements and annual report of activities.

(2) Evaluation generally includes verification of deadlines, required documents and applicant's technical/financial capacity. Capacity evaluation is particularly for when more than one offer is received for a block, apparently occurring very infrequently.

Box 2. The Consultative Committee on Hydrocarbons

The CCH is an inter-ministerial committee chaired by the minister of industry or his/her representative (in practice, the director general of energy [DGE]) and composed of representatives from the prime minister's office, the Ministries of Interior, National Defense, Finance, State Property and Land Affairs, Industry, and a representative of the Central Bank of Tunisia. The CCH must approve all issuances, renewals, extensions, transfers, renunciations or cancellations of the different hydrocarbon titles under the Hydrocarbons Code.

In practice, CCH examination of applications remains a formal control focused on ensuring that conditions required by law are met. CCH members encounter difficulties in ensuring even such control because they (other than those representing the DGE) are generally not hydrocarbon sector specialists, are not involved in the whole process, and depend on information provided by DGE. The CCH could serve as a meaningful check on the process, especially as the represented government institutions could ask tough questions, but in practice it remains largely dependent on information and analysis provided by the DGE. Also, only the DGE and ETAP are in direct contact with the investor(s).³³

Once a positive CCH decision is made (step 4 in Figure 3), the CCH is not involved in the process of negotiating, elaborating or approving of the contractual documents and generally plays no real oversight role at this stage nor over the content of contractual documents. The DGE and ETAP lead at this stage and CCH members do not have access to the documents even after they are signed.³⁴

33 The DGE provides summaries of applications without including the actual documents presented by the applicant, though it is unclear whether the CCH can request such documents, and whether it would receive the documents upon request.

34 The approval decisions published in the *Journal Officiel* is limited to the name of title or document approved, without publication of the actual contractual documents or a summary

2.2 MINING SECTOR: TYPES OF “CONTRACTS” AND “CONTRACTING” PROCESS

Unlike the Hydrocarbons Code, the Mining Code of 2003 does not specifically provide for conventions or contracts. The Mining Code instead relies on three types of mining titles: (1) prospecting licenses; (2) exploration permits; and (3) exploitation concessions.³⁵ These titles are not contracts (see the glossary in Annex 3 on the difference between licenses and contracts) and many terms (including fiscal terms) that one finds in mining contracts in other countries are established directly in Tunisia’s Mining Code.

Nevertheless, the exploration permit and especially the exploitation concession do involve the title holder agreeing to certain project-specific commitments that partially replicate the role of contracts. The types of titles are:

- Prospecting license: permission to conduct geological investigations to prepare requests for exploration permits. Valid only for one year and renewable once.
- Exploration permit: permission to conduct exploration activity in a particular area to demonstrate existence of economically viable deposits of specified minerals. Valid for three years with possibility of three renewal periods and with the possibility of an exceptional year to validate the research results.
- Exploitation concession: permission to exploit minerals in a particular area (contained within the exploration permit) and granted for a specific period depending on the certified reserves and the rate of extraction. An exploitation concession application must provide:
 - Memorandum of obligations (cahier des charges) containing commitments regarding work investments, production and quantities of equipment
 - Development plan including a feasibility study (geological/economic), an exploitation plan, a timetable for development works, a local personnel recruitment and training plan
 - Environmental impact study
 - Proof of payment of fixed fees

From a transparency perspective it is important to note that exploration permits and exploitation concessions, and significantly their memorandum of obligations, are not publicly available.³⁶ Only the ministerial order granting these mining titles is published in the *Journal Officiel*.

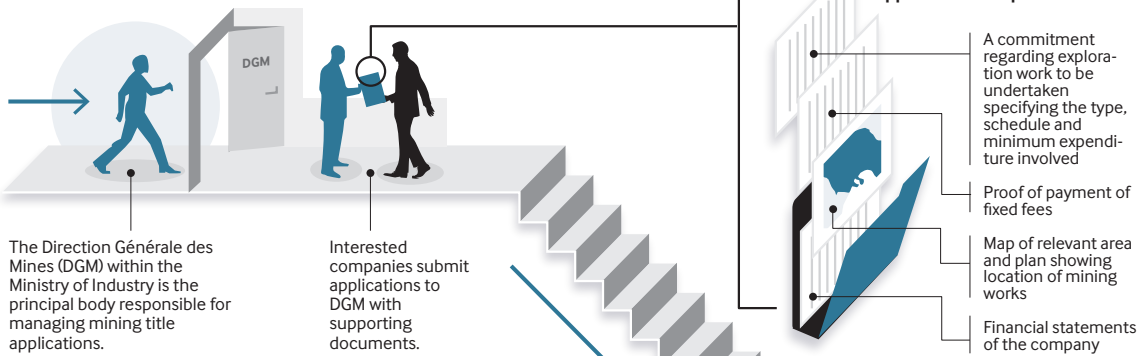
35 It is also worth noting that in Tunisia’s mining sector an important portion of mining activity, particularly in the significant phosphate sector, is conducted by State owned Compagnie des Phosphates de Gafsa (CPG). Nevertheless, there are a significant number of non-phosphate mining concessions concluded with private companies. Of the 50 mining exploitation concessions listed on the government’s open data portal, the vast majority were concluded with private companies. See: <http://catalog.industrie.gov.tn/dataset/concessions-d-exploitations-des-produits-miniers/resource/a41c2e2b-8070-485b-be01-7b59034864d6>.

36 There is however a publicly available model memorandum of obligations. Government of Tunisia, “Décret n° 2004-1026 du 26 avril 2004, portant approbation du cahier des charges – type relatif à la production et aux montants des travaux de recherche et d’équipement minima devant être réalisés par le titulaire d’une concession d’exploitation de substances minérales classées « Mines ».” *Journal Officiel de la République Tunisienne*, 36 (2004), p. 1203..

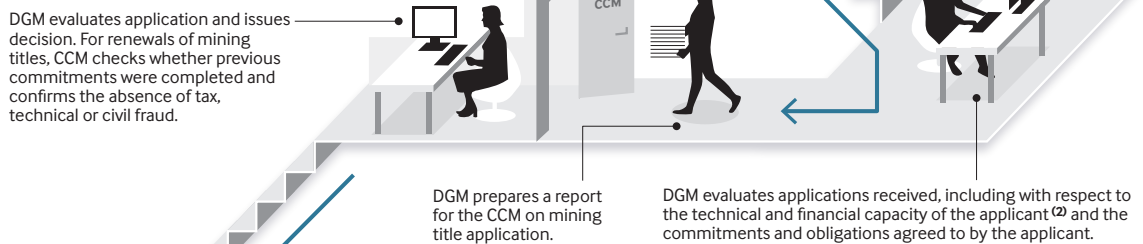
Figure 4

Tunisia’s mining “contracting” process

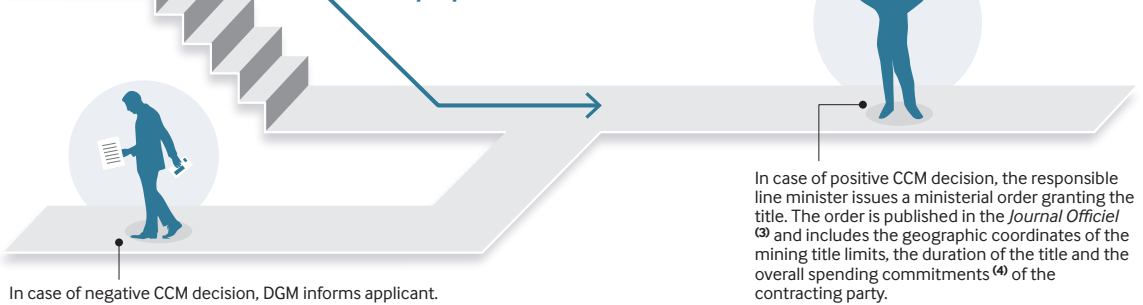
1. Submission of application by interested company to DGM



2. Application opening, evaluation and examination by DGM and Consultative Committee on Mines (CCM)⁽¹⁾



3. Grant of the title and preparation of documents



(1) The CCM is chaired by a judge and composed of representatives of: DGM, DGE, prime minister, ministries of National Defense and Environment, state-owned Phosphate Company of Gafsa, the National Office of Mining, and the Faculty of Sciences of Tunis.

(2) Where multiple applicants apply for an exploration permit for the same area, per the Mining Code the choice is to be made on the basis of the technical and financial capacity of the applicants.

(3) See for example the exploration permit granted for "Hammam Zriba -Jebel Guebli": (Arabic) http://www.legislation.tn/detailtexte/Arr%C3%AAt%C3%A9-num-2013-0734-du-29-04-2013-jort-2013-037__20130370X7344?shorten=gT06

(4) Details generally not specified, just the total minimum spending commitment.

2.3 IMPLICATIONS OF THE CURRENT CONTRACTING PROCESS FOR ARTICLE 13 IMPLEMENTATION

The current contracting process described in Chapter 2 has important implications for implementation of Article 13, both with respect to challenges Tunisia is likely to face, and opportunities to use Article 13 implementation to address some shortcomings of the existing system.

First, the complexity of the existing system is indicative of the challenges that parliament may face in carrying out the role entrusted to it through Article 13. While it is still to be determined exactly where in the contracting process parliamentary approval will come in, based on the experience of other countries and the parallels to other legislative processes, it is likely that this will be at or near the end of the contracting process. This would mean conditional decisions would already have been made, including the selection of the company, the negotiation of relevant terms and the general approval of the contract by the executive branch, including the inter-ministerial consultative committee.³⁷ In order to ensure that parliamentary review and approval is more than a mere formality or a primarily political process, parliamentarians will need to have a strong understanding of the process and the underlying legal requirements.

The role of the CCH in the contracting process, and the challenges faced in executing it may be particularly informative for parliamentarians as they think about Article 13. For example, the challenge of ensuring sufficient control while not being sector specialists (other than those representing the DGE), not being involved in the whole process, and depending on information provided by others,

are particularly relevant when thinking about parliamentary approval. In effect Parliament would be playing a somewhat similar role to that of the CCH, albeit from outside the executive branch, and would face similar challenges.

Secondly, the current contracting process' shortcomings can be very relevant inputs in Article 13 implementation. This includes learning from the limitations of existing oversight mechanisms such as the role of the consultative committees. In order to ensure effective oversight, parliament should focus on building its capacity, including potentially through external assistance, to be able to properly review the contracts sent to it for approval. Similarly, parliament will need to establish a process through which information on the relevant contracts is provided to it by the executive branch in a form that will facilitate parliamentary review.

Another shortcoming of the existing process to be taken into account is the relative lack of transparency. As noted above, the lack of transparency of contracts makes it difficult to establish conformity of contracts with the law and model contracts and to dispel rumors about contracting in the extractive sectors. Implementation of Article 13 in a way that increases transparency of the executed contracts (ideally through their publication in the *Journal Officiel*) could help address these shortcomings. Similarly the transparency shortfalls in the process for selecting companies could be addressed through implementation of Article 13 in a way that sheds more light on this process, including providing the public with more information on the criteria for selection of particular companies.³⁸

37 Involvement of parliament at a significantly earlier stage could make the contracting process a barrier to investment, and also render the task of review and approval difficult as there would be limited details for parliament to review and approve.

38 Legal reform of the process can also play an important role here through requiring a transparent pre-qualification process, using (where appropriate) competitive processes for selecting companies, and publication of information on the processes and their results.

3. Guiding principles for implementation of parliamentary approval of contracts in Tunisia

This chapter builds on the previous chapters in that it takes the lessons learned from global experience with parliamentary approval of contracts and aims to adapt them to the specificities of Tunisia's current law and practice for extractive sector contracting. The guiding principles below take into account the Tunisian context, by identifying opportunities to use Article 13 to address existing shortcomings, and by addressing institutional challenges such as limited capacity for contract review.

Guiding Principle

1

Transparency and accountability are goals of the Tunisian Constitution and the country should interpret and implement Article 13 with these goals in mind, including by facilitating the publication of contracts and civil society engagement.

This may seem obvious, but it can all too easily be forgotten when politics and entrenched interests and practices lead to parties forgetting the overall goals of the constitution in interpreting and implementing legal provisions such as Article 13. As Chapters 1 and 2 above have demonstrated, extractive contracts in Tunisia matter, and parliamentarians can have significant leverage to promote policies and influence contracts in a way that strengthens transparency and accountability. The power to approve contracts entrenched in Article 13 can be a significant element in this.

Based on lessons learned from other countries and Tunisia's contracting practices, Tunisian policymakers should consider the following:

- **Transparency and access to information should be seen as an integral part of good stewardship of the natural resources sector.** Interpretation and implementation of Article 13 should take these principles into account, in line with the constitution's Article 15 on transparency and Article 32 on access to information. As the global experience shows, parliamentary approval of contracts is not itself a guarantee of transparency, but it can play a significant role in promoting transparency if implemented with this goal in mind. Accordingly, Tunisia's parliament should support transparency and work with the executive branch to carefully implement various policies promoting it, including in the process for parliamentary approval of contracts. This is not to say that every document should be public, but that a reasonable process should be put into place that presumes transparency. In its 2013 Resource Governance Index (RGI), NRG found that of the 58 countries studied, 20 countries publish all or some of their extractive contracts.³⁹ Moreover, the global resource contracts database contains details of more than 1,000 contracts from 72 countries and can be a helpful tool for MPs and stakeholders in comparing contracts from different countries.⁴⁰

39 NRG, "Reader: Contract Transparency", March 2015, http://www.resourcegovernance.org/sites/default/files/nrgi_Contract-Transparency.pdf. Since the Resource Governance Index was published, additional countries including Guinea, Mozambique and Sierra Leone have begun to publish contracts for their extractive sector.

40 Resource contracts database: A directory of petroleum and mineral contracts. <http://www.resourcecontracts.org/>

The Tunisian government and parliament should apply the principle that there should be no secrecy in the extractives sector legal framework, and as such, Article 13 should lead to the publication of the contracts approved by parliament. As set out in Chapter 2, implementation of Article 13 can represent a major step forward with regard to transparency shortcomings in Tunisia's current contracting process if it results in requiring the public disclosure of contracts such as the oil and gas sectors' specific conventions, production sharing contracts and partnership contracts. These could be published in the *Journal Officiel's* record of parliamentary approval of the contract, as is done in some countries, and ideally should be available online and on request by citizens. These contracts are the core of the deal made with extractive companies and a number of countries make these types of documents public, with or without parliamentary approval. Tunisia should too. Recent actions and statements by the

Tunisian government indicate a willingness within government to publish contracts⁴¹ and legislation implementing Article 13 provides an excellent opportunity to institutionalize the norm in Tunisia.⁴²

- **Parliamentary approval of contracts should be an opportunity to further engage civil society in natural resource governance.**

As the practice in countries like Liberia has shown, parliamentary contract approval can play this role by using the consultative process (including involvement of stakeholders such as civil society organizations) that should accompany all of parliament's work, including review and approval of natural resource contracts. As Chapter 2 indicates, the current contracting process in Tunisia is relatively closed and implementation of Article 13 can be an opportunity to improve on this by creating opportunities for stakeholders to be heard, for example through parliamentary hearings and debates or associated media coverage.

Study visit by journalists, Kef Eddour phosphate mine



Photo by Laury Haytayan

41 On 14 June 2016 the Minister of Energy and Mines announced the publication of over 50 oil contracts on the government's open data portal (<http://catalog.industrie.gov.tn/group/contrats-petroliers>). For more on this see: <http://www.resourcegovernance.org/blog/tunisia-contract-disclosure>.

42 For more on contract transparency globally and in Tunisia, see NRGi, "Five Steps to Disclosing Oil, Gas and Mining Contracts: Focus on Tunisia", available at: <http://www.resourcegovernance.org/blog/tunisia-embraces-emerging-global-norm-contract-disclosure>

Guiding Principle

2

Parliamentary contract approval should be done according to a process with standardized timeframes, clear parameters for review, and requirements on information to be provided by the executive. This can reduce discretion and decrease the likelihood of parliamentary approval becoming an impediment to investment.

Parliamentary oversight should be implemented in a reasonable way in order to avoid excessively hindering investment. As the global lessons learned indicate, when the contract approval process becomes a barrier to investment, countries have tended to curtail the practice; and in the most extreme cases, the power has been taken away from parliament. This curtailment of parliamentary approval of contracts has previously occurred in Tunisia as well. Parliament's role under the old regime, governed by the Decree Law n° 85-9 dated 14 September 1985, was eventually viewed as a barrier to investment in the sector. Thus, the regime was modified under the Hydrocarbons Code of 1999 and specific conventions were approved by executive decree.

Efficiency should not preclude a thorough review. Effective parliamentary review and approval of contracts may require time, especially if the parliamentary committee with subject matter expertise needs to review the accompanying report, access and assess information, and call meetings, briefings or other hearings to ask follow up questions. A good report and thorough documentation of the history of the contracting process will be of no use without time for the committee to review it. While this would necessarily have efficiency costs and could be viewed negatively by the executive and the affected company, this should not mean that parliamentary

approval should be a rushed process that is a formality instead of a genuine review and approval. This sort of risk has been seen in other countries. In Ghana, for example, the executive branch has submitted contracts to the legislative body under the “certificate of emergency” which has meant that the parliament had little to no time for contract analysis and the gathering of stakeholder views.

Ultimately, the contract submission and approval process can and should be unique to Tunisia. At the same time there are approaches that can both support efficiency and result in a stronger review. Tunisian policymakers should consider the following:

- **Establish a standardized process.** In order to increase the likelihood of successful implementation, the Tunisian government and parliament should establish the procedures for parliamentary approval of contracts in advance. Standardization of the process will decrease the likelihood of arbitrary decisions. One element of standardization that has worked elsewhere is establishing what information is to be provided by the Executive when submitting a contract for approval. In order to promote efficiency, in Tunisia this could take advantage of the reports already prepared for executive approval of contracts by bodies such as the CCH. However, parliament should also have the ability to request additional information where necessary to conduct a thorough review.
- **Avoid creating an overly specialized process and procedures for contract approval.** The parliaments of most countries surveyed for this guide use the same process for approval of contracts as for the approval of laws. Accordingly, it makes sense to use Tunisia's current legislative rules and procedures as much as possible while adding

elements that are specific to the contract submission and approval process. An example of such an additional element would be specifying the required documentation and reports that would add a minimum need to accompany any contract submitted for approval.

- **Contracts submitted for approval should be accompanied by a report that is understandable by a non-expert.** As outlined in Chapter 1, several countries that require parliamentary approval of contracts have the executive provide a report on the contract as part of the approval process. The issue for many countries, however, is that MPs are not experts and may have difficulty understanding technical reports. They may be even more confusing than the contract they are meant to support. Accordingly, technical reports should be accompanied by non-technical summaries as far as possible.

The topics to be covered in such reports will need to be agreed between parliament and the executive, but parliament may be particularly interested in getting information on the contract's compliance with law. (See Guiding Principle 5.) The report should also include information on the investor and the contract allocation and investor selection processes. In addition, parliamentarians will at a minimum want to ensure that a report covers contract terms not otherwise specified in law, including

with respect to taxation, production sharing, investment and work obligations, any social or environmental obligations, and provisions on contract term, termination and renewal. A report could also include the research and preparatory permits and documents as an appendix. In the Tunisian context, there could be copies, ideally with non-technical summaries, of the prospection authorization, prospection permit, CCH and CCM opinions, environmental authorizations and other documents parliament deems reasonably necessary to do its work, as determined in conjunction with the Ministry of Industry, ETAP and other relevant parties.

- **Set parameters for review in advance.** One of the steps parliament can take to emphasize efficiency is to establish in advance what the general parameters of its review are going to be and asking the executive to provide specific information on these elements, e.g., specifically identifying any areas where a contract deviates from existing law and/or the model contract. Another step could be to establish a target period for review. In order to avoid tension between the executive and legislative branch it may be best if parliament itself establishes the standard period for review time in advance and only extends this in exceptional circumstances, rather than having the executive establish the period.

Guiding Principle

3

The roles and responsibilities of all those involved in the contracting process should be clearly defined, and key issues of interpretation and scope of Article 13 should be addressed, ideally in advance through legislation or rules of procedure.

In order to mitigate politicization, confusion, and impasse in the future, Tunisian politicians should consider addressing the issues identified below. For some of them, the vehicle for implementation could be legislation, for example revisions of the Hydrocarbons Code and Mining Code in order to implement Article 13. Others could be done through parliament's procedural rules, or the functional relationship between parliament and the executive.

- **Establish clarity on roles, with recognition of parliament's contract approval role being primarily one of oversight.** Effective parliamentary review and approval needs to be strategic and focus on high-level issues. Parliament should acknowledge the respective roles of the executive and legislative branches of government, including that day-to-day management of the sector, including with respect to negotiating and monitoring contracts, remain primarily with the executive. Parliamentary approval of contracts should not be implemented so broadly, for example as to have parliamentarians being directly involved in negotiations with investors, though parliament should be empowered to look into any issues where necessary to conduct a thorough review. As the quotation below from the former Norwegian Minister of Energy indicates, it is important however to not confuse these roles.

“Please do not convert parliamentarians into technocrats. One must respect checks and balances: What is the responsibility of the politicians? What should the ministry take care of?”

—Honorable Einar Steensnæs, former Minister of Energy and former MP, Norway

- **Parliamentarians should try to reach agreement, ideally in collaboration with the executive branch, on difficult questions of interpretation such as Article 13’s reference to approval of “agreements” by the plenary and submission of “investment contracts” to the relevant committee.**

In the hydrocarbons sector, one possible interpretation, which has the benefit of being relatively easy to implement within the existing legal framework, could stem from the two-level contractual regime established by the Hydrocarbons Code, which requires (i) a specific convention, and (ii) a production sharing contract or a partnership contract (contrat d’association). This two-level regime lends itself to some parallels with Article 13’s two-level approach to contract approval. Accordingly, the specific convention, which is the primary agreement between the Tunisian state, ETAP and the investor, could be interpreted as the “agreement” requiring plenary approval, while the associated production sharing contract or partnership contract (as the case may be), which is the second level agreement between ETAP and the investor, could be interpreted as the “investment contract” needing to only be submitted to the relevant committee. One possible risk of not requiring explicit approval of contracts such as production sharing contracts is that these contracts can contain important conditions, such as the terms for sharing of production between the investor and ETAP. One possible mitigating approach to this risk could be for parliament to not proceed with approval of a specific convention in practice

until the associated production sharing contract or partnership contract has also been submitted and reviewed.

Furthermore, this type of interpretation would at least allow Parliament to receive the second level agreements and conduct some sort of review, whereas a strict literal interpretation that there are no “investment contracts” in the hydrocarbon sector would likely mean that parliamentary review would be limited to the specific conventions. This would mean no automatic parliamentary oversight of the production sharing contracts or partnership contracts entered into with ETAP, even though these contracts can include important elements such as the split of production between ETAP and the investing company as described in Chapter 2.

Another potential guiding principle in deciding which contracts are to be approved by the plenary and which are to be submitted to the relevant committee could be on the basis of their “importance” (determined, for example, on the basis of investment levels or type of contract), with the more important needing approval and the others being just submitted. Tunisia’s recent Renewable Energies Law (described further in Box 3) seems to take an approach inspired by prioritization in its treatment of parliamentary approval of renewable energy contracts. Of course one challenge of such an approach would be how to establish the different gradations of “importance” and whether this can work with Tunisia’s existing approach to contracting.

- **The question of whether parliamentary approval is required for contract renewals, cancellations or transfers should depend upon whether the rules governing these occurrences are already set out in the law and/or contract.** If they are, then simple application of those rules by the executive branch could be viewed as part of day-to-day sector management and would not require parliamentary approval, though these developments should by all means be included in periodic reports submitted to parliament. Where the rules or conditions for renewal, cancellation or transfer are either not included in

the contract or law, or where the rules are being changed, this can be viewed as an amendment of the agreement previously approved by parliament and therefore parliamentary approval would be appropriate. For example, where a specific convention approved by parliament provides for two renewal periods of three years each for an exploration permit, a decision by the executive to issue such a three-year renewal would not be subject to parliamentary approval, but a decision to issue a four-year renewal or three renewals would be equivalent to an amendment of the approved contract and would require further approval.

Train transporting phosphates, Gafsa



Photo used under creative commons license from Flickr/Dennis Jarvis

Box 3: Approach to Article 13 in the Renewable Energy Law

The law n° 2015-12 dated 11 May 2015 relating to the generation of electricity from renewable energy is the first attempt at implementation of Article 13 of the new constitution.

While the law has not been without controversy,⁴³ the approach ultimately taken leans towards interpreting Article 13's parliamentary approval of contracts in a manner that requires an increasing role for Parliament depending on the importance of the type of contract involved.

Specifically, the renewable energy law requires:

- Submission only to the relevant parliamentary committee for certain categories of contracts (namely those for sale of excess self-consumption electricity to the national company and sale of electricity for local consumption, in both cases within limits of a maximum to be fixed by governmental decree);
- Parliamentary approval for certain agreements (namely those for sale of electricity for local consumption but in excess of the maximum to be fixed by governmental decree); and
- Parliamentary approval "by law"⁴⁴ for certain contracts (namely generation of electricity intended for export).

Accordingly, the approach of this law to parliamentary approval seems to incorporate an implicit prioritization of parliamentary control based on the magnitude of contracts involved (i.e., contracts involving generation of electricity intended for export are likely to involve more significant investment and revenues than those for sale of excess personal generation for local consumption).

Nevertheless, the approach to Article 13 in the renewable energy law is not particularly detailed with respect to the procedures and scope for each parliamentary control regime. The law in certain cases simply reproduces the relevant wording of Article 13 in full and without further elaboration. Finally, the law generally does not provide further clarification on the process (for example, by establishing timing requirements in order to ensure an efficient approval process) or the documents to be provided by the executive with a request for approval (for example, in order to facilitate parliamentary review).⁴⁵

43 The law as initially passed was rejected by the courts for not incorporating parliamentary approval of contracts (see the decision of the Provisional Authority for Constitutional Oversight No. 6 of 8 October 2014). The issue of whether renewable energy qualifies as a "natural resource" for the purposes of Article 13 remains controversial and we take no position on the issue here.

44 It is unclear what "approval by law" specifically refers to and how this would be different in practice from the general parliamentary approval in category (ii).

45 One exception is the specification that certain contracts should be provided along with any ancillary agreements and a final certified report (*process verbal de constat*). Other specifications could also possibly be established through procedural rules or another regulatory method rather than through legislation.

Guiding Principle

4

In order for parliament to fulfill its constitutional role in the contract approval process, measures should be taken to build in-house analytical capacity and to forge functional partnerships with other government bodies.

Parliaments are not necessarily immune to the difficulties that many developing countries with weak governance systems face: scarce resources to draw in external expertise and low internal capacity for meaningful contract review, corruption as well as rent-seeking behavior to name a few. In addition, turnover of individuals may be very high in elected bodies, making institutional knowledge and expertise difficult to develop and maintain. All of these factors can undermine and devalue the power of contract approval, making it an overly political process or one that does not benefit the country.

- **Identify and secure independent and external expertise** to help parliament verify the quality and compliance of the proposed contract. This could include – but should not be limited to – a role for auditors (both state and independent), technical experts (to assess proposed extraction protocols and projections) and relevant civil society groups.

A concerted effort is needed in order to embed knowledge in the parliament and not just in parliamentarians. A cooperative approach with the executive branch and state-owned enterprises will be needed as well, politics notwithstanding. The executive branch and state-owned enterprises such as ETAP will continue to possess significant powers and knowledge regarding the sector. Leadership will be needed to find common ground and mechanisms to share knowledge in order to ensure that parliamentary contract approval is done in a rational and efficient manner rather than a purely political manner. In addition, as global practice indicates, sufficient parliamentary capacity is one of the main challenges for contract approval. Accordingly, Parliament will need its own staff and resources that remain with the institution as has been done by the parliaments of Mongolia and Ghana which both have parliamentary staff specialized in oil, gas, mining and other sectors. The positive impact of the creation of parliamentary budget offices and parliamentary research offices in Kenya and Uganda for instance can provide good examples for how to build this capacity internally. At same time Parliament should also call on expertise in the executive branch, supreme audit institution, civil society and other relevant external sources of expertise to support its contract approval work.

Guiding
Principle
5

Parliament is strongest when it changes sector legislation and does not sanction ad hoc

modification of legislation through its approval of contracts. If the contract nevertheless contains any derogations from law, these should be limited in scope and their specific justification should be published.

The approval of the specific convention is not an occasion to establish a regime that overrides the Hydrocarbon and Mining Codes.

In particular, they should not override Tunisian legislation on controversial issues such as renewal and extension beyond what are provided for in the codes. Tunisia ought to avoid the experience of other countries which have allowed derogation resulting in a system in which virtually none of the contracts signed strictly follows the sector law.⁴⁶

Allowing modifications to the laws through contracts undermines the parliament's own law-making power. The power of parliament to legislate is a core and incontrovertible power. If there is a need to modify the law on a particular point or include flexibility to accommodate different projects, it should be done through an amendment of the code and not through ad hoc approval of derogations from the law on a contract-by-contract basis. In Tunisia, the government is currently reviewing the Mining and Hydrocarbons Codes. Parliament should seize this opportunity and be actively involved in an informed review of those texts. Parliamentary approval of contracts should be a supplementary check that the legal framework established by parliament is being complied with, not an opportunity to change or undermine the laws of the country.

Given the risk of using parliamentary approval for deviations from law and parliament's particular interest in ensuring compliance with law, the report from the executive should specifically identify any deviations from the law (or model contract where applicable) that are included in the contract being approved and provide justifications for such deviations.

46 LEITI, Post Award Process Audit Final Report, 2013, http://www.leiti.org.ln/uploads/2/1/5/6/21569928/leiti_post_award_process_audit_final_report.pdf.

Guiding Principle

6

The parliament should take a holistic approach to improving governance of the extractive sectors, using all of its powers to work with the executive branch to achieve this goal, not just the power of approval of contracts.

There needs to be a holistic view of parliament's oversight role, not just a singular focus on the approval of contracts. As noted in the lessons learned, most countries do not have parliamentary approval of contracts and yet many still have rigorous oversight of the oil, gas and mining sectors—most notably among the countries studied for this report, Norway. A holistic approach will require parliament to use its other powers, such as:

- Power of inquiry, hearings, and, if there is suspected wrong-doing, investigation
- Power of censure
- Allocating budgetary resources
- Specific hearings auditing the effectiveness of government agencies

In practice this may mean holding hearings, working cooperatively with the Ministry of Industry, ETAP, CPG and others on a consistent basis, and requiring regular reporting from the executive branch on new developments in the sectors, such as: the status of current exploration and production operations; and health, safety and environmental issues.⁴⁷

Tunisia's current parliament is aware of these powers and is already beginning to use them. The example of the recent questioning of the Minister of Industry by parliament following the Winou el Petrol campaign is an example of that role, and included queries on issues key to governance in the sector. This practice should be embraced and used not just to question, but also to learn and share knowledge throughout the entire oil, gas and mining value chain.

47 Requiring regular reporting could also help MPs perform their contract approval role more efficiently.

Conclusion

Tunisia has made important strides in the last few years, most notably through the adoption of a new constitution aimed at increasing government accountability to citizens. The constitution's inclusion through Article 13 of a requirement for parliamentary approval of natural resource contracts was motivated by the goal of increasing accountability in a sector viewed as particularly opaque and unaccountable.

As this guide has described, global experience, including Tunisia's own prior experience, with parliamentary approval of oil, gas and mining contracts indicates it can bring benefits and risks, and that it is often accompanied by significant implementation challenges. Nevertheless, the inclusion of the requirement in the constitution means that it is now part of the "social contract" between the Tunisian state and its citizens. Accordingly the focus of government and parliament should now be on effectively implementing Article 13 in a way that fulfills its potential positive impact on transparency, accountability and good governance.

This guide has therefore aimed to support Tunisian stakeholders, and in particular parliamentarians, in implementing Article 13 in a way that, insofar as possible:

- *Increases benefits* by promoting the core goals of accountability and transparency, for example through publication of approved contracts
- *Mitigates risks* through a review process that provides parliamentarians with sufficient information, but also decreases the likelihood of unduly impeding investment
- *Overcomes implementation challenges* by focusing on increasing parliamentary capacity and reaching an agreement between parliament and the executive regarding key Article 13 interpretation and scope issues.

Establishing the rules for implementation of Article 13, the focus of this guide, is only the first step in a process. An important next step for actors ranging from civil society to government could be to think further about what specific elements parliament should focus on in reviewing a contract. What questions should parliament ask? What "red flags" should parliament look out for? A collective effort, led by parliament with support from actors such as the executive, civil society, media and international partners will be needed to address these and other issues. This continued engagement will be critical in building the capacity of Parliament to carry out the role given it by Article 13 and in strengthening the likelihood that this role contributes to improved governance of the extractive sectors in Tunisia.

Appendix 1. Sources and methodology

The research for this parliamentary guide on contract approval was conducted from May 2015 to April 2016. The information is based on a review of the literature on global practice and specific research into the experience with contract approval of selected countries, including review of the laws and secondary sources.

The desk research was complemented by interviews with established in-country legal experts and stakeholders including members of parliament, parliamentary staffers, former ministers responsible for oil, gas or mining, and

other government officials. This guide does not attempt to provide an exhaustive overview of all types of parliamentary approval processes, but rather draw from the varied experiences of six selected countries. The research team conducted a total of 12 interviews covering experiences in Bolivia (1), Ghana (4), Kuwait (1), Liberia (2), Mongolia (2) and Norway (2). Country selection was based on relevance for Tunisia's case, availability of contacts with local experts and variance in approval processes, as well as parliamentary systems.

Seldja potassium plant



Photo used under creative commons license from Flickr/Stefan Gara

Appendix 2. Key documents in the legal framework for hydrocarbons and minerals in Tunisia

Legal framework for hydrocarbons and mining

Currently, the Tunisian legal regime governing the sectors of hydrocarbons and mines is regulated by several texts, including:

- The decree law dated 13 December 1948 establishing specific provisions facilitating the research and exploration of the mineral substances of the second group
- The decree law dated 6 October 1949 approving the convention of concession of occupation and exploitation of maritime public domain of 1949 with COTUSAL
- The decree law dated 1st January 1953 relating to mines
- The decree law n° 85-9 dated 14 September 1985 establishing specific provisions relating to the liquid and gaseous hydrocarbon research and production
- The Hydrocarbons Code promulgated by law n° 99-93 dated 17 August 1999 (and its amendments dated 2002, 2004 and 2008)
- The Mining Code promulgated by law n° 2003-30 dated 28 April 2003
- Decree n° 2000-713 of 5 April 2000, on the composition and operation of the Hydrocarbons Consulting Committee
- Decree n° 2003-1726 of 11 August 2003 on the composition and modalities of operation of the Mining Consulting Committee
- Decree n° 2001-1842 of 1st August 2001 approving the model specific convention (*convention particulière*) relating to research and exploitation of hydrocarbon deposits
- Decree n° 2002-1318 of 3 June 2002 setting the conditions and the procedures for granting of a concession of electricity production from gas provided by operating hydrocarbon concessions
- Decree n° 2004-1026 of 26 April 2004 approving the model of specifications (*cahier des charges*) relating to minimum production and expenses of research and equipment that need to be realized by the owner of license of exploitation of mineral resources classified “mines”

The Hydrocarbon and Mining Codes did not fully repeal the application of previous texts to existing titles. As a result, different hydrocarbon titles are currently governed by different legal regimes, including:

- Titles governed by regulations from before decree law 85-9 and special conventions (agreements) on exploration, research and production of hydrocarbons
- Titles governed by regulations under decree law 85-9 and special conventions (agreements) and all previous texts insofar as they are not contrary or inconsistent with these provisions
- Title governed by the Hydrocarbons Code. When investors with existing title opt for the code, the previous legal texts and the provisions of the convention of the license are no longer applicable if they are contrary to or inconsistent with the provisions of the code.

The hydrocarbon and mining codes establish the procedures for granting hydrocarbon titles and mining titles as well as for their renewal, extension, cession, renunciation or cancellation.

The codes fix the rights and obligations of the state, of the investors and other intervening structures and determine *inter alia* the environmental rules, the land-use plan, the tax system, the regime of customs and foreign trade control, the mode of detection of offenses and penalties applicable.

The codes also establish the different kinds of hydrocarbon and mining titles as well as the different oil contracts and the standard contracts.

Appendix 3. Glossary

Definitions of concepts included in this glossary are generic global definitions and are not specific to the Tunisian context or legal framework. Nevertheless the definitions remain relevant in understanding the concepts in the Tunisian context.

Accountability

The concept of ensuring officials in public, private and voluntary sector organizations are answerable for their actions and that there is redress when duties and commitments are not met.

Blocks

Designated geographic areas over which resource exploration and/or extraction rights are granted (also known as concessions or license area in some countries).

Contract

An agreement or set of legal terms executed by a government entity or its representative (e.g., state-owned enterprise) and a company whereby the government grants the company the right to explore and/or extract a resource in a given area in return for paying to the government royalties, taxes or other consideration. Generally negotiated (though may be based on a model) and more detailed than a license or permit.

Extractive resource

A non-renewable natural resource found in or under the ground; specifically oil, gas and minerals.

Fiscal regime

The set of terms and instruments/tools (e.g., taxes, royalties, dividends) that determine how the revenues from oil and mining projects are shared between the state and companies.

Governance

Action, manner, or system of governing or exercising control.

Government take

Refers to the overall revenues received by the government from a project, including elements such as royalties, taxes, fees, bonuses as well as the dividends received due to the government's ownership share. This government take is often expressed as a percentage of the overall pre-tax cash flow of a project.

License

Usually a standard-form legal document that the state uses to grant exploration or extraction rights according to a generally applicable set of terms, with limited variation from one project to another. Generally shorter and less detailed than a contract. Sometimes called a "permit."

Licensing or contracting

How governments decide which companies will have the right to extract and on what terms.

Local content

Non-tax benefits to the national economy and communities through the use or development, by extractive sector operators, of domestic labor, suppliers, goods and services, capital and infrastructure.

Model contract

Document outlining general terms for possible extraction agreements within a country; the level of detail and deference given to a model contract varies from country to country.

Production

The quantity of a resource extracted in a given time period.

Production sharing contract

An extractive agreement in which the product recovered is shared between the government and a private company, after deduction of investment and production costs (in lieu of or sometimes along with cash payments of taxes); also called production sharing agreement (PSA or PSC).

Regulations

Specific requirements usually set forth in accordance with a law by an executive ministry or department.

State-owned company

A corporate entity created by a government to undertake commercial activities on behalf of an owner government. An state-owned company can be wholly or partially owned by the government; in the oil sector often referred to as national oil company.

Miskar B platform off the coast of Tunisia



Photo used under creative commons license from Flickr/Ben Eddings

ACKNOWLEDGEMENTS

The authors are grateful to all interviewees for sharing their invaluable experience with contract approval during the course of this research. We would like to thank Lotte Geunis, Sofi Halling and Julia Keutgen from UNDP, who provided valuable comments for improvement of the guide. We also thank NRGi's Patrick Heller and Matteo Pellegrini for their review and comments, which greatly improved the document.

This publication is the result of a team effort involving NRGi staff members (Femke Brouwer, Laury Haytayan, Wissem Heni and Amir Shafaie) and external consultants (Susan Maples and Nejib Mokni).

This research project was funded by the U.K.'s Department for International Development (DFID).

The Natural Resource Governance Institute (NRGI) helps people to realize the benefits of their countries' endowments of oil, gas and minerals. We do this through technical advice, advocacy, applied research, policy analysis, and capacity development. We work with innovative agents of change within government ministries, civil society, the media, legislatures, the private sector, and international institutions to promote accountable and effective governance in the extractive industries.

www.resourcegovernance.org



Oil, gas and mining for development