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All exploration and production projects are, to some extent, infrastructure-dependent. As the ultimate goal of any such project is profit, a hydrocarbon reservoir, once discovered and appraised, must be monetized. Monetization, in turn, generally requires some measure of processing—for example, to remove impurities—and transportation, whether through pipes, trucks, shuttle tankers, or otherwise. Thus, a simplified development schematic for an offshore gas field might include (1) tieback to a platform on which sulphur, carbon dioxide, and other impurities are stripped out of raw gas, liquids are separated, and the gas is otherwise made ready for transportation and ultimate sale; (2) compression of the processed "dry" gas into an export line; and (3) transport of that gas to an onshore sales point. Without the intermediate steps between production and sale, no viable project would exist.

The same is generally true of a given onshore field. However, offshore infrastructure is typically more expensive, extensive, and complex, and requires a greater degree of planning, sometimes in volatile markets in which the investor cannot ensure that hydrocarbon prices will support the continuation of a project from one budgeting period to the next. Furthermore, longer planning, fabrication, and installation times required for offshore infrastructure can lead to longer cycle times between project sanction, the payment of costs, and first commercial production.[1] This front-loading of costs can reduce the economic appeal of a project that requires significant new infrastructure.

Offshore reservoirs are especially sensitive to infrastructure-related costs through project sanction or final investment decision. Even a relatively large and otherwise economically attractive, offshore project can quickly be rendered uneconomic due to, for example, the costs required to fabricate a production system, such as a floating production storage and offloading unit. If each project required new material infrastructure, the subset of commercially viable offshore hydrocarbon

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1. *See, e.g.*, Preston Cody, *Shale vs. Big Exploration: What Sorts of Risks Are You Taking?*, E&P Jan. 1, 2013, http://www.epmag.com/item/Shale-vs-big-exploration_111180 [perma.cc/3TRU-4XWF] (discussing conventional resource project cycle times and their relationship with unconventional resource cash flows).

development projects would likely be much smaller than it is. Therefore stakeholders in offshore projects, including governments, have an interest in reducing infrastructure costs.[2] One of the major ways to accomplish this goal is by utilizing existing infrastructure, some or all of which may be owned by third parties that are not investors in the project seeking access to such infrastructure, or by one or more investors in such infrastructure in percentages that differ from their respective cost and revenue interests in such project.[3]

In theory, such access would go a long way toward minimizing infrastructure costs and maximizing project value and, by extension, project development. However, the interests of infrastructure owners on the one hand, and those of the upstream project stakeholder seeking access on the other, are not necessarily aligned. Owners of infrastructure fabricated for a particular project may seek, among other things, recompense for operating expenses relating to such infrastructure, a return on capital expenditures, and a reservation of capacity in a facility for that project as well as other upstream projects in which they hold an interest.[4]

Left to its own devices, an infrastructure owner might not allow access for third party production for any number of reasons, including lack of capacity, disagreement on the legal and economic terms on which access would be granted, inability to handle the type of production for which access is proposed, and the desire not to enrich a company that is likely to be a competitor. The use, or increased use, of a facility generally brings greater risks of liability and damage and faster rates of depreciation and mechanical breakdown. Investing companies risk capital in the fabrication and installation of infrastructure for an owned project but do not necessarily have an incentive to allow a competitor access to that infrastructure—likely, to some extent, to the detriment of the project for which the infrastructure

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2. *See* Ernest E. Smith, *Typical World Petroleum Arrangements*, *in* INST. ON INT'L RES. LAW: A BLUEPRINT FOR MINERAL DEV. 9-1, 9-21 (ROCKY MTN. MIN. L. FOUND., Feb. 1991) (discussing a grantor's interest in encouraging petroleum resource development).

3. *See* Canadian Ass'n of Petroleum Landmen, *2007 CAPL Operating Procedure*, § 14.02 (2007) (providing for the deletion of infrastructure from the operating agreement after it reaches a certain level of cost or complexity).

4. *See, e.g.*, OIL & GAS UK, CODE OF PRACTICE ON ACCESS TO UPSTREAM OIL AND GAS INFRASTRUCTURE ON THE UK CONTINENTAL SHELF § 5.2 (Nov. 2012) (espousing agreements based on "fair and reasonable tariffs and terms, where risks taken are reflected by rewards") [hereinafter OGUK]; *see also* AM. ASS'N OF PROF'L LANDMEN, Form 810 § 16.8 (2007), AM. ASS'N OF PROF'L LANDMEN, Form 710 § 13.9 (2002), and ASS'N OF INT'L PETROLEUM NEGOTIATORS § 7.9 (2012) (discussing platform and facility usage by third parties and owners with disproportionate interests, including depreciation and investment recovery charges and per unit of production throughput charges).

was built—on terms that would allow the competitor's project to go forward.

However, the grantors of hydrocarbon resources, which, with respect to offshore projects, are generally governmental authorities,[5] have an interest in encouraging the development, monetization, and use of hydrocarbon reserves.[6] Infrastructure costs exert a negative impact on hydrocarbon project evaluation, and thus development, leaving reserves "stranded." Conversely, lack of access to existing facilities can result in construction of infrastructure where none is physically necessary, with potentially detrimental environmental impacts.[7] Thus, grantors have an incentive to encourage—or require—facility owners to permit third party access and throughput in certain circumstances. This situation would suggest a mandatory access regime, or perhaps one in which the grantor owns or controls facilities and determines access thereto. However, this solution would ultimately be counterproductive, as it would tend to discourage investors to commit risk capital to infrastructure projects over which they would ultimately have little control or upside. Investment in exploration and production projects (including related facilities) is generally at the sole risk of the developing investors.[8] A company faced with billions of dollars worth of infrastructure expenditures and years worth of design, engineering, fabrication, and related costs, project delays, and other attendant risks, will be more likely to evaluate a project negatively if it cannot retain some—or exclusive—ownership over the benefits of such infrastructure.

This fundamental tension results in a balancing act between the interests of facility owners, project stakeholders, and grantors. In any event, different jurisdictions have different approaches to economic matters, so it should not be surprising that access to third party infrastructure for exploration projects is no exception. Third party access regimes can be viewed along a continuum, with systems in which the government cannot compel third party access on one end and systems mandating open and non-discriminatory access on the other. Of course,

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5. Smith, *supra* note 2, at 9-21.

6. UK DEP'T OF ENERGY AND CLIMATE CHANGE, GUIDANCE ON DISPUTES OVER THIRD PARTY ACCESS TO UPSTREAM OIL AND GAS INFRASTRUCTURE para. 9 (July 2013) [hereinafter DECC].

7. *See id*. at para. 45 ("The Government has sought to avoid the unnecessary proliferation of pipelines and other infrastructure. Access to existing infrastructure on fair and reasonable terms is therefore important for third parties.").

8. *See, e.g.*, CLAUDE DUVAL ET AL., INT'L PETROLEUM EXPLORATION AND EXPLOITATION AGREEMENTS: LEGAL, ECONOMIC & POLICY ASPECTS 69–70 (Barrows Co. 2d. ed. 2009) (discussing this concept in the context of a production sharing contract).

most access systems represent compromises between the ideals embodied by these two extremes. Furthermore, different access rules may apply to different types of infrastructure. This article examines access to third party infrastructure by analyzing the regimes governing access to platforms (including related processing and handling equipment) and pipelines in the United States sector of the Gulf of Mexico and the United Kingdom and Norwegian sectors of the North Sea.

A detailed analysis of each system follows. To provide a general summary, access on the Norwegian Continental Shelf and United Kingdom Continental Shelf is either "open" or negotiated, but delimited by a "backstop" appeals process to a governmental entity with the authority, if rarely used, to force access.[9] This system is analogous to access in the United States portion of the Gulf of Mexico, at least with respect to pipeline access.[10] In practice, however, open access rules in the Gulf of Mexico and the corresponding governmental appeals process is poorly defined and rarely exercised. Furthermore, while purported standards for access exist, such as the American Association of Professional Landmen's model forms of Production Handling Agreement,[11] those forms lack the wide industry acceptance of, for example, the Oil & Gas U.K.'s "Infrastructure Code of Practice."[12] Thus, the United States can be seen to employ more of a "negotiated access" system, while the United Kingdom and Norway can be seen as having more elements of "open" access or "negotiated" access with resort to government to determine disputes.

These rules are covered in greater detail in the articles that follow, but are summarized in the following chart.

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9. The United Kingdom committed their access system to law through the Energy Act of 2011, § 82, *et seq*.; Norway enacted a similar access framework through the Petroleum Act of 1996 §§ 4-8 and 4-9.

10. *See, e.g.*, Open and Nondiscriminatory Access to Oil and Gas Pipelines Under the Outer Continental Shelf Lands Act, 30 C.F.R. §§ 291.1–291.115 (2015) (providing a legal structure to ensure open and non-discriminatory access to pipelines).

11. These forms are available from the OCS Advisory Board in both deepwater and shelf versions. *See Documents and Resources,* OUTER CONT'L SHELF ADVISORY BD., https://ocsadvisoryboard.org/documents [perma.cc/BQ84-TDTY] (last visited Dec. 24, 2015).

12. *See generally* OGUK, *supra*, note 4.

Issue	United Kingdom	United States	Norway
Access system (pipe)	Negotiated	Regulated	Regulated
Access method (platform/other)	Negotiated—with right to appeal	Negotiated	Negotiated—duty to negotiate with right to appeal
Standardized T&Cs	In part	In part — AAPL PHA	Yes
Information (pipe)	Open	Open	Open
Information (other)	Open	Closed	Closed
Can government compel access?	Yes	In part—OCSLA open-access regulations on pipe	Yes
Can owners be compelled to expand facilities?	Yes	In part—OCSLA open-access regulations on pipe	Yes
Governmental policy to delay decommissioning?	Yes	No	Yes