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5.7 Why Regulations are Necessary

While matters of fundamental principle will typically be settled in a law and be authorized by the legislature, some rules need to be made that build upon these principles and can be periodically adjusted, without having to go through the normally long process of adopting a new law. This is the basis for the adoption of secondary rules, called regulations.

Regulations complement laws and contracts, filling in the details essential to their implementation. Typically, the legislation should authorize the competent authority to make regulations from time to time, providing the detail and procedures by which to implement the policy objectives for the EI sector and by reference to specific enabling provisions of the legislation. Regulations are subsidiary instruments of the EI sector legislation and should never be inconsistent with it.

Regulations should focus primarily on technical and operational matters (such as licensing procedures, contract area, reports on operations, and operational standards) but may also include fiscal elements (such as royalty definitions, surface rental, fees, and fines), cost and volume audits, and/or social and environmental requirements. In some cases, regulations may even specify the competent authority or authorities in the EI sector.[1] In the area of local content, the general principles can be expected to be set out in a basic law but the detail is better suited to regulations, involving specific mechanisms to achieve the law's general objectives. The Mozambique Petroleum Law 2014 and the regulations it envisages are an illustration of this.

A failure to understand the different roles of primary and secondary legislation means that matters of detail may be dealt with in the main law – whether petroleum, mining or in some countries, like Kazakhstan, in both. As knowledge of the EI sector grows, there will be pressure to amend the rules accordingly. If all matters, including essentially technical ones, are covered in a comprehensive law, the tendency will be to require amendments to the primary law. *It will quickly become an unwieldy, complicated instrument, largely impenetrable to investors and citizens alike.* A response to this problem is to issue guidance notes as aids to interpretation.

[1] Generally, however, competent authorities are detailed in the relevant legislation.

In the early stages of EI sector development, regulations may focus on main principles rather than detailed rules, leaving details to be elaborated at a later date based on growing EI sector experience and understanding. There are, however, a number of critical provisions related to resource management which should be recognized at the outset, including the right to receive all relevant information, the right to inspect, and the right to issue more specific rules as the EI sector develops.

A general trend has been for regulation to become more performance based as opposed to prescriptive in character. The latter approach is reliant on the application of a rigid framework where step-by-step compliance is required and inspections and audits are common. The former sets outcomes to be achieved, and is more flexible about how the company meets the outcomes which the government is seeking. In the EI sector such an approach is becoming much more common. It is standard in environmental practice. It does mean that government needs to be clear what outcomes it is seeking and how it will assess and monitor the companies. At its best, it can encourage companies to innovate, and lower the cost of reaching specific outcomes by applying new technologies which improve performance.

Regulations in the EI sector typically fall into two major categories: (1) resource management and (2) health, safety and environment matters.

5.7.1 Resource Management

Regulations directed at resource management are now common practice and are vital to effective EI sector oversight and control. This is an area in which *good practice* may not be a sufficiently high standard to recommend, irrespective of the context. Rather, the best available practice may well be essential. These regulations generally focus on the following: (1) regular and comprehensive reporting; (2) transfer of all significant data, analyses, and samples obtained in operations; and (3) consultation, consent, and approval requirements at critical stages of operations.

Typically, requirements are numerous; they include reporting and, where appropriate, consent or approval by the governmental authorities at each of the following junctures in the implementation of the EI Value Chain: (1) reconnaissance; (2) exploration work program implementation; (3) drilling; (4) discovery; (5) appraisal; (6) commerciality; (7) development plan and any revisions thereto; (8) reservoir management and production; (9) late field or mine life plans; and (10) decommissioning plans.

Beyond their immediate relevance in ensuring adherence to 'good oil field practice,' these regulations can be expected to provide vital inputs to broader policy decisions on licensing, the pace of sector development, state participation, social and environmental safeguards, and macroeconomic planning.

5.7.2 Health, Safety, and Environment (HSE) Requirements

Regulations dealing with social and environmental concerns have become critically important in the management of the EI sector and are dealt with in more detail in **Chapter 9.**

However, at the basic level, there exists a well-developed international practice on HSE standards.[2] These standards are reflected in state legislation or regulations and are available for adoption by newcomers to the EI sector of a particular state. As the EI sector develops, HSE regulations tend to become more detailed and highly prescriptive.

The current trend, however, is to move away from overly detailed requirements and to develop 'goal-setting' regulations. Goal-setting regulations are normally backed up by non-mandatory guidance notes.[3] The regulations set out the objectives that must be achieved but allow flexibility in the choice of methods or equipment that may be used by companies to meet their obligations. Instead of putting all the burden on the regulator to decide *ex ante* what would count as safe and what would not, increasing responsibility is put on the company to convince the regulator that their plans are reasonable and responsible.

This goal-setting approach is also sometimes referred to as the 'internal control principle.' The perceived advantages of the approach are: (1) it avoids the problems which must inevitably arise when prescriptive regulations become outdated as a result of rapidly changing and increasingly complex operating conditions and procedures; and (2) it puts responsibility squarely where action can be taken: at the company or operator level[4].

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[2] See for example, the International Organization for Standardization (ISO) (2004). *Standard 14001 on Environmental Management Systems.*

[3] Miller, K. (1991). *Piper Alpha and the Cullen Report.* Industrial Law Journal, Vol. 20, Issue 3, pp. 176-187.

[4] 'Goal-setting' regulations or the 'internal control principle' were developed in the UK and Norway in response to a string of high profile offshore oil drilling accidents. This approach has been recommended recently as one of several proposed regulatory reform responses to the 2010 Macondo well disaster in the Gulf of Mexico.