

# CHAPTER 5 – [www.eisourcebook.org](http://www.eisourcebook.org)

## 5.11 Summary

- **The first chevron in the EI Value Chain** This contains two key elements which shape the subject matter of the Chapter: property rights and contract. In almost all countries extractive resources are owned by the state and exploration and development of those resources is carried out under contract or licence by corporate entities, usually foreign ones, often with the state as a partner. Decisions on the award of rights follow from the kind of property rights and contract/licence regime they establish. Together with the fiscal terms, discussed in **Chapter 7** below, they establish what we may call a *first pillar of governance* for the extractives sector. It plays a crucial role in conferring legitimacy on the terms and conditions on which investments are made. If flawed, the long-term stability of these arrangements is unlikely to prove enduring;
- *Finding #1: Knowledge of the fundamentals of extractive industry legal and regulatory frameworks is readily available.* Supply is abundant. Much of it has been assembled in the *EI Source Book*. Understanding the form and content of basic oil, gas and mining laws, contracts and licences, regulations and methods of award, is facilitated by the large number of well-established model forms available to governments, legislatures and civil society in countries with extractives;
- *Finding #2: Application of this knowledge is difficult because of four distinct sources of dynamism:*
  - o Firstly, and most obviously, *every country context is unique*, containing specific features of a social, cultural, political, geological and economic nature that require some adaptation of this body of knowledge before it can become operational. As a result, there can be no such thing as a ‘model’ for a government to follow, lifted from another country context. However, this Chapter shows that there are different ways of combining established legal forms and instruments. The question for the country becomes: *what is the right combination of established instruments for our particular context at this time?*;
  - o Secondly, *legacy matters*. Only in very rare cases will an extractives policy be developed from a ‘blank slate’. For oil and mining in particular (rather than gas), it will have to absorb or build upon a legacy of policy, laws and contracts, usually developed when less knowledge was available and in

less propitious circumstances. In East Africa, for example, the legislation developed when there was little oil or gas discovered has been found to be entirely inadequate to addressing the complexities of hydrocarbon production from very large discoveries. The question becomes: *given this living legacy, how do new proposals manage such constraints and limit their impact?*;

- o Thirdly, *adaptation will be required* even after a new, cutting-edge regime is in place. As knowledge of the links between the extractives and wider economic and social transformation grow, the blend of different laws, contracts, other instruments, as well as some of their contents, has to be modified to reflect this. A failure to do so carries the risk that the overall regime will lose its legitimacy and long-term credibility. Currently, local content, change of control or transfer of interests, and infrastructure linkages, are areas where established approaches are being modified to better achieve development goals. Are formal mechanisms in place to allow future administrations to make adaptations smoothly and quickly, and is the capacity there to achieve this?; and

- o Finally, looking ahead, any choice made with respect to a combination of legal and regulatory instruments will need to be adjusted as knowledge grows and capacity increases. The initial choice has to be made with this flexibility in mind, or to include ways of adaptation to a variety of future circumstances. *What mechanisms can we put in place to allow for flexibility without creating uncertainty for future investment flows?*

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- **Finding #3:** *Policies are becoming increasingly differentiated among the segments of the extractives sector, recognizing the distinct challenges in each segment. This is evident in the use of Gas Policies or Master Plans, greater appreciation of the different approaches to award of rights that are common in the mining and hydrocarbons industries, and the need to provide over-arching justifications for development policies within the extractives sector. An element that affects the legal and regulatory framework in all extractives sectors is the need to sharpen instruments aimed at securing benefits from wider developmental impacts on their economies, such as local content. Publication of policy documents online as in the *Source Book* can accelerate this process.*

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- **Contract Terms** Countries have progressively better defined the nature of subsoil rights granted and the scope of each stage of the entire upstream process, especially in hydrocarbons. The aim has been to facilitate the

administration of subsoil rights, to limit interpretation problems and possible areas of dispute, and also to integrate the experience the countries have accumulated from implementing previous licences or contracts. The increasing transparency of contracts in oil, gas and mining sectors is probably contributing to this process of improvement in the detail of contract design.

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