

# Review of the role of regulators in Extractives Industry and available legislation

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# Presentation outline

- Learning outcomes
- Introduction
- Key Definitions
- The role of regulators
- Challenges of regulators
- Available legislation in the Extractives Industry
  - Regulation at the International perspective
  - Regulation in the Domestic/National perspective

## Learning outcomes

- Understanding the role of regulators in Monitoring and Evaluation of the Extractives industry
- Understanding the general principles and law regulating the extractives industry
- Understanding the sources of the law/criteria for monitoring and evaluating the Extractives industry

## Introduction

### Definition

Extractive industries defined as;

- Any process that involves the extraction of non-renewable resources. The extractive industry consists of any operations that remove oil, gas, metals, minerals and aggregates from the earth and/or sea. *(source AFROSAI and eiti.org.)*



## Why regulate EI?

- Extractives are leading drivers of economic growth around the world
- Source of income and employment.
- Natural resources are in most cases intended for the benefit of the general public.
- Have significant impact on the social, economic and environmental aspects.
- Most Extractive resources non-renewable so duty to exploit them to provide lasting benefit to society.
- Extraction of natural resources triggers geopolitical aspects of interstate interactions which need regulation.



- Likely source of conflict and human rights abuse.
- Illicit cash financial flows
- There is a growing role for minerals in the low carbon future, renewed interest in minerals calls for renewed re-evaluation of regulatory mechanisms .



In China, there was a mining accident that resulted in

**1,549**

deaths of Chinese miners on April 26, 1942.



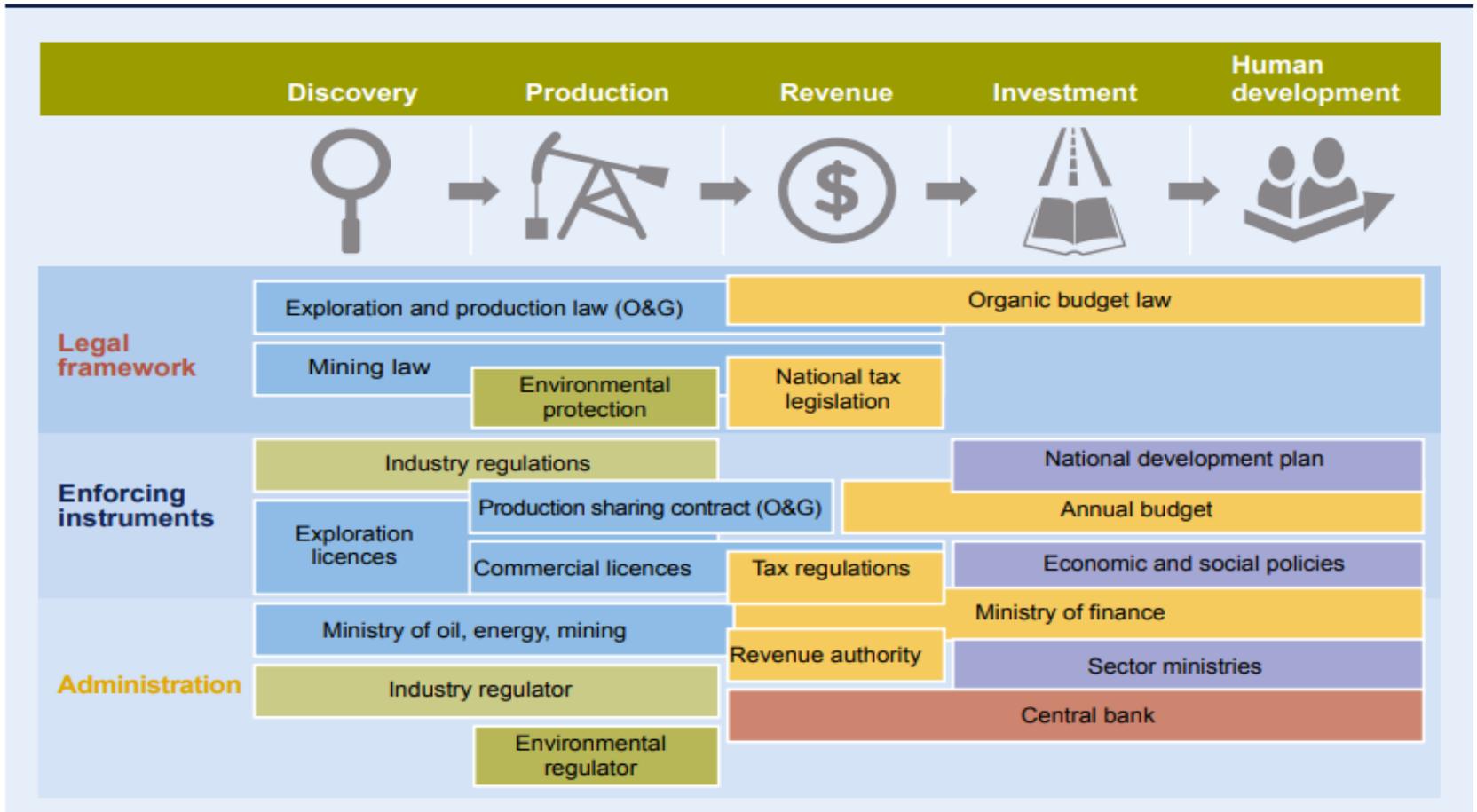
# The role of regulators

## Who are regulators?

Regulatory arrangements differ from one country to another depending on the policy and legal framework adopted in the EI of a given country but may include;

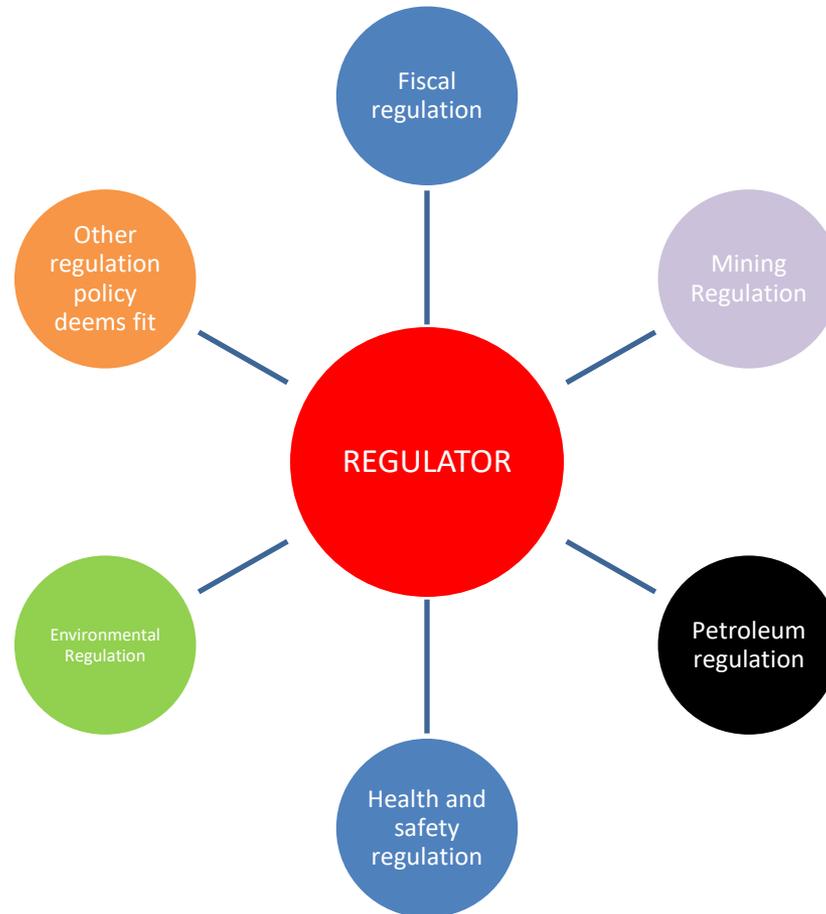
- Independent authorities
- Ministries
- National petroleum authorities
- National mining authorities
- Environmental Regulators
- Tax Authorities

# The regulatory framework: a typical structure



Source: OPM (2013). DFID PEAKS Topic Guide: Extractive Industries, Development, and the Role of Donors. Oxford: Oxford Policy Management.

# Areas of regulation in the Extractives Industry



## Role of Environmental Regulator

- Monitoring, supervising and coordinating all activities relating to the environment.
- Review and approval Social and Environmental impact assessments
- Review and approval of Environmental Monitoring Plan (EMP)- extractors under obligations to conduct self-monitoring after licencing
- Review and enforcement of Environmental Restoration plans- There are mitigation measures included in EIAs, in restoration it could include reinstatement, vegetation, fencing off shafts and excavation sites
- Compliance and enforcement of the existing environmental laws and regulations.
  - Waste management regulations
  - Air quality regulations
  - Discharge of affluent water regulations
  - Environmental audit regulations
  - Noise control standards
  - Protection of river, wetlands and lakes regulations
  - Oil spill prevention and preparedness
  - Use of harmful chemicals

## Role of Mining and petroleum Regulator

- Monitor and regulate upstream, midstream operations and downstream petroleum operations
- enforce petroleum and mining laws
- Monitor contracts and enforcement of contract working obligations (depending on the fiscal regime)
- Monitor and approve costs in case of PSAs
- Monitor and regulate petroleum activities including reserve estimation and measurement of the produced oil and gas;
- Review and approve any proposed exploration activity contained in the annual work programme, appraisal programme and production forecasts submitted by a licensee;
- Review and approve budgets submitted by a licensee (in cases of PSA)
- Assess field development plans
- Enforce local content obligations
- Licensing and enforcement of licence obligations
- Technical supervision and enforcement of working obligations

- Monitoring operations of licences
- Enforcement of social, environment, health and safety obligations
- Revenue collection and revenue management
- Production and metering...regulator should know the production volumes and quality because this is the basis of calculation of royalties taxes and other fees failure to do this could lead to revenue loss
- In minerals there is need for verification of production and corroboration of this production with customs at export the same applies to metering for oil and gas resources metering also assists in calculation of pass through tariffs

## Challenges of regulators

### Regulatory capture

- Form of failure by the regulator to execute
- Regulator acting in the interests of the regulated
- Loss of independence in regulation
- **Causes of Regulatory capture**
  - Limited funding
  - Political influence

### Limitations of capacity

- Technical and financial

## Available legislation in the Extractives Industry

What are the rules of the game in extraction of Minerals, Oil and Gas

- International law
- Domestic legislation
- Common law
- Judicial decisions
- Scholarly publication



# Regulation at the International perspective

## International Law

- Law governing inter-state relations and provides general framework for extractives industry

## Sources of International Law

- International convention and treaties
  - International custom
  - General principles of Law
  - Judicial decisions and teachings of highly qualified publicists (Trial smelter)
  - Soft law
- 
- Conventions and treaties may be either bilateral and multilateral
  - Binding on parties that signed or assented to them
  - Principle of “***Pacta sunt Servanda***”
  - Over 3000 treaties applicable to the extractives industry

## Why International Law?

International extraction of oil and gas and minerals poses several legal questions that require development of legal instruments and institutions to regulate them

1. Property and territorial rights
2. Allocation of exploitation rights
3. Responsibility for Conservation and sustainable use
4. Liability for extra-territorial harm
5. Human rights, Labour rights, Economic rights
6. Social equity

The following principles have developed by international law to address these legal questions.

- Principle of permanent sovereignty over resources
  - Principle 21 Stockholm Declaration
  - Principle 2 of the Rio Declaration (state responsibility not to cause damage)
- Trans-boundary extractive resources
  - *Resources outside the exclusive jurisdiction of one state (oil and gas reservoirs)*
  - *Unitisation agreements*
  - *Marine time delimitation...offshore oil and gas resources (who controls what in the sea?)*
  - *Art. 3 of the 1974 charter of Economic rights and duties of states (The duty to cooperate, consult for optimum use without causing damage to legitimate interests of parties)*
- Global commons (Res communis) and *Common heritage for mankind*
  - *Who owns resources of the outer space, Antarctica and high seas , deep sea bed?*
  - *Resources beyond national jurisdiction- owned by all (open access)*
  - *How tenable is the regime of open access with the renewed desire and competition for resources? (Tragedy of the commons(Hardin))*

- Freedom of transit
  - *cross-border oil and gas pipelines and other modes of transport in international extractives*
  - *Do countries have rights to access the sea for export of oil and gas or minerals?*

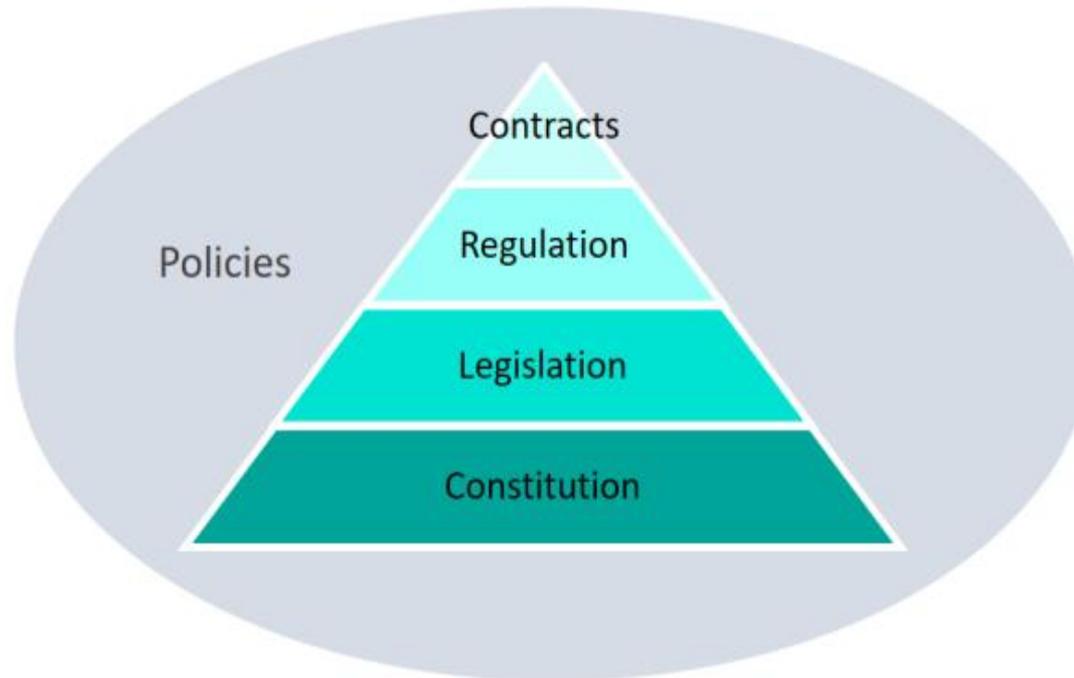
## **Other principles**

- Sustainable development, integration and interdependence
- Inter-generational and intra-generational equity
- Responsibility for trans-boundary harm
- Transparency, public participation and access to information and remedies
- Cooperation, and common but differentiated responsibilities
- Precaution
- Prevention
- “Polluter Pays Principle”
- Access and benefit sharing regarding natural resources
- Common heritage and common concern of humankind
- Good governance

## Major treaties

- Stockholm declaration 1972
- Rio Declaration on Environment And Development 1992
- United Nations Convention on the Law Of the Sea (UNCLOS)
- Convention on Biological Diversity (CBD) 1993
- Minamata convention on mercury 2013
- Ramsar Convention on Wetlands, 1976

# Regulation in the Domestic/National perspective



Source: AFROSAI-E (2019) Guideline: Audit considerations for Extractives Industries

- Policies define a core set of principles and goals that will support the development of all other laws
- Laws constitute the Constitution as the **Grundnorm** and Principle Legislation/Statutes.
- Subsidiary legislation refers to legislation made under delegated powers granted under principle legislation
- Agreements-Binding arrangements for the purpose of petroleum activities entered into by Government and another person in accordance with this Law

## **A well-designed Oil and Gas Policy and legal framework should provide for;**

- Rules for how state institutions like regulators are structured.
- How companies acquire and manage licenses.
- The fiscal terms governing payments between companies and the state;
- Environmental management.
- Relationships between extractive projects and neighbouring communities.
- The powers of public officials active in the sector.
- The public information disclosure and accountability.
- Revenue management

**Domestic laws in the Extractives Industry include the following;**

## **Environmental laws**

### **Statutes**

Environmental protection Acts

Water acts

Wild life acts

Forestry acts

Land Acts

### **Regulations**

- Waste management regulations
- Air quality regulations
- Discharge of affluent water regulations
- Environmental audit regulations
- Noise control standards
- Protection of river, wetlands and lakes regulations
- Oil spill prevention and preparedness

### **Standards**

- EIA standards

## **Mining laws**

- Mining statutes
- Mining regulations
- Mining standards

## **Oil and Gas laws**

- Upstream statutes
- Midstream statutes
- Downstream statutes
- Petroleum regulations
- Water abstraction regulations

## **Revenue management laws**

- Income tax statutes

## **Social, economic and human right laws**

- Land acquisition laws

## **Main provisions in the above laws include;**

- Principle of sustainable development
- Polluter pays
- Right to a clean and healthy environment
- Ownership of resources
- Minimum working obligations
- sharing and equity
- Public trust doctrine
- Property regimes
- Social licences
- Local content
- Collaborative natural resources
- Transparency and accountability...audit etc.....
- Fiscal rules and taxation

## **Emerging legal aspects in the Extractives**

- Global transition to low carbon economies, circular economy
- Commitments under the Paris Agreements

**END**