Chapter 4

Deconstructing Regulatory Management

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Chapter IV
Deconstructing Regulatory Management

All countries have their own unique regulatory system to make laws, regulations, and rules. Increasingly, countries are introducing regulatory management policies and strengthening their institutions to make their regulatory systems more effective. As part of the project we explored three questions:

1. What are the elements that make up an RMS?
2. Which elements add most value?
3. How does the use of elements change with levels of economic development?

Turning to the first question, a high-performing or requisite regulatory system needs to have a range of the elements of the classic policy cycle, together with supporting practices and institutions (see **Figure 2.3** in Chapter II). These policy components are in dark blue at the centre, practices in brown around the centre, institutions at the bottom in grey, and the overall regulatory strategy at the top in light blue.

The *policy cycle* for regulatory development includes:

- 'Big Policy' development – which focuses on what works best in terms of intervention options and whether regulation is indeed the best option,
- 'Little Policy' development – which focuses on what powers and functions are needed to enable the regulation to be implemented,
- 'Legal Policy' development – which focuses on nesting the policy into the broader corpus of law in ways that are consistent and legitimate,
- Decision-making support – which focuses on supporting decision-makers to assess what is politically sustainable,
- Change implementation – which focuses on change management required to get the systems and capabilities in place to support the new regulation.

These elements of the classic regulatory policy cycle need to be augmented by *supporting practices*:

- Consultation
- Communication and engagement
- Learning
- Accountability and transparency.

To be sustained, policies and practices in turn require the support of *key institutions*:

- A coordinating body that has the capability and mandate to oversee and develop the regulatory system and report on its performance,
- Other institutions that ensure the quality of the RMS elements such as legal drafting and consistency with other domestic laws and international obligations,
- Training providers who build the capabilities required.

4.1. Element by Element Review

'Big Policy' development

The focus of big policy development is to address the question 'What works?' ('Big' policy can be distinguished from the 'little' or operational policy required to make the 'big policy' effective.) The key functionality required for 'big policy' is intervention analysis and Regulatory Impact Analysis (RIA), which is a common tool used in a range of countries. The capability needed is the ability to consider regulation against other policy interventions to assess the most effective means of achieving the policy objective.

Common questions raised in this phase include:

- Is the problem clearly defined and is intervention necessary?
- What are the alternatives to regulation?
- Is regulation the most effective form of intervention?
- How are cross-border issues – such as compliance with the General Agreement on Tariffs and Trade (GATT), General Agreement on Trade in Services (GATS), and Free Trade Area (FTA) provisions on goods and trade in services – addressed?
- Do the benefits of regulation justify the costs?

'Little Policy' development

Little policy (or operational policy) is focused on the powers and functions needed to make the 'big policy' effective. The key functionality is a mixture of skills including process design, legal analysis, and organisational analysis. There is no common tool used across countries but in some cases some of these issues are covered by RIA systems and their accompanying documentation.

Key questions addressed in this phase include:

- What functions are needed?
- What legal powers are required to deliver those functions?
- What institution should have those powers and deliver those functions?
- How to organise those functions, e.g. what is an appropriate allocation of functions and powers to the private sector and within the public sector and to which level (or levels) of government?
- Is statutory independence required for the decision-makers or the institution making the decision?
- What checks and balances are required?
- How should any new organisations required be designed?
- Do the regulators have the mandate, capability, and resources required?
- How will the regime be funded?
- What accountability is required?
- When and how will the regulation be reviewed?

'Legal Policy' development

Legal policy is focused on ensuring the legitimacy of the powers and functions involved and their coherence with the rest of the legal framework. The key functionality here is legal analyses. Every country has its own institutional arrangements and there is no common tool used across countries. Key questions addressed in this phase include:

- Is there a legal basis for the regulation?
- Is this regulation consistent with superior and subsidiary law (vertical consistency) and related legislation (horizontal consistency)?
- Is the regulation clear, consistent, comprehensible, and accessible to users?

- Is there duplication and are there inconsistencies in administrative requirements?
- Is the draft compliant with international obligations?
- Is the regulatory regime proportional to the nature of the problems?

Decision-making support

Support is required for decision-makers in the executive and the legislature to handle the complexity of considering, developing, and amending regulations. The key functionality required is a combination of the little policy, financial and economic analyses, and the legal policy skills discussed above. Every country has its own unique institutional arrangements, and there is no common tool used across countries.

Change implementation

Change implementation is focused on 'what' is required for each function and 'how' to implement the change once decision-makers have decided. The key functionality required is the ability to design and execute change. Every country has developed its own unique ways of working but change management planning is a common technique. Ideally, a change implementation plan is developed as a guide.

Administration and enforcement

Administration and enforcement are focused on ensuring compliance with the regime by citizens and businesses. (Note this function includes review of individual cases for fairness in administrative procedures.) Being an effective regulator is a real craft, which requires a combination of capability, leadership, and credibility. Every country has its own institutional arrangements, and there is no common tool used across countries.

Key questions addressed in this phase include:

- What specific capabilities and what resources are required to support them?
- What is the regulatory compliance strategy that is required?
- What are the regulatory risks and the risk management strategies required?

- What procedures exist to review the procedural fairness and legality of regulatory decision-making?
- How should independence in decision-making be protected?
- How should regulators be made accountable?
- What information is required to support monitoring and review?

Monitoring and review

Monitoring and review are focused on assessing whether a regulation is working as intended. Ideally, it is based on a monitoring and review plan, required as part of the RIA. Information generated can be used to fine-tune the implementation of the regulations and provide early warning of any big or little policy issues that need to be addressed. The key functionality required is the ability to gather information so the operation of the regulation can be reviewed. According to the OECD (2010, p.50), ex post evaluation of regulation 'is a near universal weakness' across OECD countries. Key big policy questions addressed in this phase include:

- Is the regulation still *necessary*? Is there a convincing problem that the regulation seeks to address?
- Is the regulation *effective* in achieving its objectives?
- Is the regulation *efficient* by achieving the objective at lower cost than other feasible alternative options?

If the regime is necessary, efficient, and effective, there is a range of little policy and legal questions to be addressed about whether the operation of the regime could be enhanced by clarifying certain legal provisions, strengthening checks and balances, reallocating functions, improving the design and strengthening the capability of the regulator, etc.

Stock management

Stock management reviews whether regulations are working as intended. The key functionality required is the ability to review groups of regulations systematically to ensure they are effectively meeting their objectives. (It differs from monitoring in that the focus is generally on regimes, i.e. groups of regulations rather than individual regulations.) Different countries have adopted a wide range of 'regulatory stock management' tools, including the standard cost model, regulatory guillotine, red tape reduction targets, 'one-in, two-out' or 'one-in, one-out', regulatory budget, the use of review clauses, or sunset provisions. These review tools vary in their breadth (i.e. how wide the coverage is) and depth (i.e. focus on administrative costs or wider distortions).

Key questions in the review phase include:

- What are the objectives of the regulatory regime?
- Has the regulatory proposal achieved the objectives for solving or mitigating the issue?
- Who were the target audiences (i.e. regulated individuals and organisations) of the proposed regulation?
- Who were the intended beneficiaries of the proposed regulation (e.g. general public, specific groups within the public)?
- What behavioural changes in the target audience were intended to be achieved (e.g. awareness, understanding, capacity, compliance)?

(See http://www.tbs-sct.gc.ca/rtrap-parfa/pmep-pmre/pmep-pmretb-eng.asp for the Canadian advice regarding monitoring/review/evaluation.)

Part B – Supporting Practices

The discussion to date has focused on the components of the classic policy cycle. However, good policy development also includes good supporting practices, such as

- Consultation
- Communication and engagement
- Learning
- Accountability and transparency.

Consultation

Consultation can be undertaken for a number of purposes:

- to improve the overall legitimacy and consent to the proposed regime by those who are regulated;
- to improve the detailed design and operation of the regime by highlighting pressure points in administration and enforcement;
- to limit the control of the bureaucracy.

As a result, consultation can occur at multiple stages in the RMS; for example, when addressing the big policy question of what works, the little policy questions as to how the regulatory regime should operate, on how exactly should the policy be enacted in law, in the design of the change implementation stage, and in monitoring and review to see whether the regime is working.

Communication and engagement

Regulatory outcomes are co-produced in the interactions between the regulator and the regulatee. Thus, open communication and active engagement with citizens and businesses are crucial for regulatory effectiveness. Therefore, most developed countries have moved to having an online, readily searchable database of all legislation and rules open to all involved.

Learning

All regulatory changes have the nature of an experiment as it is generally uncertain how the patterns of actual behaviour will evolve over time. Thus, it is important to have the ability to learn both about whether the regulatory regime is necessary, efficient, and effective, and also to learn about how to implement and enforce the regime more effectively to improve compliance.

Accountability and transparency

Regulatory agencies use public resources and apply the coercive power of the state to its citizens and businesses. It is important, therefore, that regulatory agencies are publicly accountable for the use of those resources and the exercise of those powers.

Part C – Institutions

Policies and procedures do not exist in isolation; they need to be sustained by institutions. The diagram highlights three sorts of institutions – the ‘lead’ institution, coordinating institutions, and training providers.

The lead institution is a coordinating body that has the capability and mandate to oversee and develop the regulatory system and report on its performance. The OECD (2012) listed the roles of the ‘standing oversight body’ to include

- improving regulatory policy,

- quality control of regulatory assessments,
- coordinating ex post assessment,
- providing training and guidance on regulatory assessment and improving regulatory performance, and
- improving the application of regulatory policy.

In decentralised systems, it is important that the lead institution also assumes a role in developing the regulatory management capability of subnational governments to ensure consistency.

Other institutions undertake specialised roles to ensure the quality of regulation, such as an institution that specialises in legal drafting to ensure consistency between statutes and between primary statutes and secondary rules. A key requirement for regulatory coherence is that an institution takes responsibility for ensuring consistency between national and subnational regulations and between national law and international obligations. Training providers are also required to build the capabilities required.

4.2. Assessing which RMS Elements Added Most Value

We turn to our assessment of the value each element added based on the survey of country experts. Our aim was to isolate patterns in the impact of the RMS elements used by countries in our research sample.[14]

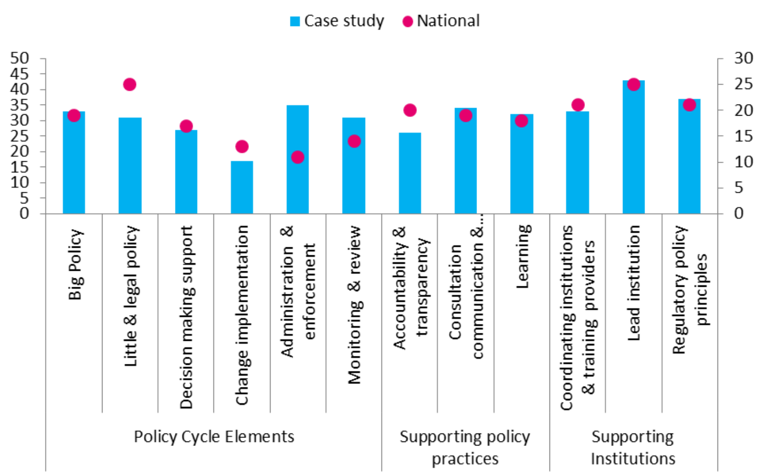
To address the question of which elements added the most value, we used the judgment of the country experts. We asked the researchers once they had completed their country and case studies to judge the significance of the individual elements in influencing the overall outcome of the case studies and the effectiveness of the overall national system. The answers were based on a four-point Likert scale – very significant, significant, not very significant, no significance. The study found that elements were consistently ranked across countries regardless of whether the focus was on the country system studies, successful case studies, or unsuccessful case studies. In summary, the analysis of RMS elements suggested:

[14] The material in this section and the introductory section to Chapter VI drew on the work of Killian Destremau, Economist at NZIER, who contributed extensively to the analysis underpinning this project. His input and insight have been very valuable.

- The key elements were the lead institution, policy instruments (such as RIA and legal support), and regulatory policy principles.
- The most important single element was the ability of the lead institution to achieve accountability for regulatory quality, particularly where a singularity of purpose around regulation was lacking (this role depends upon political commitment and bureaucratic capability).
- RMS had a strong influence on policy design (little and big) but a weaker influence on regulatory policy execution (change management and administration and enforcement).
- The importance of the wider public sector management context (including the role of the judiciary).

Figure 4.1 shows elements that were assessed as significant or very significant in adding value to the operation of the national RMS (shown with dots) or the individual case studies of regulatory reform (shown in bars). The consistency of overall rankings of elements in the case studies and for the national system as a whole lends support to the robustness of the rankings of the elements.

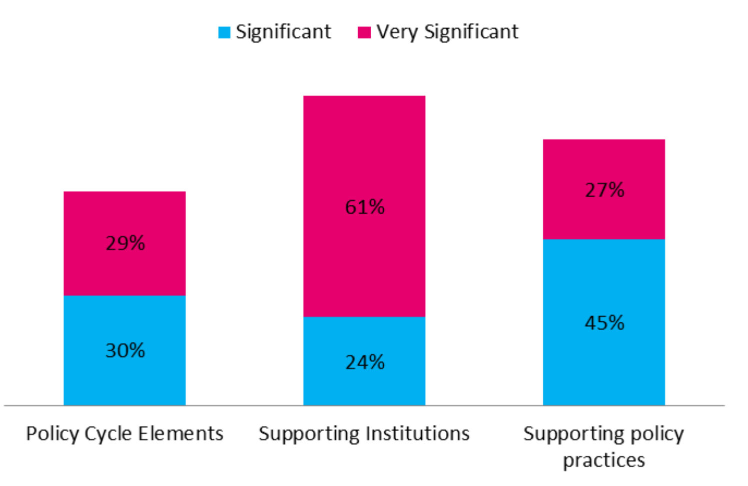
Figure 4.1: National Elements and Case Study Rankings



Source: NZIER.

In the introduction to this chapter, we discussed how an RMS is made up of three types of individual policy elements – the range of the elements that combine in the policy cycle, together with supporting practices and institutions. **Figure 4.2** shows the most significant elements grouped by type. The most valuable regulatory management instruments were lead institutions and regulatory policy principles, followed by coordinating institutions (those three regulatory management instruments combined making the RMS group supporting institutions). Consultation in supporting policy practices and administration and enforcement in policy cycle elements were also important, emphasising the need for an understanding of the implementation challenges, both from the policymakers' point of view and in light of the regulatee's input**.**

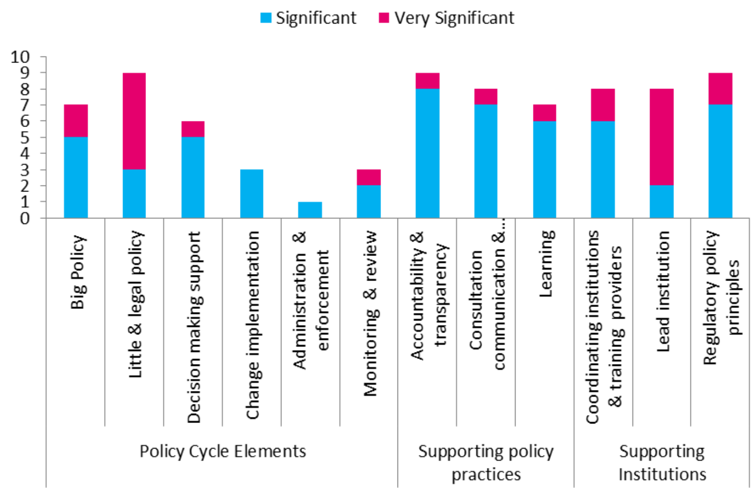
Figure 4.2: Grouping Significant Elements by Type



Source: NZIER.

In the rest of this section, we report on the ranking of elements for the national system and for the different types of case studies. **Figure 4.3** shows the elements that were either significant or very significant in adding value to the national regulatory process. Country experts ranked the 'lead institution' and 'little and legal policies' as the two very significant elements of the RMS. The second group of elements that were ranked significant included 'Big policy', 'Accountability', 'Transparency', and 'Regulatory policy principles.' Finally, there was a third group of elements that were not ranked highly; these included 'Change Implementation' and 'Monitoring and Review.'

Figure 4.3 National System Elements Rankings



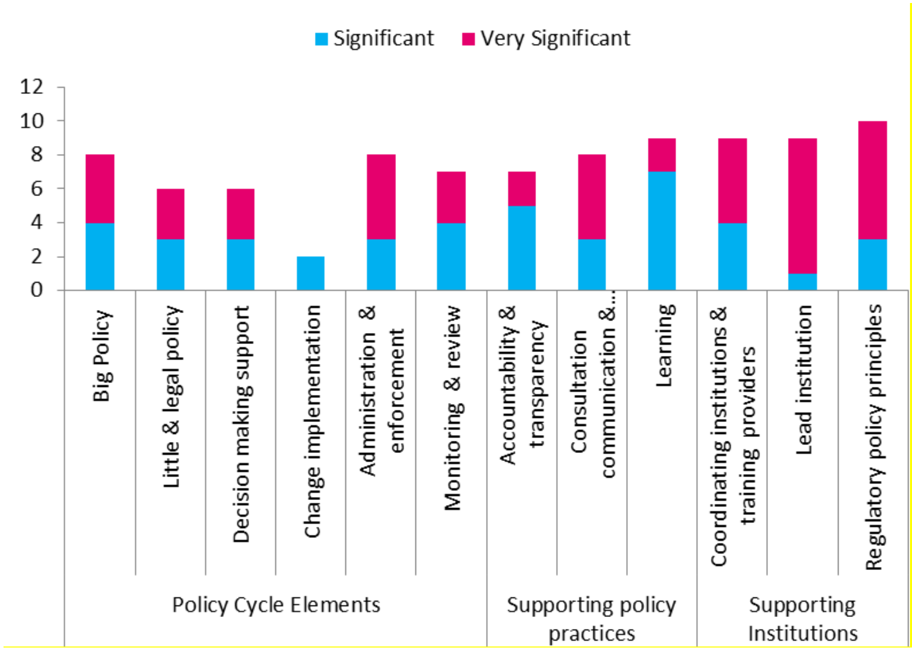
Source: NZIER.

Country academics and practitioners were also asked to assess which elements of the RMSs had the most impact on the outcome of the case studies of successful and unsuccessful regulatory reforms (see **Figure 4.4** and **Figure 4.5,** respectively).

The country experts predominantly attributed the value of supporting institutions in case studies of successful reforms. Supporting policy practices provided a strong role, while policy cycle elements played an important but relatively less valuable role in the success of reforms.

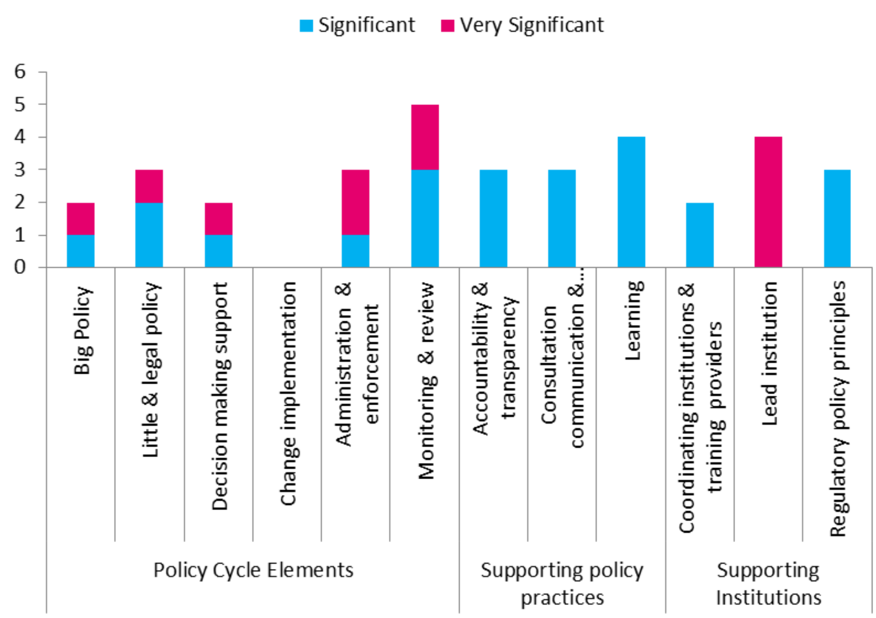
Looking at case studies of unsuccessful regulatory reforms, the results were broadly similar. Researchers were asked to make a nuanced judgment about which elements could have made a difference in averting the failure of the regulatory reform. Supporting institutions were again important; policy cycle elements were, however, more important than policy practices. The lead institution was again the most important element. Monitoring and review and administration and enforcement and, hence, policy cycle elements were more important than supporting policy practices. Monitoring and review provide instruments that allow failures to be addressed.

Figure 4.4: Elements Significant in 'Success' Case Studies



Source: NZIER.

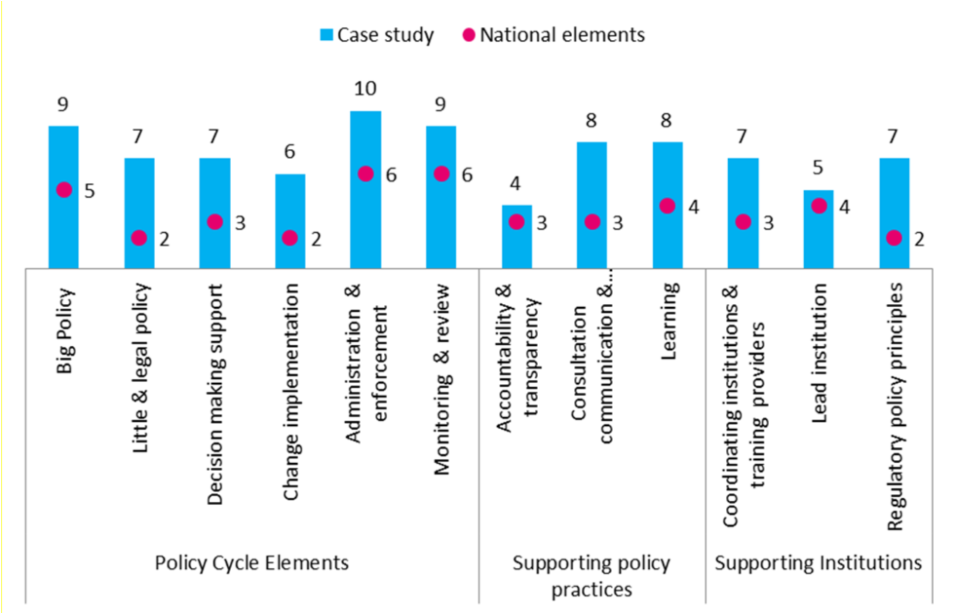
Figure 4.5: Elements Significant for Unsuccessful Reforms



Source: NZIER.

Furthermore, researchers were also asked to identify where the RMS needs strengthening (**Figure 4.6**). The main elements that could be made more effective were administration and enforcement as well as monitoring and review. This result is similar to the responses of the case studies of unsuccessful reforms.

Figure 4.6: Requisite System – Which Elements Would Have Made a Difference?



Source: NZIER.

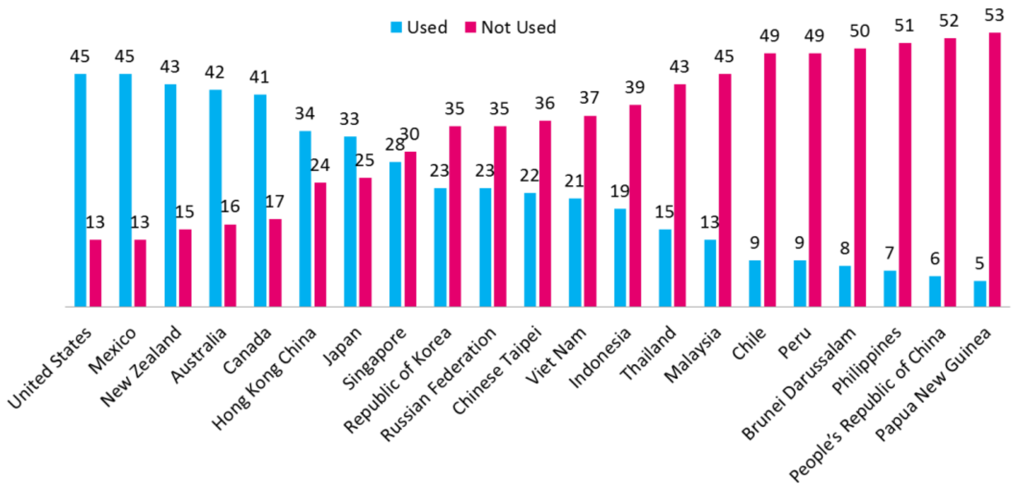
One of the subsidiary research questions for the study was how the use of RMS elements changes with the level of economic development. The Asia-Pacific Economic Cooperation (APEC) baseline study contained a useful source of data as APEC includes a range of economies with widely varying levels of economic development. The main overall finding from the baseline study is that there is a great disparity in the use of RMS instruments by APEC economies as shown in **Figure 4.7.**

There is a clear distinction between higher-income OECD and lower-income non-OECD economies: OECD countries have introduced a greater number of formal practices.[15]

[15] Chile is a recent member of OECD and still shows relatively lower use of formal RMS instruments than other OECD countries.

Figure 4.7: Use of RMS Instruments by APEC Economies

Economies ranked by count of RMS instruments used.



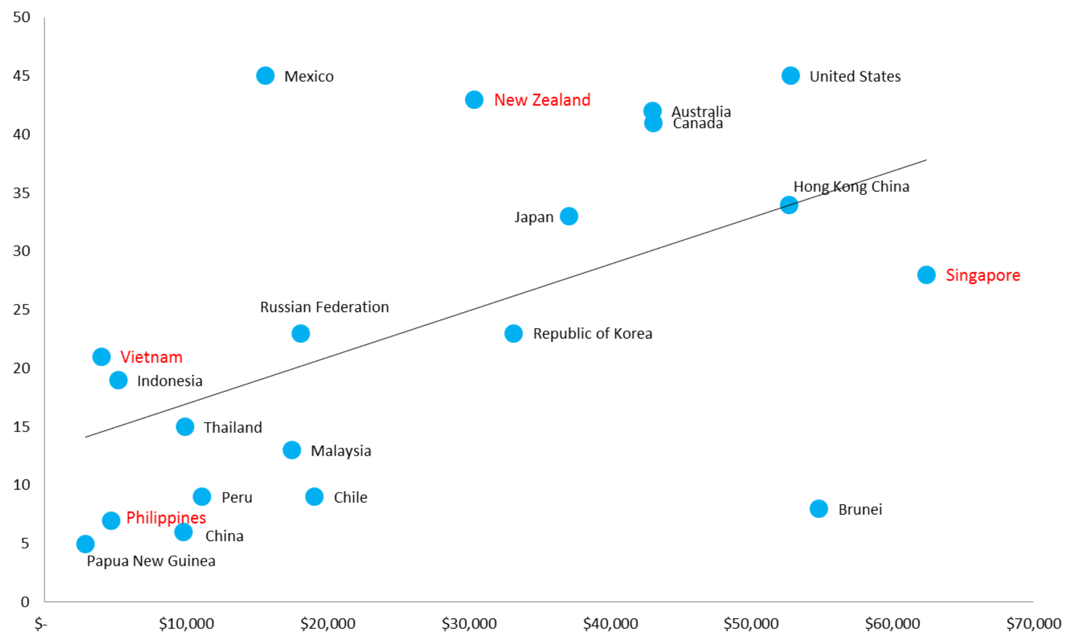
APEC = Asia-Pacific Economic Cooperation; RMS = Regulatory Management System.
Source*:* APEC (2011).

OECD is also known as the 'rich countries' club' because the membership is based among other dimensions, on the level of economic development. **Figure 4.8** shows that economic development and the generic use of RMS instruments are strongly correlated. Mexico (OECD) and Brunei Darussalam (non-OECD) stand out as outliers. The use of formal RMS instruments is related to economic development; but within OECD and non-OECD countries, there are different mixes of RMS. For example, ***it would be a mistake to conclude there is a standard OECD approach.***

Econometric analysis by the OECD (Jacobzone et al., 2010) identified a range of discrete country strategies. One group (including the Netherlands) is focused on reducing administrative costs for the existing stock of regulations. Some countries (including New Zealand, Australia, and the United States) are more focused on the regulatory coherence of the flow of new regulations and institution capability. Other countries (such as Korea) are focused on both administrative costs of stocks and institutional capability and the flow of new regulation. Finally, there is a group of low use countries such as Sweden.

Figure 4.8: Economic Development and Use of RMS Instruments

(Horizontal: GDP per Capita (PPP), Vertical: Use of RMS instruments)



RMS = Regulatory Management System.
Source*:* APEC, Central Intelligence Agency.

Which RMS elements are used in APEC economies? **Table 4.1** summarises the strength of the use of RMS instruments by APEC members by breaking down the use with respect to the three main groups of RMS instruments (coordination, RIA, and consultation).

We use three indicators to describe the use of RMS instruments:

- **Strong**: More than two-thirds of available RMS are used.
- **Moderate**: Between one-third and two-thirds of available RMS are used.
- **Weak**: less than one-third of available RMS are used.

The middle black line separates OECD and non-OECD countries (with the exception of Hong Kong, China). With regard to the individual groups of RMS instruments, we observe the following:

- The use of coordination is relatively widespread.
- The use of RIA and consultation are more concentrated in OECD countries.

- A small number of countries have a unique mix in their use of RMSs: Mexico and Korea (weak use of consultation), Singapore (weak use of RIA), Russia (strong use of consultation but weak use of RIA).

Table 4.1: Strength of Use of RMS Instruments*

APEC economies are ranked by the number of RMS instruments used.

	Internal Coordination of Rulemaking Activity	Regulatory Impact Assessment	Public Consultation Mechanisms
United States	Moderate	Strong	Strong
Mexico	Strong	Strong	Weak
New Zealand	Moderate	Strong	Strong
Australia	Strong	Strong	Strong
Canada	Moderate	Strong	Strong
Hong Kong China	Moderate	Moderate	Strong
Japan	Moderate	Moderate	Moderate
Singapore	Moderate	Weak	Moderate
Republic of Korea	Moderate	Moderate	Weak
Russian Federation	Moderate	Weak	Strong
Chinese Taipei	Moderate	Moderate	Moderate
Viet Nam	Moderate	Weak	Moderate
Indonesia	Moderate	Weak	Weak
Thailand	Moderate	Weak	Weak
Malaysia	Weak	Weak	None
Chile	Weak	Weak	Weak
Peru	Weak	Weak	Weak
Brunei Darussalam	Weak	None	None
Philippines	Weak	None	Weak
People’s Republic of China	Weak	None	Weak
Papua New Guinea	Weak	None	Weak

* ‘None’ refers to the non-use of any formal instrument in that category for the specific country.
RMS = Regulatory Management System.
Source*:* APEC, NZIER.

Overall the relationship between economic development and the use of RMS tools is consistent across coordination, RIA, and consultation. Thus, although there are different country mixes of RMS elements, a clear pattern shows that use of formal RMS instruments is related to economic development, but within OECD and non-OECD countries.