

Legal Foundation of SEA

by Charles Di Leva

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In my previous experiences, as well as in my work in the World Bank, I am very much aware of the tremendous advances that the Republic of China has made in the field of environmental law and its extensive engagement as well in the development of international environmental law. So I welcome this opportunity to give a brief summary of some of the foundations and underpinnings in the legal field towards strategic environmental assessment.

As you know from previous discussions with Bank colleagues, the term "strategic environmental assessment" itself is sometimes used in other forms, such as "sectoral environmental assessment" or "programmatic environmental assessment," and I will discuss those as well with you today.

I plan to cover four topics: first, to give you a brief overview of strategic EA in terms of international legal developments; then to discuss with you strategic EA in the context of national law in the United States, in China with the new environmental impact assessment law that was adopted in 2002, and also the appropriate directives of the European Union; and then to discuss briefly with you the approach by which some multilateral development banks are also addressing and dealing with strategic environmental assessment.

So I will begin with our first slide on SEA and international law by pointing out to you that as early as 1985, the famous Brundtland Commission, the UN World Commission on Environment and Development, referred to environmental assessment in a way that would address strategic policies and plans. So the international community as long ago as 1985 had already been familiar with this particular approach.

It was also set forth more distinctly in 1991 with the Esbo Convention, which addressed the impact from transboundary activities and which was set forth by the United Nations Economic Commission for Europe. The Esbo Convention is mostly adopted and entered into force in the European context, but it stands as an important international legal instrument, being the first legal instrument to so specifically address transboundary environmental impacts.

The year after the Esbo Convention was adopted in 1992 stands as a watershed for the field of international environmental law, specifically because of the Rio Conference taking place on environment and development, as well at the Rio Conference there was the adoption of both the United Nations Convention on Biological Diversity and the United Nations Framework

Convention on Climate Change. And it's interesting to note at that meeting in Rio, which at the time was the largest gathering ever of heads of state, that the concept of strategic environmental assessment was very much part of the discussion and the adoption of these conventions.

And as you can see, Rio Principle 4 set forth that to have sustainable development would require that the development process of governments would include environmental protection as an integral part. So the concept of environment, strategizing over how to address environment and making it part of the field outside environment, namely, development as a whole, was enshrined in the Rio Principle 4. And then in Rio Principle 17, the concept was also set forth in terms of environmental impact assessment, which must be undertaken for proposed activities likely to have a significant adverse effect on the environment.

The term as used, "proposed activities," doesn't necessarily limit it to simply projects, but opens up the scope for possibly covering more than simply investment projects.

In addition, the Convention on Biological Diversity, which, as you know, now has entered into force--more than 180 governments have ratified this convention--set out very clearly that, again, environment would be integrated into relevant sectoral and cross-sectoral plans and programs. So the term "plan," which is also, we will see, found in the new Chinese law, was set out in the Convention on Biological Diversity as having to be considered with the view of biological diversity as plans and programs are being both designed and implemented. And we see this once more in the United Nations Framework Convention on Climate Change, which spells out repeatedly that governments must design policies that take into account impact on climate change. So in Article 4 of the Climate Change Convention, it is stated that policies to protect climate should be integrated with national development programs.

One other important element of international law as a whole, of course, are the rulings that come out from the International Court of Justice. In an opinion that it released in a case concerning possible pollution and harm to the Danube waterway, a case referred to as the Gabcikovo-Nagymaros case in 1999, a separate opinion by Justice Weeramantry noted the growth of environmental law as an international law concept. He stated that environmental law in its current state of development would read into treaties which may reasonably be considered to have a significant impact upon the environment the duty of environmental impact assessment.

Now, while Judge Weeramantry's opinion was not an opinion of the full court, it is the first time in an ICJ opinion that we hear this notion of environmental impact assessment really being part of customary law and being viewed in a broad concept of necessary for sustainable development.

Even more specifically in the SEA context, in 2003, in May, in Kiev, the United Nations Economic Commission for Europe also adopted text for a draft strategic environmental assessment protocol. This protocol is intended to be a companion to the 1991 Esbo Convention, which I referred to earlier. As I referred to earlier, the Esbo Convention recognized the importance of strategic environmental assessment in a transboundary context,

and 12 years later, we now see a true advance in the field of SEA in which a full protocol sets out in detail the manner in which strategic EA would be required to be implemented in the transboundary environmental context for European and other member states that would wish to adopt this particular protocol. And the manner in which it would work would require that any time a project in Europe, in the European Union, could have an impact on a member state, and that activity included a plan or a program of either a member state or the European Commission as a whole, it would be required to undergo a strategic environmental assessment if it could have a likely significant impact on the environment. So this is really a true advance in the field of strategic environmental assessment, and it is now open for adoption by EU member countries.

I'd now like to turn to consideration of SEA and the national law level, beginning with its treatment in the United States. The United States in 1969 adopted perhaps what some might refer to as the grandfather or the grandmother of environmental law, the National Environmental Policy Act. Many of you have probably heard of NEPA. This was the law which set out the requirement that environmental impact assessment would be required for any major federal action that may significantly affect the quality of the human environment.

When the U.S. Congress adopted this law, it knew that more detailed regulations would be required to implement NEPA, and it created, at roughly the same time with NEPA, the President's Council on Environmental Quality. The CEQ sits as part of the Executive Office of the President and has the authority to adopt rules and regulations for the implementation of NEPA.

The CEQ recognized that Congress required as part of NEPA that federal actions could include United States plans or programs that could affect the environment. So the CEQ Executive Order was issued defining a major federal action to include programs and rules, regulations, plans, policies or procedures, and legislative proposals.

So what are some of these types of activities that might trigger a strategic environmental assessment of a plan or a program? In these past 20 years of implementing NEPA and its application to plans and policies, it has sometimes been difficult to determine when a plan or a program requires a strategic approach. What I wanted to list for you is an example of some of the types of activities with the United States Government decided required the application of strategic environmental assessment.

One, for example, is when the President decided to issue a plan for the harvesting of timber in the Pacific Northwest in the United States. Another example is when the United States was issuing a regulation that it would issue on an annual basis for hunting migratory birds.

Another example was when the Tennessee Valley Authority was issuing a series of coal contracts, and it was decided in that case that because these would be a continuous series of actions, it made sense to look at it in a strategic sense as opposed to looking at each contract on an individual basis for what the individual impact would be.

Another example of this was when a broad permit was going to be issued for the continued dumping of wastes in the ocean harbor outside of New York City. Again, the decision was that it wasn't necessary to do an individual environmental impact assessment for each time a dump would take place, but that because the activities were so similar and would be taking place on a continuous basis, it was appropriate to do an environmental impact assessment for the program as a whole.

Another example was the decision to address subsidies for oil tankers, another case when gold mine permits were being granted in the State of Alaska. Because the permits were very similar and because they covered a large geographic area and the permits as a whole could be viewed as having a similar type of effect on river basins in Alaska, again, the decision was made to look at it strategically.

In all of these cases in the United States, the term "programmatic EIS" can be used as a substitute for the term "strategic environmental assessment" because in most of these cases what we're looking at are broad federal programs in which you bundle together a lot of similar activities rather than the very expensive approach to do an environmental impact assessment on each particular gold mine or on each particular time that you decide to dispose of waste in the New York City harbor.

So the key concept then, in the U.S., for looking at matters strategically is that the actions should be forward-looking, they should be sufficiently similar, they should be cumulative, and there should be a way for correcting future actions by looking at them simultaneously.

China, as we've mentioned and as I'm sure all of you in the classroom are very well aware, has taken the bold step of moving forward with a new national law in 2002 which should enter into force in September 2003. This law will require assessment of the environmental impacts of plans and, the term is used, "construction projects," at least in the translated copy I have. Perhaps it has been mistranslated, but this is how I understand the Chinese law to work. And in this case, China, unlike what the United States has done, specifies very particularly that the application will be to relevant land utilization plans, construction, development, and utilization plans of regions, drainage areas, and sea areas. So just like the United States was going to apply SEA to a study of the Upper Mississippi River Basin, China would use a similar approach.

In addition, the China law also requires that there be an analysis, a forecast, and an evaluation of the impact of these plans, and that the state council would have to approve the plans.

One of the issues that I think is quite innovative in the Chinese approach is that China requires that the various departments that would be involved would form an examining team, and that that team of the various concerned departments would submit a written opinion about the examination. The team would be selected from a roster of experts, and I think this approach really gives an opportunity to look strategically across many different departments. And, of course, this is the main aspect of the need for SEA, that these types of activities tend to have a broad reach to them.

It's pointed out in the Chinese law that at the local level, the planned EIA is used as a basis for considering decisionmaking in the future, so the same point that I mentioned in the U.S. law also applies in the Chinese context, a forward-looking approach.

I'd now like to turn to the approach in Europe, and it's important to point out here that there is a specific directive that the European communities are using for strategic environmental assessment, an approach towards requiring the assessment of the effects on the environment of certain plans and programs, with the objective of having a high level of protection of the environment and to contribute to an integrated approach of environmental considerations in plans and programs.

The key here is that there is a definition of plans and programs, recognizing that it can be at the national, the regional, or the local level, or that it can also be an approach to using SEA for a legislative proposal.

Now, it is not immediately apparent to me in the version that I have of the Chinese law as to whether in China a proposed piece of legislation would undergo SEA. But this does seem to be the intent in both the U.S. law and the European law.

The scope of environmental assessment that the European Community would apply spells out very specifically which areas would be covered, and you can see them in the slide, such as agriculture, forestry, fisheries, energy. This approach is different than we see in either the U.S. approach or the Chinese approach by specifically identifying those areas. Similarly, though, they all require that SEA would be done only where there's a likelihood of a significant environmental effect.

It's also important to note that in the European context, they have specifically said certain areas that are not covered by the SEA, and these are plans and programs which deal with national defense, and they are also financial or budget plans and programs.

They also address activities where one expects a plan or an activity to take place in the future. If there's not a proposed plan to implement a strategy in the future, the SEA does not kick in in the European context. And this has raised some concern among some commentators that, for example, if there is a proposal on the use of pesticides in general, without a specific plan for application of pesticide, that that broad plan without specific application might not be covered by the SEA directive. And I think this is something all of us working in the SEA field need to be quite aware of, specifically when areas are not so clearly defined and may avoid environmental assessment of their potential impacts in the future.

Like the Chinese law, the EA does require that there be monitoring of the significant effects of these activities in the future. So this gives us an opportunity to benchmark our predictions of what might happen from a strategic standpoint with what actually does happen in the future. So I think the monitoring aspect of both the Chinese law and the European approach are quite good to give us an opportunity for lessons learned about these impacts.

At the multilateral development bank level, covering both the World Bank and various regional development banks, some of the specific terminology that's used in the context of SEA is set out most specifically in the European Bank for Reconstruction and Development. They very clearly say that the EBRD may carry out strategic EA on the likely environmental consequences of proposed sector or plans or programs with a potential effect on the environment. And they tie strategic EA to the Kiev Protocol that I mentioned to you several minutes ago using the definition of strategic EA as it's set out in that particular convention.

Like the EBRD, the World Bank also requires an assessment of sectoral plans. In our Operational Policy 4.01, we say environmental assessment of regional projects and sectoral loans has been required so that we have sort of a strategic approach to how we look at these. And in some cases, we've done it for projects that require privatization.

One area that has been under review is that in our adjustment lending policy, Operational Director 8.60, we require that for adjustment programs, there should be some analysis of the implications on the environment from adjustment lending. And we state that we should take into account the findings and recommendations of these reviews when we design adjustment programs. And this particular Operational Directive is currently under consideration for review in the World Bank, and that review is taking place in the next several months.

Other banks--Asian Development Bank--do not have a specific requirement on SEA, but very much share a similar approach to lending activities, as does the World Bank and the European Bank for Reconstruction and Development.

As we go ahead in the future, we expect increasing attention to legal instruments like the Kiev Protocol. We are also aware that many of our countries that we are working with in the World Bank, like South Africa, like Chile, like the Dominican Republic, are adopting either laws or regulations or guidelines that address strategic environmental assessment. And we will certainly work closely with them, and we hope with the Government of China in the future, to improve the methodology of strategic EA so that there's a close link between the legislation, which sets out the requirements for SEA, and then the policies, which set out a means to have SEA as effective a tool as possible.

So thank you very much for your attention today. I hope this is useful. All of the material that I've mentioned can be found on websites. If you're interested in the U.S. Council on Environmental Quality's regulations through the United States Government, you can go to the Code of Federal Regulations. All of the material is set out in Title 40 of the Code of Federal Regulations. The same is true for the material set out of the European, and as well, at the World Bank website and the website for the European Bank for Reconstruction and Development.