

## CHAPTER 2

### LEGAL REQUIREMENTS AND COMMITMENTS TO APPLYING SEA

#### 2.1 THE LEGAL BASIS FOR SEA

EIA was first introduced in the USA under the National Environmental Policy Act (NEPA) in 1969. The Act applies to “proposals for legislation and other major federal actions significantly affecting the environment”. The US Council on Environmental Quality interpreted this to include policy, programmes, and plans (PPPs). Whilst EIA practice in the US tended to focus mainly on projects, programmatic environmental impact statements also became an integral element of the implementation of the Act.

During the 1990s, SEA (or SEA-like processes) were introduced, by legislation, as a separate process from EIA in a small number of high-income countries, e.g., Australia, Canada, Denmark, Netherlands. But since then, nearly all high-income countries have adopted SEA and the number of low- and middle-income countries adopting SEA is rapidly increasing, with around 100 countries across the world now having legal provisions its application. Whilst many of these countries have formalised SEA through regulation and have established mandatory procedures, in others the legislation remains more of a framework nature with regulation pending. Processes across countries vary considerably.

Some countries have made statutory provision for SEA under EIA or planning law. In these systems, EIA-like requirements and procedures usually are followed and apply particularly to SEA for plans and programmes. Other countries have established SEA through administrative order, Cabinet directive, or policy guidelines. In these systems, SEA is applied as a separate or modified process from EIA, as in Denmark, Hong Kong, The Netherlands, and the UK (which also has a comparable process of sustainability appraisal for land use and spatial plans). In Canada, the Impact Assessment Act (the Act) requires SEA for any government policy, plan or program – proposed or existing – that is relevant to conducting impact assessments, or any issue that is relevant for impact assessments of designated projects or classes of designated projects<sup>1</sup>. All of these countries also use a less formal, minimum procedure of SEA of policy or legal acts.

#### 2.2 INTERNATIONAL DIRECTIVES, PROTOCOLS, SAFEGUARDS, DECLARATIONS AND COMMITMENTS

A number of international directives and protocols have set legal requirements to undertake SEA. Most notable is the EU SEA Directive 2001 which introduced a standardised approach and was transposed into domestic law by 2004 in all 27 members states of the EU. The Directive applies to a wide range of public plans and programmes (but not policies): those prepared for agriculture, forestry, fisheries, **energy**, industry, transport, waste/ water management, telecommunications, tourism, town & country planning, or land use and which set the framework for future development consent of projects.

The provisions of the Directive strongly influenced those of the SEA Protocol to the UNECE Convention on EIA in a Transboundary Context<sup>2</sup> (agreed in 2003). The latter is similar to the EU Directive on SEA, but with distinctive features, such as a special emphasis on health impacts alongside environmental ones. The protocol is legally binding on convention signatories with regard to plans and programmes and is discretionary concerning policies and legislation.

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<sup>1</sup> <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/fact-sheet-strategic-assessment.html>

<sup>2</sup> [1609217\\_UNECE\\_HR.pdf](#). The UNECE Protocol on SEA was negotiated under the 1991 UNECE Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) to extend the scope of the Convention, but it is a legally distinct instrument. It is an international agreement open to all UN member states – so far 37 states and the EU are signatories. The Protocol provides for legal obligations and a procedural framework for the implementation of SEA in countries that are Parties to it.

SEA and EIA remain the only sustainable development 'tools' that have legal status with government bodies dedicated to their regulation and oversight.

A number of multilateral development banks have adopted environmental and social safeguards which either promote or require borrower countries to undertake SEAs, SESAs or equivalent processes for particular proposed initiatives that they are financing (e.g., the World Bank, InterAmerican Development Bank). Other international organisations have also made commitments to promote SEA. For example, the Paris Declaration on Aid Effectiveness was adopted in 2005, and reaffirmed in Accra in 2008, at ministerial-level forums convened by the Organisation for Economic Co-operation and Development (OECD). It committed bilateral donors and partner countries to "develop and apply common approaches to SEA". More recently, the fifth session of the UN Environment Assembly (March 2022) adopted a resolution supporting strategic planning of sustainable infrastructure by applying SEA<sup>3</sup>.

By identifying and focusing on the key environmental and social concerns related to a PPP, SEA is able to identify where opportunities can be maximised and risks/impacts avoided or mitigated in relation to environmental and social commitments made under international legal conventions and agreements to which a country is a signatory, and to regional and UN organisations. Similarly, for the same reason, SEA can also support countries/agencies to ensure that individual PPPs contribute positively to the achievement of the Sustainable Development Goals and meet international commitments to combat climate change and promote corporate social responsibility.

## **2.3 SCOPE AND CONTENT OF LEGAL INSTRUMENTS**

Laws prescribing the use of SEA vary considerably in their scope and content. In some countries they are of a framework or enabling nature and merely make provision for its introduction. They assign responsibility for SEA to a designated authority (e.g., ministry or agency) - establishing a new government body or designating additional responsibility to an existing agency - but leave such a body to make subsequent regulations for the formal activation of the SEA system. In other countries, laws are more detailed and set out all the major provisions for the SEA system. Thus, either a law or a regulation will usually:

- State the objectives of the law/regulation;
- Set out any general principles;
- Assign functions, powers, roles, responsibilities and staffing for aspects of the SEA process;
- Establish any related or supporting bodies (e.g., Advisory Council), their composition, terms of reference, and regulatory of meetings;
- Indicate the types of PPPs for which SEA is mandatory;
- Define terms used in the law/regulation;
- Set out required steps and procedures;
- Establish appeals procedures (e.g. concerning decisions);
- Indicate reporting requirements;
- Describe administrative arrangements;
- Set any fees or payments that may be due.

A regulation for SEA may cover some of the above elements, but would usually focus much more on specific aspects of the SEA process such as:

- Preliminaries, e.g., definitions, objectives, role of SEA proponents, access to information, modalities and general requirements;
- Screening: for which PPPs require SEA;
- Public participation requirements;
- Scoping requirements;
- Steps in the main assessment stage;
- Reporting requirements;
- Monitoring and evaluation;
- Notification and registering of documents and decisions;

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<sup>3</sup> [Proceedings, Report, Ministerial Declaration, Resolutions and Decisions UNEA 5.2 \(unep.org\)](#)

- Administrative matters;
- Annexes (e.g., forms).

## **2.4 THE CHALLENGE OF MEETING GOOD PRACTICE IN SEA**

Chapters in Part A of this guidance describe good practice in undertaking SEA. They draw from the best elements of existing international and national guidelines and build on experience from SEA practice over the last 30 years of what works well and what is required to deliver credible and beneficial outputs and influential outcomes. This guidance is also framed around internationally agreed principles for SEA, as described in section 1.3. It can therefore be viewed as a standard to aim for. But this guidance may differ from the specific requirements set out by country SEA regulations or guidelines.

A country's SEA system requirements and regulations may differ from those of an external financier or organisation (e.g., a multilateral development bank). The latter usually set their requirements at a high level based on good practice principles.

There is no one size-fits-all approach or single recipe for SEA. Each one must be designed to be fit and appropriate for purpose and tailored to the specific need and context. The SEA practitioner(s)/consultants must interpret the terms of reference for each SEA, then propose, discuss, and agree on the approach to be followed with the client, and aim to pursue the best practice possible in the prevailing circumstances. The goal should always be to try to undertake the SEA according to the principles in Chapter 1, section 1.3.

In some countries, SEA is still a relatively new process where skills and experience may be limited or lacking. So, it must be acknowledged that it might not always be feasible to achieve or meet the ambitions of international good practice. For everyone, SEA remains a journey of 'learning by doing' with progressive improvement through usage and iteration (at least not in the early stages of SEA application in a country).

A compendium of available SEA guidelines for countries, regions, and various organisations is provided on the IAIA website (see: <https://www/iaia.org/hot-topics/inventory-of-SEA-guidelines.pdf>)