

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 (focused on PPPs) 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. In those countries with no formal provision for SEA, it is often applied on a voluntary basis and some countries have developed an active body of voluntary SEA practice (e.g., Colombia, South Africa and Thailand). Thus, several categories of practice can be recognized:

- Mandatory regulation for SEA including a procedural regulation;
- General provisions for SEA but no procedural regulation;
- Application of EIA regulation for policies plans and or programmes;
- Voluntary regulation of SEA, often based upon a policy and guidelines, but no procedure;
- No regulation of SEA, but voluntary practice.

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 projects¹. All 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.

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

The provisions of the Directive strongly influenced those of the SEA Protocol to the UNECE Convention on EIA in a Transboundary Context² (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.

Some UN conventions have started to recognize the value of SEA. The Convention on Biodiversity has prepared voluntary guidelines on the integration of biodiversity in EIA and SEA, 2006³. In March 2023, a new treaty on protecting marine life in international waters (High Seas Treaty) was concluded under the Convention on the Law of the Sea (UNCLOS), and due to be formally adopted in June 2023. Under the treaty, participating parties are obliged to conduct environmental impact assessments when a planned activity may have an effect on the marine environment, or when there is insufficient knowledge about its potential effects. In such cases, the party possessing jurisdiction or control over the activity is required to conduct the assessment. Parties under the treaty are required to consider conducting a SEA for plans and programmes related to their activities in areas beyond national jurisdiction but are not obliged to conduct one⁴.

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, Inter-American Development Bank (see Table 2.1)).

Table 2.1 International financial institutions requirements for and reference to SEA

IFI	Requirement for or Reference to SEA
UN Development Programme	<ul style="list-style-type: none"> • Social and Environmental Standards (2019)⁵. • Social and environmental screening procedure (2019). P.21, entry 58.
World Bank	<ul style="list-style-type: none"> • Environmental and Social Safeguards framework (2017): ESS 1: Part B. Entry 23.
African Development Bank	<ul style="list-style-type: none"> • Integrated Safeguards System Policy Statement and Operational Safeguards (2013)⁶.
Asian Development Bank	<ul style="list-style-type: none"> • Safeguard Policy Statement (June 2009) (p66). Currently under review.
Inter-American Development Bank	<ul style="list-style-type: none"> • Environmental and Social Policy Framework (2020)⁷: (Ch 3.5). • Implementation Guidelines for the Environment and Safeguards Compliance Policy, Revised version, July 2019. Policy Directives B.3 and B.5. [new guidelines are currently under review]
European Investment Bank	<ul style="list-style-type: none"> • Statement on Environmental and Social Principles (2009)⁸ • Environmental, Climate and Social Guidelines on Hydropower Development (2019)⁹ - Cumulative Basin Wide impacts, P.7.

² [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.

³ [CBD voluntary guidelines for the consideration of biodiversity in environmental impact assessments \(EIAs\) in marine areas \(CBD COP Decision XI/18\)](#)

⁴ [High Seas Treaty - Wikipedia](#)

⁵ [Pre-Launch.pdf](#): P 58

⁶ https://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/December_2013_-_AfDB%E2%80%99S_Integrated_Safeguards_System_-_Policy_Statement_and_Operational_Safeguards.pdf:P.8, P. 17, P.24.

⁷ <https://www.iadb.org/en/mpas>

⁸ https://www.eib.org/attachments/strategies/eib_statement_esps_en.pdf. Article 20.

⁹ https://www.eib.org/attachments/eib_guidelines_on_hydropower_development_en.pdf.

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 SEA¹⁰.

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

¹⁰ [Proceedings, Report, Ministerial Declaration, Resolutions and Decisions UNEA 5.2 \(unep.org\)](#)

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 Chapter1, 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>)