

The ADB logo consists of the letters 'ADB' in a white, serif font, centered within a dark blue square. The background of the slide features a blurred image of green leaves and a faint world map grid.

ADB

**STRENGTHENING THE CAPACITY FOR ENVIRONMENTAL AND
CLIMATE CHANGE LAW IN ASIA AND THE PACIFIC
Colombo, Sri Lanka, 28th May – 1st June 2018**

SESSION 4: ENVIRONMENTAL PLANNING AND EIA LAW

Presented by Professor Rob Fowler



LEARNING OUTCOMES

Session topic

- Understand the purpose of environmental (spatial) planning law, particularly the balancing of economic and environmental factors
- Understand the purpose and scope of EIA law and underlying procedures
- Think about the ways in which *procedural laws* advance participatory approaches and the evolving laws of public participation

Learning methodology

- Understand the role of the case-study as a learning tool



INTRODUCTION

This is the first of five topics designed to outline the scope and content of environmental law:

- **Environmental (spatial) planning and EIA law**
- Environmental protection law
- Protection of biodiversity, and natural and cultural heritage law
- Natural resources management law
- Climate change and clean energy law

RELEVANT SDGs

Goal 11: Make cities and human settlements inclusive, safe, resilient and sustainable

TARGETS

- Target 11.3: By 2030, enhance inclusive and sustainable urbanization and capacity for participatory, **integrated and sustainable human settlement planning and management** in all countries;
- Target 11.a: Support positive economic, social and environmental links between urban, peri-urban and rural areas by strengthening **national and regional development planning**

11 SUSTAINABLE CITIES AND COMMUNITIES



RELEVANT SDGs

Goal 15: Protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss



TARGETS

- Target 15.9: By 2030, integrate ecosystem and biodiversity values into **national and local planning, development processes**, poverty reduction strategies and accounts.



INTRODUCTION TO ENVIRONMENTAL (SPATIAL) PLANNING LAW

- History of development
- Planning policy instruments
- Development control mechanisms
- Appeal mechanisms
- Related measures (e.g. coastal protection laws)

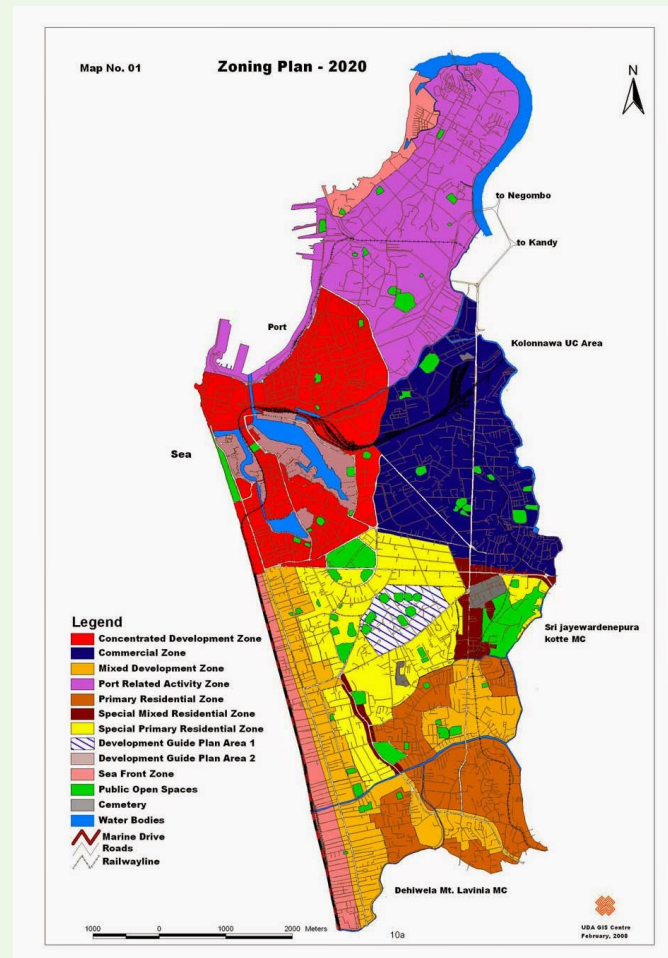
HISTORY OF DEVELOPMENT OF PLANNING LAWS

- Origins of planning law can be traced back to the early 20th century in the United Kingdom, Europe, and US
- In many developed countries, planning law is the foundation of environmental law and provides the basic mechanism for the regulation of development activity
- In developing countries, especially those experiencing rapid population and urban growth, “spatial” planning laws exist but may have less impact in regulating development activity
- However, in countries such as Sri Lanka and India, British influence during colonial period has resulted in uptake of spatial planning laws

PLANNING POLICY INSTRUMENTS

- Planning laws provide for the development by planning authorities of **policy instruments** (“development plans”) that identify the types of land uses that may be possible (or not allowed) within specific locations
- Historically, such plans were based on **zoning** via maps of regions for particular types of uses (residential, commercial, industrial, rural, recreational)
- But modern planning laws allow for more **strategic approaches**, e.g. to allow the redevelopment of land for different purposes (urban renewal, major port expansion) or to encourage higher density residential living in inner city areas

COLOMBO CITY DEVELOPMENT PLAN



DEVELOPMENT CONTROL MECHANISMS



- Planning laws rely upon the regulatory mechanism of a **consent procedure** for proposed changes in the use of land (often called “development approval”)
- Development controls are often exercised by “local” government bodies, but may also involve regional authorities or even elected government officials (governors, ministers) for certain types of proposals
- Generally, application of development controls involves the evaluation of a proposal against a relevant planning policy



APPEAL MECHANISMS

- Planning laws may provide for decisions of planning authorities to be reviewed “on the merits” via an appeal process (“merits review”)
- This is a full reconsideration of the original decision, as distinct from a judicial review of its legality
- Appeals may be brought both by an applicant for consent and in some circumstances also by “third parties” who object to the proposed development
- In some countries (e.g. Australia), **specialist courts or tribunals** have been established to hear such appeals (and exercise other functions such as enforcement and judicial review) – see, for example, the Land and Environment Court in New South Wales.

RELATED MEASURES



- Planning laws invariably are accompanied by separate legislative requirements with respect to **building standards**
- In some countries, other forms of specialised planning measures have been developed, for example in relation to **coastal management** (increasingly important in relation to managing the impacts of sea level rise)
- The scope of planning laws may be **constrained** in terms of their capacity to apply to particular types of activities – for example, where natural resources management laws also apply (e.g. re agriculture, forestry, mining, oil and gas activities)



ENVIRONMENTAL IMPACT ASSESSMENT LAWS

- History
- Scope of EIA processes
- Procedural elements (Environmental Impact Statements, etc.)
- Public participation
- Substantive mandate
- Judicial oversight of EIA process
- Strategic EIA

HISTORY OF EIA LAWS

The National Environmental Policy Act of 1969, as amended

(Pub. L. 91-190, 42 U.S.C. 4321-4347, January 1, 1970, as amended by Pub. L. 94-52, July 3, 1975, Pub. L. 94-83, August 9, 1975, and Pub. L. 97-258, § 4(b), Sept. 13, 1982)

An Act to establish a national policy for the environment, to provide for the establishment of a Council on Environmental Quality, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "National Environmental Policy Act of 1969."

Purpose

Sec. 2 [42 USC § 4321]. The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

TITLE I

CONGRESSIONAL DECLARATION OF NATIONAL ENVIRONMENTAL POLICY

Sec. 101 [42 USC § 4331].

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential

- Origin of EIA law is *National Environmental Policy Act 1970 (US)*
- EIA laws now adopted in many countries around the world and recognised in international law *[example of 'legal transplants']*



HISTORY OF EIA LAWS

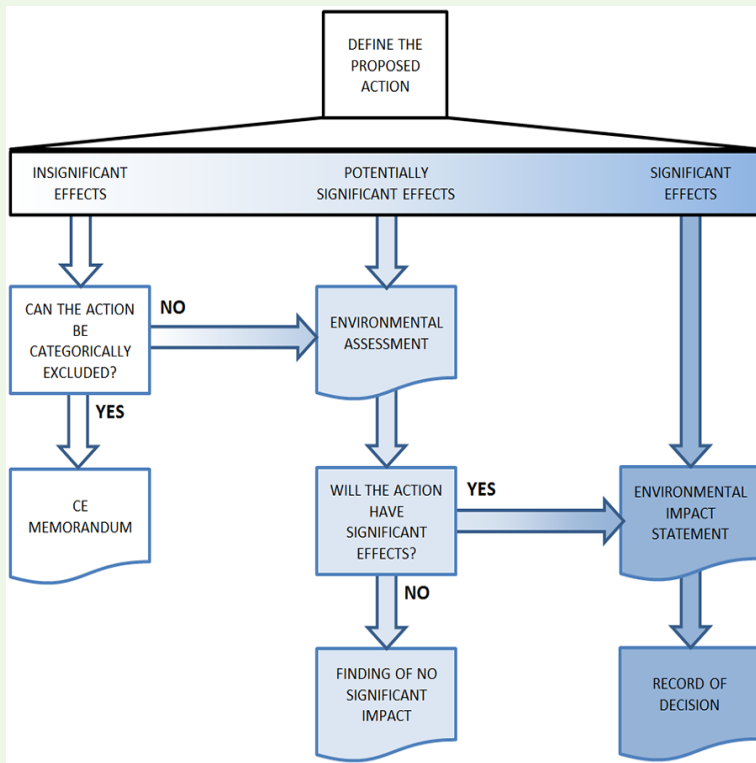
- See *UN Rio Declaration on Environment and Development (1992)*, Principle 17:
 - “Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority. “

SCOPE OF EIA LAWS



- NEPA applied to actions of US Federal **government**, including decisions to license or approve activities (e.g., highways, dams etc.)
- But EIA has been extended since in many countries to **privately-sponsored development** and hence overlaps with traditional spatial planning controls
- EIA provisions are often incorporated in spatial planning legislation, but can also operate as stand-alone laws

PROCEDURAL & SUBSTANTIVE ELEMENTS OF EIA LAWS



- EIA laws prescribe detailed **procedures** for the preparation of an Environmental Impact Statement (EIS), review of the EIS documentation by a government authority and provision for public participation (comment and sometimes public hearings)
- The ultimate purpose is to inform the relevant government decision-maker, who must be guided by the statutory criteria laid down in the relevant planning/EIA legislation (the “**substantive mandate**”)
- Courts in many countries have been regularly involved in hearing actions alleging a failure to comply with EIA statutory procedural requirements (including failure to require an EIS)





PUBLIC PARTICIPATION

A distinctive aspect of EIA law is the provision for public participation in the assessment process



PUBLIC PARTICIPATION

- This usually involves the opportunity to provide **written comments** on a draft EIS, which must then be examined and responded to by the proponent
- Some jurisdictions have expanded public involvement by allowing for **public hearings** to be conducted on proposals at which the public and experts can make submissions in person
- This can be particularly useful where minority or disadvantaged communities may be particularly affected by a proposal (e.g., indigenous peoples).



EXPANSION OF EIA: STRATEGIC AND SOCIAL IMPACT ASSESSMENTS

- Beyond the project level, EIA is steadily evolving as a tool for evaluation of **government strategies, policies and plans**, or for dealing with circumstances where the **cumulative impacts** of a series of connected projects needs to be examined;
 - E.g. where multiple port or other developments are proposed for a particular coastal region.
- EIA legislation varies considerably in its recognition of the possibility of “strategic” EIA
- Note also: expansion of EIA to include social factors alongside environmental considerations (“social impact assessment”)

