EIA and Development Planning

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Overview of Session 4

- EIA: A review of key concepts
- EIA Process in Cambodia
- Regional and International Developments
- Potential litigation in EIA matters.
- EIA and project development litigation in the Cambodian context
- Activity
- Questions and Answers
Strategy for Sustainable Development and Environmental Safeguards

To work for Economic Development in Parallel with Environmental Conservation
EIA: A review of key concepts
EIA: A review of key concepts

• Key aim of EIA:

  to achieve sustainable development
  and create sustainable societies

• The EIA is conducted, assessed and approved (together with EMP) before any construction or development occurs
Key objectives of EIA

• Definition:

*Environmental and social impact assessment is a process of estimating and assessing impacts on the environment by [development] projects and activities. It also identifies the methods and standards for preventing, mitigating and reducing such potential impacts on the environment.*
Key objectives of EIA

- To ensure that environmental considerations are explicitly addressed and incorporated into the development decision making process;
- To anticipate and avoid, minimize or offset the adverse significant biophysical, social and other relevant effects of development proposals;
- To protect the productivity and capacity of natural systems and the ecological processes which maintain their functions; and
- To promote development that is sustainable and optimizes resource use and management opportunities.
7 key principles to effective EIAs

1. Legally established, clear and effective process
2. Proponent bears cost of application and assessment
3. Meaningful public participation at all stages of the process
4. Access to information by PAP and other stakeholder
5. All relevant information is available
6. Open and evidence-based decision making
7. Effective monitoring, compliance and enforcement
Key mechanisms for EIA

Five primary mechanisms can be identified:

• Reliance on participatory approaches;
• Application of the precautionary principle;
• Application of the principle of intergenerational equity;
• Conservation of biological diversity and ecological integrity is a primary consideration; and
• Improved valuation, pricing and incentives.
Screening

- NO SIGNIFICANT IMPACT
  - Commencement of Project Construction
  - Commencement of Project Operations
  - Closure of Completion of Project

- INITIAL ENVIRONMENTAL EXAMINATION
  - Investigations & Reporting
  - Reviewing & Approval Process
  - Environmental Compliance Certificate (ECC)
  - Commencement of Project Construction
  - Commencement of Project Operations
  - Monitoring and Compliance with ECC
  - Closure of Completion of Project

- ENVIRONMENTAL IMPACT ASSESSMENT
  - Scoping
  - Collection of Data by EIA Consultants
  - Preparation of draft EIA Report and ESMP
  - Submission of EIA Report
  - Assessment of EIA Report and ESMP
  - Approval of EIA Report and ESMP
  - Environmental Compliance Certificate (ECC)
  - Commencement of Project Construction
  - Commencement of Project Operations
  - Monitoring and Compliance with ECC and ESMP
  - Closure of Completion of Project

- OTHER PERMITTING PROCESS
  - Appeal Process
  - Reject
EIA Process in Cambodia
The EIA Process in Cambodia

Project type not fall under the list of projects subject to IEIA/EIA

IEIA Required

MOE Decision

Project types fall under the list of projects subject to IEIA/EIA

IEIA

Significant Social & Environmental Consequence

EIA

Approval

Not Approval

Project Owner to revise and address comments on the EIA

EIA Approval Certificate from MOE

Conditional Registration Certificate from CDC/PISC

Final Registration Certificate

Note: Public participation required by the Law on Environmental Protection, which shall be included in the IEIA/EIA development. However, the Sub-decree from the MOE on public participation has yet to be developed. (See text in section 3.2)
EIA is required in almost all projects

- Industry, Construction, Energy, Infrastructure, Tourism
- Prior to grant of Economic Land Concession
- Prior to approval of licenses for exploration and exploitation of mining (Mining Law Art 26 and 53)
- Prior to granting forestry concessions (Law on Forestry Art 19)
- Prior to proposals and investments within or adjacent to Protected Areas (PA Law Art 44)
EIA Review at National level

Approval process for EIA of Private and public Projects

Project proponent

Prepare EIA At The Stage of Conducting Feasibility Study

EIA Department Approves TOR

Revise EIA

EIA Dept. Meeting (10 days)

Inter Dept. of MoE Meeting (5 days)

Senior Official of MoE Meeting (5 days)

Inter-ministries Meeting (5 days)

MoE, EIA Dept. mixes Comment (5 days)

Decision To Approve EIA and Issues Approval Letter

30 days
EIA Review at Provincial level

Approval process for EIA of Public and Private Projects

- **Project proponent < 2M.USD (Inv. Capital)**
  - Prepare EIA At The Stage of Conducting Feasibility Study
  - **Envt. Provincial Dept. Meeting**
    - Leader of Evt. Prov. Dept. Meeting
      - **Inter-Dept. of Province Meeting**
        - Envt. Provincial Dept. mixes comment
          - Decision to Approve EIA and Issues Approval Letter

- **Envt. Provincial Department Approves TOR**
  - (15 days)
  - (5 days)
  - (5 days)
  - (5 days)

- Revise EIA
  - 30 days
## EIA Review and Approvals in Cambodia

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The 3rd Workshop
On Consultation of the Draft Law on Environment Impact Assessment
Organized by The Department of Environmental Impact Assessment, Ministry of Environment, in Cooperation with Vishnu Law Group
May 26-27, 2014 Golden Sea Hotel, Preah Sihanouk Province
EIA Public Consultation Workshops
Regional and International Developments in EIA
EIA Developments in GMC

- There has been increasing interest in using the process of environmental and social impact assessment (EIA) and Strategic Environmental Assessment (SEA) in the Greater Mekong Region.
- Environment includes social, health, and cultural.
- With the development of the ASEAN Economic Community, both governments and CSOs are considering ways to strengthen the role of EIA in promoting Green Growth and Sustainable Development.
Future infrastructure spending

• ADB has estimated that Asia “needs to invest “about $8 trillion in national infrastructure and $290 billion in regional infrastructure between 2010 and 2020 to sustain its growth trajectory”.

• ADB – approx 80% of loans on infrastructure

• AIIB - $40 billion planned start-up

• To achieve ASEAN vision of sustainable development, EIA can be used to promote social inclusion, environmental protection and economic growth.
EIA Developments

- International trends
  - Aarhus Convention
  - Espoo Convention
  - SEA Protocol
  - Safeguard Policies

- Regional responses
  - MRC Framework
  - Asian Judges Forum
  - ADB GMS EOC
  - Guidelines on Public Participation in EIA
Country EIA Developments

- **China**
  - Amendments to penalties and process, including public participation.

- **Lao PDR**
  - EIA Ministerial Instructions December 2013

- **Thailand**
  - Some discussion of revision of EIA Law
  - New Constitution

- **Myanmar**
  - Environment Protection Law 2012
  - Environment Protection Rules 2014
  - EIA Procedures (Draft)
  - Foreign Investment Law 2012 and Rules

- **Viet Nam**
  - Amendment to include SEA
  - Increase penalties
Avoiding the long-term impacts
International trends

• Espoo Convention 1991
  – This deals with obligations of member to notify and consult on projects that have transboundary impacts.

• Amendment to the Espoo Convention was negotiated in 2001 to allow accession to non-ECE UN members.

• Strategic Environmental Assessment Protocol 2010
  – SEA covers the environmental assessment of policies or programmes by member governments which are likely to have significant environmental, including health, effects
International EIA trends

• Safeguard Policies
  – IFC Performance Standards
  – ADB Safeguards
  – JICA Safeguards
  – AIIB Safeguards
International EIA trends

- Chinese Guidelines for Environment Protection in Foreign Investment and Cooperation (February 2013) issued Minister of Commerce and Ministry of Environment.
Potential litigation in EIA matters
EIA Litigation

- Can be procedural and substantive.
- Procedural - challenging a decision due to the failure of the assessment body to apply key principles of EIA or misapplies the principles.
- Substantive - challenging the decision because a project should not be approved on the evidence or because the approval does not include sufficient conditions to avoid or mitigate possible harm.
- Criminal – breach of EIA condition
Procedural cases

• A procedural case involving a government department or the grant of a permit by a Minister may raise a fundamental rule of law principle.

• The cases often ask the Court’s to apply the legislation and the principles of law impartially.

“The essence of the rule of law is that all governmental authority is subject to and constrained by law. When any branch of government seeks to remove itself from the constraints of law, the rule of law is impoverished.” Preston CJ, NSW Land and Environment Court, October 2011.
Types of matters under EIA

• Compliance with the EIA process
• Has the Project Proponent followed the EIA procedure and received an EIA approval?
• For example the following project require an EIA before the project is legal:
  – Economic Land Concessions
  – Forestry
  – Mining
Types of matters under EIA

- Access to information.
- Ensuring meaningful public participation has occurred in the EIA process.
- Protection of the rights of indigenous people in Cambodia.
- Compliance with the EIA process.
- Enforcement of conditions of approval.
Criminal EIA Offences

• Absolute Liability (like traffic offences - mistake not available)

• Strict Liability (Result offences)
  – Harm/Damages not an element

• Intentional Offences - Proof of mens rea or intent (action or omission) or negligence.
  – Harm/Damages and causation are all relevant
EIA and project development litigation in the Cambodia Context
Types of Environmental Offences

• Where the activity is prohibited without some prior permission, which may include an EIA.

• For example:
  – Granting and operating an ELC
  – Activities adjacent to or within a protected area
  – Damaging or destroying an item of heritage
  – Activities and development in the coastal zone
  – Forestry concession or forestry activity
  – Sand mining operation
Mining

• Law on Mineral Resource Management and Exploitation 2001

• Article 5 – Must have a mineral resource license.

• Article 21 – Every license holder must comply with Law on Environment Protection and EIA, Environmental Management Plan (EMP) and rehabilitation of site.

• Chapter VIII – Penalties.
Mining

*Sub-Decree on Mineral Resources Exploration and Exploitation Licenses No. 72 ANKr.*

- Article 26 – Exploration license must include ESIA report. Compliance with the EIA process
- Article 37 – comply with the Environmental Management Plan (EMP)
- Article 53 – Exploitation license must include ESIA and EMP
- Has the Project Proponent followed the EIA procedure and received an EIA approval?
Forests

Forestry Law, 2002

• MAFF to establish system of forest harvesting and concession granted after EIA Article 19.

• Chapter 10 provides for conservation of wildlife and endangered species

• Has the Project Proponent followed the EIA procedure and received an EIA approval?
Protected Areas

Law on Nature Protected Areas 2008

• Chapter VII, Article 44, requires ESIA to be conducted prior to activities within or adjacent to a PA boundary.

• Chapter X outlines offences and penalties
Heritage Protection

Law on Protection of Cultural Heritage, 1996

• Art. 23 – no cultural property proposed for classification may be moved, destroyed, altered or subjected to repair or restoration work without approval.

• Art. 31 – controls the trade in antiquities and dealers.

• Art. 37 – “Chance discoveries” requires work to stop pending assessment by MoCFA.

• Art. 63 – penalties for breaches of the Law.
Fisheries

Law on Fisheries 2006

- Article 7 – principle of public participation
- Chapter 5 – Protection and conservation of fish
- Chapter 6 – Protection of mangroves
- Art 82 – offence of providing means or orders shall be considered an accomplice.
- Art 83 – legal persons subject to the Law.
- Art 87 – matters to be considered for transitional fines
- Art 90 – payment to restore the ecosystem