Strength and weakness of Japanese EIA law

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Introduction

EIA in Japan has a long history and now an indispensable part of Japanese law. However, compared to the contemporary EIA schemes in international law and in other jurisdictions, current Japanese EIA law has differences – or weaknesses. This paper discusses such differences including their possible causes, refers a positive side of the law, and make suggestions for the future EIA law in Japan. In this paper, the term "EIA" is used broadly, meaning any procedure by which potential impacts on the environment of a certain activity is assessed and whose result is to be taken into consideration in decision-making of such an activity. "EIA" here includes SEA.

EIA law in Japan

The central instrument in Japanese national EIA law is Environmental Impact Assessment Act[1] (Act No. 81 of 1997, "EIA Act"), which prescribes the obligations and procedures of EIA on the listed projects (Certain constructing projects and land use changes) and requires the authorities to consider the assessment results in their decisions.

There are other laws which require EIA concerning specific activities and/or specific areas, often in the course of permit procedures. The details of the procedures vary. Some include provisions on publication and consultation (Waste Management and Public Cleansing Law (Act No. 137 of 1970), Act on Special Measures concerning Conservation of the Environment of the Seto Inland Sea (Act No. 110 of 1973)). Another (Factory Location Act (Act No. 24 of 1959) (Otsuka, 2010, p.259)) requires the competent authority to research and analyze potential impacts. Identifying all the statutes of this category is difficult[2]. Act on the Regulation of Nuclear Source Material, Nuclear Fuel Material and Reactors (Law No. 166 of 1957, ARNMR) may be another, though not typical, example (See the next section).

Government Policy Evaluation Act (Act No.86 of 2001) requires *ex-ante* evaluation for certain policies. It could be implemented so that environmental impacts of policies be evaluated in some cases (See Uga, 2002, pp.82-83).

Weaknesses (1): Narrow scope of EIA Law

<u>i) Limited activities</u>

[1] The English translations of the law titles in this paper are based on, or with reference to, those in the "Japanese law translation" (http://www.japaneselawtranslation.go.jp/) or in the websites of the Ministries in charge.

[2] E.g., Kabushikigaisha kankyo sogo tekunosu (2019) refers other statutes.

Activities using nuclear materials (Shiroyama & Koyano, 2013): International law on nuclear safety requires EIA for nuclear facilities/activities. In Japan, nuclear power plants are subject to EIA Act, but others (e.g., nuclear waste recovery facilities) are not. ARNMR requires impact assessment for various nuclear activities, but the "impacts" are mainly on human-beings and does not necessarily include ecosystems. Where both EIA Act and ARNMR apply, in assessing impacts by the potential emissions of radioactive substances[3] from the nuclear power plants, the relationship between two laws would be at issue.

Activities in primary industries: There appears no clear requirement of EIA on activities in primary industries in Japan. For example, mining activities can be subject to EIA, in some cases, under US National Environmental Policy Act (NEPA), NZ Resources Management Act (RMA) or EU EIA Directive (Directive 2011/92/EU), but not Japanese EIA Act. Mining laws in Japan require the proponents to report certain environmental information and authorize the government to demand further information, but they may be short of the expectation of international law (Koyano, 2018, pp.174-178).

ii) Limited types of impacts

The types of impacts assessed under EIA Act are limited. The environmental impacts caused by the accidents are out of scope (Koyano, 2013, p.104). Transboundary impacts are not required to be assessed under EIA Act. These approaches are not necessarily the standard in other jurisdictions and international law.

Weakness (2): Lack of legislation for SEA

i) Still "project level" EIA Act

The most notable weakness of EIA law in Japan may be the lack of SEA. 2011 amendment to EIA Act introduced the procedure by which the proponents prepare primary environmental consideration documents when they decide the areas or other elements of the projects. Although it made the formal assessment process start earlier, the amended EIA Act is still considered a project-level EIA system[4] (e.g., Yanagi, 2011, p.104). There is no SEA law applicable to the wide range of plans and programs in Japan.

ii) The problems of the absence of a SEA law: A recent case

It does not mean SEA law is not necessary in Japan. Chuo Shinkansen project is a major railway construction project involving nature-rich mountainous areas in central Japan to connect three mega-

[3] Environmental impacts by the radioactive substance became subject to EIA Act after 2011 earthquake.

[4] EIA Act provides an assessment procedure for a certain plan, but it is an exception.

cities. This project was shaped under the National Shinkansen Train Development Act (NATDA)[5], first by the "basic plan" decided by the Transportation Minister in 1973, then by the "development plan" which included the rough route and the train technology adopted in 2011 by the Minister (Kokudokotsusho; (Isono, 2018, pp.424-425). Finally, the designated construction entity submitted "construction plan" for approval by the Minister in 2014, before which EIA under EIA Act had been conducted (MLIT; Isono, 2018, pp.425). While NATDA did not explicitly require SEA, environmental conditions were researched and discussed in the course of formulating the development plan, based on certain provisions of NATDA and a guideline of the Ministry (Isono, 2018, pp.430-438). It was called SEA by some, but there were many deficiencies in this procedure (Id., pp.437-438). The potential environmental impacts were never thoroughly considered when "no project" was among the practical options concerning this project (Id., pp.439).

iii) Difficulties to introduce SEA law in Japan

Why is it hard for SEA law to be introduced in Japan while many countries already have theirs? One possible reason is the theoretical distinction between the project-level EIA and SEA in Japanese law.

Iwahashi (2000), after identifying three types of EIA systems each of which is represented by NEPA, a law in Germany and EIA Act, distinguishes two settings where environmental considerations are to be made under EIA systems: when the government makes policy decisions and when the project proponents decide how to manage their projects (Iwahashi, 2000, pp.20-23). Iwahashi considers EIA Act functions well for the latter (Iwahashi, 2000, p.24). Similarly, other authors view EIA Act as a legal instrument to facilitate environmental consideration of proponents by imposing them of certain procedural requirements (e.g., Kurasaka, 2014, p.208; Yanagi, 2011, pp.28-40). Such views are supported by the understandings of EIA Act by those who were involved in the development of this law ((Iwahashi, 2000, pp.22, 32; See also, Kankyocho Kankyo eikyo hyoka kenkyukai, 1999, pp. 49-50), and the provisions of the Basic Environmental Law (BEL) in Japan[6].

Paying attention to the proponents' own decisions is not unique to Japanese EIA Act. Procedural nature of EIA laws affect the decisions of both the governments and the proponents (Lee, 2014, p.164; McGillivray & Holder, 2007, p.5). The difference exists, however, which is the primary concern of an EIA law, decisions by the proponents or the government. An author noted that among various decisions made in the course of an EIA, the "main" one is the public decision, usually made by the government (Wood, 2014, p.221). This is exemplified by EIA laws in other jurisdictions. NEPA requires Federal agencies that environmental impact statements by the officials shall accompany the proposals for "major Federal actions" (§ 102(c)), and the background of the law suggests that the provision's

[5] Before the NATDA procedure started, some idea appeared in a national development plan (Isono, 2018, p. 424).

[6] Project-level EIA and SEA are grounded in the separate provisions in BEL (e.g., Otsuka, 2010, p.285).

principal interest is in the governmental decision making (Iwahashi, 2000, p.21). EU EIA Directive targets "public and private" projects (art.1 para. 2), and environmental impact reports are prepared by the developers (art.1 para.2(g)(i)). However, the competent authority needs to conclude on the significant effects on the environment, which shall be incorporated into the decision to grant development consent (art.1 para 2(g)(iv), art. 8a para.1). Different from Japanese EIA Act, the definition of the "environmental impact assessment" includes such "reasoned conclusion by the competent authority" and integration of them into decisions by the competent authorities (art.1. para 2). Considering these provisions, it can be said that the EIA Directive puts more emphasis on the decisions by the authorities, than those of the developers. RMA is a comprehensive system to manage natural resources. It prohibits many uses of resources unless it is allowed by national/local rules or resource consents (e.g., art. 9). The project-level EIA is part of the resource consent procedure. In other word, the primary purpose of the EIA is to inform the relevant authorities to make their decisions[7].

As SEA is concerning governmental decisions, if a project-level EIA law is also considered a system whose primary/original concern is the decisions by the government, the former can be an extension of the latter if the latter precedes (See Iwahashi, 2000, pp.24-25). This means that the EIA Act cannot incorporate SEA without major modification including the objective of the law and a new statute may be a better option for SEA (See Asano, 2018, p.6; Otsuka, 2014, pp.20-21; Murayama, 2017, p.45).

Strength of EIA law

Although still limited, EIA Act is one of the most inclusive environmental statute in Japan. EIA Act requires the proponents of projects to assess and consider its environmental impacts not strictly regulated by other laws, such as GHG emissions. After the major earthquake in 2011, many new coal power plants have been planned in Japan. Whereas Japan has a commitment to cap the future GHG emissions as a nation, there is no statutory restrictions to the emissions from individual facilities. EIA Act has provided opportunities for the Environment Minister to work on the proponents observing the national policy and reconsider their projects, which also contributed to furthering GHG emissions control under other laws (Otsuka, 2017; Shimamura, 2016, 2017; Kankyosho, 2019).

Conclusions: A few suggestions for the future EIA law in Japan

1) Certain activities in nuclear activities and primary industries should be subject to the comprehensive EIA. Inserting/improving EIA provisions in the natural resources management laws or the nuclear safety laws, with other provisions involving environmental aspects would be an option.

2) Introducing (a) law(s) on SEA for major plans/programs separate from EIA Act should be considered (Murayama, 2017. p45). Discussions on the typology of plans/programs from the

[7] This is like other EIAs which are part of the permit procedures (See Iwahashi, 2000, p.21).

viewpoint of EIA(SEA) are necessary to decide the scope(s) of such (a) law(s)[8].

3) Further research would be needed for better integration of sectoral policies and EIA, including the sustainable energy policy and the EIA of renewable energy power generation facilities.

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[8] Yanagi (2011, pp.279-294) discusses a typology of SEA systems, including but not confined to the plans/programs SEAs.

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