“PLANNED MEASURES” UNDER INTERNATIONAL WATER LAW

By Attila Tanzi Ph.D.
Full Professor of International Law, Bolonia University,
Chairman, Legal Board, UNECE Water Convention
1997 UN NY Convention PART III. PLANNED MEASURES

A. NOTIFICATION

Art. 11: Information concerning planned measures

“Watercourse States shall exchange information and consult each other and, if necessary, negotiate on the possible effects of planned measures on the condition of an international watercourse.”

- AN INTRODUCTORY CONTEXTUAL READING OF THE PROVISION:
  - A specification of the general obligation of cooperation in Arts. 8, UNECE 2 (6), 9;
  - “possible effects” (Art. 11) vs. "which may have a significant adverse effect“ (Art. 12);
  - the relationship between Art. 11 and : Arts. 18; 5 (2), 7;
  - and Art.17 on consultations and negotiations concerning planned measures
  - and :Art. 25 on the regulation of the flow
  - and Art. 20, 21 on the protection and preservation of the watercourse
  - and the UNECE Water Convention Arts. 9 (2), (b) , 10 and 11 (1)
Art.12 Notification concerning planned measures with possible adverse effects

“Before a watercourse State implements or permits the implementation of planned measures which may have a significant adverse effect upon other watercourse States, it shall provide those States with timely notification thereof. Such notification shall be accompanied by available technical data and information, including the results of any environmental impact assessment, in order to enable the notified States to evaluate the possible effects of the planned measures.”

- “possible adverse effects” vs. “significant harm” (Art. 7): no presumption rationale

- A policy rationale for “the planning State” of the EIA:
  “[I]t would be in the interest of the planning State to produce such an assessment. By supplying an environmental impact assessment showing that the planned works will not entail significant harm for a co-riparian, the planning State would place on to the latter the burden to argue the contrary” (Tanzi, Arcari, 2001)

- The EIA requirement in context. i.e. Artt. 15, 17, 5 and 7.
Normative basis, contents and guidance on the operation of EIA:

- Principle 4 of the UNEP Guidelines on Goals and Principles of EIA (UNEP Res. GC 14/25, 1987)

- Principle 17 of the Rio Declaration: “EIA, 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”

- Art. 7 of the ILC’s 2001 Draft Articles on international liability for injurious consequences arising out of acts not prohibited by international law

- Art. 2(3) 1991 Espoo Convention

- Art. 3 (1), (h) 1992 Helsinki Water Convention
B. NOTIFICATION UPON REQUEST

Art. 18: Procedures in the absence of notification

“1. If a watercourse State has reasonable grounds to believe that another watercourse State is planning measures that may have a significant adverse effect upon it, the former State may request the latter to apply the provisions of article 12. The request shall be accompanied by a documented explanation setting forth its grounds.

2. In the event that the State planning the measures nevertheless finds that it is not under an obligation to provide a notification under article 12, it shall so inform the other State, providing a documented explanation setting forth the reasons for such finding. If this finding does not satisfy the other State, the two States shall, at the request of that other State, promptly enter into consultations and negotiations in the manner indicated in paragraphs 1 and 2 of article 17.

3. During the course of the consultations and negotiations, the State planning the measures shall, if so requested by the other State at the time it requests the initiation of consultations and negotiations, refrain from implementing or permitting the implementation of those measures for a period of six months unless otherwise agreed.”

-Relationship with Art. 12;
- EIA rationale as a means corroborating the good-faith assessment by the planning State that the planned measures would be equitable and reasonable: a presumption of conformity
C. PROCEDURES SUBSEQUENT TO NOTIFICATION

Art. 13: Period for reply to notification

“Unless otherwise agreed:
(a) A watercourse State providing a notification under article 12 shall allow the notified States a period of six months within which to study and evaluate the possible effects of the planned measures and to communicate the findings to it;
(b) This period shall, at the request of a notified State for which the evaluation of the planned measures poses special difficulty, be extended for a period of six months”.

Art. 14: Obligations of the notifying State during the period for reply

“During the period referred to in article 13, the notifying State:
(a) Shall cooperate with the notified States by providing them, on request, with any additional data and information that is available and necessary for an accurate evaluation; and
(b) Shall not implement or permit the implementation of the planned measures without the consent of the notified States”.

Art. 15: Reply to notification

“The notified States shall communicate their findings to the notifying State as early as possible within the period applicable pursuant to article 13. If a notified State finds that implementation of the planned measures would be inconsistent with the provisions of articles 5 or 7, it shall attach to its finding a documented explanation setting forth the reasons for the finding”.
Art. 16: Absence of reply to notification

“1. If, within the period applicable pursuant to article 13, the notifying State receives no communication under article 15, it may, subject to its obligations under articles 5 and 7, proceed with the implementation of the planned measures, in accordance with the notification and any other data and information provided to the notified States.

2. Any claim to compensation by a notified State which has failed to reply within the period applicable pursuant to article 13 may be offset by the costs incurred by the notifying State for action undertaken after the expiration of the time for a reply which would not have been undertaken if the notified State had objected within that period.”.

- Aquiescence / estoppel, a restriction of

- Presumption of due-diligence on the part of the “origin State”
Art. 17 Consultations and negotiations concerning planned measures

“1. If a communication is made under article 15 that implementation of the planned measures would be inconsistent with the provisions of articles 5 or 7, the notifying State and the State making the communication shall enter into consultations and, if necessary, negotiations with a view to arriving at an equitable resolution of the situation.
2. The consultations and negotiations shall be conducted on the basis that each State must in good faith pay reasonable regard to the rights and legitimate interests of the other State.
3. During the course of the consultations and negotiations, the notifying State shall, if so requested by the notified State at the time it makes the communication, refrain from implementing or permitting the implementation of the planned measures for a period of six months unless otherwise agreed.”

-The relationship between Art. 17 (2) and general principle of good faith cooperation:
Art. 8 UN NY Convention/UNECE Water Convention Art. 10 on Consultations

“Consultations shall be held between the Riparian Parties on the basis of reciprocity, good faith and good-neighbourliness, at the request of any such Party. Such consultations shall aim at cooperation regarding the issues covered by the provisions of this Convention. Any such consultations shall be conducted through a joint body established under article 9 of this Convention, where one exists”.
ANOTHER RELEVANT PROVISION

Article 25 Regulation [of the flow]

“1. Watercourse States shall cooperate, where appropriate, to respond to needs or opportunities for regulation of the flow of the waters of an international watercourse.

2. Unless otherwise agreed, watercourse States shall participate on an equitable basis in the construction and maintenance or defrayal of the costs of such regulation works as they may have agreed to undertake.

3. For the purposes of this article, "regulation" means the use of hydraulic works or any other continuing measure to alter, vary or otherwise control the flow of the waters of an international watercourse.”

-Another duty of cooperation, hence including consultation;

-No content, but scope of “regulation”;

-“Where appropriate”
CONCLUDING REMARKS

A. It is submitted that it corresponds to the generally accepted practice that a watercourse State potentially affected by a planned activity of a co-riparian has the right to be promptly notified of such activity before it is implemented and that notification be accompanied with sufficient information for the former State to be able to make an evaluation of the impact on its territory of the proposed activity.

B. As to the moratorium period of six months, renewable of another six months, it cannot possibly be considered to evidence an international customary rule. A precise time frame, by definition, is not suitable for customary regulation. However, the above provisions reflect the customary rule to the effect that the planning State should wait before implementing such measures for a "reasonable period of time/delais raisonable": namely, a period of time reasonably long to enable the notified State to make its own assessment of the impact on its territory of the proposed activity, as well as for conducting good faith negotiations in case of disagreement between the planning and the notified States. It is submitted that the six-month period renewable for another six months is a reasonable interpretation of this general principle.
C. It is important to stress that nowhere does the Convention indicate that the duty of notification implies a duty of prior consent. This is in line with the Lake Lanoux case in which the Arbitral Tribunal denied the existence of "a right of veto that paralyses the territorial competence of one State at the discretion of another".

D. No reference is made to the prior notification rule in the 1992 UN/ECE Helsinki Convention. This is due to the simple fact that the present rule can well be said to be absorbed by the far stronger obligation for the States parties, set out in art. 9 (2) of this Convention, to enter into agreements establishing joint bodies, whose tasks include those "[t]o serve as a forum for the exchange of information on existing and planned uses of water and related installations that are likely to cause transboundary impact", as well as "[t]o participate in the implementation of environmental impact assessments relating to transboundary waters, in accordance with appropriate international regulations".

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THANK YOU!