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SYMPOSIUM ON INTERSTATE DISPUTES OVER WATER RIGHTS

PRIOR NOTIFICATION AND WATER RIGHTS

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International practice, including international instruments and case law, confirms that states generally accept that they have a duty to provide prior notification of planned measures that may have a significant adverse effect upon co-riparians. The principle of "prior notification" is framed differently in various instruments, and it can broadly include the duty to "notify" and "consult" on planned measures. Prior notification helps to prevent and mitigate disputes, as underlined by the ICJ.[1] Notification and consultation create the conditions for cooperation among riparian states and for ensuring the protection of international watercourses. On the contrary, the lack of notification and consultation may aggravate disputes as in the case of the Great Renaissance Dam along the Nile River. The UN Convention on the Law of the Non-Navigational Uses of International Watercourses (Watercourses Convention) provides a detailed procedural framework on prior notification and consultation.[2] This essay outlines the established characteristics of the prior notification and consultation duty, then argues that the duty should be viewed not only as an inter-state obligation but also as including the obligation to inform and consult local communities.

Rationale and Basis for the Obligations of Prior Notification and Consultation

The obligation of prior notification, which is recognized in several instruments and case law, is considered a norm of customary international law.[3] The basis for this obligation is found in the 1957 *Lake Lanoux* case where the arbitral tribunal stated that: "A State wishing to do that which will affect an international watercourse cannot decide whether another State's interest will be affected; the other state is the sole judge of that and has the right to information on the proposals."[4] This award only mentions a right to information of the riparian states without giving details on the content of the information to be provided to the affected state. Early treaties that addressed the need for prior notification include the 1960 Indus Waters Treaty, the 1968 African Convention on

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[1] Case Concerning the Pulp Mills on the River Uruguay (Arg. v. Ur.), Judgment, 2010 ICJ Rep. 51, para. 113 (Apr. 20).

[2] Convention on the Law of the Non-Navigational Uses of International Watercourses arts.11–19, May 21, 1997, 2999 UNTS 1 [hereinafter Watercourses Convention].

[3] *See* Laurence Boisson de Chazournes & Komlan Sangbana, *Principle 19: Notification and Consultation on Activities with Transboundary Impact*, *in* The Rio Declaration on Environment and Development: A Commentary 493 (Jorge E. Viñuales ed. 2015).

[4] Lake Lanoux Arbitration (Fr. v. Sp.), R.I.A.A. 281, at 15 (1957).

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the Conservation of Nature and Natural Resources (amended in 2017), the 1973 Treaty concerning the Rio de la Plata and the Corresponding Maritime Boundary, and the 1975 Statute on the River Uruguay.[5]

The main objectives of prior notification and consultation include promoting compatible uses of transboundary waters, maintaining harmonious relations among basin states and preventing adverse transboundary damage. The challenge is to clarify the scope of the duty, specifically its threshold of application. The duty's objectives emphasize the importance of continuous dialogue between watercourse states. As the ICJ observed, "the procedural obligations of informing, notifying and negotiating . . . are all more vital when a shared resource is at issue, as in the case of the River Uruguay, which can only be protected through close and continuous cooperation between the riparian States."[6] The next paragraphs will examine the most salient features of the duty of notification and consultation and identify some recent controversies about the scope of this duty.

Obligations of prior notification and consultation as a process. The duty of prior notification and consultation encompasses scope, content and temporal dimensions. First, the duty applies to all riparian states irrespective of their geographical location. Thus, both all upstream states and downstream states have to notify their co-riparians about planned measures. Second, the notification process should be accompanied by the exchange of technical data and information. The information must be "sufficient to enable the other system State to determine accurately and to evaluate the potential for harm of the intended project or programme."[7] Third, the notified state must have a reasonable time to study the works or actions proposed. During this period, the notifying state must cooperate with the other watercourse states in cases where additional information or data is requested. Finally, this principle is an essential instrument of water diplomacy, supporting a continued dialogue between the riparian states on a project which might cause transboundary impacts.

The threshold for prior notification. The threshold triggering the obligations on exchange of information and notification on planned measures is another crucial dimension to consider. The Watercourses Convention establishes two different thresholds. In the first case, the threshold is related to the possible effects of planned measures on the conditions of an international watercourse. Thus, watercourses states have the duty to exchange information with other riparians when planned measures have a "possible effect" on transboundary water resources. In the second case regarding notification, the treaty refers to "significant adverse effects" as the threshold for notification.[8] However, the assessment of when these two thresholds apply remains complex in the absence of specific criteria. One approach is to identify and set out activities presumed to result in transboundary effects and therefore require notification. The Convention does not contain a list of activities. However, some environmental conventions provide helpful guidance. For example, the Espoo Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) contains general provisions applicable to all activities likely to cause transboundary damage and then sets out a list of activities that require prior notification.[9] Many of the recent

[5] Indus Waters Treaty annexures C–E, 1960; Amended African Convention on the Conservation of Nature and Natural Resources arts. VII & XXII; Treaty Concerning the Rio de la Plata and the Corresponding Maritime Boundary arts.17–22, Nov. 19, 1973; Statute on the River Uruguay art. 7–12, Feb. 26, 1975, 1295 UNTS 331.

[6] Case Concerning the Pulp mills on the River Uruguay (Arg. v. Ur.), Judgment, 2010 ICJ REP. 51, para. 81 (Apr. 20).

[7] Third Report on the Law of the Non-Navigational Uses of International Watercourses, Stephen M. Schwebel, Special Rapporteur, UN Doc. A/CN.4/348 and Corr.1 at 103 (1982).

[8] Watercourses Convention, *supra* note 2, arts. 11 and 12.

[9] *See* Convention on Environmental Impact Assessment in a Transboundary Context appendix I, Feb. 25, 1991, 1989 UNTS 309 [hereinafter Espoo Convention].

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basin treaties indicate a preference for this approach by including a list of activities that may have transboundary adverse effects.[10]

Other recent instruments have adopted an alternative approach whereby no threshold for notification is provided and simply the types of projects concerned are specified. The obligation to notify is linked to the activity regardless of how insignificant the effects of such activity may be on other riparian states. This is the case under the Mekong River legal regime.[11] The World Bank Policy for Projects on International Waterways also specifies both the types of waterways and projects that require notification to other riparian states, regardless of the level of damage.[12]

Timely notification. To ensure that notification is not deprived of any practical significance, the Watercourses Convention requires "timely notification." Although the term "timely" lacks precision, it is intended to require notification sufficiently early on in the planning stages to allow meaningful consultations, and if necessary, negotiations.[13] The ICJ confirmed this point in the *Pulp Mills on the Uruguay River* judgment. Specific criteria to determine the timeframe for notification can be found in some recent river basin organization practices.[14]

Failure to respond to the notification is often considered an "acquiescence in the implementation of the proposed activities."[15] Some treaties follow this approach. For instance, Article 55 of the Lake Chad Charter notes that "a lack of response from a recipient state within the aforementioned timeframe shall be considered as tacit consent to the implementation of the planned measures." The World Bank's practice also considers that the failure of notified states to reply to a notification is implicit confirmation that the project will not cause significant harm to the notified states.[16]

Content of the notification. The notifying state is ultimately responsible for deciding what information is available. The requirement to submit the results of an environmental impact assessment (EIA) is formulated in the Watercourses Convention as a subsidiary obligation.[17] Nevertheless, the requirement to produce the EIA results as part of the necessary elements of notification has gained prominence in recent water treaty practices.[18] Similarly, in its Pulp Mills judgement, ICJ underscored the importance of conducting EIA and the need to notify planned projects.[19] Recalling the statement made in the Pulp Mills case, the Court concluded in its 2015 judgment on the San Juan river that a rule of general international law has now emerged that requires the planning state to conduct an EIA

[10] *See* Convention on the Sustainable Management of Lake Tanganika art.14, June 12, 2003, 2338 UNTS 43 and the Water Charter of the Lake Chad Basin art.52, Apr. 8, 201; Water Charter of the Volta Basin annex 3, 2019 (on file with the author).

[11] Mekong River Commission Procedures for Notification, Prior Consultation and Agreement, 2003.

[12] BP 7.50 Projects on International Waterways (2001).

[13] Alistair Rieu-Clarke, *Notification and Consultation on Planned Measures Concerning International Watercourses: Learning Lessons from the Pulp Mills and Kishenganga Cases*, 24 Y.B. Int'l 102, 119–120 (2013).

[14] Guidelines on Implementation of the Procedures for Notification, Prior Consultation and Agreement (2005).

[15] Manuela M. Ferrajota, *Notification and Consultation in the Law Applicable to International Watercourses*, *in* Water Ressources and International Law 303 (Laurence Boisson de Chazournes & Salman M.A. Salman ed., 2005).

[16] Salman M.A. Salman, The World Bank Policy on International Waterways: An Historical and Legal Analysis 140 (2009).

[17] Watercourses Convention, *supra* note 2, art. 12.

[18] Charter of Waters of the Senegal River art. 24, 2002; Niger Basin Water Charter art. 20, 2008; Lake Chad Basin Water Charter art. 54, 2012.

[19] Case Concerning the Pulp mills on the River Uruguay (Arg. v. Ur.), Judgment, 2010 ICJ Rep. 50, para. 120 (Apr. 20).

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wherever an industrial activity planned in a transboundary context carries the risk of a significant adverse impact, particularly when a "shared resource" is at stake.[20]

Consultation and negotiation. Consultation and negotiation act as cooperation mechanisms when the potentially affected state does not agree with the planned measures. The consultation and negotiation process provides parties with the opportunity to find mutually acceptable solutions to prevent transboundary harm or at least minimize the risk of its occurrence.[21] The exchange of views between parties must be substantive to reflect a real commitment to arrive at effective preventive measures. The ICJ confirmed this view in the *Pulp Mills* judgement.[22] Whether planned measures can remain suspended during dispute settlement was addressed in the *Indus Waters Kishenganga Arbitration* case. Pakistan sought an interim order restraining India from proceeding further with the planned diversion of the Kishenganga/Neelum River until such time as the legality of the diversion was determined by the tribunal. As part of these interim measures, Pakistan sought to invoke the "proceed at own risk" principle by submitting that a "state engaged in works that may violate the rights of another State can proceed only at its own risk. The Court may in its decision on the merits, order that the works must not be continued or must be modified or dismantled."[23] In the tribunal's view, "the suspension of many of the key components of construction activity of the Kishenganga Hydropower Project . . . , such as the boring of tunnels and the construction of the power-house, does not appear to be 'necessary' to safeguard its ability to render an effective Award."[24]

Ensuring notification in the case of a lack of cooperation. When the planning state does not have good neighborly relations with another riparian state, third parties can play an essential role as intermediaries to notify all potentially affected states of planned measures. The International Law Commission addressed the possibility of notification by a third party by including Article 30 in the Watercourses Convention. Indirect procedures include the intervention of financial institutions, such as the World Bank or basin organizations. Basin organizations also may act as recipients of this notification on behalf of their riparian members. In some cases, the basin organization can directly notify the other riparian on behalf of the planning state. This was the case with the Nile Basin Initiative. Following a request from the Nile Council of Ministers, the World Bank agreed that the Initiative could provide notification on behalf of Ethiopia to the other Nile riparian states for bank-financed projects.[25]

Notification as a Process Involving Actors Other Than States

As noted in practices analyzed above, notification and consultation are mainly viewed as inter-state obligations by treaty practice and case law. However, there is also evidence of an emerging customary duty to consult with local communities that risk being affected by a project on an international watercourse. Some treaties offer to local communities an opportunity to participate in the notification and consultation process. Under the Espoo

[20] *See* Case Concerning Certain Activities Carried Out by Nicaragua in the Border Area (C. Ri. v. Ni.), 2015 ICJ REP. 665 (Dec. 16), and in the joined case concerning Construction of a Road in Costa Rica Along the San Juan River (Ni. v. C. Ri), Judgment, 2015 ICJ REP. 45, para. 104 (Dec. 16).

[21] Draft Articles on the Prevention of Transboundary Damage from Hazardous Activities art. 9.1, UN Doc. A/56/10 (2001).

[22] Case Concerning the Pulp Mills on the River Uruguay (Arg. v. Ur.), Judgment, 2010 ICJ REP. 60, para. 119 (Apr. 20).

[23] In the Matter of the Indus Waters Kishenganga Arbitration, Partial Award, 15, para. 44, PCA Case No. 2011-01 (Feb. 18, 2013).

[24] In the Matter of the Indus Waters Kishenganga Arbitration, Order on Interim Measures, 44, para. 142, PCA Case No. 2011-01 2011 (Sept. 23, 2011).

[25] SALMAN, *supra* note 16, at 114.

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Convention[26] and the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention),[27] consultation with the public is an integral part of the preparation of an EIA. The country of origin of a project and the affected state must distribute the documentation on the project to the communities likely to be affected by a project and provide sufficient time to submit comments.

The Aarhus Convention further develops the rights to information and participation in the notification and consultation process held by the public of states who are parties to this instrument. It stresses the importance of ensuring "early public participation when all options are open and effective public participation can take place."[28] It also stipulates that states should take due account of the outcome of public participation for their final decision on a project.[29] Moreover, when a final decision has been taken, the public has to be promptly informed. The state at the origin of a project has to explain the outcome and how the public's comments have been taken into account in the final project.[30] The concerned communities must also be informed when a state "reconsiders or updates" a project. This ensures the continuity of the participation of the public in a project developed by a state.[31] These obligations of concerned states of information, notification and consultation with the public are not only applicable to specific projects but also to "plans, programmes and policies."[32]

Similarly, the Espoo Convention includes a consultation procedure with the public that must take place "within a reasonable time before the final decision is taken on the proposed activity."[33] The 2003 Protocol on Strategic Environmental Impact Assessment to the Espoo Convention also requires public participation and consultation concerning planned projects.[34]

A recent example of an agreement setting out an obligation to consult with local communities is the 2018 Escazù Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean.[35] This agreement again clearly states that the public must be involved in the early stages of a project and that "due consideration" is given to its comments and observations. The information provided must also be "clear, timely and comprehensive."[36] Before adopting a decision, public authorities must "give due consideration to the outcome of the participation process."[37]

The extent of the community rights of participation in the notification and consultation process is particularly important in the context of indigenous rights. This includes water-related projects that risk having a negative impact on transboundary water resources and that may affect the rights of indigenous peoples. The Inter-American Court of Human Rights recognized the right of free, prior, and informed consent in its jurisprudence. In the case of the Indigenous Communities of the *Lhaka Honhat Association (Our Land) v. Argentina*, the Court

[26] Espoo Convention, *supra* note 9, art.2.

[27] UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters art. 3, Oct. 30, 2001, 2161 UNTS 447.

[28] *Id.* art. 6.4.

[29] *Id.* art. 6.8.

[30] *Id.* art. 6.9.

[31] *Id.* art. 6.10.

[32] *Id.* art. 7.

[33] Espoo Convention, *supra* note 9, art. 4(2).

[34] Protocol on Strategic Environmental Impact Assessment, 2003.

[35] Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, Mar. 4, 2018, UN Doc. C.N.195.2018.TREATIES-XXVII.18.

[36] *Id.* art. 7.4.

[37] *Id.* art. 7.7.

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examined the impact of constructing a route and an international bridge over the Pilcomayo River from Argentina to Paraguay. The Court interpreted Article 23 of the Inter-American Convention on Human Rights as including the obligation to consult the indigenous peoples adequately through their representative institutions. The Court concluded that Argentina "did not comply with its obligation to ensure adequate mechanisms for a free, prior and informed consultation of the indigenous communities concerned."[38]

From the treaty practices observed and the existing jurisprudence, there seems to exist an emerging customary law duty to inform the public and allow it to consult regarding planned measures.

Conclusion

While the duty to offer prior notification and consultation about projects that risk causing transboundary harm to riparian states is a customary norm and must be implemented by both upstream and downstream countries, a dimension that must be consolidated as a customary norm is the duty to inform the public and to involve it in the consultation process. The entry into force of the Escazù Agreement and case law of human rights mechanisms could give an impetus in this respect. Generally, the prior notification and consultation process appears to be dynamic mechanism that includes various steps and acts as a measure to prevent the risks of water conflicts and contribute to the protection of water rights of both riparian states and local communities.

[38] Case of the Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina, Interpretation of the Judgment on Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 420, para.184 (Nov. 24, 2020).

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