Principle 19: Notification and Consultation on Activities with Transboundary Impact

BOISSON DE CHAZOURNES, Laurence, SANGBANA, Komlan

Reference


Available at:
http://archive-ouverte.unige.ch/unige:55049

Disclaimer: layout of this document may differ from the published version.
23. Principle 19

*Notification and Consultation on Activities with Transboundary Impact*

Laurence Boisson de Chazournes* and Komlan Sangbana**

Principle 19
States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith.

I) Origins and Rationale of the Principle

II) The Principle as Enshrined in the Rio Declaration

1. Preparatory work and context
2. Scope and dimensions
   2.1. Characterization of the trigger effect
   2.2. The conditions of implementation of the principle
      2.2.1. The initiative of notification
      2.2.2. Content and time of the notification
      2.2.3. Consultation and negotiation
   2.3. Legal nature
3. Normative impact
   3.1. Reception in treaties
   3.2. Codification institutions
4. Jurisprudential relevance

III) Relations with Other Principles

IV) Assessment

V) Select Bibliography

I) Origins and Rationale of the Principle

Not expressly mentioned in the Stockholm Declaration on the Human Environment of 1972, the principle to notify and to consult appears as a significant component of the Rio Declaration. The principle provides that States which plan to carry out or permit activities that may cause a significant adverse transboundary environmental effect to another

* Professor of International Law and International Organization at the Faculty of Law of the University of Geneva.
** Research and Teaching Assistant at the Faculty of Law of the University of Geneva.
State shall give timely notification of such planned activities to such other States and enter into consultation with them in good faith.


In this regard, the principle to notify and to consult is understood as a specific application of the general principle of cooperation.\footnote{Concerning the international practice dealing with the duty to notify and to consult, see, Munro and Lammers, \textit{Environmental Protection}, 99 and 104; Kiss, A. and Beturier, J-F., \textit{Droit international de l’environnement} (Pedone 2010), 149–50; Okowa, P., ‘Procedural Obligations in International Environmental Agreements’ (1997) 67 \textit{BYIL} 275; Farras, M. M., ‘Notification and Consultation in the Law Applicable to International Watercourses’, in Boisson de Chazournes, L. and Salmon, S. M. A. (eds), \textit{Water Resources and International Law} (Academy of International Law and Martinus Nijhoff Publishers 2005), 281.} It specifies the content of one of the facets of the principle and facilitates the implementation of other obligations relating to the principle of cooperation, such as the obligation not to cause significant harm to the environment of other States (Principle 2), which is in many ways the backbone of the Rio Declaration.

II) The Principle as Enshrined in the Rio Declaration

1. Preparatory work and context
The codification of the principle within the Rio Declaration appears mainly as the culmination of a long process of its recognition as a principle of international law that is critically important in the environmental area. Before the Rio Declaration, a number of treaties and judicial decisions as well as the works of the \textit{Institut de Droit International} and the International Law Association have dealt with the duty to notify and to consult.\footnote{Munro, R. and Lammers, J. G., \textit{Environmental Protection and Sustainable Development: Legal Principles and Recommendations} (Graham and Trotman 1987), 99.}

This practice seems to justify why the inclusion of this principle in draft negotiated at PrepCom IV and eventually adopted at the Rio Summit did not raise significant controversies. The first proposal of the principle, included in Principle 9 of the draft tabled by the EC countries, entailed widely accepted aspects including notification in emergency situations and notification for planned activities:

States shall provide prior and timely notification and relevant information to \textit{other concerned States} on activities that may have a significant international or transboundary effect and shall consult with those other States at an early stage and in good faith.
States shall immediately notify other States of any emergency situation that might produce sudden harmful effects on the environment of those other States.6

The second paragraph of this draft principle became Principle 18 and the first paragraph became, almost with no changes, Principle 19.

The two differences with the text proposed by European countries were the replacement of the reference to ‘other concerned States’ with ‘potentially affected States’ which is broader in scope and that of the expression ‘significant international or transboundary effect’ with ‘significant adverse transboundary effect’, which stresses the transboundary focus on the notification obligation, particularly if compared with the prevention obligation of Principle 2 that applies also to harm to the global commons.

No changes were introduced at the Rio Summit to the formulation agreed at PrepCom IV.

2. Scope and dimensions

2.1. Characterization of the trigger effect

The trigger condition for implementation of the duty of notification and consultation as enshrined in Principle 19 of the Rio Declaration is the existence of activities that have significant adverse transboundary environmental effect.7 What kind of ‘activities’ and ‘transboundary adverse effect’ are concerned?

It appears from State and treaty practice that identification of relevant activities and the form of injuries do not lend themselves to a single formula. Sometimes it is the nature of the resources being used that is taken as the point of departure.8 For example, article 12 of the 1997 UN Watercourses Convention requires notification for ‘planned measures which may have a significant adverse effect upon other watercourse States’. In this case, the shared river represents the point of departure. In the 1979 Convention on Long-Range Transboundary Air Pollution, the protection of airspace represents this point of departure. Article 3 of the Convention provides that:

The Contracting Parties, within the framework of the present Convention, shall by means of exchanges of information, consultation, research and monitoring, develop without undue delay policies and strategies which shall serve as a means of combating the discharge of air pollutants…

In other cases it is the potential scale or probability of harm to which the activity gives rise that may determine the reference to notification.9 In this regard, notification and consultation concern all activities that may have a significant adverse transboundary environmental effect.10 The 1980 Memorandum of Intent between the United States and Canada concerning Transboundary Air Pollution specifies that notification is required not only for individual projects, but also for proposed changes of policy, regulations, or practices which may cause transboundary air pollution.11 Considering the changing nature of technology and knowledge about the effects of activities, the International Law Commission (ILC)

---

7 Munro and Lammers, Environmental Protection, 9, 104–5; McCaffrey, The Law of International Watercourses, 473; Boisson de Chazournes and Tignino, ‘Droit international et eau douce’, 14,
10 Kiss and Beurier, Droit international de l’environnement, 150, para 266.
in its Draft Article on the prevention of Transboundary Harm from Hazardous Activities preferred to not draw a definitive list of activities that would necessitate a notification requirement.\textsuperscript{12} For its part, the 1991 Espoo Convention on Environmental Impact Assessment in a Transboundary Context lists activities that require notification in its Appendix I. It includes, among other things, oil refineries, coal gasification plants, thermal power stations, large diameter oil and gas pipelines, trading ports, waste disposal installations for incineration, chemical treatment or landfills of toxic and dangerous wastes, offshore hydrocarbon production, and major storage facilities for petroleum, petrochemical and chemical products. At the initiative of any such party, concerned states can enter into discussions on whether other proposed activities, not listed in Appendix I, are likely to cause a significant adverse transboundary impact and should be treated as if they were listed (article 2 (5)).

International law does not define in a strict manner the gravity threshold that requires notification implementation. Very often, practice requires that the transboundary harm must present some level of gravity. The ILC makes reference to the notion of 'significant transboundary harm'.\textsuperscript{13} However, this term remains ambiguous. The commentaries of the Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities describe the term 'significant' as something more than 'detectable' but which need not rise to the level of 'serious' or 'substantial'.\textsuperscript{14} Finally, it is for States to assess what constitutes a significant adverse transboundary effect but 'the harm must lead to a real detrimental effect on matters such as, for example, human health, industry property, environment, or agriculture'.\textsuperscript{15}

Article 1 of the 1992 UNECE Water Convention provides that: 'such effects on the environment include effects on human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments, or other physical structures, or the interaction among these factors; they also include effects on the cultural heritage or socio-economic conditions resulting from alterations to those factors'. Practice can provide guidance on criteria to be taken into account in determining significant adverse impact. For example, Appendix III of the 1991 Espoo Convention on Environmental Impact Assessment in a Transboundary Context provides the following criteria: a) size of the activity; b) proximity to areas of specialized environmental sensitivity or importance location; and c) activities with particularly complex and potentially adverse effects.

2.2. The conditions of implementation of the principle

2.2.1. The initiative of notification

According to Principle 19 of the Rio Declaration, it is the responsibility of the State which plans the measures to inform the concerned States, even though the project is owned or


\textsuperscript{14} See ILC Prevention articles, commentary ad art 2, p 152, para 4.

\textsuperscript{15} See ILC Prevention articles, commentary ad art 2, p 152, para 4.
placed under the responsibility of a private person. The ICJ stressed this point in the *Pulp Mills* case. In rejecting Uruguay's argument in this case that the Administrative Commission on the Uruguay River ('CARU') had been made aware by private entities, the Court considered that:

the information on the plans for the mills which reached CARU via the companies concerned or from other non-governmental sources cannot substitute for the obligation to inform laid down in Article 7, first paragraph, of the 1975 Statute, which is borne by the party planning to construct the works referred to in that provision.

To avoid inertia within the planning State, practice recognizes that the implementation of notification is not only dependent upon the appreciation of the planning State. The potentially affected State has a right to require notification if it considers that there is a risk of transboundary effect. This is what emerged in the *Lake Lanoux* case. In this case, facing the refusal of France to inform the Spanish authorities on the derivation of the Carol River (on the basis that the projected works would cause no significant prejudice beyond France's own borders), the Tribunal considered that:

In any event, the possibility of prejudicing the course or the volume of the water mentioned in Article 11 cannot in any case be left exclusively to the discretion of the State which proposes to execute those works or to grant new concessions; the assertion of the French Government that the projected works can cause no prejudice to the Spanish riparian owners is, despite what has been said in argument... not sufficient to relieve that Government from any of the obligations contained in Article 11... A State which is liable to suffer repercussions from work undertaken by a neighbouring State is the sole judge of its interests...

In the absence of a general standard of appreciation, this right appears as an assurance for the potentially affected State.

The notification is generally addressed to the State that may be affected. In this regard, it is traditionally considered that the implementation of notification and consultation duties is designed to take place in a bilateral inter-state context. The growing implication of international organizations can also be observed. Recent practice shows that organizations can be used as intermediaries to notify all States parties concerned of planned measures. This has generally been the case when a multiplicity of States is involved, which is true of some river basins. Article 24 of the 2002 Water Charter of the Senegal River provides for example that: 'Pour les projets susceptibles d'avoir des effets significatifs, il est fait obligation, avant leur exécution, de les notifier aux États parties, par l'intermédiaire du Haut-Commissariat.' A similar provision can be found in article 20 of the 2008 Water Charter of the River Niger Basin. In the marine area, the 1995 Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean designates the

---

16 Boisson de Chazournes and Tignino, 'Droit international et eau douce', 14,
17 *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, 14, para 110.
18 *Lake Lanoux Arbitration* case, ILR (1957), 314, para 21.
19 *Lake Lanoux Arbitration* case, 15; see also Okowa, 'Procedural Obligations', 290.
20 'Before a State Party implements or permits the implementation on its territory of measures that may have significant adverse effects upon other Basin States, it shall provide the latter with timely notification through the Executive Secretariat.' See also 1975 Statute of the River Uruguay, Salto, 26 Feb. 1975, 1295 UNTS 340 (art 7); 1994 Danube River Protection Convention (art 11), available online at: <http://www.icpdr.org/main/icpdr/danube-river-protection-convention> (accessed 24 April 2014); 1995 Agreement on the cooperation for the sustainable development of the Mekong River Basin, Chiang Rai, 5 April 1995, (1995) 34 ILM 864 (arts 5 and 26); 2010 Agreement on the Nile River Basin Cooperative Framework (art 8), available online at <http://www.internationalwaterlaw.org/documents/africa.html> (accessed 24 April 2014).
United Nations Environment Programme to carry out administrative functions which include notification (article 17).\textsuperscript{21} Notification to those institutions can be an obligation for the concerned States.

This is what emerged in the \textit{Pulp Mills} case concerning the interpretation of article 7 of the 1975 Uruguay River Statute, which requires that a State which is initiating a planned activity inform the Administrative Commission on the Uruguay River (‘CARU’). Rejecting Uruguay’s argument, the Court observed firstly that:

Since CARU serves as a framework for consultation between the parties, particularly in the case of the planned works..., neither of them may depart from that framework unilaterally, as they see fit, and put other channels of communication in its place. By creating CARU and investing it with all the resources necessary for its operation, the parties have sought to provide the best possible guarantees of stability, continuity and effectiveness for their desire to co-operate in ensuring ‘the optimum and rational utilization of the River Uruguay’.\textsuperscript{22}

Secondly, the Court added: ‘[i]t is why CARU plays a central role in the 1975 Statute and cannot be reduced to merely an optional mechanism available to the parties which each may use or not, as it pleases...’\textsuperscript{23}

This argument justifies why the Court considers that ‘the obligation of the State initiating the planned activity to inform CARU constitutes the first stage in the procedural mechanism.’\textsuperscript{24}

2.2.2. Content and time of the notification

2.2.2.1. Content

Similarly to provisions in other instruments, Principle 19 of the Rio Declaration does not give a precise definition of the content of notification. However considering that the scope of the notification is to allow the potentially affected State to study and evaluate the possible effect of the planned measures,\textsuperscript{25} the content appears to be characterized by the elements that permit an informed determination about the effect of a planned project. In this regard, the practice requires adequate information to assess the effect of a project or a plan.\textsuperscript{26}

For example, Article 3 (2) of the 1991 Espoo Convention on Environmental Impact Assessment in a Transboundary Context provides that:

This notification shall contain, inter alia: (a) Information on the proposed activity, including any available information on its possible transboundary impact; (b) The nature of the possible decision; and (c) An indication of a reasonable time within which a response under paragraph 3 of this Article is required, taking into account the nature of the proposed activity.

Likewise paragraph 3 of the World Bank Procedure (BP) 7.50 relating to projects on international waterways provides that:

The notification contains, to the extent available, sufficient technical specifications, information, and other data (Project/Program Details) to enable the other riparians to determine as accurately

\textsuperscript{21} Art 17: ‘The Contracting Parties designate the United Nations Environment Programme as responsible for carrying out the following secretariat functions ... ii) To submit to the Contracting Parties notifications, reports and other information received...’

\textsuperscript{22} \textit{Pulp Mills}, para 90. \textsuperscript{23} \textit{Pulp Mills}, para 91. \textsuperscript{24} \textit{Pulp Mills}, para 94.

\textsuperscript{25} \textit{Pulp Mills}, para 113.

\textsuperscript{26} 1979 Convention on Long-Range Transboundary Air Pollution, Geneva, 13 Nov. 1979, (1979) 18 ILM 1442 (art 8); Espoo Convention, art 3; 1997 UN Watercourses Convention, art 12; ILC Prevention articles, art 8(1).
as possible whether the proposed project has potential for causing appreciable harm through water deprivation or pollution or otherwise... 27

In this context, the requirement to produce an environmental impact assessment among the elements of notification has gained attention in practice. The environmental impact assessment is perceived as a vehicle for providing relevant information and data. 28 For example, article 12 of the 1997 UN Watercourses Convention provides that:

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.

Article 24 of the Water Charter of the Senegal River meanwhile envisages more systematization in this area: 'The notification must be done in good time and be accompanied by all the technical data necessary to its evaluation, in particular the impact studies.'

Similarly, the International Court of Justice in its judgment in the Pulp Mills case pointed out 'the need for a full environmental impact assessment in order to assess any significant damage which be caused by a plan.' 29 In this regard, the Court considered that environmental impact assessment is a customary law obligation. 30

Various instruments specify the context of undertaking an environmental impact assessment. Article 4 of the 1991 Espoo Convention on Environmental Impact Assessment in a Transboundary Context provides that the environmental impact assessment of a State party should contain, at a minimum, the information described in Appendix II to the Convention. Appendix II lists nine items, as follows:

(a) A description of the proposed activity and its purpose; (b) A description, where appropriate, of reasonable alternatives (for example, locational or technological) to the proposed activity and also the no-action alternative; (c) A description of the environment likely to be significantly affected by the proposed activity and its alternatives; (d) A description of the potential environmental impact of the proposed activity and its alternatives and an estimation of its significance; (e) A description of mitigation measures to keep adverse environmental impact to a minimum; (f) An explicit indication of predictive methods and underlying assumptions as well as the relevant environmental data used; (g) An identification of gaps in knowledge and uncertainties encountered in compiling the required information; (h) Where appropriate, an outline for monitoring and management programmes and any plans for post-project analysis; and (i) A non-technical summary including a visual presentation as appropriate (maps, graphs, etc.). 31

29 Pulp Mills, para 116.
30 '... In this sense, the obligation to protect and preserve, under Article 41 (a) of the Statute, has to be interpreted in accordance with a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource', Pulp Mills, para 204.
2.2.2.2. Time

Generally, to ensure that the notification is not to be deprived of practical significance, practice requires a timeliness condition. Principle 19 of the Rio Declaration requires prior and timely notification. Early notification avoids the risk of additional costs of redesign to the planning States.

Treaty practice lacks preciseness. Provisions use vague terms like 'timely' or 'early as possible'; sometimes they do not contain provisions relating the time when notification must be provided. However the ILC has given some indication on this matter. It defined the term 'timely' as 'intended to require notification sufficiently early in the planning stages to permit meaningful consultations and negotiations... if such prove necessary.' In this regard, the appreciation of the timeliness of the notification is made in reference of its objective. Notification should happen at such point in time as is required relative to the intended objective of notification. The International Court of Justice confirmed this in considering that: '[n]otification must take place before the State concerned decides on the environment viability of the plan taking due account of the environmental impact assessment submitted to it.'

2.2.3. Consultation and negotiation

2.2.3.1. Consultation and negotiation process

In accordance with Principle 19 of the Rio Declaration, consultation appears as the process that ensues if the potential affected State does not agree with the planned measures. The purpose of consultations is for the parties to find acceptable solutions regarding measures to be adopted in order to prevent significant transboundary harm, or at any event to minimize the risk thereof. In case of failure of consultation, the parties will enter into negotiation to find a solution to their dispute. Whereas Principle 19 of the Rio Declaration provides a rather clear understanding of the link between notification and consultation, such a link is not clearly established in practice. The two processes have usually been addressed separately. For example, the final report of the expert group on the environment, which appears as one of working papers of the Rio conference, had made reference to them in two different principles: Principle 16 concerning the duty to give prior notice, and Principle 17 concerning the duty to consult. The formulation of Principle 19 highlights the interdependence between consultation and notification. Notification appears as the first stage of the consultation process on planned measures.

In practice, the requirement of consultation and negotiation may conduct to equitable (or acceptable) solutions between parties. To achieve this equitable solution, the parties must enter into consultations in good faith. The principle of good faith is an integral part of any requirement of consultations and negotiations. It falls on the State which foresees

34 Pulp Mills, para 120. 35 Munro and Lamers, Environmental Protection, 104-5.
36 UN Watercourse Convention, art 22.1.
37 Leb., Cooperation in the Law of Transboundary Water Resources, 137.
38 Term used in the ILC Prevention articles, art 9.1.
39 ILC Prevention articles, commentary ad art 9, para 3.
a project or a plan to take into account legitimate interests of others. This is what emerges from the Lake Lanoux case. The Tribunal considered that consultation:
cannot be confined to purely formal requirements, such as taking note of complaints, protests or representations made by the downstream State....According to the rules of good faith, the upstream State is under the obligation to take into consideration the various interests involved, to seek to give them every satisfaction compatible with the pursuit of its own interests, and to show that in this regard it is genuinely concerned to reconcile the interests of the other riparian State with its own.40

This view was also pointed out by the International Court of Justice in the Pulp Mills case on the River Uruguay. The Court observed that:
as long as the procedural mechanism for co-operation between the parties to prevent significant damage to one of them is taking its course, the State initiating the planned activity is obliged not to authorize such work and, a fortiori, not to carry it out.41

And it adds:

there would be no point to the co-operation mechanism...if the party initiating the planned activity were to authorize or implement it without waiting for that mechanism to be brought to a conclusion. Indeed, if that were the case, the negotiations between the parties would no longer have any purpose.42

2.2.3.2. Consultation and prior consent

First of all, the obligation to consultation does not imply an obligation to reach an agreement. This view is largely reflected in practice. In the Lake Lanoux case, the Tribunal considered that: 'it places an essential restriction on the sovereignty of a State, and such restriction could only be admitted if there were clear and convincing evidence.'43 In this regard, the Tribunal considered that the prior consent requirement agreement can only exist by virtue of treaty.44 This is case for the 2002 Water Charter of the Senegal River which provides that:

En tout état de cause, aucun projet susceptible de modifier d'une manière sensible les caractéristiques du régime du Fleuve, ses conditions de navigabilité, d'exploitation industrielle, l'état sanitaire des eaux, les caractéristiques biologiques de sa faune ou de sa flore, son plan d'eau, ne peut être exécuté sans avoir été au préalable approuvé par les États contractants.45

A similar provision can be found in the 1975 Statute of the River Uruguay (arts 7–13) and the 1995 Agreement on the cooperation for the sustainable development of the Mekong River Basin (arts 5 and 26).

In case of failure to reach agreement, international law permits the State to resort to diplomatic or judicial methods of dispute settlement. Article 87 of the 1973 Treaty concerning the Rio de la Plata and article 60 of the 1975 Statute of the River Uruguay provide for the submission of this issue to the International Court of Justice when the States do not reach agreement on the planned projects.

40 Lake Lanoux, para 22. 41 Pulp Mills, para 144. 42 Pulp Mills, para 147.
43 Lake Lanoux, para 22. 44 Lake Lanoux, para 22.
Concerning the obligation of 'no construction' incumbent on the State which plans the project, international practice limits to the period of consultation and negotiation. For example, article 17 paragraph 3 of the 1997 UN Watercourses Convention provides that:

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.\(^\text{46}\)

In the *Pulp Mills* case, Argentina attempted to extend this to the period between the end of negotiation and final resolution of the case by the ICJ.\(^\text{47}\) The ICJ rejected this argument:

The Court observes that the 'no construction obligation', said to be borne by Uruguay between the end of the negotiation period and the decision of the Court, is not expressly laid down by the 1975 Statute and does not follow from its provisions. Article 9 only provides for such an obligation during the performance of the procedure laid down in Articles 7 to 12 of the Statute.

Furthermore, in the event of disagreement between the parties on the planned activity persisting at the end of the negotiation period, the Statute does not provide for the Court, to which the matter would be submitted by the State concerned, according to Argentina, to decide whether or not to authorize the activity in question. The Court points out that, while the 1975 Statute gives it jurisdiction to settle any dispute concerning its interpretation or application, it does not however confer on it the role of deciding in the last resort whether or not to authorize the planned activities. Consequently, the State initiating the plan may, at the end of the negotiation period, proceed with construction at its own risk.\(^\text{48}\)

### 2.3. Legal nature

The obligation to notify and to consult is now considered as a norm of customary international law.\(^\text{49}\) The ILC went as far as to consider that:

The obligation to notify other States of the risk of significant harm to which they are exposed is reflected in the Corfu Channel case, where ICJ characterized the duty to warn as based on 'elementary considerations of humanity.'\(^\text{50}\)

As to its content, the obligation to notify and to consult appears to be a specific obligation of performance—*obligation de faire*—stipulating that the State must inform and consult the potential affected States before implementing an activity which might have significant adverse transboundary effects. The obligation provides a standard of behaviour in the conduct of hazardous activities in general. As discussed next, the obligation has been stated in a large number of treaties. The latter in some occasions have specified the content of the obligation.

\(^{46}\) See also UN Watercourses Convention, art 18.3 concerning the Procedures in the absence of notification.


\(^{48}\) *Pulp Mills*, para 154.

\(^{49}\) However, a handful of States have questioned this assertion, see eg the position of the Turkish delegation, *Summary report of the 21th session of the Working group of the Whole on the Elaboration of a Framework Convention on the Law of the Non-Navigational Uses of International Watercourses, 1996*, SR. 21, n'18, Doc NU, A/C.651/SR.21.

\(^{50}\) ILC Prevention articles, commentary ad art 8, para 3.
3. Normative impact

3.1. Reception in treaties

The principle of notification and consultation is vastly enshrined in the context of trans-boundary watercourses; however, its implementation extends to other areas such as nuclear power installations and the protection of air, weather modification, or marine space. Among the international instruments relating to international watercourses that addressed the issue of prior notice, reference should be made to the 1964 Niamey Agreement concerning the River Niger Commission and the Navigation and Transport on the River Niger, which provides:

In order to achieve maximum co-operation in connection with the matters mentioned in Article 4 of the Act of Niamey, the riparian States undertake to inform the Commission...at the earliest stage, of all studies and works upon which they propose to embark. They undertake further to abstain from carrying out...any works likely to pollute the waters, or any modification likely to affect biological characteristics of its fauna and flora, without adequate notice to, and prior consultation with, the commission.\(^{51}\)

A recent example of the inclusion of the principle in a treaty concluded in the African region is the 2002 Water Charter of the Senegal River (article 10).\(^{52}\) Others include the 2008 Water Charter of the Niger Basin (articles 20–3)\(^{53}\) and the Code of Conduct for the sustainable and equitable management of shared water resources of the Volta Basin (articles 21–2).\(^{54}\)

In Asia, one can refer to 1960 Indus Waters Treaty concluded between India and Pakistan (article 7 (2))\(^{55}\) and the 1995 Agreement on the cooperation for the sustainable development of the Mekong River Basin (article 5).\(^{56}\)

In Europe, reference may be made to treaties such as the 1964 Agreement between Poland and the USSR concerning the Use of Water Resources in Frontier Waters (article 6),\(^{57}\) and the 1980 Agreement between Norway and Finland concerning a Norwegian Finnish Commission for Frontier Watercourses (article 1).\(^{58}\) The principle was also adopted by the 1994 Danube River Protection Convention (article 11)\(^{59}\) and the 2008 Draft Agreement on cooperation on conservation and sustainable development of the Dniester River basin (article 18).\(^{60}\)

In the American region, reference may be made to the 1909 Boundary Waters Treaty between Canada and the United States (articles 3 and 4),\(^{61}\) the 1978 Great Lakes Water Quality Agreement (article 10 (2)),\(^{62}\) and the 1971 Act of Santiago between Argentina and

---


\(^{53}\) Available online at <http://www.abn.net/> (accessed 24 April 2014).

\(^{54}\) In Garane, A., *Le cadre juridique international du bassin de la Volta* (IUCN 2009), 219.

\(^{55}\) Karachi, 19 Scpr. 1960, Legislative Texts, Treaty No 98,300.


\(^{57}\) Warsaw, 17 July 1964, 552 UNTS 175 (1964).

\(^{58}\) In Overenskomster med fremmede Stater 1981, 236.


Chile concerning Hydrologic Basins (article 5), and the 1971 Buenos Aires Declaration between Argentina and Uruguay on Water Resources (article 3).

More generally reference may be made to article 6 of the 1992 United Nations Economic Commission for Europe Convention on the Protection and Use of Transboundary Watercourses and International Lakes which requires the parties to provide for exchange of information, as early as possible, on issues covered under its provisions. Article 10 of the Convention calls for consultations on the basis of reciprocity and good faith. Similar provisions can be found in the 1997 United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses (UN Watercourses Convention), and the 2008 Draft Articles on the Law of Transboundary Aquifers (article 15) require timely and prior notification and consultation for planned measures. Furthermore, the 1997 UN Watercourses includes detailed requirement on the duties arising from notification and consultation (articles 11–19).

Notification and consultation requirements are also required in areas such as long-distance air pollution (eg the 1979 ECE Convention on Long-Range Transboundary Air Pollution (articles 5 and 8 (b))), weather modification (eg the 1975 Agreement between Canada and the United States on the Exchange of Information on Weather Modification Activities (articles 2, 5)), and marine pollution (eg the 1974 Paris Convention for the Prevention of Pollution from Land Based Sources (article 9)).

In the area of nature conservation and biodiversity protection reference may be made to the 1968 African Convention on the Conservation of Nature and Natural Resources (article 5 (2)), the 1974 Nordic Environmental Protection Convention (articles 5, 11), the 1985 ASEAN Agreement on the Conservation of Nature and Natural Resources (articles 19 (2) (d, e) and 20 (3) (b, c)) and the 2001 Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities (articles 8 and 9).

3.2. Codification institutions

The Institute of International Law and the International Law Association have both contributed to the development of the principle of notification and consultation. The first instrument of the Institute of International Law which makes reference to the principle is the 1961 Salzburg Resolution on the use of International Non-Maritime Waters (Except for Navigation) which requires prior notification if the works or utilization of the waters might produce serious effects on the use of those waters by other States (article 5). Articles 6 to 8 state that: 'in the event that an objection is made, States should enter into negotiations in order to reach an agreement within a reasonable period of time; and during negotiations States should, in accordance with the principle of good faith, abstain from

---

64 Text reproduced in ILC Yearbook, 1974, vol II, part II, 324.
66 UNGA Res. 51/229.
implementing the works or utilization of the waters or from taking any other measure that could aggravate the situation'. The principle was also included in the 1979 Institute Athens Resolution on Pollution of Rivers and Lakes and International Law (article 7 (1) (d)) adopted in Athens.

The International Law Association, for its part, included rules on notification and consultation in several of its resolutions: the 1966 ILA Helsinki Rules on the Uses of the Waters of International Rivers (article 29); the 1980 ILA Belgrade Articles on the Regulation of the Flow of Water of International Watercourses (article 7 (1)); the 1982 ILA Montreal Rules on Water Pollution in an International Drainage Basin (article 5 (b)); and the 1982 ILA Montreal Rules of International Law applicable to Transfrontier Pollution (article 5 (1)). Recently, the Berlin Rules on Water Resources also make reference to the duty to notify and to consult (articles 57 and 58).

4. Jurisprudential relevance

Notification and consultation have retained great attention in the context of two contentious cases. The first is the Lake Lanoux case, which opposed Spain and France. It dealt with the diversion of the waters of Lake Lanoux, situated in the Eastern Pyrenees in France, into the Ariège River, which was flowing into Spain. The diverted waters were to be completely returned to the River Carol by means of a tunnel connecting the rivers Ariège and Carol above the outlet to the Puigcerda Canal. Fearing that the French works would adversely affect Spanish rights and interests, Spain claimed that under the treaty of Bayonne of May 26, 1866, that these works could only be undertaken with its consent. The tribunal made a number of important statements concerning the content and the extent of the principle of notification and consultation. The Tribunal considered that France had to give prior notice of works that could change the course or the volume of watercourses flowing into Spain. The Tribunal concluded that the French scheme was in compliance with the obligations of article XI of the Additional Act to the Treaty of Bayonne.

The second case is the Pulp Mills on the River Uruguay which opposed Argentina to Uruguay. The case dealt with the construction of a pulp mill along the left bank of the river. Due to the harm that the project could cause to the river, Argentina argued that Uruguay should have initiated the procedure of consultation set out in articles 7 to 12 of the 1975 Statute of the River Uruguay. Thus, it claimed that Uruguay breached the above mentioned obligations under the 1975 Statute by giving authorization for the construction of the pulp mill without having fully exhausted the notification and consultation process provided for in articles 7 to 12. In its analysis, the International Court of Justice (ICJ) emphasized that the obligation to notify:

is intended to create the conditions for successful co-operation between the parties, enabling them to assess the plan's impact on the river on the basis of the fullest possible information and, if necessary, to negotiate the adjustments needed to avoid the potential damage that it might cause.

---

75 For the contribution of the ILA, see generally, Bourne, C. B., 'The International Law Association's Contribution to International Water Resources Law' 36 Natural Resources Journal 155.
76 Lake Lanoux, para 21.
77 Lake Lanoux, para 21–4.
78 Pulp Mills, para 113; see also McCaffrey, The Law of International Watercourses; Boisson de Chazournes and Tignino, 'Droit international et eau douce'.

The Court concluded that Uruguay had the obligation to inform Argentina, through the Administrative Commission of the Uruguay River (CARU), when it prepared itself to issue the initial environmental authorization for the pulp mill. As it did not do so, Uruguay was in breach of its obligation to inform, notify, and negotiate under the 1975 Statute.  

III) Relations with Other Principles

Regarding its scope and profile, the principle to notify and to consult is linked with the other principles of the Rio Declaration. Firstly, the principle contributes to the realization of the general principle of prevention (Principle 2). Considering that the ultimate purpose of the principle to notify and to consult is to protect other States from potential transboundary damage, the principle materializes the diligence expected from a State in protecting the environment. Thus the principle is closely linked with the principles which contribute to this materialization.

Secondly, this link can also be established with the principles of cooperation (Principles 18 and 27) and the principle of environmental impact assessment (Principle 17). The principle to notify and to consult appears as a specific application of the former, before an emergency arises (by contrast with Principle 18) and in a transboundary context (by contrast with Principle 27). Principle 17 is, as Principle 19, a modality of the realization of Principle 2 on prevention. More specifically, Principle 17 may be seen as a technique for implementing Principle 19 or, at least, to inform the cooperation called for by the latter.

The interconnection between these different principles reflects the integrated character of the Rio Declaration, which requires a holistic view of its principles in the protection of environment.

IV) Assessment

The basic rationale underlying the obligation to notify and consult is to prevent adverse transboundary effects on other States. Thus the principle appears as a mechanism to avoid disputes by creating the conditions for cooperation through notification and consultation.

A remaining challenge is to clarify more precisely its content. This will reduce the margin of appreciation of States with respect to its initiation and to the modalities of its implementation. Ensuring its respect is crucial for a sound protection of the environment. The ICJ has noted in this regard that:

The Court considers that the procedural obligations of informing, notifying and negotiating constitute an appropriate means... These obligations are all the 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 co-operation between the riparian States.

79 Pulp Mills, paras 120–2.
81 Pulp Mills, para 81.
V) Select Bibliography


