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## Prior Consultation in International Law: A Study of State Practice

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PRIOR CONSULTATION IN INTERNATIONAL LAW: A STUDY OF STATE PRACTICE. By *Frederic L. Kirgis, Jr.* Charlottesville: University Press of Virginia. 1983. Pp. vii, 389. \$35.

The increasingly interdependent relationships among nations today enhance the likelihood that unilateral action by one state will have unintended detrimental effects upon another state's interests. These external costs may be political, economic, or environmental in nature and often generate international disputes. Absent treaty provisions to the contrary, international law does not impose a duty upon states to consider the external effects of their actions before they proceed (p. 359). Nevertheless, the normative expectations of

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6. Thus, even groups whose aims are consistent with official Soviet policy, but which are organized outside of official channels, are not tolerated by the Soviet regime. *See, e.g.*, N.Y. Times, Aug. 9, 1982, § 1, at 7, col. 4 (leader of independent Soviet peace group reportedly held in psychiatric hospital and administered depressant drugs against his will).

7. The expulsion of Kaminskaya and Simis followed her disqualification as an advocate in political trials and the discovery of a manuscript written by him. Simis' book was published in the United States in 1982 under the title of *USSR: The Corrupt Society*.

prior consultation that have been developed in several areas of international relations have helped to ameliorate the disputes arising from such actions. Prior consultation inserts an assessment of the external costs into the decisionmaking process of the acting state and thus provides an opportunity to reduce the negative impacts on the affected state and to alleviate potential hostilities. The international dispute avoidance ramifications of this practice have been largely ignored by legal scholars to date,<sup>1</sup> so Frederic L. Kirgis<sup>2</sup> comprehensive study of the role of prior consultation is a long overdue look at this developing legal norm.

Kirgis defines "consultation" as "something more than notification, but less than consent" (p. 11). His normative view of prior consultation is a simple one:

Decision makers in the acting state would be subjected to the arguments of governments (or, if feasible, of private parties) representing interests most likely to bear any external costs, and would be called upon to respond directly to them, before the externally significant elements of the decision to act (or to permit nongovernmental persons to act) are irrevocably made. [P. 3, footnote omitted].

Such action, Kirgis says, is "a relatively efficient, peaceful means of achieving serious consideration of externalities, and thus of preserving the shared international community interest in seeing that the benefits of proposed action exceed all reasonably anticipated costs" (p. 3). While some government officials have recognized the procedural value of prior consultation and have voluntarily assumed this obligation (pp. 3-4), few incentives exist within the international system for states to assess before acting the harm that their self-interested actions will inflict upon others. Thus, it becomes important to identify the kinds of situations in which state practices and legal norms mandate prior consultation.

Kirgis does not provide an in-depth analysis of current thought or developing trends in the field of prior consultation. He "examines state practice and tries to synthesize and draw conclusions from it, rather than attempting to create new normative structures or to make value judgments about the governmental conduct being examined" (p. 7). The major portion of the book consists of the identification

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1. The dearth of serious analyses of existing normative expectations or trends in prior consultation practice is noted by Kirgis, p. 6, and is evidenced by his scant references to secondary sources in his footnotes. Two noteworthy exceptions are Bourne, *Procedure in the Development of International Drainage Basins: The Duty to Consult and to Negotiate*, 1972 CAN. Y.B. INTL. L. 212; and Sztucki, *International Consultations and Space Treaties*, in PROC. OF THE 17TH COLLOQUIUM ON THE LAW OF OUTER SPACE 147 (M. Schwartz ed. 1975). Kirgis notes that this latter work contains a brief historical account of consultation practice in the international sphere. P. 6 n.15.

2. Frederic L. Kirgis, Jr., is currently Dean of Washington and Lee University School of Law, and is also the author of INTERNATIONAL ORGANIZATIONS IN THEIR LEGAL SETTING (1977).

and description of a series of episodes, drawn from carefully defined parameters (pp. 9-15), in which prior consultation was used. The incidents are divided into five major categories: international water-course systems; air basins, partially enclosed seas, and similar resources; nonregional resources (oceans and outer space); alliances and international organizations; and economic relations. Kirgis includes descriptions of state practices in Asia, Africa, Latin America and South America, as well as of Western practices, and at the end of each chapter he provides a "synthesis" of state practice in that area. Rather than identifying specific factors influencing individual state practice, Kirgis provides generalizations and tries to draw distinctions among national, regional, or organizational treatment of prior consultation in particular fields.

Kirgis does attempt, in his final chapter (pp. 359-75), to draw broad conclusions about the role of prior consultation in current international relations. He concludes that international law imposes no legal duty upon states to consult others before acting unilaterally (p. 359), and that when individual states do adopt a prior consultation norm, they generally do so only where the risk of harm to others is significant (pp. 359-60). The problem, of course, is whether the acting state or the affected state should make the determination that the risk of harm is sufficiently great to create an obligation of prior consultation. No satisfactory answer to this question exists. Kirgis, however, believes that this problem is partially resolved by the customary duty of each party to act in good faith (pp. 360-61).

The author also identifies several factors that increase the likelihood of prior consultation being required in a specific situation (pp. 366-71). The international community is more likely to require prior consultation when unilateral activity poses a high risk of transnational harm (pp. 366-67). For example, states that wish to dispose of hazardous wastes in the seas are obliged to consult with the global community before proceeding (p. 367). The strength of political ties between the states involved in the action and the interdependence of states with regard to a relationship or condition that will be affected by the action also tend to encourage prior consultation (p. 368). On the other hand, unilateral actions that only affect aliens within the acting state's own territory are not likely to require consultation (p. 374). Other factors mitigating against prior consultation are the need for secrecy and the need to respond quickly to an emergency (p. 372).

The generalizations that Kirgis draws are unfortunately just that — generalizations. His analyses of the situations described in the book are so superficial that one cannot clearly identify definite trends and standards in the application of prior consultation norms. His study raises many more questions than it answers. For example,

how effective is prior consultation at protecting the interests of the affected party? Does the practice serve to legitimize the actions of the acting party even if the protests of the affected party are heard but largely ignored? Are there any common standards or themes that have been applied so universally as to become international norms?

As the seminal work in a relatively new and rapidly expanding area of international law, however, Kirgis' contribution should not be underestimated. The book is based on, and Kirgis has fulfilled, his expressed desires of identifying "existing and developing prior consultation norms for the guidance of decision makers in the give and take of state practice" and suggesting "those areas in which practice has developed sufficiently to justify efforts to construct new or improved consultative mechanisms" (p. 375). He has also laid an impressive groundwork of research; the task is now left to other scholars to build upon that basis with further analysis.