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Citizenship Entitlements Beyond Borders? Identifying Mechanisms of Access and Redress for Affected Publics in International Environmental Law

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I argue that although environmental law is state centric in nature, there is a growing body of international environmental law that allows at least some input from public actors in implementing key substantive and procedural obligations. The evolution of these environmental entitlements is linked to the global diffusion of democratic norms of civic participation, the application of the nondiscrimination principle in both public and private international law, and the cosmopolitan reach of human rights claims. It is at the intersection of individual and nongovernmental organization (NGO) rights with interstate obligations that transnational citizenship entitlements are emerging—notably equal opportunities for access and redress for affected publics. I critically survey relevant multilateral environmental agreements to gauge the significance of rule making bestowing entitlements on publics affected by transboundary and global environmental harm. KEYWORDS: citizenship, international, publics, environmental law.

Insofar as states have fairly and (reasonably) effectively addressed the general concerns of their constituent populations, there has been little need to question their exclusive determination of citizenship rights, because citizen entitlements and obligations have aligned comfortably with state membership. But this historic correspondence of citizen self-determination with a national government has been upset by the increasing willingness of states to share some sovereign powers in order to address new economic, environmental, and security interdependencies. The "unbundling" of functional governance from fixed territories has seen citizens give up their formal approval of key policy decisions in exchange for a more remote, indirect say in supranational or international decisionmaking bodies.[1] Efforts to address growing transnational flows of ecological harm are at the forefront of these governance transformations, as is evident in the proliferation of multilateral environmental agreements (MEAs) over the past three or four decades. For citizens in countries facing transboundary ecological risks, the incapacity of

their home states to reduce these threats unilaterally represents a potential breach of a core citizenship entitlement—the right to protection from injury caused by activities taking place beyond the territorial borders of their home country. Both the authority of a state over its citizens and their identification with it *as* citizens are deeply unsettled by such a protection failure: their state is exposed as incapable of preventing damage to their lives and vital interests.[2] International cooperation may be the only realistic way for states to seek to prevent an ecological protection failure, yet the indeterminacy of multilateral rule-making processes and outcomes clouds the traditionally clear lines of political accountability running between citizens and their governing representatives.

If we accept that freedom of self-determination—founded on equal opportunities for participation—is at the heart of democratic citizenship, then the need to regulate transboundary (and global) environmental risks creates realms of public concern across and beyond nation-state borders. These communities of shared fate are multiple and dynamic: they expose the political shortfall of the domestic entitlement of citizens to have an influence on decisions significantly affecting their interests, as many such decisions are now taken outside the reach of their home states. Transnational notions of citizenship invoke the right of democratic governance for individuals affected by extraterritorial institutional orders and actors. In the first place, this is a moral appeal that holds all persons to be entitled to equal standing with regard to the defense of their vital interests. Not surprisingly, the most obvious source of such universal moral regard is human rights protection, for violations of basic rights commonly elicit feelings of indignation among distant onlookers as well as among conationals.[3] Some accounts of cosmopolitan obligations have emphasized the central role of human rights in determining participation rights in decisionmaking as well as in determining principles of distributive justice. From this cosmopolitan perspective, safeguarding individual well-being is paramount, and there has been some recognition that this protection may well extend beyond personal integrity and autonomy to encompass vital ecological conditions of existence.[4]

The subject of this article is less the moral justification of a cosmopolitan citizenship than it is the identification of legal norms supporting perhaps its most relevant duty for environmental protection—the prevention of significant harm to foreign affected publics. There is an emerging body of international law that, although state centered in its formulation and implementation, is attuned both to safeguarding collective ecological interests and to allowing at least some input from public actors in administering its constituent environmental obligations. The cosmopolitan scrutiny of sovereign state relations according to democratic criteria of interest representation and communication has so far not examined the existing regulation

of sources of transnational environmental harm.[5] Yet it is the intersection of individual rights and responsibilities with (inter)state obligations that offers concrete possibilities for citizen participation in global decisionmaking.

In this article, I begin by surveying customary and treaty-based law in order to highlight general obligations to prevent cross-border environmental harm and show that these are not exclusively owed by and to states. This is followed by consideration, first, of those procedural public entitlements that support substantive environmental protection rules and, second, of nascent methods of public compliance and enforcement in international environmental law. While the article is not an explanatory account of the emergence of transboundary citizen entitlements, it is guided by the "social fitness" thesis put forward by constructivist international relations scholars—that, other things being equal, a necessary condition for the effective global diffusion and legal institutionalization of new norms is that they fit with existing norms in their area of application. For norms of ecological governance, this means resonance with the dominant "norm complex" of liberal environmentalism, which favors market-based notions of harm prevention alongside public participation entitlements deferring strongly to sovereign state authority. These ascendant values set the ideological parameters against which new environmental norms with political ambition must make headway. In international law, the challenge to reach a "critical mass" of recognition and support for new norms is particularly demanding.[6]

Environmental Harm Prevention

Historically, states first developed harm protection rules to regulate the behavior of their citizens, while the experience of war prompted the emergence of international harm conventions to protect vulnerable groups (e.g., prisoners of war, civilians) from injury. Andrew Linklater observes behind the growth of "cosmopolitan harm conventions" not just the mutual interest of states in regulating force but also the accumulating influence of transnational norms that attach moral consideration to individuals and groups whatever their national citizenship status.[7] Cosmopolitan obligations on states to protect human dignity have, over time, become legally embedded in, for example, international conventions on genocide (1948), apartheid (1973), torture (1984), and terrorist bombings (1997).[8] Of course, the preoccupation of humanitarian and human rights rules is with safeguarding the bodily integrity of human beings, and some commentators have noted that the liberal no-harm principle has been deeply anthropocentric from the start, blocking its application to nonhuman nature.[9] Inasmuch as it is preoccupied with protecting human health, much international environmental regulation

reproduces this anthropocentric bias. However, this has not prevented the widespread extension of harm prevention rules to nonhuman species and, more recently, to the broader policy objective of ecological sustainability.

What merits attention here is the challenge to international rule making arising from the nature of transnational environmental harm. Linklater contrasts the abstract forms of harm associated with environmental damage to the concrete injuries inflicted on fellow human beings by violators of human rights. Not only is the former type of harm often more diffuse in its generation and impacts, often making the determination of responsibility problematic, it is also, typically, the unforeseen consequence of routine market freedoms—liberties to produce and consume—being fostered by economic globalization.[10] Growing market interdependencies and material transactions across state borders generate numerous environmental effects, rendering impractical and politically unfeasible any blanket prohibition of ecological harm. The international preference, instead, has been for states to collectively agree to prevent or restrict activities generating effects that are likely to exceed a set threshold level of environmental harm.

Difficulties in disaggregating individual culpability for much transboundary harm has reinforced the existing propensity in international law to apportion responsibility for extraterritorial injury to *states,* so the duty to prevent harm to non-nationals has primarily been imposed on governments. This accords with the continuing primacy of state sovereignty in shaping the global development of harm prevention norms—a political path dependency acknowledged by the social fitness thesis on norm emergence. States are deemed to be legally responsible if they have breached relevant treaty rules or customary obligations; whether there is a *cosmopolitan* citizen entitlement to the prevention of abstract environmental harm rests on the scope of its embodiment in international rules protecting global ecological interests (i.e., of common concern to humankind).

The International Law Commission (ILC)—the UN body charged with the codification and development of international law—has, in its work on state responsibility, concluded that there are indeed duties on states to cease and make reparations for wrongful injury ("material or moral damage") to collective interests. To be sure, these duties are attributed solely to states, but they entail remedying damage that may extend beyond injured states and the national publics represented by them. In its draft articles on state responsibility recommended to the UN General Assembly for development as an international convention, the ILC proposes, under Article 48(1), that any state other than an injured state is entitled to invoke the responsibility of another state if (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or (b) the obligation breached is owed to the international community as a whole.[11]

Applied to state environmental responsibility, the first type of breach might typically refer to an action of a treaty state that undermined a collective ecological interest protected by an MEA that it had ratified (e.g., a biodiversity conservation convention or a transboundary pollution convention), while the second type of breach would entail damage to vital ecological interests at such a level of seriousness that all states have a legal interest in preventing this from happening. Such universal obligations to the international community (termed obligations *erga omnes*) are widely acknowledged in the human rights domain (e.g., prohibitions against acts of aggression, genocide, and racial discrimination). A few environmental obligations have arguably received such recognition, including deliberate massive pollution of the marine environment and atmospheric nuclear testing.[12] This shortfall in significance compared to human rights obligations reflects in part the historical novelty of international environmental rule making beyond established relations of good neighborliness between states. The seminal international statement on extraterritorial environmental harm prevention is commonly taken to be Principle 21 of the 1972 Stockholm Declaration on the Human Environment, where it serves as a limit to the exercise of state sovereignty over natural resources:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.[13]

As a declarative principle expressed in general terms, its legal force is by no means clear-cut; indeed, it has been argued to constitute a foundational "myth" of international environmental responsibility at odds with state practice.[14] Yet the sustained influence of Principle 21 on UN General Assembly resolutions and numerous MEAs suggests that this criticism is overstated. Significantly, the international community chose to embrace it again at the 1992 UN Conference on Environment and Development, where it became, slightly amended, Principle 2 of the Rio Declaration.[15] Principle 21 is also clearly reflected in paragraph 29 of the advisory opinion on the legality of the threat or use of nuclear weapons issued in 1996 by the International Court of Justice.[16]

Substantive endorsement of a general obligation on states to prevent damage to the environment is evident in a wide array of MEAs, including ones addressing air and marine pollution, climate change, biodiversity conservation, radioactive contamination, and desertification. Alongside its proposed state responsibility rules, the ILC has also recommended a draft convention on the prevention of transboundary harm from hazardous activities,

which encompasses environmental degradation.[17] From this progressive development of international law, it is plausible to claim that there are cosmopolitan environmental obligations owed by states to all peoples. Formally, of course, states are the legal addressees as centers of sovereign authority, so that these entitlements are mediated through national political representatives, with any individual rights of enforcement set out in domestic law. However, this state-centered framework is certainly disrupted by notions of common environmental responsibility. In its least contentious form, this denotes the "common concern of mankind" affirmed, for example, in the preambles to the 1992 biological diversity and climate change conventions; but there is also the more challenging principle of "common heritage," first advanced at the UN in 1967 in relation to use of the deep seabed. As eventually embodied in Articles 136 and 137 of the 1982 Convention on the Law of the Sea, the common heritage principle suggests an obligation of common trusteeship for which the addressees are not just states but "mankind as a whole," and while this legal framing of shared ownership has faced political opposition (notably from the United States), it has also been argued to apply to Antarctica and the global atmosphere.[18]

The general obligation of preventive action is one of conduct rather than result; states are not required to be guarantors against *any* environmental harm, only "to take all necessary measure as may be expected of a reasonable government in all circumstances."[19] What is known as the requirement of due diligence enables an appreciation of context in the application of harm prevention rules, encompassing the likelihood and seriousness of the damage, the determination of causation, the governmental capacity of the source state, and the cost-effectiveness of relevant regulatory measures. In allowing for differentiated responsibility, it can result in separate as well as diluted legal obligations—for example, in the implementation allowances and technical assistance targeted at developing countries under the ozone protection and climate change regimes.[20]

Where there is a threat of serious or irreversible damage, precautionary norms are increasingly invoked in international environmental law to shape what is expected of states under due diligence. As expressed by Principle 15 of the 1992 Rio Declaration, the lack of full scientific certainty about potential effects should not be used as a reason for postponing cost-effective measures to prevent environmental degradation; and this principle, explicitly or implicitly, is endorsed in treaties on climate change, air pollution, marine pollution, transboundary movements in hazardous wastes, and the conservation of biological diversity. Patricia Birnie and Alan Boyle suggest that the main effect of the principle is to lower the standard of proof before preventive action is required.[21] Because the environmental consequences of some activities are often difficult to establish, particularly over the long term, the

legal duty on responsible states is to acknowledge potentially dangerous effects for which there are reasonable scientific grounds for concern.

Of course, due diligence obligations often pertain to the behavior of nonstate actors, which raises the question whether private individuals or companies have a direct duty to cosmopolitan citizens to prevent environmental harm. Insofar as the conduct of private actors causes ecological damage outside their home state, that state has "secondary" obligations to prevent that injury by means of the diligent regulation of their activities. The global reach of this requirement is most fully established in responsibility rules for the marine environment, where states have clear duties to prevent national vessels from polluting other national maritime areas and also the high seas environment.[22] Yet these are still obligations where the home state of the harm producer is ultimately answerable for any damage caused.

Where economic activities *routinely* incur high environmental risks, states have been willing to pass compensation burdens onto private operators, accounting for the growing influence of cross-border liability and compensation rules—for example, in liability treaties on marine pollution, nuclear damage, and the transboundary movement of hazardous wastes. The private responsibility rules in operation here rely on the harmonization of national civil liability systems through international agreements. As the social fitness thesis would predict, they defer to market-based norms of environmental valuation and compensation. This rule development is part of a wider shift in global governance toward hybrid public-private forms of regulation involving standard setting (e.g., radiation protection, food quality) and licensing procedures (e.g., vessel seaworthiness) shaped to a large degree by transnational networks of experts.[23] However, as these techniques move toward self-regulation, the cosmopolitan principle of equal treatment is eroded by unclear authority structures and legal mechanisms that are inaccessible to resource-poor individuals and groups.

In contrast to these private environmental governance initiatives, recent developments in international criminal law hold more cosmopolitan promise, at least for the prevention of severe harm. The 1998 (Rome) Statute of the International Criminal Court (ICC) has established an institution with universal jurisdiction over what are agreed to be the most serious crimes of concern to the international community: genocide, crimes against humanity, war crimes, and—subject to an agreed definition—the crime of aggression. By departing from the previously exclusive right of states to determine the criminal law for their national citizens, the ICC feeds into what has been labeled the "individualization of responsibility" for human rights violations—that is, the emergence of legal obligations of direct (individual) accountability alongside existing state responsibility rules.[24] Breaches of peremptory norms are deemed to be of such grave concern to the international community and all

peoples that culpable individuals (as well as states) are confronted directly with the consequences of their acts. Significantly, the Rome Statute empowers the ICC with jurisdiction for intentional "widespread, long-term and severe damage to the natural environment" as a result of planned or large-scale acts of war excessive in relation to their military objectives.[25] While currently restricted to a category of war crimes, this seminal recognition of universal criminal responsibility for individuals carrying out massive (trans)national ecological destruction may well become a necessary sanction in a world facing the spread of weapons of mass destruction.

This overview has suggested that international obligations on states to prevent significant harm to non-nationals now include key environmental protection duties, though their content and scope defer to dominant norms of political and private authority. What needs to be addressed now is the extent to which affected individuals have access (participation) and redress (compliance and enforcement) opportunities to realize these environmental entitlements.

Procedural Environmental Entitlements

Internationally, the external legitimacy of states is increasingly wedded to the effective bestowal on their citizens of the right to democratic governance. Understood in cosmopolitan terms, this democratic entitlement can be expressed as a right for all those significantly affected by a political decision to have an equal opportunity to influence the making of that decision—*wherever that decision is made.* For Thomas Pogge, the human right to equal opportunity for political participation extends to international ecological regulation because of the significant harms and risks now placed on outsiders by the activities of national citizens.[26] A common source of identity, as cosmopolitan citizens, for otherwise unrelated individuals is their shared experience of the cross-border ecological effects of material activities over which they typically have had little or no involvement. To recognize themselves together as transnational or even global publics, the reflexive move is that they perceive these consequences as adversely affecting their interests and therefore in need of regulation. Procedural rights and duties in support of such joint problem solving would be expected to enable open assessments of ecological risks, inclusive deliberation among all relevant parties, and consideration of the interests of those unable to contribute discursively—notably nonhumans and future generations.

Principle 10 of the Rio Declaration, as endorsed by 176 states and the UN General Assembly, is the most widely supported international statement on procedural environmental obligations:

> Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.[27]

The focus on individual entitlements at the national level is in deference to established state sovereign powers and citizenship rights, yet there is also the acknowledgment that public participation may be needed at other scales of decisionmaking.

In its draft constitution on the prevention of transboundary harm from hazardous activities, the ILC, recalling in its preamble the Rio Declaration, codifies the relevant procedural obligations judged to have currency in international environmental law: prior authorization of risk-bearing activities, risk assessment, notification and information exchange, consultation on preventive measures, and dispute settlement measures. Significantly, there is an explicit acceptance that states originating significant risk-bearing activities are required to inform and register the concerns of all affected publics, regardless of nationality. Article 13 stipulates that states shall "provide the public likely to be affected by an activity within the scope of the present articles with relevant information relating to that activity, the risk involved and the harm which might result and ascertain their views."[28] As with the other procedural articles, this provision essentially sets out a standard of diligent conduct expected of states to conform to agreed objectives for transboundary harm prevention.

Of course, these are all (inter)state obligations, but aside from any claim to equitable treatment between national publics, in Article 15 the ILC also expressly recognizes equal participation opportunities for individuals exposed to the risk of significant transboundary harm. Under the obligation of nondiscrimination, these persons are to be granted access to judicial or administrative procedures of redress regardless of their nationality, residence, or the place where the injury might occur. The nondiscrimination principle embodies, at least for specified areas of application, the cosmopolitan ambition of individuals receiving equal access across borders to procedures with which they can protect their interests. As first formulated in the 1970s by the Organization for Economic Cooperation and Development (OECD), it calls on states to accept the transboundary effects of ecologically harmful activities located in their territories as potentially having the same legal significance as domestic effects. Explicit treaty obligations to that effect are

not common—examples include Article 3 of the 1974 Nordic Convention on the Protection of the Environment and Article 9(3) of the 1992 Convention on the Transboundary Effects of Industrial Accidents—and the principle is generally regarded as not being well developed in international environmental law.[29]

Nevertheless, procedural rights realizing nondiscrimination goals are clearly in evidence in conventions addressing transboundary environmental impact assessment. The most comprehensive treaty in this area is the 1991 (Espoo) Convention on Environmental Impact Assessment in a Transboundary Context, negotiated under the auspices of the UN Economic Commission for Europe (UNECE). Its central substantive requirement on parties is to take all appropriate and effective measures to prevent, reduce, and control significant adverse transboundary impacts from proposed national activities. As noted by John Knox, the procedural obligations in support of this goal directly apply norms of nondiscrimination: states party to the convention are required to consider transboundary effects in their domestic environmental assessment procedures and to open these procedures to affected non-national publics and their representatives. Like the draft ILC convention on prevention of transboundary harm, publics in affected states are entitled to notice of, and consultation on, the proposed activity, although individuals have no direct consultation rights with states of origin and no direct access to the convention's compliance mechanisms.[30] The positive obligation on states to conduct impact assessments for transboundary environmental effects is also found outside the Espoo Convention, in issue-specific and regional MEAs—for example, the Nordic Convention on the Protection of the Environment, the Convention on the Law of the Sea (Articles 204–206), the 1994 Convention on Nuclear Safety (Article 17), and the Convention on Biological Diversity (Article 14).[31]

It would be misleading to presume that these state obligations to inform and consult non-national publics necessarily create cosmopolitan citizenship rights for all individuals under the protection of contracting states. Information provision, consultation, and notification requirements within international environmental law are found in numerous treaties but have traditionally centered on interstate obligations or, in terms of reporting and compliance monitoring, the legal relations between states and international organizations. Treaty obligations are highly significant, because, in spite of declarative statements like Principle 10 of the Rio Declaration, there is evidence that, absent specific treaty commitments, states do not generally notify or consult other states before embarking on activities that generate transboundary environmental risks.[32] Instruments like the Espoo Convention therefore set down detailed rules to ensure that the concerns of affected third parties are taken into account. The shift the Espoo Convention makes in treating the public of the affected party as having separate entitlements

from state representatives is pushed further by MEAs vesting explicit procedural rights in legal or natural persons. Seminal treaty obligations here include the individual access to information rights in the 1992 (Paris) Convention for the Protection of the Marine Environment of the North-East Atlantic (Article 9) and the 1993 (Lugano) Convention on Civil Liability for Damage Resulting From Activities Dangerous to the Environment (Chapter III).

The 1998 (Aarhus) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, developed like the Espoo Convention by the UNECE, is the most important elaboration of Principle 10 to be found in treaty law. Here procedural entitlements in environmental decisionmaking move beyond information rights to an expansive notion of public participation (covering specific activities, plans, programs, policies and other legally binding instruments) and accessible review procedures. Much has been made of the ambition of the Aarhus Convention to increase citizen participation, which has clear cosmopolitan potential: a nonterritorial notion of the public and "public concerned" refers to those natural or legal persons affected or likely to be affected by, or having an interest in, the relevant decisionmaking.[33] A crucial point is that, under this definition, environmental NGOs are accorded a legal interest in participation and access to justice. Moreover, the nondiscrimination principle is invoked in Article 3(9), stating that the provisions of the convention apply to concerned publics whatever their nationality or domicile. To be sure, concern has been expressed that the convention is too permissive in its treatment of public participation, deferring frequently in its provisions to "national law requirements."[34] Since the convention has been in force only since October 2001, it is still too soon to judge whether this will turn out in practice to be a major weakness, although the embrace of the convention by the European Union and member states has already induced strong regional rule development designed to implement it.[35]

Northern European states have, within the UNECE, championed the Aarhus recognition of environmental NGOs as legitimate bearers of procedural rights on behalf of affected publics.[36] The European Eco-Forum network of environmental NGOs, which has received funding from most of these countries (e.g., Denmark, Finland, Germany, Norway, the Netherlands), participated in the UNECE conferences charged with drafting the convention and is actively involved in assisting its monitoring and implementation. This input builds on the now-established practice for NGOs, as observers, to attend meetings of the parties of environmental treaties, typically permitted unless at least one-third of member states object—a (nonvoting) participation right first set out in Article 11(7) of the 1973 Convention on International Trade in Endangered Species, and one since included in a sizable number of MEAs, including those on stratospheric ozone protection, transboundary management of hazardous wastes, climate change,

and the conservation of biological diversity.[37] It also reflects the wider consultative status accorded to NGOs by the UN in its international conferences and other decisionmaking mechanisms (e.g., the UN Human Rights Committee). And environmental NGOs have themselves, of course, campaigned vigorously for international recognition of environmental protection norms across numerous issue areas.

The transnational scope of such procedural rights has been reinforced by the UNECE in its recent (Kiev) Protocol on Strategic Environmental Assessment to the Espoo Convention. Acknowledging in its preamble the Aarhus Convention, the 2003 Kiev Protocol conjoins the public participatory intent of the former—including its requirements for contracting parties to recognize and support environmental protection groups—with the prescribed consideration of the significant environmental effects of plans, program, and policies. The protocol reaffirms the Espoo Convention provision that public entitlements should be exercised without discrimination to national citizenship status (Article 3[7]). As with all UNECE treaty instruments, the geographical reach of this nondiscrimination cannot extend beyond member states in Europe, North America, and Central Asia; but geopolitical changes now mean that an unprecedented number of states could become signatories. The innovative development of environmental norms within the UNECE is rooted in a historical context of Western European security cooperation. With the post–Cold War emergence of democratic governance for countries in transition, the potential currency of these environmental protection rules has expanded considerably. Indeed, the newly independent states have been the most enthusiastic supporters of the Aarhus Convention, bringing its provisions into domestic effect ahead of implementing measures in other signatory states.[38] Furthermore, the executive director of the UN Environment Programme has argued that these norms have a universal moral appeal warranting consideration of their legal codification outside the UNECE region.[39]

Compliance and Enforcement Entitlements

As noted above, the expectation that nonstate actors can effectively contribute to the implementation of international environmental obligations is embodied in the principle of nondiscrimination, expressed in Principle 10 of the Rio Declaration, the ILC draft convention on the prevention of transboundary harm, and, explicitly or implicitly, in a number of MEAs. Opening up judicial and nonjudicial remedies to affected persons creates at least the potential for more cosmopolitan interest representation. It also reveals an unwillingness to rely solely on state-centered mechanisms of compliance and dispute settlement in international environmental law. In part this reflects

the inherent limitations of traditional compliance and enforcement procedures at this scale. Noncompliance of a state with its treaty obligations triggers a need to determine responsibility and possible remedies, yet typically this assessment requires the consent of the state in breach—a condition that holds for international adjudication more generally. Aside from grave criminal acts, only a state that has accepted the jurisdiction of an international enforcement mechanism is subject to its judgments. Assigning responsibility for transboundary environmental harm may be difficult enough within these constraints, when the causal connection between particular activities and injuries suffered may be contested between two states. When *multiple* source states are involved, encompassing disparate polluting activities and numerous affected parties, these problems are obviously compounded; and traditional state responsibility rules for settling disputes are found even more wanting.[40]

It is not surprising, therefore, that intergovernmental environmental litigation is rare. In cases of cross-border damage caused by high-risk activities (e.g., ship-source oil pollution, nuclear contamination, hazardous waste transport and disposal), states have tended to opt for national civil remedies and other private law arrangements, such as insurance settlements. As already mentioned, the role here of international treaties has been to promote consistency in environmental compensation rules. The requirement, under the nondiscrimination principle, that the assessment of environmental compensation be equally favorable to foreign and domestic injured parties rests, of course, on national rules of protection already being adequate. It is significant that the first treaty to feature nondiscrimination for environmental damage claims—the 1974 Nordic Convention on the Protection of the Environment—does not include substantive rules on liability; it establishes for affected persons only a *right of action* against those parties in another contracting state claimed to be causing them significant environmental harm. This presumes compatible environmental damage valuations and liability coverage among the member states (Denmark, Finland, Norway, Sweden), so that the transnational legal entitlement to seek compensation is basically a geographical extension of existing citizenship rights. For transboundary environmental risks that are unlikely to be confined to regions with shared liability norms, specific compensation standards acceptable to many states become necessary. As is evident from the environmental damage provisions of international liability regimes, such standards consequently tend to be modest in their coverage.

Where the causal links between risk sources and affected publics become more remote in space time (e.g., stratospheric ozone depletion and anthropogenic climate change), civil liability systems may no longer be feasible, but problems also with invoking traditional state responsibility rules in these cases has prompted a recent emphasis in international environmental

regimes on so-called soft compliance. Rather than favoring judicial remedies against states in breach of their MEA obligations, the preference of many treaty bodies has been for fact-finding and practical assistance, especially where lack of technical capacity rather than intentional wrongdoing is regarded as the source of noncompliance (as is often the case with countries in transition and developing countries). Soft compliance entails recourse to nonbinding commitments alongside binding targets differentiated according to state capabilities and past or present culpabilities for damage. It has also opened up spaces for NGOs and expert networks to undertake limited oversight and implementation functions. There are precedents for such input; for example, environmental NGOs have been allowed access to annual review meetings under the 1979 UNECE Convention on Long-Range Transboundary Air Pollution, while transnational wildlife NGOs are directly involved in the trade-monitoring mechanisms of the 1973 Convention on International Trade in Endangered Species. The shift to nonconfrontational implementation instruments offers environmental NGOs opportunities for more-sustained input, although they do not always have the resources or inclination to take them.[41]

The soft compliance mechanism of the Aarhus Convention creates even more scope for the participation of nonstate actors. Article 15 of the convention, on the review of compliance, expressly allows for "appropriate public involvement," which may include "the option of consideration of communications from members of the public on matters related to this Convention."[42] The public entitlement to participate in compliance was elaborated on at the first meeting of the parties to the Aarhus Convention in October 2002 in Lucca. It includes the right of members of the public to nominate (but not vote on) candidates to the Compliance Committee, as well as the right to submit to this body allegations of noncompliance by any party and thereafter be entitled to participate in the discussions of the committee. These are obligations clearly flowing directly toward citizens of contracting states that, given the convention's nonterritorial definition of publics, include environmental NGOs as addressees. The novelty of these procedural entitlements was highlighted at the Lucca meeting by the United States. Attending as a UNECE member state, but not a signatory to the Aarhus Convention, the US delegation issued a strong statement of concern about the proposed public compliance measures. They charged the participation and communication rights accorded to individuals and NGOs as an unwise "inversion of traditional treaty practice," placing on record that the United States would not recognize the compliance regime as precedent. The explicit public compliance entitlements were nevertheless adopted by acclamation at the meeting, strongly supported by European Union states.[43]

Reinforcing these compliance rights, the Aarhus Convention also includes access to justice provisions for members of affected publics in the

national enforcement of environmental regulations. Article 9 enables public access to legal review procedures to challenge, first, alleged violations of the treaty's access to information and public participation obligations and, second, private persons and public authorities claimed to be in contravention of national environmental laws. Again, environmental NGOs recognized by member states are, alongside members of the public, deemed to have a "sufficient interest" in "rights capable of being impaired," thus empowering them to initiate judicial proceedings (Article 9[2][3]).[44] Lee and Abbot caution that these provisions may not comprise a "citizen suit" entitlement as such, because deference to national review procedures means that a contracting state could accept, as sufficient to meeting its obligations, merely allowing citizens the opportunity to make complaints to a relevant prosecutor or regulatory authority.[45]

Endowing public actors with direct enforcement rights is a necessary step in realizing effective citizen involvement in environmental policy compliance. The Aarhus Convention illustrates that, even at its most progressive, international environmental enforcement goes no further than forging common national standards open to the consideration of the interests of foreign affected publics. Alongside the UNECE, the Council of Europe has also incorporated ambitious public participation norms in its environmental liability rule making, notably the provision for actionable claims by NGOs under Article 18 of the Lugano Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment and under Article 11 of the 1998 Strasbourg Convention on the Protection of the Environment Through Criminal Law. Regarding the latter, the Council of Europe expressly cites the proven capability of environmental NGOs to represent collective ecological concerns as justifying their involvement in criminal proceedings on behalf of affected publics.[46] As the criminal jurisdiction of contracting parties includes extraterritorial offenses committed by their nationals, NGOs have at least a legal basis for seeking domestic criminal remedies against responsible individuals or corporations for serious environmental damage caused beyond their home country.[47]

Article 11 of the Strasbourg Convention empowers enforcement action by nonstate parties, but this entitlement is at the discretion of individual member states within *national* criminal jurisdictions. There is no question of individuals or NGOs having access to criminal proceedings against the wishes of their home states. The direct access of affected parties to criminal environmental enforcement is here truncated—an underdevelopment of cosmopolitan rights unsurprising in the light of the potential in this area for sanctions against states. Under international law, only states have the right to bring a claim for redress before an international tribunal with compulsory jurisdiction. Even for states, there must be sufficient legal grounds to support such an action, which largely depend on the nature of the alleged

breach of an international obligation and the particular remedy sought. Typically, it would have to be demonstrated that a right had been violated, which could refer, for example, to significant physical damage (e.g., from transboundary air or marine pollution) or a failure to uphold a procedural environmental duty (e.g., an obligation to consult over the use of shared natural resources).[48] These are general rules of state responsibility; their application to environmental harm encompasses numerous duties within and outside treaties. What is clear is that states are entrusted with the sovereign right exclusively to represent the interests of their national publics in contentious judicial proceedings between countries.

Again, it is the propensity for soft implementation in international environmental regulation that is providing opportunities for the engagement of nonstate actors. The treaty-based precedent granting environmental enforcement standing to individuals or NGOs predates the Aarhus Convention compliance rights by a decade. Under the citizen submission provisions of the 1993 North American Agreement on Environmental Cooperation, any member of the public (an individual or NGO) in Canada, the United States, or Mexico has the right to claim that a member state is failing to enforce its environmental laws effectively. Subject to at least a two-thirds majority vote of the treaty's governing council, its secretariat can request the development of a factual record on the alleged deficiencies in enforcement. The factual record is nonbinding, which has provoked strong criticism from environmentalists. Nevertheless, the opening of an inter-national treaty body to direct public access may be judged as a positive step in the growth of transnational environmental accountability.[49] And this provision has influenced the formulation of soft enforcement measures elsewhere—for example, the access afforded to nonstate actors, at the OECD, to raise alleged breaches of its 2000 Guidelines for Multinational Enterprises.[50]

Conclusion

From this brief survey of international environmental regulation, several summary observations are possible on public mechanisms of access and redress. First, international cooperation on transboundary ecological problems, while constrained by the principle that sovereign states alone legally represent their national publics, is not closed to the notion that all persons have equal standing when their vital ecological interests are threatened. Core state environmental obligations articulated in terms of harm prevention commonly register duties to humanity that have general scope beyond territorial borders and into the future. The legal obligations of MEAs constitute collective group interests safeguarding the well-being of all citizens in contracting states from selected sources of ecological harm. Where environmental

damage is deliberate and massive, affected publics have a right to protection that is, at least in some circumstances, universal—legally empowering *any* state to defend this entitlement on behalf of the international community. Second, the evolution of procedural rights in international environmental decisionmaking has created some openings for non-national affected publics. Linked to the global diffusion of democratic norms of civic participation, these opportunities are most evident in the application of the nondiscrimination principle in international environmental regulation, particularly in treaties developed by the UNECE. However, these procedural entitlements are not common nor, third, are public compliance and enforcement rights. The latter have slowly emerged in MEA soft implementation mechanisms and in the legal access for non-nationals permitted in internationally harmonized domestic civil liability rules. Individuals and NGOs still cannot pursue environmental legal claims involving the compulsory jurisdiction of international courts.

Overall, then, we can observe that the prevention of significant environmental harm to non-national parties is well established as a regulative norm in international governance, but that the direct participation of affected parties in realizing the relevant rules is at best embryonic. To explain this state of affairs would, of course, require an in-depth examination of norm development across different issue areas, with a focus on the interplay of environmental protection values with territorial and market-based norm-complexes. The "social fitness" thesis put forward by constructivists seems to find empirical support in several of the political path dependencies highlighted in this article. These feature, above all, the resonance of cosmopolitan environmental rights with the harm prevention and equality of opportunity norms of democratic liberalism, and also the presence of international legitimating institutions receptive to more cosmopolitan public participation (e.g., UNECE, Council of Europe). While transboundary citizenship claims have a novel geographical reach, their content is tempered by their need—in order to secure widespread support—to connect with the foundational values of existing international rules and institutions.

My preoccupation in this article has been with clarifying the nature of new public entitlements in international environmental law. Obviously, this leaves open the question of which counterpart cosmopolitan obligations fall *on* individuals and groups. In a world of strong ecological, economic, and political interdependencies, cosmopolitan environmental duties on individuals are more than a responsibility not to engage in private activities likely to degrade ecological conditions vital to their conationals and foreigners. These are important direct duties, and the processes of intercultural communication by which we may agree on their transnational content and application warrant sustained attention. Even more challenging, perhaps, is the determination of cosmopolitan responsibilities based on the indirect role

of individuals in supporting political and market-based institutions that produce transboundary environmental degradation. As set out by Pogge, under a human rights outlook, individuals have a negative duty not to cooperate in upholding institutions that cause significant harm to others. That all humans are now participants bound up in institutional orders with global effects renders this duty cosmopolitan. However, Pogge argues, the institutional responsibility of citizens in the more powerful, affluent countries is accentuated by their governments' role in designing and maintaining economic and political ground rules that generate systemic harm. Their collective responsibility is all too apparent in the many ways in which citizens in these countries have benefited, and continue to benefit, from activities imposing environmental (and social) costs on non-nationals.[51] Thus, while obligations not to harm the vital ecological interests of distant strangers are, in principle, owed by everyone to everyone, in practice, duties of prevention, mitigation, and redress fall heaviest on the major harm producers.[52]

Notes

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1. Chris Hilson, "Greening Citizenship: Boundaries of Membership and the Environment," *Journal of Environmental Law* 13, no. 3 (2001): 336.

2. See Charles Jones, *Global Justice: Defending Cosmopolitanism* (Oxford: Oxford University Press, 1999), pp. 217–222.

3. Jürgen Habermas, *The Postnational Constellation: Political Essays* (Cambridge: Polity Press, 2001), pp. 107–108.

4. See, for example, Jones, *Global Justice,* pp. 229–230; Michael Mason, *Environmental Democracy* (London, Earthscan, 1999), pp. 58–63.

5. Seminal works include David Held's *Democracy and the Global Order* (Cambridge: Polity Press, 1995) and Andrew Linklater's *The Transformation of Political Community* (Cambridge: Polity Press, 1998).

6. Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change," *International Organization* 52 (1998): 887; Steven Bernstein, *The Compromise of Liberal Environmentalism* (New York: Columbia University Press, 2001).

7. Andrew Linklater, "Citizenship, Humanity and Cosmopolitan Harm Convention," *International Political Science Review* 22 (2001): 261.

8. Steven R. Ratner and Jason S. Abrams provide an authoritative survey in *Accountability for Human Rights Atrocities in International Law,* 2nd. ed. (Oxford: Oxford University Press, 2001).

9. For example, Brian Barry, *Justice as Impartiality* (Oxford: Clarendon Press, 1995), pp. 86–88.

10. Linklater, "Citizenship, Humanity and Cosmopolitan Harm Convention," pp. 269–271.

11. International Law Commission, *Report of the International Law Commission, Fifty-third Session, 23 April–1 June, 2 July–10 August 2001: UN General Assembly A/56/10* (New York: UN, 2001).

12. Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes* (Oxford: Clarendon Press, 1997), pp. 154–162; Jacqueline Peel, "New State Responsibility Rules and Compliance with Multilateral Environmental Obligations," *Review of European Community and International Environmental Law* 10 (2001): 82.

13. UN Doc. A/CONF.48/14/REV.1.

14. John H. Knox, "The Myth and Reality of Transboundary Environmental Impact Assessment," *American Journal of International Law* 96 (2002): 291–296.

15. UN Doc. A/CONF.151/26/REV.1.

16. To be sure, the advisory opinion tempers the force and geographical scope of Principle 21. Edith Brown Weiss, "Opening the Door to the Environment and Future Generations," in Laurence Boisson de Chazournes and Philippe Sands, eds., *International Law, The International Court of Justice and Nuclear Weapons* (Cambridge: Cambridge University Press, 1999), p. 340.

17. International Law Commission, *Report of the International Law Commission, Fifty-third Session,* pp. 370–377.

18. Thomas M. Franck, *Fairness in International Law and Institutions* (Oxford: Clarendon Press, 1995), pp. 393–405; Prue Taylor, *An Ecological Approach to International Law* (London: Routledge, 1998), pp. 258–297.

19. Phoebe N. Okowa, *State Responsibility for Transboundary Air Pollution in International Law* (Oxford: Oxford University Press, 2000), p. 81.

20. Duncan French, "Developing States and International Environmental Law: The Importance of Differentiated Responsibilities," *International and Comparative Law Quarterly* 49 (2000): 35.

21. Patricia Birnie and Alan Boyle, *International Law and the Environment,* 2nd ed. (Oxford: Oxford University Press, 2002), pp. 115–121.

22. Brian D. Smith, *State Responsibility and the Marine Environment* (Oxford: Oxford University Press, 1988), pp. 72–94.

23. See Peter Sand, *Transnational Environmental Law* (The Hague: Kluwer Law International, 1999), pp. 35–41; and Robert Falkner, "Private Environmental Governance and International Relations: Exploring the Links," *Global Environmental Politics* 3 (2003): 72.

24. André Nollkaemper, "Concurrence Between Individual Responsibility and State Responsibility in International Law," *International and Comparative Law Quarterly* 52 (2003): 631.

25. Articles 8(1) and 8(2)(a)(iv); see www.un.org/law/icc/statute/contents.htm.

26. Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (Cambridge: Polity Press, 2002), pp. 183–189.

27. UN Doc. A/CONF.151/26/REV.1.

28. International Law Commission, *Report of the International Law Commission, Fifty-third Session,* p. 375.

29. Birnie and Boyle, *International Law and the Environment,* pp. 147–148, 269–270.

30. Knox, "The Myth and Reality of Transboundary Environmental Impact Assessment," pp. 302–304.

31. Philippe Sands, *Principles of International Environmental Law I: Framework, Standards and Implementation* (Manchester: Manchester University Press, 1995), pp. 579–591.

32. Okowa, *State Responsibility for Transboundary Air Pollution in International Law,* p. 169.

33. Sub-articles 2(3) and 2(4). This broad definition of the "public" is innovative in terms of UN conventions in that it encompasses associations, organizations, and groups of natural or legal persons; see Economic Commission for Europe, *The Aarhus Convention: An Implementation Guide: ECE/CEP/72* (Geneva: UN, 2000), pp. 39–41.

34. Maria Lee and Carolyn Abbot, "The Usual Suspects? Public Participation Under the Aarhus Convention," *Modern Law Review* 66 (2003): 81–82.

35. The European Commission Aarhus Convention implementation package includes directives on access to environmental information (Directive 2003/4/EC) and public participation (Directive 2003/35/EC); see http://europa.eu.int/comm/environment/aarhus/index.htm. Richard Macrory and Sharon Turner query whether this implementation goes far enough effectively to realize transboundary participation rights; see Macrory and Turner, "Participatory Rights, Transboundary Environmental Governance and EC Law," *Common Market Law Review* 39 (2003): 489.

36. Of course, this identification of NGOs with the representation of affected publics does not go uncontested; see John Clark, *Worlds Apart: Civil Society and the Battle for Ethical Globalization* (London: Earthscan, 2003), pp. 169–185.

37. Birnie and Boyle, *International Law and the Environment,* pp. 216–217.

38. Jeremy Wates, secretary to the Aarhus Convention, personal communication, Newcastle, 28 October 2003.

39. Economic Commission for Europe, *Report of the First Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters: ECE/MP.PP/2* (Geneva: UN, 2002), p. 4.

40. Okowa, *State Responsibility for Transboundary Air Pollution in International Law,* p. 4.

41. Kai Raustiala and David G. Victor, "Conclusions," in David G. Victor, Kai Raustiala, and Eugene B. Skolnikoff, eds., *The Implementation and Effectiveness of International Environmental Commitments* (Cambridge.: MIT Press, 1998), pp. 663–669.

42. Economic Commission for Europe 2000, *Report of the First Meeting,* p. 149.

43. Ibid., pp. 8–9, 19–20.

44. Ibid., pp. 130–132.

45. Lee and Abbot, "The Usual Suspects? p. 195.

46. On Article 18 of the Lugano Convention, see Sands, *Principles of International Environmental Law I,* pp. 676–677; on Article 11 of the Strasbourg Convention, see Council of Europe, *Convention on the Protection of the Environment Thorough Criminal Law: Explanatory Report* (Strasbourg: Council of Europe, 1999).

47. It should be noted that both these participatory provisions are facultative, allowing contracting states to refrain from applying them. Also, both conventions have still to enter into force.

48. Smith, *State Responsibility and the Marine Environment,* pp. 5–8; Okowa, *State Responsibility for Transboundary Air Pollution in International Law,* pp. 209–210.

49. Malgosia Fitzmaurice, "Public Participation in the North American Agreement on Environmental Cooperation," *International and Comparative Law Quarterly* 52 (2003): 367–368.

50. Organization for Economic Cooperation and Development, *The OECD Guidelines for Multinational Enterprises* (Paris: OECD, 2000).

51. Pogge, *World Poverty and Human Rights,* pp. 169–177; Matthew Paterson, *Understanding Global Environmental Politics: Domination, Accumulation, Resistance* (Basingstoke: Macmillan, 2000), pp. 35–65.

52. On the nature of the specific obligations arising from these asymmetries, see Andrew Dobson, *Citizenship and the Environment* (Oxford, Oxford University Press, 2003), pp. 9–32.