STUDENT ARTICLES

ADDRESSING THE EXTERNAL EFFECTS OF INTERNAL ENVIRONMENTAL DECISIONS: PUBLIC ACCESS TO ENVIRONMENTAL INFORMATION IN THE INTERNATIONAL LAW COMMISSION'S DRAFT ARTICLES ON PREVENTION OF TRANSBOUNDARY HARM

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A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance; And a people who mean to be their own Governors, must arm themselves with the power, which knowledge gives.[1]

INTRODUCTION

Over the past decade, there has been a growing trend toward greater transparency and democratic accountability in national and international institutions.[2] The now standard citizen protests that accompany meetings of international financial bodies can be seen in part as a demand for openness.[3] The European Community has recognized the importance of maintaining transparency in its constitutive bodies and has been promoting increased transparency in its member countries.[4] Transparency and accountability both depend on free and open access to information about government

[1] Letter from James Madison to W.T. Barry (Aug. 4, 1822), *reprinted in* THE COMPLETE MADISON: HIS BASIC WRITINGS 337 (Saul K. Padover ed., 1953).

[2] *See generally* ORG. FOR ECON. CO-OPERATION AND DEV. (OECD), OECD ENVIRONMENTAL OUTLOOK 257-58 (2001) [hereinafter OECD ENVIRONMENTAL OUTLOOK], http://www.sourceoecd.org; Carl E. Bruch & Roman Czebiniak, *Globalizing Environmental Governance: Making the Leap from Regional Initiatives on Transparency, Participation, and Accountability in Environmental Matters*, 32 Envtl. L. Rep. (Envtl. L. Inst.) 10,428, at 10,428-29 (2002).

[3] *See* Bruch & Czebiniak, *supra* note 2, at 10,430-31 n.21.

[4] *See* Maria Gavouneli, *Access To Environmental Information: Delimitation of a Right*, 13 TUL. ENVTL. L.J. 303, 305 (2000).

policies, programs, and decisions. In the complicated areas of environmental policy and law, such access to information is truly vital if decision-makers are to be held accountable.

Recently, the International Law Commission (ILC or the Commission), the United Nations (U.N.) body responsible for the codification and progressive development of public international law,[5] has focused on public access to environmental information as part of its work on the prevention of transboundary harm. During its fifty-third session, in the summer of 2001, ILC adopted the final text of a draft preamble and a set of nineteen draft articles on Prevention of Transboundary Harm from Hazardous Activities (Draft Articles),[6] which were referred to the U.N. General Assembly with a recommendation that the Assembly elaborate a convention based on the Draft Articles.[7]

The Draft Articles "apply to activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences."[8] Thus, the Draft Articles are designed to address activities with cross-boundary effects. The types of harms that the Draft Articles attempt to address include "harm caused to persons, property or the environment"[9] resulting from hazardous or ultra-hazardous activities. The drafters declined to include an annex to the Draft Articles specifying the activities covered, concluding that "[a]ny such list . . . is likely to be under inclusion [sic] and could become quickly dated."[10] However, examples could include nuclear activity,[11] the shipment of hazardous wastes,[12] and industrial

[5] G.A. Res. 174, U.N. GAOR, 2nd Sess., at 105-10, U.N. Doc. A/519 (1947).

[6] *Report of the International Law Commission*, U.N. GAOR, 53rd Sess., Supp. No. 10, at 366-436, U.N. Doc. No. A/56/10 (2001) [hereinafter *ILC Report*], http://www.un.org/law/ilc/reports/2001/2001report.htm.

[7] *Id.* at 369-70.

[8] *Id.* at 371.

[9] *Id.*

[10] *Id.* at 381.

[11] *See id.* Nuclear activity is itself the subject of regulation by numerous treaties. *See generally* P.W. BIRNIE & A.E. BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT 452-99 (2d ed. 2002).

[12] The transboundary movement of hazardous wastes is regulated by the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, *opened for signature* Mar. 22, 1989, 1673 U.N.T.S. 125, 28 I.L.M. 657 (entered into force May 5, 1992) [hereinafter Basel Convention], and the Bamako Convention on the Ban of the Import into Africa

activity that produces air or water pollution.[13]

One of these articles, Article 13, deals with "Information to the Public."[14] Although the majority of the Draft Articles codify existing law and practice regarding transboundary harm, Article 13 represents a potential innovation in terms of public access to environmental information, as it creates in States a duty to provide information to members of the public outside their boundaries.[15]

A duty to provide information to the public about activities that might cause transboundary harm can serve a number of purposes. Open access to information about the environment is considered a fundamental part of good environmental governance, and is a necessary prerequisite to public involvement in decision-making processes that affect the environment. In the transboundary context, where externalities are all but inevitable, public access to environmental information may be one useful mechanism to force States to take into account the views of all those who are impacted by actions taken within their borders, whether the affected persons are voting citizens or residents of other States. Information can help affected populations shine light on governmental decisions and rally political support in favor of their interests, even when the political entities making the decisions are not directly accountable to them.

This Article explores the duty to provide the public with environmental information in a transboundary context and evaluates the approach taken by ILC in Article 13. Part I introduces the ILC Draft Articles and outlines their basic approach. Part II describes three separate axes along which the exchange of environmental information occurs, illustrating how Article 13 both builds on existing practice and carries it one step further. Part III

and the Control of Transboundary Movement and Management of Hazardous Wastes Within Africa, *adopted* Jan. 30, 1991, 30 I.L.M. 775 [hereinafter Bamako Convention]. *See infra* Part II.A.

[13] *See, e.g.*, Convention on Long-Range Transboundary Air Pollution, Nov. 13, 1979, 34 U.S.T. 3043, 1302 U.N.T.S. 217; Convention on the Protection and Use of Transboundary Watercourses and International Lakes, *done* Mar. 17, 1992, 31 I.L.M. 1312 [hereinafter Helsinki Convention]. *See also* BIRNIE & BOYLE, *supra* note 11, at 298-346, 500-16.

[14] *ILC Report*, *supra* note 6, at 375.

[15] During the drafting debates, there was much discussion at ILC about whether the Draft Articles in general, and Article 13 in particular, represented only codification or actual progressive development of international law. Interview with Professor Gerhard Hafner, Commissioner, International Law Commission, in Geneva, Switzerland (Aug. 2001).

establishes a theoretical basis for Article 13, describing the transboundary political process failure that results from inter-jurisdictional externalities. Part IV evaluates the Draft Articles' ability to address the theoretical concerns laid out in Part III, and concludes that while the Draft Articles represent an important first step in expanding the political discourse surrounding environmental risks, they fail to fully embrace the potential embodied by Article 13.

I
THE ILC DRAFT ARTICLES

The ILC Draft Articles were completed during the summer of 2001 and represent the conclusion of the first stage of the Commission's consideration of the larger topic of international liability for injurious consequences arising out of acts not prohibited by international law.[16] This larger topic of liability is distinct from the Commission's work on State responsibility, which concerns obligations flowing from the wrongful conduct of States.[17] It seeks instead to develop rules of strict liability requiring compensation for harm done to States, even when no legal obligation is breached.[18] The liability topic will also seek to develop rules governing States' obligation to repair, remedy, or compensate in the event transboundary damage actually occurs.[19] As originally envisioned, the topic aims to create "an obligation to 'make good the loss [due to transboundary injury],' rather than to leave the losses where they fall, even when the injury was unforeseeable."[20]

The Commission split its work on international liability into two parts in 1992,[21] after recognizing that strict liability was too difficult a topic to allow work to proceed in a useful manner.[22]

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[16] *ILC Report*, *supra* note 6, at 366-69.

[17] *Id.* at 382; Robert Rosenstock & Margo Kaplan, *The Fifty-Third Session of the International Law Commission*, 96 AM. J. INT'L L. 412, 415 (2002). ILC also completed its work on State responsibility in 2001, with the adoption of the Draft Articles, after working on the topic for more than fifty years. *See ILC Report*, *supra* note 6, at 29, 41.

[18] Rosenstock & Kaplan, *supra* note 17, at 415.

[19] *See ILC Report*, *supra* note 6, at 377.

[20] Rosenstock & Kaplan, *supra* note 17, at 415.

[21] *ILC Report*, *supra* note 6, at 367.

[22] *See* John H. Knox, *The Myth and Reality of Transboundary Environmental*

First, ILC would deal with prevention of transboundary harm, and only afterward would proceed with work on remedial measures required after transboundary harm has occurred.[23] After the split, ILC took up the part of the topic dealing with prevention of transboundary harm and, in 1997, appointed Pemmaraju Sreenivasa Rao as the Commission's Special Rapporteur.[24] Work on this topic culminated in the set of nineteen Draft Articles adopted in 2001, which aim to codify existing international law relating to prevention.[25] The Draft Articles emphasize "risk management, cooperation, and consultation by States dealing with activities involving the danger of causing significant transboundary harm,"[26] and they take a "due diligence" approach to the prevention of this harm.[27] Such due diligence consists of a set of procedures designed to identify and assess potential risks of transboundary harm, exchange information concerning those risks, and encourage consultation regarding their mitigation *before* the activity that poses the risk occurs.[28]

A brief description of the content of the Draft Articles will help illuminate their procedural approach to prevention. Under various provisions in the Draft Articles, States are required to establish internal legislative or administrative schemes to preauthorize any activity that falls within the scope of the articles[29]—that is, that poses a risk of transboundary harm—and undertake an environmental impact assessment (EIA) to assess the possibility of transboundary harm that might result from that

Impact Assessment, 96 AM. J. INT'L L. 291, 308 (2002).

[23] *ILC Report*, *supra* note 6, at 367. ILC resumed its work on the liability portion of the topic in 2002 by establishing a working group. *Report of the International Law Commission*, U.N. G.A.O.R. 57th Sess., Supp. No. 10, at 15, U.N. Doc. No. A/57/10 (2002), http://www.un.org/law/ilc/reports/2002/2002report.htm.

[24] *ILC Report*, *supra* note 6, at 368.

[25] Some scholars consider the ILC Draft Articles to adopt a "mythic" view of the duty of prevention, that is, a duty stemming from a set of ideas often believed to be part of customary international law but which in fact do not reflect State practice. *See* Knox, *supra* note 22, at 291, 309.

[26] Rosenstock & Kaplan, *supra* note 17, at 416. *See also ILC Report*, *supra* note 6, at 382-83.

[27] *See ILC Report*, *supra* note 6, at 377; Rosenstock & Kaplan, *supra* note 17, at 416.

[28] *See ILC Report*, *supra* note 6, at 373-75.

[29] *Id.* at 372.

activity.[30] If such an assessment reveals a risk of significant transboundary harm, States are under an obligation to notify the State likely to be affected in a timely manner[31] and consult with that State on measures to prevent or minimize the risk of harm.[32]

In addition to notification and consultation, States are also required to exchange with each other "all available information concerning [the risky activity] relevant to preventing significant transboundary harm or . . . minimizing the risk thereof."[33]

Draft Article 13, concerning "Information to the Public," reads: "States concerned shall, by such means as are appropriate, 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."[34] The U.N. General Assembly took note of ILC's work but has not yet proceeded with a convention on the topic.[35]

Article 13 is perhaps the most innovative of the Draft Articles. It represents a next step in the expansion of the domain of State activity subject to regulation by international law. By creating an obligation on States to provide information to members of the public of neighboring States, Article 13 expands the set of political and civic relationships subject to international law. Although human rights law has made the relationship between a State and its own citizens the subject of international obligations,[36] Article 13 represents a further evolution. This Article seeks to establish a theoretical basis for such an expansion, arguing that creating a duty to provide transboundary environmental information is one way to begin internalizing the external effects of political decisions made in the transboundary environmental context.

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[30] *Id.* at 373.

[31] *Id.*

[32] *Id.*

[33] *Id.* at 375.

[34] *Id.*

[35] *Report of the International Law Commission on the Work of Its Fifty-Third Session*, G.A. Res. 56/82, U.N. GAOR 6th Comm., 56th Sess., Agenda Item 162, at 2, U.N. Doc. A/RES/56/82 (2002), http://www.un.org/Depts/dhl/resguide/r56.htm.

[36] *See infra* Part III.A.

II
THE EXCHANGE OF ENVIRONMENTAL INFORMATION—THREE AXES

Several international and domestic legal instruments establish an obligation on States to provide information about activities involving a risk of environmental harm.[37] Governmental provision of environmental information generally occurs along one of three axes—the State-to-State axis, the State-to-internal-public axis, and the State-to-external-public axis.[38] The State-to-State axis involves the exchange of environmental information between State governments by both formal and informal means. The State-to-internal-public axis involves the exchange of environmental information between a State and its internal citizens and organizations. The State-to-external-public axis, exemplified by ILC's Draft Article 13, involves the exchange of environmental information between a State and members of the public outside of its borders.

Existing legal instruments operate along these axes. Internationally, there is an obligation on States to provide information about activities that pose a risk of transboundary harms to other States that might be affected by those harms.[39] Additionally, at least one international treaty requires that States enact domestic legislation providing the public with access to environmental information.[40] Domestically, there are extensive

[37] *See, e.g.*, *World Charter for Nature*, G.A. Res. 37/7, U.N. GAOR, 37th Sess., Agenda Item 21, para. 16, U.N. Doc. A/RES/37/7 (1982), *reprinted in* 22 I.L.M. 455 (1983). *See also* Bruch & Czebiniak, *supra* note 2, at 10,446-47.

[38] There is also a fourth axis—public-to-State information exchange—which occurs when the public participates in environmental decision-making processes, such as with EIA procedures that allow the public to comment on proposed projects. For a discussion of NEPA and the Espoo Convention see *infra*. See also Bruch & Czebiniak, *supra* note 2, at 10,428, 10,430, 10,434-35 (noting that public participation in decision-making is central to environmental governance). This Article focuses primarily on the provision of information by the State.

[39] *See* BIRNIE & BOYLE, *supra* note 11, at 126-37; *ILC Report*, *supra* note 6, at 406-07.

[40] *See* Convention on Access To Information, Public Participation in Decision-Making and Access To Justice in Environmental Matters, *done* June 25, 1998, 38 I.L.M. 517 (entered into force Oct. 30, 2001) [hereinafter Aarhus Convention]. The Aarhus Convention requires that its provisions, including provisions for public participation and access to justice, be implemented through enactment in each Party's domestic legislation. *Id.* art. 3(1), at 519. For more information on the Convention and its Parties, working groups and task forces, see Env't and Human Settlements Div., U.N. Econ. Comm'n for Eur., Introducing the Aarhus Convention, *at* http://www.unece.org/env/pp (last

examples of legal regimes that provide public access to environmental information held by the State, and, in some cases, to government-held information more generally.[41]

The literature dealing with public access to information held by governments distinguishes between active and passive dissemination of information to the public.[42] Active dissemination occurs when the government actively provides information to the public, for example, by issuing reports, rather than waiting for requests for information.[43] With active dissemination, the government must determine which information must be disclosed and must make reasonable efforts to ensure that the appropriate parties receive it. Passive dissemination, on the other hand, occurs when the State responds to requests for specific information by other States or members of the public, whether from individuals, non-governmental organizations (NGOs), or other organizations.[44]

This Part highlights the legal structure governing

updated Dec. 19, 2003).

[41] *See, e.g.*, Freedom of Information Act, 5 U.S.C. § 552 (2000) (regulating public disclosure of information held by all U.S. government agencies); Council Directive 90/313/EEC, 1990 O.J. (L 158) 56 (regulating environmental information held by European Community Member States), http://europa.eu.int/eur-lex/en/search/search_oj.html. Occasionally, this duty to provide access to information is only part of a larger environmental governance scheme, which also includes the right of the public to participate in decisions affecting the environment, and the right of access to a judicial or administrative remedy to enforce such rights. *See, e.g.*, Aarhus Convention, *supra* note 40. *See also* Neil A.F. Popović, *The Right to Participate in Decisions That Affect the Environment*, 10 PACE ENVTL. L. REV. 683 (1993); Joseph L. Sax, *The Search for Environmental Rights*, 6 J. LAND USE & ENVTL. L. 93 (1990). Although this larger environmental governance structure is not the focus of this Article, which concentrates on only one aspect—the duty to provide information—each element is important to ensuring the meaningful inclusion of the public in environmental decision-making processes. For more on another element of environmental governance—access to judicial procedures to enforce the right of access to information, see *infra* Part IV.

[42] *See, e.g.*, STEPHEN STEC & SUSAN CASEY-LEFKOWITZ, REG'L ENVTL. CTR. FOR CENT. & E. EUR., THE AARHUS CONVENTION: AN IMPLEMENTATION GUIDE 49, U.N. Doc. ECE/CEP/72, U.N. Sales No. E.00.II.E.3, (Jerzy Jendroska ed., 2000) [hereinafter AARHUS IMPLEMENTATION GUIDE], http://www.unece.org/env/pp/acig.pdf.

[43] Examples of active dissemination include requirements to publish annual "state of the environment" reports.

[44] Examples of passive dissemination include information requests made under the Freedom of Information Act, 5 U.S.C. § 552, Council Directive 90/313/EEC, *supra* note 41, and the scheme envisioned by the Aarhus Convention, *supra* note 40.

environmental information exchange along all three axes. While the legal duty to provide information along the State-to-State axis and the State-to-internal-public axis is relatively well developed, the State-to-external-public has only recently begun to emerge as a legal obligation. Draft Article 13 fits squarely into this third axis, and represents the next step in the evolution of this duty.

A. *State-to-State Axis*

The need for State-level exchanges of information on activities involving a significant risk of transboundary environmental harm was starkly illustrated by the Chernobyl disaster.[45] Although there were legal duties to exchange information before Chernobyl, since that time there has been a proliferation of treaties creating obligations between States to exchange information on a variety of environmental issues. These range from bilateral and regional treaties aimed at managing a particular resource to more comprehensive treaties aimed at managing larger environmental problems.[46] The information exchange provisions included in these treaties range from the general duty to notify to complex and formal "prior informed consent" mechanisms that specify in great detail what information must be given.

As a formal legal matter, the State-to-State exchange of information is characterized by the active dissemination of information. That is, States cannot simply sit back and wait for others to request information concerning the environment; instead,

[45] *See* Statement on the Implications of the Chernobyl Nuclear Accident, May 5, 1986, Group of Seven, 25 I.L.M. 1005, 1006 (1986) (reprimanding the Soviet Union for not disclosing information about the Chernobyl accident and calling on States to exchange information when nuclear disasters occur). Concerns about such transboundary environmental disasters were also expressed in the Rio Declaration, issued at the 1992 U.N. Conference on Environment and Development. United Nations Conference on Environment and Development: Rio Declaration on Environment and Development, *adopted* June 14, 1992, U.N. Doc. A/CONF.151/5/Rev.1, *reprinted in* 31 I.L.M. 874 (1992) [hereinafter Rio Declaration]. The Rio Declaration requires that "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." *Id.* princ. 19, at 879.

[46] *See, e.g.*, Helsinki Convention, *supra* note 13, at 1318; Convention on Long-Range Transboundary Air Pollution, *supra* note 13, at 3047, 1302 U.N.T.S. at 220. *See generally* BIRNIE & BOYLE, *supra* note 11.

there is an obligation to affirmatively notify other States about potential environmental risks under certain conditions.[47] However, there may be a great deal of State-to-State information exchange that occurs through more informal "passive" mechanisms, that is, when States respond to information requests from other States.

The formal State-to-State model of transboundary environmental information exchange is exemplified by two treaties that between them encompass a wide geographical scope[48]—the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention)[49] and the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes Within Africa (Bamako Convention).[50] Both treaties regulate the movement of hazardous waste across national borders and establish a "prior informed consent" procedure to alert States about the importation of hazardous materials and obtain their consent.[51]

The Basel and Bamako Conventions both operate on a State-to-State basis, requiring the exchange of information between State Parties, rather than the distribution of information to the general public.[52] This State-to-State information exchange occurs through the treaties' prior informed consent procedures, which regulate the transboundary movement of hazardous waste between Parties to the Conventions.[53] Any State wishing to export a hazardous waste must notify the "competent authority" of both the State of import

[47] Popović, *supra* note 41, at 696-98.

[48] Another area with a well developed information exchange regime is the regulation of international watercourses. *See generally* Angela Z. Cassar & Carl E. Bruch, *Transboundary Environmental Impact Assessment in International Watercourse Management*, 12 N.Y.U. ENVTL. L.J. 169 (2003); Carl Bruch, *Charting New Waters: Public Involvement in the Management of International Watercourses*, 31 Envtl. L. Rep. (Envtl. L. Inst.) 11,389 (2001).

[49] Basel Convention, *supra* note 12 (detailing specific procedures for obtaining informed consent prior to any transbounday movement of hazardous wastes or other wastes).

[50] Bamako Convention, *supra* note 12.

[51] *See* Basel Convention, *supra* note 12, art. 6, at 134-35, 28 I.L.M. at 664-65. For a discussion of the international regulation of trade in hazardous substances generally, including the Basel Convention and prior informed consent procedures, see BIRNIE & BOYLE, *supra* note 11, at 428-39.

[52] *See* Basel Convention, *supra* note 12, arts. 2(6), 6, at 129-30, 134-35, 28 I.L.M. at 660, 664-65; Bamako Convention, *supra* note 12, art. 6, at 785-86.

[53] For a brief overview of the prior informed consent mechanism in the Basel Convention, see BIRNIE & BOYLE, *supra* note 11, at 431-33.

and any State through which the waste will be transported (transit States).[54] Export of the waste cannot occur until written consent is received from the State of import.[55]

Neither the Basel nor Bamako Conventions include a general public right to access the information exchanged between States.[56] Both treaties establish a Conference of the Parties to receive regular reports from the Parties on their hazardous waste import, export, disposal, and management activities,[57] yet there is no obligation to make these reports public. Although such information may be made available to the public under the receiving State's domestic freedom-of-information regime, this may not be generally effective, especially in countries with traditions of state secrecy, where officials may be reluctant to provide information.[58] Additionally, there is no obligation under these treaties to give information to the public likely to be affected by the transboundary movement of hazardous wastes.

The ILC Draft Articles incorporate the State-to-State information exchange axis in the articles dealing with notification and consultation.[59] States are required to perform risk assessments,[60] to notify the State likely to be affected by an

[54] Basel Convention, *supra* note 12, art. 6(1), at 134, 28 I.L.M. at 664; Bamako Convention, *supra* note 12, art. 6(1), at 785; BIRNIE & BOYLE, *supra* note 11, at 431-32. The "competent authority" is a governmental authority designated by each state to serve as the contact for these information exchanges and to respond to such notifications. Basel Convention, *supra*, art. 2(6), at 129-30, 28 I.L.M. at 660; Bamako Convention, *supra*, art. 1(8), at 777.

[55] Basel Convention, *supra* note 12, art. 6(3), at 134, 28 I.L.M. at 664; Bamako Convention, *supra* note 12, art. 6(3), at 785.

[56] However, although the Basel and Bamako Conventions are both designed to require the exchange of information *between States*, thus facilitating State oversight and regulation of hazardous waste transport, there is some contemplation of a public role as well. Both conventions encourage Parties to cooperate in promoting public awareness of the hazardous waste problem. *See* Basel Convention, *supra* note 12, art. 10(4), at 138, 28 I.L.M. at 668; Bamako Convention, *supra* note 12, art. 10(2)(f), at 789.

[57] *See* Basel Convention, *supra* note 12, art. 13(3), at 139, 28 I.L.M. at 669; Bamako Convention, *supra* note 12, art. 13(3), at 790.

[58] *See* REG'L ENVTL. CTR FOR CENT. & E. EUR., DOORS TO DEMOCRACY: A PAN-EUROPEAN ASSESSMENT OF CURRENT TRENDS AND PRACTICES IN PUBLIC PARTICIPATION IN ENVIRONMENTAL MATTERS 9-10 (1998), http://www.rec.org/REC/Publications/PPDoors/EUROPE/PPDoorsEUROPE.pdf.

[59] *ILC Report*, *supra* note 6, at 373, 375.

[60] *Id.* at 373. This risk assessment requirement includes an obligation to perform environmental impact assessments (EIAs). *Id.* For a discussion of EIAs, see *infra* Parts II.B.3 & II.C.2.

activity about its risk, and to transmit information relevant to the risk assessment.[61] The drafters envision this exchange of information occurring through diplomatic channels.[62] The purpose of this information exchange scheme is to give States a reasonable opportunity to engage in activities with significant risks of transboundary harm while still balancing the interests of the affected State.[63]

B. *State-to-Internal-Public Axis*

A basic set of international legal instruments on environmental governance in general, and public access to environmental information in particular, formed the basis for ILC's work in the Draft Articles.[64] In addition, there are numerous domestic legal regimes dealing with access to environmental

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[61] *ILC Report*, *supra* note 6, at 373.

[62] *Id.* at 408.

[63] *Id.* at 406.

[64] *Id.* at 422-24. For excellent region-by-region catalogs of instruments and initiatives on access to environmental information and public participation in environmental decisions, see Cassar & Bruch, *supra* note note 48, at 191-217; Bruch & Czebiniak, *supra* note 2, at 10,446-48.

Public access to environmental information and participation in decisions that affect the environment at the national level is really a global phenomenon. The U.N. Framework Convention on Climate Change, meant to be a global environmental treaty, includes a provision promoting "public access to information on climate change and its effects" and "public participation in addressing climate change." United Nations Framework Convention on Climate Change, art. 6(ii)-(iii), *concluded* May 9, 1992, S. TREATY DOC. NO. 102-38, 1771 U.N.T.S. 107 (entered into force Mar. 21, 1994). The Organization of American States is also working on a strategy to promote public access to information and involvement in decisions that affect the environment. It states:

> [t]he principles and recommendations contained in the Inter-American Strategy for the Promotion of Public Participation in Decision-Making for Sustainable Development (ISP) are intended to lead to effective public policies that will encourage and ensure that civil society and governments at all levels work together to achieve sustainable development in the hemisphere. By strengthening public participation in decisions and policies on environment and natural resources management, governments and civil society can contribute to the achievement of equitable and environmentally sound development. . . . "Public participation" refers to all interaction between government and civil society, and includes the process by which government and civil society open dialogue, establish partnerships, [and] share information.

UNIT FOR SUSTAINABLE DEV. & ENV'T, ORG. OF AM. STATES, INTER-AMERICAN STRATEGY FOR THE PROMOTION OF PUBLIC PARTICIPATION IN DECISION MAKING FOR SUSTAINABLE DEVELOPMENT 6 (2000), http://www.oas.org/usde/isp/documents/cepcidi/estraeng.rtf.

information. Most of these instruments create duties along the State-to-internal-public axis of environmental information exchange. Thus, they often fail to address the informational needs of the external public. This section looks at the instruments that create an obligation to provide the public within a State (the internal public) access to environmental information and examines their potential application to the transboundary context.

1. *Access To Information: International Obligations*

a. *Laying the Groundwork—The Rio Declaration and Agenda 21*

Principle 10 of the Rio Declaration on Environment and Development, issued at the 1992 Earth Summit, was the first major statement of the obligation to provide the public with access to environmental information. It operates "[a]t the national level," requiring public authorities to make information about the environment "widely available."[65] Although it is aimed at international environmental problems that cross traditional State boundaries, the Rio Declaration speaks in terms of traditional obligations between States, on the one hand, and the recognized sphere of human rights obligations between States and members of their own public, on the other. States are asked to cooperate with each other,[66] and to enact national legislation to address the environment domestically.[67] Rio Principle 10 also found

[65] Principle 10 states:

> [e]nvironmental issues are best handled with 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.

Rio Declaration, *supra* note 45, princ. 10, at 878 (emphasis added). Embedded within Principle 10 are all "three pillars" of environmental governance incorporated into the Aarhus Convention: access to environmental information, public participation in environmental decision-making, and access to justice. For a discussion of the Aarhus Convention, see *infra* Part II.B.1.b.

[66] *See* Rio Declaration, *supra* note 45, princs. 7, 9, 12, 14, at 877-78.

[67] *See id*. princs. 10, 11, 13, at 877-78.

expression in Agenda 21, the plan of action adopted at the 1992 Earth Summit, in a section devoted to strengthening the role of major groups in sustainable development.[68]

Although the Rio Declaration and Agenda 21 are soft law instruments with no binding effect on their signatories,[69] the documents have had considerable influence on the development of international environmental law. In the decade since Rio, the soft law obligation to provide public access to environmental information has gathered momentum and found expression in a variety of treaties.[70] The obligation has been more specifically defined and has perhaps emerged as a universal norm.[71] These developments have paralleled a more general move toward more transparent governance in a variety of institutions around the world, at both the national and international level.

Both the Rio Declaration and Agenda 21 deal with a State's obligation to provide access to information within its national system. When dealing with public access to environmental information, they direct individual States to enact legislation ensuring that such access is available in their domestic legal regimes. As such, they work on the State-to-internal-public axis. There is little or no contemplation of information exchange to the *external* public in these provisions.[72] They are also generally

[68] Chapter 23 of Agenda 21 provides:

> in the more specific context of environment and development, the need for new forms of participation has emerged. This includes the need of individuals, groups and organizations to participate in environmental impact procedures and to know about and participate in decisions, particularly those which potentially affect the communities in which they live and work. *Individuals, groups and organizations should have access to information relevant to environment and development held by national authorities*.

Report of the United Nations Conference on Environment and Development, Annex II, Agenda Item 21 para. 23.2, U.N. Doc. A/CONF.151/26 (Vol. III) (1992) (emphasis added) [hereinafter Agenda 21], http://www.un.org/esa/sustdev/agenda21text.htm. *See also id.*, ch. 40 ("Information for Decision-Making").

[69] *See* PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 54-55 (7th ed. 1997); Popović, *supra* note 41, at 687-88.

[70] *ILC Report*, *supra* note 6, at 423-42.

[71] *See generally* Bruch, *supra* note 48 (discussing the possible emergence of norms on public involvement in the contexts of transboundary watercourses).

[72] Although the Rio Declaration includes a provision relating to notification and exchange of relevant information on activities with potential, significant adverse transboundary effects, this provision operates on the State-to-State axis of information exchange. *See* Rio Declaration, *supra* note 45, princ. 19, at 879.

vague and lack specific provisions or calls to action. However, they have served as the starting point for further work in this area in the international legal arena.

b. *Building on the Groundwork—The Aarhus Convention*

Building on Rio and Agenda 21, the treaty that provides for the most expansive public access to environmental information to date is the U.N. Economic Commission on Europe's (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, which was concluded in 1998 at Aarhus, Denmark (Aarhus Convention or Aarhus).[73] U.N. Secretary General Kofi Annan called it:

> by far the most impressive elaboration of principle 10 of the Rio Declaration, which stresses the need for . . . access to information on the environment held by public authorities. As such it is the most ambitious venture in the area of "environmental democracy" so far undertaken under the auspices of the United Nations.[74]

Unlike much of international law, which creates obligations among Parties,[75] the Aarhus Convention creates specific obligations owed by Parties to the public.[76] In this way, it follows the State-to-public axis for exchange of environmental information. It also follows the lead of international human rights law, which governs the relationship between States and their citizens[77] and can be seen as standing at the vanguard of the movement toward increased transparency and democratization in international environmental governance.[78]

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[73] Aarhus Convention, *supra* note 40. For an overview of the Aarhus Convention, see Bruch & Czebiniak, *supra* note 2, at 10,431-36.

[74] AARHUS IMPLEMENTATION GUIDE, *supra* note 42, at v. OECD describes "environmental democracy" as "encompassing the availability of, and access to, environmental information, opportunities for participation and partnerships of individuals, firms and NGOs in environmental decision-making, and access to courts." OECD ENVIRONMENTAL OUTLOOK, *supra* note 2, at 255-56.

[75] MALANZCUK, *supra* note 69, at 3.

[76] *See* Aarhus Convention, *supra* note 40, art. 1, at 518; *see also* AARHUS IMPLEMENTATION GUIDE, *supra* note 42, at 1. For further discussion of the theoretical questions raised by an international law obligation owed to the public, see *infra* Part III.

[77] *See infra* Part III.

[78] *See* Sumudu Atapattu, *The Right To a Healthy Life Or the Right to Die Polluted?: The Emergence of a Human Right To a Healthy Environment Under*

The Aarhus Convention rests on three "pillars" that together make up the foundational structure of environmental democracy—that is, access to information, public participation in environmental decision-making, and access to justice.[79] In addition to requiring Parties to enact national legislation to make environmental information available upon request,[80] the Convention also requires that Parties allow the public to be involved in the decision-making process for environmental matters,[81] and that Parties provide an independent and impartial forum in which the public can seek review of information requests that have been ignored or refused.[82]

Aarhus was developed by UNECE and most of its signatories are European countries.[83] Thus, it can hardly be considered a global convention, establishing global norms or obligations.[84] However, the Convention is open to non-UNECE countries, and the drafters strived to make the negotiation process fair and open.[85] Thus, while it is primarily a regional initiative, it may yet have global implications.

In the context of specific activities affecting the environment, the Aarhus Convention requires "adequate, timely and effective" notification of the public concerned in order to facilitate public participation in environmental decision-making.[86] Such

International Law, 16 TUL. ENVTL. L.J. 65, 90 (2002) (describing the procedural rights found in international human rights law that "are increasingly applied in relation to environmental issues and are generally considered as forming part of environmental rights").

[79] Aarhus Convention, *supra* note 40, arts. 4-9, at 519-24; AARHUS IMPLEMENTATION GUIDE, *supra* note 42, at 5.

[80] Aarhus Convention, *supra* note 40, arts. 4-5, at 519-22.

[81] *Id*. arts. 6-8, at 522-23.

[82] *Id*. art. 9(1), at 524.

[83] For a list of Parties to the Convention, see UNECE, Convention on Access to Information, Public Participation in Decision-Making and Access To Justice in Environmental Matters: Participants, http://www.unece.org/env/pp/ctreaty.htm (last visited Dec. 23, 2003).

[84] Not only is the Convention a primarily European endeavor, it also adopts principles and procedures developed in the domestic law and international practice of industrialized nations. The appropriateness of applying such procedural frameworks to lesser-developed countries is an open question.

[85] *See* AARHUS IMPLEMENTATION GUIDE, *supra* note 42, at v. *See also* Bruch & Czebiniak, *supra* note 2, at 10,432. The Convention has been heralded for the extensive participation of NGOs in the drafting and negotiation process. *Id*.

[86] Aarhus Convention, *supra* note 40, art. 6(2), at 522. This is not limited to EIA procedures; early notification is required for any decision that "may have a potentially significant impact on the environment." AARHUS IMPLEMENTATION GUIDE, *supra* note 42, at 90.

notification should be given early in the process, when options are still open and the public's participation can still have some impact.[87]

There is also an ongoing obligation under Aarhus to provide environmental information to the public upon request "as soon as possible and at the latest within one month after" receiving the request, though this time frame may be extended for up to two months if the "volume and complexity of the information justify an extension."[88] This ongoing access requirement is an example of the duty to passively disseminate information.

As a treaty working on the State-to-internal-public axis, one might expect Aarhus to fall short of providing strong access to environmental information in the transboundary context. Aarhus does include a strong statement of the non-discrimination principle,[89] which requires that non-citizens be given the same access to information, public participation, and judicial review procedures as are given to citizens under national law.[90] As applied to access to environmental information, the non-discrimination principle should allow non-citizens (i.e., the external public) to receive information to the same extent as citizens. Thus, the dissemination of information in the transboundary context might be considered to fall within the Convention's obligations.

However, in the provisions dealing with public participation in decision-making, Aarhus does not specifically address whether the duty to allow public participation extends to the transboundary context. The Convention requires that notice be given to "the public concerned,"[91] which could be read to include the public in other States. However, the Convention is also designed to be implemented through, and in some cases in accordance with, domestic legal systems.[92] If domestic EIA procedures do not

[87] *See* AARHUS IMPLEMENTATION GUIDE, *supra* note 42, at 89.

[88] Aarhus Convention, *supra* note 40, art. 4(2), at 520.

[89] For a more in-depth discussion of the non-discrimination principle and its relationship to transboundary environmental information exchange, see *infra* Part II.C.

[90] Aarhus Convention, *supra* note 40, art. 3(9), at 519. *See also* Knox, *supra* note 22, at 313-16.

[91] Aarhus Convention, *supra* note 40, art. 6, at 522-23. "Public concerned" is defined as "the public affected or likely to be affected by, or having an interest in, the environmental decision-making." *Id.* art. 2(5), at 519.

[92] *See id.* art. 3(1); AARHUS IMPLEMENTATION GUIDE, *supra* note 42, at 87

require the notification of public beyond the States' borders, it is unclear whether Aarhus creates this obligation on its own. Thus, it is unclear whether such transboundary notification is required by the Convention.[93]

2. *Access To Information: Domestic Obligations*

There are also a number of domestic legal instruments that operate on the State-to-internal-public information exchange axis. In 1990, the European Community adopted Directive 90/313/EEC on the freedom of access to information on the environment,[94] designed to "ensure freedom of access to, and dissemination of, information on the environment held by public authorities and to set out the basic terms and conditions on which such information should be made available."[95] The Directive is the basis for the legal regimes governing access to environmental information in all fifteen Member States of the European Union (EU),[96] and it also

("[E]ach Party has some flexibility in how it adapts the Convention's obligations to its own national legal and institutional system.").

[93] The recent vintage of the Aarhus Convention makes it difficult to evaluate the success of its implementation. Since the completion of Aarhus, a number of projects have sprung up to assist in the implementation of the Convention in various signatory countries, especially those in Central and Eastern Europe. *See, e.g.*, Reg'l Envtl. Ctr. for Cent. and E. Eur., REC Public Participation Programme, *at* http://www.rec.org/REC/Programs/PublicParticipation.html (last visited Nov. 16, 2003). The Regional Environmental Center has published a handbook containing case studies of implementation in various UNECE countries that seeks to identify best practices in information provision and access to justice. REG'L ENVTL. CTR. FOR CENT. AND E. EUR., HANDBOOK ON ACCESS TO JUSTICE UNDER THE AARHUS CONVENTION (Stephen Stec ed., 2003) [hereinafter AARHUS HANDBOOK], http://www.rec.org/rec/programs/environmentallaw/pdf/accesstojustice.pdf. This handbook notes the "failure of a public authority to respond to a request for information is common in many countries," but also provides examples of successful judicial proceedings to "defend [entitlements] to access to environmental information." *Id.* at 23-24.

[94] Council Directive 90/313/EEC, *supra* note 41. For an extensive overview of the Directive and its implementation by Member states of the European Union, see ACCESS TO ENVIRONMENTAL INFORMATION IN EUROPE: THE IMPLEMENTATION AND IMPLICATIONS OF DIRECTIVE 90/313/EEC (Ralph E. Hallo ed., Int'l Envtl. Law & Policy Series, 1996) [hereinafter ACCESS TO ENVIRONMENTAL INFORMATION IN EUROPE]. For a detailed study of the implementation of the Directive in the United Kingdom, see GISÈLE BAKKENIST, ENVIRONMENTAL INFORMATION: LAW, POLICY & EXPERIENCE (1994).

[95] Council Directive 90/313/EEC, *supra* note 41, art. 1, at 57.

[96] RES. FOR THE FUTURE, PUBLIC ACCESS TO ENVIRONMENTAL INFORMATION AND DATA 23 (2001) [hereinafter RFF REPORT], http://www.rff.org/rff/documents/rff-rpt-pubaccess.pdf.

served as the starting point for negotiations of the Aarhus Convention.[97]

The Directive establishes a broad right of access to covered information, requiring Member States to implement that right through national legislation.[98] Judicial or administrative review of unsatisfactory responses to requests for information is also governed by the rules of each national legal system.[99] In addition to responding to information requests (passive dissemination), Member States are also required to "provide general information to the public on the state of environment by such means as the periodic publication of descriptive reports"[100] (active dissemination). Under the terms of the Directive, Member States were required to adopt national legislation to comply with these requirements by December 31, 1992.[101] The Directive does not specifically address the transboundary exchange of information, but the incorporation of the non-discrimination principle suggests that citizens of any EU country should have the same right of access to information under domestic legislation implementing the Directive as citizens of the country holding the information.[102]

A recent report by the European Commission highlighted a number of problems with the implementation of the Directive. These include the need to better define certain key terms, such as "information relating to the environment" and the "public authorities" to which the Directive is addressed, and the need to ensure that States respond to all requests within specified time limits.[103] This report also highlighted the need to define more narrowly the Directive's exceptions to the duty to provide

[97] COMM'N OF THE EUROPEAN COMMTYS., REPORT FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT ON THE EXPERIENCE GAINED IN THE APPLICATION OF COUNCIL DIRECTIVE 90/313/EEC OF 7 JUNE 1990, ON FREEDOM OF ACCESS TO INFORMATION ON THE ENVIRONMENT, COM(2000)400 final, at 8 [hereinafter COMMISSION REPORT ON DIRECTIVE 90/313/EEC], http://europa.eu.int/eur-lex/en/com/rpt/2000/com2000_0400en01.pdf.

[98] Council Directive 90/313/EEC, *supra* note 41, art. 3, at 57; ACCESS TO ENVIRONMENTAL INFORMATION IN EUROPE, *supra* note 94, at 8-9.

[99] Council Directive 90/313/EEC, *supra* note 41, art. 4, at 57.

[100] *Id.* art. 7, at 57.

[101] *Id.* art. 9, at 58.

[102] For a discussion of the non-discrimination principle in the context of transboundary environmental information, see *infra* Part II.C. *See also* Knox, *supra* note 22, at 311-16.

[103] COMMISSION REPORT ON DIRECTIVE 90/313/EEC, *supra* note 97, at 4-5.

environmental information to the public.[104] In practice, these exceptions have worked to substantially undermine public access to information.[105] The Commission concluded that the European States should adopt a new directive on freedom of access to information in order to correct these problems and "to align Community legislation with the Aarhus Convention so as to enable the Community to ratify the Convention."[106]

In the United States, public access to information is governed by the Freedom of Information Act (FOIA).[107] FOIA is not limited to environmental information, but instead applies generally to records held by the executive branch of the federal government.[108] A very large set of persons are entitled to request information under FOIA, including both citizens and non-citizens; private industry; trade associations; educational institutions; local, state, and foreign governments; and NGOs, including foreign organizations.[109]

FOIA seeks to balance competing policy considerations—the desire to disclose information and the need to protect confidentiality and certain sensitive government information. This is achieved by creating a presumption in favor of disclosure, while also delineating nine specific exceptions to the duty to disclose

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[104] *Id*. at 10. The exceptions listed in the Directive are:

- the confidentiality of the proceedings of public authorities, international relations and national defence,
- public security,
- matters which are, or have been, *sub judice*, or under enquiry (including disciplinary enquiries), or which are the subject of preliminary investigation proceedings,
- commercial and industrial confidentiality, including intellectual property,
- the confidentiality of personal data and/or files,
- material supplied by a third party without that party being under a legal obligation to do so,
- material, the disclosure of which would make it more likely that the environment to which such material related would be damaged.

Council Directive 90/313/EEC, *supra* note 41, art. 3(2), at 57.

[105] *See* RALPH HALLO, EUROPEAN ENVTL. BUREAU, PROPOSAL FOR A NEW DIRECTIVE ON PUBLIC ACCESS TO ENVIRONMENTAL INFORMATION: AN ANALYSIS 8 (2001), http://www.eeb.org/publication/access-info-analysis.pdf.

[106] COMMISSION REPORT ON DIRECTIVE 90/313/EEC, *supra* note 97, at 12.

[107] Freedom of Information Act, 5 U.S.C. § 552 (2000).

[108] RFF REPORT, *supra* note 96, at 4.

[109] Under FOIA, agencies are required to respond to requests for information from "any person." 5 U.S.C. § 552(a)(3)(A). This has been given a broad interpretation. *See* RFF REPORT, *supra* note 96, at 5.

information under the Act.[110]

Although FOIA is a comprehensive statute establishing a broad right of access to government-held information, it includes only passive dissemination provisions. That is, the government is not required to actively distribute any type of information, but need only respond to requests received.[111] Thus, while FOIA serves as a potential tool for those who seek to inform themselves, it does not create a duty of proactive notification, and thus cannot on its own address the political externality problem, discussed below. Furthermore, there is no duty under FOIA to notify the public (either intra- or inter-jurisdictionally) of government activities that might affect them.

3. *Environmental Impact Assessment: Approaching the Transboundary Duty*

EIA is a standard mechanism for generating and disseminating information in the context of specific projects with potential environmental impacts. EIAs provide a baseline of environmental data and a systematic evaluation of the environmental risks associated with a particular proposal. The documents produced through the EIA process can provide a wealth of environmental information.[112]

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[110] RFF REPORT, *supra* note 96, at 7-8. The exceptions, found in § 552(b), include:

1. Matters of national defense or foreign policy.
2. Internal agency rules.
3. Information exempted by other statutes.
4. Confidential business information.
5. Privileged inter- or intra-agency memoranda.
6. Personal privacy.
7. Records or information compiled for law enforcement purposes.
8. Records of financial institutions.
9. Geological or geophysical information and data concerning wells.

Id. at 8.

[111] There are a couple of exceptions to this general rule. Under FOIA, agencies must compile and make publicly available procedures governing submission of requests, final opinions in the adjudication of cases, substantive rules of general applicability, and statements of general policy. 5 U.S.C. § 552(a)(1)-(2)(C). The agency should also release records that previously have been released upon request and are likely to be requested again. *Id*. § 552(a)(2)(D).

[112] *But see* Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 COLUM. L. REV. 903,

In the United States, EIAs[113] are required by the National Environmental Policy Act (NEPA)[114] and its state equivalents.[115] In the thirty-plus years since its enactment, NEPA has been widely emulated around the world.[116] NEPA requires federal agencies to "produce, consider, and disclose information on the expected environmental impacts of proposed actions."[117] This requirement is triggered *before* undertaking any "major Federal actions significantly affecting the quality of the human environment."[118]

The basic idea behind NEPA is similar to that underlying other freedom of information and environmental impact assessment provisions: to ensure that decisionmakers have a full range of information available to them; that the public has input into decisions that affect their environment; and that the process of decision-making is transparent and accountable.[119]

NEPA has been subject to a whole host of criticisms regarding its usefulness and effectiveness on the domestic level.[120] In the context of transboundary pollution, NEPA (and other domestic EIA regimes) can be criticized for failing to require the consideration of the potential transboundary effects of any particular project or agency action.[121] Thus, while environmental information may be generated, the information itself will not address the transboundary impacts, and the affected public in the transboundary jurisdiction will not necessarily be notified about the EIA procedure, nor receive the information and documentation

906 (2002) (criticizing EIAs in the context of NEPA for being routine and compartmentalized, "effectively marginalizing [NEPA's] operative effect and thereby circumventing [its] core purpose").

[113] In the United States, EIAs are generally known as EISs, or environmental impact statements. This Article uses the term EIA throughout in accordance with the international legal terminology.

[114] National Environmental Policy Act of 1969, Pub L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321- 4370(f) (2000)).

[115] *See, e.g.*, California Environmental Quality Act (CEQA), CAL. PUB. RES. CODE § 21000 (West 2003); New York State Environmental Quality Review Act (SEQRA), N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to -0117 (McKinney 2003).

[116] Karkkainen, *supra* note 112, at 905.

[117] *Id.* at 909.

[118] 42 U.S.C. § 4332(C) (2000).

[119] *See* Karkkainen, *supra* note 112, at 909-16.

[120] *See* James T.B. Tripp & Nathan G. Alley, *Streamlining NEPA's Environmental Review Process: Suggestions for Agency Reform*, 12 N.Y.U. ENVTL. L.J. 74 (2003) (discussing various criticisms); Karkkainen, *supra* note 112, at 917-25.

[121] Cassar & Bruch, *supra* note 48, at 208-09; Knox, *supra* note 22, at 298.

it produces. Additionally, domestic EIA laws do not necessarily require decisionmakers to take into account the views of those beyond the State's borders who might be affected by their decision.[122]

C. *State-to-External-Public Axis*

Most of the instruments that provide the broadest right of public access to environmental information contemplate information exchange between a State and its own citizens/residents, rather than between a State and the public of another State. However, there have been steps toward establishing a formal duty to provide information along the State-to-external-public axis. The incorporation of the non-discrimination principle into instruments creating the State-to-internal-public duty provides one legal mechanism to give the external public access to information. Additionally, the Convention on Environmental Impact Assessment in a Transboundary Context, often referred to as the Espoo Convention because it was concluded in Espoo, Finland, specifically ensures the public's right to participate in transboundary EIAs, which necessarily includes transboundary information exchange.[123] Espoo was concluded under the auspices of the UNECE, and, thus far, only European countries have signed and ratified the Convention.[124] Draft Article 13 represents the next step in this line of legal instruments, clearly establishing a duty to provide public access to environmental information in transboundary contexts.

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[122] *See* Knox, *supra* note 22, at 298-99. An additional problem can arise in federal systems, where decisions made by political subdivisions (e.g., states in the United States and Mexico or provinces in Canada), may not be subject to the federal EIA procedures. *See* John Knox, *Federal, State and Provincial Interplay Regarding Cross-Border Environmental Pollution*, 27 CAN.-U.S. L.J. 199, 202 (2001).

[123] Convention on Environmental Impact Assessment in a Transboundary Context, *done* Feb. 25, 1991, 1989 U.N.T.S. 309 (1997), 30 I.L.M. 800 (1991) (entered into force Sept. 10, 1997) [hereinafter Espoo Convention].

[124] Like Aarhus, Espoo is a regional European convention. For a list of Parties, see U.N., Convention on Environmental Impact Assessment in a Transboundary Context: Participants, http://untreaty.un.org/english/bible/englishinternetbible/partI/chapterxxvii/treaty22.asp (last visited Dec. 23, 2003). The United States is a signatory, but has not yet ratified the Convention. *Id.*

1. *The Non-Discrimination Principle*

Several international legal instruments require States to follow the non-discrimination principle[125] in providing access to environmental information and, in some cases, to their judicial and/or administrative review procedures.[126] In the environmental context, non-discrimination requires that non-citizens have the same access as citizens to remedies and procedures under domestic environmental law.[127] Thus, it functions primarily on a procedural level. When providing information, States cannot discriminate on the basis of national origin; non-citizens should have the same rights to information as citizens under these instruments. Non-discrimination is directly addressed to transboundary situations, as it requires equal treatment of those both within and outside of a jurisdiction. As such, it is well suited to addressing issues associated with the risk of transboundary harm.

The ILC Draft Articles incorporate the non-discrimination principle in Article 15, which provides that "a State shall not discriminate on the basis of nationality or residence or place where the injury might occur, in granting . . . access to judicial or other

[125] "Non-discrimination" may mean several things under international law. In the international trade context, non-discrimination refers to the duty to treat foreign-produced goods the same as equivalent domestic-produced goods. *See, e.g.*, General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194. In the human rights context, non-discrimination refers to the duty not to discriminate against individuals on the basis of race or national origin. In the context of this Article, "non-discrimination" refers to equal access by both citizens and non-citizens to remedies and procedures in environmental law, so that "any person who has suffered transboundary environmental damage or who is exposed to a significant risk of such damage obtains at least equivalent treatment to that afforded to individuals in the country of origin." BIRNIE & BOYLE, *supra* note 11, at 269 (describing the OECD definition of non-discrimination).

[126] *See* BIRNIE & BOYLE, *supra* note 11, at 269; Bruch, *supra* note 48, at 11,408. For an example of an international legal instrument incorporating the non-discrimination principle, see Aarhus Convention, *supra* note 40, art. 3(9), at 519.

[127] BIRNIE & BOYLE, *supra* note 11, at 269; *Transfrontier Pollution* Annex § C, OECD Recommendation C74(224) (Nov. 14, 1974), *reprinted in* OECD, OECD AND THE ENVIRONMENT 145 (1986); *Equal Right of Access in Relation to Transfrontier Pollution*, OECD Recommendation C(76)55 (May 11, 1976), *reprinted in* OECD, *supra*, at 148-49; *Implementation of a Regime of Equal Right of Access and Non-Discrimination in Relation To Transfrontier Pollution*, OECD Recommendation C(77)28 (May 17, 1977), *reprinted in* OECD, *supra*, at 150-53.

procedures to seek protection or other appropriate redress."[128] The drafters characterize this rule as "residual," since Article 15 only applies if States have not made other arrangements for . . . protecting the interests of the persons who may be subject to the risk of transboundary harm.[129] Under the non-discrimination provision in Article 15, access to judicial procedures shall be given in accordance with the existing terms and conditions of each State's domestic legal system.[130]

Reliance on the non-discrimination principle to ensure public access to environmental information and other procedural rights has been criticized as being unable to "prevent unpredictable backsliding."[131] That is, the State of origin could choose to weaken its extraterritorial duty to provide information by weakening the right to information under domestic law.[132] Additionally, use of the non-discrimination principle means that States with strong regimes of public access to information and to judicial procedures will provide greater protection than those with weak regimes, creating a reciprocity problem.[133] It has been suggested that these limitations could be addressed by incorporating substantive standards as a minimum floor below which States could not sink.[134] Article 13 could establish such a floor by creating an affirmative duty to provide environmental information to the public.

2. *Transboundary Environmental Impact Assessment*

In the international arena, the Espoo Convention deals specifically with the problem of transboundary environmental information. Espoo requires Parties to undertake an EIA for any listed activity that is likely to cause a significant transboundary impact,[135] that is, an activity within the jurisdiction of one Party

[128] *ILC Report*, *supra* note 6, at 375. Draft Article 15 is based on Article 32 of another treaty. Convention on the Law of Non-Navigational Uses of International Watercourses, *opened for signature* May 21, 1997, G.A. Res. 51/229, U.N. GAOR, 51st Sess., Agenda Item 144, U.N. Doc. A/RES/51/229, *reprinted in* 36 I.L.M. 700. *See also ILC Report*, *supra* note 6, at 427.

[129] *ILC Report*, *supra* note 6, at 428.

[130] *Id.* at 375, 427-28.

[131] Knox, *supra* note 22, at 313.

[132] *Id.*

[133] *Id.* at 313-14.

[134] *Id.* at 314.

[135] Espoo Convention, *supra* note 123, art. 2(2), at 312, 30 I.L.M. at 803.

that has an impact in the jurisdiction of another Party.[136]

In addition to requiring an EIA, the Espoo Convention also requires concerned Parties to ensure that the affected public is informed about proposed activities,[137] receives documentation on the EIA,[138] and has an opportunity to participate in the EIA procedures to the same extent as the public located in the Party of origin.[139] The Espoo Convention is designed "to enhance international co-operation in assessing environmental impact" and "to improve the quality of information presented to decision makers so that environmentally sound decisions can be made,"[140] and the inclusion of provisions for public access to the environmental information at issue in the EIAs is integral to that scheme.

Espoo specifically addresses the dissemination of environmental information to the public. However, Espoo operates at the project level, that is, it requires environmental information to be made available to the public only in the context of specific proposals (listed in an appendix to the Convention) with potential transboundary impact.[141] It goes far, but stops short of establishing a general right of access to environmental information for foreign citizens, since it does not deal with passive dissemination at all—there is no right under Espoo for foreign citizens to request information held by another State. Additionally, the Convention does not mandate that the Party of origin deal with the affected public directly; the provisions dealing with dissemination of information to the public state only that the "concerned Parties" should arrange for distribution of information.[142]

The ILC Draft Articles also specifically require States to

Listed activities include, *inter alia*, crude oil refineries, thermal power stations, production or enrichment of nuclear fuels, smelting of cast-iron and steel, asbestos extraction and processing, large-diameter oil and gas pipelines, large dams and reservoirs, offshore hydrocarbon production, and deforestation of large areas. *Id.* app. I, at 321-22, 30 I.L.M. at 812-13.

136 *Id.* art. 1(viii), at 311, 30 I.L.M. at 803.

137 *Id.* art. 3(8), at 314, 30 I.L.M. at 806.

138 *Id.* art. 4(2).

139 *Id.* art. 2(6), at 312, 30 I.L.M. at 804.

140 *Id.* pmbl., at 310-11, 30 I.L.M. at 802.

141 *Id*. art. 2(7), at 312, 30 I.L.M. at 804.

142 *Id.* arts. 3(8), 4(2), at 314, 30 I.L.M. at 806.

perform risk assessments, including EIAs,[143] to determine the potential for transboundary harm. These assessments should form the basis for any decision authorizing such an activity and are part and parcel of the information that is required to be exchanged between States,[144] as well as between the State of origin and the affected public.[145]

Both the non-discrimination principle and the Espoo Convention provide mechanisms allowing the external public to have access to environmental information held by public authorities. However, neither provides an affirmative statement of duty incumbent on States to ensure that the external public has access to such information in cases where there is a risk of transboundary harm. Article 13 takes this next step of imposing such a duty.

III
JUSTIFYING THE DUTY TO PROVIDE INFORMATION EXTRATERRITORIALLY

A. *The Inter-Jurisdictional Externality Problem*

Externalities arise as a basic problem when dealing with transboundary environmental impacts. Indeed, transboundary pollution provides a classic example of an externality requiring intervention by the legal system.[146] When a particular jurisdiction can externalize some of the costs of its activities (e.g., by sending some of it pollution to another jurisdiction), it has incentives to engage in those activities at a level higher than is socially optimal.

Another iteration of this externality problem exists in the context of separate political entities making environmental decisions that impact each other across jurisdictional boundaries. When there is a mismatch between a government's jurisdiction and

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[143] *ILC Report*, *supra* note 6, at 373.

[144] *Id.*

[145] *Id.* at 422.

[146] One of the first international law cases concerning environmental issues was the *Trail Smelter Arbitration*, which dealt with damage caused by transboundary air pollution. Trail Smelter Arbitration (U.S. v. Can.), 3 R.I.A.A. 1905 (1941), *reprinted in* 35 AM. J. INT'L L. 684 (1941); *see also* BIRNIE & BOYLE, *supra* note 11, at 109. *See generally* Richard L. Revesz, *Federalism and Interstate Externalities*, 144 U. PA. L. REV. 2341 (1996).

the scope of an environmental problem, "[r]egulators may overlook some of the costs of pollution or resource mismanagement because the harms fall on outsiders."[147] This represents a particularly intractable policy problem, since each jurisdiction has structural, political incentives to under-regulate its transboundary pollution spillovers.[148] This externality can also be conceptualized as a political process failure, since governmental decisionmakers are deciding upon actions that affect members of the public whose views they have little or no incentive to take into account.[149] That is, because the public officials in State A, where a decision is being made that will have some negative transboundary impact on State B, have little or no incentive to consider the views of State B or its citizens, State A is likely to make a decision that will impose external costs on State B. This political process failure has been written about extensively in the context of inter-local and interstate externalities within the United States.[150]

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[147] Daniel C. Esty, *Toward Optimal Environmental Governance*, 74 N.Y.U. L. REV. 1495, 1511 (1999).

[148] *Id.* at 1511-12. Professors Daniel Esty and André Dua coined the term "super externality" to describe the phenomenon of inter-jurisdictional, transboundary externalities. ANDRÉ DUA & DANIEL C. ESTY, SUSTAINING THE ASIA PACIFIC MIRACLE: ENVIRONMENTAL PROTECTION AND ECONOMIC INTEGRATION 59-60 (2nd ed. 1997).

[149] CLAYTON P. GILLETTE & LYNN A. BAKER, LOCAL GOVERNMENT LAW 778 (2d ed. 1999) (describing residents' inability to monitor public officials "when those agents are [not] electorally accountable to the residents"); Esty, *supra* note 147, at 1511-12, 1545 ("Wherever a pollution harm or resource management problem spills across political boundaries, the risk of a governance failure rises.").

[150] *See, e.g.*, GILLETTE & BAKER, *supra* note 149, at 49. *See generally* Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570 (1996); Revesz, *supra* note 146. The political process failure has also been discussed in the context of the North American Free Trade Agreement (NAFTA). *See* Vicki Been & Joel Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine*, 78 N.Y.U. L. REV. 30, 88-100 (2003). Another perspective on this political process failure comes from the literature on citizenship theory. *Cf.* Ayelet Shachar, Children of a Lesser State: Sustaining Global Inequality Through Citizenship Laws 20 (unpublished manuscript on file with author) (noting that "the territorial boundaries that shape inclusion and exclusion from the polity (and its democratic decision-making processes) fail to correlate with the spill-over effects of that polity's actions upon the citizens of another state").

However, the ongoing relationship that exists between States (which are geographically fixed and must maintain relations with their neighbors) could provide some incentives to State A to cooperate with State B and/or to take into account State B's views. *See* GILLETTE & BAKER, *supra* note 149, at 46, 49-50 (describing the phenomenon of interlocal cooperation that arises in repeat player

A legal duty requiring transboundary environmental information exchange and public input in transboundary environmental decision-making processes takes the first step in internalizing this political externality. Information disclosure becomes a mechanism of political empowerment, whereby the affected public can marshal evidence and apply political pressure to force the consideration of its views.[151] The procedural requirements for information exchange ensure that such information is available to the public, and the associated obligation to allow public input into the environmental decision-making process opens that process to the participation of a larger set of interests.

The State-to-external-public scheme embodied by Article 13 implicitly recognizes that the combination of the existing State-to-State and State-to-internal-public information-exchange schemes is not adequate to internalize the political process failure. In theory, if these two axes were functioning perfectly, the State of origin would transmit information to the affected State, which would act as an intermediary between the State of origin and the affected public. That is, the affected public would receive information from its own State and could transmit comments and other input concerning the decision-making process through its own State as well. Although having an intermediary might increase transaction costs, the affected State will have greater knowledge of and access to its own public, and this might result in lower transaction costs over all.

However, the move toward opening the process of environmental information exchange to the external public directly, begun through the non-discrimination principle and the transboundary EIA procedures and continued explicitly by Article 13, indicates at least a tacit assumption that the existing axes are not functioning successfully in all cases.[152] That is, the political

situations).

[151] Clifford Rechtschaffen & David L. Markell, *Improving State Environmental Performance Through Enhanced Government Accountability and Other Strategies*, 33 Envtl. L. Rep. (Envtl. L. Inst.) 10,559, 10,569-70 (2003).

[152] Some problems related to the State-to-internal-public axis have arisen in the implementation of the Aarhus Convention. *E.g.*, AARHUS HANDBOOK, *supra* note 93, at 23-25 (describing instances of countries failing to respond to requests for information). Disputes also arise along the State-to-State axis. For example, there is currently a pending case before the Permanent Court of Arbitration between Ireland and the United Kingdom concerning access to environmental

process externality continues despite the existing duties to provide information on the State-to-State and State-to-internal-public level.

The existing axes may work perfectly well in some instances. One can imagine situations where the affected State will strongly represent its internal environmental interests in dealing with the State of origin. For example, throughout the 1980s, the Canadian government repeatedly complained to the United States about U.S. air pollution that was causing acid rain within its territory.[153] However, such strong representation is not guaranteed. In contexts where the affected State may have goals that compete with environmental interests—for example, economic interests (such as trade and investment protections)[154] or security interests—the views of the affected public may be given short shrift.

The duty to provide information embodied in Article 13 acts between a State and members of the public. In this way, it builds upon the precedent of international human rights law, which over at least the last fifty years has made clear that the relationship between a State and its citizens is a proper subject of international law.[155] Although at first blush, the relationship between a State and its own citizens might seem like a purely internal/domestic affair, human rights law has recognized that this relationship is a matter of concern to the international community, challenging the traditional notion of international law as regulating only the relations between States.[156]

Like human rights law, the duty to provide public access to environmental information creates an obligation between a State and members of the public. However, in the context of transboundary risk, we are dealing with a State's duty to provide

information under the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention). *See* OSPAR Arbitration (Ir v. Gr. Brit. and N. Ir.) (Perm. Ct. Arb. 2003), http://www.pca-cpa.org/ENGLISH/RPC/ OSPAR%20final%20award%20revised.pdf.

[153] *See* BIRNIE & BOYLE, *supra* note 11, at 507. The United States eventually responded to these concerns by enacting the 1990 amendments to the Clean Air Act. *Id.*

[154] For example, in the context of negotiations over NAFTA, the United States and Mexico have been criticized by environmental interest groups for prioritizing free trade above strong environmental standards. *See generally* Joseph F. DiMento & Pamela M. Doughman, *Soft Teeth in the Back of the Mouth: The NAFTA Environmental Side Agreement Implemented*, 10 GEO. INT'L ENVTL. L. REV. 651 (1998).

[155] *See* MALANCZUK, *supra* note 69, at 220.

[156] *Id*. at 209-11, 220-21.

access to environmental information to the public of *another* State. As such, it goes beyond even the human rights law precedent of regulating the relationship between a State and its own citizens.[157] There have been some attempts to cast this duty to provide information in human rights terms, by defining "environmental rights," but so far no clear theoretical framework has been established.[158]

B. *Benefits and Costs of an Informational Approach*

The explosion in the last decade of legal and policy instruments creating and expanding the public's access to environmental information indicates a belief that there are many benefits to allowing the public to have access to such information. The benefits cited in treaties, policy statements, and the academic literature are varied, ranging from advantages to individual members of society, to benefits to the national environmental policy process, to improvements in international relations in the global sphere.[159] However, access to information is not a cure-all that will solve all environmental problems. The duty to provide access to environmental information in transboundary contexts serves as an initial tool, a first step, in internalizing the political externality inherent in inter-jurisdictional situations. Similarly, this internalization itself is not a guarantee of environmental progress, instead serving to improve the decision-making process in an area of vital concern to peoples' lives.

One of the most basic benefits derived from giving public

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[157] *Cf.* A. Dan Tarlock, *Exclusive Sovereignty Versus Sustainable Development of a Shared Resource: The Dilemma of Latin American Rainforest Management*, 32 TEX. INT'L L.J. 37, 42 (1997) (describing the purpose of both international environmental law and human rights law as seeking to influence internal decisions of States).

[158] *See* Popović, *supra* note 41, at 684-91 (chronicling international declarations that describe the right to participate in environmental decisions in human rights language). *See generally* Sax, *supra* note 41. As an alternative to defining some set of substantive environmental rights—such as the right to a "healthy environment"—a more fruitful avenue to explore might be the notion of procedural rights, as exemplified by provisions dealing with access to information and public participation in environmental decision-making.

[159] *See, e.g.*, Aarhus Convention, *supra* note 40, pmbl., art. 1, at 517-18; OFFICE OF POLICY, ECON. AND INNOVATION, ENVTL. PROT. AGENCY, PUBLIC INVOLVEMENT POLICY 1, 2, 14 (2003), http://www.epa.gov/publicinvolvement/policy2003/policy2003.pdf; Bruch & Czebiniak, *supra* note 2, at 10,429; Popović, *supra* note 41, at 685, 694.

access to environmental information is that such access helps to legitimize the environmental decision-making process. Open access to information allows the public to review—and, generally, to comment on[160]—the facts and assumptions underlying government policy choices, increasing the transparency of these decisions.[161] This transparency helps to increase the legitimacy of the entire process and public acceptance of the final decision.[162] In the context of the transboundary political process failure, transparency may give added political leverage to the external public—if the decision-making processes that result in the imposition of costs on external interests are open, they are easier to attack.[163]

Public access to environmental information also has the potential to improve the substance of environmental policy choices. Public review of information increases the number of people looking for factual errors, inaccuracies, and incorrect or unexamined assumptions; in essence, the public acts as another level of review for the information.[164] Although it is unclear how useful lay review of environmental information by individuals can be, given the relative technical sophistication of environmental

[160] *See ILC Report*, *supra* note 6, at 422; Espoo Convention, *supra* note 123, art. 4(2), at 314, 30 I.L.M. at 806.

[161] EIA procedures can accomplish this goal. *See* Espoo Convention, *supra* note 123, art. 4, at 314, 30 I.L.M. at 806.

[162] "[S]ocial acceptance of any policy is closely linked with the perception of a fair procedure in making the decision." Ortwin Renn & Andreas Klinke, *Public Participation Across Borders*, *in* TRANSBOUNDARY RISK MANAGEMENT 245, 271 (Joanne Linnerooth-Bayer et al. eds., 2001). *See also id.* at 266; OECD ENVIRONMENTAL OUTLOOK, *supra* note 2, at 255-56; Frances Irwin & Carl Bruch, *Information, Public Participation, and Justice*, 32 Envtl. L. Rep. (Envtl. L. Inst.) 10,784, 10,784 (2002); ECE/UNEP NETWORK OF EXPERT ON PUB. PARTICIPATION AND COMPLIANCE, UNECE, WATER MANAGEMENT: GUIDANCE ON PUBLIC PARTICIPATION AND COMPLIANCE WITH AGREEMENTS 11 (2000) [hereinafter UNECE/UNEP GUIDANCE], http://www.unece.org/env/water/publications/documents/guidance.pdf.

[163] This political leverage can result from increased media attention, which could be facilitated by greater information and from potential alliances with supporters within the State of origin. Greater access to information could help to reduce the organizational costs of finding citizens and groups within the State of origin that support the position of the public in the affected State.

[164] The more people you have reviewing information, the more mistakes may be identified. *See* Jim Rossi, *Participation Run Amok: The Cost of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 185-87 (1997).

problems,[165] NGOs may be quite sophisticated in their review of information.

Furthermore, public participation in the environmental review process allows for the input of additional knowledge and perspectives, including specialized regional or anecdotal information held by the public in a potentially affected area.[166] In the transboundary context, it is particularly likely that members of the public in the affected State (and the affected State itself) may have specialized knowledge regarding their environment that is not readily available to the State of origin. Again, however, there may be limits to the usefulness of lay information in addressing highly technical environmental problems.

There are also potential benefits to society as a whole beyond the benefits achieved in the context of specific projects. Giving the public access to environmental information and involving the public in decisions affecting the environment is one element in strengthening democracy and promoting civic discourse and civil society.[167] Similarly, increased access to environmental information can empower consumers and spur community activism around environmental issues.[168] In the context of transboundary environmental issues, the cooperative approach embodied by public involvement in environmental decision-making can improve international relations, preventing environmental conflicts[169] and increasing the democratization of international affairs.[170] Finally, there is some evidence that mandatory information disclosure requirements improve the environmental performance of private firms,[171] an important benefit in the international context, where ensuring compliance

[165] *See* Esty, *supra* note 147, at 1520.

[166] *See* Renn & Klinke, *supra* note 162, at 266; Irwin & Bruch, *supra* note 162, at 10,788.

[167] OECD ENVIRONMENTAL OUTLOOK, *supra* note 2, at 255; UNECE/UNEP GUIDANCE, *supra* note 162, at 11.

[168] OECD ENVIRONMENTAL OUTLOOK, *supra* note 2, at 256.

[169] *Decision II/3: Guidance on Public Participation in a Transboundary Context*, Working Group on Envtl. Impact Assessment, U.N. Economic & Social Council, 3rd mtg., Annex, at 5, U.N. Doc. MP.EIA/WG.1/2000/19 (2000), http://www.unece.org/env/documents/2000/eia/mp.eia.wg.1.2000.19.e.pdf.

[170] Renn & Klinke, *supra* note 162, at 266.

[171] Mark A. Cohen, *Information as a Policy Instrument in Protecting the Environment: What Have We Learned?*, 31 Envtl. L. Rep. (Envtl. L. Inst.) 10,425, 10,425-26 (2001).

with international obligations is often problematic.[172] Although information is not a cure-all and cannot be a substitute for sound environmental management on the part of governments,[173] it does represent one element of an intelligent, progressive, and democratic approach to protecting the environment.

IV
EVALUATING THE DRAFT ARTICLES

As indicated earlier, the ILC Draft Articles, for the most part, build on existing models for information exchange, incorporating a State-to-State information exchange mechanism in combination with the non-discrimination principle, as well as a duty to perform EIAs. However, the Draft Articles include an important innovation in Article 13 by specifically creating a *transboundary* public right of access to environmental information. As such, they represent an important step in the development of international legal duties addressing the external effects of States' internal decisions. Yet, how far do the Draft Articles go towards internalizing the externality? What are their limitations and what considerations must they balance? In assessing their ability to address the political process failure identified above, a number of issues relating to implementation and enforcement need to be examined.

Successful internalization of the political externality requires, to begin with, a strong and enforceable right of access to relevant environmental information for the public likely to be affected by activities that pose the risk of transboundary harm. On the whole, the Draft Articles take the important step of clearly establishing a duty to provide information extraterritorially. However, the Draft Articles are not a panacea. They also include elements that could undermine the internalizing effect of such a duty, and they lack the institutional enforcement mechanisms that could ensure vigorous enforcement.[174]

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[172] *See* BIRNIE & BOYLE, *supra* note 11, at 178-81.

[173] Much has been written about the limitations of the process-based approach to environmental policy in the context of NEPA. *See, e.g.*, Karkkainen, *supra* note 112, at 904 n.2; Joseph L. Sax, *The (Unhappy) Truth About NEPA*, 26 OKLA. L. REV. 239 (1973).

[174] John H. Knox, *Assessing the Candidates for a Global Treaty on Transboundary Environmental Impact Assessment*, 12 N.Y.U. ENVTL. L.J. 153

A. *Full and Accurate Information*

The external, transboundary effects of activities within the State of origin cannot be assessed by the affected State and its public unless they have full and accurate information regarding the activity and its potential risks. The accuracy of this information can be improved through greater public input from those likely to be affected. An analogy can be seen in the context of agency decision-making in U.S. administrative law.[175] In that context, the accuracy of decisions may be improved by allowing greater public input because such input helps correct agencies' tendency of bias in favor of regulated entities.[176] This bias is due to an imbalance in the interests represented in the agency decision-making process; more effective representation of under-represented interests serves to re-balance agency decision-making.[177] In the context of the transboundary political externality, there is an imbalance between the interests of the citizens of State A and State B, resulting in a bias in State A's favor by the State A governmental decisionmaker. The duty to provide information to the public in State B and consider its input serves to help re-balance the decision-making process.[178]

The Draft Articles promote this process by requiring States to provide "relevant information" related to activities involving a risk

(2003).

[175] Improved accuracy is an oft-identified rationale for requiring additional procedures in agency decision-making. *See* STEPHEN BREYER ET AL., ADMINISTRATIVE AND REGULATORY POLICY 832 (5th ed. 2002) (questioning whether the need to resolve factual issues requires the imposition of additional procedures prior to any deprivation of welfare benefits in *Goldberg v. Kelly*, 397 U.S. 254 (1970)). Another goal of using agency decision-making processes is efficient provision of government services. The need to balance these (sometimes) competing goals is one factor driving the Court's post-*Goldberg* opinion in *Mathews v. Eldridge*, 424 U.S. 319 (1976), which cut back on due process protections.

[176] *See* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1715 (1975). *See also* John Harrison, *A Proposal for an Environmental Right-to-Know Convention*, *in* TRANSBOUNDARY ENVIRONMENTAL NEGOTIATION 304, 305 (Lawrence Susskind et al. eds., 2002) ("Freedom of access to environmental information makes it more likely that the 'environmental voice' is heard in the decision-making process by enhancing the quality of the public discourse.").

[177] *See* Stewart, *supra* note 176, at 1715.

[178] *Id.* at 1670 ("Increasingly, the function of administrative law is . . . the provision of a surrogate political process to ensure the fair representation of a wide range of affected interests in the process of administrative decision.").

of transboundary harm.[179] However, the Draft Articles' ability to provide full and accurate information may be limited by the inclusion of exceptions to the duty, found in Article 14. Article 14 provides that data and information "vital to the national security of the State of origin or to the protection of industrial secrets or concerning intellectual property may be withheld."[180] However, it also includes a good faith requirement for cooperation from the State of origin.[181]

Most of the instruments creating public rights of access to government-held information include exceptions under which States can withhold specific information, notwithstanding the general obligation to provide the public with environmental information.[182] Although such exceptions are necessary to protect State sovereignty and ensure their willingness to adopt the obligations, experience from existing regimes indicates that poorly crafted exceptions can effectively undermine the duty to provide information.[183] Carefully defining what information may be withheld from disclosure to the public will be essential to creating an acceptable and effective framework for public access to information.

B. *Dissemination of Information To the Affected Public*

The Draft Articles will only succeed as a mechanism to internalize the political externality if the external public receives and is able to comment on the relevant information. Article 13 specifies only that "the public likely to be affected by an activity" be given information relating to that activity.[184] The commentary to Article 13 makes clear that this requirement extends to any public that is likely to be affected, whether in the State of origin or

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[179] *ILC Report*, *supra* note 6, at 375.

[180] *Id.*

[181] *Id.*

[182] *See, e.g.*, Freedom of Information Act, 5 U.S.C. § 552(b) (2000); Aarhus Convention, *supra* note 40, art. 4(3), at 520; Council Directive 90/313/EEC, *supra* note 41, art. 3(2), at 57.

[183] *See supra* notes 103-106 and accompanying text.

[184] *ILC Report*, *supra* note 6, at 375. The language used to describe the obligation is affirmative. States are required to "provide" information to affected persons. This suggests that Draft Article 13 is only dealing with active dissemination of information in the context of specific projects with transboundary impacts. See *infra* for discussion of the active/passive dissemination distinction.

in other States.[185] By limiting the duty to provide access to information to those "likely to be affected," it appears that Article 13 may establish a narrow "right to know" covering only those members of the public who can show a particular interest in the information—that is, some probability of being affected by a particular activity involving the risk of transboundary harm.

This "interest requirement" stands in contrast to the right of access to information established by the Aarhus Convention.[186] Interest requirements have been criticized in the context of domestic laws providing (internal) public access to information as circumscribing the right too narrowly.[187] However, in the context of transboundary dissemination of information designed to internalize the political externality, an interest requirement limiting the duty to provide information may make sense. Such a requirement ensures that information is targeted at those members of the public whose views should properly be taken into account by environmental decisionmakers. A broader right of access might over-correct the externality problem, in effect giving those not impacted by an activity the opportunity to impose their preferences on the State of origin.

The interest requirement can also be seen as a tradeoff between access to information and cost-efficiency. Providing broad access to information could be a very costly undertaking; limiting the right of access to those likely to be affected by an activity reduces the cost of disseminating information, as well as

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[185] *Id.* at 422.

[186] Aarhus Convention, *supra* note 40, art. 4(1), at 519.

> Under the Convention, public authorities shall not impose any condition for supplying information that requires the applicant to state the reason he or she wants the information or how he or she intends to use it. Requests cannot be rejected because the applicant does not have an interest in the information.

AARHUS IMPLEMENTATION GUIDE, *supra* note 42, at 54.

[187] *See* Harrison, *supra* note 176, at 332 n.19. Harrison proposes an international environmental "right-to-know" convention that includes a provision recognizing the potential undermining effect an interest requirement can have:

> [t]he experience of domestic freedom-of-access-to-information measures in a number of jurisdictions indicates that it is crucial that the party requesting the information need not demonstrate an interest. Bureaucrats the world over have demonstrated a consistent reluctance to release information they hold, and *any hint that a person had to prove an interest would make the freedom of access a dead letter.*

Id. at 314 (emphasis added).

the cost of identifying those who should receive it. The tradeoff between access and efficiency can be particularly important and difficult in the transboundary context, where different States may have quite varied fiscal and informational resources and differing traditions of public political participation.[188] Limiting the duty to provide access to information to only those who are likely to be affected is an appropriate approach in this context.

C. *Enforceability*

The duty to provide the public with information about the risk of transboundary harm is worth little if it cannot be enforced. A strong formulation of the duty would create a right of access to information that is actionable under domestic law. Otherwise, the public would have no direct remedy in cases of its breach. The Draft Articles do not explicitly require that States make this an actionable right. Although access to judicial procedures must be provided on a non-discriminatory basis,[189] the Draft Articles do not address potential standing barriers that could make the duty outlined in Article 13 unenforceable. That is, because the Draft Articles rely on existing national legal systems for implementation and enforcement of the obligations contained therein, domestic doctrines that deny standing for breaches of informational rights would effectively make the rights unenforceable in domestic courts.[190]

In addition to enforcing the right to receive information, an effective internalization regime should also include some mechanism to ensure that the State of origin takes the affected public's views into account in its decision-making process. The incorporation of their views is essential to overcoming the political process failure and forms an essential justification for the duty to provide information to the public in the first place.[191] However,

[188] *See id.* at 308-11 (discussing the international interests of information-rich and information-poor nations).

[189] *ILC Report*, *supra* note 6, at 375.

[190] Even if members of the public who are denied information would have standing to sue, practical difficulties may arise. If non-citizens have standing to sue to enforce their right to information, would they also be entitled to a visa to enter the country in order to pursue the litigation? Because we are dealing with transboundary exchanges of information, there are also issues associated with language barriers. *See also* Cassar & Bruch, *supra* note 48, at 179 nn.28-29, 206, 228.

[191] *ILC Report*, *supra* note 6, at 422 ("It is, of course, clear that the purpose of

the Draft Articles fall short of establishing institutional mechanisms to deal with these concerns.

CONCLUSION

By creating an affirmative duty to provide information on the State-to-external-public axis, Article 13 goes further than both the non-discrimination principle and the Espoo Convention in addressing the inter-jurisdictional effects of activities posing a risk of transboundary harm. The external public is not only entitled to the same procedures given to the internal public, it is given an independent substantive right to information of its own. This substantive right to information provides one tool to begin forcing the internalization of external effects in the environmental decision-making process of the State of origin. Although a full internalization of the inherent transboundary political process failure would require giving the affected public the right to vote on particular decisions, information begins the process by allowing those affected to have complete information, which they can then use to mobilize political support, or at least make their views known by participating in the process. Indeed, the drafters implicitly recognize this cost-internalization function of Article 13 when they state that the purpose of giving such information to the public is "to ascertain their views."[192]

Although Article 13 is an important step in addressing the transboundary political process externality, it is not as strong as it could be. The drafters appear hesitant to embrace the full implications of the State-to-external-public scheme. The commentaries indicate a willingness to fall back on traditional State-to-State methods of information exchange and consultation—that is, diplomatic channels and "the good offices of the State concerned."[193] Additionally, although the Draft Articles require that each State allow access to its judicial and administrative procedures,[194] strong enforcement mechanisms are lacking, as it is not at all clear that the right of access to

providing information to the public is in order to allow its members to inform themselves and then to ascertain their views.").

[192] *Id.* ("Without that second step, the purpose of the article would be defeated.").

[193] *Id.* at 425.

[194] *Id.* at 375.

environmental information would be actionable. Thus, the next step in a serious attempt to address the political externality would be the establishment of clear standing rights and causes of action to allow the external public to enforce their right to environmental information in the transboundary context.